

Timmsen: A Criminal Procedure U-Turn or Just a Detour?

Nancy Jack* & Karl T. Muth**

*This Article reviews a recent traffic stop case in Illinois that looks unremarkable from a distance but, upon closer examination, contains a variety of criminal procedure questions about traffic stops, mistake of law, formation of suspicion, and—ultimately—the durability and flexibility of the reasonable, articulable suspicion standard itself when a bizarre fact pattern puts it to the test. In *People v. Timmsen*, the Illinois Supreme Court wrestles with the question of whether wholly legal behavior, when misinterpreted as illegal conduct, can create the basis for a roadside interaction and the evidentiary question of whether, given the facts particular to this case, the fruits of a subsequent search should have been available to the prosecution. This Article rejects the Illinois Supreme Court’s conclusion and explains why the case could and should have been decided differently. Finally, looking to the not-so-distant future of autonomous vehicles, this Article imagines motorists’ legal problems when they are questioned, detained, or searched for things their autonomous vehicles did innocently that may, as in the *Timmsen* case, look unusual at first glance but, nevertheless, should not by themselves arouse police suspicion; today’s Google Maps route suggestions and rudimentary self-driving modes (like Tesla’s FSD V12, newly released at the time of this Article) as a temporary state and prerequisite to a future ecosystem where automotive guidance technology and law enforcement scrutiny may collide unexpectedly.*

* Assistant Attorney General, State of Illinois; Judicial Law Clerk, Illinois Supreme Court (2013–’18). This is an academic article meant to explore and critique a lineage of criminal procedure ideas; the comments herein do not represent the views of the State of Illinois or of the Office of the Attorney General and these comments belong to Ms. Jack and Dr. Muth personally and only.

** Lecturer and Researcher, The University of Chicago; Lecturer in Law, Northwestern Pritzker School of Law. The comments herein do not represent the views of The University of Chicago or of Northwestern University or any of Muth’s current or former clients; these comments belong to Ms. Jack and Dr. Muth personally and only. Thanks to the excellent editorial staff at the *Loyola University Chicago Law Journal* for comments on earlier drafts that substantially strengthened this piece; thanks also to colleagues at Northwestern who gave great seminar feedback on this piece.

INTRODUCTION: A LONG ROAD.....	833
I. THE LEGAL FRAMEWORK OF <i>TIMMSEN</i>	834
II. JUST THE FACTS, MA'AM.....	844
<i>A. A Useful Analogy: Pat Pedestrian</i>	847
<i>B. As Applied to Timmsen</i>	850
III. DISCUSSION OF THREE OPINIONS IN <i>TIMMSEN</i>	852
<i>A. The Timmsen Majority Opinion</i>	852
<i>B. A Few Words on the Timmsen Special Concurrence</i>	853
<i>C. The Timmsen Dissent</i>	854
IV. ARE ROADBLOCKS SOMEHOW SPECIAL?	855
<i>A. No Compromise Needed</i>	859
V. PROPOSAL	860
<i>A. Forecasting</i>	860
<i>B. Products Liability Framework</i>	863
CONCLUSION.....	867

INTRODUCTION: A LONG ROAD

At every turn in modern criminal procedure, courts endeavor to balance law enforcement's intrusiveness against citizens' rights to travel and go about their business without interruption. Appellate jurists, however, should be intrigued to learn that for over twenty years in Illinois, law enforcement has inconvenienced the safe and orderly movement of vehicles (not to mention those within them) without good or *reasonable* reason. The motorist's ability to move about the country's highways is so treasured that Justice Ginsburg and Justice Souter's dissent in *Illinois v. Caballes* focuses on the *length of the stop* and the *inconvenience to the motorist*, rather than the motorist's privacy interest in the vehicle or some theory of violation of the motorist's privacy interests during the encounter.¹

The vast majority of scholars discussing the reasonableness of searches in the archetypical traffic stop fact pattern assume that the first prong of *Terry v. Ohio* is satisfied.² The *Terry* test, to summarize the many descriptions of it the Court offers over the past sixty-plus years, is that: (1) the motorist was properly stopped from continuing his or her travels,³ and (2) the conduct during the stop remained within the scope of the initially undertaken inquiry.⁴ But what of a much rarer fact pattern where

1. *Illinois v. Caballes*, 543 U.S. 405, 419–20 (2005) (Ginsburg & Souter, JJ., dissenting).

2. See, e.g., Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 251 (1994) ("Perhaps because of the first prong's inherent defects, the second prong has come to dominate contemporary expectations analysis. Most cases turn upon the Court's decision about the reasonableness of those expectations."); Wayne R. LaFave, *The Routine Traffic Stop from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1862–63 (2004) (acknowledging the second prong is "less than immediately apparent" than the first prong); see also *Terry v. Ohio*, 392 U.S. 1, 30 (1968) ("[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search . . .").

3. The first prong in *Terry* is crucial because without it there is no objective way to determine the propriety of the officer's actions. See *Terry*, 392 U.S. at 30. When a traffic stop is supported by probable cause, an officer's subjective intent is irrelevant. See *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[C]ases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

4. The inquiry at the roadside generally is of one of two characters, though the former can become the latter. See generally *Rodriguez v. United States*, 575 U.S. 348, 356–58 (2015). The first is an inquiry focused on the public safety or highway safety role of the patrol officer. *Id.* The second is an inquiry of specific enforcement thrust, for instance a stop for drug interdiction purposes. *Id.* While the first may become the second, the officer may not loiter indefinitely once a stop of the first species has concluded in the hope evidence inviting the second species of inquiry

the defendant does not concede the first prong—where the stop itself may have been improper? That is precisely the unusual and intriguing fact pattern presented in *People v. Timmsen*.⁵

This Article proceeds in four Parts. Part I provides the legal framework of a traffic stop, and more specifically, *Timmsen*. Part II then gives “Just the Facts, Ma’am” of Mr. Timmsen’s encounter and offers a helpful analogy, which is then applied to our analysis. Next, Part III outlines the factual and procedural history, focusing on the three Illinois Supreme Court opinions in *Timmsen*. Part IV analyzes whether roadblocks are somehow unique. Finally, Part V contemplates how, in the imaginably near future, people may utilize autonomous vehicles that make legal U-turns and do things many human drivers would not and why the *Timmsen* opinion may age quickly and poorly given contemporary technological progress.

I. THE LEGAL FRAMEWORK OF *TIMMSEN*

A century-long history of traffic stops in Illinois stretching from Prohibition-era bootleggers in Ford Model Ts to the facts in *Timmsen* would be ambitious, to say the least, within the boundaries of a law review article. Hence, the primer offered here is meant for law students learning the basic concepts of criminal procedure and for judges and practitioners who may not encounter many criminal matters or who want to brush up on key concepts in criminal procedure; it is not meant as an exhaustive exploration of either concepts or case law and is not meant to describe every case or controversy that might be relevant when considering the fact pattern in *Timmsen*.⁶ Rather than beginning with bootleggers and Gatsbyesque fact patterns, we deal primarily with post-World War I law, and only broadly describe case law prior to *Terry v. Ohio*.⁷

might arise; to the extent a stop of the first kind exceeds its original bounds, it also exceeds the *Terry* twilight in which a person is *stopped* but not *seized*.

5. *People v. Timmsen*, 2016 IL 118181, ¶ 5, 50 N.E.3d 1092, 1095.

6. For an extensive primer on criminal procedure in Illinois, the Authors highly recommend Illinois Criminal Procedure by Ruebner and Miller, now in its sixth edition, see RALPH REUBNER & COLIN MILLER, ILLINOIS CRIMINAL PROCEDURE (LexisNexis Press, 5th ed., 2010). For those interested in the investigation’s aspect of criminal procedure specifically, and with less of an Illinois-specific focus, see BEN TRACHTENBERG & ANNE ALEXANDER, CRIMINAL PROCEDURE: A FREE LAW SCHOOL CASEBOOK (CALI eLangdell Press, 2nd ed., 2022).

7. See FRANCIS SCOTT FITZGERALD, THE GREAT GATSBY, 124 (Scribner ed., 1925) (presenting the first popular English-language novel to feature a plot revolving, at least in part, around car crash involving featured characters). For a discussion of separate and important aspects of the lineage of case law that descends from *Carroll*, see Catherine A. Shepard, *Search and Seizure: From Carroll to Ross, the Odyssey of the Automobile Exception*, 32 CATH. U. L. REV. 221, 225–226 (1983)

Much ink has been spilled, and deservedly so, on criminal procedure cases arising from events in Illinois. From the dog sniff in *Illinois v. Caballes*⁸ to the modern definition of headlong flight derived from *Illinois v. Wardlow*,⁹ police encounters with the public in Illinois could be said to have more than their share of time before the High Court. However, this Article focuses on a narrow slice of criminal procedure, namely traffic stops, and uses one recent case before the Illinois Supreme Court to illustrate problems that arise when allowable behavior is, in the imagination of an officer's mind, arbitrarily transformed into suspicious conduct.

The modern framework of criminal procedure surrounding the traffic stop involves both articulating and limiting the protections a motorist enjoys when seized during a temporary encounter with the police that has not yet escalated to, and may never become, a custodial arrest scenario.¹⁰ The core principles of how traffic stops are conducted and what is (and is not) permissible are laid out primarily by the Warren Court (1953–'69) and Burger Court (1969–'86), with fine-tuning of these principles by the Rehnquist Court (1985–2005) and some substantial changes to certain key aspects during the Roberts Court (2005–).¹¹ In general, one can think of the Warren and Burger Courts as having created many of the key frameworks one sees in a television procedural drama today, from the basics of how a traffic stop or vehicular search is conducted to the *Miranda* rights read to a suspect in the course of arrest.¹²

(discussing separate and important aspects of the lineage of case law that descends from bootleggers); see generally *Carroll v. United States*, 267 U.S. 132 (1925); *Terry v. Ohio*, 392 U.S. 1 (1968).

8. 543 U.S. 405, 407 (2005). Though *Caballes* is doctrinally sound and still good law as to the distinguishable or *sui generis* nature of dog sniffs, which has not changed in a fundamental sense since *Place*, some of its key elements are modified by *Rodriguez*—and some of Justice Ginsburg's dissent's concerns appear in the majority opinion in *Rodriguez*. See *United States v. Place*, 462 U.S. 696, 698 (1983); *Rodriguez*, 575 U.S. 348, 350, 357–58 (2015).

9. 528 U.S. 119, 126 (2000). *Wardlow*'s five-to-four decision remains controversial, and many believe it may over include any Black person running in a high-crime neighborhood in some larger taxonomical discussion of which people are suspicious; *Wardlow* and *Caballes* are the last major criminal procedure cases arising in Illinois in which Chief Justice Rehnquist took part in the Supreme Court deliberations.

10. For an exhaustive and sufficiently-recent discussion of the rights available to a person once arrested, see Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995).

11. See Aaron H. Mendelsohn, *Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction with the Totality of the Circumstances Test*, 88 J. CRIM. L. & CRIMINOLOGY 930, 936–38 (1998) (outlining the Warren and Burger Court's bright-line rules); see also Craig M. Bradley, *Rehnquist's Fourth Amendment: Be Reasonable*, 82 MISS. L.J. 259 (2013) (exploring the Rehnquist Court's activity in Fourth Amendment doctrine).

12. See *Miranda v. Arizona*, 384 U.S. 436, 498 (1966) (holding an arrested individual is entitled to rights against self-incrimination); see also *Cady v. Dombrowski*, 413 U.S. 433, 438–39 (1973)

In *Timmsen*, we encounter a particularly unusual scenario: the prosecution concedes the stop of Jacob D. Timmsen involves no prerequisite violation of law and that, in essence, the first prong of *Terry* is not met by anything observed, known, investigated, or concluded by the officer prior to the stop, distinguishing the facts of *Timmsen* from cases like *Kansas v. Glover*,¹³ and making the stop more analogous to the unconstitutional seizure of a motorist in *Delaware v. Prouse*.¹⁴

While “police officers [may] stop vehicles for any infraction, no matter how slight, even if the officer’s real purpose was a hope that narcotics or other contraband would be found as a result of the stop,”¹⁵ then it is an unhelpful oversimplification to say the law requires no prerequisite infraction.¹⁶ After all, if anything more than a cursory search is inappropriate in response to a minor infraction,¹⁷ and if an arresting officer’s motives are subject to review,¹⁸ then what type of inquiry is appropriate when there is no infraction at all?

(finding a search of a drunk police officer’s car reasonable because the police had exercised a form of custody of the car and the search was standard police procedure where a firearm was inside the car); *Cardwell v. Lewis*, 417 U.S. 583, 586 (1974) (involving a suspect’s vehicle used to push another vehicle over embankment to conceal evidence of earlier murder). While these cases make for fun fact patterns for law student homework and translated nicely into *Law & Order* episodes, they are not relevant to the issues in the case at hand.

13. 140 S. Ct. 1183, 1190 (2020) (explaining that while no violation of law was noticed by the officer, the officer was familiar with offender involved and gathered sufficient information by inputting license plate information into a squad car computer to conclude local habitual offender was driving without a valid license).

14. 440 U.S. 648, 650 (1979) (noting though majority opinion was penned by Justice White, *Prouse* is perhaps most notable for Rehnquist’s lone dissent, seemingly inconsistent with his later views). The officer, in *Prouse*, witnessed no particular violation of law but stopped motorist as part of non-standardized random traffic stop campaign for the purpose of checking the validity of random motorists’ licenses. *Id.*

15. *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995).

16. Even pretextual stops normally involve *at least some* valid cause for suspicion as to a minor offense: “A search is pretextual when ‘the motivation or primary purpose of the arresting officers’ is to arrest a defendant ‘for a minor offense so as to allow police to search for evidence of some other unrelated offense for which police lack probable cause to arrest or search.’” *United States v. Mota*, 982 F.2d 1384, 1386 (9th Cir. 1993) (quoting *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986)).

17. *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993) (“[A] highly intrusive search in response to a minor infraction would similarly not comport with the sliding scale advocated by the Supreme Court”); *but see United States v. Huffhines*, 967 F.2d 314, 317–18 (9th Cir. 1992) (finding the arresting officer failed to follow typical procedure for minor infractions, but this itself did not illustrate clear error in district court’s conclusion that initiating encounter was not mere pretext to search).

18. *See generally United States v. Espinosa*, 827 F.2d 604, 608 (9th Cir. 1987), *cert. denied*, 485 U.S. 968 (1988) (stating that the standard is clear error).

But stepping back from this analysis and taking the long historical view: What major themes or rules should one consider when thinking about *Terry* stops?

The first, and in some ways the prerequisite, set of questions are: Why does the *Terry* rule exist anyway? And, given that it is good law, what is needed to satisfy the two prongs of *Terry*? The rule in *Terry* exists because without it, police personnel would go unchecked, and we would generally allow behavior that wastes public resources, unduly delays or inconveniences the citizenry, and sabotages the public's trust.¹⁹ But even a quick stop-and-frisk encounter can be scary and embarrassing, as Chief Justice Warren points out: “[e]ven a limited search of the outer clothing for weapons constitutes a severe though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”²⁰ While there is a public interest in a police officer's efforts to investigate suspicious behavior and prevent crimes, there is also a public interest in not having police engage in intrusive, inappropriate, or harassing conduct without evidence of a crime.²¹ The rule, at its most bare, requires the officer to offer an “articulable reason” for their suspicions.²² If such an articulable suspicion exists, then the officer may question and “frisk” the person.²³ In recent years, judges

19. For further discussion of the policy rationales behind, or perhaps between the lines of, *Terry* with an emphasis on the purpose of policing and the deployment of public resources, see Katherine M. Swift, Comment, *Drawing a Line Between Terry and Miranda: The Degree and Duration of Restraint*, 73 U. CHI. L. REV. 1075, 1077 (2006).

20. *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968).

21. This is the rationale for the brief stop-and-frisk or *Terry* stop's framing as a “*de minimis* intrusion,” a linguistic fragment invoked frequently by appellate jurists. See, e.g., *Rodriguez v. United States*, 741 F.3d 905, 907–8 (8th Cir. 2014) (holding a seven- or eight-minute delay to conduct a dog sniff on a vehicle was “a *de minimis* intrusion” on personal liberty), *vacated and remanded*, 575 U.S. 348 (2015); accord *United States v. Alexander*, 448 F.3d 1014, 1016 (8th Cir. 2006) (describing a dog sniff a “*de minimis* intrusion” and “not of constitutional significance”), *abrogated by Rodriguez v. United States*, 575 U.S. 348 (2015). Some have raised valid concerns as to whether a person can decline to participate in activities within the context of a *Terry* stop or truly give consent to officers, given the power imbalance of the encounter and the fact that a refusal to cooperate may—albeit improperly—be used as a basis for even more invasive activities. For work on this aspect, which remains relevant thirty years later and an example of outstanding student scholarship, see Rachel Karen Laser, Comment, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1163 (1995).

22. “Articulable” is important as a mere hunch or “bad feeling,” no matter how veteran the officer, is inadequate. See *Terry*, 392 U.S. at 30. *Terry* is clear the Fourth Amendment offers protections that, in turn, require the officer have a “reasonable, articulable suspicion that criminal activity is afoot.” *Id.*

23. *Id.* at 10. A “frisk” in modern criminal procedure is a pat-down of outer clothing; activities like taking a full “intake inventory” of a person's belongings (as is common at pretrial incarceration facilities) or performing a “strip search” (now called a “clothing-removed investigatory encounter” in some police manuals and force regulation materials) would be considered well beyond the

have become more casual in the interchangeable use of “articulable” and “reasonable” suspicion, which, in practical terms, is fine 99 percent of the time.²⁴ However, originally questioning whether the suspicion was “articulable” (meaning it could be cogently described in a credible way) was a test of whether it was, in fact, “reasonable.”

These additional modes of calculus become necessary because *Terry* stops fall within the gray area between searches that are understood to be generally reasonable and searches that are explicitly allowed with judicial oversight by operation of warrants. To understand how these two traditional investigative situations interact or, at times, conflict to form the basis of our understanding of how police should behave during investigative activities, the best primer remains Justice Minton’s majority opinion and Justice Frankfurter’s dissent in *United States v. Rabinowitz*—making clear that there are encounters that are not arrests, but also not friendly, between police and nearby citizens.²⁵

What rules, then, are to be followed when a police officer spots three men acting suspiciously (say outside a jewelry store) and suspects one or more pistols may reside in the pockets of their jackets?²⁶

This is precisely the fact pattern in *Terry* and the one the Supreme Court used to craft out of whole-cloth this area of law. The Court drafts fresh law related to the Fourth Amendment carefully and infrequently; in fact, it was about ninety years (at a time of U.S. male life expectancies roughly half that) between the ratification of the Fourth Amendment and its debut in a starring role before the High Court in *Ex parte Jackson*.²⁷ The reasonableness of investigative behavior in American law can be seen, despite its many categories and taxonomies, as descending from

bounds of a “frisk” type of investigatory activity. Some legislatures have limited what kinds of investigative activities are appropriate relative to the situation or the severity of the alleged criminal activities. *See, e.g.*, MICH. COMP. LAWS § 764(a)(25)(a)(2) (2024) (imposing restrictions on strip searches of suspected misdemeanor offenders). It is vital to understand these so-called stop-and-frisk encounters are not custodial arrests, a rare instance in American law where a person is functionally “seized” and may not feel free to leave, but is not under arrest. *See Florida v. Bostick*, 501 U.S. 429 (1991) (defining “seized”); *California v. Hodari D.*, 499 U.S. 621 (1991) (same).

24. In *Caballes* and *Rodriguez*, the terms are used interchangeably in both majority and dissenting opinions with little, if any, confusion or ill effect. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *Rodriguez*, 575 U.S. 348, 353 (2015).

25. *United States v. Rabinowitz*, 339 U.S. 56, 65–66 (1950); *Id.* at 85–86 (Frankfurter, J., dissenting).

26. Though the fact pattern in *Terry* is pedestrian-focused, the Court has likened pedestrian encounters to roadside traffic stop encounters in several opinions, most explicitly, *see Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), holding “the usual traffic stop is more analogous to a so-called ‘*Terry* stop.’”

27. U.S. CONST. amend. IV; *see also Ex Parte Jackson*, 96 U.S. 727, 733 (1877) (finding letters and sealed packages in U.S. mail subject to search only if a warrant is first and properly obtained).

only three genetic troves: (1) the Fourth Amendment itself, (2) *Ex parte Jackson*, and (3) *Boyd v. United States*.²⁸ So pivotal is *Boyd* in the jurisprudential pedigree of modern Fourth Amendment law that Justices have described it as “[t]he leading case on the subject of search and seizure”²⁹ and the case in which the Fourth Amendment became “more than a dead letter in the federal courts.”³⁰

Though most modern contemporary criminal procedure courses offer only fleeting glimpses of *Ex parte Jackson* and *Boyd*, this is a shame, as with this cursory examination, it is difficult to understand the Fourth Amendment continuity of purpose and inertia of concern that connects these ancient decisions with policing on today’s street corners.³¹ To understand this area well, one must wade into the muddy shorelines of metaphor and distinction in a way few other areas of law require. Today’s *Terry* stops involve two prongs, three distinctions, and much uncomfortable subjective judgment.

There are three critical distinctions made in *Terry*.³² First, there is a difference between an investigatory stop and an arrest.³³ Second, there is a difference between a “frisk” of outer clothing for weapons³⁴ versus a

28. 116 U.S. 616, 640–41 (1886).

29. *Carroll v. United States*, 267 U.S. 132, 147 (1925).

30. *Abel v. United States*, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting).

31. And, in the matter of *Boyd*, the Fifth Amendment. *See Boyd*, 116 U.S. at 633 (“We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man ‘in a criminal case to be a witness against himself,’ which is condemned in the fifth amendment, throws light on the question as to what is an ‘unreasonable search and seizure’ within the meaning of the fourth amendment.”).

32. Professor Karl Muth would like to thank his friend and mentor the Hon. James A. Shapiro for teaching him many of the nuances of *Terry* years ago, an explanation from which this section benefits greatly.

33. *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) (explaining the differences between investigatory stops and arrests).

34. Firearms were found on two of the three men searched in *Terry*, including the eponymous defendant. *Id.* at 7. Officer safety has always been a key consideration of the Supreme Court in scenarios where officers are in close proximity to unknown and potentially-armed persons; to quote Chief Justice Warren:

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24. For more on officer safety as a consideration in the Court’s consideration in police procedure, see *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Brinegar v. United States*, 338 U.S. 160, 174–76 (1949); *Stacey v. Emery*, 97 U.S. 642, 645 (1878).

full-blown inventory of a person's clothing and belongings.³⁵ Third, there is an opportunity for a search to become a seizure, no matter how brief when initiated/designed and hence temporarily permissible, meaning the investigative incident is allowable in principle at its inception but impermissible as conducted.³⁶ In fact, a search that seemed reasonable when an officer formulated or announced the intent to carry it out may violate the constitutional rights of the person being seized and searched if its scope, duration,³⁷ or connection to the alleged activity wander too far from accepted norms of reasonableness and police practice.

While interesting and important, these distinctions are subsequent to the central analysis required to read *Timmsen* and are constituent parts of the second prong of the analysis. The two analytical prongs of the *Terry* rule are simply understood thus: (1) the person of interest (i.e., a pedestrian or, as in *Timmsen*, a motorist) was properly stopped from continuing his or her travels, and (2) the conduct during the stop remained within the scope of the initially undertaken inquiry.³⁸ These finer points and

35. This is of the kind that often occurs at a pretrial detention facility upon intake. For a discussion of what an "inventory" search related to a custodial arrest is and how it differs from a pat-down or "frisk" type of search, see *United States v. Robinson*, 414 U.S. 218, 227 (1973), but compare to *Terry v. Ohio*, 392 U.S. 1 (1968). Though the term "inventory search" is often used in both settings, an "inventory search" of a person is distinguishable from an "inventory search" of a vehicle or residence, see *infra* note 60. In the case of a person, an inventory search may be as simple as having a motorist dismounted from the vehicle empty his pockets on the hood of the car or may be as elaborate as creating a custodial evidence ticket that contains a manifest of all items in the seized individual's backpack. For example, suppose a person has a purse or shoulder bag and is "booked" into custody; in this context, it is common for police to create an evidence ticket detailing the person's possessions. The case on point is *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983), where the Court concluded a shoulder bag inventoried as part of routine intake process at a detention facility, though as to this point *Lafayette* is primarily a restatement of the rule in *Opperman* stating "the inventory search constitutes a well-defined exception to the warrant requirement." In *Lafayette*, the Court iterates that "inventory search is not an independent legal concept but rather an incidental administrative step following arrest and preceding incarceration." *Id.* at 644 (balancing test in *Prouse* applies but is easily satisfied in inventory searches); see also *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (holding the police engaged in a lawful caretaking search of an impounded car and no suggestion this standard procedure "was a pretext concealing an investigatory police motive"); *United States v. Chadwick*, 433 U.S. 1, 10 n.5 (1977) (recognizing probable cause "irrelevant" in analysis of inventory searches).

36. *Terry*, 392 U.S. at 27–28 (1968) (alluding to this idea).

37. Several cases in recent decades suggest the Court is deeply concerned about the length of time and conditions under which people are detained both in non-custodial and custodial arrest (and post-arrest) situations. See, e.g., *Dunaway v. New York*, 442 U.S. 200 (1979) (holding that unlawful arrest and coerced confession could not be cured by subsequent *Miranda* warnings and humane treatment of suspect); *Bell v. Wolfish*, 441 U.S. 520 (1979) (contemplating questions of conditions faced by detainees in short-term detention).

38. See *Terry*, 392 U.S. at 20, 24. There are probably nuanced differences in how the *Terry* rule is taught between various regions, generations, and political leanings of law professors; this description was written by Professor Muth based on how he has taught this concept in seminar settings

distinctions are never reached when *Terry*'s first prong is unsatisfied. In other words, if the person is not properly stopped and no articulable suspicion animates the encounter, then no further inquiry can be valid or allowable; to find otherwise is to discard the first prong of *Terry* entirely and to rely upon an untethered-to-empiricism reasonableness test of questionable utility, conspicuous fragility, and dubious consistency.

Now, consider this hypothetical: What if all facts in *Timmsen* remain the same, but the officer who pulled over Timmsen wholesomely but erroneously believed the U-turn was illegal?³⁹

Most law students and practitioners would, at this moment, scribble "*Atwater v. City of Lago Vista*" at the top of the hypothetical. And, indeed, as that case holds, even very minor offenses are arrestable offenses;⁴⁰ though legislatures can (and often do) tailor the definition of an arrestable offense and some police departments also craft general orders or procedure orders instructing officers to not arrest certain types of offenders.⁴¹ But the mistake-of-law framework is not present in *Atwater*; Ms. Atwater was accused of not wearing her seatbelt, and that is, in fact,

at Northwestern's Pritzker School of Law and elsewhere. Variations may vary slightly from what some were taught in law school or what some take from reading *Terry* closely; any simplification or paraphrasing of an opinion's language risks changing listeners' or readers' interpretations of its meaning, and the authors acknowledge this.

39. The police never allege in *Timmsen* the driver was intoxicated, merely that he was permissibly evading (or at least avoiding, perhaps even unintentionally) a roadblock. But even if Timmsen were intoxicated and making a legal U-turn as a result, it is hardly a reason to escalate to a "hot pursuit" stance or, really, any "pursuit" for that matter. *Illinois v. Wardlow*, 528 U.S. 119, 125, 135 (2000) (noting that flight of suspect may by itself justify pursuit or additional investigation). To better understand when pursuit is justified, see, for example, the lineage of case law roughly bounded by *Tennessee v. Garner*, 471 U.S. 1 (1985), which analyzes a fleeing suspected felon; *Graham v. Connor*, 490 U.S. 386 (1989), which describes reasonableness of force; *Brower v. County of Inyo*, 489 U.S. 593 (1989), which analyzes flight from a roadblock encounter; *Scott v. Harris*, 550 U.S. 372 (2007), which analyzes reckless driving; and *Plumhoff v. Rickard*, 572 U.S. 765 (2014), which examines reckless driving. To understand pursuit and the Fourth Amendment case law lineage, see, for example, *Michigan v. Chesternut*, 486 U.S. 567 (1988), which notes that pursuit is permissible across wide range of scenarios; and *California v. Hodari D.*, 499 U.S. 621 (1991), which explains that pursuit is not akin to seizure or detention of person being pursued.

40. See generally *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

41. General clarifying orders on arrest or non-arrest offense lists are normally closely-guarded command-level memos and rarely public, so there are few examples to cite. However, Mark Weinberg litigated the arrest-ability or non-arrest-ability of misdemeanor unlicensed peddling as an offense in Chicago years ago, and this litigation—along with other contemporary litigation by Weinberg in other matters related to nuisance offenses like panhandling—led to some of the rare transparency we have seen on what police intradepartmental and prosecutorial discussion of arrest doctrine and minor offense enforcement doctrine looks like. See generally *Weinberg v. Chicago*, 310 F.3d 1029 (7th Cir. 2002) (describing Chicago peddling ordinance found to be unconstitutional).

a crime in Texas—albeit a relatively minor one.⁴² To address this mistake-of-law scenario with an officer who believes, incorrectly, that Mr. Timmsen made an illegal U-turn when, in fact, he executed a safe and permissible U-turn, one must look to *Heien v. North Carolina*, a much more recent case than *Atwater*.⁴³ In *Heien*, a motorist was driving a friend's car with a faulty brake light; the misinformed officer believed two functioning brake lights were required on motor vehicles in North Carolina when, in fact, only one functioning brake light is required by law.⁴⁴ In the view of *Heien*, Timmsen's arrest for the legal but-thought-to-be-disallowed U-turn would be valid.

In Illinois, however, we likely need not reach *Heien*, as Illinois embraces a broad good-faith exception to the exclusionary rule that almost certainly embraces situations such as the mistake-of-law⁴⁵ in our hypothetical.⁴⁶ Hence, it may not be relevant with what degree of certainty or enthusiasm the officer believed the U-turn was illegal. Simply believing he witnessed a crime is likely sufficient to justify the arrest and the subsequent search (or other similar investigative activity), regardless of later judicial determinations that the activity witnessed was not criminal. In short, if the officer had believed—and truthfully and articulately made his belief known for the benefit of appellate examination of the record—Timmsen's U-turn was an unlawful act, this belief, combined with the broad good-faith exception in Illinois, may have been enough to save the search or, at a minimum, satisfy the first prong of *Terry* and allow the analysis to proceed to *Terry*'s second prong. But that mistake-of-law simply is not what happened in *Timmsen*, at least on the basis of the wanting trial court record.⁴⁷

42. *Atwater*, 532 U.S. at 324–25; see also TEX. TRANSP. CODE ANN. § 545.413(a), (b) (1999) (codifying the offense of riding a vehicle without wearing a safety belt).

43. See generally *Heien v. North Carolina*, 574 U.S. 54 (2014).

44. *Id.* at 59.

45. For relevant discussion of the Exclusionary Rule's modern operation, see *Arizona v. Gant*, 556 U.S. 332 (2009). At least three (Fifth, Ninth, Eleventh) circuits show concern for the growing breadth of the exclusionary rule and hence do not allow the exception (or the exclusion) to swallow the rule. See *United States v. Chanthasouvat*, 342 F.3d 1271, 1279 (11th Cir. 2003) (“[T]he correct question is whether a mistake of law, no matter how reasonable or understandable, can provide the objectively reasonable grounds for reasonable suspicion or probable cause. And to that question we join the Fifth and Ninth Circuits in holding that a mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop.”).

46. See generally *People v. Turner*, 2018 IL App (1st) 170204, 97 N.E.2d 140; see also *Davis v. United States*, 564 U.S. 229, 241 (2011) (explaining the good faith exception to the exclusionary rule).

47. “Wanting” because many aspects one might want to learn about or further scrutinize on appeal are missing, including the rationale behind the traffic stop.

Instead, the primary officer involved did not testify in the *Timmsen* matter, and the second officer stated he could not explain why the first officer had seized Timmsen and his vehicle.⁴⁸ In the absence of this explanation, the good faith exception to the exclusionary rule cannot be applied, and the *Heien* mistake-of-law framework is a silver bullet still in search of its werewolf. Even *Atwater* fails as a salve for the officers' woes, as it requires *some* crime rather than a manifestly lawful and unremarkable U-turn. The Illinois good-faith exception is broad and generous to officers, but it is not a default setting.

We need not delve deeply into the many "factor" and "trade-off" tests jurisprudentially appended to *Terry*'s second prong, as we cannot find how *Terry*'s first prong is satisfied on the basis of this record. In a but-for context, absent a lawful and proper stop, the invalidity of Timmsen's driver's license is never discovered,⁴⁹ and a "random" stop merely to check the validity of driver credentials is not permissible in view of *Prouse*. To learn more about the arguments affecting this latter aspect, compare Justice White's opinion in *Prouse* to Justice Rehnquist's dissent.⁵⁰

Just as there are as many interpretations of the Constitution as there are judges, there are as many totality-of-the-circumstances interpretations of any given roadside scenario as there are patrol officers. However, attempts were at some points (notably in the 1960s and 1980s) to legislate more specifically how police should behave. In addition to this, most departments have general orders in place that suggest a set of norms and mores to which officers are expected to adhere in most circumstances.

Due to the heterogeneity of police procedure in the 1980s,⁵¹ recent legislative activity in Illinois attempts to better-define how police encounters should unfold and to give police wide latitude to affect arrests in scenarios perhaps questionable in purely constitutional contexts. This includes the ability to arrest people believed to be in violation of orders

48. See *People v. Timmsen*, 2016 IL 118181, ¶ 64, 50 N.E.3d 1092, 1110 ("Deputy Duffy, the officer who initially stopped defendant's vehicle, did not testify at the suppression hearing and Trooper Miller stated that he did not know why Deputy Duffy stopped defendant.").

49. See *id.* ¶ 4, 50 N.E.3d at 1095 ("Trooper Miller also stated that none of the police officers knew who was in the vehicle or that defendant's license had been suspended."). This fact pattern is distinguishable from *Glover*, where the driver's license's invalidity was noticed prior to the *Terry* stop. See generally *Kansas v. Glover*, 589 U.S. 376 (2020); see also Hon. James A. Shapiro & Karl T. Muth, *Beyond a Reasonable Doubt: Juries Don't Get It*, 52 LOY. U. CHI. L.J. 1029 (2021) (analyzing jury instructions and the importance of avoiding Type I error at all costs).

50. See generally *Delaware v. Prouse*, 440 U.S. 648, 664–67 (1978) (Rehnquist, J., dissenting).

51. For a sense of Illinois police procedure in this era, see Ralph Ruebner, *Automobile Stops and Searches: The Law in Illinois*, 19 LOY. U. CHI. L.J. 1045 (1988).

of protection and permitting similar arrests involving child custody, or child support violations where the arresting officer may be in possession of little pertinent evidence at the time of arrest.⁵² In addition, Illinois trial procedure bifurcates into two stages the determination of probable cause; while the term “probable cause” is used in both settings, the grand jury and preliminary hearing are distinct venues and places where defendants enjoy differing rights.⁵³

Beyond legislative regulation of police procedure and the bounds of trial procedure—which tend to bind prosecutors primarily and officer conduct only secondarily except in the most egregious cases of witness intimidation or evidence tampering, for instance—much Illinois police activity is controlled through General Orders (in the case of the Chicago Police Department) and General Directives (in the case of the Illinois State Police).⁵⁴ It is not surprising that not every person with a badge and a gun in Illinois is entirely up-to-date on legislative activity, trial procedure, and sources of guidance within a given police department or policing agency; mistakes are bound to happen, and good-faith mistakes (and the generous exceptions that anticipate and embrace them) will be common. However, if the good-faith exception encompasses every instance where police step on the wrong side of the line, it swallows the rule.

Given the facts in *Timmsen*, we cannot find a path to the second prong of *Terry*, let alone a conviction.

II. JUST THE FACTS, MA'AM

Timmsen does not require a grand or unprecedented calculus of criminal procedure. Rather, the opinion's first sentence identifies the narrow and relatively simple-on-its-face issue involved: “Whether police officers had reasonable suspicion to stop defendant Jacob Timmsen's vehicle

52. See generally 750 ILL. COMP. STAT. 5/505 (2018) (describing child support). Protective orders in Illinois are both procedurally and in effect different from equivalent orders in some other states; for details on how protective orders function in Illinois, see 725 ILL. COMP. STAT. 5/124B-150 (1963); 750 ILL. COMP. STAT. 60/301 (1986); 720 ILL. COMP. STAT. 5/12-3.4 (2012); and 750 ILL. COMP. STAT. 16/1, 5, 7, 10, and 15 (2021).

53. See John C. Robinson, Jr., *The Determination of Probable Cause in Illinois—Grand Jury or Preliminary Hearing*, 7 LOY. U. CHI. L.J. 931–49 (1976) (explaining distinct and peculiar distinctions through comparing Illinois to the majority of other states).

54. For an example of a General Directive, see ILL. STATE POLICE DIRECTIVE ENF-037, WARRANTLESS SEARCHES (2022).

when he made a U-turn fifty [] feet before a police roadblock.”⁵⁵ The undisputed facts were as follows.

Timmsen “was driving eastbound on” a four-lane “highway from Iowa to Illinois” at 1:15 a.m. on a Saturday.⁵⁶ As Timmsen crossed the border into Illinois, he encountered a marked police roadblock.⁵⁷ About fifty feet before the roadblock, Timmsen made a legal U-turn “at a railroad crossing, which was the only location to turn around before reaching the roadblock.”⁵⁸ As Timmsen drove away from the roadblock, an officer pulled over his vehicle; a second officer arrived at the scene shortly thereafter.⁵⁹ Timmsen was arrested for driving with a suspended license and was also issued a citation for driving “to the left of center of roadway.”⁶⁰ The officers searched his vehicle and recovered a metal pipe and a small amount of marijuana.⁶¹

It is important, as a matter of police procedure and as a matter of criminal procedure, that the officer stopped Timmsen for having made a *permissible* U-turn—not as a result of having run the plates on the car, finding Timmsen was the registered owner, and through the magic of linked databases then discovering that Timmsen, the registered owner, did not have a currently-valid license; the Supreme Court found this

55. *People v. Timmsen*, 2016 IL 118181, ¶ 1, 50 N.E.3d 1092, 1094. Unusual, but lawful, maneuvers are not enough to arouse reasonable suspicion, even when those maneuvers are frequently associated with illicit activity; for instance, weaving back and forth within one’s lane is a behavior often associated with intoxication. *See cf.* *State v. Post*, 2007 WI App 60, ¶ 38, 301 Wis.2d 1, 733 N.W.2d 634, 644 (“We determine that weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle.”).

56. *Timmsen*, ¶ 3, 50 N.E.3d at 1094.

57. *Id.*

58. *Id.* *See also id.* ¶ 3, 50 N.E.3d at 1094 n.2 (“U-turns are legal in Illinois as long as the turn can be made safely and without interfering with other traffic.” (citing 625 ILL. COMP. STAT. 5/11-802 (West 2010))).

59. *See id.* ¶ 3, 50 N.E.3d at 1094 (“Deputy Duffy requested assistance and Trooper Miller went to the location where defendant’s vehicle was stopped.”).

60. The offense of driving with a suspended license is found in 625 ILL. COMP. STAT. 5/6-303(a) (2010). The offense of driving “to the left of center of roadway” is found in 625 ILL. COMP. STAT. 5/11-706(a) (2010). Timmsen’s passenger “was also arrested based on an active warrant for his arrest.” *See Timmsen* ¶ 3, 50 N.E.3d at 1094 n.3.

61. The officers conducted an inventory search incident to arrest. *See Timmsen* ¶ 3, 50 N.E.3d at 1094. An “inventory search” is a police process meant to produce an exhaustive manifest of items of interest at a location and can be performed on a car, truck, home, shipping container, vessel, aircraft, etc.; it must, however, be an actual inventory of items present and not merely “general rummaging” and more likely to be acceptable if police are “following standardized procedures” of some kind. *See Florida v. Wells*, 495 U.S. 1, 4 (1990) (“[A]n inventory search must not be a ruse for a *general rummaging* in order to discover incriminating evidence.” (emphasis added)); *see also Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (“[T]here was no showing that the police, who were following *standardized procedures*, acted in bad faith . . .”) (emphasis added). For more information on inventory searches in the context of an individual, see *supra* note 34.

specific, separate fact pattern (not present in *Timmsen*) to be permissible in *Kansas v. Glover*.⁶²

Timmsen sought to suppress the evidence recovered from the stop.⁶³ At the suppression hearing, he stated “that he saw the roadblock and made a U-turn at the railroad crossing but did not give a reason for turning around.”⁶⁴ The officer who pulled over the vehicle “did not testify at the suppression hearing,” and the officer who arrived second on the scene stated that “he did not know why” the first officer “stopped the vehicle.”⁶⁵ The officer “also stated that none of the police officers” present at the roadblock knew of any reason to stop the vehicle.⁶⁶ “The circuit court denied the motion, finding Timmsen’s U-turn 50 feet before the roadblock provided a reasonable, articulable suspicion.”⁶⁷ In related proceedings, Timmsen was found guilty of driving with a suspended license.⁶⁸

Timmsen appealed, and “a divided panel of the appellate court . . . found that absent any other suspicious activity, the U-turn itself did not provide specific, articulable facts that a criminal offense had been or was about to be committed.”⁶⁹ The Illinois Court of Appeals, Second District, reversed Timmsen’s conviction.⁷⁰

62. See generally *Kansas v. Glover*, 589 U.S. 376 (2020); see also *supra* note 13 and accompanying text.

63. *Timmsen* ¶ 4, 50 N.E.3d at 1094.

64. *Id.* at 1095.

65. *Id.* ¶ 64, 50 N.E.3d at 1110; *Id.* ¶ 4, 50 N.E.3d at 1095.

66. See *id.* ¶ 4, 50 N.E.3d at 1095 (“Trooper Miller also stated that none of the police officers knew who was in the vehicle or that defendant’s license had been suspended. He further admitted that the officers knew of no arrest or search warrant authorizing the stop of the vehicle or its occupants.”).

67. *Id.* See a similar fact pattern in *Montero-Carmago*, asserting “[p]eople who turn around right before a checkpoint generally do have something to hide” (offered with no citation or support for stated probability), with Judge Reinhardt of the Ninth Circuit attempting to distinguish *Montero-Carmago* from *Ogilvie*, where the Ninth Circuit’s Judge Duniway wrote “turning off the highway and turning around [are] not in themselves suspicious” and “the proximity of the turn to the checkpoint, regardless of the legality of the checkpoint, [is] not a sufficient foundation on which to rest reasonable suspicion.” Compare *United States v. Montero-Carmago*, 208 F.3d 1122, 1142 (9th Cir. 2000) (Kozinski, A., concurring); with *United States v. Ogilvie*, 527 F.2d 330, 332 (9th Cir. 1975) (Duniway, J.). Separately, as to the substance of disposing of such motions, and a discussion of the exclusionary rule, see *Virginia v. Moore*, 553 U.S. 164, 177 (2008).

68. See *Timmsen* ¶ 4, 50 N.E.3d at 1095 (“The parties subsequently agreed to proceed by way of a stipulated bench trial on the license charge and the court found defendant guilty of driving with a suspended license.”).

69. *Id.* ¶ 5, 50 N.E.3d at 1095.

70. *Id.* ¶ 1, 50 N.E.3d at 1094.

A. A Useful Analogy: Pat Pedestrian

Putting aside the roadside motorist framework⁷¹—itself an evolution and decoration of a framework created for pedestrians⁷²—may be helpful before examining the nuances of the fact pattern in *Timmsen*. Rather than beginning with scrutinizing *Timmsen*, first, contemplate the following hypothetical fact pattern.

Suppose Pat Pedestrian is walking toward Ollie Officer on a clear, sunny day—Pat can see Ollie, and Ollie can see Pat. Pat is dressed normally for an afternoon walk, and Ollie is wearing their police officer’s uniform. Pat is walking while Ollie is standing still. They are on the same side of the street, on a sidewalk, in a city like Chicago—with long city blocks of many hundreds of feet in length.

When Pat was about fifty feet away—a distance close enough for Ollie to observe Pat’s actions but too far for Pat to pose any apparent danger⁷³—Pat decided to turn around, and began to walk away in the opposite direction. Importantly, Pat does nothing to arouse Ollie’s suspicion; there were no indications of Pat being armed or displaying any alarming, outwardly suspicious behavior. When Pat turned, Pat did not run but simply continued to stroll at precisely the same pace as moments before, now moving away from Ollie. The width of the sidewalk is only a few feet wide; Pat would have unavoidably come into close contact with Ollie if Pat continued along.

Perhaps Pat had forgotten a cell phone or a wallet at home, and it was at this moment, Pat realized the mistake, and it occurred to Pat to return home and retrieve it. Perhaps Pat began to tire of the walk and decided to go home and rest (or obtain an energy drink from the store on the

71. For more on the special considerations that arise in the motorist context, see Karl T. Muth, *Learning Facts from Fiction in Jay-Z’s 99 Problems*, 111 J. CRIM. L. & CRIMINOLOGY ONLINE 1 (2021).

72. See *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (“A routine traffic stop, on the other hand, is a relatively brief encounter and ‘is more analogous to a so-called “Terry stop” . . . than to a formal arrest.” (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984))). Contrary to misconceptions of generations of law students, the eponymous Mr. Terry was not a motorist, but instead a pedestrian outside a retail store.

73. Self-protective searches for weapons are allowable in a *Terry* stop-and-frisk context due to a recognized public policy concern for officer safety, but this does not mean an officer can simply search every pedestrian within the effective range (dozens or hundreds of yards) of a firearm because one of them might conceivably possess a concealed firearm. See generally *People v. Mickelson*, 380 P.2d 658 (1963); *People v. Taggart*, 229 N.E.2d 581 (1964), *cert. denied*, 379 U.S. 978 (1965). New York’s stop-and-frisk statute, which would later be fodder for national discussion during former Mayor of New York City Rudy Giuliani’s presidential campaign, was first crafted without his input when Giuliani was still in his twenties and not yet a prosecutor. See N.Y. CODE CRIM. PROC. § 140.50(1).

previous block). Perhaps that most recent step was step 5,000—halfway to Pat’s goals of how many Fitbit steps to get that day—causing Pat to turn around.

Or maybe, after all, Pat wanted to avoid interacting with Ollie. Even if Pat’s *only reason* for turning around was to avoid Ollie, is Pat’s avoidance of law enforcement encounters *by itself* suspicious?⁷⁴ On the basis

74. The question of whether reasonable suspicion can arise from legal activities predates the current generation of case law, predates the *Terry* era, and will almost uncertainly run far into the future, too. One can imagine a scenario where “the facts and circumstances of the situation” suggest a crime is afoot though everything visible is legitimate; recently, in Chicago, the citizen-led police oversight commission, Community Commission for Public Safety and Accountability (CCPSA), unanimously voted to dismantle that city’s police-maintained and notoriously-overinclusive gang database after thousands of people, including the law-abiding geriatric father of the police oversight commission’s president, Anthony Driver, were found to have been erroneously listed in the database for years (the database had the effect of making the actions, or even mere presence, of individuals in many situations appraised by police as “suspicious”). See Chris Tye, *Oversight Commission Shuts Down Chicago Police Gang Database*, CBS NEWS (Sept. 7, 2023), <https://www.cbsnews.com/chicago/news/oversight-commission-shut-down-chicago-police-gang-database/> [https://perma.cc/BY8H-DSXM]. Transforming law-abiding activities into suspect behaviors is not a slippery slope, it’s a Teflon-coated cliff; courts have consistently emphasized that policies “likely to sweep many ordinary citizens into a generality of suspicious appearance” are undesirable. See *United States v. Rodriguez*, 976 F.2d 592, 595–96 (9th Cir. 1992) (holding that a Hispanic motorist operating older vehicle with worn-out suspension not adequate to create articulable suspicion of criminal activity); see also *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1492 (9th Cir. 1994) (noting that no matter how standardized or pervasive, policing methods that “cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped” are inadequate to meet standard).

Simply avoiding police while not undertaking headlong flight does not by itself create a reasonable articulable suspicion. See, e.g., *Hinton v. United States*, 424 F.2d 876, 879 (D.C. Cir. 1969) (“[F]light [is not] a reliable indicator of guilt without other circumstances to make its import less ambiguous.”); *People v. Thomas*, 660 P.2d 1272, 1276 (Colo. 1983) (en banc) (“[A]n effort to avoid police contact, by itself, is insufficient to support a stop.”); but see *People v. Waits*, 196 Colo. 35, 580 P.2d 391, 393 (1978) (en banc); *In re D.J.*, 532 A.2d 138, 141 (D.C. 1987) (“[A person of interest] merely attempted to walk away, behavior indicative simply of a desire not to talk to police. No adverse inference may be drawn from such a desire.”); *McClain v. State*, 408 So.2d 721, 722 (Fla. Dist. Ct. App. 1982) (“[B]ehavior which, taken for its most insidious implications, indicated only that he wanted to avoid police, could not give rise to a reasonable suspicion that he was engaged in criminal activity.”); *People v. Fox*, 421 N.E.2d 1082, 1086 (1981) (“[T]he mere fact that the vehicle drove away at the approach of a squad car does not serve as a justifiable basis for conducting a *Terry* stop.”); *State v. Hathaway*, 411 So.2d 1074, 1079 (La. 1982) (“Even where flight . . . appear[s] designed to avoid apprehension, reasonable cause will not arise unless flight . . . would indicate to a reasonable mind that the combination of circumstances is inconsistent with any innocent pursuit.”); *People v. Shabaz*, 378 N.W.2d 451, 460 (Mich. 1985) (“[A]voiding police] does not alone supply the particularized, reasoned, articulable basis to conclude that criminal activity [might be] afoot . . .”). See also *United States v. Garcia-Barron*, 116 F.3d 1305, 1307 (9th Cir. 1997) (“[E]fforts to avoid checkpoints combined with other factors have generally been found to constitute ‘reasonable suspicion.’” (quoting *Rodriguez-Sanchez*, 23 F.3d at 1493)); but cf. *United States v. Montero-Carmago*, 208 F.3d 1122, 1138–39 (9th Cir. 2000) (“While it is not clear whether the U-turn here was legal, the other surrounding circumstances render the reversal-in-direction one that may properly be given significant weight in our reasonable suspicion analysis. . . . [T]he U-

of Pat's about-face alone, is Ollie's pursuit of, stopping of, and investigation of Pat justified? And what if Pat had turned left or right rather than turned around to avoid encountering Ollie—is a 90-degree turn less suspicious than a more dramatic change in direction (and, if so, on what basis)?

To use the criminal procedure terms of art: Is this “particular governmental invasion of a citizen's personal security”⁷⁵ justified if Ollie “seizes” Pat,⁷⁶ despite the fact that Pat's stroll away from the officer was not itself illegal or suspicious and Ollie could not “articulate a specific”⁷⁷ reason Pat would want to avoid or “flee” police?⁷⁸

Pat's 180-degree pedestrian maneuver, indeed, is not by itself suspicious.⁷⁹ Even if no other explanation exists for Pat's reversal of course than a preference not to interact with law enforcement, such preferences are not a valid reason to affect the seizure of a person, the questioning of that person, or an inventory of that person's belongings. If expressing such preferences were by itself suspect, wearing the briefly-popular “I don't talk to cops” t-shirts of the mid-1990s would subject the wearer to heightened police scrutiny and her strolls on the public way to undue inconvenience.⁸⁰ Surely, the jurisprudential winds do not blow in favor of

turn occurred just after a sign indicating that a Border Patrol checkpoint that had been closed for some time was now open.”).

75. *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

76. *See Brendlin v. California*, 551 U.S. 249, 255 (2007) (articulating the test for justifying seizure).

77. *Terry*, 392 U.S. at 21 (noting the Court's use of reasonable, articulable, and specific).

78. The word “flee” is carefully included here. *Cf. Illinois v. Wardlow*, 528 U.S. 119 at 129–30 (2000) (Stevens, J., dissenting) (describing how Illinois case law defines a “fleeing person” such that not all flight is suspicious).

79. For concerns regarding the ordinary pedestrian on the sidewalk being unduly inconvenienced or unfairly seized, see *Illinois v. Caballes*, 543 U.S. 404, 417 (2005) (Souter, J., dissenting).

80. For a discussion of what actually qualifies as suspect within the context of behavior in a public place, see the activities and behaviors of Andrew Sokolow as described by Chief Justice Rehnquist in *United States v. Sokolow*, 490 U.S. 1, 3 (1989) (“When respondent was stopped, the agents knew, *inter alia*, that (1) he paid \$2,100 for two airplane tickets from a roll of \$20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.”). This inventory in *Sokolow* from Chief Justice Rehnquist is illustrative, but it is not necessary for appellate forums to retrospectively taxonomize a motorist's every choice of route, lane change, or use of turn signals as either innocuous or suspicious, nor to accumulate enough items in the suspicious column that a search suddenly becomes appropriate. *See United States v. Lopez-Martinez*, 25 F.3d 1481, 1484 (10th Cir. 1994) (“Our task, however, is not to pigeonhole each purported fact as either consistent with innocent travel or manifestly suspicious.”); *see also United States v. Ochoa*, 4 F. Supp. 2d 1007, 1015 (D. Kan. 1998) (relying on this *Lopez-Martinez* principle to limit deference on the

such sweeping definitions or “articulations” of what might be suspicious or worthy of further investigation.⁸¹

B. As Applied to Timmsen

In the case of Pat Pedestrian and Ollie Officer, the hypothetical seems easy to solve: Pat did nothing to sufficiently, or specifically, arouse Ollie’s suspicion while out for an unremarkable walk that included an unusual, but also unsuspecting, change of direction. As Chief Justice Rehnquist wrote in 2000,⁸² summarizing *Florida v. Royer*,⁸³ a quarter-century earlier: “[the Court] held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business.”⁸⁴ Pat’s hypothetical fits snugly within *Royer*’s ambit.

The fact pattern in *Timmsen* diverges somewhat from that of Pat and Ollie. Rather than the clear sunny afternoon of Pat’s walk, *Timmsen*’s “avoidance” of an encounter with authorities occurs in the dark at “1:15 a.m. on a Saturday.”⁸⁵ Rather than Pat approaching Ollie on a

officers); *United States v. Ferro*, No. 2:07CR11DAK, 2007 WL 3125085, at *5 (D. Utah 2007) (holding the officer had reasonable suspicion to detain defendant under the totality of the circumstances).

81. Courts have resisted prosecutorial attempts to argue suspicion can be categorical rather than specific, even when the seizure of a person or that person’s belongings is brief (or “the intrusion is slight”) and even though “the public interest in prevention of crime is substantial.” *Buie v. Maryland*, 550 A.2d 79, 83 (1988), *vacated*, 494 U.S. 325 (1990). Suspicion, in this context, must be a belief reasonably formed on the basis of “specific and articulable” observations and not a “suspicion” or “hunch” alone. *Terry*, 392 U.S. at 27. Every investigative action by a police officer involves at least three potential costs: (1) the direct and calculable costs related to publicly-funded expenditure of the officer’s paid time and miscellaneous necessary resources (from police car fuel to radio and flashlight batteries to pistol ammunition), (2) the opportunity cost of the officer’s time not being expended toward some higher or better purpose, and (3) the actuarial risk (and hence social cost) to the public that an investigative encounter may result in avoidable commotion or violence, damage to nearby property, or harm to theretofore uninvolved bystanders. In other words, investigative activities are neither costless nor riskless. For more on the duty relationship between officers and their employers (a.k.a. “the public”), see generally Karl T. Muth & Nancy Jack, *Watching the Watchers: Monitoring Police Performance as Public Servants*, 73 NAT’L LAW. GUILD REV. 23 (2016).

82. Rehnquist had already served as an Associate Justice for over a decade at the time of *Royer*, where he dissented from the plurality opinion with some of the strongest rhetoric he ever employed against his fellow Justices. *Florida v. Royer*, 460 U.S. 491, 519–20 (1983) (“The plurality’s meandering opinion contains in it a little something for everyone . . . [this] opinion nonetheless, in my view, betrays a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on, than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent.”).

83. See generally *id.*

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

85. See *People v. Timmsen*, 2016 IL 118181, ¶ 3, 50 N.E.3d 1092, 1094.

sidewalk, Timmsen approaches a police roadblock on a highway while driving a vehicle. Akin to Pat's afternoon walkabout, however, Timmsen's vehicle does not violate the law at any point. His driving toward the roadblock is unremarkable, not erratic or illegal, and his U-turn upon approaching the roadblock's general vicinity is, by all accounts legal. And his driving away from the roadblock was neither speedy ("[h]eadlong flight"),⁸⁶ stealthy (evasion),⁸⁷ nor illegal—quite the opposite of the scene one imagines when reading *Wardlow*.⁸⁸

In short, nearly all of the innocuous explanations for Pat's uneventful about-face also apply to Timmsen's drive U-turn. But it is not, and cannot be, a burden of the defendant to justify otherwise innocuous behavior.⁸⁹ Instead, it is, and must be, the burden of the State to find a

86. See 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 9.5(g), 731 (5th ed., 2012) ("[H]eadlong flight—wherever it occurs—is the consummate act of evasion." (quoting *Wardlow*, 528 U.S. at 124)).

87. When one considers the degrees of escalation possible in one's flight from police, Timmsen's behavior near the roadblock seems particularly slight and innocuous. Compare *Timmsen's* fact pattern with police evasion fact patterns in *State v. Cross*, 483 S.E.2d 432, 434 (N.C. 1997), where "[T]he defendant was found hiding from police in an apartment near the location . . . Defendant had also shaved his head and repeatedly denied that his name was Cross," and *Matthews v. State*, 124 So.3d 811, 812–16 (Fla. 2013), where the defendant evaded multiple police vehicles including police helicopters, attempted to alter his appearance and abandon his observed clothing, placed his observed clothing in a plastic bag in an alleged coconspirator's home, hid other evidence away from the crime scene, or perhaps stashed for later destruction, and for a time successfully concealed himself only a few feet from investigating officers "under a pile of clothes in [a] bedroom," and *State v. Hebert*, 82 P.3d 470, 478–80 (Kan. 2004), where the defendant escaped from jail by subduing two Deputy Sheriffs in hand-to-hand combat, fled the campus of the carceral facility, navigated through a heavily-wooded area including crossing county line undetected, obtained three firearms, concealed himself in attic of a home; while concealed, he fired three rounds, killing Sheriff's Deputy Kenney and Officer Copper, who were searching for the defendant, before descending from the attic and eventually surrendering to police. These cases present far more severe attempts to evade police or conceal oneself than performing a permissible U-turn at low speed.

88. See *Wardlow*, 528 U.S. at 124 (describing how respondent's unprovoked flight aroused suspicion). See also *People v. Souza*, 885 P.2d 982, 983 ("[F]light in response to the appearance of a uniformed officer or a marked patrol car ordinarily is behavior that police may legitimately regard as suspicious . . ."). Note that one can "flee" even if one is not being chased or does not know by whom he is being pursued. See *California v. Hodari D.*, 499 U.S. 621 at 623–25 (1991) (recounting a fleeing teenager running from scene of drug deal, but trying to evade no particular officer); see *cf. Proverbs 28:1* (King James) ("The wicked flee when no man pursueth . . ."). Should one's imagination of "headlong flight" need further fodder, see *People v. Bunker*, 177 N.W.2d 644, 646 (Mich. Ct. App. 1970), where "[t]he chase, at speeds up to 110 miles per hour [with the pace set by a 1962 red Chevrolet Corvette], led through the City of Warren and several subdivisions. The car managed to avoid a police road block at one point, but finally went out of control after hitting another vehicle and came to a stop on the median strip of Mound Road." Or perhaps, whilst listening to PRINCE, *Little Red Corvette*, on 1999 (Warner Brothers Music 1983).

89. Innocuous unusual behavior that might be undertaken lawfully and for unremarkable reasons does not transform into suspicious behavior at an observing officer's whim. Behavior inexplicable without illicit motivations, however, creates the articulable suspicion without which

kernel of suspect activity in the defendant's behavior,⁹⁰ not behavior that is merely atypical or interesting, but something that justifies investigative activities of innocent persons.⁹¹ Nevertheless, the *Timmsen* majority opinion, as discussed in Part III, sees a cookie crumbling differently.

III. DISCUSSION OF THREE OPINIONS IN *TIMMSEN*

A. *The Timmsen Majority Opinion*

On appeal to the Illinois Supreme Court, a majority of the court ultimately concluded that based on the totality of the circumstances, there was reasonable suspicion to conduct an investigatory stop of Timmsen's vehicle.⁹² The court's analysis appropriately begins by laying out the framework for Fourth Amendment search and seizure jurisprudence.⁹³

Terry's safeguards cannot be traversed. Compare *People v. Martinez*, 37 N.Y.2d 662 (1975) (seizure of motorist initially impermissible but exclusion of all subsequently-gathered evidence neither sole nor appropriate remedy), and *People v. Allende*, 39 N.Y.2d 474, 476–77 (1976) (finding officers approached a double-parked Chevrolet Vega with drawn guns without provocation or possible traffic violation wherein the seizure was not reasonable), with *People v. Singleteary*, 35 N.Y.2d 528, 530 (1974) (holding probable cause for search and seizure where a parked car involved in a recently committed crime and the culprits originally in the car fled, such that “[t]ime was of the essence and it would have been unreasonable for the police to have delayed their investigation of the suspect vehicle further to obtain a search warrant”), and *People v. Green*, 35 N.Y.2d 193, 195–96 (1974) (concluding sufficient ground for reasonable suspicion where the officer received a description from a teenager, eyewitness to an attempted robbery, and approached the defendant, grabbed him and patted him down, discovering the defendant's gun in his coat pocket).

90. For the nuance-in-practice, rather than obviousness-in-philosophy, of this, a trio of cases of recent vintage in the Eighth Circuit describes the burden eloquently. See generally *United States v. Crumley*, 528 F.3d 1053 (8th Cir. 2008); *Kellogg v. Skon*, 176 F.3d 447 (8th Cir. 1999); *United States v. Grassrope*, 342 F.3d 866 (8th Cir. 2003).

91. See *Minnesota v. Carter*, 525 U.S. 83, 111 (1998) (Ginsburg, J., dissenting) (“Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.”).

92. See *People v. Timmsen*, 2016 IL 118181, ¶ 23, 50 N.E.3d 1092, 1100 (finding reasonable suspicion to stop Timmsen's vehicle).

93. The Fourth Amendment protects against unreasonable searches and seizures, and the touchstone of the fourth amendment is the reasonableness of the government's invasion of a citizen's personal security. U.S. CONST. amend. IV. Stopping a vehicle and detaining its occupants is a “seizure” within the meaning of the fourth amendment, which is analyzed under the principles set forth in *Terry*. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Under *Terry*, an officer may conduct a brief, investigatory stop of a person when the officer reasonably believes that the person has committed, or is about to commit, a crime. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Though a stop under *Terry* requires less than probable cause, an officer must have a reasonable, articulable suspicion that criminal activity is afoot, which is more than an unparticularized suspicion or a general hunch. *Id.* at 30. And the stop must be justified at its inception. *Id.* at 17–19. The corollary to the reasonable suspicion requirement is that an individual has the right to avoid an encounter with the police in the absence of reasonable suspicion. When an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has the right to ignore the police and go about his business. *Florida v. Bostick*, 501 U.S. 429, 436 (1991). And an individual's refusal to

After setting forth these principles, the court looked at the totality of the circumstances present when Timmsen's vehicle was stopped.⁹⁴ It pointed to such facts as: the U-turn across railroad tracks just fifty feet before a roadblock could be interpreted as an "evasive" maneuver; the U-turn occurred in the early morning hours of a weekend, rather than at 8 a.m. on a weekday; the roadblock was well-marked and readily identifiable as a roadblock from a distance and would not be mistaken for an accident site or a road hazard; and, the roadblock was not busy, such that a typical driver would not fear a long delay.⁹⁵ The court then noted that its conclusion was consistent with *Wardlow's* pronouncement that an individual has the right to go about his business because Timmsen's U-turn was the opposite of his business.⁹⁶

The court declined to adopt the bright-line rules urged by Timmsen and the State.⁹⁷ Timmsen urged the court to hold that avoiding a roadblock alone is insufficient to form the reasonable suspicion necessary to conduct a traffic stop, whereas the State urged the court to hold that the sole act of avoiding a roadblock is sufficient to generate reasonable suspicion.⁹⁸ The court reasoned that the proposed bright-line rules were at odds with a reasonable suspicion determination, which considers the totality of the circumstances of each case, noting that the United States Supreme Court reiterated such an analysis in 2002.⁹⁹

B. A Few Words on the Timmsen Special Concurrence

Justice Thomas's special concurrence agreed with the majority's conclusion that the police had the necessary reasonable suspicion to stop Timmsen's vehicle when he made a U-turn before a police roadblock, but

cooperate, without more, does not amount to reasonable suspicion (nor do typical questions to the officer like "how long will this take?" or "am I free to leave?" arouse reasonable suspicion). *Id.*

94. *See Timmsen*, ¶ 5, 50 N.E.3d at 1095 ("[A]bsent any other suspicious activity, the U-turn itself did not provide specific articulable facts that a criminal offense had been or was about to be committed.").

95. *Id.* ¶ 14, 50 N.E.3d at 1098 ("[T]he roadblock was not busy . . . a driver would not have feared a lengthy delay."). *See also* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 448 (1990) (describing a sobriety-related roadblock that increased motorists' travel times, on average, by less than a minute and the Court evaluated relevant factors of the *Brown* test regarding what one might want to avoid a roadblock, including undue delay).

96. *See Timmsen*, ¶ 15, 50 N.E.3d at 1098.

97. *See id.* ¶ 50, 50 N.E.3d at 1107 ("While the four dissenters identify, discuss and reject a variety of *per se* rules put forward by the state and the defendant, respectively, the majority opinion does none of that." (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE 9.5(g), at 731 (5th ed. 2012))).

98. *Id.* ¶ 17, 50 N.E.3d at 1098–99.

99. *Id.* ¶ 18, 50 N.E.3d at 1099.

advocated for a per se rule allowing the police to stop those who evade roadblocks.¹⁰⁰

C. *The Timmsen Dissent*

Justice Burke's dissent agreed with the majority that it was appropriate to consider the totality of the circumstances surrounding Timmen's seizure, but disagreed that those circumstances amounted to reasonable, articulable suspicion of criminal activity.¹⁰¹ Reiterating the majority's observation that an individual "has a right to ignore the police and go about his business" and that any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure,"¹⁰² Burke's dissent noted that when a driver approached a roadblock without speeding or violating any traffic regulation, officers do not have reasonable, articulable suspicion that the driver is engaged in any criminal wrongdoing.¹⁰³ At that point, since there is no reasonable suspicion of criminal activity, the driver has the right to avoid an encounter with the police. Thus, if the driver chooses to exercise that right by lawfully driving in another direction, including the opposite of a previously explored direction, it follows that officers cannot use that fact as justification for a seizure; otherwise, the right to avoid a police encounter would cease to exist.¹⁰⁴

Regarding the majority's application of the facts presented, the dissent first pointed out that Timmsen's U-turn was legal, he did not violate any traffic laws and there was nothing indicative of criminal flight such as "speeding, squealing tires, or spraying gravel."¹⁰⁵ It next pointed out that the facts surrounding the roadblock encounter—that is, that it was well-marked, not busy and occurred at 1:15 a.m. on a weekend, were not well taken because a person's right to avoid an encounter with the police

100. *See id.* ¶ 27, 50 N.E.3d at 1100 (Thomas, J., concurring). Though the special concurrence is worth reading and raises a number of interesting issues, they are not pertinent to the thrust of this article's argument, specifically that *Timmsen* presents a rare case where the first prong of *Terry* is at issue.

101. *See id.* ¶ 49, 50 N.E.3d at 1107 ("[T]he totality of the circumstances test is clearly not incompatible with bright-line rules.").

102. *Id.* ¶ 57, 50 N.E.3d at 1109.

103. *See id.* ¶ 58, 50 N.E.3d at 1109 ("At that point, because there is no reasonable suspicion of criminal activity, the driver has the right to avoid an encounter with the police.").

104. *See id.* ¶ 59, 50 N.E.3d at 1109 ("[A]ccepting the State's argument that a legal U-turn before a police roadblock, by itself, is adequate grounds for an investigatory stop would mean negating the fundamental principle that we have the right, in the absence of reasonable, articulable suspicion of criminal wrongdoing, to avoid encounters with the police.").

105. *Id.* ¶ 61, 50 N.E.3d at 1109. *Cf.* *State v. Fulton*, No. COA08-1210, 2009 WL 1523823, at *2 (N.C. App. 2009) (finding defendant "floored it, spraying gravel").

cannot vary depending on the time of day¹⁰⁶ or whether other people are also being stopped.¹⁰⁷ The Court has often shown concern for whether, and to what degree, local police and even federal agents¹⁰⁸ interfere with (or simply obstruct the flow of) traffic.

Having examined at high resolution the Illinois Supreme Court's heterogeneous views, one might want to take a step back and ask a more fundamental question: Is there "roadblock law" or simply a lineage of *Terry* jurisprudence occasionally applied in the roadblock context? In a totality of the circumstances approach, is the presence of a roadblock one of the circumstances, or is the presence of a roadblock itself a category of circumstances, like the presence of a *bona fide* journalist in a free speech case or the presence of a defendant-aligned attorney during an interrogation in an *Rhode Island v. Innis* scenario?¹⁰⁹

IV. ARE ROADBLOCKS SOMEHOW SPECIAL?

Whether roadblocks are *sui generis*¹¹⁰ as a venue for encounters between the state and the individual invites law students' least-favorite (and their professors' most-favored) answer: *maybe*.

The roadblock is not a piece of automotive flypaper or a magic net that captures only guilty drivers—there is nothing special about it, and its ability to discern culpability of the few while inconveniencing the many is dubious in many cases.¹¹¹ The Framers "thought it better that the guilty should sometimes escape, than that every individual should be subject to

106. See *Timmsen*, ¶ 62, 50 N.E.3d at 1110. Cf. *Adams v. Williams*, 407 U.S. 143, 148–49 (1972) ("While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly had ample reason to fear for his safety.").

107. *Timmsen*, ¶ 62, 50 N.E.3d at 1110.

108. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–83 (1975) (examining interference by border patrol officers wherein they, too, must establish "the requirement that officers must have a reasonable suspicion to justify roving-patrol stops").

109. See generally *Rhode Island v. Innis*, 446 U.S. 291 (1980).

110. *Sui generis* as a phenomenon, not as a principle of law. Cf. *Jackson v. Lamphire*, 28 U.S. 280 (1830) (using *sui generis* as a principle of law).

111. For cases where the High Court has weighed inconvenience of the public against the merits of public safety monitoring (particularly as to intoxicated driving), see generally *Brower v. Inyo Cnty.*, 489 U.S. 593 (1989); *Delaware v. Prouse*, 440 U.S. 648, 658 (1979); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 448 (1990). Illinois's is not the first, nor these authors suspect the last, ultimate state court of appeal to wrestle with this set of issues. See, e.g., *LaFontaine v. State*, 497 S.E.2d 367, 369 (Ga. 1998); see also *State v. Downey*, 945 S.W.2d 102 (Tenn. 1997) (governing sobriety roadblocks).

vexation and oppression.”¹¹² But an absolutist imposition of roadblocks adopts the opposite tack.

While courts are cautious about providing uniformity, avoiding scenarios where the exception swallows the rule, as some scholars believe it has in the case of canine searches,¹¹³ reality provides a diversity of fact patterns impossible to anticipate and codify in bright-line rules exhaustively.¹¹⁴ When carefully curated rule-making collides with the messiness of reality (i.e., with drug-sniffing dogs or infrared surveillance technology¹¹⁵) new and special rules may be needed. However, roadblocks need no new or special rules. And trying to graft particular rules onto the myriad of roadblock situations inevitably leads to contradictory and unworkable results.

In *LaFontaine*, Justice Hunstein of the Georgia Supreme Court succinctly lays out factors that, in some form or another, are common to doctrine in most states; note that the criteria mixes constitutional concerns with administrative concerns, blending these with local police procedure rules about matters like general orders, internal hierarchies (e.g., who can prescribe what), and training requirements:

A roadblock is satisfactory where the decision to implement the roadblock was made by supervisory personnel rather than the officers in the field; all vehicles are stopped as opposed to random vehicle stops; the delay to motorists is minimal; the roadblock operation is well identified

112. *Draper v. United States*, 358 U.S. 307, 320 (1959) (Douglas, J., dissenting) (quoting *Conner v. Commonwealth*, 3 Binn. 38 (Pa. 1810)).

113. See, e.g., Brian R. Gallini, *Suspects, Cars, and Police Dogs: A Complicated Relationship*, 95 WASH. L. REV. 1725, 1768 (2020) (“Applying that precedent, the court saw ‘no reason to reach a different result . . . because the presence of drugs was detected via canine.’” (quoting *People v. Neuberger*, 2011 IL App (2d) 100379, ¶ 10, 959 N.E.2d 195, 199)); Cecil J. Hunt II, *Calling In the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy*, 56 CASE W. RES. L. REV. 285, 294 (2006) (“Americans do not think they are in public, they think they are in their own private space that just happens to have wheels on it.”).

114. To begin to explore the diversity of bizarre, hard-to-anticipate fact patterns that might surround roadblocks and whether or not a person is “seized” at a given point in time, see, for example, *Brower*, 489 U.S. at 594, which describes a scenario wherein an individual encountered, and died within, police roadblock architected to make bypass impossible but not designed specifically to cause mortal injury to the decedent.

115. See *United States v. Place*, 462 U.S. 696, 707 (1983) (“[T]he canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.”); accord *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (“A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”). See also *Kyllo v. United States*, 533 U.S. 27, 38 (2001) (“The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider intimate” (quotation marks omitted)).

as a police checkpoint; and the “screening” officer’s training and experience is sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication.¹¹⁶

These concepts are individually easy to visualize and relatively portable to Illinois, though even after weighing all these factors, it remains somewhat unclear how—or if or why—roadblocks are special places from a constitutional perspective. A sheriff or police commander may suggest roadblocks are special, but this pronouncement has no more legal weight or constitutional significance than a law enforcement officer suggesting parades are special or protests are special.

In *Timmsen*, Justice Freeman correctly notes that some courts have taken notice of the special characteristics of roadblocks; some have even extended the jurisdictional reach of the roadblock beyond its intuitive locus.¹¹⁷ But are roadblocks a feature deserving of special treatment, or are they simply one of many conspicuous locations wherein a person is disproportionately likely to encounter law enforcement?

Roadblocks are simply fixed, temporary “zones of enhanced inquiry” that motorists may choose to interact with or avoid. Further, if avoiding such zones of enhanced inquiry is by itself suspicious, then a pedestrian who uses a crosswalk to cross the street safely and legally to avoid a streetlight-mounted blue-blinking camera in an urban area might be similarly suspicious.¹¹⁸ However, something more than a mere “hunch” is required.¹¹⁹

To make passing through zones of enhanced inquiry mandatory rather than optional offers little benefit to public safety but does significant harm to individuals’ privacy.¹²⁰ Unlike an air travel security screening

116. *LaFontaine*, 497 S.E.2d at 369 (citing *State v. Golden*, 318 S.E.2d 693, 694 (Ga. Ct. App. 1984)).

117. *People v. Timmsen*, 2016 IL 118181, ¶ 17, 50 N.E.3d 1092, 1099 (“And, as pointed out by Professor LaFave, determining when a vehicle avoids a roadblock in a suspicious manner has caused state and federal courts considerable difficulty, with no clear consensus.” (internal quotation marks omitted)). But see *People v. Long*, 465 N.E.2d 123, 126 (Ill. App. Ct. 1984), which is clearly difficult to apply across wide ranges of fact patterns because “the defendant was not stopped by the police” and instead “made the decision to stop on the shoulder of the road.”

118. Such cameras are common in Chicago and other cities, see *Police Observation Device (POD) Cameras*, CHI. POLICE DEP’T, <https://home.chicagopolice.org/inside-cpd/police-observation-device-pod-cameras> [<https://perma.cc/KV8R-V6NN>] (last visited May 15, 2024).

119. The prejudice against mere hunches predates *Terry*, though it is most famously called out as inadequate in *Terry*. See *Henry v. United States*, 361 U.S. 98, 102 (1959) (“[G]ood faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”).

120. Admittedly, roadblocks may contribute to public safety; however, the consequences to highway users’ privacy and progress are not inconsequential—even in instances of the slightest inconvenience. See *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 448 (1990) (“The average

checkpoint,¹²¹ the public way is not a place of heightened concern, nor a place where a traveler is contractually or legislatively obligated to cooperate with unusually inquisitive policing activities.

delay for each vehicle [due to the checkpoint] was approximately 25 seconds.”). A weighing of these factors over the past fifty years would reveal considerable concerns. *Compare* *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) (“[T]he States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles”); *with* *Sitz*, 496 U.S. at 455 (“[T]he balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state [roadblocks.]”); *and* *Caballes*, 543 U.S. at 409 (“Any intrusion on [motorist’s] privacy expectations does not rise to the level of a constitutionally cognizable infringement.”). *But see id.* at 422 (Ginsburg, J., dissenting) (“Under today’s decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population.”). While not roadblock scenario, Justice Ginsburg’s dissent in *Caballes* primary emphasis is inconvenience to motorists temporarily seized and the anxiety “of the law-abiding population” caused by unwelcome searches. *Id.* Justice Ginsburg’s concern for motorists’ threatened dignity, harmed privacy, and lessened rights is warranted and reasonable, particularly in manufactured roadblock settings where a motorist may feel threatened with seizure or no longer free to leave; these concerns are revived or recalled by Ginsburg in her opinion for the Court in *Rodriguez v. United States*, 575 U.S. 348, 354–58 (2015).

A growing minority of state courts, led by Washington, now agree that roadblocks are significant in their effects and represent a unique origin for concern and fresh debate. *See* *City of Seattle v. Mesiani*, 755 P.2d 775, 777 (Wash. 1988) (en banc) (“From the earliest days of the automobile in this state, th[e] Washington Supreme Court] has acknowledged the privacy interest of individuals and objects in automobiles.”). In *Mesiani*, Seattle police sobriety checkpoints and roadblocks were found legally problematic and violated both the United States and Washington Constitutions. *Id.* (“No argument has been presented to this court that would bring the checkpoint program within any possible interpretation of the constitutionally required ‘authority of law.’”). To date, approximately ten states disallow, by legislative action including IDAHO CODE §§ 19-621–622 (2017) (“[R]oad blocks [are permissible] for the purpose of apprehending persons reasonably believed . . . to be wanted for violation of the laws”), or judicial decision, as illegal under state constitutions in Michigan, Minnesota, Oregon, and Rhode Island, where checkpoints and roadblocks of the kinds considered in *Prouse* or *Sitz*. Michigan adopted an unusual position post-*Sitz* that while roadblocks may not violate the Fourth Amendment, roadblocks remain incompatible with Michigan’s Constitution. *See* *Sitz v. Dep’t of State Police*, 506 N.W.2d 209, 210 (Mich. 1993) (Boyle, J.) (“Because there is no support in the constitutional history of Michigan for the proposition that the police may engage in warrantless and suspicionless seizures of automobiles for the purpose of enforcing the criminal law, we hold that sobriety checklanes violate art 1, § 11 of the Michigan Constitution.”). *See also* *State v. Henning*, 666 N.W.2d 379, 385 (Minn. 2003) (“[P]resence of special series registration plates . . . [does not] amount[] to reasonable articulable suspicion nor do the circumstances surrounding the issuance of the plates render a suspicionless stop of a driver in a vehicle with these plates ‘reasonable.’”). Two other states’ courts, Alaska and Iowa, found no statutory authority to conduct police roadblock activities. Though Iowa addressed this with a new statute explicitly allowing roadblocks and describing their use. IOWA CODE ANN. § 321K.1 (West 2024) (“[L]aw enforcement agencies of this state may conduct emergency vehicle roadblocks in response to immediate threats to the health, safety, and welfare of the public; and otherwise may conduct routine vehicle roadblocks only as provided in this section.”). Iowa’s legislative change also modifies two earlier relevant provisions. *See* Act of May 27, 1986, ch. 1220, Iowa Acts 346–47; Act of March 24, 2003, ch. 6, Iowa Acts 4, 5–6.

121. Heightened concern about airport security stems from a more-than-fifty-year history of executive and legislative interventions to make air travel safe from criminal mischief and terrorism,

Existing, long-standing case law principles in criminal procedure already deal with situations wherein a motorist flees at illegally swift speeds or does something similarly blatant to arouse valid suspicions. But Timmsen's departure from the area was hardly *fast and furious* and was instead *slow and unremarkable*.¹²²

A. No Compromise Needed

The *Timmsen* decision attempts to balance the interests of public safety with the right for motorists to go about their business, but like Pat Pedestrian, this balancing act answers a question nobody needs to be asking. Justice Burke's dissent in *Timmsen* correctly identifies a lack of reasonable articulable suspicion created by a legal traffic maneuver; it is well-settled law that the fruits of a disallowed search or dubious hunch do not redeem the search post facto.¹²³

arguably beginning with the creation of the Air Marshals service during the Kennedy administration and followed by increased airport security under subsequent administrations, particularly following the hijacking cases of the 1970s and the attacks of September 11, 2001. Courts, including the Supreme Court, have generally respected the efforts of rule-makers as to these zones of enhanced inquiry as (1) minimally intrusive, (2) beneficial to public safety, and (3) included in the contractual obligations of passengers who purchase tickets departing from federally regulated airport facilities. Justice Ginsburg in *Chandler* opined, "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports" *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675–76 (1989)). By contrast, delaying users of the public highway while forcing them to participate in *untargeted* investigative exercises is significantly intrusive and inconveniencing, of dubious public safety benefit in many instances, and not something a motorist reasonably expects to encounter as a condition of her use of the highway. Note the use of the adjective *untargeted* in the previous statement—a targeted campaign to catch a particular person is almost undoubtedly allowable without heightened Fourth Amendment concern: "[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

122. *Timmsen*, ¶ 3, 50 N.E.3d at 1094 ("After the U-turn, Hancock County Deputy Travis Duffy stopped defendant's vehicle as he proceeded westbound on Highway 136.").

123. *Id.* ¶ 58, 50 N.E.3d at 1094 (Burke, J., dissenting) ("When a driver, such as . . . in this case, approaches a police roadblock in a normal way, . . . the police officers manning the roadblock do not have reasonable, articulable suspicion At that point, . . . the driver has the right to avoid an encounter with the police. If the driver then chooses to exercise that right by lawfully driving in another direction, and doing nothing more, it follows that the police officers may not use that fact as justification for a seizure; if they could, the right to avoid an encounter with the police would no longer exist." (citation omitted)). See also *Carroll v. United States*, 267 U.S. 132, 148–49 (1925) (identifying evidence obtained in a warrantless search of a defendant's home, in his absence, was inadmissible and an unreasonable seizure); *Rios v. United States*, 364 U.S. 253, 255 (1960) ("[E]vidence seized in an unreasonable search by state officers is to be excluded from a federal criminal trial upon the timely objection of a defendant who has standing to complain."); see, e.g., *Beck v. Ohio*, 379 U.S. 89, 91 (1964) ("There are limits to the permissible scope of a warrantless search incident to a lawful arrest, but we proceed on the premise that, if the arrest itself was lawful, those

The High Court's jurisprudence allows, in many other contexts, for people to encounter the police and to make proverbial U-turns without viewing the U-turns as themselves inculpatory. A person yelling at a protest one moment can choose to be quiet or leave when noticing the police nearby. An academic, journalist, or philosopher writing controversial materials can stop writing when the police arrive—or even rip her writings from the typewriter and throw them in the nearby roaring fireplace (an unusual but legal U-turn), without piquing the State's interest.

It is a central tenet of not only constitutional thought on these topics but also of broader liberal thought on society that a person retains agency in her encounters with the police. A person not subject to arrest can choose, within a framework of rules, to invite or abort conversations with the police, to allow or disallow specific searches,¹²⁴ and to share or not share certain information with the police. Allowing a person to select an otherwise permissible route that avoids police requires no modification or extension of these principles. There is simply no difference whether avoidance of a police encounter is done on foot, by scooter, bicycle, moped, car, or truck. To hold otherwise eviscerates the constitutional protections guaranteed to the citizenry under *Terry* and disregards decades of Supreme Court jurisprudence intended to make *Terry* pedestrian rules applicable to vehicular encounters.

V. PROPOSAL

A. Forecasting

The future of this area of law is impossible to predict but not impossible to imagine. There should be serious concerns that a rule branding avoidance of roadblocks—or zones of enhanced inquiry—may needlessly and overbroadly jeopardize the privacy and other rights of people using the public highways with scant benefit to drunk driving reduction, counter-narcotics enforcement, or any other valid purpose (or accumulation of those purposes).¹²⁵

limits were not exceeded here.”). Nor, of course, does an allowable search that produces nothing of interest become an impermissible search simply because its dividends are disappointing.

124. See *cf.* *Birchfield v. North Dakota*, 579 U.S. 438, 447 (2016) (noting that a breath analysis is allowed but blood analysis is disallowed in instances of suspected drunk driving). For a history of courts' efforts to weigh motorists' interests against concern for public safety on roads with intoxicated drivers, see *id.* at 444–49.

125. *Roadblocks Fact Sheet*, NAT'L MOTORISTS ASS'N, <http://ww2.motorists.org/wp-content/uploads/2015/05/roadblock-fact-sheet.pdf> [<https://perma.cc/Z29G-QPFN>] (“Roadblocks, as used in the United States, are designed and intended to use fear, intimidation, and inconvenience to expedite a government edict or political agenda. They have a net zero influence on public safety.”)

Already, if Google Maps or similar software detects a slowdown ahead, it may suggest that a motorist modify his route or take an alternative route to save time;¹²⁶ if the slowdown ahead in such a scenario is due to a roadblock, did the motorist unaware of the slowdown's pedigree still do something provocative or suspicious by simply following Google Maps' route suggestion to save ten minutes?

Extending this example slightly further into one possible future, one can imagine a person riding in a fully-autonomous vehicle that is speeding down the road while the occupant takes a midday slumber or battles the daily crossword; if such a vehicle, by no action of the passenger, takes an efficient route and in so doing avoids a roadblock, do we form suspicions about the human inside?

The autonomous vehicle example may seem far-fetched,¹²⁷ but it will likely happen sooner than we think. Moreover, the analogies most convenient to judges are threatening to that hypothetical vehicle occupant's rights; today, if a human-operated vehicle makes maneuvers that invite police attention—or under *Timmsen*, the autonomous vehicle does make a suspicious maneuver—the various containers within the vehicle,¹²⁸ and

But, even if there were a 'safety benefit' related to roadblocks, it would not outweigh the negative totalitarian nature of this practice.”)

126. Google Maps is used merely as an example and is, at the time of publication, the dominant navigation software used in the United States. It often offers a variety of routes to reach a given destination. See Ami Fishman, *Would You Like Some Extra Suggestions with That?*, GOOGLBLOG (May 22, 2009), <https://maps.googleblog.com/2009/05/would-you-like-some-extra-suggestions.html> [<https://perma.cc/L7C5-9NXU>].

127. One can imagine a judge considering the autonomous vehicle choosing the best route in its database as similar to the driver in *Arvizu*, who did not see a roadblock ahead and was just trying an alternate, perhaps more efficient, route. See *United States v. Arvizu*, 534 U.S. 266, 268–69 (2002).

128. The pertinent lineage of case law here begins in *Boyd*, forty years before the great American novel introduced the implications of reckless driving to the masses. See FITZGERALD, *supra* note 7, at 153–55 (noting a pivotal scene that involves a speeding motor vehicle). Next in *United States v. Ross*, 456 U.S. 798, 806 (1982), the Court dusted off century-old legal concepts to bring *Boyd* into the Reagan era. The question of just how far *Ross* reaches has seemingly troubled the Court for decades. See *California v. Acevedo*, 500 U. S. 565, 572 (1991) (describing *Ross*'s inclusion of containers in stopped vehicle as “critical step” of establishing containers in vehicle may be “searched without a warrant because of their presence within the automobile”); see also *United States v. Johns*, 469 U.S. 478, 479–80 (1985) (opening the Court's opinion with an interpretation of *Ross* as holding “that if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any containers found inside”). Prosecutors and judges with criminal dockets reading this Article will no doubt note there is nontrivial heterogeneity among departments in terms of vehicle search and container search policies; the law gives some guidance as to how these policies might be constructed, but latitude is significant. See *Marling v. Littlejohn*, 964 F.3d 667, 670 (7th Cir. 2020) (“[W]hile policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain

any passengers, may also be searched.¹²⁹ For a judge to posit a “software” driver is no different is hardly unimaginable.¹³⁰

Any blanket enhancement of suspicion reaching ordinary motorists obeying traffic laws and acting in orthodox ways, even at that blanket’s frayed outer edges, threatens the liberties of everyday people and creates unnecessary adversarial police interactions with the public, which can and do produce tragic consequences.¹³¹ The most recent example comes from Memphis, where officers pulled over Tyre Nichols and then beat him to death for an alleged traffic violation.¹³² And unfortunately, there is likely to be a more recent and equally tragic example by the time this Article is published. The “nothing to hide, nothing to fear” doctrine is, thankfully, a tiny speck in our societal and judicial rearview mirror.¹³³

from examining the containers’ exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.” (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

129. See *Wyoming v. Houghton*, 526 U.S. 295, 309–13 (1999) (Stevens, J., dissenting) (“Nor am I persuaded that the mere spatial association between a passenger and a driver provides an acceptable basis for presuming that they are partners in crime”); accord *United States v. Di Re*, 332 U.S. 581, 593 (1948) (“But if the presence of Di Re in the car did not authorize an inference of participation in the [] [crime,] it fails to support the inference of any felony at all.”). Courts correctly show serious and durable concern for the occupants of vehicles stopped due to drivers’ choices over which they likely enjoy limited or no control. See, e.g., *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (explaining that passengers may challenge detention in stopped vehicle because each individual in vehicle enjoys Fourth Amendment rights to be asserted once person or property are seized); see also *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (recognizing each occupant has individual interest in freedom from being impermissibly seized or having her belongings improperly seized); *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994) (“The interest in freedom of movement and the interest in being free from fear and surprise are personal to all occupants of a vehicle . . .”).

130. Already, judges routinely draw analogies between smartphones and filing-cabinets, between email mailboxes and physical P.O. boxes, or between online account passwords and physical locks and keys; why not human drivers and computerized pilots? See generally *State v. Wilson*, 884 S.E.2d 298 (Ga. 2023) (finding wide-reaching digital search warrant was overly broad and hence unallowably broad exploratory activity, explanation in dicta as to why searching trove of thousands of digital files may or may not be distinguishable from searching through one’s physical papers on one’s writing desk).

131. See *Black Lives Matter v. City of Seattle*, 466 F. Supp. 3d 1206, 1210 (2020) (“The city and nation are at a crisis level over the death of George Floyd. One would be missing the point to conclude that the protests that are the subject of this motion are only about George Floyd. His death just happens to be the current tragic flashpoint in the generational claims of racism and police brutality in America.”).

132. Emily Cochrane & Rick Rojas, *The Questions That Remain a Year After Tyre Nichols’s Death*, N.Y. TIMES (Jan. 8, 2024), <https://www.nytimes.com/article/tyre-nichols-memphis-police-dead.html> [<https://perma.cc/VJ34-PASC>] (explaining the circumstances of Tyre Nichols’ death).

133. Courts now recognize, correctly, that people may not enjoy encounters with police even if they are law-abiding denizens involved in no shady dealings. Judge Boyce F. Martin Jr., noted, “Many citizens become nervous during a traffic stop, even when they have nothing to hide or fear.” *United States v. Richardson*, 385 F. 3d 625, 630–31 (6th Cir. 2004). This assertion is in accord

The right to avoid an encounter with law enforcement (if that right even exists) cannot be invalidated simply through legal and unremarkable avoidance of a law enforcement roadblock. Policing activity can be effective investigative practices do not necessitate the unanimous cooperation of the public.

Timmsen is a problematic decision wherein, instead of the current framework of articulable reasonable suspicion, actions that are neither problematic nor suspicious individually are declared in the aggregate to be both.¹³⁴ A century ago, Henry W. Ballantine lamented in *Harvard Law Review* that it was troubling there were still areas of American law where a wrong could mature into a right.¹³⁵ Today, our focus is on the inverse: inoffensive and unremarkable occurrences that inexplicably accrete into acts deserving suspicion and investigation.

B. Products Liability Framework

Practitioners and Judges alike, particularly those with criminal matters before them, should heed this warning and carefully consider the fact pattern in *Timmsen* and the merits of Justice Burke's dissent. The ascribing of an inchoate suspicion to a neutral action is a step off the current path, and judges must consider both the contemporary and eventual implications of their positions. In the case of *Timmsen*, the holding is problematic in the present—and possibly disastrous in at least some imaginable near-future scenarios.

The near-future scenarios, which should give rise to the most concern, involve the transferability of suspicion from “innocuous acts” or acts “outside” the motorist's control to that motorist in a Fourth Amendment context. In one imaginable fact pattern, a primarily autonomous or “driver-as-passenger”¹³⁶ vehicle makes a legal but unusual maneuver that

with other courts' findings that nervousness in police encounters is not unusual. “It is certainly not uncommon for most citizens—whether innocent or guilty—to exhibit signs of nervousness when confronted by a law enforcement officer.” *United States v. Wood*, 105 F.3d 942, 948 (10th Cir. 1997).

134. The maneuver involved is by itself neither illegal nor suspicious in the absence of the roadblock; should the state's introduction of the roadblock transform the nature of the nearby activity? By what mechanism? If the state can erect temporary facilities that turn innocuous activities into suspicious ones, what boundaries would limit or contain that behavior?

135. Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (“[M]aturing a wrong into a right [is] contrary to one of the most fundamental axioms of the law.”); see also *Wallace v. Fletcher*, 30 N.H. 434, 453 (1855) (“[L]ight evidence gains force by continued repetition, until at the end of twenty years it becomes, unexplained, conclusive evidence of right.”).

136. “Driver-as-passenger” vehicles are vehicles that are autonomous in all but the most extreme or unusual of circumstances, equivalent to the Society of Automotive Engineers (SAE) Level 4 level of driving automation. See *Taxonomy and Definitions for Terms Related to Driving*

a human driver would likely avoid attempting, and, as a result, the onlooking officer believes an intoxicated human rather than a creative artificial intelligence (AI) is in control, leading to a traffic stop. Similarly, a motorist in control of a vehicle selects a route—at a smartphone rideshare application’s urging—that is circuitous, circling back to a resort hotel periodically, legitimately waiting to pick up a passenger for the rideshare service and obeying all traffic laws; an onlooking officer erroneously believes the person is circling in wait for a victim of violent crime or to deal drugs at a surveilled location.¹³⁷

Whether a person is acting at the suggestion of AI—in the case of a rideshare or popular navigation application’s—or the vehicle is wholly controlled and operated by AI (in the case of Society of Automotive Engineers (SAE)¹³⁸ Level 4- and Level 5-equipped vehicles), the quantity and kind of suspicion afforded to the humans aboard must in some way relate proportionally to their degree of control over the vehicle; current law contains no mechanism for this proportional reasoning to occur and the analogy that the AI systems are simply “drivers” is unworkable: while an erratic human driving behavior might indicate the need for further investigation of intoxication or allow the search of other occupants, it is unclear why an occupant whose vehicle software failed to update that morning or whose car’s AI software is corrupted should be the subject of criminal suspicion; the only thing the occupants are more likely to be in possession of than they were moments earlier is a products liability claim against the car manufacturer.

While reasonable minds can differ as to where the line in the sand is drawn, in the past, courts have looked to motor vehicle insurers to judge reasonableness in some matters, and should adopt this practice for all cases requiring a judgment as to the degree of control human occupants exercised over the vehicle to avoid inconveniencing and even prosecuting

Automation Systems for On-Road Motor Vehicles, SOC’Y OF AUTO. ENG’RS INT’L, 35 (2021) [hereinafter SAE, *Taxonomy and Definitions*], https://www.sae.org/standards/content/j3016_202104/ [<https://perma.cc/Q7W7-DGDN>]. In short, when one imagines Level 4 vehicles, one should imagine a vehicle able to traverse the vast majority of road scenarios uneventfully and with aplomb and where a human’s need to intervene is rare and heroic; when one imagines Level 5 vehicles, these are vehicles in which a person might send a child to school, might take a nap in the back seat at 70 miles an hour, or might send one’s elderly parent to a doctor’s appointment, all with no human in control of the vehicle and no human needing to be ready to take control; one can imagine a Level 4 vehicle as one where human hands touch the steering wheel rarely, while one can imagine a Level 5 vehicle as a moving room with no steering wheel.

137. See *United States v. Williams*, 321 F. Supp. 3d 594 (D.S.C. 2018) (noting similar facts).

138. In the United States, the SAE sets everything from the definition of a horsepower to the definition of each level of vehicle autonomy. See SAE, *Taxonomy and Definitions*, *supra* note 136, at 2–4.

occupants for vehicle behavior mostly or completely beyond their control. As vehicles approach SAE Level 4 and Level 5 levels of autonomous operation, many scholars argue that automotive collisions should no longer operate within the current tort and personal injury framework,¹³⁹ instead urging that they should reside entirely in the framework applied to products liability.¹⁴⁰ This delineation could be meaningfully and informatively imported into the realm of criminal procedure.¹⁴¹

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the ‘luck’ of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm.¹⁴²

It is odd to subject a “driver” to searches on the basis of the vehicle’s operation when the “driver” does not control the vehicle’s operation (in essence, this person is a passenger). When an autonomous vehicle

139. See generally Sophia H. Duffy & Jamie Patrick Hopkins, *Sit, Stay, Drive: The Future of Autonomous Car Liability*, 16 SCI. & TECH. L. REV. 453, 456 (2013) (urging a products-liability-like strict liability framework for autonomous vehicles); Katie Atkinson, *Autonomous Cars: A Driving Force for Change in Motor Liability and Insurance*, 17 SCRIPTED 125, 141–44 (2020) (suggesting products liability will be spread among car manufacturers, software firms, and other parts of the digital ecosystem enabling vehicle autonomy); Kyle Colonna, *Autonomous Cars and Tort Liability*, 4 CASE W. RES. J.L. TECH. & INTERNET 81, 118–30 (2012) (drawing a parallel to the legislative protections enacted for nuclear energy liability to one possible for manufacturing of autonomous cars); but see Kevin Funkhouser, *Paving the Road Ahead: Autonomous Vehicles, Products Liability, and the Need for a New Approach*, 2013 UTAH L. REV. 437, 452–62 (2013) (suggesting no current regulatory or tort framework may perfectly fit autonomous vehicle regulatory challenge and fresh framework architecture may be necessary).

140. See John Villasenor, *Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation*, BROOKINGS INST. 4 (Apr. 2014) (“[T]here is not a need to encumber the legal system with a new set of overly broad federal or state liability statutes relating to autonomous vehicles.”); but see Jeffrey K. Gurney, *Sue My Car Not Me: Products Liability and Accidents Involving Autonomous Vehicles*, U. ILL. J.L. TECH. & POL’Y 247 (2013) (suggesting human occupant attentiveness might still factor in liability calculus). Compare K.C. Webb, *Products Liability and Autonomous Vehicles: Who’s Driving Whom?*, 23 RICH. J.L. & TECH. 1, 5–9 (2017) (suggesting applying a new standard: the reasonable car standard, rather than using tort law for liability); with Duffy & Hopkins, *supra* note 139, at 471–79 (analyzing strict liability versus other frameworks for autonomous or largely-autonomous vehicle systems).

141. See generally Michael L. Rustad, *Products Liability for Software Defects in Driverless Cars*, 32 S. CAL. INTERDISC. L.J. 171 (2022). See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986) (“The determination has been said to turn on the nature of the defect, the type of risk, and the manner in which the injury arose.”).

142. *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965).

crashes into something, the manufacturer is responsible in a products liability framework; we do not blame the vehicle occupants because they do not have control over the vehicle's operation (an SAE Level 5 vehicle may not even have a steering wheel or way for occupants to pilot the vehicle). To that end, at or near the line where property and casualty insurers cease to insure vehicles (SAE Level 4 or Level 5), the vehicle's maneuvers should no longer create suspicion as to the "driver" inside.¹⁴³

When a person sprays herself with sunscreen that contains chlorofluorocarbons, a banned substance, we do not arrest that person at the beach or use it as a pretense to search her home for an underground chlorofluorocarbon meth-lab-style facility; we might ask where she bought the sunscreen and look into actions that can be taken against the manufacturer of the can of banned sunscreen.¹⁴⁴ Just as we do not expect every beachgoer to ace an organic chemistry exam in the sunscreen section of the drugstore, it is unreasonable to expect that every occupant of an autonomous vehicle will have the skill, time, or resources to perform a wholesale audit of the vehicle's recent software updates before embarking on a commute to work or a trip to the airport. Instead, responsibility rests with the manufacturer.

Similarly, when autonomous vehicle software leads a vehicle astray, the occupants, whether or not in the "driver's seat" (an obsolete interior taxonomy, especially in an autonomous vehicle with no steering wheel), should bear responsibility that is not wildly disproportionate to the occupants' input as to, and, therefore responsibility for the vehicle's path. For instance, if an autonomous vehicle crashes and injures the occupants, an equitable society would not blame the occupants for having purchased the vehicle but instead would blame the manufacturer for the harm visited upon the purchaser; nor would an equitable society limit the occupant's damages to the price paid for the vehicle. "It is obvious that the amount of consequential damages can exceed many times over the consideration tendered by a plaintiff. . . . [T]he prospect of liability for the large

143. This proposal synchronizes with the proposal that collisions involving SAE Level 4 vehicles in full autonomous mode and Level 5 vehicles in any mode be subject to strict liability frameworks. See Adam Rosenberg, *Strict Liability: Imagining a Legal Framework for Autonomous Vehicles*, 20 TUL. J. TECH. & INTELL. PROP. 205, 218–21 (2017) (discussing autonomous vehicles, excluding SAE Level 5, wherein they should be held to a strict liability standard).

144. To be precise, it is not the sunscreen that is problematic, but rather the propellant used in the spray can. Chlorofluorocarbons are complex organic compounds used as propellants, lubricants, and coolants. See Archie McCulloch, *Fluorocarbons in the Global Environment: A Review of the Important Interactions with Atmospheric Chemistry and Physics*, 123 J. FLUORINE CHEMISTRY 21, 25–28 (2003) (discussing fluorine's effect on the ozone).

company's lost profits or good will that might result from an [incident] caused by faulty software could be staggering."¹⁴⁵

CONCLUSION

Not long ago, the theme was “stranger danger” and not getting into vehicles driven by unknown people; today, people summon a rideshare vehicle from a smartphone and have a “stranger” drive the kids to school. In the not-distant future, a vehicle with no human at the steering wheel (and, in the case of SAE Level 5 vehicles, perhaps no steering wheel at all) will be summoned and will deliver children to school, sports practice, and back home uneventfully with superhuman safety records, thanks to superhuman sensors and superhuman response times—perhaps all while watching a children's film projected onto the windshield rather than the passing scenery.¹⁴⁶ This technology is fantastic and the authors are not change-resistant Luddites; however, the occupants should not be suspects on the basis of behaviors they do not control.

We should not resist the progress that inevitably accompanies new technologies and ideas. We must, however, question and rewrite legal frameworks that move so quickly from suspicion to search to prosecutorial activities when the initial suspicion's software provenance is so distinguishable from its eventual human target. The *Timmsen* fact pattern with an autonomous SAE Level 5 vehicle involved illustrates how quickly perfectly-legal maneuvers could be transformed into roadside suspicion simply because a software update was missed or the onboard AI decided to do something odd, like make a legal U-turn to pursue a different route after noticing a possible slow-down or obstruction ahead.

Our concern going forward is less to do with the Illinois Supreme Court's *fallibility* and more with the *Timmsen* majority opinion's *durability*.¹⁴⁷ And, in a world not far in the future, we posit its holding that transforms perfectly legal driving into cause for suspicion will not age well—whether vehicles are piloted by people like Mr. Timmsen, by people using computer-aided navigation, or by artificial intelligence.

145. *RRX Indus. v. Lab-Con, Inc.*, 772 F.2d 543, 550 (9th Cir. 1985).

146. In 2016, a “driver” not in control of the vehicle died while allegedly watching *Harry Potter* rather than the road ahead. Sam Levin & Nicky Woolf, *Tesla Driver Killed While Using Autopilot Was Watching Harry Potter, Witness Says*, GUARDIAN (July 1, 2016), <http://www.theguardian.com/technology/2016/jul/01/tesla-driver-killed-autopilot-self-driving-car-harry-potter> [<https://perma.cc/7BQU-MDXH>].

147. See generally *People v. Timmsen*, 2016 IL 118181, ¶ 5, 50 N.E.3d 1092, 1092.