TERRY, REASONABLE SUSPICION, AND AN OFFICER'S PRE-STOP BEHAVIOR

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[*] This article presents a solution to address a shortcoming in Fourth Amendment jurisprudence by way of a new test trial courts can use to give boundaries to an otherwise amorphous area of law. As a Municipal Court Judge and adjunct professor of law at the University of Wyoming College of Law progression of the law and ensuring clarity in the law is important to me. To be clear, nothing in this article seeks to opine on the current state of the law. Moreover, nothing in this article should be taken to suggest that I would utilize the proposed change herein in cases coming before my court—that would be inappropriate and violative of the Rules of Judicial Conduct.

> "The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding."
>
> —Louis D. Brandeis

INTRODUCTION

In America, "[p]olice pull over more than 50,000 drivers on a typical day, more than 20 million motorists every year."[1] Traffic stops are the most common police interaction.[2] Nationwide, the discussion of law enforcement conduct polarizes opinions, beliefs, and values. On one side, law enforcement supporters abide by sayings like "Thin Blue Line," "I've got his six," "Back the Blue," and the list goes on.[3] On the other side, critics of law enforcement claim police brutality, overreaching, misconduct, and a host of other maladies against law enforcement.[4]

The headlines and case law are littered with examples of officers making unnecessary stops that sometimes turn violent or deadly. Some scholars have opined that decriminalization of some

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[1] *The Stanford Open Policing Project*, STANFORD, https://openpolicing.stanford.edu/findings/ [https://perma.cc/8YMS-RAXP] (last visited Feb. 13, 2024).

[2] *See id*.

[3] *See Statement in Support of the Thin Blue Line Act*, AFPI (Feb. 16, 2023), https://americafirstpolicy.com/issues/statement-in-support-of-the-thin-blue-line-act [https://perma.cc/XHD9-6BYA]; *see also* Brooke Schultz, *Barring 'Thin Blue Line' Flag on Pennsylvania Township Property is Unconstitutional, US Court Rules*, WESA (Nov. 15, 2023), https://www.wesa.fm/courts-justice/2023-11-15/thin-blue-line-pa-unconstitutional [https://perma.cc/MP3R-KKDQ] (noting a US District Court's ruling that prohibiting the display of a law enforcement supporter American Flag violated free speech); *see also* Ezekiel Kweku, *The Thin Blue Line that Divides America*, N.Y. TIMES (Jan. 4, 2024, 5:30 AM), https://www.nytimes.com/2024/01/04/opinion/thin-blue-line-capitol.html [https://perma.cc/W638-J78S] (recounting the history of the 'thin blue line' flag and why it stands for police support today).

[4] *See generally* Adrian Sainz, *Relatives of Tyre Nichols, George Floyd and Eric Garner Say Lack of Police Reform is Frustrating*, AP NEWS (Mar. 22, 2024, 5:17 PM), https://apnews.com/article/police-violence-tyre-nichols-george-floyd-2c05e0950c21421e72d5135242b060d2 [https://perma.cc/2H7J-P5FY]; *see also* Daphne Duret et al., *Aggressive Policing in Memphis Goes Far Beyond the Scorpion Unit*, THE MARSHALL PROJECT (Mar. 14, 2023, 6:00 AM), https://www.themarshallproject.org/2023/03/14/memphis-police-beatings-tennessee [https://perma.cc/X2VT-NGTF].

(or all) traffic offenses is the answer.[5] If officers do not have the authority to stop motorists for traffic offenses or are limited in some way, then the chance and opportunity for police misconduct in many forms is significantly lessened.[6] There is no question the logic behind that premise is fairly sound—less interaction equals less misconduct. But that approach seeks to avoid the problem rather than address it when it occurs.

What is missing from the discussion, both in case law and scholarship, is answering the question: "how should courts analyze police misconduct in relation to a traffic stop?" Most courts and scholars only discuss the standard for the traffic stop itself—whether the officer *should* have stopped the motorist based on what they knew at the time of the stop.[7] Essentially, courts and scholars focus on what information the officer had at the moment he decided to pull over the motorist that would justify the stop.[8] As is discussed in depth below, that standard comes from the landmark case *Terry v. Ohio*.[9] The United States Supreme Court created an objective test to determine whether an officer had reasonable suspicion, which is something far less than probable cause, to stop someone briefly or detain. Historically, such an analysis requires a determination of what the motorist did or did not do that was violative of the law,

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[5] *See generally* Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. Rev. 672 (2015); *see also* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1069 (2015).

[6] *See* Woods, *supra* note 6, at 678, 754-55.

[7] *See generally* Russell L. Weaver, *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, 109 DICK. L. REV. 1205 (2005); *see also* Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1517-20 (2017); *see also* Hunter J. Rodgers, *Terry, Traffic Stops, and Tragedy: Conflicts and Concerns in the Wake of* Kansas v. Glover, 19 SEATTLE J. FOR SOC. JUST. 251 (2020); *see also* Kansas v. Glover, 589 U.S. 376 (2020); *see also* Illinois v. Wardlow, 528 U.S. 119 (2000) (holding that evidence of fleeing without provocation can be considered in determining reasonable suspicion); *see also* United States v. Sokolow, 490 U.S. 1 (1989).

[8] *See* State v. Murphy, 823 N.E.2d 25, 28 (2004) (citing Dayton v. Erickson, 665 N.E.2d 1091 (Ohio 1996)); *see also* State v. Brown, 63 N.E.3d 509, 516 (2016) (citing Bowling Green v. Godwin, 850 N.E.2d 698 (Ohio 2006)); *see also* United States v. Johnson, 63 F.3d 242, 245 (3rd Cir. 1995) (citing Scott v. U.S., 436 U.S. 128, 137-38 (1978)); *see also* State v. Garcia, 123 S.W.3d 335, 344 (Tenn. 2003); *see also* State v. Day, 263 S.W.3d 891, 902-03 (Tenn. 2008); *see also* Carla R. Kock, State v. Akuba*: A Missed Opportunity to Curb Vehicle Searches of Innocent Motorists on South Dakota Highways*, 51 S.D. L. REV. 152, 166 (2006).

[9] *See generally* Terry v. Ohio, 392 U.S. 1 (1968); *see also* Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998).

which the officer could have, or did, observe.[10] From there, courts across the country have extrapolated that same principle to what has been coined a "routine traffic stop."[11] "Routine traffic stop" has become a moniker and dividing line for how to judge an officer's decision to stop a motorist for a purported violation.

Nevertheless, a few courts have added a layer to the analysis and now include an analysis of an officer's pre-stop behavior.[12] The issue with such an approach is there is no uniform process to determine how, if at all, the officer's pre-stop behavior,[13] as opposed to the information the officer knew to initiate a stop, should be weighed.[14] The courts that have addressed an officer's pre-stop behavior in relation to development (or not) of reasonable suspicion to initiate a stop seem to be isolated to a handful.[15] Those same courts have yet to *meaningfully* address how or if an officer's pre-stop behavior factors into a totality of the circumstances analysis as outlined and required from *Terry* and its progeny. Some have said *Terry* principles and analysis address it sufficiently. But what is clear is there is no consensus.[16] Trial courts, prosecutors, defense attorneys, defendants, and law enforcement deserve a uniform and

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[10] Whren v. United States, 517 U.S. 806, 817-18 (1996) ("'[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations' which afford the 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained." (citations omitted)).

[11] *See* United States v. Bassols, 775 F. Supp. 2d 1293, 1298 (D.N.M. 2011); *see also* United States v. Williams, 7 F. App'x. 876, 881 (10th Cir. 2001); *see also* United States. v. Burnett, 240 F. Supp. 2d 1183, 1189 (D. Kan. 2002); *see also* United States v. Jones, 44 F.3d 860, 871-72 (10th Cir. 1995); *see also* United States. v. Cervine, 169 F. Supp. 2d 1204, 1209 (D. Kan. 2001); *see also* United States. v. West, 219 F.3d 1171, 1176 (10th Cir. 2000); *see also* Graves v. Thomas, 450 F.3d 1215, 1223-24 (10th Cir. 2006); *see also* United States v. Bradford, 423 F.3d 1149, 1156 (10th Cir. 2005).

[12] *See generally* United States v. Ochoa, 4 F. Supp. 2d 1007 (D. Kan, 1998); *see also* Levenson v. State, 508 P.3d 229 (Wyo. 2022); *see also* United States. v. Esteban, 283 F. Supp. 3d 1115 (D. Utah 2017).

[13] I am going to refer to what I perceive is the topic at hand as an officer's "pre-stop behavior." Often, reasonable suspicion cases refer to an officer's conduct. However, as I discuss below, conduct has almost become a legal term of art, so for the sake of this article, some distinction must be drawn so as not to confuse the issues.

[14] *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

[15] *See generally* Levenson v. State, 508 P.3d 229 (Wyo. 2022); *see also* United States v. Worthon, 520 F.3d 1173 (10th Cir. 2008); *see also* United States v. Ochoa, 4 F. Supp. 2d 1007 (D. Kan. 1998); *see also* United States v. Esteban, 283 F. Supp. 3d 1115 (D. Utah 2017); *see also* State v. Farabee, 22 P.3d 175 (Mont. 2000).

[16] *See supra* note 15.

repeatable test to appropriately analyze an officer's conduct pre-stop.

I do not argue whether the police conduct is good or bad generally. Rather, I seek to propose a path forward for how courts should measure and gauge an officer's pre-stop behavior in the context of a traffic stop. To be clear, this is a distinct issue and discussion from that of *Whren* and officers' subjective intent.[17]

As a gentle segue, I want to be fully transparent and disclose to the reader that I was the prosecutor in the *Levenson v. State* case at the trial level.[18] I did not handle the appeal. That said, nothing in this article is meant to be righteous indignation for the Wyoming Supreme Court's reversal. Nevertheless, the court's decision sparked my interest in this area of Fourth Amendment jurisprudence. What follows is the product of that sparked interest.

This article first discusses the history of probable cause and the progression to reasonable suspicion. I will chronicle how for the majority of this country's legal history, probable cause under the Fourth Amendment was sufficient for determining whether an officer's invasion into a citizen's privacy was appropriate or alternatively, whether a warrant should be issued to do the same. But along the way, the landscape changed, and the pendulum swung in favor of a heavier handed approach in policing; thus, the birth of the *Terry* stop. This article will delve into some of the bigger problems with the *Terry* standard, societal impacts, and progression of the case law after *Terry*. In that same section, this article will address the direct impact *Terry* has had on Fourth Amendment law.

Next, this article speaks to the more recent cases addressing officer pre-stop behavior. As discussed below, the conversation continues to grow. However, the various cases analyzing the officer's pre-stop behavior come out in mixed results. Then, I examine why analysis of the officer's pre-stop conduct is or can be problematic as-is. In this section, I go over extreme examples to hopefully illustrate the problem more clearly.

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[17] *See generally* Whren v. United States, 517 U.S. 806 (1996). *Whren* focused on pretextual stops and whether they were constitutional. *See generally id.* As the reader is likely aware, the U.S. Supreme Court resoundingly said yes, pretextual stops are constitutional. *Id.* at 811.

[18] Levenson v. State, No. 34-129, 2021 (Wyo. First Jud. Dist. 2021).

Last, this article offers a test that courts can utilize in light of the totality of the circumstances to analyze an officer's pre-stop behavior. The suggested test stems from the already established law (conceptually) of negligence, primarily causation. Such a tool gives courts an objective multi-factor test to give continuity in assessing an officer's pre-stop behavior in relation to traffic stops.

I. WHAT IS REASONABLE SUSPICION, AND HOW DID WE GET HERE?

This section discusses the historical progression of the standard(s) American courts use to determine whether an officer properly stopped a motor vehicle, recounting the history of probable cause and the eventual result that is reasonable suspicion. To start off this section highlights the objective history of the two standards, generally. Then, more specific to the arguments contained herein, the section focuses on motor vehicle investigatory stops.

A. Probable Cause—Historical Analysis

The United States Constitution's Fourth Amendment prohibits unreasonable searches and seizures.[19] Ordinarily, unreasonable searches and seizures are those officers conduct in the absence of probable cause.[20] But in the early Framers' era, probable cause was not enough to initiate a search or conduct an arrest.[21] Without a victim to say what a defendant did or an officer's observation of a completed crime, an officer could not arrest.[22] This approach led to little investigation.[23] Generally speaking, the Fourth Amendment to the United States Constitution guarantees that people will be free from unwarranted searches and seizures.[24]

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[19] *See generally* U.S. CONST. amend. IV.
[20] JOSHUA DRESSLER ET AL., CRIMINAL PROCEDURE 195 (8th ed. 2023).
[21] *See* Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 378 (2011).
[22] *See id.* (noting the two reasons for relying so heavily on victims in this model was (1) there was not a practical alternative; and (2) in most instances, a victim was a predicate to a crime).
[23] *See id.*; *see also* George C. Thomas, III, *Time Travel, Hovercrafts, and The Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1468 (2005) ("Constables were expected to preserve order . . . but they were not otherwise expected to investigate crime.").
[24] *See generally* U.S. CONST. amend. IV; *see also* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.1 GENERAL CONSIDERATIONS

This concept is so because warrantless searches are *per se* unreasonable.[25]

Congress ratified the Fourth Amendment to the Constitution on December 15, 1791.[26] The Fourth Amendment was drafted "in response to increasing infringements on privacy in both the colonies and in England."[27] Drafters of the Fourth Amendment knew and understood the threat of "general warrants" as well as warrantless searches and seizures after having recently escaped the reign of the Crown.[28] A warrant ensured (theoretically) that there was another pair of eyes on the allegations. A neutral and detached magistrate could test the veracity of an affiant as well as the facts presented and determine whether a person should be subject to the power of an arrest or search.

Moving forward, the question of probable cause evolved from the observation standard described above to what is more recognizable today: is it more likely than not this person committed 'X' crime?[29] Police tactics, including more modern investigation and crime controlling, expanded wildly.[30] Concerns arose that with

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(6th ed.); *see also* Thomas, *supra* note 23, at 1468 (noting the "nature of eighteenth-century crime and policing did not produce much in the way of searches without warrants.").

[25] Coolidge v. New Hampshire, 403 U.S. 443, 443-44 (1971) ("The basic constitutional rule is that 'searches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment…") (emphasis in original).

[26] This date is particularly important later in the article for context.

[27] Nicholas J. Dilley, *Constitutional Amendments – Amendment 4 – "The Right to Privacy"*, RONALD Reagan PRESIDENTIAL LIBR. & MUSEUM, https://www.reaganlibrary.gov/constitutional-amendments-amendment-4-right-privacy#:~:text=Amendment%20Four%20to%20the%20Constitution,from%20unreasonable%20searches%20and%20seizures [https://perma.cc/6VBA-4CB2] (last visited Feb. 6, 2024).

[28] Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law" – "Fourth Amendment Reasonableness" is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 59 (2010). The author takes the position that our case law's historical documentation is not entirely accurate. In outlining a more thorough and accurate history, the author describes the impetus for the Framers in drafting the Fourth Amendment. Specifically, condemnation of "unparticularized general warrants during trespass cases." *Id.*

[29] *See* Oliver, *supra* note 21, at 379 (rather than strictly relying on a victim as evidence or for an oath, virtually any evidence, so long as it met the threshold, was adequate).

[30] *Id.* (citing the 19th century wave of riots as the main driving force for increased police efforts nationwide); *see also* Antonyuk v. Chiumento, 89 F.4th 271, 323 (2d Cir. 2023) (noting that one of the most prominent themes of the 19th century was the

those same police tactics, the potential for police misconduct and/or abuse of power would occur.[31] Officers could now attest to their observation of what *they* believed were illegal activities to obtain a warrant.[32] As the concern regarding victimless crimes continued to grow, the evidentiary standard of probable cause began to develop.[33] Borne out of this early example of probable cause was a remedy not so dissimilar to the current day exclusionary rule.[34] This expansive power of law enforcement continued to grow throughout the latter half of the 19th century.[35]

In modern day criminal procedure, probable cause is best described as the ability to search or seize when the "known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[36] Moreover, the standard of proof for probable cause is necessarily correlative to what must be proved in a traditional trial setting.[37] For example, a judge deciding whether to grant a search warrant may rely upon statutory elements a prosecutor would seek to prove at trial. Courts, primarily the United States Supreme Court, have routinely held that probable cause is fluid, meaning that no two situations or sets of fact may be the same in considering

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transformation of the state and stating that it was no coincidence that "true" police forces came into being).

[31] Oliver, *supra* note 21, at 379; *see also* Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. REV. 119, 151 (2022) (detailing the history of public and private prosecutions, noting public consensus was that government should not have *exclusive* control over criminal prosecutions; the same sentiment was true of a "public police force.").

[32] Oliver, *supra* note 21, at 410. This was the first time an officer could obtain a warrant without absolute certainty a crime had been committed. In 1853, Maine Governor Hubbard signed into law the requirement that at least three competent witnesses had to swear that alcohol could be found through the requested search. Moreover, it required that a judicial officer could only sign a warrant so long as he was certain "'by the testimony of witnesses upon oath, that there is reasonable ground for believing' that unlawfully possessed liquor was in the house." *Id.*

[33] *Id.* at 380; *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 627-28 (1999) (noting how modern policing requiring probable cause for arrests and searches is a recent development as compared to framing-era policing).

[34] *See* Oliver, *supra* note 21, at 411.

[35] *See id.* at 417-18 (noting that in the 1870s, laws provided for obtaining a warrant in cases of prostitution, gambling, liquor, and pornography. Then, in the 1880s, laws specifically provided for police captains to obtain warrants).

[36] Ornelas v. United States, 517 U.S. 690, 696 (1996) (citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949)).

[37] *See id.* (citing Ker v. California, 374 U.S. 23, 33 (1963)).

whether probable cause exists, or not; however, building upon prior factual scenarios is important in the appellate review process.[38]

B. Terry v. Ohio—A New Analytical Framework

For almost a century, basic Fourth Amendment analysis constituted a determination of whether the officer had probable cause to search and/or seize.[39] Despite what can be referred to as a "warrant preference" under the Fourth Amendment, the cornerstone of the same has been reasonableness.[40] As such, an exception was likely to naturally grow out of the probable cause and/or warrant requirement. Enter the *Terry* Court.

Prior to *Terry v. Ohio*, an officer needed probable cause to arrest without a warrant.[41] But the *Terry* Court answered the question: what analysis is necessary or appropriate if the interaction was something less than a full-blown arrest which requires probable cause? The *Terry* Court held that a person "is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.'"[42] Thus, the question the Court sought to answer was "whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure[?]"[43] Moreover, the

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[38] *See id.* at 698 (citing Carroll v. United States, 267 U.S. 132 (1924); *see also* United Sates v. Sokolow, 490 U.S. 1 (1989); *see also* Florida v. Royer, 460 U.S. 491 (1983); *see also* California v. Acevedo, 500 U.S. 565 (1991); *see also* United States v. Mendenhall, 446 U.S. 544 (1980); *see also* Reid v. Georgia, 448 U.S. 438 (1980); *see also* Illinois v. Gates, 462 U.S. 213, 232 (1983)).

[39] *See Carroll*, 267 U.S. at 149; *see also* Katz v. United States, 389 U.S. 347, 357 (1967); *see also* Devenpeck v. Alford, 543 U.S. 146, 152-53 (2004).

[40] Russell L. Weaver, *Investigation and Discretion: The* Terry *Revolution at Forty (Almost)*, 109 PENN. ST. L. REV. 1205, 1206 (2005) (noting that warrantless searches and seizures are invalidated only when the same is unreasonable).

[41] *See* Lenese C. Herbert, *Bête Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149, 181 (2003).

[42] Terry v. Ohio, 392 U.S. 1, 9 (1968) (citing Elkins v. United States, 364 U.S. 206, 222 (1960)).

[43] *Id.*

Court sought to strike an "appropriate balance between the police and the citizenry," considering the obviously competing interests.[44]

In *Terry*, Officer McFadden, a detective of 35 years, was on patrol in downtown Cleveland.[45] Officer McFadden observed two men on a street corner but was unable to say what about them drew his attention.[46] Officer McFadden stated the two men would not look at him. He saw the men within 300 to 400 feet of the entrance of a store in broad daylight.[47] He saw one of the men walk away, pass some stores, pause and look in a store window.[48] After the man rejoined his friend, the friend engaged in the same series of actions.[49] Officer McFadden stated the men did these five or six times that he observed.[50] Officer McFadden testified this piqued his interest and he believed they were casing the stores.[51] As such, he identified himself, called them over. Officer McFadden grabbed Terry and patted down the outside of his clothing to feel what he described as a pistol.[52] He testified that he only did that to see if any of them had weapons.[53]

This case was the first time the Court had the opportunity to answer and decide the difference between a stop and full-blown arrest.[54] Prior to *Camara v. Municipal Court*, the warrant clause reigned supreme. A search or arrest was only reasonable with a

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[44] Weaver, *supra* note 40, at 1207. As Professor Weaver points out, the idea of a balancing approach did not originate with *Terry*; however, it was the first decision to apply that approach to citizen-police encounters. *Id.*
[45] Terry v. Ohio, 392 U.S. 1, 5.
[46] *Id.*
[47] *Id.* at 5-6.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *See Terry*, 392 U.S. at 9-10 ("We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court." The Court went on to acknowledge the ongoing debate in the country surrounding whether law enforcement should have the power to stop a suspicious person. The Court also recognized that there was, in fact, a need to distinguish between a "stop" and an "arrest" and between a "frisk" and a "search."); *see* Jennifer E. Laurin, *Terry, Timeless and Time-Bound*, 15 Ohio State J. Crim. Law, 1, 3-4 (2017) (noting *Terry* was the Court's first ruling on the "constitutionality of the police practice that was already familiarly known as 'stop-and-frisk[.]'").

warrant.[55] Then, the Court decided *Terry* and gave the green light to a new standard informed by reasonableness.[56] *Terry* dispensed with the previous belief that warrantless searches and seizures are *per se* unreasonable and replaced that with the question of whether the search or seizure are reasonable.[57] Possibly the most important analysis to come out of *Terry* was the recognition that not every governmental intrusion was the same nor should they be treated as the same.[58] Post-*Terry*, courts now refer to a three-tier analysis for government interaction with citizens, adding a middle ground between consensual interaction and full-blown arrest.[59] The *Terry* Court held the old-framework was too rigid to properly address the "myriad daily situations in which policemen and citizens confront each other on the street."[60] The Court also recognized that the prior judicial analytical framework was not appropriate to determine the result of those same interactions.[61] The Court "emphatically"

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[55] DRESSLER, *supra* note 20, at 390. (Dressler opined that *Camara* was a turning point in Fourth Amendment jurisprudence and "redefin[ed] probable cause as a flexible concept . . . [giving] reasonableness a foot in the door as an independent factor in fourth amendment analysis.").

[56] *Id.*

[57] *Id.* at 391 (Dressler goes on to recognize the Court very clearly made warrantless police conduct easier to justify).

[58] *Id.* at 387.

[59] *See e.g.*, United States v. Watson, 953 F.2d 895, 897 n. 1 (5th Cir. 1992); *see also* United States. v. Wallraff, 705 F.2d 980, 988 (8th Cir. 1983); *see also* United States. v. Black, 675 F.2d 129, 133 (7th Cir. 1982); *see also* Pryce v. State, 477 P.3d 90, 95 (Wyo. 2020); *see also* Flood v. State, 169 P.3d 538, 543 (Wyo. 2007); *see also* Custer v. State, 135 P.3d 620, 624 (Wyo. 2006); *see also* Wilson v. State, 975 A.2d 877, 891 (Md. 2009) (discussing the three-tier analysis in relation to an arrest and a detainment); *see also* United States v. Cannizzaro, 2005 WL 757884, at *5 (D. Me. 2005) (discussing the three-tier analysis in relation to a consensual encounter); *see also* State v. Graham, 820 So. 2d 1101, 1105-06 (La. App. 5th Cir. 2002) (discussing the three-tier analysis in relation to an arrest); *see also* United States v. Mora-Cabrera, 59 F. Supp. 2d 366, 377 (D. P.R. 1999) (discussing the three-tier analysis in relation to an arrest); *see also* United States v. Alvarado-Rodriguez, 59 F. Supp. 2d 329, 333-34 (D. P.R. 1999) (discussing the three-tier analysis in relation to a detainment). These cases describe the lowest level of interaction between police and citizens as that which does not implicate the protections of the Fourth Amendment, *i.e.*, consensual interactions. Second, and new after *Terry*, is the investigative detention (seizure) and frisk (search). This mid-level interaction between police and citizens requires the officer to articulate at least reasonable suspicion. Last is arrest, which requires probable cause and/or a warrant.

[60] *Terry*, 392 U.S. at 12. Again, the Court analyzed the implication of the Fourth Amendment as it relates to the officer's conduct in stopping and patting down the suspect. The point being, no consideration toward whether the officer's conduct before or after the interaction was constitutional.

[61] *See id.* at 13. Police have no "right" to stop and frisk a citizen. *See id.* at 12-13. But that is not the question. The question answered in *Terry* is what happens when/if such

rejected the notion that a stop and frisk did not implicate Fourth Amendment protections.[62] The Court concluded that Officer McFadden, without question, seized and searched the defendant.[63] The quintessential and long-standing question the Court was faced with was "whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did."[64] Born out of that question was more or less the standard courts across America use to this day: a dual inquiry of whether the officer's action was justified *at its inception*, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.[65]

Of particular relevance to this article is the Court's discussion of not departing from the warrant clause of the Fourth Amendment.[66] With distinction, the Court made clear that the standard from *Terry* was a different framework than that of requiring probable cause and/or a warrant.[67]

In the end, the Court compounded the difficulty of finding a middle ground between the probable cause warrant requirement and the reasonableness clauses' general proscription against "unreasonable searches and seizures."[68] The rationale being that some police conduct is "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat."[69] Thus, to determine what is reasonable suspicion, the Court held that an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion."[70] The test when examining the potential intrusion has always been, will the law and society tolerate such an

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a stop occurs and when/if a violation of rights occur. *Id.* Then, as a separate question, should courts allow evidence gained as a result of such violation (which has the "necessary effect of legitimizing the conduct which produced the evidence") or exclude evidence (which "withholds the constitutional imprimatur")? *Id.* at 13.

[62] *Id.* at 16.

[63] *See id.* at 19.

[64] *Id.*

[65] *See id.* at 19-20.

[66] *See id.* at 20.

[67] *See id.*

[68] DRESSLER, *supra* note 20, at 387.

[69] *Terry*, 392 U.S. at 20.

[70] *Id.* at 21.

intrusion?[71] To determine that, courts must learn what facts the officer knew and could articulate at the time to justify such an intrusion.[72] Said another way, there have to be enough facts that a removed judge can say that at that moment the search or seizure occurred there was more than "inarticulate hunches," which the Court has stood against.[73]

In Part IV of *Terry*, the Court analyzed whether McFadden's search and seizure was reasonable based on his conduct—"at their inception and as conducted."[74] The Court next looked at the facts McFadden relied on to intercede and detain the suspects.[75] The entire discussion surrounded what McFadden could articulate—what the "trio" was alleged to have been doing.[76] This behavior is consistent with the theme of balancing the governmental interest—intrusion to prevent crime—against the citizenry's interest in remaining free from governmental intrusion absent justification.[77] Importantly, the Court also noted the inextricably intertwined nature of the exclusionary rule with the standard for search and seizure.[78] Without a remedy, the exclusionary rule was toothless. However, what the Court did not discuss or analyze is whether an officer's conduct, generally, should be analyzed separate from what the officer knew or observed that led the officer to seize or search the suspect.[79]

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[71] *See id.* at 20-21; *see also* Camara v. Municipal Court of San Francisco, 387 U.S. 523, 534—35 (1967).
[72] *See Terry,* 392 U.S. at 21-22. Missing from this discussion is whether the officer did something wrong—intentionally or otherwise—that would/should negate the observed facts supporting reasonable suspicion. *See id.*
[73] *Id.* at 22. The judge sits in the shoes of the officer and determines whether the officer truly had reasonable suspicion or if it was simply a hunch. *See id.*
[74] *Id.* at 27-28.
[75] *See id.* at 28.
[76] *See id.*
[77] *See id.* at 20-21.
[78] *Id.* at 28-29. ("The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that 'limitations upon the fruit to be gathered tend to limit the quest itself.' Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.") (citations omitted).
[79] *See generally Terry*, 392 U.S. 1.

Terry v. Ohio is quite possibly the most important Supreme Court opinion in recent history regulating police conduct.[80] Never before had the Court recognized an exception to the probable cause requirement, which brought about a "dramatic reduction of civil liberties."[81] Misguided or spot on, the *Terry* decision and resulting standard (balancing test) is "quite simply, monumental" and marks a "diminution in the role of the warrant clause in Fourth Amendment jurisprudence."[82] As discussed in the next section, the Court's *Terry* standard did not remain "quite narrow" and was broadened to its flexible limits.[83]

C. The Natural Outgrowth of Application of Terry*: Traffic Stops*

As discussed in the preceding section, the courts gave on-the-street policing a new tool in 1968 by way of a lesser standard than probable cause. Law enforcement could intrude upon a person's liberty, detain him or her briefly, and, if concerned for the officer's or public's safety, conduct a cursory pat-down search. Officers could take these actions so long as they could articulate facts amounting to reasonable suspicion.

Again, prior to *Terry*, courts required officers to have probable cause to search and/or seize a person. This fact was true of searches and seizures involving vehicles.[84] As far back as 1925, courts held that searches and seizures of vehicles without a warrant but done with probable cause "reasonably arising out of circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure and destruction, the search and seizure are valid" under the Fourth Amendment.[85] So to speak,

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[80] *See* Craig S. Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL'Y 25, 26 (2007).
[81] *Id.* at 33; *see also* Frank Rudy Cooper, *Cultural Context Matters:* Terry*'s "Seesaw Effect,"* 56 OKLA. L. REV. 833, 852 (2003) ("Prior to *Terry*, the Fourth Amendment required probable cause for a criminally-oriented search or seizure to be deemed constitutionally permissible."); *see also* Herbert, *supra* note 41, at 181-82 ("Prior to *Terry*, the Court's Fourth Amendment jurisprudence championed the rights of the individual in encounters between civilians and the police. . . . [F]or the first time, [the Court] gave constitutional imprimatur to police intrusion upon an individual's right to be let alone on less than probable cause to arrest.").
[82] DRESSLER, *supra* note 20, at 391.
[83] *Terry*, 392 U.S. at 15.
[84] *See generally* Carroll v. United States, 267 U.S. 132 (1924).
[85] *Id.* at 149.

probable cause was a part of the "rules of the road". That is, until the *Terry* doctrine drove those "rules" off the road.

Courts quickly began applying the *Terry* standard to vehicles and traffic stops.[86] As a reminder, the Fourth Amendment very clearly guarantees the right to people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[87] No one questions the premise that vehicles are one's "effects" under the Fourth Amendment.[88] As such, "traffic stops [of vehicles] have long been considered akin to *Terry* stops," primarily because reasonable suspicion is the standard in each scenario.[89]

The rationale for courts to apply *Terry* to vehicles was two-fold: (1) vehicles are inherently mobile; and (2) "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[90] Furthermore, vehicles have an "obviously public nature" because they function as transportation rather than a home or as "the repository of personal effects."[91]

The *Terry* standard with regard to vehicles evolved over time. The evolution went something like this: "[t]he Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or *vehicles* that fall short of traditional arrest."[92] Courts, including

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[86] Delaware v. Prouse, 440 U.S. 648, 653 (1979); *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 880-82 (1975).
[87] U.S. CONST. amend. IV.
[88] *See* Rodgers, *supra* note 7, at 252 (citing United States v. Jones, 565 U.S. 400, 404 (2012)).
[89] *Id.* at 255 (citing Knowles v. Iowa, 525 U.S. 113, 118 (1998)); *see also* Navarette v. California, 572 U.S. 393, 396 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)) ("The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'").
[90] South Dakota v. Opperman, 428 U.S. 364, 367 (1976).
[91] *Id.* at 368 (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)). Fast forward almost 40 years and a description of a person's car and his/her relationship to their car is likely different. Take for example the most obvious contradiction, people who live in their cars, whether by choice or circumstance. On the lighter side of things, what about a limousine or party bus? Granted, these are extreme examples, but examples nonetheless, that don't necessarily fit the Court's original rationale for lowered expectation of privacy. It is worth noting that some courts have addressed a vehicle doubling as a home. I am not concerned with that distinction in this article.
[92] United States. v Arvizu, 534 U.S. 266, 273 (2002) (emphasis added) (citing *Terry*, 392 U.S. at 9; United States. v. Cortez, 449 U.S. 411, 417 (1981)).

SCOTUS, have relied on the idea "that a routine traffic stop 'is more [similar] to a so-called '*Terry* stop' . . . than to a formal arrest,'" meaning it is "temporary and brief in nature."[93] In an attempt to strike a "balance between the public interest and the individual's right to personal security," courts leaned in favor of a less robust standard than probable cause.[94] Most courts (federal and state) have adopted the investigative stop/reasonable suspicion model pertaining to vehicles.[95] To be clear, officers satisfy the stricture of the Fourth Amendment if their actions of stopping a vehicle are "supported by reasonable suspicion to believe that criminal activity 'may be afoot[.]'"[96] To determine if the officer's decision to stop (seize) the vehicle passes constitutional muster, courts routinely look at the "totality of the circumstances" to see if the officer had a "particularized and objective basis" for believing the occupants of the vehicle were engaged in illegal activity.[97] "Totality of the circumstances" is fancy lawyer phrasing for a fact-specific reasonableness inquiry.[98]

Akin to determining the totality of the circumstances, courts have long held that the "touchstone of the Fourth Amendment is reasonableness."[99] To gauge said reasonableness, courts have sought out an objective measure of and consistently landed on examining the totality of the circumstances.[100] Similarly, courts have used the totality of the circumstances analysis in other cases, such as in claims of excessive force, determination of custody in

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[93] LAFAVE, *supra* note 24, at § 9.3(a) (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)).
[94] *Arvizu*, 534 U.S. at 273 (quoting *Brignoni–Ponce*, 422 U.S. at 878).
[95] LAFAVE, *supra* note 24, at § 9.3(a). The treatise cited to various state and federal court cases all noting some permutation of a quantum of evidence the officer had or obtained that is sufficient to satisfy the reasonable suspicion standard. *Id.* at nn.22-23. What is clear from annotations like this is that reasonable suspicion is not a bright line rule.
[96] *Arvizu*, 534 U.S. at 273 (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)).
[97] *Id.* (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)).
[98] Ohio v. Robinette, 519 U.S. 33, 39 (1996) (rejecting bright line rules and *per se* determinations in favor of weighing facts individually in each circumstance).
[99] Florida v. Jimeno, 500 U.S. 248, 250 (1991) (citing Katz v. United States, 389 U.S. 347, 360 (1967)).
[100] *See Robinette*, 519 U.S. at 39; *see also* State v. Sims, 546 S.E.2d 47, 49 (Ga. Ct. App. 2001); *see also* State v. Crone, 961 N.W.2d 97, 102 (Wis. Ct. App. 2021); *see also* United States v. Bush, 173 F.3d 430 (6th Cir. 1999) (unpublished table decision); *see also* United States v. Brigham, 382 F.3d 500, 507 (5th Cir. 2004).

relation to *Miranda*, and searches.[101] Despite courts' frequent use and analysis of the phrase, one is left without a concrete definition. At best, courts have given guidance to litigators, law enforcement, and defendants.

As the Court in *United States v. Arvizu* explained, officers must be able to describe a "particularized and objective basis" for stopping a motorist.[102] Reviewing courts must then determine by a "totality of the circumstances" analysis whether the officer's beliefs were appropriate.[103] Moreover, "[t]his process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"[104] The reviewing court must look at all of the facts to see if what the officer knew at that time —the moment the officer intercepted the motorist—was something more than a hunch.[105] In fact, an officer's rationale to stop a motorist may be made up of several observations, some of which "readily susceptible to an innocent explanation."[106]

In the end, reasonable suspicion is without a doubt hard to concretely identify from case to case.[107] When wading through the

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[101] *See* Lea v. Kirby, 171 F. Supp. 2d 579, 583-84 (M.D.N.C. 2001) (discussing a totality of the circumstances analysis in relation to a § 1983 claim); *see also* Myatt v. City of Chicago, 816 F. Supp. 1259 (N.D. Ill. 1992) (discussing a totality of the circumstances analysis in relation to a § 1983 claim); *see also* Stevenson v. City of Albuquerque, 446 F. Supp. 3d 806 (D.N.M. 2020) (discussing a totality of the circumstances analysis in relation to a § 1983 claim); *see also* Retz v. Seaton, 741 F.3d 913, 918 (8th Cir. 2014) (discussing a totality of the circumstances analysis in relation to a § 1983 claim); *see also* State v. Johnston, 572 S.E.2d 438 (N.C. Ct. App. 2002) (discussing a totality of the circumstances analysis in relation to determination of custody in a *Miranda* analysis); *see also* State v. Pruett, 347 P.3d 239 (Kan. Ct. App. 2015) (per curiam) (unpublished table decision) (discussing a totality of the circumstances analysis in relation to determination of custody in a *Miranda* analysis); *see also* State v. Patterson, 581 P.2d 752 (Haw. 1978) (discussing a totality of the circumstances analysis in relation to determination of custody in a *Miranda* analysis); *see also* State v. Buchanan, 543 S.E.2d 823 (N.C. 2001) (discussing a totality of the circumstances analysis in relation to determination of custody in a *Miranda* analysis).

[102] *Arvizu*, 534 U.S. at 273 (quoting *Cortez*, 449 U.S. at 417-18).

[103] *Id.*

[104] *Id.* (quoting *Cortez*, 449 U.S. at 418).

[105] *Id.* at 273-74.

[106] *Id.* at 274.

[107] Ornelas v. United States, 517 U.S. 690, 695-96 (1996). The Court labored over adequately defining reasonable suspicion in comparison to probable cause. *Id.* The Court noted that reasonable suspicion is not a "finely-tuned standard[]," unlike proof beyond a reasonable doubt or preponderance of the evidence. *Id.* at 696 (quoting Illinois v. Gates, 462 U.S. 213, 235 (1983)).

permutation of reasonable suspicion, courts have eschewed bright-line rules and concluded reasonable suspicion is instead a fluid concept.[108] Nevertheless, the only necessary and sufficient components to determine reasonable suspicion are the "events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion."[109] In other words, the court must determine whether an officer had enough information at the time of a stop to formulate a rational basis that there was criminal activity, which would justify stopping a vehicle.

II. CASES DISCUSSING OFFICER MISCONDUCT IN RELATION TO REASONABLE SUSPICION AND PROBABLE CAUSE.

As discussed above, there are a handful of cases where courts have addressed an officer's pre-stop behavior to determine if the officer had caused the traffic violation, thereby negating his/her reasonable suspicion. The following synopses briefly describe each court's approach and conclusion.

A. Ochoa

The United States District Court for the District of Kansas decided a case in 1998 that is relevant to the discussion herein.[110] In *United States v. Ochoa*, two troopers were stopped in the median patrolling traffic.[111] Despite a low level of traffic that day, the troopers observed a Lincoln and a Toyota following in close distance to the Lincoln.[112] Because of how close the Toyota was to the Lincoln, the troopers were unable to see the plates; however, they observed temporary tags on the Toyota and could not discern the dates.[113] As such, the troopers pulled out and pursued the two vehicles.[114]

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[108] Levenson v. State, 508 P.3d 229, 240 (Wyo. 2022).
[109] *Ornelas*, 517 U.S. at 696.
[110] *See generally* United States v. Ochoa, 4 F. Supp. 2d. 1007 (D. Kan. 1998).
[111] *Id.* at 1009.
[112] *Id.*
[113] *Id.*
[114] *Id.*

At the subsequent suppression hearing, the troopers testified that they followed the vehicles for several miles.[115] Having observed the Toyota's tags but still not being able to discern the tag date, the troopers pulled up next to the Toyota to get a look at the occupants.[116] The troopers stayed in the lefthand lane next to the Toyota for about 15 seconds.[117] While next to the Toyota, the troopers testified that the Lincoln "briefly drift[ed] one and a half to two feet onto the shoulder" of the road.[118] Then, the Lincoln immediately returned to its lane of travel.[119]

The troopers testified that they pulled the Toyota over for following too closely and the Lincoln for failure to maintain a single lane of travel.[120] The Government argued two reasons to justify the stop of the Lincoln—(1) crossing the fog line, and (2) concern for Ochoa's physical well-being.[121]

The District Court began its analysis by noting the Lincoln "initially had done nothing wrong, [so] the troopers seemingly had decided to try to find some way to justify pulling the [Lincoln] over anyway."[122] The court went on to suggest, without citation, that the "patrol car likely was a significant factor in causing the Lincoln's momentary drift of one and a half to two feet partially onto the shoulder."[123]

The court continued on to discuss how the troopers' pre-stop conduct may have caused Ochoa to depart from his lane of travel.[124] Specifically, the court noted with the Toyota following Ochoa closely and the trooper vehicle driving right next to the Toyota, Ochoa, as a "reasonable driver might have been distracted by the commotion and looked to see what was going on, briefly drifting partially onto

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[115] *Ochoa*, 4 F. Supp. 2d. at 1009.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* It is worth noting Trooper Rule testified there are any number of reasons a driver of a vehicle may drift lanes or outside of their lane of travel—*e.g.*, pouring a cup of coffee or changing a cassette tape. *Id.*
[120] *Id.* There are substantial facts remaining which the District Court cited from the suppression hearing; however, most are not relevant to the discussion of the trooper's pre-stop behavior. Therefore, I will only outline the necessary facts relevant to the argument I make in this article.
[121] *Id.*
[122] *Id.* at 1011.
[123] *Id.*
[124] *Id.* at 1012.

the shoulder."[125] If that single line was not enough, the court went on to say considering the troopers' intent to find a violation, "the court must consider the impact of the officers positioning their vehicle beside the Toyota, which may have startled Ochoa into crossing onto the shoulder or committing some other minor traffic violation."[126] Additionally, in a footnote, the court explicitly stated its determination was not one of intent of the officer but rather a finding that the trooper caused or contributed to the drifting, thereby negating any reasonable suspicion finding that Ochoa had violated the law.[127]

Ochoa, whether right or wrong, is a perfect example of a court failing to clearly describe why or how the trooper negated their observed reasonable suspicion is necessary. Moreover, in failing to explain a real rationale for how the troopers caused the violation, the court missed an opportunity to explain for future courts how it made its determination and why. As discussed below, overlaying a test and giving a trial court, such as the *Ochoa* court, the tools to work with in determining an officer's pre-stop conduct's impact on a defendant or violation would have, without question, been beneficial.

B. Esteban

In another case similar to *Ochoa*, the United States District Court for the District of Utah addressed a trooper's pre-stop behavior and its potential impact on a defendant's violation of the law.[128] In *United States v. Esteban*, the defendant was traveling with two other passengers eastbound on I-80 through Utah.[129] The trooper involved in the stop had observed the California-plated

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[125] *Ochoa*, 4 F. Supp. 2d. at 1012.
[126] *Id.* Admittedly, the court appeared to be primarily concerned with the state statute prescribing vehicles travel as close to the center as practicably as possible—taking into consideration traffic, weather, road conditions, etc.—however, it was this logic regarding the trooper's vehicle positioning that got them to the conclusion the single lane deviation was not a violation. *Id.* Perhaps dicta, but the court simply could have said Ochoa's single lane departure was not a violation of the state statute, rather than injecting the troopers' pre-stop behavior.
[127] *Id.* at 1012 n.4. Whether intentionally or unintentionally, the court used specific language—"caused" or "contributed" to the violation. *Id.* As discussed below, that type of language fits neatly into a tort analysis.
[128] *See generally* United States v. Esteban, 283 F. Supp. 3d. 1115 (D. Utah 2017).
[129] *Id.* at 1118.

vehicle travel past him while he maintained a stationary position in the median.[130] The trooper observed how the defendant driver of the vehicle looked "hidden behind the door pillar, almost leaned back" and could only see the defendant's hands on the steering wheel.[131] This lean back circumstance concerned the trooper because he feared the defendant may have had visibility issues.[132] Having noticed the California plates and the potential visibility issue, the trooper pulled out of the median and pursued the defendant's vehicle.[133]

When the trooper pulled out onto the interstate, the defendant's vehicle was in the righthand lane where the vehicle remained for some time.[134] The trooper was in the lefthand (passing) lane.[135] The trooper maintained a fair distance but did not notice any erratic or illegal driving.[136] Ahead of both vehicles was an emergency vehicle pulled to the side of the interstate with its emergency lights flashing.[137] As defendant's vehicle approached the emergency vehicle, the defendant signaled his intent to change lanes while at a safe distance and with the requisite amount of time to do so.[138] For whatever reason, the trooper sped up from 68 MPH to 77 MPH, testifying that he believed he was maintaining a safe distance.[139]

Once both vehicles passed the sidelined emergency vehicle, the defendant signaled his intent to return to the driving lane and thereafter executed the lane change.[140] However, the trooper did not believe the defendant had waited the statutorily required time before changing lanes.[141] Standing alone, such a movement arguably violated Utah state law, and therefore, the trooper pulled

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[130] *Esteban*, 283 F. Supp. 3d. at 1118.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* It should be noted the court suggested and inferred the trooper's patrol car was closer than it should have been but gave no analysis or facts to support such a conclusion. *Id.* at 1129.
[140] *Id.* at 1118.
[141] *Id.* at 1118-19.

over the defendant's vehicle.[142] Once pulled over, troopers ended up searching the vehicle and finding two pounds of methamphetamine for which the Government charged the defendant.[143]

The defendant then filed a motion to suppress.[144] In support of his motion, the defendant argued that despite the alleged violation, "[the trooper] *induced* the traffic violation . . . and that a traffic stop should not be deemed reasonable when the officer provokes the violation."[145] In a hearing, the District Court considered the briefing, and ultimately ruled the stop violated the defendant's Fourth Amendment rights as the stop was an unlawful seizure, and as such the court suppressed the evidence.[146]

In support of its decision, the District Court opened its analysis with the often-quoted law that a traffic stop is a seizure, which is more akin to investigative detention, and therefore, the stop should be analyzed under the *Terry* doctrine.[147] However, different from *Ochoa*, the District Court in *Esteban* gave a very thorough analysis rationalizing its decision.[148]

In *Esteban*, the court called out an analogous case but misstated much of the rationale.[149] In the analogous case—*United States v. Sigmond-Ballesteros*—the Ninth Circuit Court of Appeals said the following: A border patrol agent was observing traffic on a local highway when he observed a truck with a camper shell pass by.[150] The agent had his headlights on and aimed directly at oncoming traffic.[151] When Sigmond-Ballesteros passed the agent's

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[142] *Esteban*, 283 F. Supp. 3d. at 1118-19. Similar to *Ochoa*, the issues in the case required the court to develop further facts. However, for the purposes of this article, discussion of the facts pre-stop is all that is directly relevant.
[143] *Id.* at 1122-27.
[144] *Id.* at 1127.
[145] *Id.* at 1128 (emphasis added). Importantly, the defendant in *Esteban* first argued the causation nexus to negate the trooper's observation of a traffic violation. *Id.* at 1128. The court goes on to note the various other cases the defendant cites to support his proposition. *Id.* However, the court only relies on one as analogous to the facts of defendant's case *Id.* (citing United States. v. Sigmond-Ballesteros, 285 F.3d 1117 (9th Cir. 2002)).
[146] *Id.* at 1127.
[147] *Id.*
[148] *Id.* at 1127-37.
[149] *Id.* at 1128. The Utah District Court handpicked various quotes from the *Sigmond-Ballesteros* case to synergize its rationale. *See* United States. v. Sigmond-Ballesteros, 285 F.3d 1117 (9th Cir. 2002)).
[150] *Sigmond-Ballesteros*, 285 F.3d at 1120.
[151] *Id.*

vehicle, he placed his hand up to block the bright light, which the agent thought was odd.[152] The agent then pursued the defendant, traveling quickly to catch up to the defendant.[153] Once the agent was within three car lengths behind the defendant, the defendant made a "'sudden change into the slow lane' and decreased his speed."[154] The agent—still traveling in the fast lane—pulled alongside the defendant and shined his "alley light" into defendant's driver side window.[155] The defendant again placed his hand between the light and his face, which the agent believed was an attempt to "conceal[ ] his face again."[156] The agent dropped behind the defendant in the slow lane and attempted to run his plates.[157] However, when this occurred, the defendant immediately slowed and pulled to the shoulder.[158] The agent then activated his emergency lights and initiated a traffic stop.[159]

As to the lane change and slowing of speed, the Ninth Circuit Court of Appeals said nothing more than that the defendant had no other choice but to do exactly as he did.[160] Additionally, the court stated that nothing of what the defendant had done was illegal.[161] Therefore, the agent could not have relied on the defendant's driving behavior for the basis of reasonable suspicion.

As to the hand gestures, the court quickly dismissed the agent's belief that blocking the headlights or the "alley light" with his hands was indicative that criminal activity was afoot. In fact, the court held "[d]efendant's reactions were necessitated by the agent's actions." The court went on to clarify its holding by saying, "we conclude that [d]efendant's reaction to [the agent's] conduct

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[152] *Sigmond-Ballesteros*, 285 F.3d at 1120.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* (alteration in original).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *See id.* at 1122-23.
[161] *Id.* at 1123. The court went through the relevant case law discussing wholly innocent behavior to a trained and reasonable law enforcement officer can be sufficient for reasonable suspicion. *Id.* at 1122. However, the court was quick to hold they were "unwilling to place motorists in a 'damned if you do, equally damned if you don't' situation," considering the likely choices available to the defendant would have more than likely led the agent to claim a different, but similarly inconsequential, violation of the law. *Id.* (quoting United States. v. Montero-Camargo, 208 F.3d 1122, 1136 (9th Cir. 2000)).

does not contribute to a finding of reasonable suspicion."[162] To be sure, the Court of Appeals analyzed many other factors the government claimed gave the agent *sufficient* reasonable suspicion to have initiated the traffic stop.[163] However, in the end, the Court of Appeals found that either the factors weighed in favor of the Defendant or were of no evidentiary value.[164] Ultimately, the Court of Appeals concluded that the trial court "erred in denying [d]efendant's motion to suppress" because the officer appeared to have done nothing more than "profile [ ] suspicious behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on hunch."[165]

Returning to the analysis in *Esteban*, the court relied heavily on *Sigmond-Ballesteros*, noting that defendant concealed his face out of necessity.[166] The *Esteban* court distinguished the facts therein from *Sigmond-Ballesteros* by pointing out that the defendant did not violate any traffic laws.[167] The *Esteban* court also noted the defendant's argument that an officer cannot create the exigency justifying the officer's intrusion with favor.[168] The court further noted the

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[162] *Sigmond-Ballesteros*, 285 F.3d at 1124. Without question, the Ninth Circuit accurately analyzed this case considering an officer's pre-stop behavior (characterized by the court as conduct). The determination of reasonable suspicion has historically been based on the defendant's actions alone. The Ninth Circuit correctly recognized there were factors external to the defendant that required certain action on his part, but simply said as such, his conduct was therefore not sufficient to rely upon for reasonable suspicion, rather than simply saying since the agent did something bad, the evidence is suppressed.
[163] *Id.* at 1124-26. The court went through other factors propounded by the Government such as: "notoriety of the route for smuggling," the "type of vehicle," the "character of particular traffic pattern for that time of day," and "proximity to [the] border." *Id.* at 1124-26. As to each, the court essentially said the facts gleaned from the record were either not adequately developed or the evidence was of such low probative value no reasonable officer should have considered it in relation to reasonable suspicion. *Id.* at 1126 (citing *Montero-Camargo*, 208 F.3d at 1132).
[164] *Id.* at 1127. *See generally Sigmond-Ballesteros*, 285 F.3d. 1117.
[165] *Id.* at 1126-27 (quoting United States v. Rodriguez, 976 F.2d 592, 595-96 (9th Cir.1992)).
[166] United States v. Esteban, 283 F. Supp. 3d. 1115, 1128 (D. Utah 2017).
[167] *Id.*
[168] *Id.* (citing Kentucky v. King, 563 U.S. 452, 462 (2011)).

> …logic of this principle, that law enforcement officers cannot create the *circumstance justifying* an intrusion implicating the Fourth Amendment, clearly parallels Mr. Esteban's argument that an officer cannot engender or provoke a traffic violation forming the basis for the subsequent stop, particularly if the violation is a reasonable reaction to the officer's conduct.[169]

From there, the *Esteban* court discussed *United States v. Ochoa* as support for the proposition that "driving conduct that could, in the absence of other circumstances, provide the basis for a traffic violation, failed to do so because of the officer's conduct."[170]

Ultimately, the court found that the trooper "provoked the two-second traffic violation, though perhaps unintentionally."[171] The court went on to quote *Whren* for the proposition that traffic violations provide "the 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained."[172] Nevertheless, the *Esteban* court went one step further by holding police discretion is not constrained when an officer provokes or substantially contributes to a violation.[173] In fact, the court concluded that based on the trooper's driving conduct, Esteban *could reasonably have thought* the trooper wanted him to get out of the way as soon as practicable.[174] Therefore, the court found that the trooper provoked the alleged traffic violation by his own driving conduct and held that the "minimal level of objective justification" fell away and that the stop became unreasonable.[175]

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[169] Esteban, 283 F. Supp. 3d. at 1128 (emphasis added). To be clear, the holding in *Kentucky v. King* largely addressed police-created exigent circumstances in relation to a warrantless search of a particular place. The Court did not address seizures—traffic or otherwise. To be fair, the logic is close but, as is discussed below, relies on a far more thorough analysis, which the *Esteban* court did not engage in.
[170] *Id.* at 1128-29 (citing United States v. Ochoa, 4 F. Supp. 2d 1007, 1009 (D. Kan. 1998)) (discussing the holding in *Ochoa* and that Ochoa drifting to the shoulder did not constitute a traffic violation, where officers were clearly looking for a reason to pull both vehicles over).
[171] *Id.* at 1129.
[172] *Id.* (citing Whren v. United States, 517 U.S. 806, 817-18 (1996)).
[173] *Id.*
[174] *Id.*
[175] *Id.* at 1129-1130.

C. Levenson

In *Levenson v. State*, the Wyoming Supreme Court reviewed a state district court's denial of a motion to suppress evidence.[176] Ultimately, the court reversed and remanded, holding that the trooper in that case had negated any reasonable suspicion he may have developed.[177]

In 2018, Levenson was riding passenger with his girlfriend driving eastbound on I-80 through Wyoming while the trooper was patrolling stationary in the median.[178] After Levenson's vehicle passed the trooper's position, the trooper pulled out and began pursuing the vehicle.[179] The trooper testified he had not initially observed any traffic violation.[180] However, to catch up to Levenson's vehicle, the trooper traveled approximately 111 miles per hour.[181] It took the trooper about one minute to catch up to Levenson's vehicle.[182]

The trooper was in the left lane as he came upon Levenson's vehicle.[183] Levenson's vehicle was in the right lane.[184] The trooper pulled up to Levenson's rear bumper.[185] To maintain that position, the trooper slowed numerous times.[186]

While in the right lane, Levenson's vehicle was between two semi-trucks.[187] The court found the trooper had "positioned his patrol car such that it would have been unsafe" for Levenson's vehicle to change lanes into the left lane.[188] The court also found that Levenson's vehicle could have created more distance between the semi-trucks and Levenson's vehicle.[189] At this point, the trooper observed twice that the defendant's vehicle was following too closely

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[176] *See generally* Levenson v. State, 508 P.3d. 229 (Wyo. 2022).
[177] *Id.* at 241-42. To be clear, the Wyoming Supreme Court never used fault-based language; e.g., caused, provoked, substantial factor, etc. Rather, the court used phrases like the trooper "vitiated the reasonable suspicion necessary." *Id.* at 241.
[178] *Id.* at 232-33.
[179] *Id.* at 232.
[180] *Id.* at 234.
[181] *Id.* at 232.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*

behind the semi-truck directly in front of it.[190] Based on that observed violation, the trooper pulled the vehicle over.[191] During the traffic stop, troopers discovered forty-two pounds of marijuana.[192]

The Wyoming Supreme Court, based on the briefed arguments, examined the appellant's claims both under the Wyoming State Constitution and the Fourth Amendment of the United States' Constitution.[193] Under the Wyoming constitution, the court began its analysis by stating, "[w]e objectively analyze the surrounding facts and circumstances to determine whether the officer was justified in making the stop."[194] The court dismissed any argument from the appellant that the trooper's subjective intent in making a traffic stop was irrelevant.[195] However, the court did "make clear that an officer's conduct, no matter his subjective intent, is one of the surrounding facts and circumstances that should be considered when analyzing whether an initial traffic stop is reasonable under *all the circumstances*."[196] The court further made clear that "efforts to enforce traffic laws are objectively reasonable and [v]iolations of the traffic code provide an objective standard by which to judge the reasonableness of a traffic stop seizure; because an observed violation provides probable cause for a traffic stop seizure."[197]

The Wyoming Supreme Court then took issue with the fact that the district court failed to analyze the trooper's conduct at all in its analysis in denying the motion to suppress.[198] As such, the Wyoming Supreme Court sought to do just that. It noted the statutory language regarding following too closely and that there is no "absolute standard" by which a trooper may gauge a motorist's distance behind another vehicle.[199] The court went on to analogize the fact-specific inquiry in following-too-closely cases to a fact-specific inquiry into whether a trooper would have reasonable

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[190] *Levenson*, 508 P.3d. at 232.
[191] *Id.*
[192] *Id.* at 233.
[193] *Id.*
[194] *Id.* at 235-36.
[195] *Id.*
[196] *Id.* at 236 (emphasis added).
[197] *Id.* (alteration in original).
[198] *Id.* at 237.
[199] *Id.* (citing Elmore v. State, 482 P.3d 358, 364-65 (Wyo. 2021)).

suspicion to stop a vehicle.[200] Rightly so, the court held that it must take all circumstances into account and give deference "to a law enforcement officer's ability to distinguish between innocent and suspicious actions."[201] Immediately after that, however, the court noted that as part of "considering the whole picture, [one must] look at the officer's conduct to determine whether the initial stop was reasonable under all the circumstances."[202]

The court, still looking at a state constitutional analysis, next discussed the two-pronged approach borne out of *Terry*.[203] The court then appears to discuss officer conduct in relation to causation rather than whether the officer could articulate reasonable suspicion at the inception of the stop.[204] The court quoted *Terry*, noting the importance of a judge's neutral scrutiny to evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[205] The court then held that in addition to examining "the traffic violation . . . [it] also examine[s] an officer's conduct using an objective standard which considers all the surrounding circumstances including the officer's own driving behavior."[206]

In briefing the issue, both the state and the appellant argued a new standard for the court to adopt in making such an analysis.[207] Instead, the court declined and instead reiterated its "holding in *O'Boyle* that 'a narrower standard, one maintaining the requirement that a search [or seizure] be reasonable under all of the circumstances, [is] more consistent with the historical intent of our search and seizure provision."[208]

Ultimately, the Wyoming Supreme Court held that the state constitution required reasonableness under all circumstances, and that the trooper's seizure of Levenson's vehicle violated the

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[200] *Levenson*, 508 P.3d. at 237.
[201] *Id.* (citing Klomliam v. State, 315 P.3d 665, 669 (Wyo. 2014); Leyva v. State, 220 P.3d 791, 794 (Wyo. 2009)).
[202] *Id.* (alteration in original).
[203] *Id.* at 237-38 (citing Terry v. Ohio, 392 U.S. 1, 20-22 (1968)).
[204] *Id.* at 238.
[205] *Id.* (citing *Terry*, 392 U.S. at 9).
[206] *Id.* (citing Simmons v. State, 473 P.3d 1259, 1262 (Wyo. 2020).
[207] *Id.*
[208] *Id.* at 238 (alteration in original) (quoting *O'Boyle v. State*, 117 P.3d 401, 410 (Wyo. 2005)).

Wyoming Constitution.[209] More specifically, the court held that "the Trooper's objective justification for a traffic violation was *negated*, and the initial traffic stop was unreasonable."[210]

The Wyoming Supreme Court next turned to the Federal Constitutional analysis of the facts.[211] The court began by noting that it did not "perceive any difference between the independent protection provided . . . under the Wyoming Constitution and that provided by the Fourth Amendment."[212] Similar to its state constitutional analysis, the court looked first to the reasonableness of the stop and again relied on the *Terry* factors to determine whether it was reasonable.[213] The court relied on federal case law and Wyoming state case law interpreting and applying the Fourth Amendment protections.[214] The court centered its analysis on the totality of the circumstances.[215] Staying in line with federal case law, the court said "[w]hen determining whether the officer's conduct and the traffic stop are reasonable, 'the [United States] Supreme Court has [also] rejected bright-line rules and focused instead on a fact-specific reasonableness inquiry.'"[216]

The court concluded that it would reach the same result as under the Wyoming Constitution analysis — the stop was unreasonable.[217] The court reached back to the *Esteban* case and its analysis of the trooper.[218] The Wyoming court cited *Esteban*, saying that court had found that the trooper's conduct "vitiated" the reasonable suspicion necessary to justify the stop.[219] The Wyoming court concluded that the facts of *Levenson* were similar to *Esteban*, and therefore, the trooper's conduct in *Levenson* "vitiated" the reasonable suspicion originally supporting the initial stop.[220] As such, the court determined the stop was invalid.[221]

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[209] *Levenson*, 508 P.3d. at 238-39 (citing *O'Boyle*, 117 P.3d at 411-12).
[210] *Id.* at 239 (emphasis added).
[211] *Id.* at 239-40.
[212] *Id.* at 239.
[213] *Id.* at 240 (citing Terry v. Ohio, 392 U.S. 1, 19-20 ((1968)).
[214] *Id.* at 240-41.
[215] *Id.* at 240.
[216] *Id.* (alteration in original).
[217] *Id.* at 240-41 (citing United States v. Esteban, 283 F. Supp. 3d 1115, 1129 (D. Utah 2017)).
[218] *Id.*
[219] *Id.* at 240.
[220] *Id.* at 241.
[221] *Id.*

III. WHY IS IT A PROBLEM TO DISCUSS CONDUCT AS ONE ANALYSIS?

As discussed above, some courts have analyzed an officer's behavior before a traffic stop as something different than the objective analysis outlined in *Terry*.[222] These cases were few and far between but are now trending more in the last fifteen or so years.[223] In *Terry*, the Court said Officer McFadden's conduct was justified under the circumstances, *i.e.*, McFadden's decision to stop and frisk Terry and his compadres because of their suspicious behavior late at night was appropriate.[224] The conduct the Court referred to was McFadden's stop and frisk of Terry, not what he did leading up to interacting with Terry.[225] The *Terry* Court did not discuss or analyze what Officer McFadden did earlier in the day, whether he had alleged *Brady* violations against him (generally), whether he jaywalked, etc. The standard the Court outlined only contemplated whether the officer observed conduct violating the law. Critics of this theory might well say those facts and others, simply were not present to discuss but easily could have been part of the discussion. But the logic underpinning *Terry* does not support analysis of such behavior or facts. Rather, *Terry* only permits courts to look at the officer's conduct—*i.e.*, the decision to stop the vehicle—and determine whether, based on what the officer *knew* at that time, there was sufficient reasonable suspicion to stop the vehicle.[226]

Courts routinely reiterate the phrase, the "touchstone of the Fourth Amendment is reasonableness."[227] Thus, searches and

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[222] *See generally* United States v. Ochoa, 4 F. Supp. 2d 1007 (D. Kan. 1998); *see also* Levenson v. State, 508 P.3d 229 (Wyo. 2022); *see also* United States v. Esteban, 283 F. Supp. 3d 1115 (D. Utah 2017); *see also* Ramirez v. State, 532 P.3d 230 (Wyo. 2023).

[223] More recently, the Wyoming Supreme Court decided *Ramirez*, 532 P.3d 230. Therein, the Wyoming Supreme Court clarified some of the language previously used in *Levenson* but maintained its position that an officer can negate his/her own reasonable suspicion by virtue of his/her conduct leading up to the stop. *Id.* at 236. However, in *Ramirez*, the court used phrasing like "caused" and "provoked," to conclude the trooper had invalidated his probable cause supporting the traffic stop. *Id.* at 237.

[224] Terry v. Ohio, 392 U.S. 1, 27-28 (1968).

[225] *Id.* ("We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted.").

[226] *Id.* at 21-22.

[227] Ohio v. Robinette, 519 U.S. 33, 39 (1996) (citing Florida v. Jimeno, 500 U.S. 248, 250 (1991)); *see also* State v. Sims, 546 S.E.2d 47, 49 (Ga. Ct. App. 2001); *see also* State v. Crone, 961 N.W.2d 97, 102 (Wis. Ct. App. 2021); *see also* United States v. Bush, 173 F.3d

seizures, including investigatory and traffic stops, must be reasonable.[228] Appellate courts have overturned numerous convictions based on trial courts' erroneous rulings denying suppression based on an alleged Fourth Amendment violation.[229] Conversely, in cases where courts have upheld the trial court's decision to deny suppression based on an alleged Fourth Amendment violation, the language often reflects that the officer had sufficient probable cause or reasonable suspicion to stop the person or vehicle and/or search the person or vehicle.[230] But what is, in my research, not often discussed is what the officer did leading up to the stop.[231]

Therefore, while the word "conduct" is oft repeated in Fourth Amendment traffic stop cases, clarification is necessary. This article posits that "conduct," as discussed in traffic stop cases, has historically meant the officer's physical intervention—*i.e.*, the stop, the search, the seizure, the pat down, etc. This "conduct" must be based on a reasonable and articulable suspicion, meaning what the officer observed, learned, knew, etc.[232] However, the other, less discussed, conduct is distinguished as the officer's conduct leading up to the stop, which this article will refer to as "pre-stop behavior."

430, at*4 (W.D. Ky. 1999); *see also* United States v. Brigham, 382 F.3d 500, 507 (5th Cir. 2004).

[228] United States v. Garcia, 644 F. Supp. 3d 474, 478 (N.D. Ind. 2022); *see also* United States v. Torres, 987 F.3d 893, 901 (10th Cir. 2021) (citing United States v. Gomez-Arzate, 981 F.3d 832, 838 (10th Cir. 2020)).

[229] *See generally* Berryhill v. State, 372 So. 2d 355 (Ala. Civ. App. 1979); *see also* United States v. Gates, 755 F. App'x 649 (9th Cir. 2018); *see also* People v. Townsend, 229 N.E.3d 255 (Ill. App. Ct. 2022).

[230] *See generally* State v. King, 2008 WL 4839662 (Ohio Ct. App. Nov. 10, 2008); *see also* Davis v. State, 202 S.W.3d 149 (Tex. Crim. App. 2006); *see also* Smith v. State, 1998 WL 742384 (Tex. App. Oct. 26, 1998); *see also* State v. Dudley, 779 N.W.2d 369 (N.D. 2010); Raymer v. State, 482 N.E.2d 253 (Ind. 1985); *see also* State v. Hall, 894 N.W.2d 836 (N.D. 2017); *see also* United States v. McMullin, 568 F.3d 1 (1st Cir. 2009).

[231] Save for a few exceptions discussed throughout this article.

[232] *See* United States v. Mendez, 118 F.3d 1426, 1431 (10th Cir. 1997) (citing United States v. Lopez-Martinez, 25 F.3d 1481, 1484 (10th Cir. 1994); United States v. McRae, 81 F.3d 1528, 1534 (10th Cir. 1996)); United States v. Carel, 133 F. App'x 497, 498 (10th Cir. 2005) (citing United States v. Sandoval, 23 F.3d 537, 540 (10th Cir. 1994)); United States v. Wisniewski, 358 F. Supp. 2d 1074, 1087 (D. Utah 2005) (citing United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998); United States v. Villa-Chaparro, 115 F.3d 797, 801 (10th Cir. 1997)).

A. The Problem Fleshed Out

Terry focused on the officer's intervention into a person's life, specifically, McFadden stopping Terry and his companions on the street.[233] For the purposes of this article, the focus is seizing a motorist on the side of the road. In this context, the only question that has historically been asked is whether the officer had reasonable suspicion or probable cause at the time the officer pulled over the motorist.[234] As mentioned above, that is the conduct that is customarily discussed.

Nevertheless, considering an officer's behavior *before* the stop occurs requires an analysis courts have not historically engaged in.[235] But the few cases discussed above that have broached the subject of pre-stop behavior, have strained to mesh an officer's pre-stop behavior into prong one of the *Terry* standard.[236] *Terry* and its progeny make clear the conduct meant to be analyzed must be the act of the stop not the officer's actual pre-stop behavior. However, such a discussion is worthy of further exploration. If an officer's pre-stop behavior, as opposed to just conduct–i.e., initiating the stop—is to be considered, the analysis should not be boot-strapped to the typical one prong analysis of *Terry*. The question arises: did the officer have sufficient reasonable suspicion at the outset of the stop based on his/her observations?

Presumably, courts *can* look at an officer's behavior to determine if it should have an impact on whether a constitutional violation has occurred or if the officer has negated his/her own development of reasonable suspicion. In fact, *Terry* permits courts to look at the totality of the circumstances. Thus, the question is: when *should* an officer's pre-stop behavior in relation to a stop negate his/her reasonable suspicion? Reasonable suspicion and probable cause are borne out of a balancing test between a citizen's right to avoid intrusion by the government and society's interest to

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[233] *See generally* Terry v. Ohio, 392 U.S. 1 (1968).
[234] *See* United States v. Hands, 2012 WL 4928867, at *5 (E.D.N.C. Oct. 16, 2012) (citing United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)); United States v. Haines, 42 F. App'x 554, 557 (4th Cir. 2002). (citing United States v. Crittendon, 883 F.2d 326, 328 (4th Cir. 1989).
[235] The author is well aware of the "this is how we've always done it" trope that is present in this dialogue.
[236] *See supra* text accompanying footnotes 204, 207, and 208.

thwart or respond to criminal behavior.[237] What follows are extreme examples of including the analysis of an officer's conduct into the traditional analysis.

B. Extreme Examples of the Problem

Courts are adding a layer of consideration—officer pre-stop behavior—to the analysis of *Terry*. This addition, however, appears to be somewhat of a square peg and round hole. Take the following example, the officer has his child in the car with him on a ride along and stumbles upon a potential DUI investigation. Because of the suspect's level of intoxication, he travels at a high rate of speed. The officer, believing there's some concern (hunch territory still), speeds up and pursues the suspect, matching the high rate of speed . . . with his child in the car. This situation of the officer's child in the car during a high speed chase constitutes child endangerment, which violates the law. Does that, or should that behavior negate the officer's reasonable suspicion? Arguably, no. Such pre-stop behavior is the result of poor decision-making. He could have radioed another officer or any other number of alternatives. But the simple fact that he had his child in his patrol car, which is arguably child endangerment, should not negate his reasonable suspicion. But how should a court determine that if raised? This situation proves an extreme example.

On the other end of extreme, imagine an undercover, unmarked narc patrol car cruising the south side of Chicago in the heart of the projects. The narc officers believe they observe two young males engage in a drug transaction on the street corner. Not sure of what they saw (avoiding the issue of a "hunch"), the officers seek to observe a traffic violation to get an opportunity to investigate further.[238] The young males get in a car and take off; they are not speeding but also are not being cautious. The narc

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[237] Arnzen v. Palmer, 713 F.3d 369, 373 (8th Cir. 2013) (citing Serna v. Goodno, 567 F.3d 944, 949 (8th Cir. 2009)); *see also* Mobley v. City of Birmingham, 2020 WL 7353338, at *7 (N.D. Ala. Nov. 20, 2020) (citing Tennessee v. Garner, 471 U.S. 1, 8 (1985);; *see also* United States v. Prevo, 435 F.3d 1343, 1345 (11th Cir. 2006)).

[238] *See generally* Whren v. United States, 517 U.S. 806 (1996). Generally, the Court prohibited an analysis of a pre-textual stop, i.e., subjective intent with regard to an officer detaining a suspect. While this example could cut more toward a pre-textual stop, this example is meant to show how an officer, rightfully so, seeks to investigate further when they do not have all the information.

patrol car takes off after them, speeding up near the vehicle with the windows up and lights off while in the bad neighborhood. Because of the officer's driving behavior, the two young males speed up too, almost hit a child, and blow a stop sign. The suspects later testify that they assumed the unmarked undercover patrol car was a rival gang member, which seems a fairly reasonable assumption in that neighborhood and area of Chicago. The officers could have turned their lights on, radioed for a marked unit, or any number of other options. Clearly, again, this situation proves an extreme example but one where the officers' behavior before the stop perhaps should play more of a role in the totality of the circumstances, to determine whether there was reasonable suspicion. As discussed in some of the cases above, but for the officers' decisions and actions, perhaps the suspects would not have acted as they did. Additionally, but for the officer's pre-stop behavior, the officers would not have gained certain knowledge.

Examples are numerous of how looking at the officer's pre-stop behavior might prove worthwhile. Nevertheless, the problem is this necessarily discounts the black letter law — what did the officer observe the defendant doing? Perhaps such language is too simplistic, or critics may take issue with such a one-sided analysis. But when Officer McFadden approached Terry and his cohort, the United States Supreme Court did not analyze whether McFadden had jaywalked to get to them or whether he had a marijuana joint in his pocket leading up to the seizure of Terry. Rather, the Court looked at whether at the moment McFadden restrained Terry, he could articulate facts supporting reasonable suspicion. Continuing with those examples, if an argument had been raised or articulated that McFadden had that marijuana joint and that it was partially smoked, then this would be a question of McFadden's perception. But that is different from simply what he observed in the second before he seized Terry.

As another extreme example, say a trooper is patrolling eastbound interstate traffic for human trafficking. The trooper, however, in the hour preceding taking up his stationary post, got in a fight with his wife and struck her, committing a crime in most jurisdictions. This interaction left him agitated and out of sorts. Arguably, with this open-ended analysis of "reasonable under all the circumstances," his prior interaction could affect any traffic stop

he makes thereafter. Again, this example proves extreme. Relevance is the limiting factor in this example. To determine relevance a court could look to proximity in time of the fight with his wife to a potential stop or seizure made afterwards.

Yet another example is the proverbial manufacturing of a traffic violation. Assume that an officer believes a particular house is a trap house. He has been tasked with making a "wall stop" after an alleged drug transaction. But he has watched these particular residents, to determine if they are drug dealers or if they are otherwise law-abiding. Recognizing that he is unlikely to observe the potential drug dealers commit a traffic violation, the officer unplugs a wire on the vehicle that shorts the headlight on the transport vehicle. Therefore, when the dealers drive off in the night, the officer will have his traffic violation. Should this fact pattern appear in a real case, most courts would likely discount the officer's pre-stop behavior as out of bounds, criminal, and violative of the Fourth Amendment. But what is the support, specifically, for the Fourth Amendment violation? The reality is the drug dealers did not commit a traffic violation; rather, the officer violated the law and then created a problem to justify a stop.

The last example, despite its cartoonish nature, helps to highlight the notion that without some sort of boundaries or test, courts are left to determine what is best or right in the moment. Courts more likely confront what lands in the middle. Courts are typically required to determine what the officer saw, when they saw it, and how certain the officer is that he or she saw the thing that happened. Analysis beyond that is atypical. But if courts are to include such things as an officer's pre-stop behavior, a framework to assess the same is necessary.

IV. THE NEW STANDARD FOR JUDGING AN OFFICER'S PRE-STOP BEHAVIOR IN RELATION TO A TRAFFIC STOP

Neither *Terry* nor its progeny explicitly *require* analysis of an officer's behavior pre-stop; rather, these cases look at the knowledge available to the officer just before initiating the stop, as conduct. *Terry* never required analysis of the officer's behavior pre-stop. Courts since *Carroll v. United States* have always looked at what the officer knew at the time of intrusion and whether that

information warranted intrusion upon the particular suspect.[239] The narrow application of the Fourth Amendment in relation to traffic stops predicated on traffic offenses requires nothing more than the officer's observation of the violation.[240] As an alternative to officers conducting traffic stops in relation to traffic offenses, there are situations that officers pull someone over for violating some other law. Additionally, courts typically do not consider an officer's subjective intent short of a few explicit situations/circumstances as outlined in *Whren* and its progeny.[241] Thus, *if* courts were to consider an officer's behavior pre-stop, the consideration must be objective.

Some courts have analyzed the officer's conduct leading up to the traffic stop and in relation to the traffic stop using a "causation" approach.[242] The efforts of these courts, praiseworthy as they are, have created standards *Terry* never imagined nor enumerated. Moreover, these courts have injected life into a Fourth Amendment analysis that is unnecessary in the context of traffic stops. Traffic stops require nothing more than an officer's observations.[243] By including an officer's conduct into the analysis, a court would now necessarily weigh that against the defendant's conduct.[244]

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[239] *See generally* Terry v. Ohio, 392 U.S. 1 (1968); *see also* Carroll v. United States, 227 F. Supp. 3d 1242 (W.D. Okla. 2017).

[240] Intentional conduct to cause a negative outcome is not within the scope of this article. Needless to say, that topic could easily fill another article.

[241] *Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); Damato v. State, 64 P.3d 700, 705 (Wyo. 2003) (citing *Whren*, 517 U.S. at 813); Pier v. State, 432 P.3d 890, 896 (Wyo. 2019) (citing Fertig v. State, 146 P.3d 492, 496 (Wyo. 2006)).

[242] *See generally* United States v. Ochoa, 4 F. Supp. 2d 1007 (1998); *see also* Levenson v. State, 508 P.3d 229 (Wyo. 2022); *see also* United States v. Esteban, 283 F. Supp. 3d 1115 (D. Utah 2017); *see also* Ramirez v. State, 532 P.3d 230 (Wyo. 2023).

[243] *See generally* Ciak v. State, 597 S.E.2d 392 (Ga. 2004) (holding that an "officer's observations gave rise to reasonable suspicion justifying traffic stop."); *see also* United States v. Stancle, 184 F. Supp. 3d 1249 (N.D. Okla. 2016) (holding that "with respect to first traffic stop, officer's observation of burnt marijuana smell constituted probable cause to expand scope of detention and search defendant's vehicle, even though they failed to corroborate the marijuana smell[.]"); *see also* State v. Anderson, 683 N.W.2d 818, 823 (Minn. 2004) ("Generally, if an officer observes a violation of a traffic law, no matter how insignificant the traffic law, that observation forms the requisite particularized and objective basis for conducting a traffic stop.") (citing State v. George, 557 N.W.2d 575, 578 (Minn. 1997)).

[244] Certainly, there are scenarios where that very balancing occurs: whether the officer properly administered a breathalyzer, whether the officer lied while giving a sworn statement for a warrant, if an officer goes onto the curtilage (or beyond) of a house without a warrant or extenuating circumstances, and the list goes on.

In the United States, officer conduct is scrutinized now more than ever.[245] Certainly, as a normative goal, officers should do the "right thing" leading up to a traffic stop. Therefore, despite not historically being a part of the *Terry* analysis, determining whether an officer's pre-stop behavior impacted the stop might be the right answer.[246] Because the totality of the circumstances is such an integral component of Fourth Amendment analysis, keeping the discussion of officers' pre-stop behavior in the realm of exclusion as a remedy is the right answer. The other available remedies are inadequate to meaningfully address such transgressions. Moreover, as the exclusionary rule's basis is deterrence, courts should maintain that theme in trying to curb improper pre-stop behavior in addition to making bad stops. An officer's pre-stop behavior can be broken down into two categories: (1) intentional and (2) unintentional behavior.

In cases where an officer has intentionally acted outside the bounds of the law to justify a stop, the officer never had reasonable suspicion. But logically, that does not track. If, as argued above, *Terry* stands for the proposition that officers may base reasonable suspicion only on the *defendant's* violation of law, then an officer's intentional act is probably antithetical to such a determination. Because *Whren* addressed the issue of subjective intent and because § 1983 cases give rise to a separate cause of action as to a remedy, this article will not address flagrant or intentional acts of officers against defendants in relation to traffic stops.

Instead, this article will address officers' pre-stop behavior that is unintentional, incidental, or even knowingly but without intent to harm or cause a certain outcome.[247] The closest comparison to this type of conduct in the law is negligence. The civil law claim of negligence provides a framework to achieve a workable

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[245] Andrew Millman, *Renewed Scrutiny of Police Misconduct Includes Reexamination of Qualified Immunity for Officers*, GOTHAM GAZETTE (Sept. 7, 2020), https://www.gothamgazette.com/state/9738-renewed-scrutiny-police-misconduct-black-lives-matter-nypd-qualified-immunity-officers [https://perma.cc/K8W8-87TG].

[246] *See generally* Margaret M. Lawton, *The Road to* Whren *and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917 (2008); *see also* Rohit Asirvatham & Michael D. Frakes, *Are Constitutional Rights Enough? An Empirical Assessment of Racial Bias in Police* Stops, 116 NW. U. L. REV. 1481 (2022); *see also* United States v. Ochoa, 4 F. Supp. 2d 1007 (D. Kan. 1998); *see also* Levenson v. State, 508 P.3d. 229 (Wyo. 2022).

[247] Intentional conduct to cause a negative outcome is not within the scope of this article. Needless to say, that topic could easily fill another article.

test to analyze an officer's pre-stop behavior. Negligence sounds in what a reasonable person should have done or not done that results in harm to another.[248] In tort, the basic elements of negligence are broken down into duty, breach, causation, and harm.[249] Negligence relies on an understanding of agreed-upon behavior of a "reasonable person"— duty.[250] Next, a determination must be made whether a person deviated from the agreed-upon behavior; i.e., a breach.[251] Lastly, courts look at whether the breached duty was causally related to the resultant harm — causation.[252] In that same layer of analysis, negligence requires foreseeability.[253]

This article will only discuss causation. Causation serves as the starting point for analysis of an officer's pre-stop behavior. Causation requires the actor's conduct to be the proximate cause in bringing about the identified harm.[254] To determine whether an officer's pre-stop behavior is the proximate cause, a court must consider two overarching factors: (1) whether the event would have occurred but for the officer's conduct and (2) whether the officer's conduct was a substantial factor in bringing about the event.[255] Said another way, if the officer had not engaged in certain conduct, would the event have occurred?

The substantial factor test, customarily used in causation determinations, is most appropriate to adopt in the situations discussed herein. Hailing back to torts class, "an actor's negligent conduct is a 'legal cause' of harm if the actor's conduct is a 'substantial factor' in bringing about that harm."[256] In a but-for analysis, courts apply a two-step test: (1) whether the actor's conduct was a substantial factor in bringing about the harm and (2) whether there is a rule of law relieving the actor from liability because of the way in which the actor's negligence caused the

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[248] *Berberich v. Jack*, 709 S.E.2d 607, 612 (S.C. 2011) ("'[N]egligence is the failure to use due care,' i.e., 'that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances.'").
[249] *Hatton v. Energy Elec. Co.*, 148 P.3d 8, 13 (Wyo. 2006).
[250] Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1250 (2009).
[251] *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998).
[252] *Id.*
[253] Zipursky, *supra* note 250, at 1250.
[254] *See* RESTATEMENT (SECOND) OF TORTS § 431 (AM. L. INST. 1965); 2 Owen & Davis on Prod. Liab. § 11:2 (4th ed. 2024).
[255] Bozelko v. Papastavros, 147 A.3d 1023, 1028-29 (Conn. 2016).
[256] 3 AM. L. OF TORTS § 11:2 (Stuart M. Speiser et al., eds., 2024).

harm.[257] Proximate cause, as opposed to cause in fact or actual cause, is flexible in concept and requires some direct relationship "between the injury asserted and the injurious conduct alleged."[258]

In the scenarios discussed herein, a court could easily make a similar analysis. First, courts should consider whether the officer's behavior pre-stop was a substantial factor in the defendant committing a traffic violation or other violation of the law. Second, courts should also consider whether the officer's conduct was permissible under some exception to the law. The first factor is easily adopted in the criminal realm. In fact, courts have done just that in relation to criminal elements of crimes of violence, attempt cases, and inchoate crimes.[259] Again, relying on civil law, an analysis of the but-for causation should require courts to look at foreseeability.[260] The question is whether the officer's conduct would create a "likely result"—one that was reasonably foreseeable.[261] Necessarily, proximate causation precludes fault or liability "where the causal link between conduct and result is so attenuated that the consequence of an action is more aptly described as mere fortuity."[262]

Criminal courts, federal and state alike, can utilize the negligence causation nexus to consider an officer's behavior pre-stop within the totality of the circumstances. To do so, there should be two additional factors within the proximate cause analysis that courts should always consider. First, courts should look at the temporal relationship between the cited negative pre-stop behavior and the actual stop. Second, courts should look at whether an officer

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[257] Estate of Frey v. Mastroianni, 463 P.3d 1197, 1207 (Haw. 2020).
[258] State v. Irish, 873 N.W.2d 161, 167 (Neb. 2016).
[259] *See generally* Burrage v. United States, 571 U.S. 204 (2014) (discussing but-for causation in relation to penalty enhancements); *see also* State v. Christman, 249 P.3d 680, 687 (Wash. Ct. App. 2011); *see also* People v. Jennings, 237 P.3d 474, 496 (Cal. 2010); *see also* People v. Bailey, 549 N.W.2d 325, 334–336 (Mich. 1996); *see also* Commonwealth v. Osachuk, 681 N.E.2d 292, 294 (Mass. App. Ct. 1997).
[260] Steed v. Rezin Orthop. and Sports Med., 182 N.E.3d 109, 120 (Ill. 2021) ("Legal cause is established only when the injury is reasonably foreseeable, i.e., when the defendant's conduct is 'so closely tied to the plaintiff's injury that he should be held legally responsible for it.'") (internal citations omitted).
[261] *Id.* at 120-21 (holding that a defendant doctor's failure to schedule a follow up appointment within two weeks of his initial appointment was not a substantial cause of plaintiff's death because the mass emerged outside the timeframe within which the doctor could have scheduled the appointment and, theoretically, would have properly diagnosed the disease).
[262] State v. Irish, 873 N.W.2d 161, 167 (Neb. 2016).

is acting within the bounds of the law leading up to and upon initiation of a stop. Then, in the spirit of the Fourth Amendment and traditional causation analysis, a true balancing test must occur. This article will analyze each below. Then, the article will explain how a case may come out either different or the same with the application of such a test.

To be sure, causation is an objective test.[263] So the legal concept of causation fits neatly in the precedent surrounding Fourth Amendment analysis. Causation is the missing link in the analysis, and therefore, arguably, the most important. A court should ask: did the officer's actual conduct cause the infraction which led to reasonable suspicion, or at least was the conduct a substantial factor in causing the infraction? If the answer is yes, then causation weighs in favor of the officer's pre-stop behavior being unreasonable under the circumstances. At this point, courts may not need to conduct further analysis of whether the officer had reasonable suspicion. This contention seems obvious, as the Montana Supreme Court pointed out.[264] If the officer *intentionally* caused the basis for the reasonable suspicion, then the suspect cannot reasonably be thought to have broken the law of his own accord.

A comparison is the common law defense of necessity. The trespass or wrong is excused because the person was forced into the situation or forced to make a choice between the lesser of two evils.[265] Familiar law school examples include the man who enters onto another's property without permission not to commit a trespass or any further crime but rather out of necessity to keep warm from an ice storm or avoiding some other harm. Another example is the pilot who cannot make it to the landing strip and instead must decide between the busy highway, which provides an

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[263] Jamison v. Kilgore, 903 So. 2d 45, 48-49 (Miss. 2005) (citing Reikes v. Martin, 471 So. 2d 385, 392 (Miss. 1985)); *see also* Guebard v. Jabaay, 452 N.E.2d 751, 757 (Ill. App. Ct. 1983) (citing Crain v. Allison, 443 A.2d 558, 563 n.14 (D.C. App. 1982)); *see also* Hartke v. McKelway, 707 F.2d 1544, 1550 (D.C. Cir. 1983).

[264] *See generally* State v. Farabee, 22 P.3d 175 (Mont. 2000).

[265] *See generally* Allen v. State, 123 P.3d 1106 (Alaska Ct. App. 2005); *see also* Bowen v. State, 162 S.W.3d 226 (Tex. Crim. App. 2005); *see also* Juarez v. State, 308 S.W.3d 398 (Tex. Crim. App. 2010); *see also* Seibold v. State, 959 P.2d 780 (Alaska Ct. App. 1998); *see also* United States v. Kiss-Velasquez, 2010 WL 11545250, at *2 (C.D. Cal. Mar. 15, 2010) (outlining four factors a defendant may present in support of a necessity defense) (citing to United States v. Perdomo-Espana, 522 F.3d 983, 987 (9th Cir. 2008)).

easier target to land but will harm numerous motorists, or the farmer's field, where the landing is sure to cause damage to the crops. Of course, these examples are a little far afield. But the major premise is the law absolves the actor, the suspect motorist in our scenario, of the wrongdoing one would normally ascribe to him because some other force, some other actor, interceded. In the examples, the trespasser is not actually trespassing. He is seeking refuge. Similarly, the pilot does not wish to land the plane where he knows he should not. The motorist, trespasser, and pilot are forced to do something they would not otherwise do.

By way of example, in *Ochoa*, the court discussed how the officer engaged in driving behavior that likely negatively impacted the defendant's driving, which caused the defendant to stray from his lane and in any other scenario would have been a violation of the statute prohibiting the same.[266] Nevertheless, the court said the defendant likely swerved from the lane and committed a traffic violation because of the officer's conduct, which proves but-for causation.[267] But the court did not use such language or analysis. Admittedly, another court could come behind the *Ochoa* court and decide different tomorrow. Again, that is a reality of a great many tests (factors and elements) in the law and factual interpretation. Nevertheless, where something can be tightened up, it should.

To bring the analogy home, take another look at the *Ochoa* case.[268] In that case, the trooper pursued the defendant on the highway after seeing what he believed to possibly be a minor traffic violation.[269] When pursuing the defendant, the trooper pulled up next to the defendant's vehicle to get a better look at the situation inside the vehicle.[270] While alongside the defendant's vehicle, the trooper varied speed, made his own sudden movements, and lingered next to the defendant's vehicle.[271] As a result, the defendant made a sudden move to the right, which caused his vehicle to cross the righthand fog line of the highway.[272] As the

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[266] United States v. Ochoa, 4 F. Supp. 2d 1007, 1012 (D. Kan. 1998); *see also* United States v. Esteban, 283 F. Supp. 3d 1115, 1129 (D. Utah 2017).
[267] *Ochoa*, 4 F. Supp. 2d at 1012.
[268] *See generally id.*
[269] *Id.* at 1009.
[270] *Id.*
[271] *Id.*
[272] *Id.*

Ochoa court pointed out, most motorists would likely respond the same way.[273] But for the officer's conduct, which was a significant contributing factor, the defendant would likely not have swerved.[274]

The defendant in *Ochoa* did not appear to want or intend to swerve. The court found, and presumably most people could agree that but for the trooper's own conduct, the defendant's erratic driving was unlikely to have occurred.

The next question becomes, was there a rule of law relieving the actor from liability because of the way in which another actor's negligence caused the harm?[275] In the criminal traffic stop context, the only question is whether the officer's pre-stop behavior is excusable by some rule of law. Such excuses are likely a narrow set of exceptions. For example, in Wyoming and likely many other jurisdictions, an officer traveling above the speed limit to pursue a suspect he/she believes has committed a traffic violation is excused from adhering to the speed limits and other traffic laws while in pursuit of the suspect.[276] For the sake of the analysis, one should assume that the defendant's argument might be that the officer was speeding well above the speed limit, which caused the defendant to also speed and travel through a stop sign without stopping. Because the officer was absolved of speeding, this action necessarily could not be a "but-for" causation of the defendant's actions.

But-for causation is not relegated to the confines of civil tort law. Numerous courts in criminal cases have discussed the relationship between but-for causation and elements of a crime.[277] Most notably, the United States Supreme Court discussed causation in its various forms in *Burrage v. United States*.[278] The Court explained the formulations of criminal codes that included

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[273] *Ochoa*, 4 F. Supp. 2d at 1012.
[274] *Id.*
[275] Estate of Frey v. Mastroianni, 463 P.3d 1197 (Haw. 2020).
[276] WYO. STAT. ANN. § 31-5-106 (2023); *see also* ALA. CODE § 32-5A-7 (2023); *see also* LA. STAT. ANN. § 32:24 (2023); *see also* MO. ANN. STAT. § 304.022 (West 2023); *see also* GA. CODE ANN. § 40-6-6 (2023); *see also* N.J. STAT. ANN. § 39:4-103 (West 2023); *see also* VA. CODE ANN. § 46.2-920 (2023).
[277] State v. Irish, 873 N.W. 2d 161, 168 (Neb. 2016) (finding that DUI defendant was in fact guilty of causing victim's bodily injury, despite potential other causes being present); *see also* State v. Sollman, 953 N.W. 2d 569 (Neb. Ct. App. 2021); *see also* State v. Malone, 957 N.W.2d 892 (Neb. 2021).
[278] Burrage v. United States, 571 U.S. 204 (2014).

phrases like "results from" and "because of" that are all intuitively interpreted as causation language.[279]

A. Foreseeability

As a consideration of proximate cause, most jurisdictions consider foreseeability. As one scholar points out, jurisdictions are split on what the appropriate test is to analyze foreseeability as a predicate to liability.[280] Categorically, foreseeability serves to limit liability of a tortfeasor.[281] Jurisdictions are split on whether foreseeability should be determined by a "risk standard" or a "direct-consequences" test.[282] However, the risk standard has been "adopted by 'virtually all jurisdictions . . . for some range of scope-of-liability issues in negligence cases.'"[283] Since *Palsgraf*, courts have rejected the idea of a universal duty that would allow recovery for a defendant's breach of a duty even if it was not a relational duty to the plaintiff.[284] Rather, the harm should be a foreseeable result of the defendant's conduct.[285]

In the context of this article, foreseeability places a limit on the analysis of whether the officer's pre-stop behavior caused the defendant's conduct or had some impact on the defendant's conduct. Similar to the negligence (civil) situations discussed above, there should be a relational connection from which a duty stems by which to analyze the events rather than a universal duty. And this contention neatly fits in the criminal context. Fourth Amendment cases are replete with the oft-repeated phrase, "Fourth Amendment rights are personal rights which . . . may not be vicariously

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[279] *Id.* at 210-13.
[280] Mark A. Geistfeld, *Proximate Cause Untangled*, 80 MD. L. REV. 420, 422 (2021) (discussing the legal landscape and history of proximate cause and foreseeability).
[281] *Id.* at 423 (noting that the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 29 cmt. B (Am. L. Inst. 2010) "limits liability 'to those harms that result from the risks that made the actor's conduct tortious.'").
[282] *Id.* at 423-424 (noting the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM, § 29 cmt. E (AM. L. INST. 2010)).
[283] *Id.* at 423 (noting the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM, § 29 cmt. E (AM. L. INST. 2010)).
[284] *Id.* at 427 (noting how this idea of relational duty of reasonable care means the potential plaintiff/victim of the defendant's conduct can, and likely will, change depending on the specifics of the conduct).
[285] *See id.* at 422. It should be noted the author goes on to discuss the criticisms of foreseeability test.

asserted."[286] Because of their personal nature, Fourth Amendment rights have a natural limitation that could be overlaid onto this adopted analysis, regarding an officer's pre-stop behavior.

Foreseeability is a reasonable addition to the analysis for officers' pre-stop behavior because if the officer's pre-stop behavior could reasonably be foreseen to cause a defendant's conduct, which is part of the overall reasonable suspicion analysis, then making a finding negating the officer's reasonable suspicion already requires foreseeability. If, however, the effect the officer's conduct has on the defendant's conduct is attenuated or unforeseeable, then the officer's conduct would not negate the officer's reasonable suspicion.

B. Temporal Factor

While not always a consistent consideration in terms of civil negligence, an appropriate time frame *could* be a factor for courts to weigh in this analysis. Time matters in the context of an officer's behavior pre-stop because time provides a natural boundary and framework to the context of the analysis. The obvious and easy question is how far back in time is important to this framework. A court's lookback period should be constrained by the evidentiary principle of relevance.[287] Additionally, courts have routinely held that temporal proximity alone is insufficient to show causation, but temporal proximity can certainly be part of the nexus of evidence of causation.[288]

Still, courts are more likely to give temporal connection greater weight when coupled with other forms of evidence

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[286] Rakas v. Illinois, 439 U.S. 128, 133-134 (1978) (quoting Alderman v. United States, 394 U.S. 165, 174 (1969) (discussing how a defendant against whom evidence is introduced which was obtained through an illegal search and seizure of a third person's premise or property has not had his (the defendant's) own rights violated)); *see also* State v. Dubose, 843 N.E.2d 1222, 1229 (Ohio Ct. App. 2005); *see also* United States v. Nadler, 698 F.2d 995, 998 (9th Cir. 1983); *see also* State v. Kenny, 399 N.W.2d 821, 824 (Neb. 1987).

[287] *See* FED. R. EVID. 403; *see also* Krekelberg v. City of Minneapolis, 991 F.3d 949, 956 (8th Cir. 2021); *see also* Parker v. Tyson Foods, Inc., 499 F. Supp. 3d 297, 302 (S.D. Miss. 2020); *see also* Davis v. Velez, 15 F. Supp. 3d 234, 252 (E.D.N.Y. 2014); *see also* Life Plus Intern. v. Brown, 317 F.3d 799, 803 (8th Cir. 2003).

[288] Martin v. Ramos, 120 N.E.3d 244, 252 (Ind. Ct. App. 2019); *see also* Daub v. Daub, 629 N.E.2d 873, 878 (Ind. Ct. App. 1994); *see also* Abdul-Latif v. County of Lancaster, 990 F. Supp. 2d 517, 530 (E.D. Pa 2014) (citing Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989)); *see also* Lin v. Sheraton License Operating Co., LLC, 2020 WL 6274839 at *5 (2020) (citing Peters v. Forster, 804 N.E.2d 736, 739 (Ind. 2004)).

supporting the causal link.[289] Courts have also said that temporal evidence of causation is sufficient only where both the circumstances of the event and the timing of the conduct are so compelling as to render further evidence of causation unnecessary.[290]

Courts should only look back in time as far back as something related to and relevant to the stop that occurred. Given the challenge comes from a defendant on the legality of a stop, the defendant's should have the burden to show relevance to points in time prior to the stop in relation to the officer's conduct. For example, if the defendant can show that the day before the stop the officer staked out the defendant's residence and vehicle only to wait until defendant was sleeping and unaware to smash the defendant's taillight on his vehicle, then looking back in time is appropriate and relevant. If, on the other hand, the defendant requests the court to consider evidence about whether the officer sped down the street to catch up to the defendant to investigate further about his potential expired registration, going back in time to analyze the officer's conduct would have no relevance.

Time can be important to the discussion because, similar to the second prong of the *Terry* analysis, different circumstances will spur a body of cases to discuss what is appropriate and what is inappropriate in terms of consideration of time and consideration of the officer's conduct. For example, courts did not consider motorists' travel plans under the totality of the circumstances until the *Terry* decision allowed them to do so.[291] Today, such a consideration is commonplace.

Clearly, there has to be some reason to say going back in time before the stop is necessary, which is why the defendant should have the burden to point this out. Otherwise, a prosecutor is forced to go back in time to the officer's training or to some arbitrary point in hopes of satisfying the court's curiosity or the defendant's challenge.

Critics of this thesis will unquestionably take issue with the defendant having the burden to prove relevance. But not so

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[289] Gass v. Marriott Hotel Servs., Inc., 501 F. Supp. 2d 1011, 1020 (W.D. Mich. 2007).
[290] Arias v. DynCorp, 928 F. Supp. 2d 1, 7 (D.D.C. 2013).
[291] Let's be honest, they probably did. But it was easier to make such considerations once the SCOTUS said courts could do it.

dissimilar to an affirmative defense, the defendant should have the burden. Here, the minimal burden is relevance, not necessarily that the thing occurred. In most suppression or Fourth Amendment analyses, the government is required to show the stop was reasonable under all the circumstances. That burden should remain. But if the defendant wishes the court to look back in time to pull together a theory of why the officer's conduct is relevant to causation, the burden should be on the defendant.

C. Legality of Officer's Conduct

Another consideration in this causation analysis is whether the officer's pre-stop behavior was outright illegal, legal, or in some gray area. Clearly, if an officer was engaging in illegal activity himself, that does not bode well for the overall reasonableness of his conduct. Moreover, if the officer's conduct was illegal, there should still be a requirement of a connection to the causation.[292] However, if his pre-stop behavior was legal, it likely should weigh in favor of the behavior being reasonable under the circumstances.

In various contexts, courts and triers of fact must decide whether an actor is within the bounds of law.[293] Similarly, the law generally requires officers to perform their duties as a peace officer lawfully.[294] As the argument goes, an officer should not have the protection of the law if they are not also following the law while engaged in conduct related to a defendant or suspect.

Numerous states have statutes prohibiting interfering with a peace officer.[295] What many of those statutes have in common is that they require that for a defendant to be charged with interference with a peace officer, the officer must have been in the

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[292] Pun intended.

[293] For example, many self-defense statutes require the claimant to prove they were where they were lawfully allowed to be, were not engaging in wrongdoing on their own part, and the responsive force was reasonably (granted, not illegal) appropriate under the circumstances. Wyo. Stat. Ann. § 6-2-602 (2023).

[294] 42 U.S.C. § 1983.

[295] WYO. STAT. ANN. § 6-5-204 (2023); *see also* TEX. PENAL CODE ANN. § 38.15 (West 2023); *see also* UTAH CODE ANN. § 76-8-305 (West 2023); *see also* OR. REV. STAT. ANN. § 162.247 (West 2023); *see also* CONN. GEN. STAT. ANN. § 53a-167a (West 2023); *see also* N.J. STAT. ANN. § 2C:29-1 (West 2023); *see also* ARK. CODE. ANN. § 5-54-104 (2023); *see also* S.C. CODE ANN. § 61-2-240 (2023); *see also* LA. STAT. ANN. § 14:108 (2023); *see also* CAL. PENAL CODE § 69 (West 2023).

lawful performance of his duties.[296] Despite the expectation that officers will act within the bounds of the law while performing their duties, several cases detail scenarios in which that expectation is point of contention which changed the outcome of a case.[297]

In the context of determining whether an officer has or can develop reasonable suspicion in relation to a traffic stop, there is no question that the officer should be within the lawful performance of their duties. For example, when analyzing a search, courts routinely consider whether the officer was where they were legally allowed to be or whether technology allowed encroachment somewhere the officer would not otherwise have been allowed to see.[298] The law should not tolerate lawlessness to capture lawlessness; two wrongs do not make a right. That said, an analysis in the context of reasonable suspicion may not be so simple. Thus, a balancing of various interests is the right path to take. The Fourth Amendment often requires or imposes a balancing test to determine an appropriate outcome.[299] The balancing inquiry is now relegated to policy discussions, scholarly articles, and cases.[300] The analysis

[296] *See supra* note 295.

[297] *See* Pulliot v. Hodgdon, 402 A.2d 199, 200-01 (N.H. 1979) (citing State v. Kimball, 77 A.2d 115, 120 (N.H. 1950)); *see also* Clayton v. Branson, 570 S.E.2d 253, 255 (N.C. Ct. App. 2002); *see also* Manno v. Metro. Life Ins. Co., 139 Misc. 848, 850 (City. Ct. 1931); Commonwealth v. Saul, 499 A.2d 358, 359 (Pa. Super. Ct. 1985); *see also* Bavilla v. State, 2012 WL 1959557, at *2, *6 (Alaska Ct. App. May 23, 2012).

[298] Kyllo v. United States, 533 U.S. 27, 29 (2001); *see also* Florida v. Jardines, 569 U.S. 1, 3 (2013); *see also* United States v. Jones, 565 U.S. 400, 402 (2012); *see also* United States v. Lambis, 197 F. Supp. 3d 606, 608-09 (S.D.N.Y. 2016); *see also* United States v. Baker, 563 F. Supp. 3d 361, 367 (M.D. Pa. 2021); *see also* Brown v. State, 540 A.2d 143, 146 (Md. Ct. Spec. App. 1988); *see also* Collins v. Virginia, 584 U.S. 586, 588 (2018).

[299] Arnzen v. Palmer, 713 F.3d 369, 373 (8th Cir. 2013) (citing Serna v. Goodno, 567 F.3d 944, 949 (8th Cir. 2009)); *see also* Mobley v. City of Birmingham, 2020 WL 7353338, at *7 (N.D. Al. Nov. 20, 2020) (citing Tennessee v. Garner, 471 U.S. 1, 8 (1985); *see also* United States v. Prevo, 435 F.3d 1343, 1345 (11th Cir. 2006)).

[300] *See* Matthew Whitaker & Pam Bondi, *Statement in Support of the Thin Blue Line Act*, AM. FIRST POL'Y INST. (Feb. 16, 2023), https://americafirstpolicy.com/issues/statement-in-support-of-the-thin-blue-line-act; *see also* Brooke Shultz, *Barring 'Thin Blue Line' Flag on Pennsylvania Township Property is Unconstitutional, US Court Rules*, 90.5 WESA (Nov. 15, 2023), https://www.wesa.fm/courts-justice/2023-11-15/thin-blue-line-pa-unconstitutional; *see also* Kweku, *supra* note 3 (recounting the history of the 'thin blue line' flag and why it stands for police support today); *see also* Sainz, *supra* note 4; *see also* Duret et al., *supra* note 4; *see also* THE MARSHALL PROJECT, *supra* note 4; *see also* Woods, *supra* note 5, at 672, 759; *see also* Natapoff, *supra* note 5, at 1069; *see also* Meyer v. State, 535 P.3d 635, 640 (Idaho Ct. App. 2023); *see also* State v. Wharton, 510 P.3d 682, 686-87 (Idaho 2022); *see also* Dee Wampler & Joseph Passanise, *The Increasing*

of what the public's interest is in remaining free from illegal searches and seizures balanced with law enforcement's interest in stopping criminals is muddy and unclear at best. So, while determining whether the officer in a traffic stop scenario has engaged in illegal pre-stop behavior is perhaps simple—did he or she violate a law within the jurisdiction—how to consider that piece of information is less clear.

Take the example above of the officer speeding to observe a potential suspect. However, now assume that the officer has not observed a traffic violation nor does the officer have any attendant information; he simply speeds up to see what he sees.[301] Again, the easy question is did the officer violate the law? The answer is resoundingly yes. The harder or deeper question is how, if at all, should the officer's speeding factor into the analysis of his causation of a later discovered alleged offense. The answer is, it depends.

A court finding that an officer's pre-stop behavior was outside the lawful performance of his duties should weigh in favor of causation and unreasonable pre-stop behavior. Again, a court should weigh the competing interests: a citizen's desire to remain free from intrusion and law enforcement's desire to stop or investigate crime. The officer's pre-stop behavior proves the variable in this scenario. Regarding the illegal conduct, courts should take into consideration the severity of the illegal conduct. For example, did the officer speed 95 mph in a 75 mph speed zone? Such a violation of the law is likely excusable if the attempt is to catch a potential suspect. On the other hand, did the officer drive the wrong way on the interstate and then exit on the entrance ramp to circle around and catch a suspect?[302] A court could weigh those factors in determining whether the illegality of an officer's conduct played into causation and therefore the reasonableness of the pre-stop behavior.

Because of various jurisdictions' statutes and laws that permit law enforcement to violate relevant traffic laws in pursuit of a potential suspect, an officer's pre-stop behavior is oftentimes found

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Use of Profiles and Prescribed Tactics in Drug Prosecutions, 51 J. Mo. Bar 288, 288 (1995).

[301] Levenson v. State, 508 P.3d 229, 232 (Wyo. 2022). The trooper in *Levenson* testified he had not observed the defendant commit any traffic violations nor did he suspect him of any criminal activity. But nevertheless, sped up to observe the defendant's vehicle. *Id.*

[302] These are actual facts of a case I prosecuted.

legal. However, the courts should consider the flagrant nature of the officer's conduct—as the officer's violation of the law egregious, or was it innocuous in light of the circumstances? In no way is this a suggestion to look at intent. Rather, courts should make a determination of whether the officer's pre-stop behavior recklessly disregarded the safety of others. Similarly, a court should analyze whether the officer's pre-stop behavior was so careless as to be deemed out of bounds.

Alternatively, some courts may elect to review this factor in a binary fashion—legal or illegal. This approach too is appropriate under the relevant considerations. If the officer engaged in *any* unlawful pre-stop behavior, the stop is unreasonable, and the evidence should be suppressed. The problem with this example is that it completely divests the court of a meaningful analysis of causation. This approach goes back to: did the officer, independent of *all* other evidence of the motorist's conduct, do something bad enough to make the court (as a proxy for the public) willing to say the entire stop was bad?

D. Burden

In the law, burdens can dictate the outcome.[303] In motions to suppress, defendants file the initial motion because they have the burden to first claim a violation occurred.[304] For example, the defendant will file his or her motion and allege the officer violated his or her Fourth Amendment right to remain free from unreasonable searches and seizures.[305] Depending on the circumstances and sometimes the particular defense attorney, the defendant may not allege much more than that. Then, the prosecution has the burden to prove that the stop, or the expansion of the stop, was reasonable under the totality of the

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[303] Examples of where this is the case include *Batson* challenges in *voir dire* in criminal cases; affirmative defenses in both civil and criminal cases; and prosecutorial misconduct.

[304] Davis v. State, 859 P.2d 89, 93 (Wyo. 1993); Guerra v. State, 897 P.2d 447, 452 (Wyo. 1995); Hall v. State, 911 P.2d 1364, 1367 (Wyo. 1996); Lee v. State, 2 P.3d 517, 522 (Wyo. 2000).

[305] *Davis*, 859 P.2d at 92; *Guerra*, 897 P.2d at 451; *Hall*, 911 P.2d at 1367; *Lee*, 2 P.3d at 521-22.

circumstances.[306] Typically, the matter will proceed to a hearing where the prosecution calls most of the witnesses and submits most of the evidence—body or dash camera footage—to show the officer's actions were reasonable under the circumstances. But all the while, the defense is attempting to show that the stop was unreasonable, that the expansion of the stop was unreasonable, or that the search was unreasonable.

Because this burden system works, the same burden requirement can and should apply here. The defendant should first file a motion to allege a violation based on the officer's pre-stop conduct and/or some other Fourth Amendment violation. The prosecution's burden should not shift to the defendant. The prosecution must prove that the officer's pre-stop behavior *and* that the initiation of the stop were reasonable under the totality of the circumstances. Similar to a motion to suppress, this burden will require an evidentiary hearing so that the parties and ultimately the court can test the credibility and veracity of witnesses as well as the volume of evidence for one side or the other. In essence, applying the procedural framework of a motion to suppress can play out fairly and consistently.

V. THE TEST IN ACTION

Judges can easily use the above factor test to determine how, if at all, an officer's pre-stop behavior should be weighed. Below, I will apply the test to a set of hypothetical facts as an example. Whether the outcome should be different is up for debate. But what the reader can see is an objective application of the factors in the test above.

A. Hypothetically Speaking

Assume there is a local law enforcement officer patrolling a high-crime area. The officer had patrolled the night before and saw a 2012 Nissan Sentra that had been driving suspiciously. While patrolling tonight, the officer again sees what he believes is the

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[306] Lunsford v. State, 652 P.2d 1243, 1245 (Okla. Crim. App. 1982) (citing Leigh v. State, 587 P.2d 1379, 1383 (Okl. Crim. App. 1978); *see also* People v. Romeo, 240 Cal. App. 4th 931, 941 (Sept. 28, 2015) (citing People v. Williams, 973 P.2d 52, 58 (Cal. 1999)); *see also* People v. Thomas, 29 Cal. App. 5th 1107, 1115 (Dec. 27, 2018).

same Nissan Sentra traveling in the opposite direction, possibly over the speed limit. He is unable to make a visual estimation or determine speed by radar. After the Nissan passes him, the officer waits until traffic is clear and flips around to pursue the Nissan. The speed limit along this road is 35 mph, as the road is semi-residential. Because of the delay before he could turn around, the Nissan has gained substantial ground on the officer. As such, the officer speeds, reaching up to 70 mph.

After about one minute of speeding up to the Nissan, the officer sees the vehicle nearing an intersection. This intersection is a four-way with stop signs at each corner for each direction of travel. The Nissan has applied its brakes and is clearly slowing down, but the car has not yet stopped completely. The officer is still traveling at a high rate of speed but has begun to slow as he now nears the intersection. The officer has not activated his emergency lights at this point. Once the officer's vehicle is within one-hundred feet of the Nissan, the Nissan abruptly turns right onto a side street at the four-way intersection. At best, the Nissan performed a "California stop"[307] and failed to use a turn signal before executing the turn.

The officer sees each of these violations and activates his emergency lights. Upon seeing the officer's emergency lights the Nissan pulls over. Throughout the traffic stop interaction, the officer develops probable cause to search the vehicle. Officers find 27 pounds of methamphetamine and charge the driver of the Nissan accordingly.

Pre-trial, the defendant files a motion to suppress, arguing the stop was invalid because the officer caused her to turn abruptly. At the suppression hearing, the defendant testifies that she saw the officer coming up quickly behind her vehicle and got startled. Therefore, she quickly turned onto the side street from the four-way stop and all but admits not using her turn signal nor fully stopping.

During the hearing, the defense attorney elicits testimony from the officer that he was in fact speeding and "reached speeds of at least 65 mph, maybe more." Additionally, the officer testifies that he failed to use a turn signal when he turned around to pursue the

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[307] Colloquial phrasing describing when a motorist comes to an intersection, which has some form of traffic control device, and slows but does not stop and then proceeds.

defendant.[308] Last, the defense attorney also questions the officer about his day prior to the traffic stop, because from the dash camera footage one can hear that the officer was upset about somebody he had interacted with earlier in the day.

The prosecution argues that the officer observed two valid violations of the law and *then* decided to pull over the defendant. Additionally, the officer believed that the Nissan was being suspicious both on the night before and on that night, was in a high-crime area, and was potentially speeding. The prosecution concedes none of those things are violations of the law but argues that those are the factors that made the officer behave the way he did leading up to the stop.

The defense simply argues there was no reasonable suspicion because the officer caused the two violations—no turn signal and failure to stop—when he sped to the defendant.

Applying all the other Fourth Amendment case law related to traffic stops, the trial court could additionally utilize the factors outlined above to thoroughly analyze the officer's conduct. First, the court should look at foreseeability. Was the defendant's conduct—not stopping and failing to use a turn signal—foreseeable under the circumstances? Based on the defendant's testimony, she saw the officer's vehicle approaching at a high rate of speed. A reasonable person could assume that a driver who is about to stop at a stop sign but has another car approaching quickly from behind would not want to stay in the path of that same vehicle. Arguably, one could foresee that the defendant would have moved out of the way. The further analysis for foreseeability is whether the defendant's movement would have been made erratically and without consideration of the normal driving behaviors and requirements. One could argue that the defendant's failure to use a turn signal and stop completely were each foreseeable under the circumstances. As such, one could foresee that but-for the officer speeding up behind the defendant, she would not have driven the way she did and committed those traffic violations.

Next, the court could analyze the temporal proximity of the alleged pre-stop behavior of the officer. There is no question as to

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[308] Assume the hypothetical jurisdiction requires use of a turn signal prior to completing a U-turn in addition to determining no other vehicles that would present an immediate hazard.

the relevance of the officer speeding up behind the defendant. Given that this action happened within minutes and up to the point of defendant's violations, the temporal proximity is clear. However, there were the other two issues: (1) the officer being agitated previously, and (2) his own failure to use a turn signal upon executing the U-turn. Without that first line of relevance being proven, the timeframe within which they occurred is of little legal significance in this hypothetical. That said, with more facts another attorney could very well argue differently.

Third, the court should analyze the legality of the officer's conduct. The speed limit along the road was 35 mph. The officer traveled over 60 mph without his lights on to catch up to a vehicle he had yet to see commit a violation. In this hypothetical, he violated the law in various ways, which the court can consider. As discussed above, courts could either analyze this factor as a sort of level of wrongfulness of the officer's conduct or simply a binary that the officer was in violation of a law. In either analysis, the outcome is likely the same. Under the former, the officer's speed was almost double the legal limit in a semi-residential area where severe harm is more likely to occur for speeding. In a more binary fashion, the officer clearly sped. Therefore, the court could count this against the officer in light of everything else considered.

In the end, the court could conclude that the officer's high rate of speed approaching the defendant was a but-for cause of the defendant's two traffic violations. This simple set of facts should give the reader a quick overview of how the factors could play out should courts adopt this type of test. The court could then proceed to a normal Fourth Amendment analysis and determine as other courts have. Because the officer sped and caused the defendant to commit traffic violations, the officer has negated any reasonable suspicion or probable cause and the stop would be considered unreasonable.

CONCLUSION

The test outlined above is necessary to save the confusion of trying to integrate an officer's pre-stop behavior into the analysis of the officer's conduct in stopping the motorist. *Terry* does not address an officer's pre-stop behavior, but the test adopted in this article does. Like courts' analyses of an officer expanding the stop

beyond the initial reason, courts may develop more factors to analyze than discussed herein. Then, presumably, courts in various jurisdictions can use those factors as guidelines in similar scenarios. This test can work both in its current iteration and can grow over time with the further development of case law.

Critics may say this standard is unnecessary, but to avoid further *ad hoc* decision-making by trial courts, the proposed analysis is necessary to give boundaries and structure to the standard. Trial courts deserve to be armed with the tools to make the correct decisions given the various facts and questions they face in each case. *Terry*, alone, cannot provide the necessary analysis for such questions. *Whren* prohibits analysis of an officer's subjective intent in relation to a traffic stop, and *Terry* does not address an officer's actual pre-stop behavior. Addressing the problem that appears to be rising in frequency (or perhaps was always there) is of great importance, especially if the concern is deterrence. Therefore, the test articulated in this article is a repeatable and predictable test to resolve the concerns regarding an officer's pre-stop behavior.