HANDS OFF MY LICENSE PLATE: THE CASE FOR WHY THE FOURTH AMENDMENT PROTECTS LICENSE PLATES FROM RANDOM POLICE SEARCHES

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INTRODUCTION

The Fourth Amendment guarantees privacy by prohibiting unreasonable searches and seizures.[1] Unfortunately, the Amendment does not define reasonableness, so the extent of an individual's privacy rights can vary greatly depending on the context.[2] When individuals are in their homes, their right to privacy is ardently protected. But the moment they step out the door and into the public sphere, their right to privacy can be severely curtailed and even infringed on through technology and public-safety concerns.[3] Modern technology makes it easy to sweep up an individual's private information, because it is designed to quickly collect, store, and access massive amounts of data.[4] Once collected, state actors—like law enforcement—can use this data to promote public safety.[5]

License-plate numbers sit at the intersection of these issues.[6] In terms of technology, license-plate numbers refer to an electronic file, which contains both public and private information collected through the Department of Motor Vehicles (DMV).[7] This information exists in the public sphere but remains invisible to most people. Law enforcement is one of the special few who possess both the technology and authority to access

1. *See* Cardwell v. Lewis, 417 U.S. 583, 589 (1974) ("The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy." (quoting Jones v. United States, 357 U.S. 493, 498 (1958))).

2. *See* U.S. CONST. amend. IV (lacking a definition of reasonableness).

3. *See* Terry v. Ohio, 392 U.S. 1, 24–26 (1968) (balancing individual privacy rights against governmental interest in public safety).

4. *See* Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141, 145–46 (2014) (articulating how cellphones, drones, and big data projects are complicating privacy).

5. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 562–63 (Vicki Been et al. eds., 5th ed. 2011) (citing United States v. United States Dist. Ct., 407 U.S. 297, 314–17 (1972)) (balancing the government's interest in domestic security and individual's right to be free from unreasonable electronic surveillance); *see also How Your Information is Shared,* CA. DEP'T MOTOR VEHICLES [hereinafter *How Your Information is Shared*], https://www.dmv.ca.gov/portal/dmv/detail/dl/how_info_shared (last visited Nov. 24, 2020) (detailing laws that govern release of private DMV information to law enforcement).

6. *Infra* notes 7–10 and accompanying text.

7. *See, e.g.*, *How Your Information is Shared*, *supra* note 5 (detailing laws that govern release of private DMV information to law enforcement).

these files,[8] because of their duty to public welfare.[9] The ingenuity of the license-plate system lies in its technological design. This design allows private information to further public safety while hiding it in plain sight.[10] In theory, this system strikes a perfect balance between individual privacy, public welfare, and technology.

However, in practice, officers can—and do—access drivers' private information without any apparent justification.[11] In the 2018 case, *Kansas v. Glover*, an officer pulled over a vehicle because he ran the plates and found that the registered owner had a suspended license.[12] What is troubling about *Glover* is that the officer had no articulable reason for singling out this vehicle in the first place.[13] By all accounts, the car was obeying all overt traffic regulations.[14] Therefore, the officer's initial search was not only baseless but also completely arbitrary.[15] The Fourth Amendment was designed to prohibit the kinds of baseless searches seen in *Glover*.[16] Yet, many courts continue to find these searches permissible because they hold that the Fourth Amendment does not apply to license-plate searches.[17]

As a result of these rulings, certain states have taken this practice a step further and installed automatic license-plate readers (ALPRs).[18] These

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8. Driver's Privacy Protection Act of 1994, 18 U.S.C § 2721(b) (2018); Emily Delbridge, *Can I Run a License Plate Number for Free?*, THE BALANCE (Jan 29, 2020), https://www.thebalance.com/can-i-run-a-license-plate-number-for-free-3861067.

9. *See* U.S. CONST. amend. X (giving powers not delegated to the United States by the Constitution to the states; these residual police powers include those governing health, safety, and general welfare).

10. *See, e.g.*, Olabisiomotosho v. Houston, 185 F.3d 521, 523 (5th Cir. 1999) (using an electronic search of the license plate to see traffic violations, which were not visible to the naked eye).

11. *See, e.g.*, *id.* at 529 (allowing officers to search a driver's license plate without cause because the Fourth Amendment does not protect license plates); United States v. Ellison, 462 F.3d 557, 563 (6th Cir. 2006) (holding that a LEIN system search of a license plate did not violate the Fourth Amendment since license plates are not protected by the Amendment). The LEIN (Law Enforcement Information Network) system provides all law enforcement agencies in Michigan with computerized data on an individual through a search of their license-plate number. *Id.* at 562 n.3.

12. Kansas v. Glover, 422 P.3d 64, 66 (Kan. 2018), *rev'd*, 140 S.Ct. 1183 (2020).

13. *See id.* (stating no basis for an initial search of the license plate).

14. *Id.*

15. *See id.* (indicating initial search of license plate was unprompted).

16. *See* Delaware v. Prouse, 440 U.S. 648, 660–61 (holding that stopping a car to perform a random spot check without a reasonable basis violates the Fourth Amendment).

17. *E.g.*, Olabisiomotosho v. Houston, 185 F.3d 521, 529 (5th Cir. 1999); *accord* United States v. Ellison, 462 F.3d 557, 563 (6th Cir. 2006).

18. Defenders of ALPRs argue that drivers have no privacy rights in the data collected from their license plates because the license plates are exposed to the public. Jennifer Lynch & Peter Bibring, *Automated License Plate Readers Threaten Our Privacy*, ELEC. FRONTIER FOUND (May 6, 2013), https://www.eff.org/deeplinks/2013/05/alpr. This argument mirrors those found in cases that have addressed the constitutionality of license-plate searches. *See, e.g.*, United States v. Matthews, 615 F.2d 1279, 1285 (10th. Cir. 1980) (arguing that constitutional protections do not extend to license plates because they are in plain view); *accord Olabisiomotosho*, 185 F.3d at 529.

electronic devices systematically capture and catalogue license-plate numbers, thus allowing the State to surveil its population.[19] While there are legitimate public policy justifications for this practice,[20] this method of policing comes at the high price of invading the privacy of millions through a system of mass surveillance.[21]

Courts have repeatedly held that the Fourth Amendment does not protect license plates from baseless police searches. This Note argues that not only is this position incorrect, but that it also is based on a flawed understanding of the Fourth Amendment. This Note warns that by failing to defend license plates, the courts open the door to evermore intrusive types of public-surveillance technology, like facial-recognition software. Part I lays out the history of the Fourth Amendment and argues that modern understandings of the Amendment conflict with its original meaning. This misunderstanding has led to the steady decline of protections for cars and license plates. As a result, courts have set the stage for a system of mass surveillance through ALPRs. Part II recommends that courts look to *Carpenter v. United States* for guidance on how to understand the Fourth Amendment's definition of reasonableness and then how to apply it to invasive technological practices. Part III directly takes on the jurisprudence used to support the claim that the Fourth Amendment does not extend to license plate searches. Part III unravels this intricate web of cases to expose the flawed reasoning and misapplication of fundamental constitutional principles. Part IV explains how to properly apply both the *Katz* test and plain-view doctrine to license-plate searches. Part V addresses the collateral consequences that result from adopting an overzealous form of policing, which is essentially search first and seize later. Finally, the Conclusion shows how the fight over license plates is related to a larger fight over use of technology and privacy rights in the modern age.

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19. *Automated License Plate Readers (ALPRs)*, ELEC. FRONTIER FOUND., https://www.eff.org/pages/automated-license-plate-readers-alpr (last visited Nov. 25, 2020).

20. *See* Lynch & Bibring, *supra* note 18 (touting that this system will help recover stolen vehicles); *see also* KEITH GIERLACK ET AL., LICENSE PLATE READERS FOR LAW ENFORCEMENT: OPPORTUNITIES AND OBSTACLES 2 (2014) ("Authorities can mine databases to determine vehicles in the vicinity of a crime scene, to provide photos of those vehicles to confirm alibis, and even to analyze crime patterns.").

21. *See* Lynch & Bibring, *supra* note 18 (describing how patrol cars with mounted ALPRS can scan up to 1,800 license plates per minute, allowing one patrol car to record more than 14,000 license plate numbers in a single shift).

I. HISTORY

Those who do not learn from history are doomed to repeat it.[22] This adage has never been truer than when it comes to modern courts applying the Fourth Amendment to cars. Courts will often say that the car "is not a talisman in whose presence the Fourth Amendment fades away and disappears."[23] However, modern rulings tell a different story.[24] When it comes to cars, modern courts have an understanding of reasonableness that is narrower than its original meaning.[25] Because courts have adopted a myopic understanding of reasonableness, they consistently rule in favor of stripping away key protections for license plates and cars.[26] If modern courts do not change their approach, they will not be prepared to handle the threat that modern technology, like ALPRs, poses to privacy rights. As a result, they will inevitably allow the rise of the very same evils that the Founders sought to end with the Fourth Amendment. To avoid this result, courts need to follow the lead of the Supreme Court in *Carpenter v. United States*. There, the Court both affirmed the original meaning of reasonableness and used it to defend individual privacy against intrusion by modern technology.[27]

A. The Original Meaning of a Reasonable Search and Seizure

In order to fully capture the meaning of the Fourth Amendment, one must understand the nature of the evil the Founding Fathers sought to end—general writs of assistance.[28] To do anything less would be like trying to

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22. GEORGE SANTAYANA, THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE (1905), *reprinted in* THE WORKS OF GEORGE SANTAYANA 172 (Marianne S. Wokeek and Martin A. Coleman eds., Critical ed. 2011) ("Those who cannot remember the past are condemned to repeat it.").

23. Coolidge v. New Hampshire, 403 U.S. 443, 461–62 (1971).

24. *Infra* Part I.B.

25. Modern courts look at reasonableness in terms of arbitrary state action. *Infra* Part I.B. However, the original meaning of reasonableness was a prohibition on both arbitrary state action and mass surveillance. *Infra* Part I.A.

26. *See infra* Part I.B (arguing how the courts' creation of reasonable suspicion combined with the concept of plain view has made it significantly easier for officers to search and seize cars).

27. See Carpenter v. United States, 138 S.Ct. 2206, 2214 (2018), where the Court explains that its analysis is rooted in the "historical understandings of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." (citation omitted). Namely, this has meant recognizing: (1) "that the Amendment seeks to secure the privacies of life against arbitrary power[,]" and (2) "that a central aim of the Framers was to place obstacles in the way of a too permeating police surveillance." *Id.* (citations omitted) (internal quotations omitted).

28. *See* JOSHUA DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE VOLUME 1: INVESTIGATION 67 (7th ed. 2017) (citing Boyd v. United States, 116 U.S. 616, 625 (1886)) (detailing the discussions that the Founding Fathers had during the drafting of the Fourth Amendment).

understand the American Civil War without ever mentioning slavery. General writs of assistance were general search warrants that allowed law enforcement to search and seize persons and property at will and without limit.[29] Early lawyers and judges, most notably, James Otis and Chief Justice Pratt, critiqued these writs on three grounds. First, these writs turned law enforcement into "legal tyrants" who could act arbitrarily without any judicial oversight.[30] Second, general writs were different from other kinds of writs because they were perpetual in duration.[31] Third, and most importantly, general writs were purposefully vague.[32] This meant that law enforcement could use them to justify invading the privacy of any person.[33] Using these powers the state could conduct mass surveillance through arbitrary invasions of individual privacy.[34]

James Otis and Chief Justice Pratt vociferously critiqued general writs of assistance because they understood that when the state had the power to invade the privacy of *anyone*, at *any time*, and for *any reason*, there was in effect no right of privacy at all,[35] merely the illusion of it.[36] James Otis

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29. THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 65 (3rd ed. 2017); *Carpenter*, 138 S.Ct. at 2213 ("The Founding generation crafted the Fourth Amendment as a 'response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.'" (quoting Riley v. California, 573 U.S. 373, 403 (2014))).

30. James Otis, *Speech against Writs of Assistance* (Feb. 1761), *in* BY THESE WORDS: GREAT DOCUMENTS OF AMERICAN LIBERTY SELECTED AND PLACED IN THEIR CONTEMPORARY SETTINGS 62, 65 (1954).

31. *Id.* During this time there were other writs known as special writs of assistances. These writs were similar to modern warrants in that they were court issued, had specified scope, and returned to the court after the search was complete. PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 26–27 (2005). Unlike special writs, general writs did not have a specified scope or duration. CLANCY, *supra* note 29, at 71.

32. In the famous English case *Wilkes v. Wood*, Chief Justice Pratt criticized general writs of assistance for "failing to specify the offenders' names . . . and for giving [law enforcement] the discretionary power to search wherever their suspicions chanced to fall." CLANCY, *supra* note 29, at 74 (citing Wilkes v. Wood, 98 Eng. Rep. 489, 498 (K.B. 1763)). In the General Writs of Assistance Speech, one of James Otis's principal arguments against general writs was that "the writ is universal . . . [meaning it is] directed to every subject in the King's dominions." Otis, *supra* note 30, at 65.

33. Otis, *supra* note 30, at 65.

34. *See* Delaware v. Prouse, 440 U.S. 648, 653–54 (1979) ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' [on law enforcement] . . . in order 'to 'safeguard the privacy and security of individuals against arbitrary invasions . . . .'" (footnote omitted) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978))).

35. *See* Otis, *supra* note 30, at 62–63 (describing the power granted by general writs as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law . . . ."); CLANCY, *supra* note 29, at 77–78 ("Lord Camden went beyond procedural criticisms of the general warrant [used in *Entick v. Carrington*] and indicated that there were substantive restrictions on the [government's] ability to search or seize. . . . [T]o pronounce that practice legal 'would be subversive of all the comforts of society.'").

inspired the Founding Fathers who also lived under the tyranny of general writs of assistance.[37] The Founders crafted the Fourth Amendment with the intent of ending the regime of general writs,[38] which principally relied on arbitrary state action and mass surveillance.[39] These two traits were the greatest threats to privacy. Thus, when the Fourth Amendment speaks of the "reasonableness" of a search or a seizure, it is prohibiting both arbitrary state action and mass surveillance.

B. How Modern Understandings of the Fourth Amendment Have Lessened Protections for Cars

Modern courts stripped away Fourth Amendment protections for cars in two key ways. First, they lowered the level of scrutiny for a search and/or seizure from the warrant standard to reasonable suspicion.[40] Second, in the case of license plates, courts have gone one step further and used the concept of "plain view" to claim that license plates fall squarely outside the protection of the Fourth Amendment.[41] These two shifts laid the groundwork for a new type of policing—search first and seize later.[42] When this police method meets the modern technology of ALPRs, the result is that drivers are subject to a sweeping police-surveillance state each time they turn on their engines.[43]

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36. *Cf.* Moya K. Mason, *Foucault and His Panopticon*, MOYAK, http://www.moyak.com/papers/michel-foucault-power.html (last visited Nov. 25, 2020) (describing Michel Foucault's panopticon: a device which effectively destroys privacy by instilling fear in those who are subject to its seemingly perpetual gaze that someone is always watching them and can punish them for failing to comply with prescribed rules).

37. *See* DRESSLER ET AL., *supra* note 28, at 67 (citing Boyd v. United States, 116 U.S. 616, 626 (1886) (detailing the discussions that the Founding Fathers had during the drafting of the Fourth Amendment)).

38. *Id.*

39. *See* Carpenter v. United States, 138 S.Ct. 2206, 2213–14 (2018) (explaining that the Fourth Amendment put an end to general writs of assistance by: (1) "secur[ing] the privacies of life against arbitrary power[,]" and (2) "plac[ing] obstacles in the way of a too permeating police surveillance." (citations omitted) (internal quotations omitted)).

40. *See infra* Part I.B.1 (describing contemporary jurisprudence and the shift from the warrants standard to the reasonable suspicion standard with respect to seizure of cars).

41. *See infra* Part I.B.2.

42. *See infra* Part I.B.3.

43. *See infra* Part I.B.3.

1. The Origins of Reasonable Suspicion and How Courts Used it to Diminish the Standard for the Reasonable Search and Seizure of Cars

When it comes to judging the reasonableness of a car search, courts will ask whether an officer acted arbitrarily.[44] But they tend to ignore whether an officer's actions promote mass surveillance.[45] Because modern courts take this approach with cars, their understanding of reasonableness almost exclusively focuses on arbitrary state action. Handcuffing reasonableness exclusively to arbitrariness is bad enough. But what makes this dynamic even worse is that courts will evaluate arbitrary state action under the deferential standard of reasonable suspicion.

Reasonable suspicion's rise in the policing of cars is the story of a narrow exception to probable cause that slowly consumed the rule. Modern courts judge the arbitrariness of state action by using one of three standards: warrants, probable cause, or reasonable suspicion.[46] Each of these tiers has a different origin, and consequently places a different limitation on state action. Take the warrant requirement for example: it comes directly from the Fourth Amendment's plain language.[47] Consequently, the warrant requirement sits at the highest tier because it is the most restrictive, requiring the state to go before a court and obtain a warrant supported by probable cause before it can search or seize people or their property.[48]

In contrast, probable cause and reasonable suspicion sit at the second and third tier because they are judicially created exceptions to the warrant

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44. *See generally* Carroll v. United States, 267 U.S. 132, 153–54 (1925) (considering whether the officer's search of a vehicle without a warrant was arbitrary state action that violated the Fourth Amendment); Delaware v. Prouse, 440 U.S. 648 (1979) (considering whether a random spot check unsupported by probable cause was arbitrary state action that violated the Fourth Amendment).

45. In *Olabisiomotosho v. Houston*, the court glosses over the mass surveillance implications when it argues in part that "'[u]nless a registration check reveals information which raises a reasonable suspicion of criminal activity, the subject remains unaware of the check and unencumbered.'" Olabisiomotosho v. Houston,185 F.3d 521, 529 (5th Cir. 1999) (quoting United States v. Walraven, 892 F.2d 972, 974 (10th Cir. 1989)). The court is essentially arguing that the government can covertly spy on its citizens through their license plates, so long as the government does not arrest them. *Olabisiomotosho* lifts this line of reasoning from *United States v. Walraven*, another case dealing with baseless license-plate searches and does not consider the mass surveillance implications of this police practice. *Walraven*, 892 F.2d at 974.

46. *See* U.S. CONST. amend. IV (requiring all state searches and seizures to be accompanied with a warrant); *Carroll*, 267 U.S. at 147 (allowing the state to seize cars without a warrant so long as they had probable cause); Terry v. Ohio, 392 U.S. 1, 21 (1968) (allowing law enforcement to temporarily seize individuals without a warrant so long as they had reasonable suspicion).

47. *See* U.S. CONST. amend. IV ("The right of the people to be secure . . . shall not be violated, and no Warrants shall issue, but upon probable cause . . . .").

48. *See generally* FED. R. CRIM. P. 41 (detailing the requisite process for obtaining a warrant to search and seize property and persons).

requirement, which relieve the state of certain burdens.[49] For example, probable cause sits at the second tier because it requires the state to have "a reasonable ground for belief of guilt" before acting. [50] Reasonable suspicion sits at the lowest tier because it merely requires specific and articulable facts that suggest to the reasonable person that criminal activity may be afoot.[51] Reasonable suspicion is a purposefully relaxed standard, because it was designed to give law enforcement greater latitude to search and seize so that they could respond to imminent threats to public welfare.[52] Initially, reasonable suspicion was created to justify the *Terry* stop, also known as the police practice of "stop and frisk."[53] While certain states have done away with "stop and frisk," the concept of reasonable suspicion endured and then expanded to other kinds of searches and seizures—most notably traffic stops.

The integration of reasonable suspicion into the search and seizure of cars stems from a long history of the Supreme Court relaxing its standards on what constitutes arbitrary state action. Starting in 1925 with the announcement of the *Carroll* doctrine, the Supreme Court allowed the state to search and seize vehicles based solely on probable cause.[54] The Court created this exemption to the warrant requirement because it reasoned that cars were different from private dwellings and, therefore, deserved less protection.[55] After the creation of reasonable suspicion, the Supreme Court held in *United States v. Brignoni-Ponce* that the state could use *Terry* stops to search and seize vehicles crossing the U.S.–Mexico border.[56] Four years later, in *Delaware v. Prouse*, the Court allowed law enforcement to use *Terry* stops to police commonplace traffic infractions.[57] Although the Court expanded the uses of reasonable suspicion to deal with emerging public-safety concerns, these landmark decisions reduced the standard for what constitutes an arbitrary search and seizure of a car to an extremely

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49. *See Carroll*, 267 U.S. at 147 (creating a probable cause exemption for cars); *Terry*, 392 U.S. at 21 (creating the test for what would later be called reasonable suspicion).

50. Brinegar v. United States, 338 U.S. 160, 175 (1949).

51. Ornelas v. United States, 517 U.S. 690, 696 (1996).

52. *See Terry*, 392 U.S. at 27–28 (1968) (justifying intrusion under the reasonable suspicion standard on the grounds that the officer must be able to respond when he has reason to believe that "his safety or that of others was in danger.").

53. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

54. *See* New York v. Class, 475 U.S. 106, 123 (1986) ("[The *Carroll*] exception applies only to searches of vehicles that are supported by probable cause." (quoting United States v. Ross, 456 U.S. 798, 809 (1982))); *see generally* Carroll v. United States, 267 U.S. 132 (1925) (creating the probable cause exception which would later be called the *Carroll* doctrine).

55. *Carroll*, 267 U.S. at 151.

56. United States v. Brignoni-Ponce, 422 U.S. 873, 883–84 (1975).

57. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

deferential standard. In the 2020 case *Kansas v. Glover*, the Court continued down the path of normalizing reasonable suspicion in routine traffic stops.[58] This case becomes one more step in steady march towards an era where the exception is replacing the rule in everyday life.

2. The Concept of "Plain View" and How Courts Used It to Place License Plates Beyond the Protection of the Fourth Amendment

When it comes to license-plate searches, before a defendant can even challenge whether there was enough evidence for probable cause or reasonable suspicion, they first have to overcome the challenge that the Fourth Amendment does not even apply to license-plate searches.[59] This challenge is rooted in the judicially created concept of "plain view."[60] This concept has developed into two distinct, yet related, branches of jurisprudence.

One branch of "plain view" takes shape as the plain-view doctrine. This doctrine says that when law enforcement inadvertently sees incriminating evidence from a legally justifiable position, they are allowed to search and seize the object without violating the Fourth Amendment.[61] Thus, in the case of *Kansas v. Glover*, some courts would allow the officer to run a baseless and arbitrary search of a driver's license plate simply because the officer saw the plate from a legally justified position.[62]

The second branch of "plain view" takes shape as an element of the *Katz* test. The *Katz* test says that the Fourth Amendment's privacy protections only apply to interests where a person has a reasonable expectation of privacy.[63] To have an expectation of privacy, a person must

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58. *See* Kansas v. Glover, 140 S.Ct. 1183, 1188 (2020) (justifying the officer's search using the standard of reasonable suspicion).

59. *See, e.g.*, United States v. Ellison, 462 F.3d 557, 560–61 (6th Cir. 2006) (considering whether an individual even has a cognizable Fourth Amendment right to privacy in their license plate); *accord* Olabisiomotosho v. Houston, 185 F.3d 521, 529 (5th Cir. 1999).

60. *See Ellison*, 462 F.3d at 560–63 (rejecting the Fourth Amendment claim because the license plate was in plain view); *accord Olabisiomotosho*, 185 F.3d at 529; United States v. Walraven, 892 F.2d 972, 974 (10th Cir.1989).

61. DRESSLER ET AL., *supra* note 28, at 229; *see also* Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971) (articulating the plain-view doctrine for the first time).

62. *See, e.g.*, *Ellison*, 462 F.3d at 563 (using the plain-view doctrine to find the search constitutional); Harris v. United States, 390 U.S. 234, 236 (1968) (holding that the officer picking up a registration card sitting on the driver seat of a car held in police custody was constitutional because the card was in plain view and the officer saw it while in the performance of his normal duties); *Ellison*, 462 F.3d at 563 (arguing that the officer could search the license plate because the officer saw it from a legally justified position).

63. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

seek to keep the interest out of the plain view of the public.[64] For the expectation to be reasonable, it must be "one that society is prepared to recognize as 'reasonable.'"[65]

This test comes from the landmark decision *Katz v. United States*.[66] In *Katz*, officers suspected Mr. Katz of committing a crime, so they bugged a public telephone booth to listen in on his conversation.[67] When Mr. Katz claimed that listening to his phone call violated his Fourth Amendment rights, the government asserted that no violation occurred for two reasons. First, the government claimed that Mr. Katz had no right to privacy since he was in a public booth.[68] Second, the government contended that no Fourth Amendment violation occurred because the government did not physically enter the booth while Mr. Katz was on the phone.[69]

The Supreme Court rejected both arguments by stating that "the Fourth Amendment protects people, not places."[70] In one fell swoop, the Court both affirmed an individual's right to privacy in public spaces and articulated a new principle, which rejected an older form of Fourth Amendment analysis that based privacy protection on a theory of physical trespass.[71] This new principle modernized the Amendment so that its protections could account for technological advancements.[72] The Court created the *Katz* test to give effect to the principle that the Amendment protects people, not places.[73]

Although the *Katz* test is supposed to protect privacy interests for objects in plain view, some courts argue that license-plate searches, like the one conducted in *Glover*, are constitutional. For these courts, drivers cannot have an expectation of privacy with their license plate, because the law requires drivers to expose their license plates to the plain view of the public.[74] Without an expectation of privacy, an essential element of the *Katz* test is missing, and thus officers are free to conduct baseless searches because the Fourth Amendment does not apply to license plates.[75]

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64. *Id.* at 351 (majority opinion).
65. *Id.* at 361 (Harlan, J., concurring).
66. *Id.* at 347, 351 (majority opinion).
67. *Id.* at 348.
68. *Id.* at 352.
69. *Id.* at 348.
70. *Id.* at 351.
71. DRESSLER ET AL., *supra* note 28, at 68–70.
72. *Id.* at 68.
73. *Id.* at 68–70.
74. *See, e.g.*, United States v. Ellison, 462 F.3d 557, 561–62 (6th Cir. 2006) (finding that there is no expectation of privacy in license plates since the law mandates them to be exposed to the public).
75. *Id.*

3. When Reasonable Suspicion and the Concept of "Plain View" Meet ALPRs, All Three Work in Lockstep to Greatly Diminish a Driver's Privacy Rights

Part I.B.1 and Part I.B.2 explained how courts used reasonable suspicion and the concept of "plain view" to diminish—and even erase—Fourth Amendment protections for cars and license plates. In the real world, when these theories meet, they produce a new kind of police power, which lets officers search first and seize later.[76] This policing method allows the state to conduct arbitrary searches like the one in *Kansas v. Glover*.[77] Proponents of ALPRs would claim that this technology removes the bias of arbitrary searches since it indiscriminately scans every person's license plate.[78] But this "solution" replaces arbitrariness with something even worse—systematic mass surveillance. Whereby, the state constantly searches the driving files of millions of innocent people.[79] This type of mass surveillance, backed with the threat of criminal liability, is precisely what the Fourth Amendment was designed to end.[80]

When federal courts remove Fourth Amendment protections from cars, they expose drivers to capture by the surveillance state.[81] Their regressive jurisprudence created a system where law enforcement can ultimately search and seize millions of people's license plates almost entirely at will because law enforcement is armed with: (1) the unfettered power to run licenses;[82] (2) access to ALPRs that can surveil millions;[83] and (3) the ability to use the most threadbare evidence to support a traffic stop under reasonable suspicion.[84] While this system is not an exact rendering of the

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76. *Compare* Kansas v. Glover, 422 P.3d 64, 66 (Kan. 2018) (running the license plate first then performing a seizure second), *rev'd*, 140 S.Ct. 1183 (2020), *with* Delaware v. Prouse, 440 U.S. 648, 650 (1979) (seizing the vehicle first then performing a search second).

77. *See Glover*, 422 P.3d at 66 (stating no basis for conducting the initial license plate search).

78. *Automated License Plate Readers (ALPRs)*, *supra* note 19; *see also* GIERLACK ET AL., *supra* note 20, at 10 (noting that ALPRs capture both criminal and non-criminal activity).

79. Lynch & Bibring, *supra* note 18.

80. *See* Carpenter v. United States, 138 S.Ct. 2206, 2214 (2018) ("[A] central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" (quoting United States v. Di Re, 332 U.S. 581, 595 (1948))).

81. *See, e.g.*, Lynch & Bibring, *supra* note 18 (explaining how officers can invade a driver's privacy through mass surveillance under the ALPR system).

82. *Supra* Part I.B.2.

83. *Cf.* Lynch & Bibring, *supra* note 18 (reporting that a single patrol car equipped with an ALPR can scan up to 14,000 cars in a single shift).

84. *Supra* Part I.B.1; *see also* Terry v. Ohio, 392 U.S. 1, 37–39 (1968) (Douglas, J., dissenting) (criticizing reasonable suspicion as a lesser standard than probable cause because it allows an officer to search and seize people "in their discretion."). *See also* Kansas v. Glover 140 S.Ct. 1183, 1189 (2020) (allowing officers to support reasonable suspicion using "common sense inferences," which do not have to be based on their law enforcement experience).

general writs of assistance of old, it shares many of the same odious features, namely mass surveillance through arbitrary invasions into privacy.[85] If federal courts continue to view reasonableness through the narrow lens of arbitrariness, they will not only fail to adequately apply the Fourth Amendment to emerging technology, but they will also inadvertently erect a twenty-first century version of the general writs of assistance.[86] This version will arguably be even more odious than its predecessor because it will have a technological upgrade that will allow police to invade privacy in ways that the tyrants of old could not.[87]

C. The Carpenter *Decision and What Modern Courts Can Learn from It*

In the 2018 case *Carpenter v. United States*, the government seized Global Positioning System (GPS) locator records from cell towers without a warrant.[88] Because cell towers automatically record the time and location of every cellphone that connects to it, these locator records allowed the government to accurately track the movements of cellphone users. Here, the government had 12,898 locations points that catalogued Mr. Carpenter's movement over 127 days, with an average of 101 location points per day.[89] The Supreme Court held that this seizure of Mr. Carpenter's cellphone data violated the Fourth Amendment.[90] In reaching its decision, the Court acknowledged that the Fourth Amendment was a "response to the reviled . . . 'writs of assistance' of the colonial era . . . ."[91] Based on this history, the Court reasoned that the Fourth Amendment had the dual purpose of protecting individual privacy from "arbitrary power" and "plac[ing] obstacles in the way of a too permeating police surveillance."[92] By understanding the history of the Amendment, the Court in *Carpenter*

85. *Compare supra* notes 76–84 and accompanying text (explaining the police practice of search first and seize later and how it relies on mass surveillance and arbitrary invasions of privacy), *with supra* notes 29–39 and accompanying text (explaining how general writs of assistance rely on mass surveillance and arbitrary invasions of privacy).

86. *Compare supra* notes 82–84 and accompanying text (describing the three features of modern policing which makes it resemble general writs of assistance), *with supra* notes 29–34 and accompanying text (describing three central features of general writs of assistance).

87. *See* United States v. Jones, 565 U.S. 400, 429 (2012) (Alito, J., concurring) ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken.").

88. Carpenter v. United States, 138 S.Ct. 2206, 2212 (2018).

89. *Id.*

90. *Id.* at 2217.

91. *Id.* at 2213 (quoting Riley v. California, 573 U.S. 373, 403 (2014)).

92. *Id.* (first quoting Boyd v. United States, 116 U.S. 616, 630 (1886); and then quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

was able to use the original meaning of reasonableness to defend individual privacy rights from a new system of surveillance.

1. Lesson #1: The Surveillance Concerns from *Carpenter* are Equally Applicable to Cars and the Battle over ALPRs

The *Carpenter* Court tried to constrain its holding to cellphones by contrasting it to the surveillance of cars. The Court reasoned that "when the Government tracks the location of a cell phone it achieves a near perfect surveillance, as if it had attached an ankle monitor to the phone's user,"[93] whereas with a car this kind of surveillance would be less possible since people regularly leave their cars in a location and travel by foot.[94] Using *United States v. Jones* as a touchstone, the Supreme Court further attempted to distinguish the surveillance of cars from cellphones by suggesting that, in the former, police had to know whom they wanted to follow, whereas in the latter, they did not.[95] Perhaps this distinction makes sense in *Jones* where officers tracked the defendant's movements by placing a beeper on the undercarriage of the defendant's car.[96] However, in the case of ALPRs, these distinctions between cars and cellphones fall apart.

First, ALPRs are several steps ahead of the tracking in *Jones* because unlike the beeper that targets *one person*, these fixtures indiscriminately run and log the license-plate number of *every driver* in their line of sight. This is almost identical to how a cell tower captures data and logs from nearby phones.[97] Second, ALPRs are just as capable of accurately tracking a driver's movements because they not only run searches, but they also catalog the time and location of where the driver was seen.[98] This, in turn, provides a comprehensive record of a driver's movements, much like the cell towers in *Carpenter*.[99] ALPRs have the capacity to scan up to 1,800 license plates per minute.[100] As a result, it does not take many patrol cars to effectively surveil a given area, especially when each car is constantly

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93. *Id.* at 2218.

94. *Id*.

95. *Id*.

96. United States v. Jones, 565 U.S. 400, 403 (2012).

97. *Compare* GIERLACK ET AL., *supra* note 20, at 2 (explaining that ALPRs capture license plates over a specific area and logging into a database where the data is stored for an indefinite period of time), *with Carpenter*, 138 S.Ct. at 2218, 2220 (explaining that cell towers automatically capture cell site location information (CSLI) from nearby cellphones, and can store this data for about five years).

98. *Compare* GIERLACK ET AL., *supra* note 20, at 2 (using license plates to capture "time and geospatial information."), *with Carpenter*, 138 S.Ct. at 2211–13 (describing how CSLI collects time and geographic information through cell phones and site towers).

99. *Automated License Plate Readers (ALPRs)*, *supra* note 19.

100. Lynch & Bibring, *supra* note 18.

feeding information to a larger database.[101] Given that ALPRs operate in a manner that parallels cell-phone towers, the Court's holding in *Carpenter* should extend to a person's driving data. As a result, accessing this data through license-plate searches should be subject to Fourth Amendment scrutiny—much like how the Court scrutinized the state's searching and seizing of cellphone data from cell towers.

2. Lesson #2: The Third-Party Doctrine Has Limits

One of the most important impacts of *Carpenter* is that it limits the applications of the third-party doctrine.[102] The third-party doctrine comes from the Supreme Court decision *Miller v. United States*.[103] In *Miller*, officers used a defective subpoena to obtain Mr. Miller's bank records, which officers later used to convict Mr. Miller of illegal bootlegging.[104] The issue in the case was whether this search of Mr. Miller's bank records violated the Fourth Amendment.[105] The Court held that since Mr. Miller disclosed this information to a third-party, the third-party could disclose this information to the government without triggering Fourth Amendment protections.[106] Since its creation in *Miller*, the third-party doctrine has stood for the proposition that, whenever individuals disclose information to a third-party, they lose nearly all Fourth Amendment protections over that information. Thus, law enforcement can seize the information from the third-party without violating the Fourth Amendment.[107]

In *Carpenter*, the government tried to argue that the third-party doctrine allowed them to seize the cellphone information given to the third-party cellphone company.[108] Even though the government's argument tracked with previous applications of the doctrine, the Court rejected this argument.[109] The Court realized that applying the third-party doctrine in this case would violate the Fourth Amendment's prohibition on mass surveillance.[110] The Court's decision shows that the third-party doctrine is

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101. GIERLACK ET AL., *supra* note 20, at 10, 13.

102. *Carpenter*, 138 S.Ct. at 2220.

103. United States v. Miller, 425 U.S. 435, 443 (1976), *superseded by statute*, Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697.

104. *Id.* at 436–39.

105. *Id.* at 437.

106. *Id.* at 443.

107. *Id.*

108. Carpenter v. United States, 138 S.Ct. 2206, 2210 (2018).

109. *Id*.

110. *See id.* (declining to apply the third-party doctrine because "there is a world of difference between limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.").

not absolute, and at least in the case of cellphones, its ability to create mass surveillance is a limiting principle.[111]

As explained in Part I.C.1, license plates exist under a scheme of mass surveillance that is similar to cellphones. Drivers are required to turn over more and more private information to the DMV, which will be compiled into their electronic record.[112] Given the amount of electronic data that gets collected from drivers, both consensually and non-consensually, why should drivers not have the same expectation of privacy in their driving data as their cellphone data?

In the 2003 case *Hallstien v. Hermosa*, the Ninth Circuit held that drivers did not have a privacy interest in their electronic driving data.[113] The court based its holding on *Miller* and the third-party doctrine.[114] In light of *Carpenter*, the *Hallstien* decision seems outdated. Courts looking at the issue of license-plate searches have *Carpenter* as a touchstone for recognizing when the third-party doctrine has gone too far and allowed for an all "too permeating [state of] police surveillance."[115]

II. UNDERSTANDING AND UNRAVELING THE TANGLED WEB OF PRECEDENT

United States v. Ellison and *Olabisiomotosho v. City of Houston* are the leading federal circuit court decisions asserting that the Fourth Amendment does not apply to license-plate searches.[116] The court in *Ellison* is quick to boast that "[e]very court that has addressed this issue has reached the same conclusion."[117] The *Ellison* court then rattles off a string of case law, which gives the impression that the court's assertion is a well-settled conclusion.[118] But a closer look at this precedent reveals an incestuous affair of circuit court decisions citing themselves, each other—or not at

111. *Id.*

112. *See* Brief of Amicus Curiae Electronic Privacy Information Center (EPIC) and Twenty-Seven Technical Experts and Legal Scholars in Support of the Petitioner at 10–19, Maracich v. Spears, 570 U.S. 48 (2013) (No. 12-25) (explaining that DMVs collect and store extensive personal information, such as copies of birth certificates, social security numbers (SSNs), height, weight, eyesight, fingerprints, child support violations, medical and mental health records, and vehicle and homeowner insurance and information).

113. Hallstein v. Hermosa Beach, 87 F.App'x 17, 19 (9th Cir. 2003).

114. *Id.*

115. *Carpenter*, 138 S.Ct. at 2214 (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

116. Olabisiomotosho v. Houston, 185 F.3d 521, 529 (5th Cir. 1999); *accord* United States v. Ellison, 462 F.3d 557, 563 (6th Cir. 2006).

117. *Ellison*, 462 F.3d at 563.

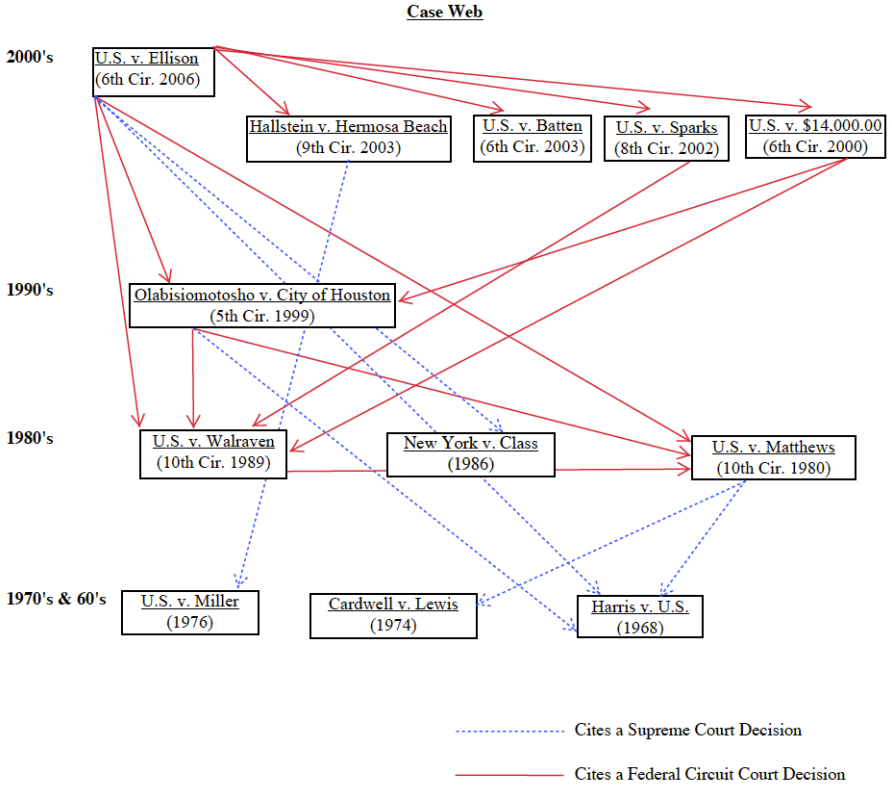
118. *Id*.

all.[119] This "well-settled conclusion" is actually the sum total of circuit courts misapplying the *Katz* test and plain-view doctrine to the issue of license plates. As this section will explain, courts misapply these tests in part because they misunderstand the privacy interest at stake and they neither understand nor adhere to the founding principles of these tests. As a result, courts misuse these cases to support their argument. This misuse often manifests as ignoring key factual differences and misapplying arguments.

This Part will pull at the various strands in this web of case law in order to analyze this issue from a variety of angles. The *Ellison* decision will be the main focus of this critique since it sits atop this web of precedent. For the reader's convenience, Figure 1 (Case Web) has been included. The Case Web visually represents the string of cases that *Ellison* cites to support its assertion that the Fourth Amendment does not apply to license-plate searches. The Case Web also shows how these cases relate to each other. Each arrow represents where each court finds support for the assertion made in *Ellison*.

119. If one follows the string cite in *Ellison*, one will find that each case tends to cite some combination of *United States v. Walraven*, *United States v. Matthews,* or *Olabisiomotosho v. Houston*. *Ellison*, 462 F.3d at 563. *United States v. Batten* is one of the few cases that cites no other case to support its assertion because the court frames the claim in the negative and asserts that no court has held that the Fourth Amendment protects license-plate numbers. United States v. Batten, 73 F.App'x 831, 832 (6th Cir. 2003). To better illustrate this connection, a "Case Web" has been included to visually depict these relationships. *Infra* Part II.

Figure 1. Case Web



A. Ellison *Rests on Precedent that May Actually Be Outdated*

Some of the precedent used to support *Ellison*'s Fourth Amendment claim is becoming outdated. Take, for example, *Hallstien v. Hermosa*. This decision uses the third-party doctrine to assert that drivers have no right to privacy over their electronic DMV records and driving data.[120] As explained in Part I.C.2, *Carpenter* shows that the third-party doctrine reaches one of its limits when it is used to empower concepts that the Fourth Amendment abhors, such as a system of mass surveillance.[121] Another consideration is that some of the underlying case law predates the

120. Hallstein v. Hermosa Beach, 87 F.App'x 17, 19 (9th Cir. 2003).
121. *See supra* Part I.C.2.

enactment of the Driver Privacy Protection Act of 1994 (DPPA).[122] The DPPA specifically protects a driver's data from the public.[123] In 2007, the Eleventh Circuit even went so far as to say that this statute grants a constitutionally recognized right to privacy in one's driving data.[124]

B. Courts Like Ellison *and* Olabisiomotosho *Ignore Key Factual Differences in the Cases Used to Support Their Holding*

Beyond the fact that support for this claim may be outdated due to subsequent laws and rulings, this "precedent" suffers from an even more troubling fault, which this Part will explore. The cases that make up this so-called precedent should not be strung together because they have crucial factual differences that distinguish them. A prime example of this problem is *United States v. Matthews*. *Matthews* is one of the cases most cited to support the assertion that the Fourth Amendment does not apply to license-plate searches.[125] *Ellison* and *Olabisiomotosho* both rely on *Matthews* to support their Fourth Amendment assertion regarding license plates; however, these courts fail to acknowledge key factual differences.[126] As a result, *Ellison* and *Olabisiomotosho* misuse *Matthews.*

In *Matthew*s, military police at a local military health center spotted a civilian vehicle bearing a military license plate.[127] The officers knew that the plates were military because military license plates have a distinct physical feature that distinguishes them from civilian ones.[128] Since it was illegal for civilian cars to have military plates, the military police arrested the defendant.[129] The issue in *Matthews* was whether the officers performed an unconstitutional search by viewing the license plate.[130] Here, the military police did not run an electronic search of the vehicle's license plate. They

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122. As depicted in the Case Web, several circuit court cases such as *United States v. Walraven*, *United States v. Matthews*, and other Supreme Court cases such as *United States v. Miller*, *Cardwell v. Lewis*, and *Harris v. United States* all predate the 1994 DPPA. *Ellison*, 462 F.3d at 563.

123. *See* Driver's Privacy Protection Act of 1994, 18 U.S.C § 2721(a) (2018) (detailing that generally drivers' data is protected from being disclosed except for certain limited circumstances).

124. Collier v. Dickinson, 477 F.3d 1306, 1308–12 (11th Cir. 2007).

125. Looking at the Case Web, *Matthews* is the second most cited case after *United States v. Walraven*. *Ellison*, 462 F.3d at 563.

126. *See* Olabisiomotosho v. Houston, 185 F.3d 521, 529 (5th Cir. 1999) (citing United States v. Matthews, 615 F.2d 1279, 1285 (10th Cir. 1980)) (arguing that the Fourth Amendment does not extend to license-plate searches); *accord Ellison*, 462 F.3d at 563.

127. United States v. Matthews, 615 F.2d 1279, 1281 (10th Cir. 1980).

128. *Id.*

129. *Id.*

130. *Id*. at 1282.

simply noticed an obvious trait that would stand out to law enforcement.[131] The court's holding uses the plain-view doctrine to assert that "[since] the military license plate was in plain view . . . [it] was subject to seizure. . . . [Thus,] no expectation of privacy was infringed . . . ."[132]

Ellison and *Olabisiomotosho* lift this assertion from *Matthews* and misapply it, because neither case sees the critical difference between using the physical license plate itself as evidence of an overt traffic violation and using the license plate as a tool to engage in a fishing expedition.[133] In *Olabisiomotosho*, the defendant Ms. Olabisiomotosho was driving her two children home from school when she saw a motorist stranded on the side of the road.[134] After she pulled over to help the motorist, officers rolled up behind her and ran her license-plate number.[135] Unlike *Matthews*, where the military plates on a civilian car was overt evidence of a potential crime that warranted a police response, nothing on Ms. Olabisiomotosho's license plate and nothing about her conduct would give rise to a belief that she was engaged in or about to engage in a crime.[136]

In *Ellison*, officers acted in a similar (albeit an arguably less egregious) manner as officers in *Olabisiomotosho*. There, officers noticed the defendant's car illegally standing in a fire lane.[137] In the face of this obvious violation, the officers ran the defendant's plates and discovered an arrest warrant.[138] They executed the warrant and arrested him.[139] The trial court later found that actually the car was not illegally standing in the fire lane, and it was determined as a matter of law that there was no probable cause.[140] Thus, the issue before the circuit court was whether a baseless search of the defendant's license plate violated the Fourth Amendment.[141]

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131. *See id.* at 1281 ("[The car] raised suspicion of various military officers because it was a civilian car . . . bearing military license plates.").

132. *Id.* at 1285.

133. *Compare id.* at 1281 (finding clear illegal activity with a military license plate on a civilian car), *with* Olabisiomotosho v. Houston, 185 F.3d 521, 523 (5th Cir. 1999) (seeing no clear illegal activity until the electronic license-plate search was done).

134. *Olabisiomotosho*, 185 F.3d at 523.

135. *Id.*

136. *Compare Olabisiomotosho*, 185 F.3d at 523 (making no mention of officers seeing any illegal conduct before running the license-plate search), *with Matthews*, 615 F.2d at 1281 (having a reasonable belief that a crime is ongoing based on physical attributes of the license plate).

137. United States v. Ellison, 462 F.3d 557, 559 (6th Cir. 2006).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 560.

Without probable cause, the search in *Ellison* was just as baseless as the search in *Olabisiomotosho*.[142] Additionally, like *Olabisiomotosho,* the *Ellison* court does not distinguish between license plates as evidence of an overt crime and license plates being used to uncover a crime.[143] By failing to make this distinction, both courts use *Matthews*—a case where there was probable cause to support the arrest—to give police the power to go on fishing expeditions using peoples' license plates.[144]

C. Ellison *and* Olabisiomotosho *Ignore the Key Factual Differences in* Matthews *Because They Fundamentally Do Not Understand What It Means for an Item to Be in "Plain View."*

Ellison and *Olabisiomotosho* misuse *Matthews* because they have a fundamentally different understanding of the interest in "plain view." Both courts only understand plain view in terms of what is perceptible to the natural eye.[145] But this understanding does not account for technology in the modern age, which can enhance the natural senses to such a degree that it brings things otherwise invisible to the naked eye into plain view.

License plates epitomize this distinction. Looking at the physical license plate with the natural eye, an officer cannot see a person's driving record, arrest warrant,[146] or in the case of ALPR's, a detailed outline of a person's driving patterns and habits.[147] When police run electronic license-plate searches, they are using technology to enhance their natural sight so that they can see information that would otherwise be invisible to the naked eye.

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142. *Compare id.* at 559 (having no basis to run the initial search because the officer had no probable cause), *with* Olabisiomotosho v. Houston, 185 F.3d 521, 523 (5th Cir. 1999) (having no basis to run the initial search, because the officer never had any evidence to support probable cause or reasonable suspicion).

143. *Compare Ellison*, 462 F.3d at 561–62 (failing to see how using the license plate in an electronic search is different than the simply viewing physical license plate), *with Olabisiomotosho*, 185 F.3d at 523 (failing to consider the difference between the physical license plate and the information that can be obtained by an electronic search).

144. *See Ellison*, 462 F.3d at 563 (citing United States v. Matthews, 615 F.2d 1279, 1281 (10th Cir. 1980)) (citing *Matthews* as support for the claim that the Fourth Amendment does not extend to license-plate searches, thus allowing baseless police searches); *accord* Olabisiomotosho v. Houston, 185 F.3d 521, 529 (5th Cir. 1999).

145. *See Ellison*, 462 F.3d at 561 (discussing plain view in terms of the physical plate, which is visible with natural sight); *Olabisiomotosho*, 185 F.3d at 523 (considering the physical license plate as the item in plain view, which is perceptible with natural sight).

146. See for example, *Olabisiomotosho*, 185 F.3d at 523 where officers only saw the traffic violations once they conducted an electronic search, and *Ellison*, 462 F.3d at 559 where officers only saw the arrest warrant after conducting the electronic search.

147. GIERLACK ET AL., *supra* note 20, at 16; *Automated License Plate Readers (ALPRs)*, *supra* note 19.

An officer seeing evidence with natural sight versus an officer seeing evidence with technologically enhanced sight is the critical difference between *Matthews* and cases like *Ellison* and *Olabisiomotosho*. In *Matthews*, the physical license plate was by itself evidence of a crime because it was illegal to have military plates on a civilian car.[148] Officers could clearly see this mismatch using only their natural sight.[149] In contrast, the officers in *Ellison* could not see the arrest warrant on the physical plate.[150] Officers could only perceive the crime once their natural sight was technologically enhanced via the electronic search of the license plate.[151] Similarly in *Olabisiomotosho*, officers could not see the crime with their natural sight; they needed technology to enhance their view.[152]

D. When Courts Misunderstand the Item in Plain View, They Fundamentally Misunderstand the Privacy Interest at Stake. As a Result, They Misapply the Katz *Test and the Plain-View Doctrine*

Since courts like *Ellison* understand plain view in terms of natural sight, they see the privacy interest as the physical license plate itself.[153] But if these courts understood plain view in terms of technologically enhanced sight, they would realize that the actual interest at stake is the electronic driving data. More specifically, it is the search of this electronic driving data on public roadways. By having a different understanding of plain view, *Ellison* and other courts misunderstand the privacy interest at stake. When the court misunderstands the interest at stake, the court cannot properly apply the *Katz* test or the plain-view doctrine to license plates.

In the case of the *Katz* test, *Ellison*'s natural-sight understanding of plain view leads the court to start with the physical license plate and work inward to the electronic data.[154] This approach is incorrect. The court should actually *start* with the electronic driving data and work *outward* to the physical plate. When it comes to applying the *Katz* test to electronic license-plate searches, an understanding of plain view in terms of

148. United States v. Matthews, 615 F.2d 1279, 1281 (10th Cir. 1980).

149. *Id.*

150. *See Ellison*, 462 F.3d at 559 (needing to run an electronic license-plate search before officers could see the arrest warrant).

151. *Id.*

152. *See Olabisiomotosho*, 185 F.3d at 523 (seeing the traffic violation only after conducting the electronic search).

153. *See, e.g.*, *Ellison*, 462 F.3d at 561 (discussing plain view in terms of the physical plate, which must be visible to natural sight); *Olabisiomotosho*, 185 F.3d at 523 (considering only the physical license plate itself because this is the only item the court sees as being in plain view, since it is operating from a definition of "plain view" as things perceptible with natural sight).

154. *Ellison*, 462 F.3d at 561–63.

technologically enhanced sight is more appropriate because it is a more accurate application of *Katz*'s fundamental principles. One of the central principles in *Katz* is that technology has the power to access information that natural human abilities alone cannot.[155] This principle is why the *Katz* test is worded in such a broad manner.[156] Thus, when courts like *Ellison* invoke the *Katz* test but do not consider the issue of sensory-enhancing technology,[157] they are fundamentally ignoring part of the test's founding principles. This results in the court applying the test to the wrong privacy interest.

When it comes to the plain-view doctrine, courts must distinguish between circumstances like *Matthews* where law enforcement uses natural sight to see evidence of criminal activity on the physical license plates itself,[158] versus cases like *Ellison* where law enforcement uses technologically enhanced sight to look into an individual's electronic driving data.[159] Failing to make a distinction between these types of "plain view" results in allowing technology to undermine the limiting principle of the plain-view doctrine—the prohibition on baseless searches.

When the Supreme Court created the plain-view doctrine, the Court did so understanding that if the doctrine was not constrained, police could use it to conduct baseless searches and seize any item that came into their line of sight, even if the circumstances would otherwise violate the Fourth Amendment.[160] To avoid this result, the Court required officers to have cause to be in the presence of the item.[161] Additionally, the Court required that the item *itself* give rise to the reasonable belief of a crime, i.e., probable

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155. *See generally* Katz v. United States, 389 U.S. 347 (1967) (dealing with the issue of government using technology to eavesdrop).

156. *See id*. at 353 (citing Silverman v. United States, 365 U.S. 505, 511–12 (1961)) (explaining that violations of the Fourth Amendment can no longer simply "turn upon the presence or absences of a physical intrusion" into a particular place because of instances like *Silverman v. United States*, where officers were able to infringe on privacy rights with audio recordings, without ever committing physical trespass).

157. *Ellison*, 462 F.3d at 561 (citing only the first half of the *Katz* test).

158. United States v. Matthews, 615 F.2d 1279, 1281 (10th Cir. 1980).

159. *Ellison*, 462 F.3d at 559.

160. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465–69 (1971) (discussing the precedent and principles underlying the plain-view doctrine).

161. *See id.* at 465–66 (explaining that the officer's initial intrusion, which allows the item to come into the officer's plain view, comes from one of the recognized exceptions to the warrant requirement, such as: (1) the officer coming "across evidence while in 'hot pursuit' of a fleeing suspect"; (2) the officer coming across evidence "during a search incident to arrest that is appropriately limited in scope under existing law . . . ."; or (3) the officer is not "searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object.").

cause or reasonable suspicion.[162] In cases like *Matthews*, which only involve natural sight, the court should follow the traditional application of the plain-view doctrine, because the license-plate is itself evidence of a crime.[163] However, in cases like *Ellison*, which involve technologically enhanced sight, a court must look at the officer's basis for accessing the data in the first place. In other words, since the electronic data is itself going to be evidence of a crime, then courts must look at what basis the officer had for running the initial electronic search in first place. Did the officer have a warrant, probable cause, or at the very least reasonable suspicion? Without this distinction, law enforcement will have free reign to use technology to conduct baseless searches on any item that falls into the line of their natural sight and still claim protection under the plain-view doctrine. Such a result would be fundamentally antithetical to the limiting principles underlying the doctrine.

E. When Courts Splice Together the Katz *Test and the Plain-View Doctrine, They Create Confusion that Leads to Misapplication of the Doctrines and Misuse of Precedent*

This Note carefully distinguishes between the two branches of "plain view" because many cases, like *Ellison*, do not. This Part uses *Ellison* to highlight the problems that arise when courts do not differentiate between these two branches. Reading the *Ellison* decision can be quite confusing because it is unclear whether the court is applying the *Katz* test or the plain-view doctrine.[164] In truth, the court is actually trying to apply both tests at the same time, and it uses the concept of "plain view" to pivot between the two tests.[165] The court uses the plain-view doctrine to show that license plate searches do not meet the *Katz* test, and therefore the Fourth Amendment does not protect them.[166] Put another way, *Ellison* is arguing that since license plates can be searched under *certain* circumstances, they can be searched in *all* cases.

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162. This means that something about the item, by its very nature, would lead the officer to a reasonable belief a crime has taken place, is taking place, or is about to take place. *See id.* at 465–66 (noting that the object must have an "incriminating character" and allowing the extension of prior jurisdiction only when "it is immediately apparent to the police that they have evidence before them."); DRESSLER ET AL., *supra* note 28, at 231 (citing Arizona v. Hicks, 480 U.S. 321 (1987) for its holding that defines "immediately apparent" as evidence that gives the officer probable cause to seize it).

163. United States v. Matthews, 615 F.2d 1279, 1281 (10th Cir. 1980).

164. In *Ellison,* when the court is describing the rule of law, the court merges both the *Katz* test and the plain-view doctrine. *Id.* at 561. To support its assertion under *Katz*, the court cites cases applying the plain-view standard like in *United States v. Matthews*. *Id.* at 563.

165. *Infra* notes 170–72 and accompanying text.

166. *Id.* at 561.

When stated in these terms, the court's argument is clearly flawed. But the average reader would not see this unless the reader understood the fundamental difference in effect between the *Katz* test and the plain-view doctrine. While both tests rely on the concept of "plain view" to determine the Fourth Amendment's applicability, these principles have two drastically different implications. The plain-view doctrine lays out a narrow set of circumstances where an officer does not need a warrant before searching or seizing an item because the officer already has a lawful reason for being near the item, and something about the item by its very nature creates the belief that a crime is likely taking place.[167] On the other hand, the *Katz* test broadly looks at whether the Fourth Amendment even applies to the situation at all.[168] Under *Katz*, it is not a question of *how much* evidence an officer needs before conducting a search or seizure (as is the case with the plain-view doctrine); but rather, it is a question of whether an officer needs *any* evidence at all.[169]

Given these considerations, the *Ellison* court's decision is confusing because it is saying two contradictory things at once. In one breath, the court says officers need to be in a legally justified position to view the license plate. [170] This means the court is applying the plain-view doctrine and implicitly acknowledges that officers *must* have cause or legal justification to see and access the license plate. Yet, in the next breath, the court asserts that because license plates are in plain view officers *never* need to show cause, since drivers have no expectation of privacy under the *Katz* test.[171] Put simply, the court is saying that officers need to show cause so that they can take advantage of the plain-view doctrine. And, at the same time, the court is also saying that officers never need to show cause because

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167. Coolidge v. New Hampshire, 403 U.S. 443, 465–69 (1971); DRESSLER ET AL., *supra* note 28, at 229.

168. DRESSLER ET AL., *supra* note 28, at 68; *see* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that the Fourth Amendment only protects that which a person has a reasonable expectation of privacy); *id*. at 351 (majority opinion) (defining the *Katz* test in part by explaining that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

169. *Compare Coolidge*, 403 U.S. at 465–67 (discussing types of evidence an officer would need to support a search under the plain-view doctrine), *with Katz*, 389 U.S. at 349–50 (dealing with the issue of whether the government needed any evidence to support its electronic bugging since it was in dispute whether the public phone booth was protected by the Fourth Amendment).

170. *Ellison*, 462 F.3d at 563.

171. When the court explains that the officer needs to be in a legally justified position to view the license plate, the court is invoking the plain-view doctrine, which means it is implicitly acknowledging that officers must have cause or legal justification to see and access the license plate. *Id.* However, the court's end result is that this cause for viewing the plate combined with the plate's exposure to the public is the reason why license plates can never have any protection under the Fourth Amendment. *Id.* at 561–63.

license plates do not satisfy the *Katz* test and thus the Fourth Amendment does not even apply in the first place. By splicing these tests together, the *Ellison* court uses the plain-view doctrine to justify baseless searches by the police. Using the plain-view doctrine in this manner directly contradicts one of the doctrine's fundamental principles—the prohibition of baseless police searches.[172]

Ellison's invalid premise leads the court to incorrectly cite cases that apply the plain-view doctrine as support for its claim that license plates are not protected under *Katz*.[173] *Matthews* is one example of these plain-view cases that the court misuses.[174] Another is the 1986 Supreme Court decision *New York v. Class.*[175]

1. How *Ellison* Misused *New York v. Class*

The *Ellison* court fashions much of its argument and pattern of reasoning after those found in *New York v. Class*.[176] Like *Ellison*, the *Class* opinion seems to meld the *Katz* test with the plain-view doctrine.[177] This melding can give the impression that the Court is applying the *Katz* test. However, a closer reading shows that the Court is actually applying the plain-view doctrine.[178] *Ellison* misses this point in part because it is too focused on drawing an analogy between searches involving Vehicle Identification Numbers (VINs)—the issue in *Class*—and searches of license plates.[179] Since *Ellison* fails to recognize that *Class* is a case applying the plain-view doctrine and *not* the *Katz* test, the court in *Ellison*

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172. Justice Stewart explains that the "rationale for the [plain-view doctrine]" is based on the Fourth Amendment's two distinct objectives: (1) eliminating searches not based on probable cause (i.e., baseless searches); and (2) eliminating exploratory searches. *Coolidge*, 403 U.S. at 467.

173. As depicted in the Case Web, *Ellison* cites Supreme Court cases applying the plain-view doctrine such as *Harris v. United States*. *Ellison*, 462 F.3d at 561. The court also cites *United States v. Matthews*, another case depicted in the Case Web, which this Note has already argued is a case applying the plain-view doctrine. *Supra* Part II.C and Part II.D; *Ellison*, 462 F.3d. at 563.

174. *Ellison*, 462 F.3d 563 (citing United States v. Matthews, 615 F.2d 1279, 1285 (10th Cir. 1980)).

175. New York v. Class, 475 U.S. 106 (1986). *New York v. Class* is in the Case Web because *Ellison* cites the decision for its regulatory argument. *Ellison*, 462 F.3d at 561. This Note argues that *Class* is actually an application of the plain-view doctrine and not simply the *Katz* test. *See infra* notes 196–212 and accompanying text.

176. *Ellison*, 462 F.3d at 561.

177. *See infra* notes 201–12 and accompanying text (explaining that even though it seems like the Court in *Class* is applying both the plain-view doctrine and the *Katz* test, the Court is actually just applying the plain-view doctrine).

178. *Id.*

179. *See Ellison*, 462 F.3d at 561 (reciting the argument made in *New York v. Class* but swapping out the term "VINs" for "license-plates").

misapplies *Class*'s regulatory argument to license plates and extends it far beyond what *Class* intended and what the Fourth Amendment allows.

Ellison argues that the Fourth Amendment does not extend to searches of license plates because license-plate numbers are like VINs in that they both play a role in the extensive regulation of cars.[180] At the outset, this analogy is flawed because although VINs and license plates both regulate cars, their applications in the real world vary drastically. VINs are physically much smaller than a license plate, making it much more difficult for an officer to see a VIN number from a distance, much less when a car is in motion.[181] Therefore, in order to observe the VIN on a passing car, officers would likely have to stop the driver. Regardless of whether the Fourth Amendment protects VINs or not, the initial traffic stop is a seizure that will trigger the Fourth Amendment.[182] As a result, in most instances before the VIN can even come into the officer's natural line of sight, the officer would have to comply with the Fourth Amendment, meaning they would have to have at least some evidence to support probable cause or reasonable suspicion.[183] In contrast, license plates are larger and more visible from a distance; therefore, an officer does not need to initiate a traffic stop to see the plate number and run a search.[184] Under the license-plate scheme, it is very easy for officers to get similar information about the driver without ever facing Fourth Amendment scrutiny.[185]

Even if one ignored the court's flawed analogy, the argument suffers from an even more detrimental problem. *Ellison*'s argument is essentially that since an area is highly regulated, there is no Fourth Amendment

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180. *See Ellison*, 462 F.3d at 561 (arguing that since both VINs and license plates play an important role "'in the pervasive governmental regulation of the automobile [and that the Federal Government has made great efforts] to ensure that [both license plates and VINs are] placed in 'plain view' . . . motorist[s] can have no reasonable expectation of privacy in the information contained on [either].").

181. *See What is a Vehicle Identification Number (VIN)?*, AUTO CHECK, https://www.autocheck.com/vehiclehistory/vin-basics (last visited Nov. 25, 2020) (showing examples of how small the VIN is on a car); *see also* New York v. Class, 475 U.S. 106, 112 (1986) (citing 49 C.F.R. § 571.115 (S4.6) (1984)) (describing the minimum height for characters of VINs as 4mm).

182. Delaware v. Prouse, 440 U.S. 648, 653 (1979).

183. *See, e.g.*, *infra* notes 203–05 and accompanying text (explaining how in *Class* probable cause was established long before the officers initiated the traffic stop or the VIN search).

184. *See, e.g.*, *Ellison*, 462 F.3d at 559 (running the license-plate search from a distance); *accord* Olabisiomotosho v. Houston, 185 F.3d 521, 523 (5th Cir. 1999); United States v. Walraven, 892 F.2d 972, 973–74 (10th Cir. 1989).

185. *See, e.g.*, *Ellison*, 462 F.3d at 559 (running the license-plate search and obtaining information about the driver without facing any Fourth Amendment scrutiny); a*ccord Olabisiomotosho*, 185 F.3d at 523; Walraven, 892 F.2d at 973–74.

protection.[186] This argument runs counter to: (1) the historical origins of the Fourth Amendment and (2) contemporary jurisprudence.

Turning to the historical point first. This Note started with the historical origins of the Fourth Amendment because many of the arguments that courts invoke today were used back in the time of the Founders to justify the oppressive regime of general writs of assistance.[187] The general writs-of-assistance cases, which inspired the founding principles of the Fourth Amendment, often involved highly regulated industries like customs in the American colonies and the newspapers in England.[188] The fact that these industries were highly regulated did not stop jurists like James Otis and Lord Camden from arguing that people still had a fundamental right to privacy despite the government's regulatory interests.[189] These sentiments are deeply engrained in the Fourth Amendment, and a number of contemporary jurists have affirmed this.

In contemporary jurisprudence, the Supreme Court in both *Camara v. Municipal Court of San Francisco* and *Delaware v. Prouse* held that simply because an entity is highly regulated, this does not waive away Fourth Amendment protections.[190] Both the history of the Fourth Amendment and its contemporary applications resist the impulse to use regulation as cause to erase Fourth Amendment protections. This resistance is carefully imbedded in the *Class* decision, and it ultimately affects how *Class* should be read and applied.[191]

In *Class*, officers stopped a vehicle for speeding and driving with a cracked windshield.[192] After pulling the vehicle over, officers attempted to

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186. *Ellison*, 462 F.3d at 561.

187. *Cf.* CLANCY, *supra* note 29, at 69 (explaining that general writs of assistance were used in America to enforce customs laws and stop smuggling).

188. *See* CLANCY, *supra* note 29, at 69 n. 49 (noting that the Massachusetts colony was particularly impacted by general writs because this colony "had more intrusive search and seizure practices than other colonies" with respect to customs); *see also* CLANCY, *supra* note 29, at 73, 77 (explaining that in *Wilkes v. Woods* and *Entick v. Carrington* the general writ was issued to prosecute newspapers for printing "seditious libel.").

189. *Supra* notes 29–35, 188 and accompanying text.

190. *See* Camara v. Municipal Court of San Francisco, 387 U.S. 523, 531–34 (1967) (holding that enforcement of regulatory interest does not override the Fourth Amendment); Delaware v. Prouse, 440 U.S. 648, 662 (1979) ("An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its uses are subject to government regulation.").

191. This restraint is exemplified in how the *Class* court restrains its holding, despite claiming that drivers have no expectation of privacy in their VINs. *See* New York v. Class, 475 U.S. 106, 119 (1986) (linking the traffic violations to the lack of expectation of privacy in one's VINs to reach its holding); *see also infra* notes 196–210 and accompanying text (explaining the significance of how *Class* crafted its holding).

192. *Class*, 475 U.S. at 108.

get more information about the car by reading the VIN; however, papers on the dashboard blocked the number.[193] The officer reached into the car to move the papers.[194] This act raised an issue of whether the officer's search violated the Fourth Amendment.[195] The Court held that under these circumstances this search was permissible because there was: (1) a lack of expectation of privacy in the VIN, *and* (2) officers saw the driver commit two traffic violations.[196]

The *Ellison* court only wishes to look at the first part of this holding, where the *Class* Court appears to use the *Katz* test to say that VINs are an "unprotected space" because VINs are subject to pervasive governmental regulation.[197] If the *Class* Court really intended for VINs to not be protected by the Fourth Amendment, then it would follow that officers could always reach through car windows in order to access this "unprotected space."[198] The *Class* Court expressly rejects that outcome in a later part of its holding.[199] This rejection is evidence that even though VINs do not satisfy the first part of the *Katz* test, they are still protected from certain kinds of searches under the Fourth Amendment.[200] But wait, this result seems odd. If the *Katz* test is supposed to determine what interests the Fourth Amendment protects, then how can VINs both fail the *Katz* test and yet still receive some protections under the Fourth Amendment?

The short answer is that although the *Class* Court invokes some of the rhetoric of *Katz*, the Court ultimately decides the case using the plain-view doctrine. One of the key themes in nearly all plain-view cases is that before the officer ever sees the item to be seized or searched, the officer has already overcome several hurdles erected by the Fourth Amendment.[201] Put another way, before the item in question can even come into the officer's field of vision, the officer must have either had a warrant, probable cause, or reasonable suspicion.[202] In *Class*, this whole chain of events started

193. *Id*.

194. *Id*.

195. *Id*. at 109.

196. *Id*. at 119.

197. *Compare id.* at 119 (describing VINs as an "unprotected space"), *and id.* at 114 (finding no expectation of privacy in VINs because of its pervasive role in governmental regulation), *with* United States v. Ellison, 462 F.3d 557, 561 (6th Cir. 2006) (arguing that license plates are an unprotected space with no expectation of privacy since license plates are subject to pervasive regulation).

198. *Class*, 475 U.S. at 119.

199. *See id.* at 119 (rejecting the possibility that law enforcement may reach into the vehicle when the VIN is clearly visible from the outside).

200. *See id.* at 118–19 (maintaining protections for VIN numbers from certain kinds of police searches).

201. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971) (describing the instances where the Court applies the plain-view doctrine).

202. *Id.*

because the officers initiated a traffic stop.[203] Since traffic stops are a type of seizure protected by the Fourth Amendment, the officers needed to have probable cause.[204] In *Class*, the officers did have probable cause because they saw the driver commit at least two overt traffic violations (i.e., speeding and having a cracked windshield).[205] The Court in *Class* treats the search of the VIN as an extension of the initial traffic stop and thus extends to it certain qualified protections.[206] Although the *Class* Court made a case for not extending Fourth Amendment protections to searches of VINs,[207] it constrains its holding by limiting it to instances where there is an underlying traffic stop.[208] This is ultimately why, in the holding, the Court links drivers not having an expectation of privacy in their VINs to the probable cause generated by officers seeing the traffic violations.[209] The *Class* Court removes some protections from VINs but also imposes a duty on law enforcement to show cause before conducting a search.[210]

When the *Ellison* court cites *Class*, it erroneously removes the underlying safeguards provided by the traffic stop and gives law enforcement a new unfettered right to search license plates at will.[211]

III. THE TALE OF TWO PLAIN VIEWS: UNDERSTANDING & APPLYING THE *KATZ* TEST AND PLAIN-VIEW DOCTRINE TO LICENSE PLATES

This Part discusses the correct way to apply the *Katz* test and the plain-view doctrine to license-plates searches. The purpose of this Part is to show that when courts properly apply these tests to this issue, the results will be very different than in *Ellison* and similar cases.

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203. *Class*, 475 U.S. at 108.

204. Delaware v. Prouse, 440 U.S. 648, 653–54 (1979).

205. *Class*, 475 U.S. at 108.

206. Justice O'Connor's majority opinion frames the search of the VIN around the initial traffic stop and reasons that because the traffic stop was valid, the officer would have been justified in obtaining the VIN from the vehicle. *Id.* at 115. From there, Justice O'Connor treats the VIN search as part of the overall Fourth Amendment transaction involving the traffic stop and analyzes the reasonableness of the search based on the level of intrusiveness. *Id.* at 116–20. Justice O'Connor's reasoning is nearly identical to how Justice Stewart explains the plain-view doctrine. *See Coolidge*, 403 U.S. at 466 ("The [plain-view] doctrine serves to supplement the prior justification—whether it be a . . . search incident to lawful arrest . . . and permits the warrantless seizure.").

207. *Class*, 475 U.S. at 118–19.

208. *Id.* at 119; *see also id.* at 132 (White, J., dissenting) (refusing to join the majority because it allows officers to search cars for the VIN when there is a legal stop).

209. *Id.* at 119 (majority opinion).

210. *Id.*

211. *See* United States v. Ellison, 462 F.3d 557, 561 (6th Cir. 2006) (ignoring the latter half of the holding in *Class*).

A. If Courts Applied the Katz *Test Properly to License-Plate Searches, They Would Conclude that the Fourth Amendment Applies to License-Plate Searches*

The Fourth Amendment and *Katz* test are not meant to be applied in a rigid fashion.[212] Therefore, in order for courts to apply these rules of law properly, they must have a strong understanding of the foundational principles that underlie these rules.[213] This means courts must use the original meaning of reasonableness, which prohibits both arbitrary state action and mass surveillance.[214] This understanding of reasonableness should be applied to all license-plate searches, regardless of whether they are performed manually by police or automatically by ALPRs. Next, when courts apply the *Katz* test, they need to understand the privacy interest at stake.[215] This means recognizing the difference between when the interest at stake is perceived through natural sight versus technologically enhanced sight.[216] Courts will be best prepared to make this distinction if they follow the guiding principle of *Katz*, which says that "the Fourth Amendment protects people, not places."[217] This principle moves away from the rigid and archaic physical-trespass theory of the Fourth Amendment to a more expansive theory, which is better equipped to handle the impacts of modern technology on individual privacy.[218]

The *Katz* test says that when a person has an expectation of privacy that society is willing to recognize as reasonable, the Fourth Amendment will protect that interest.[219] To determine whether a driver has an expectation of privacy, the Supreme Court has said "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment Protection. But what he seeks to preserve as private, even in an area

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212. *See* Kyllo v. United States, 533 U.S. 27, 35 (2001) (noting that *Katz* rejected the rigid application of the Fourth Amendment using the physical trespass theory, and adopted a standard that is more flexible and capable of dealing with advancing technology); *see also* Braun v. Maynard, 652 F.3d 557, 560 (4th Cir. 2011) ("Applying the Fourth Amendment has always required consideration of a search's context and characteristics rather than a mechanical application of hard-and-fast rules.").

213. *See supra* Part I (explaining in detail what happens when courts decide cases without a firm understanding of the foundational principles of the Fourth Amendment, namely its dual prohibitions of arbitrary state action and mass surveillance); *supra* Part II.D (explaining that courts misunderstand the interest at stake because they do not understand the principles of *Katz* and, as a result, they apply the *Katz* test to the wrong interest).

214. *Supra* Part I.

215. *Supra* Part II.D.

216. *Supra* Part II.D.

217. Katz v. United States, 389 U.S. 347, 351 (1967).

218. Carpenter v. United States, 138 S.Ct. 2206, 2213 (2018); *see also infra* Part III.D.

219. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

accessible to the public, may be constitutionally protected."[220] Implicit in the expectation of privacy is the presumption that individuals are making conscious and consensual choices about what they expose to the public and what they keep private.[221]

1. Applying *Katz* to the Correct Privacy Interest: Why a Driver's Electronic Data is the Privacy Interest at Stake—Not the Physical License Plate

Courts like *Ellison* use only a natural-sight approach; and therefore, they perceive the privacy interest at stake as the physical license plate.[222] As a result, when they apply the first prong of the *Katz* test to this interest it always fails.[223] Since the law mandates that drivers expose their plates to the public, courts like *Ellison* reason that there can be no expectation of privacy.[224] But this reasoning is flawed for two reasons.

First, the court tries to infer consent through compliance with a mandate.[225] Second, and more importantly, the physical license plate is not the privacy interest at stake. License plates are but a means to access a driver's electronic data.[226] This is the real interest at stake. When law enforcement runs electronic searches of license plates, they are using technology to enhance their sight.[227] A court that looks for the interest from the perspective of technologically enhanced sight will realize that the interest at stake is not in the physical world—but in the digital one.

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220. *Id.* at 351–52 (majority opinion).

221. When the Supreme Court created the *Katz* test, they based it on the fact that Mr. Katz entered the booth and closed the door. The Court reasoned that these acts meant that Mr. Katz made both a conscious and voluntary decision to keep the public from hearing his conversation. As a result, Mr. Katz was rightfully entitled to a reasonable expectation of privacy. *Id.* at 352.

222. United States v. Ellison, 462 F.3d 557, 561 (6th Cir. 2006).

223. *Id*.

224. *Id.*

225. There is a stark difference between voluntarily presenting one's plates and complying with a mandate. The license-plate mandate is a fundamental part of legally operating a car. People cannot opt out of showing their license plate to the public, no more than could they opt out of having their cellphones automatically transmit information to cellphone towers. Carpenter v. United States, 138 S.Ct. 2206, 2211–12 (2018) (explaining that the phone automatically transmits information to cellphone towers, regardless of whether the owner is using the phone or not). Thus, to say anyone operating a car is "voluntarily" presenting their license plate to the public would be akin to saying anyone using a cellphone is "voluntarily" consenting to have their movements tracked and stored. One cannot honestly look at these situations and believe that users are voluntarily choosing to expose information to the public as the *Katz* test presupposes.

226. *See, e.g.*, *Ellison*, 462 F.3d at 559 (using the license plate to conduct an electronic search of the driver's driving data); *accord* Olabisiomotosho v. Houston, 185 F.3d 521, 523 (5th Cir. 1999); United States v. Walraven, 892 F.2d 972, 973–74 (10th Cir. 1989).

227. *Supra* notes 146–47 and accompanying text.

2. Drivers Have an Expectation of Privacy in Their Driving Data

When the privacy interest is properly framed as a person's driving data, then there is no doubt that the driver has an expectation of privacy. When drivers give the DMV personal information like their name, address, and Social Security Number (SSN), they do so with an expectation that the DMV will not expose this information to the public.[228] This expectation comes from the DPPA, which expressly limits who state DMVs may share information with.[229] Under the DPPA, DMVs cannot give a driver's personal information to the public without the driver's consent.[230] However, there is an exception that allows DMVs to share this information with law enforcement and other government officials so long as it is "in connection with matters of motor vehicle or driver safety and theft . . . ."[231] The DPPA's definition of personal information is extensive, including a person's name, address (minus the five-digit zip code), photograph, SSN, driver's-license number, telephone number, and medical information.[232]

The DPPA distinguishes between a person's private data and their public data, such as driving accidents, violations, and status.[233] This distinction allows critics like the majority in *Ellison* to claim that since portions of a driver's file are public record, then the driver cannot have a privacy interest in those portions of their file.[234]

This argument is flawed for two reasons. First, it assumes that there can be a clear partition between public and private information. In the case of cars, private and public data are inextricably linked, because private information is an administrative tool used to catalogue public information.[235] Driving records best exemplify this. Driving records contain

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228. *See* Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721(a) (2018) (restricting who state DMVs may share a driver's personal information with); 18 U.S.C. § 2725(3) (defining personal information to include a driver's name, address (except for the five-digit zip code), and social security number (SSN)).

229. 18 U.S.C. § 2721(a).

230. *See* 18 U.S.C. § 2721(d) (excluding the exceptions laid out in § 2721(b), the DMV must obtain a driver's consent before releasing their personal information to a third party).

231. 18 U.S.C. § 2721(b)(2).

232. 18 U.S.C. § 2725(3)–(4).

233. U.S.C. § 2725(3).

234. The argument is a variation on the *Ellison* court's argument that because license plates are supposed to be exposed to the public, there can be no privacy interest. United States v. Ellison, 462 F.3d 557, 561 (6th Cir. 2006).

235. From an administrative standpoint, this personally identifying information is necessary to distinguish between drivers and their files. In *Ellison*, it would have been difficult for officers to know that they found the right suspect if they did not have personally identifying information such as height, weight, and even a photo. A member of the public would face the same problem if they tried to pull Mr.

public information such as traffic infractions and driving status.[236] Without other identifying information—such as a person's address, photo, SSN, date of birth, height and weight—it would be very difficult, if not impossible, for law enforcement to distinguish between two people who had the same name.[237] It is for precisely this reason that driving records contain a driver's private information.[238]

The second flaw of this argument is that it presumes that no privacy interest can exist because some members of the public—like law enforcement—have access to this information. Part one of *Katz* states that "what [a person] seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected."[239] This means that just because something is accessible to the public does not mean that an expectation of privacy cannot exist. *Katz* focuses on the efforts of the individual to keep information generally out of the public eye.[240] In this case, a person's driving record is similar to the public phone booth and the DPPA, which limits how that information is accessed, is similar to Mr. Katz physically closing the booth door. The only difference between these scenarios is that the phone booth only had one access point, whereas a person's driving record has multiple.[241] Therefore, when considering this issue of access, courts need to examine who in the general public can access a person's electronic driving record through an individual's license plate.[242]

Ellison's record. *See also* GIERLACK ET AL., *supra* note 20, at 16 (noting that the personally identifiable information coming from a driver's data helps distinguish between individuals).

236. *See, e.g.*, Brief of Amicus Curiae Electronic Privacy Information Center (EPIC) and Twenty-Seven Technical Experts and Legal Scholars in Support of the Petitioner at 13 n.28, Maracich v. Spears, 570 U.S. 48 (2013) (No. 12-25) (citing a federal statute which requires that state DMV databases maintain both public and private information—and using a New York state driving abstract of a driving record as an example to show how this information is woven together).

237. *Cf.* GIERLACK ET AL., *supra* note 20, at 16 (noting that the personally identifiable information coming from a driver's data helps distinguish between individuals).

238. *See, e.g.*, *Abstract of Driving Record,* N.Y. DEP'T. OF MOTOR VEHICLES (Feb. 2012), https://dmv.ny.gov/forms/ds2421.pdf (showing the types of information on a New York driving record).

239. Katz v. United States, 389 U.S. 347, 351–52 (1967) (emphasis added).

240. *See id.* (looking at Mr. Katz's efforts to exclude the "uninvited ear" from his conversation).

241. In *Katz*, the Court treated closing the phone booth as an effective way of keeping people for listening into Mr. Katz's conversation. *Id.* at 351 ("[W]hat [Mr. Katz] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear."). In contrast, a person's driving data could be accessed via their license plate and driver's license. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 648 (1979) (using the driver's license to access the driver's data); United States v. Ellison, 462 F.3d 557, 563 (6th Cir. 2006) (using the license plate to access the driver's data).

242. Additionally, courts need to contend with how much access police have. The DPPA places no limitations on an officer's ability to access a driver's electronic data, so long as it is in connection with carrying out law enforcement's functions. Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721(b)(1) (2018). Without a statutory limitation, the Fourth Amendment becomes the only thing standing between officers and unfettered access to a driver's data. Thus, when it comes to using the physical license plate as an access point to a driver's data, the current battle is not about how much the

With limited exceptions, the DPPA explicitly keeps the general public from using a person's license-plate number to access their driving record.[243] As a result, in nearly every jurisdiction, the DMV only grants access to a person's driving record through some combination of the individual's driver's-license number, SSN, date of birth, name, or consent.[244] In several states, drivers can only access their own record.[245] Given these requirements, it is quite difficult for an unauthorized member of the public to access another person's public driving record without the driver's consent or knowledge.[246] While members of the public can still run a license-plate number through online platforms,[247] they run a high risk of violating the DPPA and other state laws through unauthorized access to a person's private information.[248] As a result, it is effectively illegal for most members of the public to run a license-plate search on another person.[249] This ensemble of limitations placed on the public at large constitutes a conscious effort to keep parts of driving data from the public. These efforts to keep information private are enough to create an expectation of privacy. Thus, part one of *Katz* is satisfied.

3. A Person's Driving Data is a Privacy Interest that Society is Willing to Recognize as Reasonable

Part two of *Katz* requires the interest to be one that the society is willing to recognize as reasonable.[250] The enactment and enforcement of the DPPA is strong evidence that society is willing to—and does in fact—recognize a driver's privacy interest in their data. First, the DPPA's statutory language expressly restricts every state DMV's ability to release a

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door should be closed (i.e., whether the standard should be warrants, probable cause, or reasonable suspicion); rather it is a battle of whether there should be a door at all (does the Fourth Amendment apply). In her dissenting opinion, Judge Moore notes that the trial court found that officers lacked probable cause and thus they could not be considered to be "carrying out legitimate law enforcement duties." *Ellison*, 462 F.3d at 570–71 (Moore, J., dissenting). If the officers were not carrying out their duties, then it is arguable that they could not comply with the DPPA.

243. Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Federal Driver's Privacy Protection Act, 18 U.S.C.A. §§ 2721 to 2725*, 183 A.L.R. Fed. 37, § 2 (2020).

244. Spencer Lam, *State-by-State Guide to DMV Records*, VR RESEARCH (Jan. 16, 2019), https://www.vrresearch.com/blog/2019/1/16/dmv-records.

245. *Id.*

246. *Supra* text accompanying notes 243–45; *see also* 18 U.S.C. § 2721(a) (making it illegal to disseminate personal information to unauthorized persons or entities).

247. *See, e.g.*, *Free License Plate Lookup*, VINCHECKINFO, https://vincheck.info/free-license-plate-lookup/ (last visited Nov. 25, 2020) (allowing people to run license plates).

248. 18 U.S.C. § 2721(a).

249. *Supra* notes 243–48 and accompanying text.

250. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

driver's data.[251] Second, the statute's legislative history shows that Congress created the act with the intent to protect drivers' DMV data.[252] Third, courts have recognized that the DPPA creates a statutory right to privacy over one's driving information.[253] This means that private individuals can sue to enforce their rights. The Eleventh Circuit in *Collier v. Dickinson* went the furthest in holding that the DPPA creates a constitutional right to privacy in a driver's data that is enforceable under federal law.[254] Even juries have recognized driver privacy rights in their driving data. One jury awarded Amy Krekelberg $585,000 in damages after officers improperly accessed the personal information in her DMV records.[255] Since 2003, officers had accessed Ms. Krekelberg's driving record anywhere from 74 up to 1,000 times, even though she was not under investigation.[256] Another jury awarded Jennifer Menghi $3,000,000 after an officer used the personal information on her DMV records to harass her.[257] The DPPA's history, language, and enforcement prove that a driver's expectation of privacy in their electronic driving data is an interest that society finds reasonable and worthy of protecting. Thus, part two of the *Katz* test is satisfied.

Since both elements of the *Katz* test are satisfied, a driver has a reasonable expectation of privacy in their driving data, and thus it is an interest the Fourth Amendment protects. Since the Amendment protects a driver's data from unreasonable searches, it follows that the Amendment must apply to the information needed to conduct such a search—license-plate numbers.

B. Why License-Plate Scans and Searches Done by ALPRs Also Satisfy the Katz *Test*

Much of the arguments laid out above with respect to manual license-plate searches apply to ALPRs. Like the manual search, these

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251. Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721(a) (2018).

252. Buckman, *supra* note 243, § 2.

253. *See id.* § 13 (citing Collier v. Dickinson, 477 F.3d 1306 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 869 (2008); Heglund v. Aitkin County, 871 F.3d 572 (8th Cir. 2017)).

254. *See* Buckman, *supra* note 243, § 13 (2020) (citing Collier v. Dickinson, 477 F.3d 1306 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 869 (2008)).

255. Civil Case Judgment at 1, Krekelberg v. Minneapolis, No. 13-3562 DWF/TNL (D. Minn. June 19, 2019).

256. *Id.*; Louise Matsakis, *Minnesota Cop Awarded $585K After Colleagues Snooped on Her DMV Data*, WIRED (June 21, 2019), https://www.wired.com/story/minnesota-police-dmv-database-abuse/.

257. Menghi v. Hart, 745 F.Supp.2d 89, 97 (E.D.N.Y. 2010).

devices use technologically enhanced sight to access a driver's data.[258] Although ALPRs operate on databases that are separate from the DMV systems, these databases are populated with a person's driving information collected by the DMV.[259] The expectation of privacy in one's data should not change simply because it passes from the DMV to local law-enforcement's database. Nor should society's willingness to treat that interest as reasonable change because the data has changed hands.

ALPRs add into the mix this issue of location tracking.[260] This type of tracking is possible because each time an ALPR captures a license-plate image, it also adds in a time and location stamp.[261] Through this additional information, law enforcement can gain an accurate depiction of a driver's driving habits and schedule.[262] This is identical to what officers did in *Carpenter* using cellphone-locator records.[263] The million-dollar question is whether this information collected by law enforcement is part of a driver's data.

One could argue that it should not be, since this information does not belong to the driver. Anyone could gather this information by simply observing the driver.[264] The problem with this argument is that it does not make a distinction between a single officer casually observing an individual's movements and a comprehensive scheme to track individuals.[265] This would be an instance where technology's ability to enhance human abilities triggers the Fourth Amendment's prohibition on mass surveillance.[266] It is one thing to casually follow an individual; it is entirely another to create a scheme that accurately tracks not just one person, but rather, hundreds of thousands of people.[267]

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258. GIERLACK ET AL., *supra* note 20, at 16.

259. *Id.* at 8.

260. *Automated License Plate Readers (ALPRs)*, *supra* note 19.

261. *Id.*

262. *Id.*

263. *See* Carpenter v. United States, 138 S.Ct. 2206, 2212-13 (2018) (using data gathered from the cell-site location information to place Carpenter near four charged robbery locations).

264. *See* Lynch & Bibring, *supra* note 18 (arguing that ALPRs are no different than law enforcement manually tracking cars moving in the public).

265. *Cf.* GIERLACK ET AL., *supra* note 20, at 15 (showing that part of the effectiveness of ALPRs lies in its ability to access a variety of databases from different branches of law enforcement, along with timely updates to the system).

266. In his concurring opinion in *United States v. Jones*, Justice Alito notes that technology is changing Fourth Amendment concerns because "[i]n the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken." United States v. Jones, 556 U.S. 400, 429 (2012) (Alito, J., concurring).

267. *See Automated License Plate Readers (ALPRs)*, *supra* note 19 (noting that one vendor of ALPRs brags that its product could scan up to 6.5 billion plates each month); GIERLACK ET AL., *supra*

Second, this argument fails to acknowledge that people do have a "reasonable expectation of privacy in the whole of their physical movements."[268] This makes sense since generally people do not broadcast their entire schedule to the masses. Even though some members of the public may have access to portions of a driver's itinerary, this does not mean that a driver cannot have an expectation of privacy. After all, the Supreme Court has said that one can still maintain an expectation of privacy even when the interest is accessible to the public.[269] Based on these factors, a driver's itinerary and habits should be included as part of their private driving data.

C. The Founding Principals of Katz *Supports Extending Fourth Amendment Protections to License-Plate Searches*

One of the most cited lines from *Katz* is that "the Fourth Amendment protects people, not places."[270] This simple phrase is more than mere dicta; it is the organizing principle around which the *Katz* test turns.[271] Before *Katz*, courts evaluated violations of the Fourth Amendment using the physical-trespass theory.[272] This theory based violations of the Fourth Amendment on whether law enforcement physically invaded a person or their property.[273] The *Katz* decision moved away from this rigid application, towards an understanding of the Fourth Amendment that vests the right to privacy in the person.[274] This is ultimately what the phrase—the Fourth Amendment "protects people, not places"—means, and why it is the foundational principal of *Katz*. The Supreme Court designed the *Katz*

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note 20, at 13–16 (explaining the comprehensive police methods attached to ALPRs' data collection). *Cf.* Carpenter v. United States, 138 S.Ct. 2206, 2210 (2018) (noting that "there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.").

268. *Carpenter*, 138 S.Ct. at 2217 (citing United States v. Jones, 556 U.S. 400, 430 (2012) (Alito, J., concurring)).

269. Katz v. United States, 389 U.S. 347, 351 (1967).

270. *Id.*

271. *See supra* notes 70–74 and accompanying text.

272. DRESSLER ET AL., *supra* note 28, at 68.

273. *Id.* at 66.

274. The reasonable expectation of privacy is the basis for judging whether the Fourth Amendment applies. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). This expectation is rooted in the person and their choices. *Id.* at 351 (majority opinion). Since the Fourth Amendment's protection turns greatly on these choices, individual privacy rights are vested in the person. *See also* Carpenter v. United States, 138 S.Ct. 2206, 2237 (2018) (explaining that *Katz* supplanted prior case law basing searches on physical-trespass theory with a new guiding principle that asserts, "the Fourth Amendment protects people, not places," and a person's efforts to keep certain aspects of life private (quoting *Katz*, 389 U.S. at 351)).

principle to be purposefully broad so that future Fourth Amendment analysis could better deal with the problem of modern technology invading a person's privacy without ever making physical contact.[275]

1. How Does the Foundational Principle in *Katz* Apply to License-Plate Searches?

Ellison and other courts struggle to apply this organizing principle to their analyses because they likely do not understand its application in cases involving technology.[276] One stark example is *Olabisiomotosho*'s argument that license-plate searches should not be protected by the Fourth Amendment in part because "unless a registration check reveals information which raises a reasonable suspicion of criminal activity, the subject remains unaware of the check and unencumbered."[277] Put another way, *Olabisiomotosho* is asserting that people do not suffer harm from a search until they are under arrest. Therefore, it is constitutionally permissible for the police to run baseless searches on people. This pattern of reasoning reflects the physical-trespass theory of the Fourth Amendment, where the harm itself is tied to physical contact.[278]

The *Katz* principle is far more expansive and is designed to deal with the problem that technology can still invade a person's privacy without ever making physical contact.[279] In order for courts to properly apply the *Katz* test to the issue of license-plate searches, they need to take the principles of the doctrine seriously. This means, in part, that courts must let go of the physical-trespass theory.

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275. *See, e.g.*, *Katz*, 389 U.S. at 350–53 (dealing with the issue of the government eavesdropping without physically intruding into the public phone booth).

276. United States v. Ellison, 462 F.3d 557, 562 (6th Cir. 2006) (failing to understand the dissent's contention that the electronic search using the LIEN search system could infringe on a driver's Fourth Amendment privacy interests); *see also id.* at 561 (failing to fully state the *Katz* test, specifically leaving out the portion which says: "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351 (1967)).

277. Olabisiomotosho v. Houston, 185 F.3d 521, 529 (5th Cir. 1999) (quoting United States v. Walraven, 892 F.2d 972, 974 (10th Cir. 1989)).

278. *Compare* DRESSLER ET AL., *supra* note 28, at 66–67 (citing Olmstead v. United States, 277 U.S. 438 (1928), which claimed that there was no violation of the Fourth Amendment because there was no physical invasion), *with Olabisiomotosho*, 185 F.3d at 529 (quoting United States v. Walraven, 892 F.2d 972, 974 (10th Cir. 1989) to claim that there is no violation of the Fourth Amendment until there is a physical seizure).

279. *See, e.g.*, *Katz*, 389 U.S. at 350–53 (dealing with the issue of the government eavesdropping without physically intruding into the phone booth).

2. What Does Taking the Foundational Principle of *Katz* Seriously Look Like?

Moving away from the physical-trespass theory is only half the battle. In order for courts to take the principle in *Katz* seriously, they have to look closely at how technology is operating under the circumstances. An instructive application of this principle is *Kyllo v. United States*. There, officers suspected Mr. Kyllo of growing marijuana in his home, so they used a thermal-imaging device to create images of the home's interior based on heat waves emanating from the premises.[280] In *Kyllo*, the issue was whether the use of this heat-sensing technology, which enhanced the officers' natural senses, was a constitutional search.[281] The government argued that the search was constitutional because the heat waves were on the outside of the home and thus not protected.[282] Invoking *Katz*, the Supreme Court ruled against the government, stating: "We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth."[283] The Court in *Kyllo* took the principles of *Katz* seriously when they rejected the government's trespass argument and looked at how officers used technology to see into a person's home.[284]

Courts that take seriously the principle that "the Fourth Amendment protects people, not places,"[285] would realize that there is no difference between law-enforcement's behavior in *Katz*, *Kyllo*, and *Ellison*. In all three cases, officers used sensory-enhancing technology to reach into a space in order to gather information about a person.[286] In *Katz*, officers used a listening device to *hear into* the phone booth so that they could reach Mr. Katz.[287] In *Kyllo*, officers used thermal imaging to *peer into* the home so that they could reach Mr. Kyllo.[288] In *Ellison*, officers used an electronic license-plate search to access driving records so that they could *reach into* the vehicle and gather information about the driver.[289] In all these cases, technology extends law-enforcement's reach so that they can gather

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280. Kyllo v. United States, 533 U.S. 27, 29–30 (2001).
281. *Id.* at 29.
282. *Id.* at 35.
283. *Id.*
284. *Id.*
285. Katz v. United States, 389 U.S. 347, 351 (1967).
286. *See, e.g.*, *Katz*, 389 U.S. at 348 (using technology to reach the person); *accord Kyllo*, 533 U.S. at 33; United States v. Ellison, 462 F.3d 557, 559 (6th Cir. 2006).
287. *Katz*, 389 U.S. at 348.
288. *Kyllo*, 533 U.S. at 29–30.
289. *Ellison*, 462 F.3d at 559.

information about a person.[290] Since the foundational principle of *Katz* vests privacy rights in the person, law enforcement must comply with the Fourth Amendment when they are using technology to deliberately reach the person.

3. A New Methodology for Applying the Foundational Principles of *Katz*

Imagine that in each of these cases officers did not have technological assistance. How would they have gone about acquiring the information? In almost every case, officers would have likely conducted either a search or seizure that would have triggered the Fourth Amendment. If officers wanted to listen to Mr. Katz's phone call or search Mr. Kyllo's home, they would have needed either a search warrant or probable cause to enter the space.[291] In *Ellison*, if officers wanted to learn about the driver and vehicle, they would have to do a traffic stop and obtain the individual's driver's license.[292] Since traffic stops are constitutionally protected seizures, officers would likely have to support the stop with either probable cause or reasonable suspicion.[293]

The only difference between these hypotheticals and the actual scenarios is that the hypotheticals require officers to engage in some form of physical trespass to reach their target.[294] Under a traditional physical-trespass theory, these situations would clearly trigger Fourth Amendment protections.[295] The *Katz* principle is a purposefully broader theory, which is meant to deal with both the physical and non-physical

290. *See also Katz*, 389 U.S. at 348 (using technology to reach the person); a*ccord Kyllo*, 533 U.S. at 29–30; *Ellison*, 462 F.3d at 559.

290. *Katz*, 389 U.S. at 348.

291. Admittedly, it is difficult to think of a scenario where law enforcement in *Katz* could listen to the conversation without technology. If the government had to wire-tap the phone, they would have needed a warrant. CLANCY, *supra* note 29, at 54. In *Kyllo*, the officer would have needed a search warrant to enter the home to see the inside. *Id.* at 206.

292. The officers in *Ellison* were essentially conducting a spot check, which is the same thing that the officer in *Delaware v. Prouse* conducted. Delaware v. Prouse, 440 U.S. 648, 650 (1979). The only difference is that the officer there had to perform a traffic stop in order to get the person's driver's license. *Id.* at 650–51.

293. *Id*. at 653–54.

294. *Compare supra* text accompanying notes 286–90 (detailing how officers used technology in *Katz*, *Kyllo*, and *Ellison* to conduct searches), *with supra* text accompanying notes 291–93 (describing how officers in *Katz*, *Kyllo*, and *Ellison* would need to comply with the Fourth Amendment if they did not have technological assistance).

295. *See* DRESSLER ET AL., *supra* note 28, at 66–67 (explaining the Fourth Amendment violations based on violations of a person's property interests).

invasions.[296] One way courts can better apply *Katz* to technology cases is to use a hypothetical like the one constructed above. Courts should ask: In the absence of technological assistance, how would an officer obtain this information? If the officer would have had to engage in a constitutionally recognized search or seizure under the physical-trespass theory, then the use of technology is merely an attempt to evade the Amendment by changing the form of the invasion without impacting the substance. Thus, the court in those cases should look to see whether the use of technology complied with the Fourth Amendment.

If the *Ellison* court took this approach, it would understand that this search was unconstitutional. Running the license plate in this instance was a spot check.[297] In the absence of technology this spot check would require a seizure through a traffic stop.[298] In *Delaware v. Prouse*, the Supreme Court addressed the issue of officers performing baseless spot checks on drivers.[299] The Court held:

> The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ." By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon

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296. *See* Katz v. United States, 389 U.S. 347, 353 (1967) ("[I]t becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

297. *Compare* United States v. Ellison, 462 F.3d 557, 559 (6th Cir. 2006) (running the license plate in order get information about any potential violations), *with* Delaware v. Prouse, 440 U.S. 648, 650 (1979) (conducting a spot check using a driver's license which is meant to find potential violations).

298. *See, e.g.*, *Prouse*, 440 U.S. at 653–54 (engaging in a Fourth Amendment seizure first so that officer could then perform the spot check).

299. *Id*. at 661.

> which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.[300]

The *Prouse* decision expressly rejects a system of traffic enforcement where officers can seize drivers without cause first and then search them later.[301] *Ellison* is only distinguishable from *Prouse* in that technology allowed officers to conduct a baseless search of a driver first and then seize them later.[302] In both cases, the spot check's substantive invasion is still the same, even if the form differs. Under such circumstances, a court that takes seriously the principles of *Katz*, should apply Fourth Amendment scrutiny to this technology-based search.

D. Applying the Plain-View Doctrine: Why the Type of License-Plate Search that Took Place in Ellison *Does Not Satisfy the Doctrine*

Much like the *Katz* test, correctly applying the plain-view doctrine requires that courts appreciate the Fourth Amendment's dual prohibition on arbitrary state action and mass surveillance. These prohibitions are integral to the plain-view doctrine because they limit the doctrine's application.[303] Just as courts need to understand the expansive principles of *Katz* in order to properly apply the test, courts need to understand the limiting principles of the plain-view doctrine in order to apply it.[304] Finally, when courts apply this doctrine, they must be able to distinguish between interests that come into plain view because of natural sight versus those that come into view because of technologically enhanced sight.[305]

As explained previously in Part II.B, *Matthews* is a proper application of the plain-view doctrine where the interest comes into plain view because of natural sight.[306] This Part addresses the *Ellison* case where the interest comes into plain view because of technologically enhanced sight. Namely,

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300. *Id*. (citation omitted).

301. *See id*. ("To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . .'" (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968))).

302. *Compare* United States v. Ellison, 462 F.3d 557, 559 (6th Cir. 2006) (running the license plate first then performing a seizure second), *with Prouse*, 440 U.S. at 650 (seizing the vehicle first then performing a search second).

303. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465–67 (1971) (discussing the parameters of the plain-view doctrine).

304. *Supra* Part II.D.

305. *See supra* Part II.D.

306. *Supra* Part II.D.

this subpart explains why cases like *Ellison* do not satisfy the requirements of the plain-view doctrine. Additionally, it will explain why the limiting principles of the plain-view doctrine reject allowing law enforcement to engage in these types of searches.

1. *Ellison* Does Not Satisfy the Elements of the Plain-View Doctrine

The plain-view doctrine says that when an officer has a prior justification for being in a specific place, and they inadvertently find incriminating evidence in plain view, an officer may search or seize that evidence without a warrant.[307] To invoke the plain-view doctrine an officer must: (1) see the item from a "lawful vantage point";[308] (2) have a right to access the item;[309] and (3) it must be "immediately apparent to the [officer] that they have evidence before them . . . ."[310]

In *Ellison*, the majority perceived the interest as the physical license plate because the court operated from an understanding of plain view as natural sight.[311] Leaving aside that this is the incorrect way to construe the interest, the facts of the case still do not satisfy the plain-view doctrine. The majority found that the officers had a lawful vantage point because the officer observed the license plate while doing a routine patrol of a public place.[312] The majority also argued that since license plates play an important role in the government's regulation of vehicles, the officer—in furtherance of this government interest—had a right to access the license plate.[313] Even if these rationales are accepted as true, the officers in *Ellison* did not satisfy the third element.

For an item to be "immediately apparent" as evidence of a crime, "the officer must have probable cause to seize the article in plain view."[314] In *Ellison*, the trial court determined that the officer did not have probable cause to support its license-plate search.[315] Without probable cause officers could not justify the license-plate search under the plain-view doctrine. While it is possible that the physical license plate could give rise to

307. *Coolidge*, 403 U.S. at 465–66.
308. DRESSLER ET AL., *supra* note 28, at 230.
309. *Id.* at 231.
310. *Coolidge*, 403 U.S. at 466.
311. *Supra* Part II.C.
312. United States v. Ellison, 462 F.3d 557, 563 (6th Cir. 2006).
313. *Id.*
314. DRESSLER ET AL., *supra* note 28, at 231 (referencing Arizona v. Hicks, 480 U.S. 321, 331 (1987)).
315. *Ellison*, 462 F.3d at 559.

probable cause, those circumstances were not present here.[316] In *Ellison*, there was no suggestion that there was something wrong with the physical license plate, which would give rise to a belief that a crime was taking place.[317] In contrast, in *Matthews* the military officers had a reasonable belief that a crime was taking place because: (1) they knew that it was illegal for civilian cars to have military license plates; and (2) with their natural sight, the officers could tell that the civilian vehicle had plates with all the physical traits of a military plate.[318]

2. The Limiting Principles of the Plain-View Doctrine Reject Allowing Searches Like Those in *Ellison*

When the Court created the plain-view doctrine, it did so understanding that most things that an officer would search or seize would already be in the officer's plain view before the search or seizure occurred.[319] One of the key limits set is that the search must be backed by probable cause so that it does not turn into an exploratory search.[320] While it is easy for courts like *Ellison* to adopt the natural-sight approach to the license plate, they cannot get past this limiting principle because generally nothing about a driver's physical plate gives rise to probable cause that a crime is underway.[321] Take, for example, cases like *Ellison*, where the incriminating evidence that gives rise to probable cause is something that is normally invisible to the naked eye, such as an individual's electronic driving record. In these situations, courts need to adjust their definition of "plain view" so that they are talking about things visible through technologically enhanced sight and not things readily visible with natural sight. By adjusting their understanding of "plain view" to consider technologically enhanced sight, courts will approach these cases with a more accurate vision of what is actually taking place in the real world.

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316. If such facts were present, then it would essentially be the *Matthews* case all over again because the license plate itself would be evidence of a crime. United States v. Matthews, 615 F.2d 1279, 1281 (10th Cir. 1980).

317. *See Ellison*, 462 F.3d at 559 (basing initial license plate search on the parking violation, not because of any incriminating attribute of the physical license plate).

318. *Matthews*, 615 F.2d at 1281.

319. Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971).

320. *Id.* at 467 (explaining that one of the objectives of the Fourth Amendment and implicit limitations of the plain-view doctrine is the prohibition of "exploratory rummaging.").

321. *Compare* United States v. Matthews, 615 F.2d 1279, 1281 (10th Cir. 1980) (finding clear illegal activity with a military license plate on a civilian car), *with* Olabisiomotosho v. Houston, 185 F.3d 521, 523 (5th Cir. 1999) (seeing no clear illegal activity until the search was done), *and Ellison*, 462 F.3d at 559 (seeing no clear illegal activity until an electronic search was done).

Accessing someone's driving record in the digital world raises questions of why the officer is there in the first place. Courts usually do not ask this question because all they can see is the physical license plate. As a result, courts give discretion to law enforcement to access a person's driving record without ever facing an ounce of judicial scrutiny.[322] The only real limit on an officer's discretion would be local rules and perhaps the DPPA.[323] However, neither one is sufficient to limit discretion. The problem with the DPPA is twofold. First, the DPPA only scrutinizes acts that squarely fall outside law enforcement or traffic safety, such as searches for personal use.[324] Secondly, the DPPA defines these terms broadly. As a result, the DPPA gives law enforcement a lot of latitude to act and never scrutinizes law-enforcement's conduct so long as they stay in those bounds. As to local rules, police departments within the same state can vary on their policy, and some do not have a formalized policy detailing when officers may run license plates while on duty.[325]

When it comes to license plates, the Fourth Amendment is the only tool that can truly guard against personal and professional abuses of power in a uniform manner because it was designed to scrutinize and limit state action.[326] These principles of scrutiny and restraint are ingrained in the plain-view doctrine, hence why it would be abhorrent for a court to use this doctrine to justify not scrutinizing baseless searches.

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322. See for example *Ellison*, 462 F.3d at 566–67, Judge Moore's dissenting opinion where she states: "The majority rests its conclusion that the Fourth Amendment was not implicated by the LEIN search on the relatively uncontroversial fact that . . . [a driver] has no privacy interest in the particular combination of letters and numerals that make up his license-plate number, but pays short shrift to the crucial issue of how the license-plate information is used. . . . [The majority's] approach misses the crux of the issue before the court: even if there is no privacy interest in the license-plate number per se, can the police, without any measure of heightened suspicion or other constraint on their discretion, conduct a search using the license-plate number to access information about the vehicle and its operator that may not otherwise be public or accessible by the police without heightened suspicion?"

323. *See* Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721(b)(1)–(b)(2) (2018) (detailing what are permitted uses of personal information).

324. 18 U.S.C. § 2721(b)(1).

325. *See, e.g.*, Audiotape: Interview with Vermont Law Enforcement (Aug. 4, 2020) (on file with author) (explaining how, in Vermont, there is no real policy on when law enforcement should run a license-plate search while on duty).

326. *See* Delaware v. Prouse, 440 U.S. 648, 653–54 (1979) (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)) (noting that the Fourth Amendment imposes a limitation through a standard of reasonableness on government officials).

IV. COLLATERAL ISSUES

Up until this point, this Note primarily focused on the legal reasons why it is incorrect for courts to assert that the Fourth Amendment does not apply to license-plate searches.

This Part picks up a theme first raised in Part I. In Part I, this Note argued that courts allow for a modern-day form of policing of search first and seize later when they: (1) claim that the Fourth Amendment does not apply to license plates and (2) diminish the standard for seizing car through traffic stops. When these decisions are combined with the advent of ALPRs, courts give life to policing that starkly resembles the general writs of assistance of old. This Part looks at the practical effects of this method of policing, both in terms of manually entered electronic searches and those conducted by ALPRs. In particular, this Part looks at the resulting real-world effects.

United States v. Walraven will be the touchstone of this Part because this case effectively demonstrates many of the collateral issues that arise when courts assert that the Fourth Amendment does not apply to license-plate searches. First, this case shows that without the Fourth Amendment, certain police practices are effectively unreviewable by courts because other Amendments are not capable of providing viable challenges.[327] Worse still, *Walraven* shows that the practices that escape review are so beyond the bounds of the constitution, that even the slightest amount of Fourth Amendment scrutiny would render them unconstitutional.[328] Finally, *Walraven* highlights the problem that mistakes cause in policing.[329]

A. What Happened in United States v. Walraven*?*

In *United States v. Walraven*, a Wyoming officer ran the license plate of a passing car even though, by all accounts, the car was not engaged in any overt criminal conduct or suspicious behavior.[330] The officer targeted the vehicle because it had a Tennessee license plate, and it was the officer's job to specifically target and search all out-of-state license plates.[331] The officer stopped the vehicle when the registration check incorrectly returned

327. *Infra* Part IV.B.
328. *Infra* Part IV.B.
329. *Infra* Part IV.C.
330. United States v. Walraven, 892 F.2d 972, 973 (10th Cir. 1989).
331. *Id.*

that the plates belonged to another vehicle.[332] The officer eventually learned of the error, but not before he started questioning the defendant and obtained permission to search the car for drugs.[333] The officer found drugs and arrested the defendant.[334] After their conviction at the trial level, the defendants argued on appeal that the license-plate search violated their Fourth Amendment right to privacy and their Fourteenth Amendment right to travel.[335]

The *Walraven* court dismissed the Fourth Amendment claim, citing *Matthews*.[336] The court dismissed the Fourteenth Amendment claim, arguing that license-plate searches did not interfere with the defendants' right to travel because "[u]nless a registration check reveals information which raises reasonable suspicion of criminal activity, the subject remains unaware of the check and unencumbered."[337] Put another way, *Walraven* asserts that it is constitutionally permissible for the police to run baseless searches on people, because so long as people never learn of the search, there is no harm.

B. Otherwise Unconstitutional Police Practices Escape Scrutiny and Challenge

The type of location-based policing used in *Walraven* could not pass constitutional muster even under the most relaxed standard of reasonable suspicion. In order to meet reasonable suspicion, the State must point to specific and articulable facts that suggest to the reasonable person that criminal activity may be afoot.[338] In *Brown v. Texas*, the Supreme Court held that merely being in a location, even a suspicious one, is not a stand-alone fact that would lead the reasonable person to believe the individual is committing a crime.[339] Location is particularly unpersuasive when it is a place frequented by many people.[340]

The method of policing used in *Walraven* is unconstitutional because the officer based the initial search solely on the fact that an out-of-state driver was in Wyoming. Under *Brown*, this type of location-based targeting

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332. *Id.* at 973–74.
333. *Id.* at 974.
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (explaining, under the reasonable suspicion standard, officers must point to specific and articulable facts that, taken together form a rational inference).
339. Brown v. Texas, 443 U.S. 47, 51–52 (1979).
340. *Id.* at 52.

is not enough to support a search under reasonable suspicion.[341] It is important to point this out because the police policy in *Walraven* is so beyond the bounds of the Fourth Amendment that it could not even pass muster under the Amendment's most relaxed standard.[342] Yet because courts endorse the assertion that the Fourth Amendment does not apply to license plates, they make unconstitutional police practices (like the one in *Walraven*) immune to challenge.

Without the Fourth Amendment, there really are no other viable alternatives for challenging these practices.[343] In *Walraven*, the defendants tried to raise a Fourteenth Amendment right to travel argument; however, the court dismissed it, saying that "[u]nless a registration check reveals information which raises a reasonable suspicion of criminal activity, the subject remains unaware of the check and unencumbered."[344] The court's argument is essentially that a person's right to travel is not impacted by a search until they have been arrested. In the context of the Fourteenth Amendment right to travel, this position is defensible. If one treats the electronic license-plate search as an entirely separate and distinct transaction from the subsequent traffic stop and arrest, then it is easy to argue that an electronic license-plate search alone does not violate the right to travel, since the search does not physically impede the driver's movements.[345]

However, if one tries to apply this argument to the Fourth Amendment, as *Olabisiomotosho* does, one sees that it is patently indefensible.[346] The Fourth Amendment clearly prohibits both arbitrary state action and mass

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341. *Cf. id.* (rejecting use of an alley way frequented by drug users as sufficient support for the stop).

342. *See supra* note 52 and accompanying text (explaining why reasonable suspicion is the most relaxed standard under the Fourth Amendment).

343. Compare *supra* notes 338–42 and accompanying text where *Walraven*'s argument fails in the face of the Fourth Amendment, with *infra* notes 344–45 and accompanying text where *Walraven*'s argument is successful in the face of the Fourteenth Amendment.

344. United States v. Walraven, 892 F.2d 972, 974 (10th Cir. 1989).

345. This bifurcation of the issue is just one approach. A more realistic approach would be to treat the license search and subsequent traffic stop as one single transaction since the search provided the basis for the stop. If a court took this unified view, it is possible to claim that this search does violate the right to travel since it is part of a method of policing that is specifically meant to scrutinize out-of-state drivers and ultimately does impede their movements.

346. In *Olabisiomotosho v. Houston*, the court glosses over the mass surveillance implications when it argues in part that "[u]nless a registration check reveals information which raises a reasonable suspicion of criminal activity, the subject remains unaware of the check and unencumbered." Olabisiomotosho v. Houston, 185 F.3d 521, 529 (5th Cir. 1999) (quoting *Walraven*, 892 F.2d at 974). The court is essentially arguing that the government can covertly spy on its citizens through their license plates, so long as it does not arrest them.

surveillance.[347] The argument that the government can covertly spy on its citizens through their license plates, so long as it does not arrest them, is clearly antithetical to goals of the Fourth Amendment.[348] *Olabisiomotosho*'s argument provides fertile ground for mass surveillance using ALPRs. Furthermore, it exemplifies why courts need to look at the license-plate issue using a broader definition of reasonableness. When courts scrutinize policing methods without considering the mass-surveillance consequences, logic like that in *Olabisiomotosho* can slip through the cracks and get woven into precedent.

C. The Effects of Mistake in Policing

In *Walraven*, the officer's unconstitutional method of policing was further exacerbated by the electronic search mistakenly returning plates as belonging to another vehicle.[349] While mistakes are foreseeable in policing, they do serve as a reminder of why police should have a proper basis before initiating a stop. One of the problems with operating in this overzealous manner is that once the door is open, it becomes very difficult to shut the government out. In this case, the officer's mistake gave him the right to pull over the vehicle.[350] Even though the mistake was eventually resolved and the basis for the stop disappeared, this error still provided enough of an opening for the officer to create a new chain of suspicion, which allowed him to further invade the privacy of the driver.[351] In *Walraven*, a mistaken good-faith belief about incorrect registration led to a completely unrelated drug arrest.[352]

ALPRs suffer from a similar problem because, at times, they do not capture images accurately, which can lead to mistaken information.[353] These mistakes can have dire consequences, as in the case of Denise Green.[354] In 2009, an ALPR misread her license plate and flagged her car as stolen.[355] This mistake was identical to the one that took place in *Walraven*; however, in this case, the mistake resulted in Ms. Green, an innocent

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347. Carpenter v. United States, 138 S.Ct. 2206, 2214 (2018).

348. *See id.* ("[T]he Amendment seeks to secure 'the privacies of life' against 'arbitrary power.' . . . [R]elatedly . . . a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" (citation omitted)).

349. *Walraven*, 892 F.2d at 974 (pulling the driver over only because the officer made a mistake in the registration check of the car).

350. *Id.*

351. *Id.*

352. *Id* at 974–75.

353. GIERLACK ET AL., *supra* note 20, at 15.

354. *Automated License Plate Readers (ALPRs)*, *supra* note 19.

355. *Id.*

African-American woman, being handcuffed at gunpoint and forced to her knees.[356]

In August 2020, Colorado officers used a license-plate reader to scan the license plate of an SUV.[357] Some license-plate readers, like the one used there, only record plate numbers and not the state where the plate is issued or the type of car it is registered to.[358] This lack of data can lead to false matches. In this case, the reader matched the license-plate number of the SUV to the license plate of a stolen motorcycle from Montana.[359] This simple mistake led officers to handcuff four young Black girls, ages 6, 12, 14, and 17.[360] The officers had them lay flat on the ground with their stomachs pressed against the hot asphalt while they cried in terror for their mother, who was handcuffed and placed in the back of a patrol car.[361] The police chief later apologized.[362] Unfortunately, no matter how sincere this apology was, it will not erase the trauma that the mother and her girls experienced on that fateful summer day.

Sometimes officers have the correct information from the license plate but can be completely mistaken about the driver.[363] This is one of the biggest problems with solely relying on license-plate searches. They give officers information about the vehicle's registered owner but nothing regarding the present driver.[364] Since it is possible for people other than the registered owner to drive a car, any violations found against the owner makes the vehicle and, consequently any person driving it, subject to possible seizure by the police.[365] This is precisely what occurred in the 2014 case, *United States v. Chartier*, where law enforcement ran a license-plate search and learned that the registered owner was a white male with an invalid driver's license.[366] At the time, the driver was actually a female named Aubree Sivola.[367] Since the officer did not try to verify the driver's identity before the stop, law enforcement ultimately subjected Ms. Sivola to

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356. *Id.*

357. Elise Schmelzer, *"It Was Done Wrong": Aurora Police Chief Explains Mistakes That Led to Officers Handcuffing Children*, THE DENVER POST (Aug. 4, 2020), https://www.denverpost.com/2020/08/04/aurora-police-handcuff-children-video/.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *See, e.g.*, United States v. Chartier, 772 F.3d 539, 542 (8th Cir. 2014) (pulling over the driver based on information from the registration check which did not apply to the driver).

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

a traffic stop, which was actually groundless.[368] This is the inherent risk that officers run each time they base their stops solely on searches of a person's license plate.

This form of policing is as blind as officers conducting random spot checks on passing cars.[369] One solution to this problem is to follow the approach laid out in *Delaware v. Prouse*. In *Prouse*, the Supreme Court stated that "the foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations."[370] The logic of this approach is that, by observing the violation, probable cause or reasonable suspicion becomes tied directly to the present driver's behavior rather than to the registered-owner's identity. Additionally, this approach upholds one of the essential purposes of the Fourth Amendment: "[T]o impose a standard of 'reasonableness' upon the exercise of discretion by . . . law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'"[371]

D. Driving While Black: Discrimination in Policing

Up until this point, this Note has only made legal arguments, which show how this form of policing affects every person. However, the ugly truth is policing does not affect all people equally. People of color, specifically African Americans, have and continue to bear the consequences of overzealous police practices. This Subpart draws upon some of my own experiences as an African-American male and other news reports to discuss this problem in policing.

One of the nagging questions of the *Kansas v. Glover* case is why did the officer choose Mr. Glover's car? By all accounts, the car was obeying all overt traffic rules and regulations.[372] There was nothing about Mr. Glover's driving behavior that would have made him any more suspicious than any other car—so why this car? One could chalk it up to bad luck. Mr. Glover was simply in the wrong place at the wrong time. But when I

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368. *See id.* (conducting a traffic stop based on information from the registration check that did not apply to the driver).

369. *Compare* United States v. Ellison, 462 F.3d 557, 559 (6th Cir. 2006) (running a baseless search of the license plate in order to find potential violations), *with* Delaware v. Prouse, 440 U.S. 648, 650 (1979) (conducting a baseless spot check using a driver's license in order to find potential violations).

370. *Prouse*, 440 U.S. at 659.

371. *Id*. at 653–54 (footnote omitted) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)).

372. Kansas v. Glover, 422 P.3d 64, 66 (Kan. 2018), *rev'd*, 140 S.Ct. 1183 (2020).

discovered Mr. Glover was African American, I could not help but wonder if the initial search was just another case of driving while Black (DWB).

1. How Reasonable Suspicion Facilitates Discrimination in Policing

DWB is a colloquial expression that describes the "common experience of constant stops and harassments of [B]lacks by police."[373] The expression conveys the notion that being Black in certain spaces and times is in itself an offense, no different than running a red light or speeding (albeit this offense is not written explicitly in any law—at least not anymore).[374] DWB occurs in part because courts lowered the threshold of proof officers need before initiating a stop. As this Note previously mentioned, the standard of reasonable suspicion was created expressly to allow for *Terry* stops—commonly referred to as "stop and frisk."[375] Stop and frisk was originally touted as a brief investigatory search meant to protect officers from potentially dangerous suspects.[376] While there is truth to this argument, the cost for additional officer safety was rampant harassment of people of color.

New York City best exemplifies this cost. From 2004 to 2012, the New York Police Department (NYPD) conducted over 4.4 million *Terry* stops.[377] At its height in 2011, officers briefly detained 686,000 individuals in a year.[378] Of the 4.4 million reported stops, officers searched individuals for weapons approximately 50% of the time.[379] Of these roughly 2.3 million weapon searches, only 1.5% revealed a weapon.[380] This means that 98.5% of the time, the individual had nothing on them.[381] Stop-and-frisk cases overall led to 6% of individuals being arrested, 6% resulting in a summons, while the other 88% never had any further law-enforcement action.[382] Based on these numbers, New York's stop-and-frisk policy had a poor record of actually stopping crime. But the story gets worse when one considers that of the 4.4 million people stopped, 52% were Black, 31% were Hispanic, and only 10% were white.[383] New York City's population

373. David Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 n.10 (1997).

374. *Id.*

375. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

376. *Id*. at 24–27.

377. Floyd v. City of New York, 959 F.Supp.2d 540, 573 (S.D.N.Y. 2013).

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* at 559.

demographics in 2010 was about 23% Black, 29% Hispanic, and 33% white.[384] When these numbers are all put together, it means that police stopped Blacks at least five times the rate of white people, even though they both made up roughly equal portions of the city's population (with Black people actually being a smaller part).[385] Similarly, police stopped Hispanic individuals at least three times the rate of white people.

The figures cited above come from the 2013 United States District court decision *Floyd v. New York*.[386] Judge Shira Scheindlin, in her 157-page decision, found that New York City's stop-and-frisk policy was unconstitutional because it violated both the Fourth and Fourteenth Amendments.[387] As egregious as these figures are, they do not tell the full story; they only represent stops that the police reported.[388] Reasonable suspicion served as the grease that allowed for this systematic harassment of Black people to operate with such ease. Until Judge Scheindlin's ruling, police in New York could satisfy reasonable suspicion by "merely checking a series of boxes," many that had "inherently subjective and vague [categories] (such as 'furtive movements')."[389] At no point did the officers have to explain in any real detail their basis for suspicion.[390]

This lack of substantive accountability is not a bug with the doctrine of reasonable suspicion, but in fact the doctrine's main feature. In *Glover*, the Supreme Court explained "that reasonable suspicion is an 'abstract' concept that cannot be reduced to a 'neat set of legal rules.'"[391] Rather, "[t]he standard 'depends on the factual and practical considerations of everyday life on which *reasonable and prudent men* . . . act.'"[392] At first glance, this line of reasoning makes practical sense because officers are regularly placed in situations where they need to "make 'commonsense judgments

384. *Id.*

385. This math holds true even if one looks only at the stops done in 2010. There, 54% of individuals were Black, 33% were Hispanic, and 9% of individuals were white. This equals police stopping Hispanic and Black people anywhere from three to six times as often as white people. ACLU of New York *Stop and Frisk Data*, NYCLU, https://www.nyclu.org/en/stop-and-frisk-data (last visited Nov. 25, 2020).

386. *Floyd*, 959 F.Supp.2d at 562.

387. *Id.*

388. *See id.* at 559. Judge Scheindlin acknowledged that not only is it impossible to individually analyze all 4.4 million stops, but also that specifics of each recorded stop come from a database that only records the stop from the officer's point of view.

389. *Id.*

390. *Id.*

391. Kansas v. Glover, 140 S.Ct. 1183, 1190 (2020) (quoting United States v. Arvizu, 534 U.S. 266, 274 (2002)).

392. *Id.* at 1188 (quoting Navarette v. California, 572 U.S. 393, 402 (2014)).

and inferences about human behavior'" in order to keep the public and themselves safe.[393]

But the problem is that "commonsense" in America does not exist in a hermetically sealed bubble of rationality untainted by history. America has a deeply racist culture, which has produced a collective understanding that Black people—especially Black men—are criminals. A prime example of this "commonsense" at work was the Maryland State Police and their stop of Robert Wilkins, a D.C. public defender, in 1992.[394] Wilkins sued the department for illegally detaining him and the three other passengers in the car, claiming that officers had targeted them for their race.[395] The Maryland State Police rejected the claim, stating that their "practice of stopping a disproportionate number of [B]lacks simply represented 'an unfortunate byproduct of sound police policies.'"[396] In other words, since "African-Americans commit the most crime[,] to stop crime, [they had to] stop African-Americans."[397] Mr. Wilkins won his suit, and got the department to cease using "'race as a factor for the development of policies for stopping, detaining, and searching motorists'" and reform its officer training to reflect this prohibition on the use of race.[398] Despite this victory, the intractable force of "commonsense" seemed to persist, as numbers in later years showed that still up to 75% of the motorists detained were African American.[399]

2. Why It Is So Hard to Catch Those "Few Bad Apples"

When citizens call for reform of the police in America, the common refrain is that these officers that operate based on racial bias are just among the "few bad apples." In my conversation with a 21-year veteran of Vermont law enforcement, I asked the officer how departments deal with weeding out these "bad apples." The officer replied that departments overall have gotten much better in testing and making the police force more professional to weed out people who lack the disposition to be an officer.[400]

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393. *Id.* (quoting Illinois v. Wardlow, 528 U.S. 119, 125 (2000)).

394. David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 563–66 (1997).

395. *Id.* at 565.

396. *Id.* (quoting Michael A. Fletcher, *Driven to Extremes,* WASH. POST (March 29, 1996), https://www.washingtonpost.com/archive/politics/1996/03/29/driven-to-extremes/65f47ce4-3829-4257-a3b1-07fff49c154d/.

397. *Id.*

398. *Id.* (quoting Settlement Agreement at 4, Wilkins v. Maryland State Police, Civ. No. MJG-93-468 (D. Md. 1995)).

399. *Id.* at 566.

400. Audiotape: Interview with Vermont Law Enforcement (Aug. 4, 2020) (on file with author).

For example, in Vermont officers undergo polygraph tests. The point is not simply to uncover past wrongs but to test an officer's propensity to tell the truth, even when it would be to the officer's detriment.[401] When I pressed the officer on how departments specifically tackle racial bias, the officer explained that it was really tough to catch.[402] Sometimes these officers are upfront about it, and so one can spot it early on. But often, officers are good at hiding their bias and are on their best behavior for the first few years.[403] Over time, however, these ugly biases slowly start to spill out more and more.[404] The officer recommended that maybe one of the only ways to catch this type of "bad apple" was to have other officers who work with the person report them as they see these biases and racist tendencies play out.[405]

3. Economic Incentives of Policing

It is no secret that people will sometimes find ways to look busy at work without actually doing any real work, and law enforcement is no exception. During my interview with a veteran Vermont officer, I learned that sometimes officers run plates of passing cars so that they look busy.[406] Leaving aside the fact that this act constitutes a casual and baseless intrusion into a driver's information, this act touches on the economic incentives that sometimes drive law enforcement's behavior.

Following the 2014 killing of Mike Brown by officers in Ferguson, Missouri, the United States Department of Justice (DOJ) investigated the police practices of the city.[407] In its report, the DOJ found that the City of Ferguson had been generating a sizeable portion of its annual revenue (about 10% according to other sources)[408] through fines and fees for "parking infractions, traffic violations, or housing code violations."[409] The city levied these fines primarily against African-American families. The report detailed how pressure to generate revenue for the city had a "profound effect on [the Ferguson Police Department's] approach to law

401. *Id.*
402. *Id*.
403. *Id.*
404. *Id.*
405. *Id*.
406. *Id.*
407. Dan Kopf, *The Fining of Black America*, PRICEONOMICS [hereinafter *Fining Black America*], https://priceonomics.com/the-fining-of-black-america/ (last visited Nov. 25, 2020).
408. *See id.* (reporting that in 2012 alone, the city of Ferguson generated over two-million dollars in revenue from fining African Americans, which placed it among the 38 municipalities nationwide that generated 10% of its revenues from fines).
409. U.S. DEPT. OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (2015) [hereinafter DOJ REPORT ON FPD].

enforcement."[410] When it came to traffic violations—specifically speeding charges—African Americans represented a disproportionate percentage of drivers ticketed.[411] This percentage was even greater when officers did not rely on objective tools for measuring speed (like radar guns) and resorted to a more subjective "visual assessment."[412] Similarly, African-American drivers were "more than twice as likely as white drivers to be searched during vehicle stops . . . ."[413]

Under these conditions, "routine" traffic stops become incidents for massive economic upheaval in the lives of drivers. In one particularly outrageous example, the DOJ report recounts the story of a 32-year-old African-American man named Mike who, in the summer of 2012, was sitting in his parked car cooling off after a basketball game when officers pulled up behind him and started accusing him of being a pedophile.[414] The officers ordered him out of the car, patted him down for weapons—even though there was no evidence that he was armed—and then pressured him to consent to a search of his vehicle.[415] When Mike refused and invoked his Fourth Amendment rights, officers arrested him, allegedly at gunpoint, and then charged him with eight violations of Ferguson's Municipal Code.[416] Among the charges were: (1) a violation for not wearing a seatbelt, even though he was in a parked car; (2) having an expired driver's license; and (3) having no license on him at the time of the arrest.[417] Because of these charges, he lost the job he had held for several years as a federal contractor.[418] In an instant, a mere traffic stop became a disruptive economic event. These financial consequences were only exacerbated by the complicity of the judicial system.

The DOJ report outlines—in painstaking detail—how the Ferguson municipal court used its power to compel African Americans to pay fines for the charges the police brought against those individuals.[419] In 2013, Ferguson's municipal court issued over 9,000 municipal arrest warrants for minor violations involving "parking infractions, traffic tickets, [and] housing code violations."[420] Failing to appear to court for a moving traffic

410. *Id.* at 2.
411. *Id.* at 5.
412. *Id*.
413. *Id.* at 4.
414. *Id.* at 3.
415. *Id*.
416. *Id*.
417. *Id*.
418. *Id*.
419. *See generally id*. at 3–4.
420. *Id*. at 3.

violation results in a suspension of a person's driver's license.[421] This suspension would only be lifted after the person fully paid all "charges, fines, and fees," which would continue to accrue if the driver missed a single payment or missed a court date.[422] Without a car and possibly no job, law enforcement and the judiciary in Ferguson all but ensured that African Americans would bear a debt that they would likely never be able to pay off.

This was notably the case for one African-American woman, who authorities gave a $151 ticket for parking illegally in 2007.[423] Over the next seven years, she faced financial difficulty that resulted in her being homeless, and then police arrested her twice for failing to pay the parking ticket, as well as appear in court for the matter.[424] During that time, she attempted to pay off the ticket by making two partial payments of $25 and $50. However, her payments were refused because she did not pay the entire fine at once.[425] Even though she had already paid $550 to cover the additional charges and fees resulting from this $151 ticket, she still owed $541 in 2014.[426]

The DOJ report notes that this instance was not an exception but more the rule:

> Together, [the court's] practices exacerbate the harm of Ferguson's unconstitutional police practices. They impose a particular hardship upon Ferguson's most vulnerable residents, especially upon those living in or near poverty. Minor offenses can generate crippling debts, result in jail time because of an inability to pay, and result in the loss of a driver's license, employment, or housing.[427]

Ferguson is not the only city to engage in this kind of behavior—it just so happens to be one of the ones that got caught because of the press coverage surrounding Mike Brown's killing.[428] This kind overzealous and mostly unregulated policing not only leads to economic harm for the

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421. *Id*.
422. *Id*.
423. *Id*. at 4.
424. *Id*.
425. *Id*.
426. *Id*.
427. *Id.*
428. Given that the city of Ferguson was only one of 38 other metropolises who in 2012 generated 10% of their revenue through fines and fees, it is likely that one of these other cities engaged in behavior similar to those found in Ferguson. *Fining Black America, supra* note 407.

communities law enforcement is supposed to serve, but it also creates deep and long-lasting psychological harm.

4. Psychological Harms of Policing

As a young African-American male growing up in New York during the era of stop-and-frisk, I recall being mindful to avoid run-ins with law enforcement. Whenever I was in their presence, I became hyper aware of my own behavior and mannerisms. For example, one night I was running to catch the subway when I noticed police lights in the distance. Instinctively, I slowed down to a casual walk because I did not want to draw unwanted attention. In the back of my mind I knew that even though I had done nothing wrong, it did not look good to be a Black man running at night.

Growing up in the United States as an African-American male, it is quite literally a normal course of affairs to see Black people being harassed, arrested, beaten, and even killed by the police. While this reality is part of daily life for people of color, it goes mostly unnoticed by white America unless it makes a splash in national headlines.

For example, the March 1991 beating of Rodney King, which triggered the Los Angeles riots (commonly referred to as the Rodney King Riots), was brought to national attention.[429]

Or, the July 2014 killing of Eric Garner, which was filmed live by bystanders who watched as several officers wrestled him to the ground while one applied a chokehold.[430] His death later led to a string of protests around the country where protestors stood in solidarity to affirm that "Black Lives Matter."[431]

Or, the July 2016 killing of Philando Castile, which was streamed live over Facebook by his girlfriend.[432] She filmed on in horror as police opened fire on her boyfriend during a traffic stop.[433]

Or, the March 13, 2020 killing of Breonna Taylor, when three officers broke down her door looking for drugs, and fired several times at her and

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429. Anjuli Sastry & Karen Grigby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (April 26, 2017), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots.

430. Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME (July 23, 2014), https://time.com/3016326/eric-garner-video-police-chokehold-death/.

431. Oliver Laughland et al., *Eric Garner Protests Continue in Cities Across America Through Second Night*, THE GUARDIAN (Dec. 5, 2014), https://www.theguardian.com/us-news/2014/dec/05/eric-garner-case-new-york-protests-continue-through-second-night.

432. Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, THE WASHINGTON POST (June 21, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/.

433. *Id.*

her boyfriend, after her boyfriend fired a shot at police because he believed they were intruders.[434] It is worth noting that police did not find any drugs in this raid.[435]

Or, the infamous May 25, 2020 killing of George Floyd by a Minneapolis police officer who kneeled on George's neck for eight minutes and 46 seconds.[436] His death sparked international outrage and protests.[437]

Or, the near-fatal shooting on August 23, 2020 of Jacob Blake by officers who shot him in the back as he walked away from them, leaving him currently paralyzed from the waist down.[438]

These instances quite literally do not begin to scratch the surface of the long history of violence, abuse, and psychological trauma that the Black community has suffered at the hands of police. In a DOJ report on the Ferguson Police Department, the DOJ noted that there was a deep amount of community distrust towards the department due to its long-standing history of "unnecessarily aggressive and at times unlawful policing[, which] reinforces the harm of discriminatory stereotypes . . . ."[439]

The psychological trauma these occurrences cause combined with long-standing police practices serves only to create further disaster. During my interview with a Vermont officer, I asked about how officers go about choosing the cars they will pull over. The officer explained that officers tend to look for at least two traffic-safety violations before initiating a traffic stop.[440] When I asked about what factors officers use to initiate license-plate searches, the answer was less clear. The officer explained that any number of factors could go into an officer running a plate.[441] For example, if an officer sees a driver who purposefully avoids making eye contact or who makes eye contact and then quickly looks away, this behavior is an indicator that the person might be engaged in criminal activity and is apprehensive about the presence of police.[442] This example

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434. Christina Carrega & Sabina Ghebremedhin, *Timeline: Inside the Investigation of Breonna Taylor's Killing and Its Aftermath*, ABC NEWS (Sept. 24, 2020), https://abcnews.go.com/US/timeline-inside-investigation-breonna-taylors-killing-aftermath/story?id=71217247.

435. *Id.*

436. Evan Hill et. al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Aug. 13, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

437. *International Reaction to George Floyd Killing*, ALJAZEERA (June 20, 2020), https://www.aljazeera.com/news/2020/6/2/international-reaction-to-george-floyd-killing.

438. Leah Asmelash, *Jacob Blake's Mom Says He'd Be Upset over the Unrest in City Where He Came for a Fresh Start*, CNN, https://www.cnn.com/2020/08/25/us/who-is-jacob-blake-trnd/index.html (last updated Aug. 26, 2020).

439. DOJ REPORT ON FPD, *supra* note 409, at 5–6.

440. Audiotape: Interview with Vermont Law Enforcement (Aug. 4, 2020) (on file with author).

441. *Id*.

442. *Id*.

triggered the follow-up question: how do officers distinguish between an individual who is nervous because they are committing a crime and an individual who is nervous because they are afraid that this police encounter can lead to harassment, violence, or death? The officer responded that ultimately an officer just knows the difference between the two because of their training and experience.[443]

Although this response was not the most satisfying, it may also just be the truth. One of the reasons the reasonable suspicion standard was created was to allow officers to use their intuition and experience to tackle imminent real-world issues.[444] Ultimately this discretion is not by itself a bad thing. However, the problem is that law enforcement in almost every locale in the United States has so cavalierly wielded this power that they have inflicted deep psychological harm to communities of color, particularly the African-American community.

As this Note has already articulated at several points, traffic stops are not just brief inconveniences. For people of color, these stops can readily turn into a high-stakes situation where a large portion of the outcome depends on the disposition of that particular officer. Put another way, a traffic stop for a person of color is akin to being forced into a game of Russian roulette, [445] where at least two or more of the chambers are loaded. It is precisely for this reason that overzealous policing needs to be tempered by the protections enshrined in the Fourth Amendment.

CONCLUSION

This Note has argued that the Fourth Amendment does apply to license-plate searches. As a result, officers at a bare minimum should have to show cause before running a driver's license plate. Ideally there should be enough evidence to satisfy probable cause, but at the very least there should be enough to support reasonable suspicion. Critics of this position will look at the case law cited and may find defendants unsympathetic because, in every case, the defendant engaged in criminal conduct that the police uncovered. To these people, advocating that police show more cause may sound like simply making law enforcement work harder and making it easier for criminals to get away. However, what these critics fail to realize

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443. *Id*.

444. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

445. Russian roulette "is a lethal game of chance in which a player places a single round in a revolver, spins the cylinder, places the muzzle against their head, and pulls the trigger" with the hope that the gun does not fire the bullet. *Russian roulette*, WIKIPEDIA, https://en.wikipedia.org/wiki/Russian_roulette (last visited Nov. 25, 2020).

is that case law only reflects the people that chose to fight back; it does not reflect who is actually subject to these police practices. For every one of the individuals mentioned in these cases, there is an untold number of innocent, ordinary citizens who have their constitutional rights infringed upon and who simply acquiesce.

For every George Floyd, there are hundreds—if not thousands—of other cases that go unnoticed and unreported. Placing these barriers to police action may result in some criminals getting away, but its purpose is to defend the rights of the over 300 million people who make up the United States. In the wake of the killings of George Floyd and Breonna Taylor, as well as the shooting of Jacob Blake, many are calling for a reallocation of police funds to other social services (commonly referred to as defunding the police), whereas others suggest passing new laws. While there is validity in these approaches, one of the simplest and most effective ways to address some of these issues is to enforce the laws and rights that we already have in existence. In many cases, the egregious acts committed by police are illegal under the Fourth Amendment.

This Note has repeatedly pointed out how courts are reluctant to apply the Fourth Amendment in a way that restrains certain kinds of police action. This reticence makes courts complicit with the modern police practice of search first and seize later. Sadder still, the arguments used to deny Fourth Amendment protections to license plates can be easily repackaged to justify other forms of surveillance technology, such as facial-recognition software. If one applies the plain-view justifications used for license plates, then it becomes all too easy to say that individuals do not have an expectation of privacy in any of the information pulled from scanning their face because individuals choose to expose their faces to the plain view of the public.

By having: (1) an understanding of the history and founding principles of the Fourth Amendment; (2) an appreciation of the *Katz* principle that the Fourth Amendment protects people, not places; and (3) a more nuanced view of the concept of "plain view," courts will be better equipped to handle both the technology that affects license plates and technology that threatens privacy in other areas of life.