

12-31-2020

Terry, Traffic Stops, and Tragedy: Conflicts and Concerns in the Wake of *Kansas v. Glover*

Hunter J. Rodgers

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

J. Rodgers, Hunter (2020) "Terry, Traffic Stops, and Tragedy: Conflicts and Concerns in the Wake of *Kansas v. Glover*," *Seattle Journal for Social Justice*: Vol. 19 : Iss. 1 , Article 16.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol19/iss1/16>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

Terry, Traffic Stops, and Tragedy: Conflicts and Concerns in the Wake of *Kansas v. Glover*

Hunter J. Rodgers*

ABSTRACT

*In early April of this year, the Supreme Court of the United States decided *Kansas v. Glover*, and held that when an officer discovers that a passing vehicle's registered owner has a revoked license, there is a commonsense inference sufficient to create reasonable suspicion for a traffic stop. A narrow holding at first glance, *Glover* stands on the precipice of almost immediate confrontation with other aspects of Fourth Amendment doctrine. This essay aims to examine two of those confrontations: how the *Glover* inference will interact with both the prohibition against prolonged stops under *Rodriguez v. United States* as well as the exclusionary rule and its exceptions. Finally, this essay examines reasonable suspicion's history and justifications in light of traffic stops' disproportionate impact on the poor and communities of color, concluding that the standard does more to exacerbate police-citizen relations than it helps them.*

I. INTRODUCTION

Felix Frankfurter once wrote that the old adage “hard cases make bad law has its basis in experience,” but that “petty cases are even more calculated to make bad law.”¹ Few things have caused a cavalcade of bad law more

* © 2020 Hunter J. Rodgers, Esq. J.D. 2018, Georgia State University College of Law. The author wishes to thank J. Ryan Brown, Esq., and Sean Robinson, Esq., for putting up with his feverish ranting about this and other topics. The views expressed herein are entirely the author's, and the author's alone.

than automobiles, especially when they intersect with the Fourth Amendment, which guarantees to people the right “to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizure” from government infringement.² Although “beyond dispute” that vehicles are “effects” under the Fourth Amendment,³ vehicles have been categorically excepted from the warrant requirement for almost a century.⁴ Initially, the so-called “automobile exception” to the warrant requirement applied only to searches based upon probable cause.⁵ But with the textual shift from the Warrant Clause to the Reasonableness Clause at the end of the 1960s,⁶ the probable cause requirement waned as reasonable suspicion waxed. However, nowhere did the rise of reasonable suspicion have a greater impact than on the automobile.

The U.S. Supreme Court recently addressed the intersection between automobiles and reasonable suspicion in *Kansas v. Glover*.⁷ A short opinion, the Court in *Glover* stressed the narrowness of its holding: a computer check of a passing vehicle’s license plate which reveals the car’s registered owner has a revoked license, coupled with the commonsense inference that the registered owner is probably the driver, gives an officer reasonable suspicion to stop the car absent any information undermining

¹ *United States v. Rabinowitz*, 339 U.S. 56, 68 (1950) (Jackson, J., dissenting), *overruled in part by* *Chimel v. California*, 395 U.S. 752, 768 (1969).

² U.S. CONST. amend. IV.

³ *United States v. Jones*, 565 U.S. 400, 404 (2012) (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)).

⁴ *See Carroll v. United States*, 267 U.S. 132 (1925).

⁵ *See id.* at 153–54 (“It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”).

⁶ *See Terry v. Ohio*, 392 U.S. 1, 16, 20 (1968) (finding that stops and frisks plainly constituted searches and seizures under the Fourth Amendment, while simultaneously noting that “[i]f this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether ‘probable cause’ existed to justify the search and seizure which took place. However, that is not the case.”).

⁷ *Kansas v. Glover*, 140 S. Ct. 1183, 1186 (2020).

that inference.⁸ Taken in isolation, it is. But in the context of the rest of the Fourth Amendment's voluminous case law, several glaring issues rear their ugly heads.

This essay seeks to address those concerns. After a brief overview of reasonable suspicion, Part II discusses the three opinions from *Glover*. Part III then turns to the impending conflicts: Part III-A addresses how *Glover* will interact with the Supreme Court's 2015 ruling in *Rodriguez v. United States*, which flatly prohibited any prolongation of a traffic stop's duration.⁹ Part III-B questions how *Glover* interacts with the Court's recent attacks on the exclusionary rule. This rule requires courts to exclude evidence obtained by state actors in violation of the Fourth Amendment from any criminal trials stemming from that evidence. Finally, Part IV questions whether reasonable suspicion should be reconsidered in light of its impact on police and citizen relations.

II. KANSAS V. GLOVER AS THE INEVITABLE CONCLUSION OF REASONABLE SUSPICION

The bastard offspring of probable cause, reasonable suspicion is an intermediate standard under the Fourth Amendment. It requires "some minimal level of objective justification" beyond an "inchoate and unparticularized suspicion or hunch."¹⁰ Reasonable suspicion was created by Chief Justice Earl Warren in *Terry v. Ohio* and is defined as "the amount of evidence required to [a]ffect a brief detention to investigate whether a crime has occurred, is occurring, or is imminently likely to occur."¹¹ In the

⁸ *Id.* at 1186; *see id.* at 1191 ("We emphasize the narrow scope of our holding.").

⁹ *See Rodriguez v. United States*, 575 U.S. 348, 354 (2015).

¹⁰ *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citations and punctuation omitted).

¹¹ 392 U.S. at 26 (1968); *see Morgan Cloud, A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477, 496 (2013) [hereinafter "Cloud"] (noting that in *Terry* "[f]or the first time the Court held that searches and seizures could be lawful although the investigating officers possessed neither probable cause nor a warrant or warrant exception.") (citing *Terry*, 392 U.S. at 20).

half-century since establishing it as dogma in *Terry*, the Supreme Court Justices have examined reasonable suspicion in countless cases, distilling their interpretation of reasonable suspicion into certain key principles.

First, reasonable suspicion requires that officers have “a particularized and objective basis for suspecting the particular person stopped of criminal activity.”¹² The amount of suspicion necessary for this stop varies. It depends upon both the content of the police officer’s information and the reliability of that information.¹³ Like probable cause, reasonable suspicion requires examining the “totality of the circumstances,” which simply means the whole picture.¹⁴ Certainty is not required; rather, courts must allow officers to make “commonsense judgments and inferences about human behavior,”¹⁵ and the officers “need not rule out the possibility of innocent conduct.”¹⁶ That said, reasonable suspicion is not a heavy burden by any stretch of the imagination; the Supreme Court has gone out of its way to make certain of that. Officers can stop you for whatever reason they want, regardless of the legitimacy, so long as they have some pretextual

¹² *Navarette v. California*, 572 U.S. 393, 396 (2014) (citation omitted). A modified form of suspicion is required for the eponymous *Terry* frisks, brief pat down searches of a person that officers reasonably believe to be armed and dangerous. *See Terry*, 392 U.S. at 27. Reasonable suspicion in the frisk context requires not only the particularized basis for suspecting criminal activity, but also that a particularized basis to suspect the person stopped is armed and dangerous. *See Arizona v. Johnson*, 555 U.S. 323, 327 (2009) (“To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”). These “protective searches” apply to cars as well: officers may conduct warrantless searches of a vehicle’s passenger compartment when they have reasonable suspicion that someone in the vehicle—regardless of driver or passenger—is “dangerous” and might access the vehicle to obtain a weapon. *See Arizona v. Gant*, 556 U.S. 332, 346–47 (2009); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

¹³ *Alabama v. White*, 496 U.S. 325, 330 (1990).

¹⁴ *United States v. Cortez*, 449 U.S. 411, 417 (1981); *see Illinois v. Gates*, 462 U.S. 213, 230–31 (1983) (applying totality of the circumstances test to probable cause).

¹⁵ *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

¹⁶ *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

justification ready to use when haled into court.¹⁷ Nor are officers required to know which law you broke, so long as they can point to one later—even one that is minor, unrelated, or ambiguous.”¹⁸

Second, traffic stops have long been considered akin to *Terry* stops, since officers in both only need to possess reasonable suspicion to stop someone.¹⁹ Any observed traffic violation validates a stop, regardless of the officer’s subjective intent in pulling someone over.²⁰ Once stopped, officers can require vehicle occupants—including passengers—to give their names²¹ and step out of the vehicle.²² That said, traffic stops, like *Terry* stops, are strictly limited to the time necessary to complete a traffic stop’s “mission”: to address the traffic violation and attend to any related safety concerns.²³ Officers are required to diligently pursue their investigation,²⁴ and the seizure’s authority ends the moment the tasks tied to the stop are—or

¹⁷ See *Whren v. United States*, 517 U.S. 806, 813 (1996).

¹⁸ *Utah v. Strieff*, 136 S. Ct. 2056, 2069–70 (2016) (Sotomayor, J., dissenting) (citing *Devenpeck v. Alford*, 543 U.S. 146, 154–55 (2004); *Heien v. North Carolina*, 574 U.S. 54 (2014)).

¹⁹ *Knowles v. Iowa*, 525 U.S. 113, 118 (1998); see *Navarette v. California*, 572 U.S. 393, 396 (2014) (“The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity’”) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)); *Heien*, 574 U.S. at 60 (“[T]o justify this type of seizure, officers need only ‘reasonable suspicion’ . . .”).

²⁰ *Whren*, 517 U.S. at 813.

²¹ *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004).

²² See *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (per curiam) (holding that government’s “legitimate and weighty” interest in officer safety outweighs “*de minimis*” additional intrusion of requiring driver, already lawfully stopped, to exit vehicle); *Maryland v. Wilson*, 519 U.S. 408, 413–15 (1997) (applying *Mimms* to vehicle’s passengers).

²³ *Rodriguez v. United States*, 575 U.S. 348, 354 (2015); see *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”).

²⁴ See *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (finding that courts determine stop’s reasonable duration by “examin[ing] whether the police diligently pursued [the] investigation.”).

reasonably should be—completed.²⁵ Only by developing an additional reasonable suspicion during the stop may officers prolong the stop even a second beyond the amount of time necessary to complete their purpose.²⁶ All of which brings us to *Kansas v. Glover*.²⁷

Glover's facts are simple—much to the chagrin of some of the justices.²⁸ While on routine patrol, a deputy with the local sheriff's office in Kansas saw a pick-up truck driving along.²⁹ The deputy ran the truck's license plate through the Kansas Department of Revenue's file service.³⁰ The file service indicated that the truck belonged to the respondent, Charles Glover, Jr. and that his license had been revoked.³¹ Assuming that Glover was the vehicle's driver, and despite neither observing any traffic infractions nor attempting to identify the truck's driver, the deputy pulled the truck over and discovered Glover behind the wheel.³² After his arrest, Glover filed a motion to suppress.³³ The trial court granted his motion, reasoning that because many families have multiple cars per household, someone other than the registered owner could be driving the car instead.³⁴ The State appealed, and after trading reversals in the appellate ladder with Glover, the State petitioned the Supreme Court of the United States for certiorari to review.³⁵

²⁵ *Rodriguez*, 575 U.S. at 354.

²⁶ *See id.* at 357.

²⁷ *Kansas v. Glover*, 140 S. Ct. 1183, 1186 (2020).

²⁸ *See id.* at 1192, 1194 (Kagan, J., concurring) (referring to “the parties’ unusually austere stipulation” and the “barebones stipulation” in “this strange case.”).

²⁹ *Id.* at 1187.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *State v. Glover*, 400 P.3d 182, 184 (Kan. Ct. App. 2017), *rev'd*, 422 P.3d 64 (Kan. 2018), *rev'd and remanded*, 140 S. Ct. 1183 (2020).

³⁴ *Id.* at 185.

³⁵ *Id.* For an excellent discussion of the lead-up to *Glover*, see Zach Kumar, *On Kansas v. Glover and the Issue of Reasonable Suspicion*, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 29 (2020).

In an 8-1 opinion written by Justice Thomas, the Court found it reasonable for the officer to initiate “an investigative traffic stop after running a vehicle’s license plate and learning that the registered owner has a revoked driver’s license” because the officer lacked “information negating an inference that the owner” was the vehicle’s driver.³⁶ Recognizing the State’s “vital interest” in ensuring both that only qualified persons operate vehicles and that those persons are complying with licensing, registration, and inspection requirements, the *Glover* Court found the fact that a vehicle’s registered owner is not always its driver did not negate the reasonableness of the deputy’s inference.³⁷ Buttressed by empirical data and Kansas’s extensive list of reasons to suspend or revoke a driver’s license, the Court concluded that “[t]he concerns motivating the State’s various grounds for revocation len[t] further credence to the inference that a registered owner with a revoked Kansas driver’s license might be the one driving the vehicle.”³⁸ Finally, the Court stressed its holding’s narrowness, providing as an example that “if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not ‘raise a suspicion that the particular individual being stopped is engaged in wrongdoing.’”³⁹

Justice Kagan, joined by Justice Ginsburg, concurred in the majority’s opinion.⁴⁰ Rather than resting on a commonsense inference, the crucial detail for Justice Kagan was Glover’s revoked license because Kansas “almost never revok[ed] a license except for serious or repeated driving offenses.”⁴¹ By virtue of the revocation, Glover had already shown “a willingness to flout driving restrictions,” thereby providing the reason to infer that he would drive without a license enough to warrant the traffic

³⁶ *Kansas v. Glover*, 140 S. Ct. 1183, 1186 (2020).

³⁷ *Id.* at 1188.

³⁸ *Id.* at 1189.

³⁹ *Id.* at 1191.

⁴⁰ *Glover*, 140 S. Ct. at 1191 (Kagan, J., concurring).

⁴¹ *Id.* at 1192.

stop.⁴² That said, Justice Kagan stressed the difference between a revoked license—based upon “[c]rimes like vehicular homicide and manslaughter, or vehicular flight from a police officer,” or even “multiple convictions for moving traffic violations within a short time”—and suspended licenses, which Kansas suspends for matters having nothing to do with road safety, “such as failing to pay parking tickets, court fees, or child support.”⁴³ Because several studies had found that “most license suspensions do not relate to driving at all; what they most relate to is being poor,” Justice Kagan doubted whether the majority’s inference would hold any value.⁴⁴ Finally, after explaining various ways that hypothetical defendants could have rebutted the license-revocation signal through cross-examining the officer about their observations, the car’s attributes, and even statistical evidence—all which were absent from “the parties’ unusually austere stipulation” list—Justice Kagan stressed that “in more fully litigated cases, the license-revocation alert does not (as it did here) end the inquiry.”⁴⁵

Justice Sotomayor wrote the lone dissent, raising two main issues with the majority opinion.⁴⁶ First, she derided the majority’s shifting the burden of justifying a seizure—which had always rested upon the State⁴⁷—onto the defendant by permitting police officers to conduct traffic stops “whenever they lack ‘information negating an inference’ that a vehicle’s unlicensed owner is its driver.”⁴⁸ More importantly, Justice Sotomayor challenged the “commonsense inference” in light of the Court’s precedent stressing the government’s burden of justifying a seizure, “usually through a trained

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1194; *see id.* at 1193 (discussing ways of rebuttal).

⁴⁶ *Glover*, 140 S. Ct. at 1194 (Sotomayor, J., dissenting).

⁴⁷ *See Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (“It is the State’s burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.”).

⁴⁸ *Glover*, 140 S. Ct. at 1195–96 (Sotomayor, J., dissenting).

agent.”⁴⁹ Given the Court’s history of reliance upon officers’ training, knowledge, and experience, diluting the reasonable suspicion standard to a “commonsense inference” served only to give officers “free rein to stop a vehicle involved in no suspicious activity simply because it is registered to an unlicensed person. That stop is based merely on a guess or a ‘hunch’ about the driver’s identity.”⁵⁰ Finally, Justice Sotomayor undermined the revocation/suspension difference, pointing out that, although Kansas limits revocations for serious offenses, other states’ grounds for revocation can include offenses completely unrelated to driving offenses.⁵¹ Other states use “revocation” as temporary sanctions for things as mundane as failure to pay child support.⁵² Because vehicle stops interfere with freedom of movement, are inconvenient, consume time, and can create “substantial anxiety” through unsettling shows of authority, Justice Sotomayor dissented from the majority’s lowering of the (already minimal) burden of proof for reasonable suspicion.⁵³

III. NO “LOVE” IN *GLOVER*: HOW THE COURT’S DECISION WILL INTENSIFY CONFLICTS IN THE LAW OF TRAFFIC STOPS

Glover answered a narrow issue with a narrow ruling, but rarely do those cases stay that way.⁵⁴ Given the complexity of Fourth Amendment law, with its competing interests, doctrines, and analyses, *Glover* seems destined for conflict. From the intersection between the commonsense inference and

⁴⁹ *Id.* at 1194.

⁵⁰ *Id.* at 1196.

⁵¹ *Id.* at 1198 (citing KY. REV. STAT. ANN. § 186.560 (West 2019); MONT. CODE ANN. § 61-5-206 (2019); R.I. GEN. LAWS § 31-11-6 (2010)).

⁵² *Id.* at 1198 (citing OKLA. STAT. tit. 47, § 6-201.1 (2011)).

⁵³ *Id.*

⁵⁴ See generally *United States v. Rabinowitz*, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting) (“The old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law.”), *overruled in part by* *Chimel v. California*, 395 U.S. 752, 768 (1969).

prolonged stop case law to its impact on exclusion, *Glover* proves likely to have broader implications and to start fires.

A. *Glover* vs. *Rodriguez*: *When Does the Stop Prolong?*

Consider the *Glover* Court's example of a way to rebut the commonsense inference when the vehicle's registered owner's description patently does not match the vehicle's driver.⁵⁵ The officer's initial justification for the stop, the stop's "mission," is to investigate if the vehicle's driver is the owner whose license is revoked. Once the car is pulled over and the officer sees that, instead of a mid-sixties man, the driver is a mid-twenties woman, this new information should dispel the reasonable suspicion. At that point, the traffic stop should terminate, Right? In light of the new information, the officer's reasonable suspicion evaporates. It is then supplanted by the discovery that the driver is not the vehicle's registered owner; as noted by the trial court in *Glover*,⁵⁶ as well as in Justice Kagan's concurrence,⁵⁷ reasonable suspicion ceases absent the inference that the owner is probably driving.

The problem comes from the U.S. Supreme Court's decision in *Rodriguez v. United States*, the most recent case to discuss prolonged detentions in traffic stops.⁵⁸ *Rodriguez* emphasized that addressing the traffic infraction is the reason for the stop, so the stop can last only so long as necessary to do so.⁵⁹ But at the same time, the *Rodriguez* Court clarified that a traffic stop's mission is "to address the traffic violation that warranted

⁵⁵ *Glover*, 140 S. Ct. at 1191.

⁵⁶ See *State v. Glover*, 400 P.3d 182, 185 (Kan. Ct. App. 2017), *rev'd*, 422 P.3d 64 (Kan. 2018), *rev'd and remanded*, 140 S. Ct. 1183 (2020) (noting that the trial court granted the defendant's motion to suppress by reasoning that "for a lot of families [where] there are multiple family members and multiple vehicles, that somebody other than the registered owner often is driving that vehicle.").

⁵⁷ *Glover*, 140 S. Ct. at 1193 (Kagan, J., concurring).

⁵⁸ *Rodriguez v. United States*, 575 U.S. 348 (2015).

⁵⁹ *Id.* at 354. *Accord Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification.").

the stop, *and* attend to related safety concerns.”⁶⁰ Those safety concerns include making “ordinary inquiries incident to the traffic stop,” which generally involve checking driver’s license status, determining whether there are outstanding warrants, and inspecting the vehicle’s registration and proof of insurance.⁶¹ But when the initial justification for the stop is subsequently invalidated, like when discovering a teen is driving her uncle’s car, Can the officer nevertheless conduct the ordinary inquiries? There is no reasonable suspicion anymore for detaining the vehicle; that change in circumstances should cause the stop to terminate. Those ordinary inquiries occur as part of a traffic stop because they help to ensure that vehicles on the road are operated safely and responsibly. All of this, however, is based upon the initial reason for the stop, which is generally the existence of a traffic violation. However, the *Glover* inference can be rebutted the moment the officer sees the driver does not match the vehicle owner’s description.

There are two main ways that *Glover* and *Rodriguez* interactions play out. The first would be to rule in line with Supreme Court precedent authorizing “minimal” intrusions in vehicle stop contexts, like removing drivers or passengers from vehicles. Based upon this rationale, reviewing courts would find that the State’s “weighty interest” in officer safety, combined with the equally weighty interest in roadway safety, authorizes the officer to conduct the ordinary inquiries. After all, the “ultimate touchstone of the Fourth Amendment is reasonableness.”⁶² Utilizing the balancing test created by the Court in *Terry*,⁶³ courts would weigh “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to

⁶⁰ *Rodriguez*, 575 U.S. at 354 (emphasis added) (citations omitted).

⁶¹ *Id.* (citation omitted).

⁶² *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020) (quoting *Heien v. North Carolina*, 574 U.S. 54, 60 (2014)); *accord* *Riley v. California*, 573 U.S. 373, 381 (2014).

⁶³ *See* *Cloud*, *supra* note 11, at 497.

justify the intrusion.”⁶⁴ Here, the government’s interests would be weighty, while the individual’s interest would be comparatively minimal. The officer would discover that the vehicle’s driver was not its registered owner, but that would affect only the initial inference. The officer would have no way of knowing whether the vehicle’s driver in fact had a valid license, or that the car was properly licensed, registered, and insured. Given the prevalence of motor vehicles in America today,⁶⁵ and the inherent safety concerns officers face every time they pull someone over,⁶⁶ a court could reasonably rule that the traffic stop was not prolonged by the officer’s ordinary inquiries.⁶⁷

Frankly, I doubt that this would be the outcome in this scenario for three reasons. First, the facts warranting reasonable suspicion—*fact*, really—were undermined by the officer’s discovery of the driver. If reasonable suspicion requires considering “the whole picture,” then that picture evaporates the moment the inference is rebutted. Allowing a stop to continue when the original justification has vanished is impermissible in any other kind of *Terry* stop.⁶⁸ If an officer sees someone come out of a bar one night, start walking down the street, and then stumble and sway, that

⁶⁴ *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

⁶⁵ *See, e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018).

⁶⁶ *See Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (discussing how in 1994 alone, 5,762 officers were assaulted and eleven were killed during traffic stops); *See United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973) (discussing how “a significant percentage of murders of police officers occurs when the officers are making traffic stops.”). *See also United States v. Stanfield*, 109 F.3d 976, 978 (4th Cir. 1997) (“Law enforcement officials literally risk their lives each time they approach occupied vehicles during the course of investigative traffic stops.”).

⁶⁷ *See United States v. McRae*, 81 F.3d 1528, 1540 n.6 (10th Cir. 1996) (“Considering the tragedy of the many officers who are shot during routine traffic stops each year, the almost simultaneous computer check of a person’s criminal record, along with his or her license and registration, is reasonable and hardly intrusive.”).

⁶⁸ *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 500 (1983) (“[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.”).

behavior warrants an investigative detention for public drunkenness. But if the person stopped turns to the officer promptly, speaks clearly and cogently, and does not smell of alcohol, that initial suspicion dissipates. For the officer then to follow-up with additional questions prolongs the detention without any objective basis.⁶⁹

In the wake of *Rodriguez*, courts have been cracking down on unrelated questioning by officers during traffic stops.⁷⁰ It makes no sense to allow the police to continue to detain a vehicle and its passengers while conducting ordinary inquiries if the officer initiated the stop based on an inference that vanished the second the officer saw the driver. The fact that the driver is not the registered owner *could* suggest something nefarious, but that is a leap that will not even clear reasonable suspicion's low bar. Rather than objective facts from which inferences may arise, continuing a stop because the officer believes the driver may have stolen the car from the registered owner "would not much differ from a 'mere hunch'—and so 'not create reasonable suspicion.'" ⁷¹

Second, I struggle to see how officer safety is more strongly promoted by allowing the inquiries rather than simply by releasing the driver to go about their business. Again, the justification for the ordinary inquiries is predicated upon the fact that the stopped vehicle's driver did *something* to

⁶⁹ Cf. *Ohio v. Robinette*, 519 U.S. 33, 41 (1996) (Ginsburg, J., concurring in judgment) ("While the legality of consensual encounters between police and citizens should be preserved, we do not believe that this legality should be used by police officers to turn a routine traffic stop into a fishing expedition for unrelated criminal activity.") (citation omitted).

⁷⁰ See, e.g., *United States v. Campbell*, 970 F.3d 1342, 1356 (11th Cir. 2020) (finding that twenty-five seconds of unrelated questioning prolonged stop); *United States v. Clark*, 902 F.3d 404, 410–11 (3d Cir. 2018) (finding that twenty seconds of unrelated questions impermissibly extended traffic stop); see also *United States v. Callison*, 436 F. Supp.3d 1218, 1125 (S.D. Iowa), *appeal filed*, 20-1398 (8th Cir. Feb. 27, 2020) ("The [*Rodriguez*] Court did not say 'adds material time' or 'adds unreasonable time' or 'adds less-than-a-minute of time.' It said adds time.") (footnote omitted).

⁷¹ *Kansas v. Glover*, 140 S. Ct. 1183, 1192–93 (2020) (Kagan, J., concurring) (quoting *Navarette v. California*, 572 U.S. 393, 397 (2014)).

indicate less-than-perfect dedication to the rules of the road.⁷² Of course, this case is dealing exclusively with *Glover*'s inference; if the officer observes something that gives reason for a continued detention, that is a separate source of suspicion justifying a separate investigation. But where the officer pulls someone over because a license plate reader tells them that the vehicle's registered owner's license has been revoked, then that inference's abrogation should terminate the stop, minimizing the officer's risk of harm.

Third and finally, allowing the officer to still conduct the ordinary inquiries even after the reasonable suspicion disappears runs almost straight into the random license checks the Supreme Court rejected forty years ago in *Delaware v. Prouse*.⁷³ The *Prouse* Court disavowed discretionary license checks by police officers specifically because these checks would authorize *Terry* stops based upon neither an "appropriate factual basis for suspicion directed at a particular automobile," nor upon some "other substantial and objective standard or rule to govern" officers' exercise of discretion.⁷⁴ Allowing officers to conduct traffic stops based upon the *Glover* inference—which is rebutted immediately upon contact with the driver—yet, still allowing the ordinary inquiries is precisely the kind of "standardless and unconstrained discretion" that the Fourth Amendment guards against.⁷⁵

Given the conflicting precedent, the narrowness of *Glover*'s holding, and the risk of arbitrary seizures, reviewing courts should reject any attempts to

⁷² See *Rodriguez*, 575 U.S. at 355 (noting that "[a] warrant check makes it possible to determine whether the *apparent* traffic violator is wanted for one or more previous traffic offenses.") (quoting 4 WAYNE R. LAFAVE, SEARCH & SEIZURE §9.3(c), 516 (6th ed. 2020)) (emphasis added).

⁷³ *Delaware v. Prouse*, 440 U.S. 648 (1979).

⁷⁴ *Id.* at 661.

⁷⁵ *Id.*

circumvent with two steps instead of one that the Supreme Court already rejected in *Prouse* and affirmed in *Rodriguez*.⁷⁶

B. *Glover vs. the Exclusionary Rule*

Assuming a court agrees with the argument above, an officer should not continue his questioning after the *Glover* inference has been rebutted. If the officer's illegal investigation discovers contraband, Does the exclusionary rule apply? Though some may think it does, or that it should, those people do not make up five members of the Supreme Court, which in the 21st century has gone out of its way to undermine and curtail the rule's application.⁷⁷

1. *Utah v. Strieff* as the Prelude to *Glover*

Take what I anticipate will soon be a likely scenario: An officer asks those ordinary inquiries and discovers that the driver has an outstanding warrant. During the arrest, they discover contraband on the driver. Does that trigger suppression? The officer discovered the warrant based solely upon the information discovered through the driver's prolonged (or even unjustifiable) detention. It was not inevitable that the evidence would have

⁷⁶ Cf. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920) (rejecting government's argument that exclusionary rule articulated in *Weeks v. United States*, 232 U.S. 383 (1914), "is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words.").

⁷⁷ See Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should it Be?*, 10 OHIO ST. J. CRIM. L. 341, 341 (2013) (referring to U.S. Supreme Court's recent decisions as "reveal[ing] a Court that is now willing to take much larger bites out of the rule, and perhaps even swallow it whole."); Rohith v. Srinivas, *The Exclusionary Rule as Fourth Amendment Judicial Review*, 49 AM. CRIM. L. REV. 179, 180 (2012) ("Proponents of the exclusionary rule are playing a goal-line defense."); Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477, 477–78 (2013) ("[O]ver the past four decades the Supreme Court has devised doctrines rooted neither in the constitutional text nor its history that have transmogrified the exclusionary remedy from a core element of Fourth Amendment rights into a nuisance.").

been discovered; the stop should not have occurred,⁷⁸ nor was there an alternative, independent source for the contraband's discovery.⁷⁹

Here we run into the Supreme Court's most recent case on the exclusionary doctrine, *Utah v. Strieff*.⁸⁰ Another opinion pitting Justice Thomas in the majority against Justice Sotomayor in the dissent, the *Strieff* Court held that when officers illegally stop someone without reasonable suspicion and during the detention discover an outstanding warrant, evidence discovered during a subsequent search incident to arrest is sufficiently attenuated from the initial stop's illegality to warrant an exception from the exclusionary rule.⁸¹ The conflict with *Glover* arises from Justice Sotomayor's dissent in *Strieff*, where she pointed out the flaw with using bench warrants to attenuate an illegal seizure's fruits. Foreshadowing her concerns in *Glover* itself, Justice Sotomayor questioned the majority's reliance upon outstanding warrants, given both the ubiquity of their use and their tendency to originate from minor infractions.⁸² To allow the

⁷⁸ See *Nix v. Williams*, 467 U.S. 431, 444 (1984) (defining inevitable discovery exception to exclusionary rule as where "prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means" unconnected to illegal search or seizure).

⁷⁹ See *Murray v. United States*, 487 U.S. 533, 537 (1988) (defining independent source exception as applying "to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality"); accord *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) ("If knowledge of [the facts obtained through a Fourth Amendment violation] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.").

⁸⁰ *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

⁸¹ *Id.* at 2059.

⁸² *Id.* at 2068 (Sotomayor, J., dissenting) (discussing how "[o]utstanding warrants are surprisingly common," with courts issuing them for things as simple as "[w]hen a person with a traffic ticket misses a fine payment or court appearance," or "[w]hen a person on probation drinks alcohol or breaks curfew," let alone "the 'staggering' number of warrants, 'drawers and drawers' full, that many cities issue for traffic violations and ordinance infractions,") (quoting Dept. of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* 47, 55 (2015), <https://www.justice.gov/sites/default/files/opa/press->

attenuation in *Strieff* to apply in situations where the *Glover* inference has been rebutted all but opens the floodgates to illegal stops, allowing officers to detain and arrest individuals with impunity. Even in *Strieff*, the officers were investigating *something* rather than casting lines and hoping for bites.⁸³

To the chagrin of civil libertarians, the answer is that *Strieff* will likely apply. Although the officer conducted an unauthorized investigation based on an unconstitutional detention, the *Strieff* Court made plain that discovering the outstanding warrant was enough to break the causal link between the officers' illegal conduct and the contraband's discovery.⁸⁴ At the same time, there may be a possible way to distinguish *Strieff* if the person whose name returns with an outstanding warrant is the passenger, rather than the driver. Unlike in *Strieff*, which was an on-the-street encounter as opposed to a vehicle stop, the hypothetical officer had no reason whatsoever to run warrant checks on the passenger. The Ninth Circuit even held last year that because a passenger's identity ordinarily has "no relation to a driver's safe operation of a vehicle," demanding the passenger's identification is not part of the traffic stop's mission.⁸⁵ That said, the Ninth Circuit's view is the minority, with other federal circuits and state courts finding that the passenger's identification is a permissible inquiry.⁸⁶ Thus, the majority of courts will likely view *Strieff* as controlling authority.

releases/attachments/2015/03/04/ferguson_police_department_report.pdf
[<https://perma.cc/8QCU-DAPE>]].

⁸³ See *Strieff*, 136 S. Ct. at 2059 (discussing the officers' investigating narcotics activity).

⁸⁴ *Id.* at 2062.

⁸⁵ *United States v. Landeros*, 913 F.3d 862, 868 (9th Cir. 2019).

⁸⁶ See, e.g., *State v. Martinez*, 424 P.3d 83, 88–89 (Utah 2017) (collecting cases where federal courts upheld officers' ability to request passenger identification); *State v. Allen*, 779 S.E.2d 248, 255–56 (Ga. 2015) (authorizing officers to demand identification and collecting authorities).

2. The *Glover* Inference and Negligent Records

Consider a different scenario—What happens when the officer’s *Glover* inference is based upon a revoked license status and later determined to be erroneous? For example, the registered owner’s license was revoked but subsequently reinstated, and the computer system is outdated. Does *that* undermine the officer’s investigation?

Again, it is doubtful that this scenario does undermine the officer’s investigation. The Supreme Court has already exempted clerical laziness from triggering exclusion, regardless of whether the outdated information is due to police negligence or someone else’s.⁸⁷ Although the Court in *Herring v. United States* hedged in this regard, noting that if the police have been reckless in maintaining their records, then exclusion could apply,⁸⁸ this does little to promote Fourth Amendment protections or police accountability. It also places a greater burden on defendants to show the “widespread pattern of violations” necessary to circumvent the good-faith exception, which is evidence that may prove inordinately more difficult to find.⁸⁹

In a worst-case scenario, *Herring* effectively insulates police use of automated license-plate readers, also known as ALPRs, which are devices affixed to patrol vehicles that use optical character recognition to scan license plates of passing cars.⁹⁰ Police departments across the country have

⁸⁷ See *Arizona v. Evans*, 514 U.S. 1 (1995) (excepting from exclusionary rule evidence obtained from arrest stemming from officer’s good faith reliance upon computer system which showed defendant had active warrant, later determined to have been recalled but not updated due to court clerk’s negligence); *Herring v. United States*, 555 U.S. 135 (2009) (extending *Evans* to police databases).

⁸⁸ *Id.* at 146.

⁸⁹ *Id.* at 146–47 (emphasis deleted) (quoting *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring in part and concurring in judgment)); see Kay L. Levine *et al.*, *Evidence Laundering in a Post-Herring World*, 106 J. CRIM. L. & CRIMINOLOGY 627, 648–50 (2017) (researching the effect of *Herring* and determining lower courts relied on it to insulate police 80% of the time).

⁹⁰ See *License Plate Recognition Systems*, ELECTRONIC PRIVACY INFORMATION CENTER, <https://epic.org/privacy/licenseplates/> [<https://perma.cc/E9QL-XNP4>].

already started using ALPRs, and two-thirds of departments having 100 or more officers utilize ALPRs.⁹¹ That number jumps to over 90% for departments in cities with more than one million people.⁹² However, this technology is far from perfect, with errors not only in reading passing license plates but also in maintaining outdated records systems.⁹³ What happens when the *Glover* inference collides with these ALPR systems? If a computer hit authorizes police to pull someone over, it will inevitably encourage departments to maintain records past their sell-by date. It creates a win-win scenario for police because if their system is up to date, then *Glover* authorizes the stop, but if the system is outdated, then *Herring* excuses it. But when the police have a win-win situation, generally it is the public who loses.

Police departments use ALPRs in other ways than inside patrol vehicles. Due to their small size, ALPRs can be placed on light poles, buildings, and even on traffic cones.⁹⁴ With so many cameras, each running ALPR software, police can effectively track a person's movements across a city as accurately as GPS tracking. The Supreme Court previously ruled that people do not have a protected privacy interest in the exterior of their cars,⁹⁵ because the ALPRs never physically touch passing vehicles, no trespass violations occur to trigger the Fourth Amendment.⁹⁶ There may be an argument to support a privacy interest rooted in the Court's recent decision

⁹¹ Brief for Electronic Privacy Information Center (EPIC) & Twenty-Two Technical Experts & Legal Scholars as Amici Curiae Supporting Respondent at 8–9, *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (citations omitted) (No. 18-556).

⁹² *Id.*

⁹³ *Id.* at 13.

⁹⁴ *Id.* at 8.

⁹⁵ *See* *United States v. Class*, 475 U.S. 106, 114 (1986) (finding it “unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile.”).

⁹⁶ *Cf.* *United States v. Jones*, 565 U.S. 400, 404 (2012) (holding that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search’” because the Government had “physically occupied private property for the purpose of obtaining information.”).

in *Carpenter v. United States*, with its claim of seeking to “assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”⁹⁷ If the Court was serious in accepting that “as ‘subtler and more far-reaching means of invading privacy have become available to the Government,’” it has the duty “to ensure that the ‘progress of science’ does not erode Fourth Amendment protections,” then the advent of ALPRs should warrant careful scrutiny.⁹⁸ Courts should refuse to tolerate even the appearance of gamesmanship from police in their use. For instance, if a defendant can prove that the police are intentionally or recklessly failing to update their systems so as to take advantage of *Glover* and *Herring*, then good faith should not apply.⁹⁹ However, the situation looks grim. In April, the Massachusetts Supreme Court ruled that although ALPRs’ widespread use could rise to an invasion of someone’s reasonable expectation of privacy, it did not occur in the case before them.¹⁰⁰ This ruling came despite the fact that the case involved the police investigating the defendant for drug distribution by using ALPRs to not only track his movements over two bridges, but also “access historical data, which revealed the number of times he had crossed the bridges over a three-month period,” and receive real-time alerts.¹⁰¹

⁹⁷ *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (punctuation omitted) (citation omitted).

⁹⁸ *Id.* at 2223 (quoting *Olmstead v. United States*, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting)).

⁹⁹ See *Herring v. United States*, 555 U.S. 135, 144 (2009) (“[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”).

¹⁰⁰ See *Commonwealth v. McCarthy*, 142 N.E.3d 1090, 1095 (Mass. 2020).

¹⁰¹ *Id. contra Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) (questioning whether individuals “reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.”).

IV. SHOULD THE COURT RECONSIDER REASONABLE SUSPICION IN THE WAKE OF *GLOVER*?

Since the Court created reasonable suspicion, it has authorized police to consider your ethnicity,¹⁰² where you live,¹⁰³ what you wear,¹⁰⁴ and how you behave¹⁰⁵ as factors for consideration. As it stands now, reasonable suspicion has more in common with *Tinder* than with the Fourth Amendment.¹⁰⁶ Scholars have sought to justify the *Terry* case as an original matter, but routinely find no answer.¹⁰⁷ Part of that lies in Chief Justice Warren rejecting the Warrant Clause's procedural safeguards and instead rooting the *Terry* analysis in the "reasonableness clause."¹⁰⁸ He created a balancing test whereby courts weigh the government's interest in "effective crime prevention and detection" in one corner and the individual's interest

¹⁰² *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

¹⁰³ *Adams v. Williams*, 407 U.S. 143, 147 (1972).

¹⁰⁴ *United States v. Sokolow*, 490 U.S. 1, 4–5 (1989).

¹⁰⁵ *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

¹⁰⁶ *Tinder* is an online and smartphone-based program for meeting people and dating, criticized for its "swipe" system—which lets people choose to reject or "like" someone's profile, usually based on several photos of that person—as encouraging users to judge people based on their appearances alone. See, e.g., Rachel Hosie, *Tinder Update Allows Users to Focus on Looks Without Being Distracted by Personality*, INDEPENDENT (Oct. 6, 2017), <https://www.independent.co.uk/life-style/love-sex/tinder-update-looks-pictures-not-personality-bio-dating-app-shallow-appearance-a7986796.html> [<https://perma.cc/8TB4-EHHV>]; Katie Moritz, *Why You Can't Judge a Date by Their Photo*, REWIRE (Jul. 24, 2017), <https://www.rewire.org/online-dating-photo/> [<https://perma.cc/3RYV-2RVQ>].

¹⁰⁷ Sophie J. Hart & Dennis M. Martin, Essay, *Judge Gorsuch and the Fourth Amendment*, 69 STAN. L. REV. ONLINE 132, 136 (2017) ("*Terry* was a pragmatic—not an originalist—approach. Scholars and judges seeking a historical hook for *Terry* have uncovered little evidence linking *Terry*'s stop and frisks to police actions at common law"); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 915–16 (2002) (noting how reasonable suspicion was "[c]reated in 1968," that it "has no roots in Framing-era law, as a reasonable suspicion test was unknown to legal scholars at that time," and that it "has absolutely no nexus with the text of the Fourth Amendment.").

¹⁰⁸ Cloud, *supra* note 11, at 495 ("In 1968, *Terry v. Ohio* abandoned the warrant-based procedural "face" of the Amendment and sanctioned some searches and seizures violating all of the requirements imposed by the Warrant Clause") (footnote omitted).

in personal security in the other.¹⁰⁹ To the surprise of few, though, far too often, the Court “balances” these two factors and finds that societal needs outweigh individual rights.¹¹⁰ Contrary to what the Supreme Court holds now,¹¹¹ the touchstone of the Fourth Amendment is *not* “reasonableness.” The Framers understood “unreasonable” searches and seizures to be those against the reason of the common law, which means those procedures found in the Warrant Clause: probable cause, oath or affirmation, and particularity.¹¹² Worse, *Terry*’s balancing test has more in common with equal protection scrutiny than with the Fourth Amendment—and a rational basis test, at that, despite being a fundamental right.¹¹³ Finally, by

¹⁰⁹ *Terry v. Ohio*, 392 U.S. 1, 16, 22 (1968). *But see* *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of [constitutional rights].”).

¹¹⁰ Arthur Leavens, *The Fourth Amendment and Surveillance in a Digital World*, 27 J. CIV. RTS. & ECON. DEV. 709, 745 (2015) (discussing how in interest-balancing, “the government side of the balance is easy to over-value, particularly in an age of seemingly ubiquitous terrorist plots, . . . while the privacy-liberty side of the balance may seem an extravagance, particularly to those who cannot picture themselves subject to such investigative attention.”). For an excellent example of interest balancing’s futility compared against constitutional rights, *see* *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401–02 (2020).

¹¹¹ *See, e.g.*, *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016); *Heien v. North Carolina*, 574 U.S. 54, 60 (2014); *Riley v. California*, 573 U.S. 373, 381 (2014); *Michigan v. Fisher*, 558 U.S. 45, 47 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

¹¹² *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1264 (2016) (“Although, at least since 1967, the concept of ‘unreasonable’ has become untethered from the original meaning, the word itself implied something different in the eighteenth century. ‘Unreasonable’ translated into ‘against reason,’ or against ‘the Reason of the Common Law’”) (footnotes and citations omitted); Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 330–37 (2010) (examining *Terry* from originalist standpoint and finding that “*Terry*’s central innovation—permitting detention and frisk on a predicate that could not support an arrest—has no support in the nightwalker statutes or any other framing-era practice.”).

¹¹³ *See* *Clark v. Jeter*, 386 U.S. 456, 461 (1988) (discussing how courts consider equal protection challenges under “different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and

authorizing searches and seizures at less than probable cause, the *Terry* Court opened the door to arbitrary interference by the State—exactly what the Fourth Amendment was designed to ward against.¹¹⁴

Consider how the *Glover* inference disproportionately impacts low-income communities because, although it is now “reasonable” to infer a registered owner is likely the vehicle’s driver, shared vehicles in low-income families skews that inference. Additionally, Justice Kagan’s concerns about license suspension’s relation to poverty¹¹⁵ bear fruit: 71% of license suspensions in Florida are for unpaid court debt, 62% of the three-million-plus suspensions Ohio issued in 2017 alone were unrelated to driving, and 56% of license suspensions in Wisconsin were issued for unpaid parking tickets.¹¹⁶ Rather than levying taxes to fund public expenses, many municipalities have turned to increased ticketing and traffic enforcement as a source of revenue. For example, the town of Ferguson, Missouri—home of Michael Brown and the birthplace of the Black Lives Matter movement—collected \$2.4 million in fines and fees in 2013 alone, second only to taxes as the municipality’s income source.¹¹⁷ Although *Glover*’s inference authorizes only a traffic stop—one that should hopefully

classifications affecting fundamental rights, are given the most exacting scrutiny.”) (citations omitted).

¹¹⁴ Cf. *United States v. Jones*, 565 U.S. 400, 406 (2012) (discussing how courts “must ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’”) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

¹¹⁵ *Kansas v. Glover*, 140 S. Ct. 1183, 1192 (2020) (Kagan, J., concurring).

¹¹⁶ Brief for Fines and Fees Justice Center et al., as Amicus Curiae Supporting Respondent at 7, *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (citations omitted) (No. 18-556).

¹¹⁷ Eric Markowitz, *The Link Between Money and Aggressive Policing*, *NEW YORKER* (Aug. 11, 2016), <https://www.newyorker.com/news/news-desk/the-link-between-money-and-aggressive-policing> [<https://perma.cc/S2LP-LJ85>]; see Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors’ Prisons*, 51 *HARV. C.R.-C.L. L. REV.* 189, 225–26 (2016) (discussing the Ferguson police’s multiple unconstitutional practices to better funnel fine monies to the local government).

terminate the moment the officer realizes that the vehicle’s driver is not the registered owner—traffic stops do more than simply interfere with freedom of movement, inconvenience drivers, and consume time; traffic stops “create substantial anxiety” from the police’s “unsettling show of authority” to the driver.¹¹⁸ They are fraught with potentially lethal consequences for both officers and those who are pulled over.

Just as traffic stops have made targets out of the poor, so too has reasonable suspicion case law affected marginalized communities. By authorizing police to make “investigative detentions” of someone based upon their race, their clothes, their location, and their demeanor, reasonable suspicion has overwhelmingly impacted communities of color at monstrously disproportionate rates. The Stanford University Open Policing Project examined almost 100 million traffic stops conducted from 2011 to 2017, concluding that “police stopped and searched [B]lack and Latino drivers on the basis of less evidence than used in stopping white drivers, who are searched less often but are more likely to be found with illegal items.”¹¹⁹ Combined with the Court’s condonation of pretextual stops in *Whren v. United States*,¹²⁰ the Court has effectively authorized the practice of singling out minorities for pretextual traffic stops in the hope of discovering contraband.¹²¹

Consider all the police shootings that have occurred in the past few years. Philando Castile was shot five times during a traffic stop while reaching for his identification after informing the officer he had a firearm.¹²² Maurice

¹¹⁸ *Delaware v. Prouse*, 440 U.S. 648, 657 (1979).

¹¹⁹ See Erik Ortiz, *Inside 100 Million Police Traffic Stops: New Evidence of Racial Bias*, CBS NEWS (Mar. 13, 2019), <https://www.nbcnews.com/news/us-news/inside-100-million-police-traffic-stops-new-evidence-racial-bias-n980556> [<https://perma.cc/79HZ-ZHDW>] (citing *The Stanford Open Policing Project*, STANFORD UNIV., <https://openpolicing.stanford.edu/> [<https://perma.cc/5ZW9-SQ2J>]).

¹²⁰ *Whren v. United States*, 517 U.S. 806 (1996).

¹²¹ I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 862 (2008).

¹²² Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (Jun. 21, 2017), <https://www.washingtonpost.com/news/post->

Gordon was killed by a police officer during a traffic stop in June 2020, despite the fact that the officer already frisked him and found no weapons.¹²³ Samuel DuBose was another unarmed Black man who was shot in the head by a campus police officer during a traffic stop.¹²⁴ Walter Scott was also shot in the back by a South Carolina police officer during a traffic stop.¹²⁵ In 2015 alone, over 100 people were killed by police during routine traffic stops, a third of whom were Black.¹²⁶ Post-*Terry*, courts are supposed to determine a search or seizure's "reasonableness" by balancing the invasion of the individual's privacy against the degree to which the invasion is needed "for the promotion of legitimate governmental interests."¹²⁷ However, what "legitimate governmental interests" result from killing people during traffic stops? The courts and other criminal justice officials have tolerated and even sanctioned the injustices people of color experience; can anyone be surprised that the perpetually mistreated "develop distrust and disrespect for the justice system"?¹²⁸

nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/ [https://perma.cc/969G-P3K5].

¹²³ Tracey Tully, *A Black Man Is Killed by a Trooper. His Family Wants Answers*, N.Y. TIMES (Jun. 10, 2020), <https://www.nytimes.com/2020/06/08/nyregion/maurice-gordon-nj-killed.html> [https://perma.cc/F2CZ-PC4P].

¹²⁴ Charles M. Blow, *The Shooting of Samuel DuBose*, N.Y. TIMES (Jul. 29, 2015), <https://www.nytimes.com/2015/07/30/opinion/charles-blow-the-shooting-of-samuel-dubose.html> [https://perma.cc/93SR-CWUE].

¹²⁵ Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [https://perma.cc/7GQS-C499].

¹²⁶ Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, WASH. POST (Dec. 24, 2015), https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html [https://perma.cc/4J5M-MJQT].

¹²⁷ *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); cf. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (determining lawfulness by balancing privacy and law enforcement interests); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (determining lawfulness by balancing privacy and law enforcement interests).

¹²⁸ Angela Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 442 (1997).

Support for reasonable suspicion proves less than convincing. As an original matter, the fact that a brief, investigative detention would not trigger Fourth Amendment protections at the time of the Framing because it is less than an arrest¹²⁹ ignores just how transformative *Terry* has been to the American legal lexicon. At the Framing, to arrest someone meant “to obstruct; to stop; to check or hinder motion”¹³⁰—which is exactly what a *Terry* stop is. Nor is it convincing to argue that vehicles are subject to “pervasive and continuing governmental regulation and controls” to justify traffic stops.¹³¹ For instance, one 2011 study published in the *American Journal of Criminal Law* found that people rejected the automobile exception by a 52.3% to 35.8% margin as a barometer of reasonable privacy expectations in vehicles.¹³² Same with the *Terry* Court’s refusal to blind itself “to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.”¹³³ If officers lack probable cause for an arrest, there is a simple solution: Investigate.¹³⁴ The freedom from unreasonable

¹²⁹ See *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“There is some suggestion in the use of such terms as ‘stop’ and ‘frisk’ that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a ‘search’ or ‘seizure’ within the meaning of the Constitution.”).

¹³⁰ Noah Webster, *American Dictionary of the English Language* (1828), <http://webstersdictionary1828.com/Dictionary/arrest> [<https://perma.cc/4RG5-78CH>].

¹³¹ *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976); *accord California v. Carney*, 471 U.S. 386, 392 (1985) (referring to “the pervasive regulation of vehicles capable of traveling on the public highways.”).

¹³² Henry F. Fradella et al., *Quantifying Katz: Empirically Measuring “Reasonable Expectations of Privacy” in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289, 364 (2011).

¹³³ *Terry*, 392 U.S. at 24.

¹³⁴ Cf. *Falkner v. State*, 98 So. 691, 693 (Miss. 1924) (discussing how freedom from search and seizure will inevitably “restrict the activity and the efficiency of the law-enforcing officers, and necessarily some mischief must go undiscovered sometimes; but this was regarded as a less evil than giving officers unrestricted power to invade the property and houses of the citizen in search of evidence.”); *Underwood v. State*, 78 S.E. 1103, 1106 (Ga. Ct. App. 1913) (referring to the freedom from search and seizure and the privilege against self-incrimination as “sacred civil jewels” brought over in the common law, ripped from tyrants’ unwilling hands by the apostles of personal liberty and personal

searches and seizures exists for a reason, and it is rooted in the abuses experienced by the Founders at the hands of the British—which had more in common with modern police forces than the constables of old. With “roots that are deep in our history,” the probable cause standard “represents the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest ‘reasonable’ under the Fourth Amendment.”¹³⁵ Rather than relegating probable cause to merely “an inconvenience to be somehow ‘weighed’ against the claims of police efficiency,”¹³⁶ pre-*Terry* courts consistently applied a straightforward, general rule: Get a warrant.¹³⁷ That some criminals may escape capture and punishment is troubling, but so too is the systemic injustice reasonable suspicion has promulgated. It is a truism that constitutional protections have costs,¹³⁸ but the enshrinement of constitutional rights “necessarily takes certain policy choices off the table.”¹³⁹

security. They are hallowed by the blood of a thousand struggles, and were stored away for safe-keeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them).

¹³⁵ *Bailey v. United States*, 568 U.S. 186, 192-93 (2013) (quoting *Henry v. United States*, 361 U.S. 98, 100 (1959); *Dunaway v. New York*, 442 U.S. 200, 208 (1979)).

¹³⁶ *Riley v. California*, 573 U.S. 373, 401 (2014) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

¹³⁷ *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018).

¹³⁸ *Coy v. Iowa*, 487 U.S. 1012, 1020 (II) (1988).

¹³⁹ *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008); *cf. Crawford v. Washington*, 541 U.S. 36, 67–68 (2004) (“The Framers...knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people.... They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.”); *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring in judgment) (“Judges are not well suited to strike the right ‘balance’ between [such] incommensurable interests. Nor do I think it is our role to do so. The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail. Those tradeoffs are thus not for us to reevaluate.”).

V. CONCLUSION

Already a negligible burden, *Kansas v. Glover* decreased reasonable suspicion's requirements even further. Though claiming to be a narrow holding, *Glover* may soon confront several other doctrines in the *Terry* traffic stop analysis. Questions regarding the interplay between *Glover*'s inference and prolonged stop case law under *Rodriguez* are almost certain to arise. So too with the inevitable clash with the Roberts Court's exceptions to the exclusionary rule, especially in light of the looming specter of mass surveillance under automated license plate readers. If *Glover* has shown us anything, it is the inherently fickle, unreliable, and unconstitutional nature of reasonable suspicion, which historically has been abused by police officers—often at the expense of the liberty, the livelihood, and the lives of persons of color. Perhaps it may one day serve as the motivating factor to see reasonable suspicion's incursion upon the Fourth Amendment repudiated—much like other misguided rules promulgated from the impact of automobiles.¹⁴⁰ Until then, courts should stay vigilant in defending the people's right to be free from unreasonable searches and seizures from stealthy encroachments, masking under the false talisman of law enforcement efficiency.¹⁴¹

¹⁴⁰ *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting); *see id.* n.6 (comparing the rule in *New York v. Belton*, 453 U.S. 454 (1981)—“suspicion less search of a car permitted upon arrest of the driver”—with the rule in *Arizona v. Gant*, 556 U.S. 332 (2009)—“on second thought, no.”).

¹⁴¹ *Cf. Morgan v. State*, 151 N.E. 98, 100 (Ind. 1926) (“The expression, ‘the end justifies the means,’ has never been adopted as a part of the legal jurisprudence of this state”); *Underwood v. State*, 78 S.E. 1103, 1106 (Ga. Ct. App. 1914) (rejecting idea that “in the effort to detect crime and to punish the criminal ‘the end justifies the means.’ This is especially not true when the means adopted are violative of the very essence of constitutional free government.”).