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### Learning Facts from Fiction in Jay-Z's 99 Problems

Karl T. Muth

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# LEARNING FACTS FROM FICTION IN JAY-Z'S 99 PROBLEMS

KARL T. MUTH\*

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## INTRODUCTION

Well my glove compartment is locked, so is the trunk in the back, and I know my rights so you goin' need a warrant for that.

... *sung in faux colloquy* ...

Aren't you sharp as a tack? You some type of lawyer or something? Somebody important or something?

Jay-Z, 99 Problems

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\*Lecturer in Law and Economics, Northwestern University. The opinions and any errors herein belong only to the author and the contents of this Article may not reflect the views of Northwestern University or of the Pritzker School of Law. Special thanks to Judge James A. Shapiro, whose guidance has improved my writing for over a decade. Thanks also to Cristina Desmond, Nancy Jack, Andrew Leventhal, Dayo Olopade, and others for helpful comments on earlier drafts. Thanks to Gary Becker, Frank Easterbrook, Bernard Harcourt, Kevin Murphy, and others who influenced my interest in law and economics and writing from new perspectives. This Article expands upon earlier work by Caleb Mason, Emir Crowne, and others who have discussed *99 Problems* (particularly the second verse); the purpose of this Article is to reach beyond those analyses, to discuss the nearly ten years of subsequent case law, and to integrate empirical work from the law-and-economics scholarship not featured in earlier discussions of this topic. The author can be reached at [karl.muth@law.northwestern.edu](mailto:karl.muth@law.northwestern.edu) or at [@karlmuth](https://twitter.com/karlmuth) on Twitter.

Here you have this guy who's in the car and he has, you know, drugs on him. And he's all the way in the wrong. And he's going on the highway. And here you have this cop who's on the turnpike and he pulls the car over—not because they have drugs in the car, but because the driver is Black, which happened a lot.

Jay-Z in a 2010 interview at the New York Public Library<sup>1</sup>

Twenty years ago, according to hip-hop folklore, Jay-Z played with lyrics that would become the song *99 Problems*—a hit on his 2004 *Black Album* that became one of the defining tracks of the era. Combining a hook taken from Ice-T's single of the same name<sup>2</sup> with an entertaining and apocryphal account of a traffic stop, Jay-Z masterfully mixes tension, humor, and the kind of contemporary societal critique he would expand upon throughout *The Blueprint*.<sup>3</sup>

Many songs discuss or recount encounters with the law—far too many to discuss comprehensively in a single article. But among these, *99 Problems* stands out. In just five minutes, the artist discusses multiple criminal procedural issues of varying complexity, all with impressive precision. And the song's "educational" effect on the population should not be underestimated: *99 Problems* enjoyed a positive reception among a diverse audience of millions of people, including a generation of young Black men—a group more likely than others to encounter the police under adversarial conditions. Recognizing this, the article follows the chronology of the song's events, discussing each of the multiple criminal procedural issues the artist adeptly describes with reference to the relevant case law.

## I. SETTING THE STAGE: OUR APOCRYPHAL PROTAGONIST'S PREDICAMENT

The song's central storyline occurs in 1994 while the protagonist is driving at highway speeds with contraband in the trunk compartment of his vehicle and begins when an officer in a trailing police vehicle initiates a

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<sup>1</sup> Jay-Z *Decodes 99 Problems*, New York Public Library Nov. 15, 2010), <https://www.youtube.com/watch?v=fSP7cY2uzPY> [<https://perma.cc/9PNZ-5RD3>].

<sup>2</sup> *99 Problems* appears on Ice-T's album *Home Invasion* (Priority Records 1993). Aside from this observation, throughout this Article *99 Problems* refers to the Jay-Z track. Jay-Z is the stage name of Shawn C. Carter, who holds copyrights and other rights to the music being discussed under his legal name; the names Jay-Z and Shawn C. Carter are used interchangeably in footnotes to correctly portray the legal rights involved, but Jay-Z is used in the body text of the Article for brevity and due to reader familiarity with this individual's stage name.

<sup>3</sup> *The Blueprint* refers both to an eponymous 2001 studio album and the lineage of albums and tours that followed.

traffic stop.<sup>4</sup> Though the narrator considers fleeing the encounter, he thinks better of it. He pulls his vehicle to the side of the road—in part citing his pecuniary capacity<sup>5</sup> to hire counsel if he is arrested. Had he fled, the song would offer a very different criminal procedure lesson, and there would be no nuance as to the vulnerability of our protagonist's trunk to a police search under *King*, one of the most important cases in recent years that discusses the scope and use of the so-called “hot-pursuit” exception, historically known as the “exigent circumstances” exception.<sup>6</sup>

When the officer commences the traffic stop inquiry in a typical manner<sup>7</sup> by asking whether our narrator-motorist knows of the reason for the *Terry* stop, the motorist alleges racism or racial profiling may be among the motives for the interruption of his otherwise-innocuous highway travels.<sup>8</sup>

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<sup>4</sup> “The year’s [19]94, in my trunk is raw; in my rearview mirror is the motherfuckin’ law.” Shawn C. Carter, *99 Problems*, on *The Black Album* (Roc-A-Fella Records and Def Jam Recordings 2004).

<sup>5</sup> “I got a few dollars, I can fight the case.” *Id.* For a discussion of what happens to defendants who don’t “got a few dollars” to fight a case, see generally Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1178–82 (2018) (discussing evolution of legal aid movement to help defendants without requisite pecuniary resources); see also Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 974–76 (2012); Julian A. Cook, III, *Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process*, 60 B.C. L. REV. 1073, 1091–99 (2019) (discussing *Lee v. United States* and *Class v. United States* in detail and emphasizing importance of assistance of able counsel at trial and in preparation for appeal).

<sup>6</sup> *Kentucky v. King*, 563 U.S. 452, 455 (2011) (Alito, J. writing as part of an eight-justice majority) (“It is well established that ‘exigent circumstances,’ including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant.”).

<sup>7</sup> “‘Son, do you know why I’m stopping you for?’” Carter, *supra* note 4.

<sup>8</sup> “‘Cause I’m young and I’m black and my hat’s real low . . .” *Id.* “A policeman who concentrates a disproportionate amount of his limited time and resources on young black men is going to uncover far more crimes—and therefore be far more successful in his career[.]” John Derbyshire, *The Case For Racial Profiling*, JOHN DERBYSHIRE (February 19, 2001), <https://johnderbyshire.com/Opinions/Culture/racialprofiling.html>; accord Jackson Toby, *Racial Profiling Doesn’t Prove Cops Are Racist*, WALL ST. J. at A22 (Mar. 11, 1999) <https://www.wsj.com/articles/SB921110326632114685> [<https://perma.cc/E2EU-PANL>]. For contextual discussion of racial profiling in traffic stops, see Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 687–89, 721–29 (2002); GARY S. BECKER, ACCOUNTING FOR TASTES 140–41 (Harvard 1996) (economics discusses taste-based discrimination in race, as opposed to statistical discrimination, as preference on basis of race itself rather than result correlated with race statistically); see generally J. Guryan & K.K. Charles, *Taste Based or Statistical Discrimination: The Economics of Discrimination Returns to its Roots*, 123 ECON. J. 417–(2013) (discussing lineage of law-and-economics discrimination research beginning with Becker’s book, The Economics of Discrimination, in 1957).

Indeed, recent empirical research suggests this may be the case: in a large-scale analysis of over 100,000,000 traffic stops, researchers<sup>9</sup> exploited the known time of sunset in various jurisdictions<sup>10</sup> and analyzed the demographics of motorists stopped by police. Unsurprisingly, Pierson et al. found that non-white drivers are stopped more often during hours of the day when their race is more easily detected from a distance.

The song suggests there are drugs detectable by a canine search<sup>11</sup> in the protagonist's trunk. To understand the context for this, the listener must appreciate changes in the regulatory climate and actions of state legislatures since 1994. We now enjoy access to data that did not exist in 1994 (when the song's events occur) or in 2004 (when the song was released) as to the effects of marijuana legalization on police behavior during *Terry* stops. In 2012, with the legalization of recreational marijuana in Colorado and Washington, searches of vehicles driven by motorists of all studied racial groups decreased meaningfully in those states.<sup>12</sup> This suggests that stops, like the one described in the song, will generally reduce as marijuana legalization grows in

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<sup>9</sup> See Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignes Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Schroff, & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, STANFORD COMPUTATIONAL POLICY LAB (Mar. 13, 2019) on file with the author at [karlmuth.com/100M-stops.pdf](http://karlmuth.com/100M-stops.pdf) [<https://perma.cc/4BGG-TM4Y>]. For context and an excellent discussion of earlier research, see generally FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES (Harvard 2003) (providing then state-of-the-art analysis of available data on alignment of behavior and stereotypes in relevant contexts).

<sup>10</sup> It is meaningfully harder to identify the race of a motorist from a distance after dark. See Jeffrey Grogger & Greg Ridgeway, *Testing for Racial Profiling in Traffic Stops From Behind a Veil of Darkness*, 101 J. AM. STAT. ASSOC. 878 (2006) (asserting veil-of-darkness allows observation of daytime racial bias in traffic stops and comparisons to nighttime conditions with reduced bias). *But see* Jesse Kalinowski, Stephen L. Ross, & Matthew B. Ross, *Endogenous Driving Behavior in Tests of Racial Profiling in Police Traffic Stops*, HCEO WORKING PAPERS SERIES (2017), available at [http://humcap.uchicago.edu/RePEc/hka/wpaper/Kalinowski\\_Ross\\_Ross\\_2017\\_driving-veil-darkness\\_v3.pdf](http://humcap.uchicago.edu/RePEc/hka/wpaper/Kalinowski_Ross_Ross_2017_driving-veil-darkness_v3.pdf) [<https://perma.cc/V26T-RQWA>] (questioning whether exploiting veil-of-darkness conditions creates bias in resulting research).

<sup>11</sup> Jay-Z's music often features fictional protagonists carrying firearms or narcotics who are subject to imminent risk of arrest. These characters are sometimes presented in a semi-autobiographical guise, as in *I.Z.Z.O.* where the narrator is holding crack cocaine in his hand within sight of police officers: "Why I got my hand closed? Crack's in my palm, watchin' the long arm o' the law." Shawn C. Carter, *I.Z.Z.O.*, on *The Blueprint* (Roc-A-Fella Records and Def Jam Recordings 2001).

<sup>12</sup> Pierson, Simoiu, Overgoor, Corbett-Davies, Jenson, Shoemaker, Ramachandran, Barghouty, Phillips, Schroff, & Goel, *supra* note 9, at 8.

popularity and footprint<sup>13</sup> in the United States and federal reform looks possible.<sup>14</sup> This research also raises the exciting prospect of reducing discriminatory behavior by police hoping to find and seize marijuana in Black motorists' vehicles.

Despite this positive potential collateral effect of reduced arbitrary searches of Black defendants from marijuana legalization, the current state is grim. In work that generalizes an earlier model<sup>15</sup> and examines data from the Boston Police Department,<sup>16</sup> Kate Antonovics and Brian Knight observe that in a scenario where the decision of an officer to search a motorist's vehicle is independent of race, or statistical rather than preference-based, then the searches *should* occur independent of the officer's race. But instead, Antonovics and Knight find officers are far more likely<sup>17</sup> to search the vehicle of a motorist whose racial identity differs from the officer's racial identity.

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<sup>13</sup> In June of 2019, Illinois legalized recreational marijuana use effective January 1, 2020. See A Bill Regarding Cannabis Legalization I.L.G.A. HB0902 (2019) and 720 ILCS 130, 301, 550, and 600 *et seq.* and as amended (most recently amended in June and November of 2019).

<sup>14</sup> See Paul Larkin Jr., *The Proper Way to Reconsider Federal Marijuana Policy*, The Heritage Foundation (2018). Available at <https://www.heritage.org/the-constitution/report/the-proper-way-reconsider-federal-marijuana-policy> [<https://perma.cc/24DQ-Z6WU>] (last accessed April 22, 2020).

<sup>15</sup> For additional methodological context, see John Knowles, Nicola Persico, & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203, 221–25 (2001).

<sup>16</sup> Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 REV. ECON. & STAT. 163, 169–72 (2009). The introduction of body cameras and other technologies in the decade since the Antonovics & Knight article has not substantially changed police behavior, unfortunately; for a discussion of why recording the police may be helpful evidence but not curative of misbehavior, see generally Karl T. Muth & Nancy Jack, *Watching Watchers: Monitoring Police Performance as Public Servants*, 73 NAT'L L. GUILD REV. 23, 25 (2016) (arguing observing police officers' misconduct is separate and distinct from ensuring officers receive discipline).

<sup>17</sup> Antonovics & Knight, *supra* note 16, at 170–72.



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## II. "DOING 55 IN A 54": *TERRY V. OHIO* AND ITS EXTENDED FAMILY

The justification for the *Terry* stop<sup>18</sup> in *99 Problems* stems from an alleged speed limit violation, though the narrator suggests this is a pretense<sup>19</sup> for further investigation of the vehicle, its occupant, and its contents. Simple curiosity about whether the narrator is a licensed driver or has a registered

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<sup>18</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>19</sup> *Cf. Ohio v. Robinette*, 519 U.S. 33, 35 (1996) (Rehnquist, C.J.) (Fourth Amendment does not require informing suspects they are free to go prior to obtaining permission for vehicle search), notably two years after the year of the portrayed incident; *see also* *United States v. Laymon*, 730 F. Supp 332, 339 (D. Colo. 1990) (traffic stop based on defendant's driving was a pretext for an impermissible stop primarily based on defendant's race and origin). *Contra Whren v. United States*, 517 U.S. 806, 818–19 (1996) (Scalia, J., unanimous decision) (any infraction, however minor, represents a valid reason for initiating *Terry* stop).

vehicle,<sup>20</sup> or suspicion from afar that a young Black man might be armed,<sup>21</sup> or suspicion that the motorist may be traveling an unusually long distance, all constitute insufficient cause to stop a vehicle, let alone search it.<sup>22</sup>

Once the vehicle is stopped, the officer questions the narrator.<sup>23</sup> Embarking on a “fishing expedition,”<sup>24</sup> the officer asks the motorist, “Well, do you mind if I look around the car a little bit?”

The motorist replies that the glovebox and trunk are locked<sup>25</sup> and that he will not consent<sup>26</sup> to a warrantless search of either.<sup>27</sup> A locked compartment does not itself create sufficient reasonable suspicion<sup>28</sup> and it would be unreasonable for an officer to contend the glovebox might hold an

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<sup>20</sup> “License and registration and step out of the car.” Carter, *supra* note 4.

<sup>21</sup> “Are you carrying a weapon on you? I know a lot of you are.” *Id.*

<sup>22</sup> See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (stopping motorists merely to check they are licensed drivers or to examine their vehicle registrations constitutes a Fourth Amendment violation); see also *United States v. Nicholas*, 448 F.2d 622, 625 (8th Cir. 1971) (finding search not reasonable when based upon “a generalized suspicion that any black person driving an auto with out-of-state license plates might be engaged in criminal activity”); cf. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (holding Fourth Amendment does not allow law enforcement officers driving around and stopping vehicles on highways to determine if occupants are of Mexican ancestry or are illegal aliens).

<sup>23</sup> Carter, *supra* note 4.

<sup>24</sup> This phrase is purposefully chosen by the author as an allusion to *Robinette*, 519 U.S. at 41 (Ginsburg, J., concurring).

<sup>25</sup> “Well, my glove compartment is locked, so is the trunk in the back, and I know my rights so you gon’ need a warrant for that.” Carter, *supra* note 4.

<sup>26</sup> Though the narrator does not explicitly say “I do not consent,” his demand for a warrant is a non-consent to a warrantless search. *Id.* As to this proposition of law, see generally *Florida v. Jimeno*, 500 U.S. 248 (1991) (standard in evaluating consent is “what would the typical reasonable person have understood by the exchange between the officer and the suspect”). See also *Illinois v. Rodriguez*, 497 U.S. 183, 189 (1990). A person’s non-consent or failure to cooperate with an officer is not by itself suspicious. *Florida v. Bostick*, 501 U.S. 429, 437 (1991); see also Rachel Karen Laser, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1178–79 (1995) (asserting the value of the right to refuse a search in a *Terry* context is compromised “if the exercise of that right can be used against a person” in later proceedings).

<sup>27</sup> *Rodriguez*, 497 U.S. at 189; Cf. *Carroll v. United States*, 267 U.S. 132, 143–147 (1925) (matter at bar involving bootleg alcohol being smuggled in automobile).

<sup>28</sup> See *New York v. Belton*, 453 U.S. 454, 464–471 (1981) (Stewart, J. for six-Justice majority establishes bright-line rule to replace earlier case-by-case determination; Rehnquist, J. concurring and exploring relationship to *Mapp v. Ohio* explicitly); accord *United States v. Tavalacci*, 895 F.2d 1423, 1425–26 (D.C. Cir. 1990) (as to locked piece of luggage). But see *United States v. Valiant*, 873 F.2d 205, 206 (8th Cir. 1989) (as to locked briefcase); *United States v. Gonzales*, 71 F.3d 819, 820–22 (11th Cir. 1996) (as to glovebox).



easily-accessible pistol or something else posing a danger to the officer.<sup>29</sup> Nor is it reasonable to believe the motorist, or anything in his area or possession, poses an imminent danger to the officer.<sup>30</sup> Yet the threshold is the boundary of the vehicle; once a search of the vehicle becomes reasonable, a search of its contents also becomes reasonable. This is a distinction without a difference,<sup>31</sup> so our protagonist must hold the boundary of the police officer's inquiry to the exterior of his vehicle.

Before analyzing the police officer's behavior, however, one must stop to focus on perhaps the most important lyric in the song from a criminal procedure standpoint, which happens in the first volley of dialogue between the narrator and the officer: "*Am I under arrest?*"

### III. FREE TO LEAVE?

"Am I under arrest?" and its cousin, "Am I free to leave?"<sup>32</sup> are staples of criminal procedure fact patterns in law school classrooms and on bar examinations. They are magic words and force a binary reply from the state; in this case, the officer conducting the *Terry* stop.<sup>33</sup> Posing the question

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<sup>29</sup> See generally *Michigan v. Long*, 463 U.S. 1032, 1035–37 (1983) (O'Connor, J.) (facts in *Long* involved motorist David Long transporting illegal marijuana across Michigan); see also *Arizona v. Gant*, 556 U.S. 332, 335–36 (2009) (defendant standing outside vehicle cannot reasonably access weapons or destroy evidence inside vehicle).

<sup>30</sup> *Gant*, 556 U.S. at 335–36; see also *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

<sup>31</sup> *United States v. Ross*, 456 U.S. 798, 799–803 (1982) (finding search of vehicle's contents indistinguishable from search of vehicle). See also *California v. Acevedo*, 500 U.S. 565, 568–69 (1991) (stating if there is probable cause to conduct a warrantless search of an automobile, then probable cause also exists to search that vehicle's contents).

<sup>32</sup> For a novel experiment in the free-to-leave doctrine, see David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 51–52 (2009) (406 Boston residents asked whether they feel they are free to leave under test conditions designed to simulate Fourth Amendment jurisprudential narratives).

<sup>33</sup> Though primarily discussed in the context of contact between officers and motorists in the modern world, *Terry* did not involve a traffic stop in the modern sense. Rather, it involved a pedestrian armed with two revolvers and ammunition. See *Terry*, 392 U.S. at 2. From *Terry* descend two important lineages of criminal procedure, one having to do with the practice of questioning motorists on the roadside and one having to do with stop-and-frisk investigations of pedestrians by the police, something utilized aggressively in then-Mayor Bloomberg's New York City. In fact, the description of stop-and-frisk codified in New York seems tailored by a legislator freshly acquainted with *Terry*. Compare N.Y. CRIM. PRO. L. § 140.50 (McKinney 2010) with *Terry*, 392 U.S. at 16–30. In *Terry*, Chief Justice Warren describes what would become the skeleton upon which the last nearly-sixty years of police interaction with the citizenry depends. For a description of *Terry* in more depth, inclusive of its substantial modification by the cases discussed herein and its clarification by *Hübel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 179–182 (2004), which is not relevant here (but would

directly to the officer eliminates the *Mendenhall* calculus<sup>34</sup> and transforms a cumulative analysis, on which reasonable people might differ, into a deterministic outcome. Without the question, *Mendenhall* dictates a totality of the circumstances test that determines whether a defendant is in custody or free to leave, something difficult to examine in hindsight, even with the benefit of today's body cameras<sup>35</sup> or similar contemporarily created accounts of the circumstances.

Once the analysis escapes the orbit of the totality-of-the-circumstances calculus in *Mendenhall*, however, the path of inquiry does not end. While that analysis governs whether the subject of the investigation may leave, it does not dictate whether that person is *subject to* arrest. By posing the question, Jay-Z's protagonist engages in a well-timed and savvy gambit: he suspects the officer has not yet developed probable cause to effect an arrest.<sup>36</sup> And the Court has said on more than one occasion, most recently in *Vernonia*, that suspicion alone is not enough for an arrest,<sup>37</sup> even if the officer's training provides a basis for heightened suspicion under these circumstances.<sup>38</sup>

Thus, once the question is posed, there are two possible outcomes:

"You are under arrest."

The defendant motorist is "seized" under the Fourth Amendment.<sup>39</sup> The defendant enjoys, and should be informed of, the rights of an arrestee.

"You are free to leave."

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be if Jay-Z's protagonist resisted producing his license and registration), the Author recommends the reference treatise popular among criminal law practitioners WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 117–22 (Thomson/West 5th ed. 2012).

<sup>34</sup> *United States v. Mendenhall*, 446 U.S. 544, 547 (1980) (introducing totality of circumstances test as to whether person in question was free to leave).

<sup>35</sup> Muth & Jack, *supra* note 16, at 27–29.

<sup>36</sup> "The police may not arrest upon mere suspicion but only on 'probable cause.'" *Mallory v. United States*, 354 U.S. 449, 454 (1957).

<sup>37</sup> Individualized suspicion and probable cause are used interchangeably by the modern Court, but this is meaningfully different from the "general" or colloquial suspicion being discussed here. For the distinction between individual and general suspicion, see *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting) ("[T]he individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself."). For distinctions and relevant nuance of usage, see, for example, *Wyoming v. Houghton*, 526 U.S. 295, 311–13 (1999) (Stevens, J., dissenting).

<sup>38</sup> *See generally* *United States v. Cortez*, 449 U.S. 411, 419 (1981) (officer cannot rely upon his or her training to manufacture or enhance suspicion where none would otherwise adhere to that particular scenario).

<sup>39</sup> The initial *Terry* stop is also a seizure, albeit a seizure of special and limited scope, "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

The defendant motorist is not “seized” under the Fourth Amendment. The defendant motorist can depart immediately.

It seems, at the time the question is posed and with the limited facts available, that the narrator is free to leave. The officer does not reply that he is under arrest or that he cannot depart and continue on his way. Moreover, the officer has not developed reasonable suspicion to introduce a canine search to the scenario. Absent “reasonable suspicion,” police extension of a routine traffic stop to conduct the procedure colloquially known as a “dog sniff” violates the Fourth Amendment.<sup>40</sup> An officer’s suspicion is not reasonable if derived simply from his or her own training<sup>41</sup> or from intuition and vague hunches.<sup>42</sup>

Further, the traffic stop has likely reached its natural conclusion, with the officer having confirmed the motorist-narrator is a licensed driver with valid registration. If a police cruiser was so equipped in 1994, the police officer might have used a computer or radio to check for warrants or review stolen vehicle records. These are valid activities that may occur in a traffic stop without unduly delaying or burdening the motorist.<sup>43</sup> There is no mention made of whether a citation for speeding was issued, but if so, this can be effected promptly. Delaying the narrator’s further travel while a canine unit arrives is unreasonable under current law.

Though nuanced differences exist between the Circuit Courts of Appeal, the Sixth Circuit is representative in doctrine and eloquent in its recent descriptions of law. Like many of its sibling Circuit Courts of Appeal, the United States Court of Appeals for the Sixth Circuit appreciates that perpetually curious officers may prolong traffic stops until all of their suspicions, no matter how unreasonable, are exhausted. This is burdensome and intrusive from the motorist’s perspective and creates an unreasonable roadside seizure of the person and his or her only mode of transport. Delaying the writing of a ticket for a trivial offense does not acceptably or lawfully prolong a roadside *Terry* stop.<sup>44</sup> Nor does an officer’s “feeling” that a motorist is nervous or a “perception” that answers to the officer’s questions were “confusing” or contradictory transform an unacceptable roadside

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<sup>40</sup> *Rodriguez v. United States*, 575 U.S. 348, 353 (2015) (police may not “extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff”); “Well we’ll see how smart you are when the K-9 come.” Carter, *supra* note 4.

<sup>41</sup> See *Cortez*, 449 U.S. at 411–12.

<sup>42</sup> *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

<sup>43</sup> See *Prouse*, 440 U.S. 648, 648–50; see also *United States v. Hunnicutt*, 135 F.3d 1345, 1349 (10th Cir. 1998).

<sup>44</sup> See *United States v. Stepp*, 680 F.3d 651, 661–62 (6th Cir. 2012).

detention into an acceptable one.<sup>45</sup> Being nervous, being of a particular ethnic group, or “traveling light” do not form a basis for detaining an otherwise-unremarkable motorist.<sup>46</sup> But this lineage of case law, the beneficiary of clarity in *Rodriguez*,<sup>47</sup> was importantly and appreciably murkier in 1994 when Jay-Z’s narrator encounters the police officer.

#### IV. RELEVANT CASE LAW SINCE 1994

At the time of the search in *99 Problems*, *Place*<sup>48</sup> represented the law regarding dog sniffs in the United States. It is unclear whether the song was written with *Illinois v. Caballes*<sup>49</sup> in mind, but setting the song in 1995 with the benefit of *Caballes* and without *Rodriguez* would have created a less ambiguous situation (albeit not in the narrator’s favor). Indeed, some lower courts have penned decisions seen as increasingly motorist-friendly in the years since the fictional *Terry* stop in *99 Problems*.<sup>50</sup> Most motorist-friendly among these is *State v. Carty*, and its *accord* cousins in other state courts of appeal, holding that the officer must have an articulable suspicion before asking to search a vehicle; however, no United States Court of Appeals has not held this in any case.

In 1994, officers felt empowered both to stop motorists and to use dogs. The then-recently decided *Sitz* case (1990)<sup>51</sup> seemingly endorsed a broader *Terry* stop framework and an expansion of officers’ roadside authority. The nineties were a time of shifting views and shifting policy priorities, especially regarding drug enforcement. Drug enforcement policies revealed increasingly disparate socioeconomic and racial impacts and resulted in a swelling of the nonviolent offender prison population during the Clinton

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<sup>45</sup> *United States v. Richardson*, 385 F.3d 625, 630–31 (6th Cir. 2004).

<sup>46</sup> *See, e.g., United States v. Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990).

<sup>47</sup> *Rodriguez v. United States*, 575 U.S. 348, 351–53 (2015).

<sup>48</sup> *United States v. Place*, 462 U.S. 696, 698–99 (1983) (O’Connor, J.) (discussing cocaine found by dog at LaGuardia Airport). The Court has remarked it is these “hair-splitting distinctions” that decide cases. *See, e.g., Quarles v. New York*, 467 U.S. 649, 664 (1984) (O’Connor, J., concurring in the judgment in part and dissenting in part).

<sup>49</sup> *Illinois v. Caballes*, 543 U.S. 405, 408–10 (2005) (Stevens, J.) (introduction of canine unit in traffic stop where stop is not unreasonably prolonged does not violate rights of *Terry*-stop-detained motorist).

<sup>50</sup> In *State v. Carty*, 790 A.2d 903, 905 (N.J. 2002), the New Jersey Supreme Court held an officer must have a reasonable, articulable suspicion *before even asking to search a vehicle* in the scenario the song describes. *See also State v. Quino*, 840 P.2d 358 (Haw. 1992). *But see Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>51</sup> *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447–49 (1990) (upholding sobriety checkpoints wherein every motorist is briefly seized for purposes of diagnostic conversations designed to detect inebriation); *see generally United States v. Martinez-Fuerte*, 428 U.S. 543, 548–50 (1976) (upholding similar checkpoint for immigration purposes).

administration.<sup>52</sup> These changes culminated in Justice O'Connor's opinion in *Edmond*,<sup>53</sup> holding that it was unreasonable to detain motorists even for a short period for what was a general investigation of crime. Justice O'Connor's reasoning, durable enough to be used again by the Court in *Caballes*,<sup>54</sup> shifted the focus from the investigation's method to the inconvenience that investigation causes the motorist.

As for dogs, police felt in 1994, in part by virtue of *Place*, that use of dogs constituted a special "non-search search." Instead, they offered a mode of investigative inquiry that was dispositive without being intrusive. Under the doctrine in *Place*, a sniff is not a search. Because of a dog's unique and extraordinary olfactory abilities, the Court reasoned in Justice O'Connor's *Place* opinion, a dog can determine a parcel's contents without opening it. By allowing this non-search search, O'Connor's opinion created a loophole for inquisitive police behavior outside the traditional Fourth Amendment construct and (perhaps) outside *Terry's* traditional ambit.<sup>55</sup>

The narrowing—or more optimistically, the increased precision—of the *Place* matter is important. At trial, *Place* challenged the canine search and moved to suppress the discovered cocaine<sup>56</sup> as the fruit of an impermissible search. The Second Circuit, noticing the challenge of the search had been properly preserved for appeal, reversed.<sup>57</sup> That court found the duration and circumstances of the search to be pertinent and dog's sniff to be necessary, however unobtrusive and impermissible (primarily on the duration or burden of the investigation of *Place's* luggage). The matter was escalated.<sup>58</sup>

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<sup>52</sup> While the 1994 crime bill was meant to "break the cycle of drugs and crime," it actually amplified this cycle's speed, by incarcerating an enormous number of non-white men and then ensuring they would not have legal job prospects once released; worse, police departments rewarded their officers for this wave of detentions, arrests, and "tough on crime" outcomes, again increasing the prevalence of harassment of Black motorists by police officers and, not unrelatedly, accelerating the cycle of Black incarceration in America. Compare U.S. DEPT. OF JUSTICE REPORT ON THE CLINTON ADMINISTRATION'S LAW ENFORCEMENT STRATEGY (1999), [https://www.justice.gov/archive/dag/pubdoc/Drug\\_Final.pdf](https://www.justice.gov/archive/dag/pubdoc/Drug_Final.pdf) [https://perma.cc/4LWT-Y9DK] with H.R. 3355 VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (104th Congress) (1994) codified by Pub. L. 103-322 (1994).

<sup>53</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 35–37 (2000).

<sup>54</sup> *Caballes*, 543 U.S. at 408–10.

<sup>55</sup> See *Rodriguez v. United States*, 575 U.S. 348, 354–58 (2015). Justice Ginsburg discusses this problem throughout *Rodriguez*.

<sup>56</sup> *United States v. Place*, 498 F. Supp. 1217 (E.D.N.Y. 1980) (motion to suppress cocaine denied).

<sup>57</sup> *United States v. Place*, 660 F.2d 44, 46–50 (2d Cir. 1981).

<sup>58</sup> See *United States v. Place*, 457 U.S. 1104 (1982) (cert. granted).

Under *Place*,<sup>59</sup> asking a defendant to endure a 90-minute delay for a dog sniff investigation to occur is unreasonable. However, it is the delay (and seizure of the defendant and his or her effects during the delay) that creates the unreasonableness under O'Connor's opinion, and not the sniffing itself—*accord Caballes* years later. In fact, the sniffing is not even a “search” in the Fourth Amendment context and does not trigger heightened scrutiny of the type afforded to officers rummaging through a defendant's belongings or similar, more invasive investigative activities.<sup>60</sup>

If *99 Problems* contains a legal message, it is that *Place* and its lineage of thought created an exception to the prior Fourth Amendment framework that was ripe for exploitation and abuse. A dog may be special, and may even be unique (*sui generis*), but to place it outside the search-and-seizure framework that benefits from centuries of jurisprudence is several steps too far. The song *99 Problems* uses unexceptional circumstances to illustrate the folly of this exception.

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<sup>59</sup> See generally *United States v. Place*, 462 U.S. 696 (1983) and its lineage.

<sup>60</sup> Justice Brennan, concurring, observed that dogs are not binary indicators and can reveal more than the mere presence or absence of narcotics. *Place*, 462 U.S. at 710 (Brennan, J., concurring in the result). Justice Blackmun, concurring separately and substantively in parallel, noted it was not necessary to decide whether a dog sniff was a search, as the seizure of the luggage was unreasonable. *Id.* at 721 (Blackmun, J., concurring in judgement). In the wake of *Illinois v. Caballes*, however, the scope-of-inquiry analysis is replaced with a reasonableness-of-duration analysis; in other words, the dog may “search” as much as it likes because its “search is not a search” but it may not “search” for as long as it wants. See *Caballes*, 543 U.S. at 405–09, noting also Justice Stevens' citation to *Place* and the *sui generis* doctrine surrounding dog sniffs.



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#### V. ARRAIGNMENT, PRETRIAL HEARING, AND BOND DISPARITIES

The listener is spared the intervening indignities of the canine search and the narrator's arrest. What the listener hears instead is echoes of the process: the arresting officer's imagined bragging to his boss,<sup>61</sup> the narrator's being sent to a holding cell,<sup>62</sup> and the narrator's journey from there to a courtroom.<sup>63</sup>

The narrator alludes to the significant disparities in how Black defendants are treated in pretrial hearings and the fact that judges often enjoy

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<sup>61</sup> "He and his boys gonna be yappin' to the Captain." Carter, *supra* note 4.

<sup>62</sup> "And there I go trapped in the Kit-Kat again, back through the system with the riff-raff again." *Id.*

<sup>63</sup> "Paparazzi with they cameras, snappin' em." *Id.*

wide latitude in determining bond amounts in ways that are not outcome or impact-neutral from a race standpoint.<sup>64</sup> Specifically, because of the substantial average wealth gap between Black and non-Black individuals, a similar money bond amount may cause the pretrial incarceration of the Black individual, while his non-Black counterpart can await trial from the comfort of his home.<sup>65</sup> In recent groundbreaking research, Damon Jones and colleagues at the University of Chicago<sup>66</sup> examine JP Morgan Chase & Co. data combined with voter registration data<sup>67</sup> to show that Black households have a lower wealth (asset) base than other racial groups.

When one combines this lower wealth in Black households with the measurably disparate treatment of Black and other non-white defendants in bond hearings in jurisdictions that still utilize money bond, it's easy to see why the "same bond for the same crime" doctrine may not result in equitable treatment of pretrial defendants. Indeed, defendants have challenged money bail systems on both due process and equal protection grounds with varying degrees of success.<sup>68</sup> Some jurisdictions have, in part due to equity concerns, made the release of an accused person on an unsecured bond the default outcome of their pretrial hearing mechanisms.<sup>69</sup>

The U.S. District Court for the Eastern District of Missouri summarized the excess bail argument this way: "[N]o person may, consistent with the

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<sup>64</sup> *Id.*; see generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH / WHITE WEALTH 39–42, 174–80 (2dd. 2006) (discussing disparate treatment of Black individuals by courts).

<sup>65</sup> See Francine D. Blau & John W. Graham, *Black-White Differences in Wealth and Asset Composition*, 421 Q.J. ECON. 321–39 (1990); see also Edward N. Wolff, *Household Wealth Trends in the United States, 1962–2013: What Happened over the Great Recession?* (Nat'l Bureau of Econ. Research, Working Paper No. 20733, 2014), <https://www.nber.org/papers/w20733.pdf> [<https://perma.cc/8BUU-ML7B>].

<sup>66</sup> Working with collaborators and datasets provided by JP Morgan Chase & Co., see Peter Ganong, Damon Jones, Pascal Noel, Diana Farrell, Fiona Greig, and Chris Wheat, *Wealth, Race, and Consumption Smoothing of Typical Income Shocks* (Draft Working Paper current version: April 21, 2020), [https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/b/1275/files/2020/04/2020-04-20\\_race\\_cons\\_smoothing.pdf](https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/b/1275/files/2020/04/2020-04-20_race_cons_smoothing.pdf) [<https://perma.cc/SF8Z-4AFY>]. See also cf. Peter Ganong & Pascal Noel, *Consumer Spending During Unemployment* (Nat'l Bureau of Econ. Research, Working Paper No. 25417, 2019), <https://www.nber.org/papers/w25417> [<https://perma.cc/JKP5-Y8BX>].

<sup>67</sup> Voter registration data in the jurisdictions involved reveal the race of the voter-registrant.

<sup>68</sup> See generally Timothy C. Evans, "General Order No. 18.8A – Procedures for Bail Hearings and Pretrial Release" (July 17, 2017).

<sup>69</sup> *Accord* Jones v. City of Clanton *etiam sciri* Varden v. City of Clanton, No. 2:15-cv-34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (plaintiff arrested and jailed on misdemeanor charges but could not produce the municipality's required \$500 bond per charge).



Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond.”<sup>70</sup> The matter in question involved a 26-year-old female motorist cited for having a nonfunctioning headlight who argued she could not provide for her two young children if she posted bond; such trade-offs indicate our society’s endemic wealth disparities, which exacerbate the poor treatment of Black defendants in our system even in the earliest stages of a case’s trajectory.<sup>71</sup>

But Jay-Z’s “half a mil’ for bail ‘cause I’m African”<sup>72</sup> fails to comprehensively describe the disadvantages young Black men like the song’s narrator face in the American criminal justice system. This disparity in treatment of defendants continues throughout the process of a criminal matter, a fact that is both well-studied and well-documented.<sup>73</sup> Statistically, Black defendants are not only more likely to be searched<sup>74</sup> and held on bond (and comparatively high bond,<sup>75</sup> particularly relative to their household wealth or access to liquid capital), but Black defendants are also more likely to face serious charges,<sup>76</sup> more likely to be convicted,<sup>77</sup> and more likely to be incarcerated<sup>78</sup> as a result of that conviction.

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<sup>70</sup> *Pierce v. City of Velda City*, No. 4:15-cv-00570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (appended materials, Settlement Agreement at \*1); *see also* MISSOURI SUPREME COURT RULE 37.15(a) and MISSOURI LOCAL RULE E44-457 codified as RULES § 544.457 (applies specifically to municipal courts and their proceedings) (2017, 2019, and as amended).

<sup>71</sup> *Pierce*, 2015 WL 10013006 at \*1; *see also* *Strauder v. West Virginia*, 100 U.S. 303, 307–08 (1880) (considering participation in justice system by Black people in context of jury service and more broadly).

<sup>72</sup> Carter, *supra* note 4.

<sup>73</sup> Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don’t Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIR. IN PSYCH. SCI. 183, 183–87 (2018).

<sup>74</sup> *See generally* Sharad Goel, Justin M. Rao, and Ravi Schroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 ANNALS OF APPLIED STAT. 365, 365–94 (2016) (discussing differences in *Terry* stop-and-frisk behavior in New York City); *see also* Shanti P. Chakravarty, *Economic Analysis of Police Stops and Searches: A Critique*, 18 EUR. J. POLIT. ECON. 597, 597–600 (2002).

<sup>75</sup> *See* David Arnold, Will Dobbie, and Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1885–1932 (2018).

<sup>76</sup> M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320–54 (2014).

<sup>77</sup> Shamena Anwar, Patrick Bayer, & Randi Hjalmarrsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1017–55 (2012).

<sup>78</sup> David S. Abrams, Marianne Bertrand, & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEG. STUD. 347, 347–83 (2012).

## CONCLUSION

The lyrics of *99 Problems* do not include lurid shootouts,<sup>79</sup> car accidents,<sup>80</sup> or reckless behavior.<sup>81</sup> Instead, they feature something familiar, and too often deadly, for a young Black motorist: a *Terry* stop encounter with the police.<sup>82</sup> Recent research illustrates that such an encounter can be risky business<sup>83</sup>—one false move on either the motorist's or officer's part can be deadly,<sup>84</sup> even if you're rolling like Chamillionaire and your whip's squeaky clean.<sup>85</sup> The Author's hope is that songs like *99 Problems* not only serve to start conversations about the difficult topic of police interactions, but also to educate listeners about criminal procedure and the reality that, as in the case of Jay-Z's protagonist, even if a traffic stop does not turn deadly, risk of confrontation or worse is inexorably part of any contact between a young Black man and the police.

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<sup>79</sup> "I grabbed my nine, all I heard were shells. . . . Jumped in my car, slammed on the gas. . . . Police on the scene. You know what I mean" ROBERT MATTHEW VAN WINKLE, *Ice Ice Baby*, on HOOKED (SBK Records 1990).

<sup>80</sup> "I swerved left then I swerved right, she was still tailgating me too damn tight. To the left lane I tried to switch then you saw my blinker, bitch." WILLARD CARROLL SMITH JR. & JEFFREY ALLEN TOWNES, *You Saw My Blinker*, on HOMEBASE (Jive RCA 1991).

<sup>81</sup> THE BEASTIE BOYS, *High Plains Drifter*, on PAUL'S BOUTIQUE (Capitol 1989).

<sup>82</sup> See JAMES TODD SMITH, *Illegal Search*, on MAMA SAID KNOCK YOU OUT (Def Jam 1990); see also THE PHARCYDE, *Officer*, on BIZARRE RIDE II (Delicious Vinyl 1992).

<sup>83</sup> Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2018), <https://www.nber.org/papers/w22399.pdf> [<https://perma.cc/RB3D-9ZZQ>].

<sup>84</sup> See Roland G. Fryer, *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210 (2019).

<sup>85</sup> Chamillionaire's song, *Ridin'*, discusses the virtues of driving around Houston without contraband. HAKEEM SERIKI, *Ridin'*, on THE SOUND OF REVENGE (Universal 2005).