William & Mary Journal of Race, Gender, and Social Justice

Volume 28 (2021-2022)
Issue 2

Article 4

2-2022

Imposing a Daily Burden on Thousands of Innocent Citizens: The Supreme Court Unnecessarily Limited Motorists' Fourth Amendment Rights in Kansas v. Glover

George M. Dery

IMPOSING A DAILY BURDEN ON THOUSANDS OF INNOCENT CITIZENS: THE SUPREME COURT UNNECESSARILY LIMITED MOTORISTS' FOURTH AMENDMENT RIGHTS IN *KANSAS V. GLOVER*

GEORGE M. DERY*

ABSTRACT

This Article analyzes *Kansas v. Glover*, in which the Supreme Court ruled that an officer could stop a vehicle owned by a person having a revoked license on the assumption that the owner was currently driving the vehicle. This work examines the concerns created by *Glover*'s ruling. This Article asserts that, in creating its new rule enabling police to stop a motorist without first confirming his or her identity, the Court based its holding on the existence of two facts, thus effectively changing its traditional "totality of the circumstances" analysis for reasonable suspicion to a categorical rule. Further, *Glover*'s reasoning eroded *Terry v. Ohio*'s reasonable suspicion standard and discounted the motorist's interests against seizures of the person, thus undermining Fourth Amendment rights. Finally, the Court, in adding a new element of "when the officer lacks information negating an inference" to *Terry*'s analysis, shifted the burden of proof for assessing the lawfulness of the seizure to the motorist. *Glover* therefore potentially imposes a daily burden on "thousands of innocent citizens" who happen to be borrowing a car.

* Professor, California State University Fullerton, Division of Politics, Administration, & Justice; Former Deputy District Attorney, Los Angeles, California; JD, 1987, Loyola Law School, Los Angeles, California; BA, 1983, University of California Los Angeles.

INTRODUCTION

In *Kansas v. Glover*, the Supreme Court ruled that an officer could stop a vehicle owned by a person having a revoked license on the assumption that the owner was currently driving the vehicle.[1] The Court reached this holding with near unanimity, leaving Justice Sotomayor as the lone dissenter.[2] Justice Thomas, the author of *Glover*'s majority opinion, considered resolution of the case's issue to be a simple matter of "common sense."[3] In her concurring opinion supporting the Court's holding, Justice Kagan declared, "When you see a car coming down the street, your common sense tells you that the registered owner may well be behind the wheel."[4]

The general consensus behind *Glover*'s conclusion, however, obscures the fact that the Court, in reaching its holding, made some perilous logical leaps that unnecessarily undermined Fourth Amendment rights against unreasonable seizures. While dutifully stating that it was considering the "totality of the circumstances" to assess reasonable suspicion for the vehicle stop,[5] the Court actually based its holding on the existence of two facts, thus effectively changing its reasonable suspicion analysis to a categorical rule.[6] Further, *Glover*'s reasoning eroded *Terry*'s reasonable suspicion standard and discounted the motorist's interests against seizures of the person, thus undermining Fourth Amendment rights.[7] Finally, *Glover*, in adding a new element of "when the officer lacks information negating an inference" to *Terry*'s justification analysis, shifted the burden of proof assessing the propriety of the seizure to the motorist.[8] With such reasoning, the Court does genuine damage beyond concluding that

1. Particularly, *Kansas v. Glover* held that an officer could perform a traffic stop of a vehicle owned by a person having a revoked license when "the officer lacks information negating an inference that the owner is the driver of the vehicle." 140 S. Ct. 1183, 1186 (2020).
2. *Id.* at 1194 (Sotomayor, J. dissenting).
3. *Id.* at 1189–90.
4. *Id.* at 1191 (Kagan, J., concurring).
5. *Id.* at 1191.
6. *Id.* at 1190.
7. *Glover*, 140 S. Ct. at 1190.
8. *Id.* at 1186.

police can stop drivers with revoked licenses. Indeed, *Glover*'s analysis could impose a "potential daily burden on thousands of innocent citizens" who happen to be driving a borrowed car.[9] The cost to a stopped motorist, in some cases, can be dire, for "low-level traffic stops" have been found to account for "an unnecessarily high number of use-of-force incidents."[10] Thus, in allowing officers to make traffic stops on less than complete information available to them, *Glover* might have employed flawed reasoning rather than "common sense."[11]

I. *TERRY V. OHIO* ALLOWED BRIEF INVESTIGATIVE STOPS WITHIN SPECIFIC LIMITS

The traffic stop in *Glover* is a kind of seizure of a person that falls short of an arrest which the Court first recognized in *Terry v. Ohio*.[12] *Terry* hardly took its creation of an officer's authority to perform a "stop and frisk" of a person lightly.[13] The Court declared, "[w]e would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues."[14] The stakes involved on both sides of the case were particularly significant.[15] When considering the concerns of the individual, the *Terry* Court warned, "[t]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."[16] On the other hand, the officer's interests were also vital for, without the authority to perform a frisk, the answer to an officer's question "may be a bullet."[17]

The Court in *Terry* therefore closely scrutinized all the facts.[18] *Terry* considered the entire career of Detective McFadden—the officer involved in the case—including the number of years he had been an officer and as a detective, as well as his current assignment looking out for "shoplifters and pickpockets" in this "vicinity of downtown Cleveland."[19] The Court also noted Detective McFadden's

9. Maryland v. Wilson, 519 U.S. 408, 419 (1997) (Stevens, J., dissenting).

10. Dave Davies Interview of Dr. Phillip Atiba Goff, *Psychologist Examines What a 'Rapid Evolution' in Policing Might Look Like*, NPR (Apr. 22, 2021), https://www.npr.org/2021/04/22/989767998/psychologist-examines-what-a-rapid-evolution-in-policing-might-look-like [https://perma.cc/8KV5-NUJG].

11. *Glover*, 140 S. Ct. at 1189–90.

12. Terry v. Ohio, 392 U.S. 1, 10 (1968). The Court noted that the issues it weighed had "never before been squarely presented to this Court." *Id.* at 9–10.

13. *Id.*

14. *Id.* at 9.

15. *Id.* at 9–10.

16. *Id.* at 8–9.

17. *Terry*, 392 U.S. at 8.

18. 392 U.S. at 4–8.

19. *Id.* at 5.

"routine habits of observation over the years."[20] In this particular case, the detective noticed two men who were acting curiously; they took turns walking past a store, looking in its window, continuing on for a short distance, turning around and looking again in the store window.[21] Further, the "two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips."[22] Each would confer with the other after walking past the store.[23] After a third man came and left, the original two "resumed their measured pacing, peering and conferring" for about ten minutes.[24] Detective McFadden "suspected the two men of 'casing a job, a stick-up,'" and therefore feared they were armed with guns.[25] He approached the men, identified himself as an officer, and asked for their names.[26] When the men "mumbled" their responses, the detective grabbed Terry, patted him down, and found a gun.[27]

The Court framed the question presented by Detective McFadden's actions as "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."[28] Here, after delving into all of the facts of the case, *Terry* determined that the officer acted reasonably in stopping the suspects.[29] The Court next considered the search, or "frisk," that then accompanied Detective McFadden's seizure of the men, noting,

> there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.[30]

---

20. *Id.*
21. *Id.* at 6.
22. *Id.*
23. *Id.*
24. *Terry*, 392 U.S. at 6.
25. *Id.*
26. *Id.* at 6–7.
27. *Id.* at 7.
28. *Id.* at 15.
29. Specifically, the Court explained,
> we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions.

Id. at 22.
30. *Terry*, 392 U.S. at 27.

The Court deemed Detective McFadden's actions fell within this "narrowly drawn authority," and so were reasonable under the Fourth Amendment.[31] *Terry* only reached this result after a deep analysis of all the details presented in the case.[32] Subsequent case law would follow not only *Terry*'s holding but also its dedicated approach to weigh all the facts in a case, mandating that, "the totality of the circumstances—the whole picture—must be taken into account."[33]

II. *KANSAS V. GLOVER*

A. Facts

The parties stipulated to the facts in *Kansas v. Glover*.[34] While patrolling on April 28, 2016, Deputy Mark Mehrer of the Douglas County Kansas Sheriff's Office observed Charles Glover Jr.'s pickup truck.[35] Deputy Mehrer ran the truck's plate through the Kansas Department of Revenue's file service, which indicated that Glover, the vehicle's registered owner, had "a revoked driver's license in the State of Kansas."[36] Assuming that the registered owner was currently driving the truck, Deputy Mehrer "did not attempt to identify the driver."[37] Instead, based "solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop."[38] As a result of the stop, Kansas charged Glover, who was indeed the truck's driver, with "driving as a habitual violator."[39] Arguing that Deputy Mehrer lacked reasonable suspicion for the traffic stop, Glover moved to suppress the evidence seized during the stop.[40]

B. The Court's Opinion

The Court deemed the issue in *Glover* to be "whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license."[41] *Glover* held,

---

31. *Id.* at 27, 30–31.
32. *Id.* at 4–8, 22–23, 28.
33. United States v. Cortez, 449 U.S. 411, 417 (1981).
34. *Glover*, 140 S. Ct. at 1187.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 1186–87. Kansas charged Glover with violating KAN. STAT. ANN. § 8 -285(a)(3) (2001).
40. *Glover*, 140 S. Ct. at 1187.
41. *Id.* at 1186.

"when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable."[42] While brief traffic stops could not be made upon mere hunches, such seizures were lawful when supported by reasonable suspicion.[43] Reasonable suspicion, which fell short of the standards for preponderance of the evidence, probable cause, and scientific certainty,[44] was a "matter of common sense."[45] Since reasonable suspicion should not be "reduced to 'a neat set of legal rules,'" officers should not be burdened with "pointing to specific training materials or field experiences" to justify stops for traffic code violations.[46] The *Glover* Court especially resisted rigidity in applying reasonable suspicion in a context where states had a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed."[47]

When it considered the "facts known to Deputy Mehrer at the time of the stop," the *Glover* Court determined they amounted to reasonable suspicion.[48] Before the traffic stop, Deputy Mehrer had gathered the following facts: a person was "operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ," the truck's registered owner "had a revoked license," and the "model of the truck matched the observed vehicle."[49] These facts enabled Deputy Mehrer to draw "the commonsense inference that Glover was likely the driver of the vehicle."[50] The Court found Deputy Mehrer's information exceeded the reasonable suspicion standard because the facts within his possession provided "more than reasonable suspicion to initiate the stop."[51] *Glover* thus concluded, "Deputy Mehrer possessed no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified."[52] Quite simply, since Deputy Mehrer knew that someone was driving a vehicle which was owned by a person lacking a valid license, he could stop the truck without further investigation.[53]

---

42. *Id.*
43. *Id.* at 1187.
44. *Id.* at 1187–88.
45. *Id.* at 1189–90.
46. *Glover*, 140 S. Ct. at 1190.
47. *Id.* at 1188.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Glover*, 140 S. Ct. at 1191.
53. *Id.*

III. CONCERNS CREATED BY *GLOVER*'S ANALYSIS

A. Glover *Reduces* Terry*'s "Totality of the Circumstances" Analysis to Only Two Facts, Effectively Changing the Reasonable Suspicion Analysis to a Categorical Rule*

In determining that Deputy Mehrer had reasonable suspicion to stop Charles Glover, the Court spoke in absolute terms, deeming drivers with revoked licenses to be "categorically unfit to drive."[54] Further, *Glover* based its determination on just two facts: (1) Deputy Mehrer "knew that the license plate" he ran "was linked to a truck matching the observed vehicle," and that (2) "the registered owner of the vehicle had a revoked license."[55] Based only on what the Court itself described as "these minimal facts," the officer could seize the driver.[56] Moreover, *Glover* ruled that an officer gained authority to intrude upon a motorist when he or she lacked facts, for the Court ruled, "when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable."[57] This stripped-down approach contrasts jarringly with the Court's traditional analysis exploring the justification for *Terry* stops.[58]

In *United States v. Cortez*, the Court required, in determining whether reasonable suspicion existed to justify a traffic stop, that "the totality of the circumstances—the whole picture—must be taken into account."[59] The Court in *United States v. Arvizu* stated flatly, the "'totality of the circumstances' principle . . . governs the existence *vel non* of 'reasonable suspicion.'"[60] In building this "whole picture" to establish a "particularized and objective basis for suspecting the particular person stopped of criminal activity," an officer would not be expected to choose to avoid an easily confirmed fact central to her inquiry, such as the identity of the suspect.[61] In *Alabama v. White*, the

---

54. *Id.* at 1189–90.
55. *Id.* at 1190.
56. *Id.*
57. *Id.* at 1186.
58. The Court has ruled:

> The Fourth Amendment permits brief investigative stops—such as the traffic stop . . . when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." . . . The standard takes into account "the totality of the circumstances—the whole picture."

Navarette v. California, 572 U.S. 393, 396–97 (2014).

59. United States v. Cortez, 449 U.S. 411, 417 (1981). In *United States v. Sokolow*, the Court reiterated, "[W]e must consider 'the totality of the circumstances—the whole picture.'" 490 U.S. 1, 8 (1989).
60. United States v. Arvizu, 534 U.S. 266, 275 (2002).
61. *Cortez*, 449 U.S. at 417–18.

Court carefully noted that reasonable suspicion was, "dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered."[62] In pursuit of maximizing the quantity and quality of information, officers carrying out *White*'s commands would not fail to follow up on key details, such as their target's gender or age for identity purposes.[63] On the contrary, in faithfully considering the totality of the circumstances, officers would assemble their cases "fact on fact and clue on clue."[64] Justice Stevens, concurring in *Illinois v. Wardlow*, lauded such a cautious totality of the circumstances approach, warning against the pull offered by a per se rule.[65] He cautioned that, "reasonable suspicion . . . is not readily, or even usefully, reduced to a neat set of legal rules."[66]

Glover's truncated reasonable suspicion analysis runs afoul of the Court's wide-ranging approach to the totality of circumstances for vehicle stops that the Court mandated in *Arvizu*.[67] *Arvizu* involved Border Patrol agent Clinton Stoddard's stop of a minivan driven by Ralph Arvizu near the U.S.-Mexico border in Arizona.[68] Agent Stoddard made the stop because he suspected the minivan of smuggling.[69] When the vehicle stop resulted in Stoddard's discovery of a duffle bag of marijuana, Arvizu was charged with intent to distribute marijuana.[70] When Arvizu moved to suppress the marijuana as obtained without reasonable suspicion, the District Court ruled against him.[71] The Court of Appeals reversed, separating out and labeling some of the facts that Agent Stoddard relied on as providing "little or no weight in the reasonable-suspicion calculus."[72] Specifically, the Court of Appeals deemed Arvizu's "slowing down, his failure to acknowledge Stoddard, the raised position of the children's knees, and their odd waving" to carry "little or no weight."[73] The Court of Appeals then turned to the case's "remaining factors"—the use of the road by smugglers, the nearness in time of Arvizu's trip to the agents' scheduled shift change, and the tendency of smugglers to favor minivans—and found them insufficient to support reasonable

62. Alabama v. White, 496 U.S. 325, 330 (1990).
63. *See* Kansas v. Glover, 140 S. Ct. 1183, 1195–96 (2020).
64. *Cortez*, 449 U.S. at 419; *Glover*, 140 S. Ct. at 1194 (Sotomayor, J., dissenting).
65. Illinois v. Wardlow, 528 U.S. 119, 126 (2000) (Stevens, J., concurring).
66. *Id.*
67. United States v. Arvizu, 534 U.S. 266, 274 (2002).
68. *Id.* at 268, 270–71.
69. *Id.* at 269.
70. *Id.* at 272.
71. *Id.*
72. *Id.*
73. *Arvizu*, 534 U.S. at 272.

suspicion for the stop.[74] The Court of Appeals thus ranked the case's facts in a hierarchy, isolating certain facts it found valid from other circumstances it deemed of little value.[75]

The *Arvizu* Court found the Court of Appeals' "methodology" to be "contrary to our prior decisions."[76] *Arvizu* declared, "the approach taken by the Court of Appeals here departs sharply from the teachings of these cases."[77] The Court emphasized, "we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."[78] *Arvizu* saw the Court of Appeals' "evaluation and rejection of seven of the listed factors" as failing to properly apply reasonable suspicion's totality of the circumstances analysis.[79] *Arvizu* thus found the Court of Appeals' effort to "'clearly delimit' an officer's consideration of certain factors" to be counter to building totality of the circumstances' "factual 'mosaic.'"[80] When properly performing its own totality of the circumstances analysis of the facts, *Arvizu* held that Agent Stoddard did indeed have reasonable suspicion to stop the minivan.[81]

Glover, in homing in on only two facts while dismissing the need for Deputy Mehrer to make a visual check of the driver's age and gender,[82] repeats *Arvizu's* Court of Appeals' mistake by similarly segregating facts into two groups; one set of facts is worthy of law enforcement's notice, the other is of "little or no weight."[83] The practical effect of *Glover*'s reasoning will be to "clearly delimit" an officer's consideration to the following facts: 1) the officer will run a license plate and learn it is linked to the observed vehicle, and 2) the vehicle's registered owner has a revoked license.[84] Justice Sotomayor, in her dissent, declared that the Court allowed the stop on "just one key fact: that the vehicle was owned by someone with a revoked license."[85] Having little incentive to go beyond these minimal facts to check the driver's identity, the officer will build a "factual 'mosaic'" with only two tiles.[86] Such a strangled "analysis breaks from settled doctrine

74. *Id.* at 272–73.
75. *Id.*
76. *Id.* at 268.
77. *Id.* at 274.
78. *Id.* at 273.
79. *Arvizu*, 534 U.S. at 274.
80. *Id.* at 274–75.
81. *Id.* at 277.
82. Kansas v. Glover, 140 S. Ct. 1183, 1191 (2020).
83. *Id.* at 1190; *Arvizu*, 534 U.S. at 272.
84. *Arvizu*, 534 U.S. at 274; *Glover*, 140 S. Ct. at 1190.
85. *Glover*, 140 S. Ct. at 1194 (Sotomayor, J., dissenting).
86. *Arvizu*, 534 U.S. at 275.

and dramatically alters both the quantum and nature of evidence a State may rely on to prove suspicion."[87]

Mandating police to consider all the circumstances of a case, rather than just two facts, properly causes any traffic stop decision to focus on "the target's behavior" rather than "the class to which" the motorist belongs.[88] By turning its back on the totality of the circumstances, *Glover* openly embraced a categorical rule, denying anyone pigeonholed as "categorically unfit to drive" the full analysis traditionally given to everyone.[89]

B. Glover*'s Reasoning Discounted Both Reasonable Suspicion and the Motorist's Interests Against Seizures of the Person, Undermining Fourth Amendment Rights*

In support of its conclusion that Deputy Mehrer made a lawful traffic stop, the Court repeatedly discounted the reasonable suspicion standard.[90] *Glover* emphasized that reasonable suspicion was "considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause."[91] The Court reiterated that reasonable suspicion was a "less demanding" standard that differed from "scientific certainty."[92] In cataloguing all the standards that reasonable suspicion failed to match,[93] *Glover* accentuated the relative ease with which this standard could be met. Such an approach would not have been recognizable to the *Terry* Court that allowed police to make such a seizure.[94] *Terry* required that any officer, in justifying a stop, "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[95] The *Terry* Court rejected "anything less," such as "inarticulate hunches" or an officer's good faith.[96] Even though the initial stop could occur without prior judicial approval, *Terry* found that the Fourth Amendment itself "bec[ame] meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular

87. *Glover*, 140 S. Ct. at 1194 (Sotomayor, J., dissenting).
88. *Id.* at 1195.
89. *Id.* at 1189.
90. *Id.* at 1191.
91. *Id.* at 1187.
92. *Id.* at 1188.
93. *Glover*, 140 S. Ct. at 1188.
94. Terry v. Ohio, 392 U.S. 1, 22 (1968).
95. *Id.* at 21.
96. *Id.* at 22.

circumstances."[97] Similarly, *Brown v. Texas* expressly noted, "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual."[98] When juxtaposed with *Terry* and *Brown*, *Glover* offered an atrophied view of reasonable suspicion.

If the Court diminished the information needed for reasonable suspicion,[99] it reduced to invisibility the rights of the individual in the balance of interests with the government. *Glover* readily recognized government rights, deeming the interests in ensuring drivers were licensed and registered as "vital."[100] The Court explicitly held the state's concerns "in mind" when it considered whether Deputy Mehrer had reasonable suspicion for his stop.[101] In contrast, the rights of the citizen to be free from government seizure were not even mentioned,[102] let alone kept in the Court's mind. This lopsided approach contrasted jarringly with that taken in *Terry*, which appreciated that, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[103] Due to the importance of the individual's rights, *Terry* created only "a narrow exception to the general rule that 'the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.'"[104]

Glover's blindness to the individual's interests implicated by a traffic stop is especially alarming when the practical impact of these seizures for invalid licenses is explored. Stops for driver's license violations have severe and cascading effects on individual interests that *Glover* simply failed to fully appreciate.[105] Seizures of drivers with suspended or revoked licenses are part of a greater problem eroding liberty, particularly of those trapped in poverty.[106] As reported in *The New York Times*,

---

97. *Id.* at 21.
98. 443 U.S. 47, 51 (1979).
99. Kansas v. Glover, 140 S. Ct. 1183, 1187–88 (2020).
100. *Id.* at 1188.
101. *Id.*
102. *See id.*
103. Terry v. Ohio, 392 U.S. 1, 9 (1968).
104. Maryland v. Wilson, 519 U.S. 408, 421 (1997) (Stevens, J., dissenting).
105. *See* Kansas v. Glover, 140 S. Ct. 1183, 1183 (2020).
106. *See id.*; *see also* Joseph Shapiro, *How Driver's License Suspensions Unfairly Target the Poor*, NPR (Jan. 5, 2015), https://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor [https://perma.cc/3ZLJ-LHXV]; Richard A. Oppel, Jr., *Being Poor Can Mean Losing a Driver's License. Not Anymore in Tennessee.*, N.Y. TIMES (July 4, 2018), https://www.nytimes.com/2018/07/04/us/drivers-license-tennessee.html [https://perma.cc/DZN3-L2QK].

> Millions of Americans have had their driver's licenses taken away not because they got drunk and got behind the wheel, or because they caused an accident and hurt someone: They lost their licenses because they were too poor to pay court costs or traffic fines, which can run into hundreds and sometimes thousands of dollars.[107]

License invalidation is hardly a rare practice, as about "40 states have such laws on the books that suspend or revoke licenses of drivers."[108] Failure to pay a ticket for a broken taillight can result in the loss of a driver's license for two years.[109] Laws suspending or revoking driver's licenses disproportionally affect communities of color; in Milwaukee, "[t]wo out of three African-American men . . . of working age, don't have a driver's license."[110] Premal Dharia, director of litigation for Civil Rights Corps, has argued that drivers who have lost driving privileges cannot see family, go to church, attend school, or pursue employment to pay off the debts prohibiting driving in the first place.[111] The adverse impact on employment stems from the lack of any alternative transportation because busses fail to serve inner-city neighborhoods.[112] A vicious circle thus traps individuals because, "You drive to work so you can pay the fines, but then you get pulled over, so you owe even more."[113]

Further, *Glover*'s dismissal of the intrusion on individual rights took no account of those innocent—fully licensed—drivers who are properly in possession of an unlicensed driver's car. Since *Glover* has relieved officers making a revoked license traffic stop from discerning the age or gender of the driver, there will be times when police will seize properly licensed drivers who are committing no wrong.[114] Even if, "[w]hen you see a car coming down the street, your common sense tells you that the registered owner may well be behind the

---

107. Oppel, *supra* note 106.
108. *Id.*
109. Shapiro, *supra* note 106.
110. *Id.*
111. Oppel, *supra* note 106.
112. As one person who lacked a license noted, "It hinders you because most jobs are not in the inner city nowadays. And they get pushed far back, and the buses don't go out there. So the inner-city jobs that we have are not able to provide for our families that we have and to provide for ourselves." Shapiro, *supra* note 106.
113. 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, 218–19 (2016).
114. In her dissent, Justice Sotomayor noted, "The consequence of the majority's approach is to absolve officers from any responsibility to investigate the identity of a driver where feasible." Kansas v. Glover, 140 S. Ct. 1183, 1196 (2020) (Sotomayor, J., dissenting). The *Glover* Court had relieved police of this responsibility even though there have been "countless . . . instances where officers have been able to ascertain the identity of a driver from a distance and make out their approximate age and gender." *Id.*

wheel," there will be times for each officer following *Glover* when he or she stops a licensed driver.[115] The cumulative impact of the Court's rule could amount to "significant law enforcement activity."[116] The Court has previously noted, "the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office" due to the "extensive regulation of motor vehicles and traffic."[117] Therefore, many motorists, doing nothing more than driving with a valid license, will be seized unnecessarily, amounting to "thousands upon thousands of petty indignities."[118] As Justice Stevens noted in *Maryland v. Wilson*, where the Court held that officers could automatically order out all passengers from a lawfully stopped vehicle, "countless citizens who cherish individual liberty" will suffer the burden of a pointless seizure where they will have to convince an often skeptical officer that he or she has stopped the wrong person.[119]

In contrast, the "vital" government interest in removing unlicensed drivers from the road as "unfit to drive" might not be as vital as *Glover* believed.[120] For the offenses triggering license revocation, *Glover* mentioned "involuntary manslaughter, vehicular homicide, battery, reckless driving, fleeing or attempting to elude a police officer."[121] However, as noted by Justice Sotomayor in her dissent, "the grounds for revocation include offenses unrelated to driving fitness, such as using a license to unlawfully buy alcohol."[122] Furthermore, many wrongs resulting in the loss of driving privileges are relatively minor.[123] "Kansas and many other states began suspending licenses

---

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

116. Maryland v. Wilson, 519 U.S. 408, 418 (1997) (Stevens, J., dissenting). In *Wilson*, the Court declared, "In this case we consider whether the rule of *Pennsylvania v. Mimms*, that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, extends to passengers as well. We hold that it does." *Id.* at 410.

117. *Id.*

118. *Id.* at 417, 419.

119. *Id.* at 410, 419. The point made by Justice Stevens, dissenting in *Maryland v. Wilson*, who criticized the Court's ruling enabling police to automatically order passengers out of lawfully stopped vehicles, aptly applies to *Glover*'s holding:

> [T]he potential daily burden on thousands of innocent citizens is obvious. That burden may well be "minimal" in individual cases . . . . But countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden to be significant.

Wilson, 519 U.S. at 419 (Stevens, J., dissenting).

120. *Glover*, 140 S. Ct. at 1188–89.

121. *Id.* at 1189.

122. *Id.* at 1198 (Sotomayor, J., dissenting).

123. *See* Brief of Amici Curiae Fines and Fees Justice Center et al. in Support of Respondent at 6, Kansas v. Glover, 140 S. Ct. 1183, 1187, No. 18-556 (2020) [hereinafter Brief of Amici Curiae Fines and Fees Justice Center].

for failure to appear in court, failure to pay parking tickets, failure to pay court fines and fees."[124] Motorists have been denied their licenses for truancy, graffiti, being a minor who attempts to purchase tobacco,[125] and defaulting on student loans.[126] Moreover, government interests in suspending or revoking licenses might be distorted by budgetary considerations.[127] States and municipalities have begun "increasingly to rely on revenue generated from fines and fees."[128] The collections from motorists denied driving privileges have become big business, as "over 7 million Americans have had their licenses suspended for failure to pay court or administrative debt."[129]

In urging the gravity of government interests in pursuing those driving without a valid license, the Court made an argument that the states themselves seem increasingly likely to dismiss.[130] In 2020, Illinois passed bipartisan legislation, the License to Work Act, stopping "the state's practice of suspending driver's licenses over most non-moving violations, like unpaid parking tickets."[131] Illinois' governor, J.B. Pritzker, noted that his state had come to recognize that, "suspending licenses for having too many unpaid tickets or fines or fees doesn't necessarily make a person pay the bill, but it does mean the people who are suffering from this don't have a way to pay."[132] Governor Pritzker continued, "If you're living below or near the poverty line and you're looking at a choice between your unpaid parking tickets or your kid's medicine or your family's next meal, well, that's no choice at all."[133] The Illinois law provided a mechanism for "automatic reinstatement of the driver's licenses of more than 50,000 people whose licenses were suspended for unpaid tickets, fees or fines."[134]

---

124. *Id.*

125. JON CARNEGIE & ROBERT EGER, III, REASONS FOR DRIVER LICENSE SUSPENSION, RECIDIVISM, AND CRASH INVOLVEMENT AMONG DRIVERS WITH SUSPENDED/REVOKED LICENSES, NAT'L HIGHWAY TRANSP. & SAFETY ADMIN. 7 (Jan. 2009). The study's authors do not distinguish between suspension and revocation, instead speaking of "drivers that are suspended/revoked." *Id.* at I.

126. Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 21, Kansas v. Glover, 140 S. Ct. 1183, 1187 (2020) (No. 18-556).

127. *See* Brief of Amici Curiae Fines and Fees Justice Center, *supra* note 123, at 6.

128. *Id.*

129. *Id.* at 7.

130. Shelby Bremer, *Pritzker Signs Law Ending Driver's License Suspensions over Unpaid Parking Tickets*, NBC NEWS CHI. (Jan. 17, 2020), https://www.nbcchicago.com/news/local/chicago-politics/pritzker-signs-law-ending-drivers-license-suspensions-over-unpaid-parking-tickets/2202964 [https://perma.cc/42E2-3Z3T]; *California No Longer Will Suspend Driver's Licenses For Traffic Fines*, L.A. TIMES (June 29, 2017, 9:50 AM) [hereinafter *California No Longer*], https://www.latimes.com/local/lanow/la-me-ln-driver-license-fees-20170629-story.html?_amp=true [https://perma.cc/P96F-TXUR].

131. Bremer, *supra* note 130.

132. *Id.*

133. *Id.*

134. *Id.*

Illinois is not alone, for California also stopped the practice of denying driving privileges for unpaid traffic fines.[135] California State Senator Bob Hertzberg argued that the new law would "help ensure people's lives are not derailed by traffic tickets."[136]

Thus, in allowing police to stop cars owned by persons with revoked licenses, the Court aided the enforcement of a practice that some states, at least, are increasingly reluctant to perform. In making such a ruling, *Glover* had to ignore the many real burdens drivers' license traffic stops place on the daily struggles people face.[137] Rather than "common," the "sense" the Court used in reaching this result seems not only exceptional, but unique.[138]

C. Glover *Added a New Element of "When the Officer Lacks Information Negating an Inference" to* Terry*'s Justification Analysis, Shifting the Burden of Proof to the Motorist*

Glover held that an officer does not violate the Fourth Amendment by stopping a vehicle after "learning that the registered owner has a revoked driver's license," so long as that officer "lacks information negating an inference that the owner is the driver of the vehicle."[139] In so ruling, the Court essentially created a presumption that any vehicle whose owner has a revoked license can be stopped. In the Court's formulation, the *Glover* presumption can only be rebutted by the motorist themselves and only after the vehicle is stopped.[140] This means that any innocent driver is only able to rebut the presumption after the injury—the unnecessary seizure—occurs. Justice Sotomayor urged that *Glover*, in allowing officers to make a stop without the bother of checking the sex, age, or other identifiable characteristics of the driver, "unnecessarily reduce[d] the State's burden of proof."[141] Rather, the Court shifted the burden of proof from the government to the individual once the officer runs the license plate.[142] This shift admittedly will likely happen with only a small fraction of innocent drivers because many motorists probably will be the vehicle's owner and therefore have a revoked license. However, there will be a not inconsiderable number of blameless drivers seized[143]

135. *California No Longer*, *supra* note 130.
136. *Id.*
137. *See* Kansas v. Glover, 140 S. Ct. 1183, 1194 (2020) (Sotomayor, J., dissenting).
138. *Id.* at 1189–90.
139. *Id.* at 1186.
140. *Id.*
141. *Id.* at 1194 (Sotomayor, J., dissenting).
142. *Id.*
143. *Glover*, 140 S. Ct. at 1194 (Sotomayor, J., dissenting).

because the officer could not be bothered to check the characteristics of the motorist for even the most basic identification purposes before stopping. The cumulative effect of *Glover*'s ruling could be the unnecessary and avoidable seizure of thousands of faultless motorists. *Glover*'s seize-first-ask-questions-later approach fails to heed Justice Brandeis' warning that the "makers of our Constitution" had "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[144] After *Glover*, a motorist who borrows a car runs the risk of losing the fundamental right to be let alone simply because someone else's license had been revoked.

Moreover, embedded within the Court's holding is the establishment of authority based on ignorance; in certain cases, an officer who does not know that a vehicle's driver is not its owner will have more seizure power than the officer who does know.[145] *Glover* thus created a perverse incentive for police. Rather than pursue a full investigation of the "totality of circumstances" upon which reasonable suspicion is firmly based, *Glover* incentivizes officers to obtain the minimum facts needed to bolster a stop—and then steer clear of looking further. The Court's ruling,[146] encouraging officers to limit investigations, will leave police in perilous situations borne of ignorance. Empowerment by ignorance seems all the more troubling in light of the tragic consequences that can arise from a traffic stop.[147] National Public Radio, in investigating police shootings, found "[m]ore than a quarter" of police killings of civilians in their study "occurred during traffic stops."[148] One commentator asserted that since, "[s]tatistically, the traffic stop scenario is one of the most dangerous activities a uniformed police officer undertakes," there is "no such thing as a routine [traffic] stop."[149] Accordingly, "police officers perceive the enforcement of traffic infractions as potentially a life-and-death scenario."[150] Shootings resulting from officers suffering mistakes of fact about the situation they face are so prevalent that they have

144. Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).
145. *Glover*, 140 S. Ct. at 1190.
146. *Id.* at 1191.
147. *Id.* at 1190.
148. Cheryl W. Thompson, *Fatal Police Shootings Of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns [https://perma.cc/5K7S-KQWU].
149. Benjamin Jaqua, *Policing the Police: Reexamining the Constitutional Implications of Traffic Stops*, 50 IND. L. REV. 345, 349 (2016).
150. Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 179 (2016).

earned a technical term, "threat perception failure."[151] The Court, therefore, does neither officers nor motorists any favors by increasing the likelihood that officers will stumble into a situation without gathering all the facts they could.

Further, the Court's dangerous innovation in shifting the burden for seizures simply defies precedent.[152] As Justice Sotomayor reminded the Court, "The State bears the burden of justifying a seizure."[153] In *Florida v. Royer*, the Court explicitly ruled, "[i]t 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."[154] *Brown v. Texas* reiterated that it is the government that must base its seizure "on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual."[155] In requiring law enforcement to justify its intrusions, *Brown* warned against "arbitrary invasions solely at the unfettered discretion of officers in the field."[156]

Moreover, instead of lessening an officer's duties to investigate, a sounder Fourth Amendment "reasonableness" standard would promote due diligence by encouraging an officer to gather as much information as they reasonably can. Demanding less and less from officers undermines the professionalism of law enforcement and erodes Fourth Amendment protections. *Glover*'s diminution of the measure for reasonableness precipitated a telling conflict between the Court and Sotomayor in how to assess reasonable suspicion.[157] Justice Sotomayor urged that, "reasonable suspicion eschews judicial common sense in favor of the perspectives and inferences of a reasonable officer viewing 'the facts through the lens of his police experience and expertise.'"[158] Rather than weigh reasonable suspicion through the eyes of an ordinary person, or even a judge, reasonable suspicion had to "be seen and weighed . . . as understood by those versed in the field of law enforcement."[159] *Glover* rejected any requirement

151. David A. Klinger & Lee Ann Slocum, *Critical Assessment of an Analysis of a Journalistic Compendium of Citizens Killed by Police Gunfire*, *Criminology, Criminality, and Public Policy*, 16 AM. SOC'Y OF CRIMINOLOGY 350 (2017). The authors argued that "threat perception failure" was a "problematic" term in part because it implied that "shootings of unarmed suspects are, by definition, mistakes." *Id.*

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

153. *Id.*

154. 460 U.S. 491, 500 (1983).

155. 443 U.S. 47, 51 (1979).

156. *Id.*

157. *Glover*, 140 S. Ct. at 1189–90, 1194–95 (Sotomayor, J., dissenting).

158. *Id.* at 1195.

159. *Id.*

that a reasonable suspicion determination be grounded in an officer's "law enforcement training or experience."[160] Disparaging Justice Sotomayor's limit as "def[ying] the 'common sense' understanding of common sense,"[161] the Court instead insisted that police be able to make "factual inferences based on the commonly held knowledge they have acquired in their everyday lives."[162] Otherwise, officers would be doomed to become "bifurcated persons."[163]

The real reason, however, for an officer being in danger of splitting into two persons is because the Court has been characterizing police in two dramatically different ways, depending on the needs of the particular case.[164] At times, the Court has placed police on the pedestal of the respected expert, having access to experience and expertise beyond mere laypersons.[165] At other times, the Court excuses officers who make mistakes just like any other human.[166] The only consistency in the use of these conflicting standards is that the criterion the Court chooses tends to benefit the officer.

For a half-century, the Court's reasoning has often strengthened the officer's position by promoting the expertise that comes with a law enforcement background.[167] In 1968, in *Terry*, the Court reviewed Detective Martin McFadden's resume, finding it relevant that "he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years."[168] The Court specified that this officer had "developed routine habits of observation over the years and that he would 'stand and watch people or walk and watch people at many intervals of the day.'"[169] *Terry* therefore pointedly viewed the officer's decision to stop the suspects in light of his "30 years' experience . . . in this same neighborhood."[170] The Court explicitly stated, as part of its holding finding Detective McFadden's seizure and frisk reasonable, that the lawfulness of official action would be measured "in light of [the officer's] experience that criminal activity may be afoot."[171] Indeed, *Terry* concluded that, "It would

160. *Id.* at 1189.
161. *Id.* at 1189–90.
162. *Id.* at 1190.
163. *Glover*, 140 S. Ct. at 1190.
164. *Compare* United States v. Cortez, 449 U.S. 411, 418 (1981), *with* Heien v. North Carolina, 574 U.S. 54, 61 (2014).
165. *Cortez*, 449 U.S. at 418.
166. *Heien*, 574 U.S. at 61.
167. Terry v. Ohio, 392 U.S. 1, 5 (1968); United States v. Mendenhall, 446 U.S. 544, 563–64 (1980); United States v. Ortiz, 422 U.S. 891, 897 (1975).
168. *Terry*, 392 U.S. at 5.
169. *Id.*
170. *Id.* at 23.
171. *Id.* at 30.

have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."[172] Thus, in creating the authority to stop and frisk, *Terry* embedded directly into its reasonable suspicion analysis the idea that an officer's ability to establish evidence for the stop increases with each year an officer works on the force.[173]

The Court repeatedly promoted officers' experience and expertise in finding individualized suspicion in a variety of contexts.[174] In *United States v. Brignoni-Ponce*, the Court enabled agents on the border to rely on "previous experience with alien traffic" in considering facts for performing traffic stops of vehicles.[175] In *United States v. Ortiz*, a case where Border Patrol officers found three undocumented persons in the trunk of a car,[176] the Court declared that agents were "entitled to draw reasonable inferences" using "their knowledge of the area and their prior experience with aliens and smugglers."[177] In *United States v. Mendenhall*, a case where Drug Enforcement Administration agents stopped a traveler in an airport, the Court admonished, "it is important to recall that a trained law enforcement agent may be 'able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.'"[178] *Mendenhall* reiterated that an "agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices" contributed to forming reasonable suspicion to support a stop.[179]

In *United States v. Cortez*, a case where Border Patrol officers were tracking the footprints of a smuggler of undocumented persons in the Arizona desert, the Court explained law enforcement's power to see reasonable suspicion which would be invisible to normal folks. *Cortez,* extolling the ability of "a trained officer" to draw "inferences and deductions that might well elude an untrained person," required that evidence be weighed, "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[180]

---

172. *Id.* at 23.

173. *See id.*

174. United States v. Brignoni-Ponce, 422 U.S. 873, 884–85 (1975); United States v. Mendenhall, 446 U.S. 544, 547–48, 563 (1980); United States v. Ortiz, 422 U.S. 891, 897 (1975).

175. 422 U.S. at 884–85.

176. *Id.* at 892.

177. *Id.* at 897.

178. 446 U.S. at 563.

179. *Id.* at 564, 563.

180. 449 U.S. 411, 418 (1981). The Court would again rely on an officer's ability to form inferences that "might well elude an untrained person" in two more cases. United States v. Arvizu, 534 U.S. 266, 273 (2002); Pennsylvania v. Dunlap, 555 U.S. 964, 964 (2008).

Cortez made a point of emphasizing, "the imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion."[181] The deep mental groove which the Court had created to reward officers for their professional experience in forming reasonable suspicion did not go unnoticed.[182] Justice Rehnquist, in *Florida v. Royer*, involving the stop of a drug courier at an airport, recognized, "This Court . . . has repeatedly emphasized that a trained police officer may draw inferences and make deductions that could elude any untrained person observing the same conduct."[183] The Court referenced law enforcement's expertise in assessing suspicious behavior in another airport case, *United States v. Sokolow*, where officers relied on a Drug Enforcement Agency "drug courier profile" to stop a suspect.[184] Weighing the "evidentiary significance" of the facts "as seen by a trained agent," *Sokolow* held that reasonable suspicion existed that the suspect was transporting illegal drugs.[185]

The Court once again relied on the experience of officials in *United States v. Montoya de Hernandez*, a case where customs inspectors suspected a passenger from Bogota Columbia of being a "balloon swallower."[186] Officials held the passenger for nearly sixteen hours, as she "exhibited symptoms of discomfort consistent with 'heroic efforts to resist the usual calls of nature.'"[187] In considering the government's seizure, *Montoya de Hernandez* lamented that "alimentary canal smuggling" gave agents "no external signs" of illegality.[188] The Court, in finding reasonable suspicion to support the seizure, remarked that it "need not belabor the facts" because the "trained customs inspectors had encountered many alimentary canal smugglers."[189] Finally, in *Navarette v. California*, the Court collected together the aggregate experience of law enforcement in general to find a stop of a motorist reasonable based on "the accumulated experience of thousands of officers."[190]

---

181. 449 U.S. at 419.
182. Florida v. Royer, 460 U.S. 491, 525, n.5 (1983) (Rehnquist, J., dissenting).
183. *Id.*
184. 490 U.S. 1, 14 (1989) (Marshall, J., dissenting).
185. *Id.* at 10, 11.
186. 473 U.S. 531, 534 (1985).
187. *Id.* at 535.
188. *Id.* at 541.
189. *Id.* at 542.
190. 572 U.S. 393, 402–03 (2014) (relying, later in the opinion, on the experience of "many officers.").

Thus, the Court has repeatedly ruled that the experience and expertise possessed by law enforcement professionals enable them to mine reasonable suspicion or probable cause from facts which would leave a layperson ignorant "that criminal activity may be afoot."[191] Police, by their hard-won specialized knowledge, have earned the benefit of the Court giving an appreciative nod to the know-how only they have.[192] However, when police stumble, the Court sometimes suffers amnesia, failing to hold officers to the higher standard that should come with professional expertise.[193] The most glaring example of the Court's acceptance of officers as just regular folks is the case, *Heien v. North Carolina.*[194] In *Heien*, a Surry County Sheriff's deputy noticed that a car he was following on the interstate had a "faulty right brake light."[195] Believing the broken brake light violated the law, the sheriff stopped the vehicle, driven by Nicholas Brady Heien, ultimately finding cocaine inside the car.[196] Heien was arrested and convicted.[197] On appeal, the North Carolina Court of Appeals, focusing on the statute's reference to "a stop lamp" in "the singular" ruled, "that a vehicle is required to have only one working brake light—which Heien's vehicle indisputably did."[198] Therefore, the sheriff, in pulling over a vehicle for one broken tail light, made a mistake about the very law he was supposed to enforce.

The Court found "the officer's mistake about the brake-light law was reasonable," and therefore concluded that "the stop in this case was lawful under the Fourth Amendment."[199] *Heien* noted that the Court had previously found "searches and seizures based on mistakes of fact can be reasonable."[200] Therefore, the Court shrugged its shoulders and declared, "reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion."[201] Here, the Court, instead of analyzing the case in terms of the professional law enforcement official who can divine things "meaningless to the untrained,"[202] now spoke of ordinary "men."[203] *Heien* declared that whether, "the facts turn out to be not what was thought, or the law turns out to be not what was thought,

191. Florida v. J.L., 529 U.S. 266, 270 (2000).
192. *See* United States v. Cortez, 449 U.S. 411, 418 (1981).
193. *See* Heien v. North Carolina, 574 U.S. 54, 57 (2014).
194. *Id.*
195. *Id.* at 57.
196. *Id.* at 57–58.
197. *Id.* at 58.
198. *Id.* at 59.
199. *Heien*, 574 U.S. at 57.
200. *Id.* at 61.
201. *Id.*
202. United States v. Cortez, 449 U.S. 411, 419 (1981).
203. *Heien*, 574 U.S. at 61.

the result is the same," seeing no difference between a mistake of fact, involving circumstances newly presented to the officer, and a mistake of law, involving the rules upon which an officer is specially trained and which he is supposed to enforce daily.[204] As for the officer's special experience and expertise, the Court made no mention.[205]

The Court also readily lowered the bar for police performance in the warrant context, despite the existence of its own warrant requirement that, "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."[206] Specifically, when police sought a warrant by filling out an application for a magistrate's review, the Court, in *Illinois v. Gates*, wished to avoid the "built-in subtleties" of its earlier case law.[207] *Gates* aimed to discourage courts from applying a "grudging or negative attitude" in their review of warrants because the affidavits in the warrant applications were "normally drafted by nonlawyers in the midst and haste of a criminal investigation."[208] Indeed, the Court's race to the bottom extended beyond its assessment of the actions of police to include those of the magistrates reviewing the applications.[209] *Gates* asserted, "search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.'"[210] Thus, the Court needed to craft a rule that would account for the "nontechnical, common-sense judgments of laymen."[211] Thus, when it benefitted officers, even in the all-important context of warrants, the Court viewed police as hurried laypersons unable to grasp legal subtleties, despite any training, experience, or expertise.

The Court's tolerance for government mistakes extended to the failure to maintain updated computer information on arrest warrants.[212] In *Arizona v. Evans*, an officer recovered marijuana as a result of a search incident to arrest of a stopped motorist.[213] The arrest was based solely on a police record—on the officer's patrol car computer—"indicating the existence of an outstanding arrest warrant."[214]

---

204. *Id.*
205. *Id.*
206. Terry v. Ohio, 392 U.S. 1, 20 (1968). The warrant requirement is alive and well today, as demonstrated by the Court's recent admonition to police to "get a warrant." Riley v. California, 573 U.S. 373, 403 (2014).
207. 462 U.S. 213, 236 (1983).
208. *Id.* at 235–36.
209. *Id.*
210. *Id.* at 235.
211. *Id.* at 235–36.
212. Arizona v. Evans, 514 U.S. 1, 3–4 (1995).
213. *Id.* at 4.
214. *Id.*

No such warrant existed to support the arrest, however, since the warrant had been quashed 17 days before the arrest.[215] *Evans* refused to suppress the evidence obtained from the warrantless arrest, finding there was "no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record."[216] *Evans* made this ruling in spite of the fact that Justice Ginsburg warned in her dissent that such mistakes in computer records could result in "Orwellian mischief."[217] The Court again stuck by law enforcement seventeen years later, when Orwell came knocking in *Florence v. Bd. of Chosen Freeholders*, a case in which an arrestee was subjected to two strip searches based on a faulty statewide computer database indicating a warrant still existed for his arrest.[218]

Perhaps the Court strayed the farthest from its portrayal of the officer as a trained professional with specialized experience and expertise in *Herring v. United States*, a case where police recovered drugs and a pistol from a stopped motorist.[219] The warrant that served as the basis for the arrest and search in *Herring* had been recalled five months before the stop of the motorist.[220] The Court refused to employ the exclusionary rule for this computer error, reasoning, "[t]he extent to which the exclusionary rule is justified . . . varies with the culpability of the law enforcement conduct."[221] To trigger the exclusionary rule, police conduct had to be "flagrant" or "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[222] Absent this egregious behavior, police would not be punished with exclusion. *Herring*, finding such a flagrant violation missing when executing a five-month-old warrant, ruled the jury should see the evidence obtained in violation of the Fourth Amendment.[223]

Glover, in allowing police to stop vehicles without the need to make a reasonable effort to identify the motorist,[224] becomes the latest case to expect less from law enforcement. In allowing stops without a full investigation, the Court is setting up police to commit

---

215. *Id.*
216. *Id.* at 3–4, 15–16.
217. *Id.* at 25 (Ginsburg, J., dissenting).
218. 566 U.S. 318, 323–24 (2012). The *Florence* Court held, "Even assuming all the facts in favor of petitioner, the search procedures at the Burlington County Detention Center and the Essex County Correctional Facility struck a reasonable balance between inmate privacy and the needs of the institutions." *Id.* at 339.
219. 555 U.S. 135, 137 (2009).
220. *Id.* at 138.
221. *Id.* at 143, 147–48.
222. *Id.* at 144.
223. *Herring* declared, "We hold that in these circumstances the jury should not be barred from considering all the evidence." *Id.* at 137.
224. *See* Kansas v. Glover, 140 S. Ct. 1183, 1188 (2020).

more errors, which it will likely choose to review by the ordinary mistake measure rather than the expert officer standard. *Glover*'s choice might not bode well for maintaining professionalism and adaptation to change, particularly in light of increasing police problems.[225] In *New York v. Quarles*, a case in which the Court created a "public safety" exception to *Miranda v. Arizona*'s requirement that officers provide warnings to a suspect in custodial interrogation, the Court spoke of "a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day."[226] In *Glover*, the Court has sadly created the possibility for many more such kaleidoscopic situations.

CONCLUSION

Is it truly too much to ask police to fully investigate the identity of a driver before seizing him? Such a duty would not have seemed too onerous to the Court in the past. *Arvizu* noted that it had "said repeatedly" that the assessment of reasonable suspicion mandated viewing the "totality of the circumstances" of each stop to determine whether there existed an objective basis "for suspecting legal wrongdoing."[227] *Cortez* declared that such careful analysis required "an assessment of the whole picture."[228] The Court has previously expected officers to form reasonable suspicion by "piecing together the information at their disposal."[229] After *Glover*, however, police need not collect all the information "at their disposal" because the Court has now ruled that officers need not bother to simply glance at the driver's window to check a motorist's age or gender.[230] Armed with ignorance about the true identity of the driver, police may now stop a motorist for a violation of a law that is itself premised on the validity, or lack thereof, of *identification*—a driver's license.

In spite of its history of deliberately and repeatedly avoiding reducing reasonable suspicion to "a neat set of legal rules," and of previously refusing to view factors "in isolation from each other," *Glover* now enables officers to intrude on drivers by forming as little as two facts.[231] In reaching its ruling, the Court spoke of "common sense" and reasonable inferences "made by ordinary people on a daily

225. *Id.* at 1190.
226. 467 U.S. 649, 655–56 (1984).
227. United States v. Arvizu, 534 U.S. 266, 273 (2002).
228. United States v. Cortez, 449 U.S. 411, 418 (1981).
229. *Id.* at 418–19.
230. *Glover*, 140 S. Ct. at 1186, 1196 (Ginsburg, J., dissenting).
231. *Arvizu*, 534 U.S. at 274; Ornelas v. United States, 517 U.S. 690, 695–96 (1996); *Glover*, 140 S. Ct. at 1190.

basis."[232] Unfortunately, *Glover*'s ruling occurred in a context in which something else occurs on "a daily basis"—police kill three people a day.[233] There is a likelihood that many of these killings are the result of surprise or confusion, and therefore are due to a lack of information. Fourth Amendment reasonableness should therefore include a mandate that members of law enforcement make a reasonable effort to gather all the "information at their disposal" before making a seizure of a person.[234] This should hardly be a controversial proposal. Indeed, since 1985, the Court has explicitly made an officer's diligence in pursuing an investigation part of its Fourth Amendment reasonableness analysis.[235] It seems to be "common sense" that officers exercise reasonable diligence to get all the facts necessary before intruding upon "the right most valued by civilized men," the "right to be let alone."[236] *Terry*, the case giving Deputy Mehrer the authority to seize a person in the first place, declared, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[237] Isn't such a sacred right worth an officer's glance in the driver's window?

---

232. *Glover*, 140 S. Ct. at 1189–90.

233. "American police forces killed three people per day in 2019, for a total of nearly 1,100 killings." Tucker Higgins & John W. Schoen, *These 4 Charts Describe Police Violence in America*, CNBC POLITICS (June 1, 2020), https://www.cnbc.com/2020/06/01/george-floyd-death-police-violence-in-the-us-in-4-charts.html [https://perma.cc/M28H-JGBN]. This problem is not new. In 2015, the *Washington Post* reported that, "more than 100 people" were "shot and killed by police after a traffic stop this year." 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/34UR-K485]. One of three of these persons "was [B]lack, making the roadside interaction one of the most common precursors to a fatal police shooting of a [B]lack person in 2015." *Id.*

234. *Cortez*, 449 U.S. at 419.

235. In *United States v. Sharpe*, the Court explicitly created police diligence as a factor in its assessment of the brevity of a traffic stop. 470 U.S. 675, 686–87 (1985). Specifically, the Court asserted,

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

Id.

236. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

237. 392 U.S. at 9.