

Anonymous Tips Reporting Drunk Driving : Rejecting a Fourth Amendment Exception for Investigatory Traffic Stops

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ABSTRACT

Drunk driving is a serious problem facing motorists and law enforcement, and one of the most commonly committed crimes in the United States. The public is well aware of and alarmed at the dangers. Although a serious social problem, the legal history surrounding drunk driving is marked by persistent efforts to ease the path of law enforcement, leading to ignored or slighted jurisprudential and constitutional values in drunk driving cases. As a result, courts often get swept up in the social magnitude of the drunk driving problem and lose sight of an individual's Fourth Amendment privacy rights.

Currently, a sharp disagreement has emerged among federal and state courts regarding traffic stops based on an anonymous tip reporting drunk driving. A majority of courts do not require independent police corroboration of erratic or suspicious driving, finding the corroboration of the innocent details of the anonymous tip sufficient. A number of other courts hold that use of anonymous tips requires independent police corroboration of erratic or illegal driving. These competing approaches have two deficiencies. The majority overemphasize the dangers of drunk driving at the expense of individual liberties; whereas, the minority unduly restrains police officers by requiring independent observations of illegal driving.

This Note will argue for a balance of the two approaches. Anonymous tips reporting drunk driving should be corroborated by police observation,

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but these observations can be based on the telltale signs of suspicious or erratic driving, not solely illegal driving activity. Requiring observations of suspicious or erratic—not illegal—driving may be a small distinction, but it is an important distinction. This distinction safeguards an individual's Fourth Amendment rights and still enables law enforcement to prevent drunk driving.

INTRODUCTION

Drunk driving is a serious problem facing motorists and law enforcement,¹ and it is one of the most commonly committed crimes in the United States.² The National Highway Traffic Safety Administration (“NHTSA”) estimates that in 2008 there were 11,773 fatalities as a result of alcohol-impaired crashes.³ However, quantifying the impact of drunk driving can be difficult because it is a condition and not an event, in which the distinction between a drinker and a drunk “hinges on a difference of a hairline.”⁴

Although drunk driving is a serious social problem, the legal history surrounding it is “marked by persistent efforts to ease the path of enforcement,” leading to “ignored or slighted” jurisprudential and constitutional values in drunk driving cases.⁵ Many legal issues make up the complex web of drunk driving cases, ranging from law enforcement's ability to conduct a sobriety checkpoint or automobile stop to the use of sobriety tests and technology.⁶ Because of the legal complexities and high social costs associated with drunk driving, courts often get swept up in the social magnitude of the problem and lose sight of their role in protecting an individual's fundamental rights.⁷

¹ See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 459 (1990) (Brennan, J., dissenting) (“I do not dispute the immense social cost caused by drunken drivers, nor do I slight the government's efforts to prevent such tragic losses.”).

² LAWRENCE TAYLOR, *DRUNK DRIVING DEFENSE* § 1.0, at 3 (5th ed. 2000).

³ NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *FATALITIES AND FATALITY RATES IN ALCOHOL-IMPAIRED-DRIVING CRASHES BY STATE, 2007-2008*, at 2 tbl.1 (2009) [hereinafter NHTSA, *TRAFFIC SAFETY FACTS*], available at <http://www-nrd.nhtsa.dot.gov/Pubs/811250.PDF>.

⁴ See TAYLOR, *supra* note 2, § 1.0, at 8. “[U]nlike [other] condition offenses such as being under the influence of narcotics, which offense involves the simple . . . presence or nonpresence of [narcotics] . . . , the offense of drunk driving occurs only when the individual crosses over that vague and arbitrary line separating the drinker from the drunk.” *Id.*

⁵ JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* 90 (1989).

⁶ See TAYLOR, *supra* note 2, § 1.0, at 4 (discussing the complex legal issues surrounding drunk driving cases).

⁷ See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (“No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating

Fourth Amendment jurisprudence is full of attempts by the Supreme Court to strike the proper balance between protecting government interests and individual privacy.⁸ However, the gravity of danger and law enforcement's need to prevent criminal activity often overshadow individual privacy rights.⁹ In drunk driving cases, the initial traffic stop triggers a multitude of other permissive police investigatory functions, which further invade individual privacy.¹⁰ Therefore, the factors and sources providing a constitutional basis to conduct a traffic stop become of paramount importance.¹¹

Currently, a sharp disagreement has emerged among federal and state courts regarding the constitutionality of traffic stops based on an anonymous tip reporting a drunk driver, and two distinct approaches have developed.¹² A majority of jurisdictions permit investigative traffic stops of alleged drunk drivers based solely on an anonymous tip reporting drunk driving.¹³ Other jurisdictions, however, require the police corroborate the anonymous tip with observations of erratic or illegal driving.¹⁴ Recently,

it."); *id.* at 460 (Brennan, J., dissenting) ("In the face of the 'momentary evil' of drunken driving, the Court today abdicates its role as the protector of that [individual privacy] right.").

⁸ See *Terry v. Ohio*, 392 U.S. 1, 10-16 (1968) (reflecting the tensions involved in the "practical and constitutional arguments" of the public debate over the power of police "stop-and-frisk" procedures).

⁹ See *id.* at 10-12 (describing tension between practical and constitutional arguments regarding law enforcement's interest in crime prevention and an individual's privacy interest).

¹⁰ See JACOBS, *supra* note 5, at 90.

After [drivers] are stopped, under the auspices of implied-consent laws, drivers must cooperate with the breath-testing procedures or face mandatory license forfeiture. Once the charge of drunk driving is filed, conviction is practically inevitable. The whole process has become increasingly automatic, a prime example of the mass processing of criminal cases that is characteristic of our criminal justice system.

Id.

¹¹ See *id.*

¹² See *infra* Part II (discussing the current split of authority among federal and state courts regarding anonymous tips reporting drunk driving).

¹³ See, e.g., *United States v. Wheat*, 278 F.3d 722, 737 (8th Cir. 2001); *People v. Wells*, 136 P.3d 810, 812 (Cal. 2006), *cert. denied*, 550 U.S. 937 (2007); *Bloomington v. State*, 842 A.2d 1212, 1219 (Del. 2004); *State v. Prendergast*, 83 P.3d 714, 723 (Haw. 2004); *State v. Walshire*, 634 N.W.2d 625, 627 (Iowa 2001); *State v. Hanning*, 296 S.W.3d 44, 54 (Tenn. 2009); *State v. Boyea*, 765 A.2d 862, 868 (Vt. 2000).

¹⁴ See, e.g., *Commonwealth v. Lubiejewski*, 729 N.E.2d 288, 292 (Mass. App. Ct. 2000); *Harris v. Commonwealth*, 668 S.E.2d 141, 146 (Va. 2008), *cert. denied*, 130 S. Ct. 10 (2009); *McChesney v. State*, 988 P.2d 1071, 1078 (Wyo. 1999). Erratic or drunk driving refers to illegal activity that would result in a traffic violation. See JOHN B. KWASNOSKI ET AL., OFFICER'S DUI

the Supreme Court denied certiorari of *Harris v. Commonwealth*, a case that addressed the use of anonymous tips reporting drunk driving.¹⁵ In *Harris*, the Virginia Supreme Court held a police officer lacked reasonable suspicion to conduct a traffic stop based on an anonymous tip, which was corroborated by an officer's observation of unusual, but not illegal, driving.¹⁶ The officer, after identifying the vehicle matching the report's description, observed the driver breaking unusually before a stop sign and prematurely before a traffic light.¹⁷ The court found the driving "unusual," but nevertheless insufficient to corroborate an anonymous tip.¹⁸ This holding prompted Chief Justice Roberts, in his dissent from denial of certiorari, to conclude the Virginia Supreme Court's rule granted drunk drivers "one free swerve."¹⁹ Chief Justice Roberts suggested, "at least in the special context of anonymous tips reporting drunk driving," that perhaps independent corroboration of an anonymous tip was not required under Fourth Amendment jurisprudence.²⁰

This Note will argue that anonymous tips reporting drunk driving should be corroborated by police observation, but that observations can be based on the telltale signs of suspicious or erratic driving, not solely illegal driving activity.²¹ The Note will focus on the "drunk driving exception" developed by jurisdictions that allow investigatory stops based solely on an anonymous tip, and argue that these jurisdictions should not permit concerns about drunk driving to trample Fourth Amendment protections.²²

Part I will address Fourth Amendment jurisprudence and the development of reasonable suspicion. Part II will discuss the current split among state and federal courts regarding anonymous tips reporting drunk driving. Part III will analyze the weaknesses of establishing a drunk driving exception to reasonable suspicion jurisprudence. In addition, Part III will address the level of corroboration necessary to conduct a traffic stop of a suspected drunk driver, concluding that the police should be allowed to use the telltale signs of suspicious or erratic driving to corroborate the anonymous tip.

HANDBOOK § 4-1a, at 128 (2003). Suspicious driving refers to unusual circumstances that may or may not prompt suspicions of criminal activity. *See id.*

¹⁵ *See* *Virginia v. Harris*, 130 S. Ct. 10 (2009).

¹⁶ *Harris*, 668 S.E.2d at 147.

¹⁷ *Id.* at 144.

¹⁸ *Id.* at 147.

¹⁹ *Harris*, 130 S. Ct. at 12 (Roberts, C.J., dissenting from denial of cert.).

²⁰ *Id.* at 10.

²¹ *See infra* Part III.

²² *See infra* Part III.

I. The Fourth Amendment: A Balancing Approach

The underlying purpose of the Fourth Amendment is to protect an individual's privacy interests from unreasonable government intrusion.²³ In drafting the Fourth Amendment, the Framers had two concerns: (1) to protect individual privacy, and (2) curtail unrestrained government activity.²⁴ The Fourth Amendment ensures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁵

In determining the scope of a traditional Fourth Amendment analysis,²⁶ courts must address a number of components.²⁷ First, the Fourth Amendment proscribes unreasonable government actions, not an individual's private actions.²⁸ Second, courts must address whether the government action constitutes a search²⁹ or a seizure.³⁰ Third, the courts

²³ See 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.1 (4th ed. 2004) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“[The Framers of the Constitution] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”)); see also NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 79-82 (1970).

²⁴ See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 820 (1994) (“By regulating ‘searches and seizures’ of ‘persons, houses, papers, and effects,’ the Fourth Amendment limits the effectiveness of the enforcement of civil and criminal laws. . . . [T]he Fourth Amendment structures the investigative process by restricting many of the most effective means of detecting law-breaking and apprehending law-breakers” (quoting U.S. CONST. amend. IV)).

²⁵ U.S. CONST. amend. IV.

²⁶ 1 JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION* § 17.01, at 277 (4th ed. 2006). “The Fourth Amendment was once considered a monolith . . . [with] ‘probable cause’ ha[ving] a single meaning,” but this changed with the introduction of a reasonable suspicion standard. *Id.*

²⁷ See *id.* § 4.04, at 59.

²⁸ See *id.*

²⁹ See 1 LAFAVE, *supra* note 23, § 2.1(a) (“The Supreme Court, quite understandably, has never managed to set out a comprehensive definition of the word ‘searches’ as it is used in the Fourth Amendment.”). In *Katz v. United States*, the Supreme Court’s seminal opinion on a search, the Court defined a search by the privacy interest sought to be protected; finding the applicability of reasonableness turns on the subjective (individual) and objective (societal) view of the privacy interest. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

³⁰ See 1 LAFAVE, *supra* note 23, § 2.1; Anthony G. Amsterdam, *Perspectives on the Fourth*

address the reasonableness of the search or seizure; reasonableness under the Fourth Amendment imposes a *per se* warrant requirement based on probable cause.³¹ Probable cause is a “fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily . . . reduced to a neat set of legal rules.”³² The Supreme Court has determined probable cause is based on the totality-of-the-circumstances test.³³

Although the warrant requirement is a cardinal principle in Fourth Amendment analysis,³⁴ the Supreme Court recognizes a number of exceptions to the warrant requirement, including an exception, recognized in *Terry v. Ohio*, for brief investigatory stops.³⁵ In *Terry*, the Supreme Court held that a law enforcement officer could conduct a brief investigatory “stop and frisk” based on the officer’s reasonable suspicion that criminal

Amendment, 58 MINN. L. REV. 349, 356 (1974) (“The words ‘searches and seizures’ . . . are terms of limitation. Law enforcement practices are not required by the [F]ourth [A]mendment to be reasonable unless they are either ‘searches’ or ‘seizures.’”). A seizure is generally defined as “the act of physically taking and removing” in the context of seizure of property, or the government’s restraint on an individual’s freedom either by physical force or show of authority in the context of seizure of a person. See 1 LAFAVE, *supra* note 23, § 2.1(a).

³¹ Although the “reasonableness” and “warrant” clauses of the Fourth Amendment could be read separately, the Supreme Court chose to read the two clauses together, holding that the reasonableness of an action often turns on the presence of a warrant. See *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (concluding that the standard of probable cause includes “only the probability, and not a *prima facie* showing, of criminal activity”); WELSH S. WHITE & JAMES J. TOMKOVICZ, *CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF* 49 (6th ed. 2008); Amsterdam, *supra* note 30, at 358 (noting that, under the theory that reasonableness turns on the presence of a warrant, the Supreme Court has repeatedly condemned searches and seizures without a warrant).

³² *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

³³ *Id.* at 230-31 (“This totality of circumstances approach is far more consistent with our prior treatment of probable cause . . . Perhaps the central teaching of our decisions bearing on probable cause standard is that it is a ‘practical, nontechnical conception.’” (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949))).

³⁴ JEROLD H. ISRAEL ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT* 127 (2009). A valid search or arrest warrant must be based on a showing of probable cause. *Id.* Similarly, there are instances where an arrest or search takes place without a warrant, but such an arrest or search is unreasonable without probable cause. See *id.*

³⁵ These exceptions include: “searches incident to arrest, exigent circumstances searches, automobile doctrine searches, inventory searches, consent searches, and plain view seizures.” See WHITE & TOMKOVICZ, *supra* note 31, at 143; see also Amsterdam, *supra* note 30, at 358 (determining that exceptions to the warrant requirement fall into three categories: consent searches, routine searches, and exigency searches); *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (holding law enforcement officers do not violate the Fourth Amendment when they stop and frisk an individual based upon the officers’ reasonable suspicion that the individual has committed, or is about to commit, a crime).

activity was afoot.³⁶ These *Terry* stops allow the police to temporarily detain a person based on reasonable suspicion that the individual is either in the process of committing or about to commit a crime.³⁷ Although these brief police-citizen interactions are searches and seizures under the Fourth Amendment, the Supreme Court found this activity outside the scope of the warrant requirement³⁸ and developed a less demanding standard of proof called “reasonable suspicion.”³⁹

A. *Reasonable Suspicion*

Reasonable suspicion applies to specific instances where the Supreme Court determines government actions fall outside the warrant requirement.⁴⁰ The reasonableness of these brief searches and seizures is evaluated by balancing the government’s interest in preventing crime and an individual’s privacy interest.⁴¹ Similar to probable cause, reasonable suspicion is also a fluid concept.⁴² There must be an adequate quantity and quality of information sufficient to create reasonable suspicion that a crime has occurred, is occurring, or is about to occur.⁴³ Reasonable suspicion can arise from a variety of sources, including a police officer’s direct observations, training, experience, and information from a reliable

³⁶ See *Terry*, 392 U.S. at 22; 4 LAFAVE, *supra* note 23, § 9.1(a) (explaining that a stop and frisk is a police procedure used to stop suspicious persons for questioning and occasionally search for dangerous weapons).

³⁷ See 4 LAFAVE, *supra* note 23, § 9.3(a).

³⁸ See *Terry*, 392 U.S. at 19, 37.

³⁹ Jon A. York, *Search and Seizure: Law Enforcement Officers’ Ability to Conduct Investigative Traffic Stops Based Upon an Anonymous Tip Alleging Dangerous Driving When the Officers Do Not Personally Observe Any Traffic Violations*, 34 U. MEM. L. REV. 173, 178 (2003). Reasonable suspicion and probable cause are “common sense, nontechnical conceptions that deal with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

⁴⁰ See *Terry*, 392 U.S. at 20 (stating that an officer’s ability to conduct brief “stop and frisk” procedures falls outside the warrant requirement, and is evaluated based on the reasonableness of the search or seizure).

⁴¹ See *id.* (noting that the focus of the analysis is on the governmental interest intruding upon a protected private interest, and looking to balance “the need to search [or seize] against the invasion which the search [or seizure] entails” (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967))); *Camara*, 387 U.S. at 536-37 (finding that some Fourth Amendment activity should be judged under a balancing test); ISRAEL ET AL., *supra* note 34, at 233.

⁴² See *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

⁴³ See *United States v. Hensley*, 469 U.S. 221, 228 (1985) (finding that a police officer may conduct an investigatory stop even after the crime has already been committed); *Terry*, 392 U.S. at 22 (noting that an officer may conduct a brief stop for the “purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest”).

informant.⁴⁴

B. *Sources of Reasonable Suspicion: Hearsay from Informants*

Reasonable suspicion to conduct an investigatory stop can arise from a variety of information sources, including “hearsay from informants.”⁴⁵ “Hearsay from informants” refers to information obtained first-hand by a known⁴⁶ or unknown⁴⁷ informant, which is relayed to a police officer.⁴⁸ Courts value this type of source, but also recognize veracity issues that accompany its use.⁴⁹ “Hearsay from informants” is evaluated under the totality-of-the-circumstances test, either in the context of probable cause or reasonable suspicion.⁵⁰ The totality-of-the-circumstances test focuses on all the circumstances surrounding the tip including the basis of the informant’s knowledge and veracity.⁵¹

1. *Known Informant’s Tip*

Reasonable suspicion can arise from a known informant’s tip.⁵² A known informant is a person who has a history of relaying credible information to the police.⁵³ For example, in *Adams v. Williams*, the Supreme Court addressed the use of information gained from an informant who

⁴⁴ 4 LAFAVE, *supra* note 23, § 9.3(a).

⁴⁵ See 1 DRESSLER & MICHAELS, *supra* note 26, § 17.03, at 286-87; WHITE & TOMKOVICZ, *supra* note 31, at 50. In this context, hearsay means information not acquired first hand by the police officer, and includes both known and unknown informants. *Id.*

⁴⁶ A known informant is typically a person who is “part of the scenery” of the criminal world and who would be in a particularly good position to give information on criminal activity to give police an “accurate picture of crime.” 2 LAFAVE, *supra* note 23, § 3.3 (quoting MALACHI L. HARNEY & JOHN C. CROSS, *THE INFORMER IN LAW ENFORCEMENT* 40 (2d ed. 1968)).

⁴⁷ See *id.* The courts have made distinctions between a known informant and the average citizen who “finds himself in the position of a victim of or a witness to criminal conduct and thereafter relates to the police what he knows as a matter of civic duty.” *Id.* Courts often consider these citizen-informers more deserving of the presumption of reliability than informants because they are less likely than known informants to be involved in the criminal activity. *Id.*

⁴⁸ See WHITE & TOMKOVICZ, *supra* note 31, at 50.

⁴⁹ See *Illinois v. Gates*, 462 U.S. 213, 229-31 (1983).

⁵⁰ See *Alabama v. White*, 496 U.S. 325, 328-29 (1990); 1 DRESSLER & MICHAELS, *supra* note 26, § 17.03, at 287.

⁵¹ See *Gates*, 462 U.S. at 229-31. The totality-of-the-circumstances test incorporates the *Aguilar-Spinelli* test of (1) basis of knowledge and (2) veracity, but it does not adhere solely to those two factors. See *Spinelli v. United States*, 393 U.S. 410, 417-19 (1969); *Aguilar v. Texas*, 378 U.S. 108, 113-14 (1964).

⁵² *Adams v. Williams*, 407 U.S. 143, 147 (1972).

⁵³ See 2 LAFAVE, *supra* note 23, § 3.3(b).

relayed the information to the police officer in person.⁵⁴ In *Adams*, an informant approached a police officer patrolling a high crime area and warned that an individual in a nearby car was carrying narcotics and a gun.⁵⁵ Following this tip, the officer approached the vehicle, reached into the car, and removed a gun from the individual's waistband.⁵⁶

Focusing on the officer's prior contact with the informant and presence at the time of the tip, the Supreme Court found reasonable suspicion to conduct a search.⁵⁷ The Court found that these factors gave rise to sufficient "indicia of reliability" to justify a *Terry* seizure.⁵⁸ Specifically, the Court noted, "in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response."⁵⁹ However, the Court recognized that some tips "would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized."⁶⁰

2. *Anonymous Tips*

Anonymous tips may provide police with reasonable suspicion to conduct an investigatory stop, but only if the tip is independently corroborated, it contains predictive information, or, in rare exceptions, the danger is so grave the police must act immediately.⁶¹ Anonymous tips lack the reliability of known informants' tips; an officer cannot easily confirm the tip's veracity or the tipster's basis of knowledge.⁶² In *Alabama v. White*, the Supreme Court held that an anonymous tip, corroborated by independent police investigation, had "sufficient indicia of reliability" to provide reasonable suspicion to make an investigatory stop.⁶³ In *White*, the

⁵⁴ *Adams*, 407 U.S. at 144-45.

⁵⁵ *Id.*

⁵⁶ *Id.* at 145.

⁵⁷ *Id.* at 146.

⁵⁸ *Id.* at 147. Indicia of reliability refers to the factors that help determine an informant's credibility, such as his basis of knowledge and veracity. See 1 DRESSLER & MICHAELS, *supra* note 26, § 8.05, at 136.

⁵⁹ *Adams*, 407 U.S. at 147.

⁶⁰ *Id.*

⁶¹ See *Florida v. J.L.*, 529 U.S. 266, 273 (2000); *Alabama v. White*, 496 U.S. 325, 330-31 (1990) ("Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the 'totality of the circumstances—the whole picture.'" (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981))).

⁶² See 2 LAFAYE, *supra* note 23, § 3.3(a), at 112-13.

⁶³ 496 U.S. at 332 ("Although it is a close case, we conclude that under the totality of the

police received an anonymous call that an individual in possession of cocaine would be leaving an apartment at a specific time and traveling to a specific motel in a brown Plymouth station wagon with a broken right taillight.⁶⁴ The officers went to the apartment building, observed an automobile fitting the description leaving the parking lot, stopped the car on the highway, and found a case containing marijuana inside the car.⁶⁵ The Court found reasonable suspicion based on the officer's independent corroboration of the vehicle, although incomplete and imperfect, and the predictive nature of the tip.⁶⁶ However, the Court explicitly found that the anonymous tip, by itself, was insufficient to justify the investigatory stop of the station wagon.⁶⁷ Analogizing to *Illinois v. Gates*, the Court noted that an anonymous tip lacked reliability since it "provide[d] virtually nothing from which one might conclude that [the caller] is either honest or his information reliable . . . [and] gives absolutely no indication of the basis for [his] predictions regarding . . . criminal activities."⁶⁸ Therefore, even though the anonymous tip was unreliable, the corroborative police observation was enough to justify the investigatory stop.⁶⁹

Ten years later in *Florida v. J.L.*, the Supreme Court again addressed the issue of anonymous tips and reasonable suspicion, holding unanimously that an anonymous tip alone did not provide reasonable suspicion to frisk for weapons.⁷⁰ In *J.L.*, the police received an anonymous telephone call reporting that a young black male wearing a plaid shirt and standing at a particular bus stop was carrying a gun.⁷¹ In response, two officers went to the bus stop and observed three young black males, one of whom wore a plaid shirt.⁷² Although the police officers did not observe any illegal conduct, the officers nevertheless frisked the three men and seized a gun.⁷³

Arguing in favor of the stop and frisk, the government presented two arguments: (1) the police could act on a tip that provided an accurate description of a particular person in a particular place, and (2) the *Terry*

circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car.").

⁶⁴ See *id.* at 327.

⁶⁵ *Id.*

⁶⁶ *Id.* at 331 ("It is true that not every detail mentioned by the tipster was verified . . ."). The Court also noted that, even though the officers stopped her before she reached the hotel, the fact that the route was the most direct route possible corroborated the destination. *Id.*

⁶⁷ See *id.* at 332.

⁶⁸ *Id.* at 329 (quoting *Illinois v. Gates*, 462 U.S. 213, 227 (1983)).

⁶⁹ *White*, 496 U.S. at 332.

⁷⁰ See 529 U.S. 266, 274 (2000).

⁷¹ *Id.* at 268.

⁷² *Id.*

⁷³ *Id.*

standard should be modified to allow a firearm exception.⁷⁴ The Court rejected both arguments.⁷⁵ First, the Court noted that an accurate description of a person's readily observable location and appearance is reliable, but only in the limited sense that it will help the police identify the individual.⁷⁶ "Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. . . . [R]easonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."⁷⁷ Second, the Court found that the tip lacked the essential element of predictive information, recognized in *White*, and therefore it did not give rise to the level of reasonable suspicion.⁷⁸ Third, the Court also explicitly rejected fashioning a firearm exception, holding that such an exception would "rove too far," and noting the difficulty in limiting such an exception solely to firearms.⁷⁹

However, in dicta the Court acknowledged that there might be certain circumstances where "the danger alleged in the anonymous tip might be so great as to justify a search . . . without a showing of reliability."⁸⁰ For example, when there is an anonymous tip reporting a person carrying a bomb the Court stated this need not "bear the indicia of reliability" required of a report of a person carrying a firearm.⁸¹ The Court also noted that anonymous tips may provide reasonable suspicion in "quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, and schools."⁸²

The potential exceptions noted in the dicta of *J.L.* have become the focus of courts that hold anonymous tips reporting drunk driving satisfy reasonable suspicion.⁸³ Essentially, courts distinguish the dangers posed by drunk driving from possession of a firearm, placing anonymous tips reporting drunk driving outside of *J.L.*, and this provides the indicia of

⁷⁴ *Id.* at 271-72.

⁷⁵ *Id.* at 272-73.

⁷⁶ *J.L.*, 529 U.S. at 272.

⁷⁷ *Id.*

⁷⁸ *Id.* at 271-72.

⁷⁹ *Id.* at 272-73.

⁸⁰ *Id.* at 273; see also Melanie D. Wilson, *Since When is Dicta Enough to Trump Fourth Amendment Rights? The Aftermath of Florida v. J.L.*, 31 OHIO N.U. L. REV. 211, 216-17 (2005).

⁸¹ *J.L.*, 529 U.S. at 273-74.

⁸² *Id.* at 274 (internal citations omitted).

⁸³ See *id.* at 273-74; Denise N. Trauth, Note, *Requiring Independent Corroboration of Anonymous Tips Reporting Drunk Drivers: How Several State Courts are Endangering the Safety of Motorists*, 76 U. CIN. L. REV. 323, 340 (2007) (noting that *J.L.* addressed a specific set of facts and state supreme courts may "empower police officers to conduct investigatory stops of drunk or erratic drivers based on sufficiently detailed anonymous tips.").

reliability necessary for reasonable suspicion.⁸⁴

C. *Investigatory Traffic Stops: Privacy and Intrusiveness Issues*

The reasonableness of an investigatory stop must balance the government's interest in crime prevention against an individual's privacy interests.⁸⁵ *Terry* recognized that searches and seizures vary in their level of intrusiveness.⁸⁶ Investigatory traffic stops address an individual's right to privacy within an automobile, and provide an example of the varying levels of intrusive searches.⁸⁷

1. *Historical Analysis*

Traditionally, under Fourth Amendment analysis courts treat automobiles differently—and less protectively—than homes and other forms of personal property.⁸⁸ In *Carroll v. United States*, the seminal case regarding warrantless automobile searches, the Supreme Court recognized inherent distinctions between searches and seizures of structures and modes of transportation.⁸⁹ The *Carroll Doctrine* applied an automobile exception to warrantless searches based on the automobile's inherent mobility and the exigency that evidence will be lost or removed from the jurisdiction and out of a warrant's reach.⁹⁰

A half-century later, the Supreme Court in *United States v. Chadwick* expanded the scope of the automobile search exception, shifting the focus to an individual's reduced privacy expectation in vehicles.⁹¹ In *Chadwick*, federal narcotics agents suspected that a footlocker located in the defendant's automobile contained drugs; therefore, they took possession of the footlocker and performed a warrantless search of the footlocker at

⁸⁴ See *State v. Boyea*, 765 A.2d 862, 867 (Vt. 2000).

⁸⁵ See JOHN F. DECKER, *REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA* 49 (1992). "Reasonableness analysis weighs the privacy interests of the citizen and balances law enforcement interest against the citizen's claim of privacy. . . . Thus, a sort of sliding scale governs the reasonableness analysis." *Id.*

⁸⁶ 1 DRESSLER & MICHAELS, *supra* note 26, § 17.01, at 278.

⁸⁷ See, e.g., *id.* § 13.01.

⁸⁸ See *id.*

⁸⁹ 267 U.S. 132, 153 (1925). In *Carroll*, the Supreme Court observed inherent distinctions between unreasonable searches and seizures of structures and transportation, and found these distinctions were enacted contemporaneously with the Fourth Amendment. *Id.* Therefore, a separate approach for automobiles search and seizure was acceptable. See *id.*

⁹⁰ See *Chambers v. Maroney*, 399 U.S. 42, 48 (1970); see also 3 LAFAYETTE, *supra* note 23, § 7.2(a), at 462.

⁹¹ 433 U.S. 1, 12-13 (1977).

police headquarters.⁹² Although the search was held unconstitutional, the Court noted several factors contributing to a reduced expectation of privacy in an automobile.⁹³ These factors included an automobile's operation on a public highway, exposing the driver and occupants to plain view, and the extensive regulation of operators and vehicles.⁹⁴

Despite the inherent distinctions between searches and seizures of an automobile and a home, the automobile does not automatically negate Fourth Amendment rights.⁹⁵ This exception "does not mean, as seems to be assumed, that every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion."⁹⁶ In *Delaware v. Prouse*, the Supreme Court explicitly rejected law enforcement's use of random suspicionless vehicle stops.⁹⁷ Although vehicle stops were "limited in magnitude compared to other intrusions," the Supreme Court found that random suspicionless stops were constitutionally prohibited.⁹⁸ "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation."⁹⁹ Automobiles are used with extreme regularity and have become a part of daily life.¹⁰⁰ To subject an individual to "unfettered governmental intrusion every time he entered an automobile" would circumscribe "the security guaranteed by the Fourth Amendment."¹⁰¹

⁹² *Id.* at 3-5.

⁹³ *See id.* at 12-13.

⁹⁴ *Id.*; *see* *California v. Carney*, 471 U.S. 386, 392 (1985); Carol A. Chase, *Cars, Cops, and Crooks: A Reexamination of Belton and Carroll with an Eye Toward Restoring Fourth Amendment Privacy Protection to Automobiles*, 85 OR. L. REV. 913, 930 (2006); George M. Dery III, *Improbable Cause: The Court's Purposeful Evasion of a Traditional Fourth Amendment Protection in Wyoming v. Houghton*, 50 CASE W. RES. L. REV. 547, 561 (2000); Catherine A. Shepard, Comment, *Search and Seizure: From Carroll to Ross, the Odyssey of the Automobile Exception*, 32 CATH. U. L. REV. 221, 237 (1982).

⁹⁵ *See* 1 DRESSLER & MICHAELS, *supra* note 26, at 318-19.

⁹⁶ *Brinegar v. United States*, 338 U.S. 160, 177 (1949).

⁹⁷ 440 U.S. 648, 659 (1979).

⁹⁸ *Id.* at 661.

⁹⁹ *Id.* at 662.

¹⁰⁰ *See id.*

¹⁰¹ *Id.* at 663.

2. Vehicle Checkpoints and Roadblocks¹⁰²

Despite invalidating individual suspicionless automobile stops and roving border patrol stops,¹⁰³ the Supreme Court, in some instances, has upheld the use of suspicionless vehicle checkpoints and roadblocks.¹⁰⁴ Typically, roadblocks are employed as a means of deterring serious criminal behavior¹⁰⁵ or if certain exigent circumstances necessitate their use.¹⁰⁶ Some legal scholars suggest that checkpoints and roadblocks should only be used in serious situations such as, “kidnapping, murder, and armed robbery,” or “forcible felonies” that endanger society.¹⁰⁷ Law enforcement officials are required to follow reasonable guidelines for suspicionless checkpoints and roadblocks.¹⁰⁸ These guidelines control the positioning of the roadblock and the procedures used, which apply to all, or most, of the cars traveling in a particular direction.¹⁰⁹ A three-part test, established in *Brown v. Texas*, evaluates the reasonableness of a particular checkpoint based on: (1) “the gravity of the public concerns served by the seizure,” (2) “the degree to which the seizure advances the public interest,” and (3) “the severity of the interference with individual liberty.”¹¹⁰

Although not a “serious crime” or “exigent circumstance,”¹¹¹ the

¹⁰² The terms checkpoint and roadblock can be used interchangeably, denoting a police procedure that seeks to enforce regulation concerning the use of vehicles. See 4 LAFAVE, *supra* note 23, § 9.7, at 697.

¹⁰³ See *Prouse*, 440 U.S. at 662-63; *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975).

¹⁰⁴ See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (upholding the use of suspicionless sobriety checkpoints); *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) (upholding the use of suspicionless permanent checkpoints for border patrol purposes). *But see City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000) (holding that a vehicle checkpoint operated to detect unlawful drugs violated the Fourth Amendment because its “primary purpose was to detect evidence of ordinary criminal wrongdoing”).

¹⁰⁵ See 4 LAFAVE, *supra* note 23, § 9.7(a), at 702-03.

¹⁰⁶ *Edmond*, 531 U.S. at 44.

Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example . . . the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.

Id.

¹⁰⁷ 4 LAFAVE, *supra* note 23, § 9.7(a), at 702.

¹⁰⁸ See *id.* at 700.

¹⁰⁹ See *id.* at 700-01.

¹¹⁰ *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

¹¹¹ Although drunk driving is a serious issue on the nation’s highways, the terms “serious

Supreme Court upheld suspicionless sobriety checkpoints.¹¹² In *Michigan Department of State Police v. Sitz*, the Michigan State Police Department implemented a sobriety checkpoint that screened 126 drivers and arrested two drivers for driving under the influence.¹¹³ Reversing the Michigan Court of Appeals' decision, the Supreme Court's majority opinion touted the "magnitude of the drunken driving problem [and] the States' interest in eradicating it."¹¹⁴ The majority found the "subjective" intrusion on motorists slight and equated the sobriety checkpoint to permanent border patrol checkpoints.¹¹⁵ Furthermore, the Court discounted the lower court's argument that the checkpoint was an ineffective way to combat drunk driving, finding the empirical data of the program's effectiveness sufficient to advance the *Brown* "public interest" prong.¹¹⁶

In the dissent, Justices Stevens, Brennan, and Marshall argued that the majority misapplied the *Brown* balancing test.¹¹⁷ They stated: "The Court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen's interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is 'virtually no difference' between a routine stop at a permanent, fixed checkpoint and a surprise stop at a sobriety checkpoint."¹¹⁸

The dissent felt that the majority "place[d] a heavy thumb on the law enforcement interest by looking only at gross receipts instead of net benefits."¹¹⁹ Concluding that the majority was "transfixed by . . . the illusory prospect of punishing countless intoxicated motorists," the dissent underscored the importance of an individual's privacy interest.¹²⁰ They faulted the majority's balancing approach, believing the majority incorrectly concluded the invasion of an individual's privacy interest was minimal because the government's interest was so great.¹²¹

crime" and "exigent circumstances" refer to situations involving kidnapping, murder, armed robbery, or terrorism attacks. See *Edmond*, 531 U.S. at 44.

¹¹² See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990); see also *Edmond*, 531 U.S. at 43 ("Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.").

¹¹³ *Sitz*, 496 U.S. at 448.

¹¹⁴ *Id.* at 451, 455.

¹¹⁵ See *id.* at 452-53.

¹¹⁶ *Id.* at 453-55; see 1 DRESSLER & MICHAELS, *supra* note 26, § 18.04, at 321.

¹¹⁷ *Sitz*, 496 U.S. at 462 (Stevens, J., dissenting).

¹¹⁸ *Id.* at 462-63.

¹¹⁹ *Id.* at 473.

¹²⁰ See *id.* at 477.

¹²¹ See *id.* at 457 (Brennan, J., dissenting).

Once the Court establishes that the seizure is "slight," it asserts without

Therefore, under Supreme Court precedent an individual has a reduced expectation of privacy in automobiles.¹²² However, this diminished privacy interest does not remove all Fourth Amendment constraints.¹²³ An officer cannot conduct individualized traffic stops without reasonable suspicion.¹²⁴

II. Anonymous Tips Reporting Drunk Driving: A Split of Authority

A sharp disagreement has emerged among federal and state courts regarding traffic stops based on an anonymous tip reporting drunk driving.¹²⁵ The conflict between the courts stems from competing analyses of the holding and dicta of *J.L.*¹²⁶ A majority of courts uphold the use of these anonymous tips without requiring independent police corroboration of erratic or suspicious driving.¹²⁷ Distinguishing *J.L.*, these courts focus on the imminent danger posed by drunk driving and conclude that an officer's corroboration of the tip's innocent details (identifying features of the vehicle) provide reasonable suspicion.¹²⁸ However, a number of other courts have determined that *J.L.* requires independent police corroboration of erratic or illegal driving.¹²⁹ These courts find corroboration of the tip's innocent details insufficient to evaluate its reliability, and therefore the

explanation that the balance "weighs in favor of the state program." The Court ignores the fact that in this class of minimally intrusive searches, we have generally required the Government to prove that it had reasonable suspicion for a minimally intrusive seizure to be considered reasonable.

Id. (internal citations omitted).

¹²² See *id.* at 455 (majority opinion); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (suggesting that states would be free to develop methods that were both less intrusive and less discretionary when conducting automobile stops).

¹²³ See *infra* Part III.C.

¹²⁴ See *Prouse*, 440 U.S. at 663.

¹²⁵ See *Virginia v. Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of cert.); Brief of Mothers Against Drunk Driving as Amici Curiae in Support of Petitioner at 12, *Virginia v. Harris*, 130 S. Ct. 10 (2009) (No. 08-1385), 2009 WL 1630301 at *12 [hereinafter MADD Amicus Brief].

¹²⁶ See MADD Amicus Brief, *supra* note 125, at 2-3.

¹²⁷ See, e.g., *United States v. Wheat*, 278 F.3d 722, 729 (8th Cir. 2001); *People v. Wells*, 136 P.3d 810, 811 (Cal. 2006), *cert. denied*, 550 U.S. 937 (2007); *Bloomington v. State*, 842 A.2d 1212, 1216-17 (Del. 2004); *State v. Pendergast*, 83 P.3d 714, 723 (Haw. 2004); *State v. Walshire*, 634 N.W.2d 625, 627 (Iowa 2001); *State v. Hanning*, 296 S.W.3d 44, 54 (Tenn. 2009); *State v. Boyea*, 765 A.2d 862, 864, 868 (Vt. 2000).

¹²⁸ See *Wheat*, 278 F.3d at 729; *Boyea*, 765 A.2d at 867-68.

¹²⁹ See, e.g., *Commonwealth v. Lubiejewski*, 729 N.E.2d 288, 291 (Mass. App. Ct. 2000); *Harris v. Commonwealth*, 668 S.E.2d 141, 146-47 (Va. 2008), *cert. denied*, 130 S. Ct. 10 (2009); *McChesney v. State*, 988 P.2d 1071, 1075 (Wyo. 1999).

police lack reasonable suspicion to conduct a traffic stop.¹³⁰

A. *Reasonable Suspicion Based Solely on Anonymous Tips Reporting Drunk Driving*

Jurisdictions allowing the use of anonymous tips reporting drunk driving without independent police corroboration distinguish tips of drunk driving from the anonymous tips in *J.L.*¹³¹ In *J.L.*, the police received an anonymous tip reporting a person carrying a firearm.¹³² There are four main arguments that distinguish drunk driving from possession of a firearm: (1) the grave and imminent danger posed by drunk driving; (2) the enhanced reliability of tips alleging the illegal activity and the presumption that the tipster was an eyewitness; (3) the lesser invasiveness of traffic stops as opposed to a stop of individuals on foot; and (4) the diminished expectation of privacy enjoyed by individuals on public roads.¹³³

1. *Grave and Imminent Danger*

The grave and imminent danger drunk driving poses to the general public is the primary focus of jurisdictions allowing the use of anonymous tips without independent police corroboration.¹³⁴ Distinguishing the

¹³⁰ See, e.g., *Harris*, 668 S.E.2d at 146 (“[T]he anonymous tip . . . lacked sufficient information to demonstrate the informant’s credibility and basis of knowledge.”).

¹³¹ The accepted interpretation of *J.L.* is that anonymous tips alone do not have the indicia of reliability necessary to provide reasonable suspicion. See *Florida v. J.L.*, 529 U.S. 266, 274 (2000); *Wheat*, 278 F.3d at 729 (noting that several states have found anonymous tips reporting drunk driving alone sufficient to justify a traffic stop).

The Supreme Courts of Vermont, Iowa, and Wisconsin have held that *J.L.* does not prevent an anonymous tip concerning erratic driving from acquiring sufficient indicia of reliability to justify a *Terry* stop, even when the investigating officer is unable to corroborate that the driver is operating the vehicle recklessly and therefore unlawfully.

Id.

¹³² See *J.L.*, 529 U.S. at 274.

¹³³ *Virginia v. Harris*, 130 S. Ct. 10, 11-12 (2009) (Roberts, C.J., dissenting from denial of cert.).

¹³⁴ See *Bloomington v. State*, 842 A.2d 1212, 1218 n.34 (Del. 2004) (stating that the court would *not* predicate its decision on the severe risk to public safety posed by drunk driving, but then proceeding to assess the public danger element of drunk driving); *State v. Boyea*, 765 A.2d 862, 865 (Vt. 2000) (citing *State v. Tucker*, 878 P.2d 855, 862 (Kan. Ct. App. 1994)) (“[T]he court concluded that the risk of not making an immediate stop was ‘death and destruction on the highways. This is not a risk which the Fourth Amendment requires the public to take.’”); Jason Kyle Bryk, Note, *Anonymous Tips to Law Enforcement and the Fourth Amendment: Arguments for Adopting an Imminent Danger Exception and Retaining the Totality of Circumstances Test*, 13 GEO. MASON U. C.R. L.J. 277, 277-78 (2003).

dangers of drunk driving from the dangers of possession of a firearm discussed in *J.L.*,¹³⁵ the courts find a vehicle's mobility; the unpredictability of a driver's actions; the observable nature of erratic driving compared to the concealed nature of firearm possession; and a lack of alternatives for police investigation of drunk driving set drunk driving apart from possession of a firearm.¹³⁶ Furthermore, these courts find that drunk driving falls into the special circumstance mentioned in *J.L.* where "the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability."¹³⁷ The courts base this exception on the bomb-firearm dicta of *J.L.*, equating a drunk driver to a bomb instead of a firearm.¹³⁸

2. Enhanced Reliability of Anonymous Tips

Jurisdictions allowing anonymous tips reporting drunk driving without independent police corroboration also find that tips reporting drunk driving have enhanced reliability.¹³⁹ Courts base this reliability on the quality and quantity of information, the public nature of drunk or erratic driving, and the likelihood that the caller is an eyewitness supplying a contemporaneous report.¹⁴⁰ In *Bloomingtondale v. State*, the police received an anonymous tip describing the make, model, and color of the vehicle; license plate tag; and approximate location of a possible drunk driver.¹⁴¹ The Delaware Supreme Court held that the particularity of the information

¹³⁵ See *Boyea*, 765 A.2d at 867 ("In contrast to the report of an individual in possession of a gun [*J.L.*], an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action.").

¹³⁶ See, e.g., *Bloomingtondale*, 842 A.2d at 1219; *State v. Walshire*, 634 N.W.2d 625, 627 (Iowa 2001) (noting that a tip about drunk driving is an "illegality open to public observation."); *Boyea*, 765 A.2d at 867 (concluding the mobile danger of the vehicle and the lack of investigative alternatives for police officers heightens the danger of drunk driving).

¹³⁷ *J.L.*, 529 U.S. at 273; see also cases cited *supra* note 127.

¹³⁸ *J.L.*, 529 U.S. at 273-74 (2000) ("We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."); see, e.g., *Boyea*, 765 A.2d at 867 ("Indeed, a drunk driver is not at all unlike a 'bomb,' and a mobile one at that.").

¹³⁹ See cases cited *supra* note 127.

¹⁴⁰ See *Bloomingtondale*, 842 A.2d at 1219-20 & n.40 ("Almost always, [the tipster's knowledge] comes from his eyewitness observations, and there is no need to verify that he possesses inside information." (quoting *United States v. Wheat*, 278 F.3d 722, 734 (8th Cir. 2001))); see also *State v. Hanning*, 296 S.W.3d 44, 51 (Tenn. 2009) ("[W]hen a tipster seeks to report the location of a reckless driver at the time the reckless driving is observed or shortly thereafter, the tipster has a very brief amount of time to contact the police, and the likelihood that the allegation is fabricated is proportionately diminished.").

¹⁴¹ *Bloomingtondale*, 842 A.2d at 1213.

and accurate prediction of the location of the vehicle enabled the police to identify the vehicle and enhanced the reliability of the tip.¹⁴² Similarly, courts have found a tip reliable because it provides sufficient predictive information regarding the “location of a fast moving vehicle on a freeway.”¹⁴³

However, these courts reject the notion that malicious intent potentially surrounds the anonymous tips.¹⁴⁴ The courts note that the quality and quantity of the information, as well as the presumption that the tip is a contemporaneous, eyewitness account, make a report an “improbable . . . and imprecise method” of harassment.¹⁴⁵ Furthermore, technology features such as caller identification have disposed of the anonymity in “anonymous” calls.¹⁴⁶ Also, the general public is aware that it is a crime to make a false report to the police, which further limits the incidences of harassment or reports with malicious intent.¹⁴⁷

3. *Traffic Stops: Diminished Expectation of Privacy*

Lastly, jurisdictions advocating the use of anonymous tips reporting drunk driving without independent corroboration point to the diminished expectation of privacy enjoyed by automobile operators and a traffic stop’s lesser degree of invasiveness.¹⁴⁸ Relying on *Sitz*, the courts argue that a traffic stop imposes a smaller intrusion on individual liberty than a search and seizure of an individual’s person.¹⁴⁹ Furthermore, an individual has a

¹⁴² See *id.* at 1219.

¹⁴³ *Boyea*, 765 A.2d at 867; see *Bloomingtondale*, 842 A.2d at 1218.

¹⁴⁴ See, e.g., *Bloomingtondale*, 842 A.2d at 1220.

¹⁴⁵ See *Hanning*, 296 S.W.3d at 51 (quoting *Bloomingtondale*, 842 A.2d at 1220). “Given the intricacies and improbabilities that would be involved in seeking to harass another by a report of reckless or erratic driving, it seems highly unlikely that such a report will have been fabricated for that purpose.” *Id.*

¹⁴⁶ See *Florida v. J.L.*, 529 U.S. 266, 276 (2000) (Kennedy, J., concurring) (noting the availability of caller identification may lend reliability to an anonymous tip that may have been deemed unreliable before this technology).

¹⁴⁷ See, e.g., *Bloomingtondale*, 842 A.2d at 1221 n.44 (“The widespread availability and use of call identification technology may also reduce the risk that an anonymous tipster is acting maliciously. . . . [M]ost potential tipsters are likely to know that their identities may be discernible by police, even if not disclosed by the tipster. . . . [T]herefore [they are] less likely to give false tips, for fear of being prosecuted for giving false reports to police.”).

¹⁴⁸ See, e.g., *Hanning*, 296 S.W.3d at 51 (finding the level of intrusion of a traffic stop different from a stop of a person walking down the street).

¹⁴⁹ See *Bloomingtondale*, 842 A.2d at 1218; *State v. Boyea*, 765 A.2d 862, 870 (Vt. 2000) (Skoglund, J., concurring) (comparing a brief traffic stop to the level of intrusion of a brief roadside sobriety checkpoint).

diminished expectation of privacy in an automobile.¹⁵⁰ Courts balance the slight traffic stop invasion with the government's interest in preventing drunk driving and conclude that a stop is the only reasonable method available to police officers.¹⁵¹

In *State v. Boyea*, the Vermont Supreme Court preferred conducting a brief investigatory stop to a situation where an officer must corroborate drunk or erratic driving because of the potential for a devastating accident.¹⁵² Failure to immediately pull over a suspected drunk driver could result in three possible outcomes: the suspect continues driving without incident; the suspect harmlessly commits a traffic violation corroborating the tip; or the suspect commits a traffic violation that "causes a sudden and potentially devastating accident."¹⁵³ Therefore, courts supporting the use of anonymous tips conclude that the investigatory stop is the least intrusive means compared to the devastating potential for an accident.¹⁵⁴

B. Jurisdictions that Require Police Corroboration of Anonymous Tips Reporting Drunk Driving

Jurisdictions that require independent police corroboration of anonymous tips reporting drunk driving follow the holding of *J.L.* and require that either the tip contain some predictive information or an officer corroborate more than an obvious or non-criminal detail of the tip.¹⁵⁵ These jurisdictions do not consider an anonymous tip reporting drunk driving distinct from an anonymous tip reporting possession of a firearm, nor an exception to the holding of *J.L.*¹⁵⁶ Therefore, they evaluate the tip based on the level of corroboration, defining corroboration as observations of erratic or drunk driving.¹⁵⁷ In *Commonwealth v. Lubiejewski*, a Massachusetts case, and *McChesney v. State*, a Wyoming case, the courts invalidated a traffic stop based on an anonymous report of drunk driving where the officers did not observe *any* erratic or drunk driving.¹⁵⁸ Similarly, in *Harris v. Commonwealth*, the Virginia Supreme Court invalidated a traffic stop where

¹⁵⁰ See 4 LAFAVE, *supra* note 23, §9.3, at 359-60.

¹⁵¹ See *United States v. Wheat*, 278 F.3d 722, 736-37 (8th Cir. 2001); *Boyea*, 765 A.2d at 865.

¹⁵² See *Boyea*, 765 A.2d at 865, 868.

¹⁵³ *Wheat*, 278 F.3d at 736-37.

¹⁵⁴ See *id.*; *Boyea*, 765 A.2d at 865.

¹⁵⁵ See, e.g., *Harris v. Commonwealth*, 668 S.E.2d 141, 145-47 (Va. 2008), *cert. denied*, 130 S. Ct. 10 (2009).

¹⁵⁶ See, e.g., *id.* at 145-46.

¹⁵⁷ E.g., *id.* at 146; see Trauth, *supra* note 83, at 335-38.

¹⁵⁸ See *Commonwealth v. Lubiejewski*, 729 N.E.2d 288, 291 (Mass. App. Ct. 2000); *McChesney v. State*, 988 P.2d 1071, 1077 (Wyo. 1999).

the officer did not observe erratic or drunk driving.¹⁵⁹ However, unlike *Lubiejewski* and *McChesney*, the officer in *Harris* observed suspicious or unusual driving.¹⁶⁰

In *Lubiejewski*, an unidentified motorist reported observing a truck traveling in the wrong direction down the highway.¹⁶¹ However, by the time the officer stopped the truck it had crossed back over the median and was traveling in the right direction.¹⁶² The Massachusetts Court of Appeals concluded that since the officer did not observe the truck traveling in the illegal direction he did not have reasonable suspicion to conduct a traffic stop.¹⁶³ In *McChesney*, an officer received an anonymous report of erratic driving, but the officer did not observe any type of weaving or erratic driving.¹⁶⁴ The officer observed “glances” in his direction by the driver and passengers.¹⁶⁵ Despite a lack of suspicious or erratic driving, the officer proceeded to stop the vehicle, boxing it into a convenience store parking spot.¹⁶⁶ The Wyoming Supreme Court invalidated the stop, finding the “glances” inconsequential and not sufficient to provide reasonable suspicion.¹⁶⁷ However, *Harris* is distinct from other cases involving anonymous tips reporting drunk driving because the police officer did not immediately pull over the driver, but followed and observed him, noting several “unusual” driving actions.¹⁶⁸

In *Harris*, the officer received a dispatch call of an intoxicated driver whose description included: the approximate location of the vehicle; the color and model of the vehicle; the name of the driver; a description of the driver; and a partial license plate number.¹⁶⁹ The police officer located the

¹⁵⁹ See *Harris*, 668 S.E.2d at 146-47.

¹⁶⁰ Compare *id.* at 147, with *Lubiejewski*, 729 N.E.2d at 291, and *McChesney*, 988 P.2d at 1077.

¹⁶¹ *Lubiejewski*, 729 N.E.2d at 290.

¹⁶² See *id.* at 292.

¹⁶³ See *id.* at 291-92.

¹⁶⁴ *McChesney*, 988 P.2d at 1073.

¹⁶⁵ *Id.* at 1077.

¹⁶⁶ *Id.* at 1073-74.

¹⁶⁷ *Id.* at 1077 (“[W]e dismiss the driver’s glances in his mirrors as inconsequential; such action is undeniably the sign of a safe driver. Likewise, the glances of the passengers are not sufficient to provide a reasonable suspicion.”).

¹⁶⁸ See *Harris v. Commonwealth*, 668 S.E.2d 141, 144 (Va. 2008). But see *Bloomingtondale v. State*, 842 A.2d 1212, 1213 (Del. 2004) (noting that the officer spotted the vehicle a few seconds after the broadcast and “followed the car just long enough to confirm the tag number”); *State v. Boyea*, 765 A.2d 862, 863 (Vt. 2000) (“This was not an officer seeking independent verification that a driver was intoxicated, but rather one intent upon catching and stopping as soon as practically possible a driver whom he already suspected of being under the influence.”).

¹⁶⁹ See *Harris*, 668 S.E.2d at 144.

vehicle, followed it, and observed the vehicle slowing down and prematurely breaking at two traffic lights.¹⁷⁰ Ultimately, the driver pulled the vehicle over to the side of the road of his own accord.¹⁷¹ When the officer approached the vehicle, he detected a strong odor of alcohol and observed the watery eyes and slurred speech of the driver.¹⁷² The court found that the anonymous tip did not contain the indicia of reliability because it merely provided information observable or available to anyone.¹⁷³ This information was not predictive, but only helped the police identify the person whom the tipster meant to accuse.¹⁷⁴ The court further found that an anonymous tip did not need to include predictive information when the informant reports readily observable criminal actions; but, in this instance, the police officer did not observe anything to indicate the driver was drunk.¹⁷⁵ Although the court acknowledged that the driver's conduct was "unusual," they found it "insufficient to generate a reasonable suspicion that the individual [was] involved in [the] criminal activity" of operating a motor vehicle under the influence of alcohol.¹⁷⁶

The competing approaches adopted by the courts to evaluate anonymous tips reporting drunk driving¹⁷⁷ have two deficiencies: the majority emphasizes the dangers of drunk driving at the expense of individual liberties, whereas the minority unduly restrains police officers by requiring independent observations of illegal driving.¹⁷⁸ However, a balance can be struck between the two approaches.¹⁷⁹ The courts should require independent corroboration of anonymous tips based on observations of suspicious driving and not solely illegal driving.¹⁸⁰

III. Anonymous Tips Reporting Drunk Driving: A Reasonable Suspicion Exception?

Relying solely on an anonymous tip reporting drunk driving to provide reasonable suspicion to conduct a stop creates an exception that is

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See id.* at 146.

¹⁷⁴ *Id.* at 145-46.

¹⁷⁵ *Harris*, 668 S.E.2d at 146.

¹⁷⁶ *Id.* at 147.

¹⁷⁷ *See supra* text accompanying notes 125-76.

¹⁷⁸ *Compare, e.g., State v. Hanning*, 296 S.W.3d 44, 51 (Tenn. 2009) (permitting a stop), *with Harris*, 668 S.E.2d at 147 (finding the stop unjustified).

¹⁷⁹ *See infra* Part III.D (arguing that anonymous tips reporting drunk driving should be corroborated by police observations of the telltale signs of suspicious or erratic driving).

¹⁸⁰ *See MADD Amicus Brief, supra* note 125, at 3.

impermissible under Fourth Amendment analysis.¹⁸¹ The jurisdictions that adopt this exception have allowed a social ill, drunk driving, to justify curtailing an individual's Fourth Amendment rights.¹⁸² While the dangers posed by drunk driving should not be ignored, the potential for harm should not eviscerate Fourth Amendment protections.¹⁸³ The tension between balancing public safety issues and an individual's privacy interest is not a novel theme under Fourth Amendment analysis.¹⁸⁴ However, public safety concerns should not automatically trigger Fourth Amendment exceptions.¹⁸⁵

Restrictions on law enforcement activity often seem "too extravagant to endure" when faced with violent crimes and public safety concerns.¹⁸⁶ But, the protection of individual liberties always entails a social cost.¹⁸⁷ When the gravity of the public safety concern becomes the focus of the balancing test the scales will almost always tip towards law enforcement interests.¹⁸⁸

¹⁸¹ See *State v. Boyea*, 765 A.2d 862, 877 (Vt. 2000) (Johnson, J., dissenting) ("By ignoring the requirement of reliability for anonymous tips, the majority has created an automobile exception to our established search and seizure jurisprudence for which there is no precedent and no conceivable limit.").

¹⁸² See *id.* at 882; JACOBS, *supra* note 5, at 90 ("Jurisprudential and constitutional values, which have figured prominently in the evolution of criminal law and procedure, have been ignored or slighted in the case of drunk driving.").

¹⁸³ See JACOBS, *supra* note 5, at 90.

¹⁸⁴ See *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) ("There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand."); *Boyea*, 765 A.2d at 884 (Johnson, J., dissenting) ("The majority is eloquent about the danger of drunk driving, but public safety is not a novel concern of this century.").

¹⁸⁵ See *Florida v. J.L.*, 529 U.S. 266, 272-73 (2000) (noting the threat to public safety is of great concern for police officers, but that an automatic firearm exception would "rove too far"); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965 (1987) (noting that the Fourth Amendment balancing test has become the vehicle used to weaken earlier categorical restrictions on government search and seizure power); Ric Simmons, *Searching for Terrorists: Why Public Safety is Not a Special Need*, 59 DUKE L.J. 843, 897 (2010) (discussing suspicionless searches in the context of terrorist threats and concluding that "antiterrorist searches are particularly ill suited to a generalized balancing test or a reasonableness analysis [because] the gravity of the potential harm is so great that it overpowers . . . the balancing equation").

¹⁸⁶ Steiker, *supra* note 24, at 820 (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting)).

¹⁸⁷ *Id.* at 820 (noting that many aspects of the Bill of Rights frustrate legitimate government enforcement of the laws).

¹⁸⁸ See *New Jersey v. T.L.O.*, 469 U.S. 325, 363 (1985) (Brennan, J., concurring in part and dissenting in part). "[T]he presence of the word 'unreasonable' in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer all Fourth Amendment questions by consulting its momentary vision of the social good." *Id.* at 370.

The courts should not focus solely on the imminence of the danger likely to occur, but the reasonableness of the police's actions.¹⁸⁹ However, jurisdictions that require independent police corroboration of *erratic* or *illegal* driving are too strict and curtail law enforcement efforts.¹⁹⁰ Therefore, courts evaluating anonymous tips reporting drunk driving should require independent police corroboration, but allow observations based on indicators of telltale drunk driving behavior or activity—short of erratic or illegal driving.¹⁹¹

A. *The Imminent Danger Posed by Drunk Driving is Not a Unique Exception.*

The imminence of danger and risk of tragedy posed by drunk driving is not an exception under *J.L.*¹⁹² Distinguishing the analysis of drunk driving from the possession of a firearm, courts conclude the danger posed by drunk driving is greater and justifies “a search even without a showing of reliability.”¹⁹³ However, the potential risk posed by drunk driving is similar to the risk posed by a loaded firearm.¹⁹⁴ Both circumstances could have horrific and fatal consequences, and both are subject to the unpredictable actions of the person wielding the instrumentality.¹⁹⁵ The focus on imminent danger attempts to fit drunk driving into the catastrophic threat articulated in *J.L.*,¹⁹⁶ but the Supreme Court sought to apply this exception only in rare instances.¹⁹⁷ The Court specifically declined to recognize an automatic firearm exception; therefore the lower courts should decline to adopt an exception for drunk driving.¹⁹⁸

¹⁸⁹ See *Boyea*, 765 A.2d at 885 (Johnson, J., dissenting). Otherwise, “if danger becomes a justification for dispensing with the requirement of reliability, then there will be nothing left of the Fourth Amendment.” *Id.*

¹⁹⁰ See MADD Amicus Brief, *supra* note 125, at 9 (suggesting that the *Harris* decision hinders government officials' ability to combat drunk driving).

¹⁹¹ See *id.* at 2-3.

¹⁹² *Contra supra* Part II.A.

¹⁹³ *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000); see also *Boyea*, 765 A.2d at 867. (“In contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action.”).

¹⁹⁴ *JACOBS*, *supra* note 5, at 60 (noting the similarities between the crime of drunk driving and possession of a firearm).

¹⁹⁵ See *Boyea*, 765 A.2d at 867 (Johnson, J., dissenting).

¹⁹⁶ See *J.L.*, 529 U.S. at 273-74.

¹⁹⁷ See *People v. Wells*, 136 P.3d 810, 818 (Cal. 2006) (Werdegar, J., dissenting).

¹⁹⁸ See *id.*

1. *The Danger of Drunk Driving*

Historically, the danger of drunk driving has been shaped by public perceptions and imagery.¹⁹⁹ Typically, dangerousness is quantified according to the number of injuries and fatalities attributable to an impaired driver.²⁰⁰ In 1968, the U.S. Department of Transportation issued the seminal report, *Alcohol and Highway Safety*, which documented “the emergence of drunk driving as an American social problem.”²⁰¹ The report concluded that drunk drivers were responsible for approximately 25,000 deaths annually or 50% of all traffic fatalities.²⁰² However, included within this figure were calculations of fatally injured passengers, pedacyclists, and pedestrians—not just drivers.²⁰³ The fatality figures do not separate the number of drunk versus innocent drivers whose deaths were caused by drunk drivers.²⁰⁴ The majority of people killed by drunk drivers are the drunk drivers themselves.²⁰⁵ Recently, the number of alcohol-related traffic fatalities has steadily decreased.²⁰⁶ Statistics indicate that it is fairly rare that an alcohol-related accident results in death.²⁰⁷ Also, anti-drunk driving programs and advocates are often caught in a statistical catch-22; they “must simultaneously show their success” through a decrease in alcohol-related fatalities and demonstrate the continued magnitude of the problem.²⁰⁸

However, the various statistical and public policy issues related to drunk-driving fatality calculations do not suggest that drunk driving is not a serious problem.²⁰⁹ Thousands are killed each year in alcohol-related

¹⁹⁹ JACOBS, *supra* note 5, at 40.

²⁰⁰ *Id.* at 27.

²⁰¹ *Id.*

²⁰² *Id.* at 28.

²⁰³ See *id.*; see also Douglas R. Richmond, *Drunk in the Serbonian Bog: Intoxicated Drivers' Deaths as Insurance Accidents*, 32 U. SEATTLE L. REV. 83, 117-18 (2008) (“[T]he National Highway Traffic Safety Administration (NHTSA), which compiles the most widely-cited statistics on alcohol-related motor vehicle fatalities, counts as alcohol-related fatalities ‘those that occur in crashes involving at least one driver, pedestrian, or pedacyclist with a BAC of .01 or above.’”).

²⁰⁴ See Richmond, *supra* note 203, at 117-18.

²⁰⁵ JACOBS, *supra* note 5, at 28.

²⁰⁶ See, e.g., NHTSA, TRAFFIC SAFETY FACTS, *supra* note 3.

²⁰⁷ See Richmond, *supra* note 203, at 118 (“In 2005 . . . there were an estimated 6,159,000 motor vehicle crashes reported to police. There were 17,590 alcohol-related crash fatalities that year. Thus, even if a drunk driver were involved in a wreck, there is less than a one percent chance that she would be killed.”) (citations omitted).

²⁰⁸ JACOBS, *supra* note 5, at 40, 206 n.10.

²⁰⁹ See *id.* at 28; see also Richmond, *supra* note 203, at 117-18.

accidents.²¹⁰ These issues merely point out that public perception of the magnitude of drunk driving has often been exaggerated.²¹¹

2. *The J.L. Analysis: A Gun or a Bomb?*

The degree of danger posed by drunk driving is not unlike the danger posed by the possession of a firearm.²¹² Both the crime of drunk driving and the illegal possession of a firearm are “not dependent on the occurrence of any harm.”²¹³ State legislatures place restrictions on both drunk driving and illegal possession of firearms for preventative and prophylactic purposes.²¹⁴ For example, a person in possession of a firearm may not pose a specific risk, “but the legislature has chosen not to wait until a lethal threat materializes.”²¹⁵ Similarly, the aim of drunk driving legislation is to prevent the development of a specific instance of harm.²¹⁶ Both firearms and automobiles can be considered dangerous instrumentalities.²¹⁷

Due to the similarities, some jurisdictions choose to analogize a report of drunk driving to a report of a bomb.²¹⁸ Courts adopting this bomb analogy readily accept that the mobility and unpredictable nature of a drunk driver are similar to that of a bomb.²¹⁹ However, a person wielding a loaded firearm is also mobile and unpredictable.²²⁰ Therefore, courts actually predicate the exception on the investigation procedures available

²¹⁰ NHTSA, TRAFFIC SAFETY FACTS, *supra* note 3, tbl.3 (reporting that the fatality rate of alcohol impaired accidents decreased from 13,041 in 2007 to 11,773 fatalities in 2008).

²¹¹ JACOBS, *supra* note 5, at 28; *Common DUI Myths*, DRUNKDRIVINGLAWYERS.COM, <http://www.drunkdrivinglawyers.com/common-dui-myths.cfm> (last visited Dec. 13, 2010) (“In recent years a number of alcohol watchdog groups have helped to successfully make the public believe that drunk driving causes half of all traffic accident deaths. This [is] an exaggeration, based on the terminology used when alcohol is involved in any capacity.”).

²¹² See JACOBS, *supra* note 5, at 60 (explaining that drunk driving is not unlike the illegal possession of a handgun since the aim of regulation for both is a preventative or prophylactic strategy).

²¹³ *Id.*

²¹⁴ MADD Amicus Brief, *supra* note 125, at 8 (“State legislatures have responded to the public’s concerns with programs designed to identify drunk drivers before they cause harm and to deter individuals from getting behind the wheel while under the influence of alcohol.”); JACOBS, *supra* note 5, at 60.

²¹⁵ See JACOBS, *supra* note 5, at 60.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See *State v. Boyea*, 765 A.2d 862, 867 (Vt. 2000) (“[A] drunk driver is not at all unlike a ‘bomb,’ and a mobile one at that.”).

²¹⁹ See *United States v. Wheat*, 278 F.3d 722, 730 (8th Cir. 2001); *Boyea*, 765 A.2d at 867.

²²⁰ See *Boyea*, 765 A.2d at 881 (Johnson, J., dissenting).

to police to prevent the harm.²²¹ Courts supporting the use of uncorroborated tips reporting drunk driving focus heavily on the impracticability of police follow and observe procedures in the context of drunk driving.²²² Due to perceived inadequacies of this procedure, the courts allow the potential for devastating effects, as well as the potential criticism of law enforcement's failure to stop the vehicle, to sweep over Fourth Amendment protections.²²³ But, the possibility of harm should not "dispense with requiring confirmation of the illegal aspects of the anonymous tip."²²⁴ The illegal possession of a firearm also has potentially devastating effects.²²⁵ "A man carrying a concealed weapon on a street can easily remove the weapon and fire into a group of people faster than any police officer can intercept him."²²⁶ In both situations, the police may be unable to prevent these potentially dangerous consequences.²²⁷

Similarly, courts distinguish a report of drunk driving from possession of a firearm by focusing on the open and observable nature of drunk driving.²²⁸ They presume that a report of drunk driving is based on the public's observations, whereas possession of a firearm is a concealed crime.²²⁹ However, identifying a drunk driver is not as readily observable as many courts conclude.²³⁰ Intoxication is not the only explanation for erratic driving; erratic driving also results from driver inattentiveness, a driver's sleepy or lethargic state, or a driver's poor vehicle operating abilities.²³¹ Furthermore, unlike the possession of a firearm in which the police could visually observe the offense, the confirmation of drunk driving does not solely hinge on police observation; after the stop, testing is usually performed to ascertain the sobriety level of the driver.²³² Therefore, the crime of drunk driving is actually concealed since the police are only

²²¹ See *Wheat*, 278 F.3d at 736; *Boyea*, 765 A.2d at 863; Trauth, *supra* note 83, at 341.

²²² See *Boyea*, 765 A.2d at 862; *supra* Part II.A.3.

²²³ See *People v. Wells*, 136 P.3d 810, 820 (Cal. 2006) (Werdegar, J., dissenting).

²²⁴ See *id.*

²²⁵ See *Boyea*, 765 A.2d at 881 (Johnson, J., dissenting).

²²⁶ *Id.*

²²⁷ See *id.*

²²⁸ See *supra* Part II.A.

²²⁹ See *United States v. Wheat*, 278 F.3d 722, 734 (8th Cir. 2001) ("Unlike . . . clandestine crimes such as possessory offenses, . . . in erratic driving cases the basis of the tipster's knowledge is likely to be apparent. Almost always, it comes from his eyewitness observations, and there is no need to verify that he possesses inside information."); Trauth, *supra* note 83, at 341.

²³⁰ See *People v. Wells*, 136 P.3d 810, 819 (Cal. 2006) (Werdegar, J., dissenting).

²³¹ See JACOBS, *supra* note 5, at 60-61.

²³² *Id.*

able to confirm a driver's intoxication through further testing.²³³

3. Commonality of Drunk Driving

The incidence of drunk driving is neither “catastrophic” nor a limited occurrence, and therefore should not be considered an exception to anonymous tips.²³⁴ In *J.L.*, the Supreme Court noted potential exceptions to anonymous tips, but the exceptions focused on a tip of such a grave threat that it would give “reasonable cause to detain even in the absence of any confirmation of the illegality.”²³⁵ The Supreme Court's recognition of possible exceptions, however, does not suggest that courts should adopt a sliding scale for reasonable suspicion.²³⁶ The holding in *J.L.* forecloses the possibility that a frequently occurring, potentially serious crime—possession of a firearm—could be an exception to anonymous tips providing reasonable suspicion.²³⁷ Unquestionably, drunk driving raises serious concerns and problems; in fact, it is the most commonly committed crime in the United States.²³⁸ But, the incidence of drunk driving does not greatly differ from the incidence of illegal possession of a firearm.²³⁹

B. Anonymous Tips Reporting Drunk Driving Are Not Inherently More Reliable.

Anonymous tips reporting suspected illegal activity raise serious issues under a probable cause or reasonable suspicion standard; therefore, the reliability of these tips should be carefully scrutinized.²⁴⁰ The argument that anonymous tips reporting drunk driving are themselves sufficient to provide reasonable suspicion is based on: (1) the presumption that the caller is an eyewitness;²⁴¹ (2) the fact that the caller's description of the

²³³ See *id.*

²³⁴ See *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000); *Wells*, 136 P.3d at 818 (Werdegar, J., dissenting).

²³⁵ *Wells*, 136 P.3d at 818 (Werdegar, J., dissenting) (citing *J.L.*, 529 U.S. at 273-74).

²³⁶ See *id.*

²³⁷ See *J.L.*, 529 U.S. at 273-74.

²³⁸ TAYLOR, *supra* note 2, § 1.0, at 3.

²³⁹ See *Wells*, 136 P.3d at 818 (Cal. 2006) (Werdegar, J., dissenting) (“I am not convinced the danger posed by drunk drivers is so much greater than the danger posed by young men carrying concealed firearms (as in *J.L.*) that a different standard should apply under the Fourth Amendment.”).

²⁴⁰ See *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *Adams v. Williams*, 407 U.S. 143, 146-47 (1972).

²⁴¹ See *United States v. Wheat*, 278 F.3d 722, 734 (8th Cir. 2001) (stating that the basis for the tipster's knowledge is likely to come from eyewitness observations).

drunk driver provides predictive or contemporaneous information;²⁴² and (3) the ability of technological advancements to provide caller identification, removing the anonymous aspect of the call.²⁴³ However, these conclusions gloss over factors such as the basis of the tipster's knowledge and the tipster's motivation in reporting the information.²⁴⁴

An anonymous tip from a bystander or potential eyewitness increases the reliability of the informant's basis of knowledge.²⁴⁵ If a person witnesses the event, then they will be able to recount the information first hand.²⁴⁶ However, the presumption that a person becomes an eyewitness based on their ability to identify certain features of an automobile is disingenuous.²⁴⁷ As the dissent in *Alabama v. White* pointed out, "[a]nybody with enough knowledge about a given person . . . will certainly be able to formulate a tip about her . . ." ²⁴⁸ The degree of specificity in anonymous tips reporting drunk driving varies from case to case.²⁴⁹ Courts that find anonymous tips reporting drunk driving sufficient only require that the tip include enough features to identify the automobile.²⁵⁰ Therefore, anyone who came in contact with the vehicle for a brief period of time could potentially formulate a basic-level tip, alluding to a suspected drunk driver.²⁵¹

Similarly, jurisdictions supporting the use of anonymous tips reporting drunk driving overlook the potential that a tipster could have malicious

²⁴² See *id.* at 735 (finding that an anonymous tip conveying contemporaneous observation of criminal activity supported by corroboration of the innocent details is sufficient to provide reasonable suspicion).

²⁴³ See *State v. Boyea*, 765 A.2d 862, 876-77 (Vt. 2000) (Skoglund, J., concurring) (noting the "increasing awareness of the lack of true anonymity in today's telecommunication world," and that the public is generally "well aware of the fact that it is a crime to make a false report to police").

²⁴⁴ See 4 LAFAVE, *supra* note 23, § 9.5(h), at 576-77.

²⁴⁵ See *id.* at 572.

²⁴⁶ See *Alabama v. White*, 496 U.S. 325, 332 (1990).

²⁴⁷ See *id.*

²⁴⁸ *Id.* at 333 (Stevens, J., dissenting).

²⁴⁹ Compare *State v. Boyea*, 765 A.2d 862, 863 (Vt. 2000) ("[A] Vermont state trooper received a radio dispatch of a 'blue-purple Volkswagen Jetta with New York plates, traveling south on I-89 between Exits 10 and 11'",), with *People v. Wells*, 136 P.3d 810, 811 (Cal. 2006) (describing a vehicle as "an '80's model blue van traveling northbound on Highway 99").

²⁵⁰ See *Bloomingdale v. State*, 842 A.2d 1212, 1213 (Del. 2004); *Boyea*, 765 A.2d at 863.

²⁵¹ See *Wells*, 136 P.3d at 819 (Werdegar, J., dissenting) (noting that the majority relied heavily on the assumption that the tip came from another driver even though the record contained no evidence that suggested the basis for the tipster's knowledge). "The information may have come from a vindictive ex-boyfriend sitting at his home or teenagers making a prank call." *Id.*

motivations.²⁵² In *Wheat*, the court recognized that an “account of erratic driving could be a complete work of fiction, created by some malicious prankster to cause trouble for another motorist,” but the court dismissed this concern based on the risk drunk driving posed.²⁵³ The court concluded that the risk that law enforcement or another person would fabricate a report was minimal.²⁵⁴ But, as Justice Kennedy recognized in *J.L.*, “[i]f the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity.”²⁵⁵ The presumption that the caller is a concerned citizen, who has witnessed erratic or drunk driving, eliminates the evaluation of a tipster’s credibility.²⁵⁶ If the caller provided the police with his identity and the basis for his knowledge, courts would likely allow an investigatory stop.²⁵⁷ However, courts should not presume these facts because a caller’s credibility includes his potential motive.²⁵⁸ There are a variety of motivations that a person may have to place an anonymous call reporting drunk driving: they actually witnessed the erratic driving, they are playing a prank on the driver, or they are acting maliciously hoping to entangle the driver in legal issues.²⁵⁹

Lastly, courts assessing the reliability of an anonymous call find that technological advancements may eliminate the caller’s anonymity.²⁶⁰ Although technology may identify the anonymous caller, the concern surrounding anonymous tips is not the lack of a specific name, but a lack of credibility.²⁶¹ A police affidavit that includes an informant’s assertion is, by its very definition, hearsay, requiring a neutral party to weigh the credibility of the information.²⁶² Furthermore, if an individual desired to remain anonymous, there are a number of ways an individual could evade

²⁵² See *United States v. Wheat*, 278 F.3d 722, 735 (8th Cir. 2001).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Florida v. J.L.*, 529 U.S. 266, 275 (2000) (Kennedy, J., concurring).

²⁵⁶ See *Wells*, 136 P.3d at 819 (Werdegar, J., dissenting).

²⁵⁷ See *J.L.*, 529 U.S. at 276 (Kennedy, J., concurring) (“If an informant places his anonymity at risk, a court could consider this factor in weighing the reliability . . .”).

²⁵⁸ See *Illinois v. Gates*, 462 U.S. 213, 234 (1983).

²⁵⁹ See *Wells*, 136 P.3d at 819 (Werdegar, J., dissenting); *supra* text accompanying notes 252-55.

²⁶⁰ See *J.L.*, 529 U.S. at 276 (Kennedy, J., concurring) (“Instant caller identification is widely available to police, . . . [T]he ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what . . . might have been considered unreliable anonymous tips.”); *Bloomington v. State*, 842 A.2d 1212, 1221 n.44 (Del. 2004).

²⁶¹ See *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring).

²⁶² *Jones v. United States*, 362 U.S. 257, 268-69 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 85 (1980).

caller identification technology.²⁶³

C. *An Individual Does Not Forfeit All Privacy Expectations in an Automobile.*

Finally, courts that provide reasonable suspicion based solely on an anonymous tip reporting drunk driving rely on an individual's reduced expectation of privacy in an automobile and the lesser invasiveness of the traffic stop.²⁶⁴ However, this understanding of an individual's privacy interest is flawed in two ways.²⁶⁵ First, the reduced expectation of privacy in an automobile does not remove all Fourth Amendment protections.²⁶⁶ Second, the Supreme Court recently limited an expansive search of an automobile, indicating a potential trend toward limiting Fourth Amendment automobile search exceptions.²⁶⁷

The leeway permitted in Fourth Amendment cases involving automobiles does not dispel the requirement that police must have reasonable suspicion to conduct a traffic stop.²⁶⁸ Courts have continuously

²⁶³ A tipster could use a pay phone, another person's phone, an unregistered phone, or engage "star 67" to block the use of caller identification. See The Fixer, *Beating Caller ID*, ART OF HACKING.COM, <http://www.artofhacking.com/files/BEATCID.htm> (last visited Dec. 13, 2010) (discussing how to use star 69 and payphones to beat caller identification); *Caller ID & Caller ID Blocking*, VERIZON WIRELESS.COM, http://support.vzw.com/clc/features/calling_features/caller_id.html (last visited Dec. 13, 2010) (describing the use of "star 67" to block caller identification).

²⁶⁴ See *supra* Part II.A.3.

²⁶⁵ See generally Jason Hermele, Comment, *Arizona v. Gant: Rethinking the Evidence-Gathering Justification for Search Incident to Arrest Exception, and Testing a New Approach*, 87 DENV. U. L. REV. 175, 195 (2009) (discussing the need for better treatment of an individual's privacy interest for Fourth Amendment analysis of vehicles).

²⁶⁶ See *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971) ("The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away . . .").

²⁶⁷ See *Arizona v. Gant*, 129 S. Ct. 1710, 1721 & n.8 (2009); Eric H. Stills & Erin H. Gerstenzang, *DWI: Impact of Recent U.S. Supreme Court Decisions on DUI Defense Law*, CHAMPION, Dec. 2009, at 54, 54-57 (discussing the impact of three recent Supreme Court decisions, *Melendez-Diaz v. Massachusetts*, *Herring v. United States*, and *Gant*, on DUI defense law).

²⁶⁸ See *Arizona v. Johnson*, 129 S. Ct. 781, 784, 786 (2009) (referencing *Terry* in concluding that an investigatory stop is lawful "whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation" or when police have reason to believe that "any occupant is involved in criminal activity"); cf. Chase, *supra* note 94, at 931-32.

[I]t must be recognized that the mere declaration by the Court that we have a reduced expectation of privacy in our automobiles has an undeniable cyclical effect The legal pronouncement itself affects the reasonableness of our expectations Thus, rather than measuring our expectation of privacy, the Court is determining it.

struggled with the varying degrees of invasiveness of traffic stops.²⁶⁹ Many rely on the constitutionality of sobriety checkpoints, recognized in *Sitz*, to justify the less intrusive nature of traffic stops.²⁷⁰ However, *Sitz* specifically excluded from its analysis the detention of particular motorists that “may require satisfaction of an individualized suspicion standard.”²⁷¹

In *Sitz*, the majority and dissent argued over the level of intrusiveness of an automobile stop.²⁷² The dissent found that there was an element of surprise and lack of fair notice to drivers in random stops or temporary checkpoints, therefore increasing the intrusiveness of the stop.²⁷³ The dissent noted that a motorist with advanced notice of a permanent checkpoint has the option of avoiding it entirely or at least preparing for the checkpoint.²⁷⁴ But, the majority found that the gravity of the issue outweighed the brief intrusion.²⁷⁵

Recently, in *Arizona v. Gant*, the Supreme Court recognized the “important” privacy interest at stake for an individual operating a motor vehicle.²⁷⁶ In *Gant*, the Court reconsidered and modified the expansive reading of the rule regarding automobile searches and the “search incident to arrest” Fourth Amendment exception.²⁷⁷ Previously the rule, adopted in *New York v. Belton*, allowed the police, in the course of a lawful arrest of an automobile’s occupant, to search the passenger compartment as well as any containers found within the passenger compartment—regardless of the occupant’s accessibility to the vehicle at the time of the search.²⁷⁸ In *Gant*, the police arrested the driver on an outstanding warrant for driving with a

Id.

²⁶⁹ See Mich. Dep’t of State Police v. *Sitz*, 496 U.S. 444, 451-53 (1990).

²⁷⁰ See Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Polices in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 472 (1990) (“[T]here is a genuine difference in degree-of-intrusion terms between an individual stop and a roadblock stop.”).

²⁷¹ *Sitz*, 496 U.S. at 450-51 (“We address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers. Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard.”).

²⁷² Compare *id.* at 452, with *id.* at 463 (Stevens, J., dissenting).

²⁷³ *Id.* at 463 (Stevens, J., dissenting).

²⁷⁴ *Id.*

²⁷⁵ See *id.* at 455 (majority opinion).

²⁷⁶ See *Arizona v. Gant*, 129 S. Ct. 1710, 1720 (2009).

²⁷⁷ *Id.* at 1718; Stills & Gerstenzang, *supra* note 267, at 56.

²⁷⁸ 453 U.S. 454, 460-61 (1981); see *Gant*, 129 S. Ct. at 1718 (noting that *Belton* allowed for “a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search”).

suspended license.²⁷⁹ When the police arrested the driver, the vehicle was parked and the driver was standing approximately ten feet away from it.²⁸⁰ After placing the driver in the back of a police car, the police searched the vehicle and found a gun and cocaine in a jacket located on the backseat.²⁸¹ The Supreme Court, rejecting a broad reading of *Belton*, held that the police are authorized to “search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”²⁸²

In *Gant*, the Supreme Court expressed displeasure with the lower court’s broad reading of *Belton*, which treated the “ability to search a vehicle incident to the arrest . . . as a police entitlement rather than as an exception.”²⁸³ The Court determined that the broad reading employed by many courts resulted in countless unconstitutional searches.²⁸⁴ Furthermore, the Court also found, in the context of automobile searches, that “the State seriously undervalue[d] the privacy interests at stake.”²⁸⁵ Though recognizing that an individual’s privacy interest is less substantial in a vehicle than in a home, the Court determined the “interest is nevertheless important and deserving of constitutional protection.”²⁸⁶

The *Gant* decision marks the Court’s departure from police entitlement to search a vehicle absent genuine concern for their safety or the preservation of evidence.²⁸⁷ The Court moved away from an over-inclusive bright line rule, crafted to assist law enforcement, and towards a reasonableness approach.²⁸⁸ Now under *Gant*, the police may not search a vehicle for evidence under the search-incident-to-arrest exception unless the individual is within reaching distance of the vehicle, or the police have a reasonable basis to believe that evidence relevant to the crime for which

²⁷⁹ *Gant*, 129 S. Ct. at 1714-15. While investigating a residence based on an anonymous tip reporting drug trafficking, the police discovered that Gant had an outstanding warrant for his arrest for driving with a suspended license. *Id.*

²⁸⁰ *Id.* at 1715.

²⁸¹ *Id.*

²⁸² *Id.* at 1719.

²⁸³ *Id.* at 1718 (quoting *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring in part)).

²⁸⁴ *See id.* at 1722-23.

²⁸⁵ *Gant*, 129 S. Ct. at 1720.

²⁸⁶ *Id.*

²⁸⁷ *See id.* at 1720-21 (noting that *Belton*’s bright line rule has “generated a great deal of uncertainty” and a broad reading is not necessary “to protect law enforcement safety and evidentiary interests”).

²⁸⁸ *See id.* at 1723; 1 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 2.9(g) n.157 (3d ed. Supp. 2009) (noting that even with the *Gant* limitation, some of the bright line aspect of *Belton* remains when an individual is in reaching distance of the vehicle).

they arrested the individual is located in the vehicle.²⁸⁹ Although recognizing “important” privacy interests at stake, the Court appears to still be grappling with the degree of protection afforded to this privacy interest.²⁹⁰ In developing the “reason to believe” standard, the Court highlights the ongoing struggle between Fourth Amendment protections and the government interests in the context of automobiles.²⁹¹ The Court appeared to move away from the oft-quoted “diminished privacy interest” in vehicles, but failed to clearly articulate the “important” privacy interests they were recognizing.²⁹²

D. *Anonymous Tips Reporting Drunk Driving and Independent Police Corroboration Under the Totality-of-Circumstances Test*

Anonymous tips reporting drunk driving should be evaluated under the totality of circumstances test to determine reasonable suspicion to conduct a traffic stop.²⁹³ The majority of jurisdictions that fashion a special exception based on the imminent danger of drunk driving fail to consider the multitude of techniques available to police officers to corroborate a tip.²⁹⁴ The focus should be on the level of corroboration necessary to evaluate the reliability of the tip, and not on the imminent danger posed by drunk driving.²⁹⁵ A police officer’s experience, observations, and common knowledge can provide sufficient basis to corroborate an anonymous tip reporting drunk driving.²⁹⁶

An officer may conduct a traffic stop if he has reasonable suspicion to suspect the driver is under the influence—even if the driver has not actually violated any traffic laws.²⁹⁷ Police officers employ many methods

²⁸⁹ *Gant*, 129 S. Ct. at 1723; see Timothy H. Everett, *Arizona v. Gant: The End of the Belton Rule as We Knew It*, CHAMPION, Aug. 2009, at 58, 58-59.

²⁹⁰ See *Gant*, 129 S. Ct. at 1720.

²⁹¹ See *id.* at 1720-21.

²⁹² See *id.*; Hermele, *supra* note 265, at 195 (noting that the reasonable belief standard actually does not deter warrantless vehicle searches and ensures that paths circumventing the Fourth Amendment will still be those most traveled).

²⁹³ See *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *Adams v. Williams*, 407 U.S. 143, 146 (1972).

²⁹⁴ See *supra* Part III.A.

²⁹⁵ See *Harris v. Commonwealth*, 668 S.E.2d 141, 149 (Va. 2008) (Kinser, J., dissenting).

²⁹⁶ Cf. Bryk, *supra* note 134, at 307. Although this author argues anonymous tips reporting drunk driving are alone sufficient to satisfy the totality of circumstances test, he notes that a totality of circumstances test based on police experience, observations, and common knowledge is the most logical and practical test. See *id.*

²⁹⁷ See HARVEY M. COHEN & JOSEPH B. GREEN, APPREHENDING AND PROSECUTING THE DRUNK DRIVER: A MANUAL FOR POLICE AND PROSECUTION § 3.01, at 3-4 (1992 & Supp. 2009); KWASNOSKI ET AL., *supra* note 14, § 4-1a, at 133 (noting that an officer may have reasonable suspicion based on unusual or suspicious driving).

to corroborate an anonymous tip reporting drunk driving, including their experience and expertise in dealing with drunk drivers, as well as commonly known “cues” that indicate drunk or suspicious driving.²⁹⁸ The NHTSA compiles a comprehensive list of over twenty cues and identifiers officers can use to determine if a driver is under the influence.²⁹⁹ These cues include: turning in a wide radius, straddling the center or lane marker, weaving, braking erratically, slow response to traffic signals, and stopping inappropriately (other than in a traffic lane).³⁰⁰ Similarly, the NHTSA has also recognized cues for suspicious driving including: driving slowly, drifting from side to side, or other unusual behavior.³⁰¹ Therefore, the common cues of suspicious or erratic driving, coupled with the details provided in the anonymous tip, are sufficient to provide reasonable suspicion to conduct an investigatory stop.³⁰²

In *Harris*, the Virginia Supreme Court correctly concluded that the police officer should be required to independently corroborate an anonymous tip reporting drunk driving.³⁰³ However, the court incorrectly determined that the officer’s observance of “unusual” driving was not sufficient corroboration to provide reasonable suspicion.³⁰⁴ Under both probable cause and reasonable suspicion standards, the Supreme Court considers critical an officer’s training, experience, and observations to evaluate the totality of circumstances surrounding the anonymous tip.³⁰⁵ The dissent noted this inconsistency, stating, “[t]he majority . . . ignores the principle that, when viewing the totality of the circumstances, an officer’s training and experience are proper factors for consideration in determining not only whether the less stringent test of reasonable articulable suspicion is satisfied but also whether probable cause exists.”³⁰⁶ Although an

²⁹⁸ COHEN & GREEN, *supra* note 297, § 3.01(3).

²⁹⁹ NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING STUDENT MANUAL, at V-4 to V-7 (2004).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² MADD Amicus Brief, *supra* note 125, at 17-18 (“[A] police officer can verify an anonymous tip of drunk or erratic driving by observing telltale behavior or activity short of erratic driving.”).

³⁰³ See *Harris v. Commonwealth*, 668 S.E.2d 141, 147 (Va. 2008).

³⁰⁴ *Id.*

³⁰⁵ See *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (“The principal components of a determination of reasonable suspicion or probable cause will be 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 or to probable cause.”).

³⁰⁶ *Harris*, 668 S.E.2d at 149 (Kinser, J., dissenting).

While I disagree with the majority’s view that the defendant’s driving

anonymous tip alone is not sufficient to satisfy reasonable suspicion, an officer's observation of suspicious or unusual driving could corroborate the tip and provide reasonable suspicion.³⁰⁷

CONCLUSION

Courts should address anonymous tips reporting drunk driving under the totality of circumstances test, requiring corroboration through police observations of the telltale signs of suspicious or erratic driving.³⁰⁸ Jurisdictions that find anonymous tips alone sufficient to provide reasonable suspicion have allowed a social ill to overrun Fourth Amendment protections.³⁰⁹ Although a serious social problem, drunk driving should not be considered under a "special context" of Fourth Amendment jurisprudence.³¹⁰ Although in *J.L.*, the Supreme Court left open the possibility that in situations of great danger reasonable suspicion could be satisfied by the tip alone, drunk driving should not fall within this limited exception.³¹¹ However, jurisdictions that require corroboration of an anonymous tip based on illegal driving activity severely limit law enforcement.³¹² Police officers are trained to recognize cues and signs of suspicious or erratic driving that may indicate the driver is intoxicated.³¹³

Independent corroboration of an anonymous tip reporting drunk driving does not give the drunk driver "one free swerve" since there are a multitude of factors the officer can consider when approaching a suspected drunk driver.³¹⁴ While law enforcement "should have every legitimate tool at their disposal" to combat drunk driving, there is a fine line between

was merely "unusual," even if the majority's characterization is accurate, the defendant's driving behavior, nevertheless, corroborated the informant's assertion that the defendant was driving while intoxicated. Furthermore, while the case before us involves the lesser legal standard of reasonable, articulable suspicion, "'innocent behavior' when considered in its overall context may [actually] 'provide the basis for a showing of probable cause.'"

Id. (quoting *United States v. Thomas*, 913 F.2d 1111, 1116 (4th Cir. 1990)).

³⁰⁷ See MADD Amicus Brief, *supra* note 125, at 18.

³⁰⁸ See *supra* Part III.D.

³⁰⁹ See *supra* Part III.A.

³¹⁰ See *supra* Part III.A.3.

³¹¹ See *supra* Part III.A.2.

³¹² See *supra* Part III.D.

³¹³ See *supra* notes 301-05 and accompanying text.

³¹⁴ See *Virginia v. Harris*, 130 S. Ct. 10, 12 (2009) (Roberts, C.J., dissenting from denial of cert.).

allowing all methods and a violation of Fourth Amendment rights.³¹⁵ Once an officer pulls over a suspected drunk driver, they are allowed to delve even deeper into Fourth Amendment search and seizures.³¹⁶ They are able to question an individual and observe certain drunk driving indicators, such as bloodshot or watery eyes, the smell of alcohol, and slurred speech.³¹⁷ As a result, the officer is also likely to require that the driver cooperate with breath testing and field sobriety procedures or face imprisonment if they refuse.³¹⁸ Under many state laws, if a person objects to these tests, the refusal results in the automatic suspension of a person's driver's license for a period of time.³¹⁹

Based on a totality of circumstances test, an anonymous tip reporting drunk driving provides reasonable suspicion if corroborated by police observations of the telltale signs of suspicious or erratic driving.³²⁰ Requiring police to observe suspicious or erratic—not illegal—driving may be a small distinction, but it is an important distinction.³²¹ As the Supreme Court once said, “[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.”³²² This fine distinction between suspicious and illegal driving prevents law enforcement from randomly intruding on individual rights.³²³

³¹⁵ *See id.*

³¹⁶ *See* JACOBS, *supra* note 5, at 90.

³¹⁷ *Id.* at 92.

³¹⁸ *See id.* at 90, 92.

³¹⁹ *Id.* at 90 (“[U]nder the auspices of implied-consent laws, drivers must cooperate with the breath-testing procedures or face mandatory license forfeiture.”).

³²⁰ *See supra* Part III.D.

³²¹ *People v. Wells*, 136 P.3d 810, 821 (Cal. 2006) (Werdegar, J., dissenting).

³²² *Boyd v. United States*, 116 U.S. 616, 635 (1886).

³²³ *See Wells*, 136 P.3d at 821 (Werdegar, J., dissenting).