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# One Free Swerve? Requiring Police to Corroborate Anonymous Tips in Order to Establish Reasonable Suspicion for Warrantless Seizure of Alleged Drunk Drivers

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"One Free Swerve"?: Requiring Police to Corroborate Anonymous  
Tips in Order to Establish Reasonable Suspicion for Warrantless  
Seizure of Alleged Drunk Drivers

Michael B. Kunz

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## Introduction

The Fourth Amendment mandates that citizens be free from unreasonable searches and seizures.<sup>1</sup> To this end, the Supreme Court holds that warrantless searches and seizures are presumptively unreasonable.<sup>2</sup> Despite declaring this general

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<sup>1</sup> 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.

U.S. CONST. amend. IV; see also *Elkins v. United States*, 364 U.S. 206, 222 (1960) (“[T]he Constitution forbids [] not all searches and seizures, but unreasonable searches and seizures.”); DARIEN A. MCWHIRTER, *SEARCH, SEIZURE, AND PRIVACY* 1 (1994) (suggesting that Supreme Court precedent indicates the main purpose of the Fourth Amendment is to protect citizen’s privacy and property).

<sup>2</sup> See *California v. Acevedo*, 500 U.S. 565, 580 (1991) (emphasizing that searches carried out without prior judicial approval are per se unreasonable under the Fourth Amendment); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948) (voicing that searches and seizures require either a warrant issued by a

rule, the Court has carved out exceptions that give law enforcement officials considerable flexibility with which to conduct their day-to-day criminal investigations.<sup>3</sup> One such exception to the warrant requirement is that police may stop and question an individual so long as the detaining officer has a reasonable belief that criminal activity may be taking place.<sup>4</sup> Furthermore, the Court permits this requisite reasonable suspicion to be based on information provided by third-party

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magistrate or the presence of specific, exceptional circumstances); see also United States v. Leon, 468 U.S. 897, 914 (1984) (stressing the warrant preference within the context of searches).

<sup>3</sup> See generally Jason K. Bryk, Anonymous Tips to Law Enforcement and the Fourth Amendment: Arguments for Adopting an Imminent Danger Exception and Retaining the Totality of the Circumstances Test, 13 GEO. MASON U. CIV. RTS. L.J. 277, 288-89 (2003) (listing numerous exceptions to the general warrant requirement).

<sup>4</sup> See Terry v. Ohio, 392 U.S. 1, 30 (1968) (allowing police to conduct an investigatory stop when the detaining officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . .").

sources.<sup>5</sup> This broad grant of power allows police substantial leeway to investigate potential crime.

While the Court has interpreted the Fourth Amendment to allow officers to act without a warrant and on less than probable cause, it has also identified specific limits as to the type and quality of information police may use. In Florida v. J.L.,<sup>6</sup> the Court unanimously recognized such a limit.<sup>7</sup> While acknowledging that police may use information from third parties to establish reasonable suspicion, the Court clarified that reasonable suspicion cannot be based exclusively on a bare-boned

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<sup>5</sup> See Adams v. Williams, 407 U.S. 143, 146 (1972) (permitting the use of information from a known informant who supplied the information in person and who had provided reliable information in the past); see also Alabama v. White, 496 U.S. 325, 332 (1990) (authorizing the use of an anonymous tip that lacked traditional indicia of reliability but provided substantial predictive information about its subject that police could to independently corroborate).

<sup>6</sup> 529 U.S. 266 (2000).

<sup>7</sup> See id. at 274 (stating that police may not solely rely on an anonymous tip that has no indicia of reliability).

anonymous tip.<sup>8</sup> Consequently, the Court established an evidentiary baseline for all future police detentions: in order to use third-party information as the basis for a stop or search, police must first ascertain the informant's reliability by either discovering the tipster's identity or verifying sufficient predictive information related to the alleged crime.<sup>9</sup>

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<sup>8</sup> See id. (holding that an anonymous tip lacking sufficient indicia of reliability, without more, is insufficient to justify an investigatory stop and frisk). The Court reasoned that an anonymous tip, such as the tip in J.L. that alleged a man was carrying a firearm, has none of the indicia of reliability available from a known source, nor provides any predictive information with which to verify the informant's knowledge or credibility. Id. at 268. Thus in J.L., "[a]ll the police had to go on . . . was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." Id.

<sup>9</sup> See id. at 271-72 (distinguishing the tip at issue from the one relied on in White by explaining that the information provided here could not be used to establish reliability regarding the alleged criminal activity, but rather could only help police locate and identify the accused person).



Where police cannot establish the informant's identity and the tip does not provide anything beyond readily observable information, reasonable suspicion to detain the subject of the tip can only be formed through independent investigation of the alleged criminal activity.<sup>10</sup>

Nevertheless, the Court complicated this general rule by hypothesizing that police might be able to act on a lesser showing of reliability when an anonymous tip alleges a sufficiently great danger,<sup>11</sup> but subsequently declined to expound on what circumstances would present such an extreme danger as to

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<sup>10</sup> See id. at 274 (“[W]e hold that an anonymous tip of the kind contemplated in Adams and White does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.”).

<sup>11</sup> See id. at 273–74 (“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.”). However, in discussing this possibility under the facts of J.L., the Court explicitly declined to adopt an automatic firearms exception to the reasonable suspicion analysis because it could easily be abused and would likely lead to other broad exceptions. Id. at 272.

allow for modification to the usual constitutional requirements.<sup>12</sup> Consequently, the Court left unanswered what set of facts would warrant using a bare-boned anonymous tip as the sole basis for initiating a seizure and search.<sup>13</sup>

As state and federal courts have applied the principles from J.L. to a variety of circumstances involving anonymous tips,<sup>14</sup> one particularly troublesome area has been its application to anonymous tips that allege potentially

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<sup>12</sup> See id. at 272-73 (explaining first that “extraordinary dangers sometimes justify unusual precautions” and then suggesting that certain circumstances may provide such immense dangers that regular reliability considerations would not be required).

<sup>13</sup> See id. at 273 (“The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability.”).

<sup>14</sup> E.g., United States v. Monteiro, 447 F.3d 39, 50 (1st Cir. 2006) (holding police lacked reasonable suspicion to conduct a traffic stop based on an anonymous tip about an alleged shooting where none of the allegations were independently corroborated by police).

intoxicated motorists.<sup>15</sup> Despite a nationwide effort to increase public reporting of drunk drivers,<sup>16</sup> decisions from courts across the country reveal that there is substantial disagreement as to the role these anonymous tips should play in an officer's decision to initiate a traffic stop.<sup>17</sup>

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<sup>15</sup> See Petition for a Writ of Certiorari at 18, Virginia v. Harris, 130 S. Ct. 10 (2009) (No. 08-1385) (listing cases).

<sup>16</sup> E.g., NAT'L TRANSP. SAFETY BD., CITIZEN REPORTING OF DUI—*EXTRA EYES* TO IDENTIFY IMPAIRED DRIVING 4-5 (2006), <http://www.nhtsa.dot.gov/people/injury/alcohol/extraeyes/images/3204EEReport.pdf> (outlining the adoption of citizen reporting programs nationally); NAT'L TRANSP. SAFETY BD., SAFETY STUDY: DETERRENCE OF DRUNK DRIVING: THE ROLE OF SOBRIETY CHECKPOINTS AND ADMINISTRATIVE LICENSE REVOCATIONS ¶8 (1984), <http://www.nts.gov/publicctn/1984/SS8401.htm> (last visited Feb. 20, 2009) (describing how Report Every Drunk Driver Immediately, a reporting program aimed at citizens, is increasingly being adopted at the state level).

<sup>17</sup> See Petition for a Writ of Certiorari, supra note 15, at 18 (listing cases); see also United States v. Wheat, 278 F.3d 722, 729-30 (8th Cir. 2001), cert. denied, 537 U.S. 850 (2002) (recognizing split of authority in light of J.L.); People v. Wells, 136 P.3d 810, 814 (Cal. 2006) (acknowledging split of

This issue recently gained national attention when the United States Supreme Court denied certiorari to hear Virginia v. Harris.<sup>18</sup> This case, coming from the Virginia Supreme Court,

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authority); *State v. Prendergast*, 83 P.3d 714, 720-23 (Haw. 2004) (discussing authorities on both sides of the question); *State v. Golotta*, 837 A.2d 359, 372 (N.J. 2003) (acknowledging split of authority); *State v. Boyea*, 765 A.2d 862, 864, 866 (Vt. 2000) (stating that majority of courts uphold traffic stops based on anonymous tips but recognizing dissension of the case law).

<sup>18</sup> *Virginia v. Harris*, 130 S. Ct. 10, 10 (2009) (mem.). See, e.g., Robert Barnes, *Justice Won't Review Case Involving Anonymous Tip About Suspected Drunken Driving*, THE WASHINGTON POST, Oct. 21, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/20/AR2009102001600.html> (recognizing the denial of certiorari and highlighting the dissention amongst the members of the Court in regards to what role anonymous tips of drunk driving should play in police investigations); cf. Ashby Jones, *When Gay Met John: An East Side Story*, THE WALL STREET JOURNAL, Oct. 27, 2009, <http://blogs.wsj.com/law/2009/10/27/when-gay-met-john-an-east-side-story/> (suggesting that Chief Justice Roberts's recent gift of an unfinished bottle of wine to a journalist who happened to

concerned a Driving Under the Influence (DUI) conviction that was overturned because the arresting officer stopped the defendant's vehicle solely on the basis of an anonymous tip without corroborating any suspicious behavior.<sup>19</sup> In an impassioned dissent from the denial of certiorari, Chief Justice Roberts argued that both the frequency and deadliness of drunk driving accidents might justify allowing stops of allegedly intoxicated motorists solely on the basis of a bare anonymous tip, without requiring corroboration of the tip's criminal allegations.<sup>20</sup> He contended that declining to hear Harris was effectively giving drunk drivers "one free swerve"<sup>21</sup> before

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be dining in the same restaurant may have been motivated in part by the Chief Justice's recently expressed attitudes towards drunk driving).

<sup>19</sup> Harris v. Commonwealth, 668 S.E.2d 141, 147 (Va. 2008), cert. denied, 130 U.S. 10 (2009) (mem.).

<sup>20</sup> See Virginia v. Harris, 130 S. Ct. at 11-12 (Roberts, C.J., dissenting) (acknowledging the split of authority and distinguishing tips in this context, due to the threat posed by drunk drivers).

<sup>21</sup> Id. at 12 (Roberts, C.J., dissenting).

police could initiate a stop, inevitably endangering countless lives.<sup>22</sup>

The Chief Justice's sentiments mirror many of the rationalizations relied on by the majority of states and one federal circuit that have spoken on this issue, which do not require verification of the alleged criminal activity and instead allow police to rely on an anonymous tip so long as it is sufficiently detailed with innocent information that can readily be confirmed.<sup>23</sup> Alternatively, the minority of courts

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<sup>22</sup> Id. (Roberts, C.J., dissenting).

<sup>23</sup> See Petition for a Writ of Certiorari, supra note 15, at 8 (summarizing that the majority of courts only require police promptly corroborate innocent details of a sufficiently detailed anonymous tip, such as a locating a vehicle in the area that matching the information provided by the tipster); Denise N. Trauth, Comment, Requiring Independent Police Corroboration of Anonymous Tips Reporting Drunk Drivers: How Several States Courts are Endangering the Safety of Motorists, 76 U. CIN. L. REV. 323, 323-24 (2007) ("[M]any state courts and the Court of Appeals for the Eighth Circuit have held that officers' corroborations of non-criminal details in anonymous tips reporting erratic or drunk driving can sufficiently justify investigatory stops of vehicles even if officers have not

who have spoken on this issue require officers to personally observe a motorist operating in an erratic manner before relying on an anonymous tip to conduct an investigatory traffic stop, rather than allowing the tip itself to singularly form the basis for reasonable suspicion.<sup>24</sup>

Despite the recent denial of certiorari, this issue is ripe for review and should be heard to conform this divisive issue to the correct interpretation of the law. In order to establish the reasonable suspicion necessary to initiate an investigatory

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personally observed criminal activity or traffic violations.”); see also *United States v. Wheat*, 278 F.3d 722, 734 (8th Cir. 2001) (rationalizing that police may rely on anonymous tips of erratic driving as they are presumptively more reliable since they are likely provided by eyewitnesses who are observing activity open to the public).

<sup>24</sup> See Harris v. Commonwealth, 668 S.E.2d at 147 (reversing conviction for traffic stop based exclusively on an anonymous allegation of erratic driving); *Petition for a Writ of Certiorari*, supra note 15, at 8 (describing courts that do not allow reasonable suspicion to be based entirely on an anonymous report of a potential drunk driver); see also id. at 1 (explaining the split of authority regarding anonymous tips of erratic driving to police).

traffic stop, police should be required to corroborate beyond readily observable innocent details of an anonymous tip alleging erratic driving. Considerable Supreme Court precedent related to warrantless seizures implies that police cannot rely solely on an anonymous tip alleging drunk driving if the tip provides no means to establish the informant's reliability.<sup>25</sup> Moreover, the threat posed by a potentially intoxicated motorist is inconsistent with the extraordinary danger exception suggested in Florida v. J.L.

Part I of this Comment will examine the historical development of Fourth Amendment case law as it relates to the use of anonymous tips by law enforcement. Part II will address how these precedents apply in the context of investigatory traffic stops of allegedly intoxicated motorists and will examine the reasoning of jurisdictions on either side of the issue. Part III will present an analysis of the issue and argue that police must corroborate beyond just innocent information provided by an anonymous tip of dangerous driving. Finally, Part IV will conclude by recommending that the appropriate focus should be on reducing the anonymity of anonymous reports of erratic driving, rather than constructing exceptions for such tips under the Fourth Amendment.

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<sup>25</sup> See infra Part II.



## **I. Background**

### **A. Reasonable Suspicion Under Terry v. Ohio**

The Fourth Amendment is principally concerned with protecting citizens from arbitrary and oppressive governmental encroachment to persons and property.<sup>26</sup> To this end, the Supreme Court generally requires government officials first obtain a warrant based on probable cause before seizing a citizen or searching their person or property.<sup>27</sup> Despite this general

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<sup>26</sup> See JOHN WESLEY HALL JR., SEARCH & SEIZURE 29-30, 100 (Lexis Law Publishing 2000) (1979) (describing that the Fourth Amendment is intended to protect all citizens from capricious or unjustified governmental intrusions); McWHIRTER, supra note 1, at 140 ("The Fourth Amendment was written, in the opinion of most Supreme Court justices who have been called upon to interpret it, to protect the private life of the people from unreasonable intrusions by government officials.").

<sup>27</sup> See Johnson v. United States, 333 U.S. 10, 14 (1948) ("[The Fourth Amendment's] protection consists in requiring [] inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."); INGA L. PARSONS, FOURTH AMENDMENT PRACTICE AND PROCEDURE 61 (Anthony Bocchino ed., 2005) (discussing the Warrant Clause of the Fourth Amendment).

edict, the Supreme Court has, over time, enumerated a number of exceptions to the warrant and probable cause requirements.<sup>28</sup> One such exception is reasonable suspicion—a reduced standard of suspicion that gives police authority to investigate possible criminal behavior without obtaining a warrant and on less than the probable cause needed to arrest.<sup>29</sup> Thus, it is understood

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<sup>28</sup> See generally PARSONS, supra note 27, at 8-9, 61 (listing recognized exceptions to the warrant requirement of the Fourth Amendment).

<sup>29</sup> See Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 185 (2004) (explaining that reasonable suspicion allows an officer to briefly stop a person and investigate the suspicion); Illinois v. Wardlow, 528 U.S. 119, 123-24 (2000) (describing reasonable suspicion as greater than an undeveloped hunch of criminal activity, but below probable cause); United States v. Roberts, 986 F.2d 1026, 1035 (6th Cir. 1993) (reiterating that an investigatory stop requires reasonable suspicion that the person to be stopped is involved in criminal activity, a standard less than the probable cause needed for arrest); PARSONS, supra note 27, at 5 (“Probable cause is a level of suspicion necessary to obtain a warrant or effect an arrest . . . . Where less than a full seizure is made, . . . mere reasonable

that despite the preference for warrants and probable cause, "[t]he Fourth Amendment does not force a police officer who lacks 'probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.'"<sup>30</sup>

In the landmark decision Terry v. Ohio,<sup>31</sup> the Supreme Court first announced and explained the reasonable suspicion exception.<sup>32</sup> In Terry, the Court considered a situation in which a veteran law enforcement officer observed several men acting \_\_\_\_\_ suspicion to believe that criminal activity may be afoot can warrant the intrusion.").

<sup>30</sup> 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) (quoting Adams v. Williams, 407 U.S. 143, 145-46 (1972)); see also PARSONS, supra note 27, at 19 (noting that prior to Terry, all police seizure, regardless how minor, required probable cause).

<sup>31</sup> 392 U.S. 1 (1968).

<sup>32</sup> See id. at 30 (allowing an investigative stop if an officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . .").

suspiciously, which subsequently prompted him to confront them and pat down their outer clothing for weapons.<sup>33</sup> The Court ruled these limited involuntary searches were constitutionally permissible, and further announced that police may conduct an investigatory stop and limited search for weapons where the officer reasonably suspects that criminal activity is occurring or is about to occur.<sup>34</sup>

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<sup>33</sup> Id. at 6-7. A plainclothes detective watched two men deliberately walk in front of a store window approximately twelve times and then meet up with a third individual. Id. at 6. Believing the men were preparing to commit a crime and fearing they might be armed, the detective approached them, identified himself as a police officer, and asked for their names. Id. at 6-7. Upon receiving only muttered responses, the detective turned one of the men around, patted down his outer clothes, and discovered a handgun concealed in a pocket. Id. at 7. The detective subsequently frisked the other two men, which lead him to find another firearm. Id.

<sup>34</sup> See id. at 30 (enunciating the stop and frisk doctrine, which allows a police officer to investigate his suspicions if he reasonably suspects criminal activity may be taking place, and to conduct a limited frisk for weapons if in the course of the investigation the officer reasonably fears a person may be armed

While Terry involved an investigatory stop on the street, similar investigatory stops have subsequently been upheld in the vehicle context, so long as the officer reasonably deduces that an occupant of the vehicle is engaged in criminal activity.<sup>35</sup>

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and dangerous); see also Wardlow, 528 U.S. at 123-24 (clarifying that reasonable suspicion is a lesser standard than probable cause but more than a general, unparticularized hunch); Robyn Silvermintz, Note, In the Wake of Florida v. J.L. - When Anonymous Tips Give Police Reasonable Suspicion, 19 TOURO L. REV. 741, 744-46 (2003) (summarizing Terry as carving out an exception to the probable cause requirement because it allows an officer to make reasonable inquiries and perform a limited search of outer clothing based on reasonable conclusions drawn from the officer's observations).

<sup>35</sup> See, e.g., United States v. Hensley, 469 U.S. 221, 226 (1985) (reiterating that police officers may conduct a brief, investigatory stop of a moving vehicle when the officer reasonably suspects the vehicle's occupants are engaged in criminal activity); United States v. Sharpe, 470 U.S. 675, 682 (1985) (affirming a vehicle stop based on reasonable suspicion of drug trafficking); United States v. Cortez, 449 U.S. 411, 421 (1981) (validating an investigatory vehicle stop where officers

Accordingly, an investigatory traffic stop constitutes a seizure under the Fourth Amendment just as the investigatory stop on the street was a seizure in Terry.<sup>36</sup> As a result, a brief investigatory stop of a vehicle similarly requires reasonable suspicion of criminal activity grounded in definite, objective facts.<sup>37</sup> If an officer initiates a traffic stop without

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reasonably suspected, based on the totality of the circumstances, that a vehicle contained illegal aliens).

<sup>36</sup> See Whren v. United States, 517 U.S. 806, 809-10 (1996) (articulating that an investigatory traffic stop is considered a seizure under the Fourth Amendment, even if the stop is limited in duration and purpose); Delaware v. Prouse, 440 U.S. 648, 657 (1979) (emphasizing that vehicle stops interfere with citizens' liberty because they hinder freedom of movement, are inconvenient, time-consuming and can create anxiety); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976) ("It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment."); United States v. Wheat, 278 F.3d 722, 726 (8th Cir. 2001) (recognizing that vehicle stops constitute a search and seizure under the Fourth and Fourteenth Amendments).

<sup>37</sup> See Hensley, 469 U.S. at 228 (requiring, at a minimum, reasonable suspicion that someone in the vehicle has been, or

reasonable suspicion, or if a stop is founded on an unreasonable, subjective belief of criminal activity based on otherwise lawful behavior, it will violate the Fourth Amendment.<sup>38</sup>

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currently is involved in criminal activity); *Harris v. Commonwealth*, 668 S.E.2d 141, 146 (Va. 2008) (stressing that traffic stops require reasonable suspicion based on specific, objective facts that an individual is engaged in criminal activity); *State v. Rutzinski*, 623 N.W.2d 516, 521 (Wis. 2001) (“At the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot.”); cf. *Terry*, 392 U.S. at 27 (articulating that an officer’s experience entitles him to draw specific inferences from the available facts).

<sup>38</sup> See *Harris v. Commonwealth*, 688 S.E.2d at 147 (“Lawful conduct that the officer may subjectively view as unusual is insufficient to generate a reasonable suspicion that the individual is engaged in criminal activity.”); see also *Alabama v. White*, 496 U.S. 325, 328, 330 (1990) (announcing that the determination as to whether an officer’s suspicions are

**B. The Use of Third-Party Information in Police Investigations**

In order to form the reasonable suspicion necessary to initiate an investigatory stop or search, officers can rely on sources other than their own firsthand observations, such as information provided by a third party.<sup>39</sup> Indeed, such

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reasonable for a Terry stop and frisk is done by examining the totality of circumstances, including the "content of information possessed by police and its degree of reliability"); cf. Prouse, 440 U.S. at 663 (invalidating a program in which motorists were randomly stopped under the pretext of checking for unlicensed drivers). But cf. Mich. Dep't of State Police v. Sitz, 496 US. 444, 455 (1990) (permitting the use of sobriety checkpoints to stop motorists without regard to particularized suspicions of criminal activity). Note, however, that the Court had previously emphasized that checkpoints are substantially less intrusive than a roving patrol stop. See Martinez-Fuerte, 428 U.S. at 558-59.

<sup>39</sup> See Adams v. Williams, 407 U.S. 143, 146 (1972) (allowing police action on the basis of information from a known informant with established credibility).



information can even be provided by an anonymous informant.<sup>40</sup> But while police may use an informant's tip to focus their independent investigation, such information cannot be the sole basis of suspicion without first demonstrating, via the totality of the circumstances, that it comports with the Fourth Amendment.<sup>41</sup>

When a known informant provides the information, the tip alone will often justify an investigatory stop and search.<sup>42</sup> In

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<sup>40</sup> See *Illinois v. Gates*, 462 U.S. 213, 243 (1983) (utilizing a totality of the circumstances test to establish probable cause from on an anonymous note that alleged criminal activity because it contained detailed information about future actions and police were able to independently corroborate most of the note's allegations).

<sup>41</sup> See id. at 238 (offering the test as one in which, "given all the circumstances . . . including the 'veracity and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

<sup>42</sup> See PARSONS, supra note 27, at 32 (noting that a tip from someone who has previously provided accurate information will almost always survive judicial scrutiny).

Adams v. Williams,<sup>43</sup> the Supreme Court held a police officer was sufficiently justified in acting on the basis of a known informant's unverified tip.<sup>44</sup> In making this determination, the Court stated that the unverified tip had sufficient indicia of reliability to justify an investigatory stop because the officer received the tip in person from a known informant who had established his credibility by providing accurate information in the past.<sup>45</sup> Conversely, when the source of information provided to police is anonymous, something more is required before police can initiate a seizure.<sup>46</sup>

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<sup>43</sup> 407 U.S. 143 (1972).

<sup>44</sup> See id. at 146 (finding a officer's reliance on a known informant's tip justified where the informant provided the information in person and had been known to provided reliable information in the past).

<sup>45</sup> See id. at 146-47 (characterizing a known informant's tip as having sufficient indicia of reliability to merit a Terry stop, even if it fell short of level required for an arrest or warrant).

<sup>46</sup> See Alabama v. White, 496 U.S. 325, 329 (1990) (asserting an anonymous tip contains no indicia of reliability, and therefore requires something beyond the tip's allegations if it is to be used by police); Gates, 462 U.S. at 244 (requiring independent

When information is provided to police anonymously, the tip itself may not demonstrate the informant's veracity or basis of knowledge, and therefore cannot be used for a Terry stop or search without further police action.<sup>47</sup> However, in Illinois v. Gates,<sup>48</sup> a case in which police anonymously received a message with detailed allegations of present and future criminal acts, \_\_\_\_\_ police corroboration of allegations contained in an anonymous note).

<sup>47</sup> See White, 496 U.S. at 329 (noting that an anonymous tip did not contain a foundation with which to establish sufficient indicia of reliability); see also HALL JR., supra note 26, at 138 (addressing generally the difficulty of meeting the dual prongs of veracity and basis of knowledge with informant hearsay); PARSONS, supra note 27, at 33 ("Anonymous tips are the bottom of the food chain when it comes to reliability of information. Most troublesome for judges is the fact that the tipster, by not identifying himself, is not subjected to any penalties if the information turns out to be false."); 68 AM. JUR. 2D Searches and Seizures § 126 (2009) (noting that information from a reliable informant can form the basis of probable cause, while information from an informant whose reliability is unknown may need to be independently corroborated).

<sup>48</sup> 462 U.S. 213 (1983).

the Court announced that the traditional indicia of reliability, veracity and basis of knowledge, should be considered as part of the larger totality of the circumstances.<sup>49</sup> Therefore, by independently corroborating major elements of the note police were able to indirectly infer that the anonymous informant possessed inside information, permitting them to proceed with a search of the areas described in the note despite the author's anonymity.<sup>50</sup>

Similarly, the Court has allowed law enforcement to rely on an anonymous tip containing none of the traditional indicia of reliability when officers independently corroborate predictive information from the tip.<sup>51</sup> In Alabama v. White,<sup>52</sup> police researched an anonymous tip's allegations of future acts and established the accuracy of the predictive information sufficient for the officers to reasonably conclude that the informant possessed inside information about the subject of the

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<sup>49</sup> Id. at 225.

<sup>50</sup> Id. at 244-45.

<sup>51</sup> See White, 496 U.S. at 332 (allowing an inference that an anonymous informant had a special familiarity with the subject of their tip once predictive future information within the tip was independently verified by police).

<sup>52</sup> 496 U.S. 325 (1990).

tip.<sup>53</sup> Thus, while the Court labeled the decision a “close call,”<sup>54</sup> it declared that under the totality of the circumstances the corroborated tip provided sufficient reasonable suspicion to warrant an investigatory stop.<sup>55</sup>

**C. Florida v. J.L.: Rejecting the Bare-boned Anonymous Tip as Grounds for Reasonable Suspicion**

By allowing law enforcement to infer reliability of an anonymous tip by independently corroborating its content, the Court broadened the spectrum of information that could be used to create reasonable suspicion but failed to clarify what type of corroboration was permissible.<sup>56</sup> However, in Florida v. J.L.,

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<sup>53</sup> See id. at 332 (“[U]nder the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop . . .”).

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> See Silvermintz, supra note 34, at 750-51 (noting that White’s failure to provide a standard for what constitutes adequate corroboration led lower courts to different interpretations). See generally York, supra note 30, at 180-83 (collecting cases of lower courts that relied on White to find reasonable suspicion based on anonymous tips regarding firearms or erratic

the Court established a baseline for police reliance on third-party information.<sup>57</sup> In an opinion authored by Justice Ginsburg, the Court stated that where an anonymous tip is

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driving where police only corroborated innocent details of the tips).

<sup>57</sup> Terry said "yes" to lowering the probable cause standard to reasonable suspicion for police officers making an investigatory stop. Adams said "yes" to the 'indicia of reliability' requirement on a tip made by a known informant. White said "yes" when the police sufficiently corroborated an anonymous tip with predictive information. J.L. just said "no" to bare-boned anonymous tips.

See Ernest Bates, Note, Search and Seizure—Anonymous Tips Lack Sufficient Reliability to Establish Reasonable Suspicion for Investigatory Stop-and-Frisks, 31 CUMB. L. REV. 803, 811 (2001) (summarizing the Court's "endpoint" in police discretion) (citations omitted); 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 (2005) (positing that J.L. establishes an "evidentiary floor" for searches and seizures allowed under Terry, and as such, provides a bright line rule regarding anonymous telephone tips).

bare-boned—in that it contains none of the traditional indicia of reliability and consists of only readily apparent information—police cannot infer the tipster’s reliability by only corroborating the innocent, readily apparent details from that tip.<sup>58</sup>

In Florida v. J.L., police received an anonymous phone call alleging that a “young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.”<sup>59</sup> Officers responded to the location and found three black males, one of which was wearing a plaid shirt, but neither saw a weapon nor witnessed any suspicious behavior.<sup>60</sup> Therefore, aside from the allegation in the anonymous tip, the officers had no basis to conduct an investigatory stop and frisk.<sup>61</sup> In spite of this

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<sup>58</sup> See Florida v. J.L., 529 U.S. 266, 271 (2000) (recognizing that an anonymous tip containing no predictive information gives police no means to test the tipster’s basis of knowledge or reliability).

<sup>59</sup> Id. at 268.

<sup>60</sup> Id.

<sup>61</sup> See id. (noting the officers had no independent basis to believe any of the three black men at the bus stop were involved in a criminal act).

shortcoming, the officers frisked the men and seized an illegal firearm discovered in J.L.'s pocket.<sup>62</sup>

The Supreme Court rejected the subsequent conviction by unanimously declaring that an anonymous tip that offers no indicia of reliability or other means to assess the informant's credibility is insufficient to establish reasonable suspicion to conduct a stop and frisk.<sup>63</sup> Anonymous tips inherently have a low degree of reliability and do not offer a straightforward means to test either their allegations or their source.<sup>64</sup> For that reason, the Court noted that in order to assess the tipster's

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<sup>62</sup> Id. J.L. was subsequently charged with possessing a firearm while under the age of 18 and for carrying an unlicensed, concealed firearm. Id. at 269.

<sup>63</sup> See id. at 274 (2000) (establishing that an anonymous tip that provides no means to assess either the informant's basis of knowledge or veracity cannot be used to initiate an Terry stop and frisk, at least where the tip involves an allegation of a firearm).

<sup>64</sup> See id. at 270 (quoting White, 496 U.S. 325, 329) ("Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'").



credibility, police must sufficiently corroborate the allegations in an anonymous tip.<sup>65</sup> However, unlike in White, the Court further clarified that corroboration cannot be accomplished solely through readily observable innocent information, but must instead relate to the alleged criminal acts.<sup>66</sup> In doing so, the Court distinguished the bare-boned anonymous tip in J.L. from the tip in White and stressed that the independent corroboration used to infer inside information in White only gave that tip a “moderate indicia of reliability.”<sup>67</sup> Thus, the Court emphasized that “[i]f White was

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<sup>65</sup> See id. at 271 (stating that anonymous tips require corroboration with information from another source).

<sup>66</sup> See id. (stating that readily observable information only helps police locate the person the informant means to accuse, rather than demonstrate that the informant possesses inside information); R. Jason Richards, Using Anonymous Informants to Establish Reasonable Suspicion for a Stop, 32 COLO. LAW. 61, 62 (2003) (observing that while the police in J.L. corroboration the description from the anonymous tip, the tip was of limited usefulness because it provided no predictive knowledge from which to judge the informant’s knowledge or credibility).

<sup>67</sup> See J.L., 529 U.S. at 271 (emphasizing that independent corroboration showing an anonymous tipster has some knowledge of

a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.”<sup>68</sup>

Justice Kennedy, while “join[ing] the opinion in all respects,”<sup>69</sup> issued a separate concurrence to propose that there may be other means to either establish the reliability or narrow the anonymity of otherwise anonymous informants.<sup>70</sup> Justice Kennedy first agreed that where an informant is completely anonymous, as was the case in J.L., the tipster is able to “lie with impunity”<sup>71</sup> because there is no way to assess the

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a person’s future actions does not necessarily suggest the tipster knows about all of the person’s affairs). The court expressly considered White a “close case” because the only indicia of reliability was an inference of inside information; an indicia absent in the tip in J.L. See id.

<sup>68</sup> Id. (distinguishing White’s moderate indicia of reliability from the total absence of indicia of reliability in J.L.).

<sup>69</sup> Id. at 274 (Kennedy, J., concurring).

<sup>70</sup> See id. at 275 (Kennedy, J., concurring) (proposing that tips that are anonymous in some aspects may also have elements with which to assess the informant’s reliability).

<sup>71</sup> Id. (Kennedy, J., concurring).

informant's credibility.<sup>72</sup> However, he theorized that the circumstances surrounding anonymous calls to police often have other features that might be used to objectively assess an

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<sup>72</sup> See id. (Kennedy, J., concurring) (suggesting that where a court cannot assess an anonymous informant's credibility, the chance that the informant may be lying becomes unacceptable); cf. Rex R. Anderegg, Cell Phone Tips of Crime and 'Reasonable Suspicion', 78 WIS. LAW. 12 (2005) (suggesting that when an informant is not completely anonymous, he risks potential criminal penalties for making false reports, which should weigh in favor of the informant's reliability). Along this same line, Justice Kennedy indicates that if an informant provides information in a way that places his anonymity at risk, such as providing the tip in-person, this should be viewed as presumptively more reliable. See J.L., 529 U.S. at 276 (Kennedy, J., concurring); Wilson, supra note 57, at 218 (summarizing that lower courts generally hold in-person anonymous tips as more reliable than anonymous tips over the telephone); see also id. at 221-22 (arguing in-person tips allow for establishing credibility, demeanor, knowledge basis, and identity of the tipster).

informant's reliability.<sup>73</sup> Justice Kennedy's concurrence implies that if the desired end is to be able to rely on anonymous tips, the proper focus might be on reducing the anonymity of those tips rather than attempting to dilute the requirements of the Fourth Amendment.

Following the majority opinion's explanation that corroboration of innocent information from a bare-boned anonymous tip is insufficient to justify police action, the Court also declined to recognize that firearms posed such an

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<sup>73</sup> See J.L., 529 U.S. at 275 (Kennedy, J., concurring)

(suggesting police can overcome a bare-boned anonymous tip by establishing its reliability or identifying the tipster through other means, such as instant caller identification, voice recording, routine documentation of calls, or judging the accuracy of consecutive anonymous calls from the same source); see also Amanda Lisenby, Note, Informant Reliability Under the Fourth Amendment in Florida v. J.L., 28 N. Ky. L. REV. 172, 183 (2000) (arguing police should be required to make reasonable attempts to establish a caller's identity and suggesting that the cost that there may be fewer informants due to a fear of identification would be substantially outweighed by a greater guarantee that officers will conduct reasonable searches based on informants' tips).

inherent danger as to justify an automatic exception to the reliability analysis.<sup>74</sup> Specifically, the Court reasoned that to allow reasonable suspicion to be automatically established whenever an anonymous tip alleged the presence of a firearm would invite abuse by those looking to subject other persons to the invasive process of a police seizure and search.<sup>75</sup>

Additionally, the Court expressed concern that such an exception for firearms would inevitably be used to justify exceptions in other closely related areas—such as tips about illegal drug

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<sup>74</sup> See J.L., 529 U.S. at 272 (rejecting a firearms exception to the reasonable suspicion requirement for an investigatory stop because it could too easily be abused and would be too difficult to confine to just firearms).

<sup>75</sup> See id. (asserting that a firearms exception would enable anyone to subject another to a mandatory police detention and search simply by anonymously alleging that person had an illegal firearm); see also *United States v. Walker*, 7 F.3d 26, 31 (2d. Cir. 1993) (Kearse, J., dissenting) (voicing concern that an anonymous call to police containing a physical description and criminal allegation, but little predictive information, may actually have been placed in order to harass its subject, a morbidly obese man).

activity—which would unreasonably erode the foundations of the Fourth Amendment.<sup>76</sup>

While choosing not to recognize a firearms exception, the Justices nevertheless explicitly did not foreclose the idea that particular circumstances might exist where an otherwise insufficient anonymous tip could justify an investigatory stop.<sup>77</sup> To illustrate this possibility, the Court stated, “[w]e 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.”<sup>78</sup> Thus, while the Court hinted that an anonymous tip could potentially allege such an extreme danger as

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<sup>76</sup> See J.L., 529 U.S. at 273 (disallowing a firearms exception and stating that “the Fourth Amendment is not so easily satisfied”); Anderegg, supra note 72, at 14 (quoting J.L., 529 U.S. at 273) (“The Supreme Court flatly rejected the request [of a firearms exception] on the ground that creating such an exception would lead to a slippery slope of additional exceptions, ‘thus allowing the exception[s] to swallow the rule.’”).

<sup>77</sup> See J.L., 529 U.S. at 273 (identifying, in dicta, that an extreme danger exception might exist for anonymous tips).

<sup>78</sup> Id. at 273–74.

to forgo the usual reliability requirement, the Justices specifically chose not to elaborate since the facts of the case were not applicable to such an exception.<sup>79</sup> Consequently, a number of lower courts have relied on this bald proposition to distinguish bare-boned anonymous tips about drunk driving in order to bypass J.L.'s holding and be used to justify investigatory traffic stop where police corroborate innocent, readily identifiable details of the tip.<sup>80</sup>

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<sup>79</sup> See id. at 273 (noting that an extreme danger exception might exist, but choosing not to speculate on the exception within the confines of the case). "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 id. at 273-74.

<sup>80</sup> E.g., United States v. Wheat, 278 F.3d 722, 724 (8th Cir. 2001) (upholding a traffic stop based on an anonymous allegation of dangerous driving, even though the detaining officer did not witness any erratic or unusual behavior); see Brief of Mothers Against Drunk Driving as Amicus Curiae in Support of Petitioner at 13, Virginia v. Harris, 130 S. Ct. 10 (2009) (No. 08-1385) (arguing that in the majority of cases, "all that is required is

## II. Judicial Differences of Opinion About Anonymous Tips of Possible Intoxicated Motorists

There is a clear division of opinion in jurisdictions that have considered what role anonymous tips alleging potentially intoxicated motorist should play in police investigations.<sup>81</sup> Several state courts and one federal circuit court have held that an anonymous call to police about an erratic driver is sufficiently distinct from the anonymous report of a concealed firearm in J.L. to justify police action.<sup>82</sup> In general, these

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a temporally proximate corroboration that a defendant's car matches the one described in the anonymous tip.").

<sup>81</sup> Compare Wheat, 278 F.3d at 737 (permitting investigatory stop based on an anonymous tip where officer verified easily observable innocent details), with Harris v. Commonwealth, 668 S.E.2d 141, 147 (Va. 2008) (rejecting an investigatory traffic stop based on an anonymous tip where officer did not witness reasonably suspicious driving).

<sup>82</sup> See, e.g., Wheat, 278 F.3d at 737 (upholding stop based on anonymous tip of erratic driving where officer corroborated most innocent details of the tip); Bloomingdale v. State, 842 A.2d 1212, 1221 (Del. 2004) (upholding stop based on anonymous call about erratic driving that provided the make, model, color, license plate number and travel route of vehicle, as well as



courts differentiate anonymous tips about dangerous driving in three aspects, thereby justifying their use as the sole basis for an investigatory stop.<sup>83</sup> Conversely, other courts that have

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race of the driver, where the officer corroborated only innocent details); *State v. Prendergast*, 83 P.3d 714, 724 (Haw. 2004) (allowing stop based on anonymous tip of dangerous driving that listed the vehicle's make, model, and license plate number, despite that the officer did not witness any erratic driving); *State v. Crawford*, 67 P.3d 115, 120 (Kan. 2003) (upholding stop based on anonymous call that a Dodge pickup truck with Oklahoma plates on a specific road was driving recklessly); *State v. Walshire*, 634 N.W.2d 625, 629 (Iowa 2001) (affirming stop by distinguishing anonymous tips about erratic driving from other contexts and noting the threat posed by intoxicated motorists); *State v. Contreras*, 79 P.3d 1111, 1117 (N.M. Ct. App. 2003) (permitting a stop based on an anonymous tip due to the amount of danger posed by a possibly drunk driver and because the caller was believed to have contemporaneously observed the erratic driving). See generally *Petition for a Writ of Certiorari*, supra note 15, at 18 (listing cases).

<sup>83</sup> See, e.g., *Virginia v. Harris*, 130 S. Ct. 10, 11-12 (2009) (mem.) (Roberts, C.J., dissenting) (noting that courts that have upheld such investigative traffic stops distinguish J.L. by

considered the issue reason that a bare-boned anonymous tip about erratic driving lacks sufficient reliability to be treated, without corroboration of the criminal allegations, as anything more than an investigatory tool.<sup>84</sup> Moreover, these

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arguing that intoxicated drivers pose a greater imminent danger; anonymous tips are likely from eyewitnesses observing a criminal act in public, which instills higher reliability; and traffic stops are less invasive and involve a lesser expectation of privacy than similar in-person stops); see also Trauth, supra note 23, at 340-42 (proffering that anonymous tips of erratic driving can be distinguished from those relating to guns because erratic driving is not a concealed crime and can be publically observed; the mobile nature of cars suggests the abuse considered in J.L. is less likely; erratic driving poses a imminent threat to public safety; and the level of intrusion in a traffic stop is temporary, brief, and public).

<sup>84</sup> See Harris v. Commonwealth, 668 S.E.2d at 147 (invalidating traffic stop based on an anonymous tip with no corroboration of alleged dangerous driving); McChesney v. State, 988 P.2d 1071, 1077 (Wyo. 1999) (holding traffic stop illegal where officer did not personally observe the alleged erratic driving); State v. Lee, 938 P.2d 637, 638-40 (Mont. 1997) (stating that anonymous caller did not indicate whether his allegations were based on

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personal observation); *State v. Miller*, 510 N.W.2d 638, 640-45 (N.D. 1994) (rejecting stop based on bare-boned anonymous tip that was uncorroborated by police); *Washington v. State*, 740 N.E.2d 1241, 1243-46 (Ind. Ct. App. 2001) (holding that traffic stop was not justified where officer did not witness erratic driving or corroborate predictions of future behavior from an anonymous caller); *State v. Boyle*, 793 So. 2d 1281, 1284-85 (La. Ct. App. 2001) (finding stop based on anonymous tip unconstitutional because officers did not witness any erratic driving); *Commonwealth v. Lubiejewski*, 729 N.E.2d 288, 291 (Mass. App. Ct. 2000) (stating corroboration of only readily observable details is insufficient to establish reasonable suspicion); see also *Wheat*, 278 F.3d at 734 (proposing that predictive aspects of an anonymous tip may be less applicable where the tip "describes contemporaneous, readily observable criminal actions, as in the case of erratic driving witnessed by another motorist"). The court further argues that since most erratic driving tips are provided by eyewitnesses, there is no need to demonstrate the anonymous caller possesses inside information. Id.

jurisdictions have found that the threat posed by drunk driving does not warrant an exception to the ordinary reliability requirement.<sup>85</sup>

**A. Majority Approach: Courts That Require Corroboration of Only Readily Apparent Details from an Anonymous Tip of Erratic Driving**

First, courts upholding traffic stops based solely on an anonymous call about erratic driving reason that such a tip is presumptively more reliable than a similar call about a firearm due to the likelihood that the tipster is contemporaneously observing a public activity.<sup>86</sup> As emphasized by the Supreme

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<sup>85</sup> See, e.g., Harris v. Commonwealth, 668 S.E.2d at 147 (rejecting traffic stop based entirely on an anonymous tip, despite the motorist being subsequently found to be legally intoxicated, because the detaining officer did not corroborate the alleged erratic driving).

<sup>86</sup> See, e.g., State v. Walshire, 634 N.W.2d 625, 627-28 (Iowa 2001) (distinguishing anonymous allegations of concealed criminal activity from criminal activity conducted in public, and further reasoning that the caller demonstrated his basis of knowledge by witnessing the publically-committed act); see also Wheat, 278 F.3d at 734 (proposing that predictive aspects of an anonymous tip may be less applicable where the tip “describes

Court of Vermont, “[w]hat is described in these drunk or dangerous driving reports is a crime in progress, carried out in public, identifiable and observable by anyone in sight of its commission.”<sup>87</sup> Therefore, rather than requiring corroboration of predictive facts to establish reliability, these courts hold that an informant is presumptively reliable so long as they allege to contemporaneously witness the erratic driving.<sup>88</sup> These

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contemporaneous, readily observable criminal actions, as in the case of erratic driving witnessed by another motorist”). The court further argues that since most erratic driving tips are provided by eyewitnesses, there is no need to demonstrate the anonymous caller possesses inside information. See id.

<sup>87</sup> State v. Boyea, 765 A.2d 862, 875 (Vt. 2000) (Skoglund, J., concurring).

<sup>88</sup> See Bloomingdale v. State, 842 A.2d 1212, 1220-21 (Del. 2004) (assuming tips alleging erratic driving are more reliable because providing a detailed description of a passing car would be difficult unless the tipster was concurrently observing the vehicle); State v. Prendergast, 83 P.3d 714, 723 (Haw. 2004) (announcing that unlike the basis of knowledge of the informant in J.L., the basis of knowledge of the anonymous tipster who informed police about an erratic driver is clear); State v. Walshire, 634 N.W.2d 625, 627-28 (Iowa 2001) (concluding that

courts generally allow an anonymous tip to justify an investigatory stop when the caller describes a vehicle in sufficient detail and the responding officer locates a vehicle matching that description within a short timeframe.<sup>89</sup>

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anonymous tips reporting concealed criminal activity are sufficiently different from tips alleging criminal activity conducted in public and noting the tipster's basis of knowledge was established by purporting to be an eyewitness); York, supra note 30, at 189-90 (articulating that these courts generally do not require verifying a tipster's inside knowledge for crimes open to the public, and instead rely on contemporaneous accounts to establish an informant's reliability).

<sup>89</sup> See, e.g., Wheat, 278 F.3d at 731-32 (utilizing three factors to determine validity of a traffic stop based on an anonymous tip of erratic driving: (1) quantity of information provided about the vehicle, (2) span of time between receiving the tip and locating the vehicle, and (3) a suggestion that the informant personally observed the erratic driving); Bloomingtondale, 842 A.2d at 1221 (articulating that an anonymous tip of erratic driving is presumptively more reliable where the tipster provides a detailed description of the vehicle and an "officer[] corroborat[es] the descriptive features of the vehicle and the location of its travel in close temporal

Second, these courts hold that the threat posed by a potentially drunk driver is substantially greater and more exigent than the dangers associated with an anonymous tip about a firearm, thereby justifying police action under the extraordinary danger exception suggested in J.L.<sup>90</sup> These

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proximity to when the report was made"); *State v. Sousa*, 855 A.2d 1284, 1290 (N.H. 2004) (announcing that whether an anonymous tip creates reasonable suspicion for a traffic stop depends on whether the tipster purports to be an eyewitness, the level of detail of the tip, and the amount of time between receipt of the tip and location of a matching vehicle); *York*, supra note 30, at 187-88 (detailing various courts' information and time requirements).

<sup>90</sup> E.g., *United States v. Elston*, 479 F.3d 314, 315-19 (4th Cir. 2007) (upholding stop based on a detailed anonymous tip alleging an imminent threat to public safety); *People v. Wells*, 136 P.3d 810, 813 (Cal. 2006) (asserting the risk posed by a potentially intoxicated driver established reasonable suspicion); *Boyea*, 765 A.2d at 867 (reasoning 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"); see also *York*, supra note 30, at 193-95 (distinguishing between anonymous tips regarding driving and

jurisdictions reiterate the sentiments of the Supreme Court of Vermont, which differentiated an anonymous call about erratic driving from one involving a firearm and likened the threat posed by a drunk driver as akin to a ticking time bomb:

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. In the case of a concealed gun, the possession itself might be legal, and the police could, in any event, surreptitiously observe the individual for a reasonable period of time without running the risk of death or injury with every passing moment. An officer in pursuit of a reportedly drunk driver on a freeway does not enjoy such a luxury. Indeed, a drunk driver

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firearms by noting that erratic driving is a publically observable crime that does not require familiarity with the subject and poses a substantial imminent danger); cf. Commonwealth v. Hurd, 557 N.E.2d 72, 72-73 (Mass. App. Ct. 1990) (allowing anonymous tip where allegedly erratic driver was said to have three children in the car, which presented an emergency situation).



is not at all unlike a "bomb," and a mobile one at that.<sup>91</sup>

Furthermore, proponents of this position stress that an anonymous tip about a motorist—unlike one involving a firearm—cannot lead to a consensual encounter.<sup>92</sup> These courts reason

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<sup>91</sup> Boyea, 765 A.2d at 867 (Vt. 2000).

<sup>92</sup> See Wheat, 278 F.3d at 736 (suggesting that a consensual encounter is an option in an allegation regarding a firearm, but not where the allegation involves reckless driving); cf. York, supra note 30, at 195 (highlighting that even if the danger presented by an intoxicated motorist is no greater than that posed by a firearm, police have comparatively fewer investigation alternatives for suspected drunk drivers). See generally Florida v. Bostick, 501 U.S.429, 434–35 (1991) (explaining that police may engage and make requests of individuals without have any basis for suspicion, where the individual consents to the encounter). Proponents of this position note that when police cannot initiate a consensual encounter and are required police to wait until they personally observe erratic behavior, it leads to one of three possible scenarios: "the suspect drives without incident for several miles; the suspect drifts harmlessly onto the shoulder, providing corroboration of the tip and probable cause for an

that because police do not have this investigatory option, requiring officers to wait to intervene until after they personally observe erratic behavior creates an unreasonably dangerous situation, since the longer the accused vehicle is mobile the greater the probability that it will cause an accident.<sup>93</sup>

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arrest; or the suspect veers into oncoming traffic, or fails to stop at a light, or otherwise causes a sudden and potentially devastating accident.” Wheat, 278 F.3d at 736-37.

<sup>93</sup> See State v. Crawford, 67 P.3d 115, 118 (Kan. 2003) (“A motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible.”) (citations omitted); Petition for a Writ of Certiorari, supra note 15, at 24 (arguing the “calculus is different” for anonymous tips alleging drunk driver, in that the longer officer waits before intercepting an allegedly intoxicated motorist, the greater the likelihood of danger). Alternately, some suggest that the exigent circumstances exception to the warrant requirement could plausibly be extended to include the danger posed by an allegation of a possibly drunk motorist. See Bryk, supra note 3, at 296-97.

Finally, a number of courts excuse anonymous tips that allege erratic driving under the rationale that a vehicle search has a lower expectation of privacy and is inherently less intrusive than a similar seizure and search of a person on the street.<sup>94</sup> The Supreme Court of Vermont exemplified this reasoning in State v. Boyea<sup>95</sup> by upholding a DUI conviction in part by explaining that unlike an in-person stop and frisk, an investigatory traffic stop is “a temporary and brief detention

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<sup>94</sup> See, e.g., Colorado v. Bertine, 479 U.S. 367, 372 (1987) (acknowledging the reduced reasonable expectation of privacy in an automobile); Wheat, 278 F.3d at 737 (noting investigatory traffic stops are less invasive than an investigatory stop and frisk conducted in person on a public street); Trauth, supra note 23, at 331 (quoting Boyea, 765 A.2d at 868) (characterizing the liberty interest involved in a traffic stop as weaker than the “hands-on violation of the person” in J.L.).

<sup>95</sup> 765 A.2d 862, 868 (Vt. 2000). In Boyea, an officer received an anonymous report that a blue/purple Volkswagen Jetta with New York license plates was being driven erratically on a certain section of Interstate 89. Id. at 863. Within five minutes, the officer found a vehicle matching the description and initiated a traffic stop based on the tip, which subsequently led to Boyea’s arrest for DUI. Id.

that is exposed to public view,"<sup>96</sup> which creates less interference with a citizen's liberty interest.<sup>97</sup>

The Court of Appeals for the Eighth Circuit, which is the only federal court to decide on this issue, relied on all three of these justifications in United States v. Wheat<sup>98</sup> to uphold a stop based on an anonymous tip without police corroboration.<sup>99</sup> An anonymous caller notified police that a tan or cream-colored Nissan Stanza bearing a license plate containing the letters W-O-C was passing on the wrong side of the road, cutting off

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<sup>96</sup> Id. at 868 (citation omitted).

<sup>97</sup> See id. (validating a traffic stop based on an anonymous tip by asserting that the liberty interest at stake is qualitatively lower than in a hands-on search and seizure); see also Wheat, 278 F.3d at 734 (announcing that an investigatory traffic stop is "considerably less invasive, both physically and psychologically, than the frisk on a public corner that was at issue in J.L."); Trauth, supra note 23, at 342 (characterizing traffic stops as having a lower level of intrusion because they are temporary and exposed to the public).

<sup>98</sup> 278 F.3d 722 (8th Cir. 2001).

<sup>99</sup> See id. at 737 (determining a traffic stop based on a call from an anonymous motorist was reasonable under the totality of the circumstances).

other motorists, and "otherwise being driven as if by a 'complete maniac.'"<sup>100</sup> Shortly thereafter, a patrolling officer saw a vehicle that matched the caller's physical description and immediately stopped the motorist without observing any irregular or dangerous behavior, which lead to the subsequent arrest of both the vehicle's driver and passenger for possession of a controlled substance.<sup>101</sup> In upholding the stop, the court first dismissed the need for predictive information in an anonymous tip where the informant is describing a contemporaneous, readily observable crime.<sup>102</sup> The court then justified the stop by noting that since a traffic stop involves a lesser invasion than a traditional stop and frisk, a motorist's right to be free of unreasonable government incursion is outweighed by the imminent

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<sup>100</sup> Id. at 724.

<sup>101</sup> Id. at 724-25. While the anonymous caller reported a Nissan Stanza, Wheat's vehicle was a tan Nissan Maxima with a license plate beginning with the letters W-O-C. Id. at 724.

<sup>102</sup> See id. at 735 ("We think that an anonymous tip conveying a contemporaneous observation of criminal activity whose innocent details are corroborated is at least as credible as the one in White, where future criminal activity was predicted, but only innocent details were corroborated.").

threat posed by drunk drivers and the limited investigative options available to police.<sup>103</sup>

**B. Minority Approach: Courts That Require Independent Corroboration of Non-Innocent Details from an Anonymous Tip of Erratic Driving**

While the majority of courts that have addressed the issue allow investigatory traffic stops where an officer corroborates readily observable details of an anonymous tip about an erratic driver, other courts hold that that an anonymous tip, by itself, does not have sufficient indicia of reliability to justify a stop.<sup>104</sup> Largely, these jurisdictions rely closely on the

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<sup>103</sup> See id. at 736-37 (arguing that traffic stop based on an anonymous allegation of an intoxicated driver is substantially different from a Terry stop and frisk where the anonymous tip is about a firearm).

<sup>104</sup> See Harris v. Commonwealth, 668 S.E.2d 141, 147 (Va. 2008) (vacating conviction where traffic stop was based only on an anonymous tip with no corroboration of criminality); McChesney v. State, 988 P.2d 1071, 1077 (Wyo. 1999) (holding no reasonable suspicion where officer did not personally witness alleged erratic driving); State v. Miller, 510 N.W.2d 638, 640-45 (N.D. 1994) (holding the anonymous tip was "short on reliability, . . . short on specifics," and uncorroborated by police

Supreme Court's reasoning in J.L., and similarly do not view the danger presented by a potentially intoxicated motorist as justifying an exception to the reliability requirement.<sup>105</sup>

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observation); *Washington v. State*, 740 N.E.2d 1241, 1243-46 (Ind. Ct. App. 2001) (holding stop based on anonymous tip invalid where officer tailed vehicle for two miles without witnessing erratic driving, nor corroborated predictions of future behavior); *State v. Boyle*, 793 So. 2d 1281, 1284-85 (La. Ct. App. 2001) (reversing conviction that resulted from anonymous tip where officers did not observe any unusual driving and stop took place on suspect's private property); *Commonwealth v. Lubiejewski*, 729 N.E.2d 288, 291 (Mass. App. Ct. 2000) (finding officer's corroboration of only readily observable details insufficient to establish reasonable suspicion for a Terry stop).

<sup>105</sup> See Brief of Mothers Against Drunk Driving as Amicus Curiae in Support of Petitioner, supra note 80, at 14 ("In such states, anonymous tips serve only to help the police to locate a possible drunk driver; to intervene, however, the officer must wait until he or she observes the driver engage in imminently dangerous driving."); York, supra note 30, at 185-86 (postulating that while the courts' specific reasons for

Accordingly, “[i]n such states, anonymous tips serve only to help the police to locate a possible drunk driver; to intervene, however, the officer must wait until he or she observes the driver engage in imminently dangerous driving.”<sup>106</sup> Moreover, some of these courts reiterate the fear expressed in J.L. that allowing an erratic driving exception would invite potential abuse by those seeking to harass innocent persons.<sup>107</sup>

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invalidating stops based solely on anonymous tips have varied, their essential justification has been consistent).

<sup>106</sup> Brief of Mothers Against Drunk Driving as Amicus Curiae in Support of Petitioner, supra note 80, at 14 (explaining the minority view of the role played by anonymous tips).

<sup>107</sup> See McChesney, 988 P.2d at 1077 (recognizing potential for abuse in allowing a reliability exception for anonymous tips of drunk driving); Wilson, supra note 57, at 229–30 (acknowledging abuse potential created by an exception to the reliability analysis). In fact, even courts that allow reliance on such tips expressly acknowledge this risk. See Wheat, 278 F.3d at 735 (admitting anonymous tips of erratic driving may be completely fabricated as a means to harass other motorists, but arguing that the risk of falsified tips is insufficient to prevent all investigatory traffic stops based on anonymous tips). But see Bloomingtondale v. State, 842 A.2d 1212, 1220 (Del.



McChesney v. State,<sup>108</sup> a case from the Supreme Court of Wyoming, is indicative of the approach taken by these jurisdictions.<sup>109</sup> A police dispatcher broadcast an anonymously received tip which alleged that a red Mercury with temporary license plates was being driven erratically, but gave no indication that the tipster had inside knowledge regarding the Mercury's driver.<sup>110</sup> An officer proceeded to follow a vehicle matching the description and subsequently initiated a traffic stop without actually witnessing any erratic or illegal driving.<sup>111</sup> On review, the court held the seizure invalid and reversed the ensuing drug conviction because the anonymous caller provided no predictive information and the officer failed to independently corroborate the alleged criminal act, since he

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2004) (arguing that anonymous tips of erratic driving are unlikely because it requires knowledge of the vehicle, its location, and its direction of travel, and needs police to be readily able to stop the vehicle).

<sup>108</sup> 988 P.2d 1071 (Wyo. 1999).

<sup>109</sup> See, e.g., supra note 104 (listing cases not permitting traffic stops solely on bare-boned anonymous tips of possibly intoxicated drivers).

<sup>110</sup> See McChesney, 988 P.2d at 1073.

<sup>111</sup> See id.

did not personally witness any erratic behavior before stopping the vehicle and instead relied solely on the anonymous bare-boned tip, whose reliability was unknown.<sup>112</sup>

Similarly, the Appeals Court of Massachusetts invalidated a traffic stop where the detaining officer did not corroborate the erratic driving alleged in an anonymous tip.<sup>113</sup> An anonymous motorist called police to report that a particular pickup truck was travelling on the wrong side of the highway, and then called back to report the vehicle had crossed the median back to the proper traffic lanes.<sup>114</sup> Police, relying exclusively on the information from the tip, stopped a truck matching the

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<sup>112</sup> See id. at 1077-78 (holding police lacked reasonable suspicion to conduct an investigatory traffic stop because the anonymous tip itself was not sufficiently reliable and the officer failed to independently corroborate the anonymously alleged criminal activity by observing suspicious behavior necessary to form the reasonable suspicion required to initiate the stop).

<sup>113</sup> See Commonwealth v. Lubiejewski, 729 N.E.2d 288, 291 (Mass. App. Ct. 2000) (announcing corroboration of only obvious details provided by an anonymous tip does not establish reasonable suspicion to initiate a traffic stop).

<sup>114</sup> Id. at 290.

description and subsequently charged the motorist with an alcohol-related offense.<sup>115</sup> In reversing the convictions, the court emphasized that reasonable suspicion cannot be based solely on corroboration of readily apparent details from a bare-boned anonymous tip.<sup>116</sup>

**C. Adoption of the Minority Approach in Virginia v. Harris and the Subsequent Denial of Certiorari**

Consistent with the viewpoint expressed by the minority of states that have heard this issue, the Supreme Court of Virginia overturned a DUI conviction where the initial vehicle stop was based entirely on a bare-boned anonymous tip of erratic driving.<sup>117</sup> On December 31, 2005, a police dispatcher informed Officer Picard of an anonymous call reporting that an intoxicated driver named Joseph Harris was travelling south in

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<sup>115</sup> Id.

<sup>116</sup> Id. at 291 (explaining that while the officer did corroborate some details, the corroboration included no facts “which were not otherwise easily obtainable by an uninformed bystander”).

<sup>117</sup> See Harris v. Commonwealth, 688 S.E.2d 141, 146 (Va. 2008) (asserting that an anonymous tip lacking in information with which to establish the informant’s basis of knowledge or credibility cannot solely form the basis of reasonable suspicion for a Terry stop).

the 3400 block of Meadowbridge Road in a green Nissan Altima bearing a partial license plate number of Y8066.<sup>118</sup> While Officer Picard was provided with considerable detail about the motorist, he was not given any details about the anonymous caller nor the timeframe in which the tipster observed the motorist.<sup>119</sup> After responding to the location, Office Picard proceeded to follow a green Nissan Altima with license plate number YAR-8046 headed southbound.<sup>120</sup> The officer followed Harris's vehicle some distance—during which time the vehicle did not speed or swerve—until Harris stopped on his own accord, at which point Officer Picard initiated a traffic stop.<sup>121</sup> During

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<sup>118</sup> Id. at 144.

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> Id. While Harris did not speed or swerve, Harris's brake lights did flash three times before the Nissan Altima pulled over on the side of the road. Id. (stating that Harris activated the vehicle's brake lights three times: (1) at an intersection despite having right of way, (2) 50 feet prior to stopping at a red light, (3) and finally while completely stopped at the red light).

the stop Harris exhibited signs of intoxication and failed a field sobriety test and was subsequently convicted of DUI.<sup>122</sup>

The Supreme Court of Virginia held that Harris's Fourth Amendment rights had been violated and consequently reversed the conviction.<sup>123</sup> While Harris argued the traffic stop was invalid because it had been based on an uncorroborated anonymous tip, Virginia asserted that the anonymous tip, combined with Picard's observations at the traffic stop, created reasonable suspicion to justify the stop.<sup>124</sup> The court concluded that the seizure was unwarranted because the anonymous tip lacked sufficient indicia of reliability and Officer Picard had not independently witnessed any reasonably suspicious conduct prior to initiating the stop.<sup>125</sup> Furthermore, the court expressed concern that by

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<sup>122</sup> See id. (noting that Harris stumbled as he exited his vehicle and had watery eyes, slurred speech, and a strong odor of alcohol on his breath).

<sup>123</sup> Id. at 147 (holding that the officer's observations and the anonymous tip did not create a reasonable suspicion of criminal activity sufficient to initiate a traffic stop).

<sup>124</sup> Id. at 145.

<sup>125</sup> See id. at 146 (voicing that an anonymous tip that cannot establish the tipster's basis of knowledge or credibility "cannot, of itself, establish the requisite quantum of suspicion

providing the tip anonymously, the caller could lie to the police without consequence since the tipster's anonymity made him immune to the penalties for providing false information.<sup>126</sup>

Justice Kinser dissented from the ruling and in doing so echoed many of the sentiments expressed by those jurisdictions allowing stops based solely on an anonymous tip.<sup>127</sup> The

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for an investigative stop"); see also id. (explaining that predictive information in an anonymous tip is unnecessary if police can corroborate the tip with observable criminal actions, which was not done in this instance). The court explained further that while Harris's pumping of his vehicle's brakes was unusual, it did not objectively indicate an intoxicated driver. See id. at 146-47 (emphasizing that law enforcement must view behavior that objectively indicates intoxication in order to initiate a traffic stop based on personal observation).

<sup>126</sup> See id. at 146 (echoing Justice Kennedy's concurrence in J.L. by noting that an unknown informant who does not provide information in person may be impervious to penalty from perjury); see also VA. CODE ANN. §18.2-461 (West 2010) (explaining the penalty for providing false information to police).

<sup>127</sup> Harris v. Commonwealth, 668 S.E.2d at 148 (Kinser, J., dissenting). Two other justices joined Justice Kinser's dissent, leading to a 4-3 decision. Id.

dissenting Justice stressed the danger presented by erratic drivers required a concomitantly greater need for quick action.<sup>128</sup> Moreover, she argued that the tip's prediction of a direction of travel and the officer's corroboration of innocent details weighed in favor of the tip's reliability and inferred the veracity of the non-corroborated criminal allegations.<sup>129</sup>

Following the Virginia Supreme Court's reversal, the Commonwealth unsuccessfully petitioned the United States Supreme Court for certiorari.<sup>130</sup> In an impassioned dissent from the denial of certiorari, Chief Justice Roberts urged the Court to take up the issue in light of the split of authority.<sup>131</sup> He highlighted the frequency of alcohol-related traffic deaths and then argued that by allowing the Virginia ruling to stand, the Court was effectively allowing drunk drivers "one free

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<sup>128</sup> See id. at 149 (Kinser, J., dissenting) (criticizing the majority for ignoring the danger presented by drunk drivers).

<sup>129</sup> See id. at 148 (Kinser, J., dissenting) (suggesting an anonymous tip's alleged criminal acts can be presumed where its innocent details are verified).

<sup>130</sup> *Virginia v. Harris*, 130 S. Ct. 10, 10 (2009) (mem.).

<sup>131</sup> See id. at 11 (Roberts, C.J., dissenting) (recognizing the split of authority on what level of corroboration is needed to initiate a traffic stop alleging an intoxicated motorist).

swerve,"<sup>132</sup> thus creating the potential for needless tragedy.<sup>133</sup> Moreover, he argued that the imminence of danger posed by potential drunk drivers might justify forgoing a requirement that an officer observe suspicious behavior before initiating a stop.<sup>134</sup> And while he acknowledged the Court's holding in J.L. about bare-boned anonymous tips, he reasoned that those limitations might not apply to anonymous tips about erratic driving.<sup>135</sup> In sum, the Chief Justice suggested that given the

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<sup>132</sup> Id. at 12 (Roberts, C.J., dissenting).

<sup>133</sup> See id. at 10 (Roberts, C.J., dissenting) ("The decision below commands that police officers following a driver reported to be drunk do nothing until they see the driver actually do something unsafe on the road—by which time it may be too late.").

<sup>134</sup> See id. at 11 (Roberts, C.J., dissenting) (weighing the imminence of danger posed by intoxicated motorists to the imminence of danger posed in other circumstances).

<sup>135</sup> See id. at 10 (Roberts, C.J., dissenting) (arguing anonymous tips about erratic driving may not require corroboration and suggesting a lesser expectation of privacy in vehicles might exempt such tips from the reliability analysis); cf. id. at 11 n.1 (Roberts, C.J., dissenting) (listing instances in which the



danger at stake, law enforcement might be justified in acting solely on the basis of an anonymous tip that alleges a drunk or dangerous driver.<sup>136</sup>

### **III. Analysis**

While the use of alcohol on our nation's roadways is a serious concern,<sup>137</sup> the solution to that problem should not come

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Court affirmed anti-drunk-driving policies that might be considered unconstitutional under other circumstances).

<sup>136</sup> See id. at 12 (Roberts, C.J., dissenting) (commenting that "[t]he conflict is clear and the stakes are high" and charging that law enforcement should be able to use "every legitimate tool at their disposal for getting drunk drivers off the road").

<sup>137</sup> See *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004) ("Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose appropriate penalties."); *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983) (acknowledging that "[Drunk driving] occurs with tragic frequency on our Nation's highways" and highlighting the Court's previous recognition of the issue); see also NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2007 TRAFFIC SAFETY ANNUAL ASSESSMENT—ALCOHOL—IMPAIRED DRIVING FATALITIES 2 (2008), <http://www-nrd.nhtsa.dot.gov/Pubs/811016.PDF> (finding that at least 12,500 alcohol-impaired driving fatalities have occurred annually since 1998).

at the price of further encroaching on citizens' Fourth Amendment freedoms. Jurisdictions that allow police to rely solely on an anonymous tip of erratic driving for a traffic stop incorrectly base their reasoning more on emotional appeals and inaccurate generalizations than on a logical analysis of the circumstances surrounding investigatory traffic stops.<sup>138</sup>

However, law enforcement cannot, in accordance with legal principles and factual circumstances, base an investigatory traffic stop exclusively on a bare-boned anonymous tip about drunk driving because such a tip neither fulfills the reliability analysis discussed in J.L.<sup>139</sup> nor merits an exception to the reasonable suspicion requirement. As a result, where the information contained in an anonymous tip provides no means to test the informant's credibility, police must corroborate the criminal allegations from the tip, rather than just those

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<sup>138</sup> See, e.g., *State v. Crawford*, 67 P.3d 115, 118 (Kan. 2003) ("A motor vehicle in the hands of a drunken driver is an instrument of death."); *State v. Contreras*, 79 P.3d 1111, 1116 (N.M. Ct. App. 2003) (emphasizing the State's serious concern over the potential threat posed by an intoxicated motorist).

<sup>139</sup> See generally *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (discussing the methodology for establishing reliability of an anonymous tip alleging possession of a firearm).

details that are readily apparent, before initiating a traffic stop.

**A. Traffic Stops are Invasive Seizures**

Contrary to the notion that an investigatory traffic stop is merely an inconsequential and limited intrusion, a mandatory police detention of a motorist is, in and of itself, an invasive seizure accompanied by the attendant impositions on one's liberty.<sup>140</sup> Just as when a police officer detains a person on the street, an investigatory traffic stop is a seizure within the meaning of the Fourth Amendment.<sup>141</sup> Thus, while the form of the interaction may differ, a traffic stop can similarly be an uncomfortable and inconvenient interaction in which the motorist

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<sup>140</sup> See Delaware v. Prouse, 440 U.S. 648, 657 (1979) (explaining that police initiated vehicle stops, like other mandatory police encounters, interfere with citizens' liberty interests).

<sup>141</sup> See Whren v. United States, 517 U.S. 806, 809-10 (1996) ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment].").

is subject to protracted public embarrassment.<sup>142</sup> Consequently, the Court has recognized that a traffic stop, like a Terry stop and frisk, similarly interferes with one's liberty interest to proceed without undue intrusion.<sup>143</sup> Moreover, beyond the initial detention an investigatory traffic stop can readily transform into a further hands-on search and additional legal ramifications should the officer subsequently discover other indications of criminality during the stop.<sup>144</sup> Accordingly, an

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<sup>142</sup> See Prouse, 440 U.S. at 657 (commenting that traffic stops can be time-consuming, inconvenient, and angst-ridden forced interactions).

<sup>143</sup> See Berkemer v. McCarty, 468 U.S. 420, 436 (1984) ("[A] traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle."); Prouse, 440 U.S. at 657 (voicing that an investigatory traffic stop interferes with one's freedom of movement and liberty).

<sup>144</sup> E.g., United States v. Wheat, 278 F.3d 722, 724-25 (8th Cir. 2001) (noting that the detaining officer's discovery of a recently discarded paper bag containing crack cocaine lying next to a vehicle detained on the basis of an anonymous tip led to an extensive search of the car and subsequent arrests for possession of controlled substances); Harris v. Commonwealth,

investigatory traffic stop is sufficiently analogous to a Terry stop on the street as to warrant not treating anonymous tips about erratic driving differently than anonymous tips in other contexts.

**B. Bare-boned Information Provided Anonymously Cannot Be Presumptively Reliable Without Adequate Corroboration**

While an investigatory traffic stop must be warranted by at least a reasonable suspicion of criminal activity,<sup>145</sup> a bare-boned anonymous tip about drunk driving does not by itself establish this level of suspicion because it neither indicates the informant's credibility or basis of knowledge nor provides a way to verify its criminal allegations.<sup>146</sup> Moreover, the fact

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668 S.E.2d 141, 144 (Va. 2008) (explaining that the detaining officer observed signs of intoxication only after initiating the traffic stop, which resulted in an arrest for DUI).

<sup>145</sup> See *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (applying Terry standards to investigatory traffic stops); Harris v. Commonwealth, 668 S.E.2d at 144 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)) ("An investigative stop must be justified by a reasonable suspicion, based upon specific and articulable facts, that criminal activity is 'afoot.'").

<sup>146</sup> See *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (detailing that a bare-boned anonymous tip that contains no predictive

that someone can provide a detailed description of a motorist does nothing to show that the tipster is actually privy to inside information about that motorist.<sup>147</sup> Thus, because confirming the readily observable innocent information from a tip cannot demonstrate the tipster's reliability in regards to the criminal allegations, this level of corroboration cannot be used as the sole basis for a Terry stop.<sup>148</sup> To justify a seizure

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information to show its source has inside knowledge lacks even a "moderate indicia of reliability").

<sup>147</sup> See id. at 272 (stating a bare-boned anonymous tip may help locate a particular person but does not show the tipster's basis of knowledge about alleged criminal acts); United States v. Martinez, 486 F.3d 855, 864 (5th Cir. 2007) (holding that an unverified anonymous tip accusing a particular person of having weapons used in the commission of a violent crime but providing no predictive information did not establish reasonable suspicion to conduct a traffic stop).

<sup>148</sup> See J.L., 529 U.S. at 272 (stressing that an anonymous tip must be reliable in its allegation of illegality to establish reasonable suspicion, not just in its ability to identify a person); Harris v. Commonwealth, 668 S.E.2d at 145 (recognizing that predictive information must related to alleged criminal

exclusively on a physical description of a vehicle, its general location, or its direction of travel would be no more valid than a seizure based entirely on finding a person standing at a particular bus stop.<sup>149</sup> Therefore, while an officer may use an anonymous tipster's description of a particular motorist as a means to locate the accused individual, police cannot also presume the criminal allegations are true simply because they located someone matching that description.<sup>150</sup>

Additionally, to presume the veracity of an anonymous caller's unconfirmed allegations would be to circumvent the already existing requirement that police objectively judge whether a motorist's driving is sufficiently unusual to warrant

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activity if it will be used to strengthen a tipster's reliability or basis of knowledge).

<sup>149</sup> See J.L., 529 U.S. at 272 (rejecting corroboration of a matching physical description and location as grounds to conduct a Terry stop and frisk).

<sup>150</sup> See id. (explaining that police may use a tip's description of a particular person to narrow their focus, but cannot use the accuracy of that description as a basis of suspicion about a criminal act).

a traffic stop.<sup>151</sup> While a valid traffic stop must be grounded on facts that objectively suggest criminal behavior,<sup>152</sup> an

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<sup>151</sup> See United States v. Hensley, 469 U.S. 221, 226 (1985) (stating law enforcement may detain a vehicle where the officer's suspicion of criminality is objectively reasonable based on specific and articulable facts); Terry v. Ohio, 392 U.S. 1, 27 (1968) (articulating that an officer's experience entitles him to draw specific inferences from the available facts); State v. Rutzinski, 623 N.W.2d 516, 521 (Wis. 2001) (detailing that reasonable suspicion must be based on specific facts and inferences that objectively warrant a police officer to believe criminal activity is taking place).

<sup>152</sup> See Terry, 392 U.S. at 30 (declaring that an officer may conduct an investigative stop if he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot. . . ."); United States v. Cortez, 449 U.S. 411, 421-22 (1981) (applying Terry reasonable suspicion to the vehicle context); Harris v. Commonwealth, 668 S.E.2d at 146 (discussing subjective versus objective indications of suspicious behavior); see also NAT'L HIGHWAY TRANSP. SAFETY ADMIN., THE VISUAL DETECTION OF DWI MOTORISTS: EXPLANATION OF THE 24 DRIVING CUES, <http://www.nhtsa.dot.gov/people/injury/alcohol/dwi/dwihtml/cues>.



anonymous informant may subjectively view certain conduct as indicative of drunk driving that, when objectively considered, would fail to raise a reasonable suspicion of criminal activity.<sup>153</sup> If police can rely on a bare anonymous report of erratic driving simply by locating a vehicle matching the description within a particular area, it bypasses the requirement that a stop be objectively reasonable and allows police to detain merely on the untested word of an unknown third party.<sup>154</sup> Rather, a more appropriate use for these anonymous

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htm (last visited Feb. 20, 2010) (detailing common indicators used by law enforcement to identify possible motorist intoxication).

<sup>153</sup> See Harris v. Commonwealth, 688 S.E.2d at 146 (rejecting an argument that a motorist's unusual behavior objectively indicated criminal activity); see also Anderegg, supra note 72, at 56 ("In the case of cell phones, the danger stems from the ease with which a police investigation can be set in motion based on what appears to be suspicious, but may ultimately turn out to be innocuous, activity.").

<sup>154</sup> See Anderegg, supra note 72, at 54 (discussing the difficulty of discrediting an anonymous report of drunk driving when police do not independently corroborate the assertion); cf. York, supra note 30, at 195-96 (quoting United States v. Wheat, 278 F.3d

tips is to use them to direct the focus of law enforcement so as to put officers in a position to act should they independently observe suspicious behavior.<sup>155</sup>

**C. Anonymous Tips of Drunk Driving Do Not Warrant an Extraordinary Danger Exception to the Reliability Analysis**

Having established that a bare-boned anonymous tip about erratic driving would fail the traditional reliability analysis, the extraordinary danger exception suggested in J.L., which would automatically establish reasonable suspicion whenever an anonymous caller alleges drunk driving, similarly cannot be used to justify these investigatory traffic stops. An anonymous allegation of erratic driving does not present such an immense

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722, 724 (8th Cir. 2001)) (arguing against a corroboration requirement by suggesting that “[c]ourts should [] require that the informant allege behavior that amounts to an actual traffic violation. For example, an allegation that a person is ‘driving like a complete maniac,’ standing alone, should be insufficient.”).

<sup>155</sup> Accord J.L., 529 U.S. at 272 (suggesting an anonymous tip can be used to locate the particular person who the tipster means to accuse).

danger as to excuse regular Fourth Amendment necessities.<sup>156</sup> Furthermore, such an exception would “rove too far”<sup>157</sup> because it would be difficult to limit to just reports of intoxicated driving<sup>158</sup> and would provide an outlet for invidious, consequence-free harassment of otherwise innocent motorists.<sup>159</sup>

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<sup>156</sup> See *People v. Wells*, 136 P.3d 810, 818 (Cal. 2006) (Werdegar, J., dissenting) (dismissing the notion that crimes can be placed on a sliding scale in which the seriousness of the crime is inversely proportionate to the showing required for an investigatory stop and further arguing that drunk driving, while serious, is not “so great” as to warrant a reliability exception); cf. *Wilson*, supra note 57, at 229 (contending that allowing an extraordinary danger exception for bare-boned anonymous tips would entirely destroy Fourth Amendment protections).

<sup>157</sup> J.L., 529 U.S. at 272.

<sup>158</sup> E.g., *State v. Rutzinski*, 623 N.W.2d 516, 527 n.10 (Wis. 2001) (allowing traffic stops based on anonymous reports of either erratic or drunk driving).

<sup>159</sup> See *McChesney v. State*, 988 P.2d 1071, 1077 (Wyo. 1999) (considering potential for abuse in allowing reliance exclusively on anonymous tips asserting drunk driving).

As the Court declared in J.L., “the Fourth Amendment is not so easily satisfied.”<sup>160</sup>

**1. Drunk driving is inconsistent with the extreme danger theorized in J.L.**

While alcohol-related traffic accidents are unquestionably an issue of national concern,<sup>161</sup> a single instance of drunk driving does not pose such an extraordinary danger as to justify a blanket exception from the showing of reliability.<sup>162</sup>

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<sup>160</sup> J.L., 529, U.S. at 273 (rejecting a categorical exception for firearms due to the ease with which an exception in one type of Fourth Amendment cases can be translated and applied to other subjects).

<sup>161</sup> 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 it.”).

<sup>162</sup> See People v. Wells, 136 P.3d 810, 818 (Cal. 2006) (Werdegar, J., dissenting) (arguing the danger posed by a drunk driver is not so different from that posed by a concealed firearm to justify a different Fourth Amendment standard). Further, the dissenting opinion notes the danger presented by an intoxicated motorist varies depending on environmental factors: in this instance, the time of night and lack of other motorists

Jurisdictions that hold that DUI poses such an imminent danger as to fall within the theorized danger exception are confusing magnitude with frequency: while the Court in J.L. spoke in terms of a danger “so great as to justify a search even without a showing of reliability,”<sup>163</sup> the proponents of an erratic driving exception instead rely on statistical probability and rate of occurrence.<sup>164</sup> Furthermore, advocates of such an

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considerably diminished the risk of danger from an intoxicated driver. See id. at 819 (Werdegar, J., dissenting). The Supreme Court, while recognizing the risks created by intoxicated drivers, has declared that the crime of DUI cannot be considered a violent or aggressive crime. See Begay v. United States, 128 S. Ct. 1581, 1588 (2008) (holding that DUI is categorically different from the Armed Career Criminal Act’s meaning of a violent felony); Leocal v. Ashcroft, 543 U.S. 1, 10 (2004) (declining to categorize negligent drunk driving that causes serious bodily injury as a crime of violence that would constitute an aggravated felony under the Immigration and Nationality Act).

<sup>163</sup> J.L., 529 U.S. at 273.

<sup>164</sup> Compare id. (suggesting a danger may be so great as to justify a constitutional exception), with Brief of Mothers Against Drunk Driving as Amicus Curiae in Support of Petitioner,

exception assume, based on the frequency of alcohol-related accidents, that it is inevitable that an intoxicated motorist will cause an accident and consequently presume that the longer a motorist is on the road, the greater the likelihood they will crash.<sup>165</sup> However, while every time a bomb is set off it will cause a destructive explosion, the same level of certainty is

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supra note 80, at 4-7 (discussing the probability of alcohol-related vehicular accidents and the frequency of such accidents nationwide). Despite the proponents' contentions, evidence indicates traffic fatalities may actually be in decline. See NAT'L HWY. TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: 2005 DATA: OVERVIEW 1 (2005), <http://www-nrd.nhtsa.dot.gov/Pubs/810623.PDF> (suggesting that a nationwide safety belt use rate of 82 percent and a three percent reduction in the rate of fatal crashes involving alcohol between 1995 and 2005 significantly contributed to a ten-year decline in the national traffic fatality rate).

<sup>165</sup> See State v. Boyea, 765 A.2d 862, 867 (Vt. 2000) (analogizing a possibly drunk motorist to a mobile bomb); Petition for a Writ of Certiorari, supra note 15, at 24 (arguing against requiring police corroboration of alleged erratic driving by reasoning that the longer the officer waits, the greater the likelihood of an accident).

not present every time an intoxicated person gets behind the wheel of a car.<sup>166</sup> Moreover, circumstantial factors such as time, location, presence of other vehicles, and attributes of the driver will affect the likelihood of injury, even presuming the motorist will crash.<sup>167</sup>

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<sup>166</sup> See Wells, 136 P.3d at 819 (Werdegar, J., dissenting) (reasoning that the danger posed by an intoxicated motorist is not constant, and largely depends on other factors such as time of day, location, and presence of other motorists); see also *United States v. Wheat*, 278 F.3d 722, 736-37 (8th Cir. 2001) (explaining three possible outcomes when observing a potentially intoxicated driver: the driver exhibits no erratic behavior, the driver exhibits erratic behavior that is harmless, or the driver exhibits erratic behavior that leads to injury).

<sup>167</sup> See NAT'L HWY. TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: 2007 DATA: OVERVIEW 1 (2008), <http://www-nrd.nhtsa.dot.gov/Pubs/810993.PDF> [hereinafter 2007 DATA] (describing categories in which alcohol-related fatalities were most common). 2007 statistics indicate that traffic fatalities were most likely for male drivers, those under the age of 25, drivers who were speeding, and motorists driving cars/light trucks. Id. at 7, 10, 11. Alcohol-related fatalities most frequently occurred for drivers with a blood alcohol content of at least 0.08 g/dL, who were

Additionally, while it may be true that waiting to observe erratic behavior could allow an accident to occur in the interim, this ignores the role that an anonymous tip can play even when further corroboration is required. The Chief Justice lamented in his dissent from the denial of certiorari that allowing the decision below to stand meant police would not be able to initiate a stop on an anonymous tip, "even for a quick check,"<sup>168</sup> which would likely lead to needless death.<sup>169</sup> Yet,

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speeding, and those between 21 and 24 years old. Id. at 5, 7. Further, males were approximately three times more likely to be involved in a fatal crash than females, and were twice as likely to be legally intoxicated. Id. at 11-12. See generally RICHARD COMPTON & AMY BERNING, RESULTS OF THE 2007 NATIONAL ROADSIDE SURVEY OF ALCOHOL AND DRUG USE BY DRIVERS 1-2 (2009), <http://www.nhtsa.gov/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811175.pdf> (concluding that factors such as time of day, day of the week, vehicle type, as well as the age and gender of the driver, dramatically impact the likelihood a randomly selected driver will be legally intoxicated).

<sup>168</sup> Virginia v. Harris, 130 S. Ct. 10, 12 (2009) (mem.) (Roberts, C.J., dissenting).



this argument overlooks the fact that these anonymous allegations of criminal activity allow law enforcement to aim their attention at possibly intoxicated motorists of which they would otherwise be unaware.<sup>170</sup> Therefore, while not directly justifying a stop, a bare-boned anonymous tip alerts police to a potentially intoxicated driver and allows them to observe the motorist and immediately initiate a stop once they see suspicious behavior.<sup>171</sup> And certainly, should the motorist cease

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<sup>169</sup> See id. (implying requiring corroboration of anonymous tips will dramatically impact the safety of other motorists); see also Wheat, 278 F.3d at 736-37 (justifying a traffic stop based on an anonymous tip by noting that because police lack the option of a consensual encounter they must wait to observe erratic driving, which might allow an opportunity for an accident).

<sup>170</sup> Accord Florida v. J.L., 529 U.S. 266, 272 (2000) (suggesting an anonymous tip can be used to locate the particular person who the tipster means to accuse).

<sup>171</sup> See, e.g., State v. Lafond, 802 A.2d 425, 430 (Me. 2002) (upholding stop based on anonymous report of a possibly intoxicated motorist where the officer found a matching vehicle and observed it swerve and cross the white fog line before initiating the traffic stop).

driving while being observed, the officer would subsequently be free to initiate a consensual interaction.

Furthermore, there also does not appear to be a substantial difference in alcohol-related traffic fatalities rates between states that allow the use of anonymous tips as justification for a traffic stop and those that do not.<sup>172</sup> In fact, even within states that permit traffic stops based solely on anonymous tips, the rate of alcohol-related traffic fatalities fluctuates annually, which suggests that relying on anonymous tips does not counteract other factors affecting the likelihood of a vehicular accident.<sup>173</sup> At the national level, the rate of traffic

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<sup>172</sup> See NAT'L HWY. TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: RESEARCH NOTE: FATALITIES AND FATALITY RATES IN ALCOHOL-IMPAIRED-DRIVING CRASHES BY STATE, 2007-2008 3 (2009), <http://www-nrd.nhtsa.dot.gov/Pubs/811250.PDF> [hereinafter CRASHES 2007-2008] (stating that from 2007 to 2008, the alcohol-impaired driving fatality rate declined in forty states, remained constant in three, and rose in seven).

<sup>173</sup> Compare NAT'L HWY. TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: RESEARCH NOTE: FATALITIES AND FATALITY RATES IN ALCOHOL-IMPAIRED DRIVING CRASHES BY STATE, 2006-2007 3 (2009), <http://www-nrd.nhtsa.dot.gov/Pubs/811099.PDF> (indicating that between 2006 and 2007 the alcohol-impaired driving fatality rate

fatalities involving alcohol has largely been either stable or in decline over the last several decades, due to a variety of factors including demographics and widely-adopted legislative enactments, such as minimum drinking age requirements.<sup>174</sup>

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in Kansas decreased 0.03 fatalities per 100 million vehicle miles traveled while New Hampshire experienced a decrease of 0.09), with CRASHES 2007-2008, supra note 172, at 3 (showing that the alcohol-impaired driving fatality rate for Kansas rose 36.1 percent from 2007 to 2008, while New Hampshire experienced a 40 percent increase). Kansas allowed traffic stops based on anonymous tips of erratic driving in 2003, while New Hampshire has allowed such stops since 2004. See State v. Sousa, 855 A.2d 1284, 1290 (N.H. 2004) (permitting stops based on anonymous tips of erratic driving when the caller provides sufficient detail and purports to witness the erratic behavior and police locate a matching vehicle in a short enough timeframe); State v. Crawford, 67 P.3d 115, 120 (Kan. 2003) (upholding stop based on anonymous report of dangerous driving).

<sup>174</sup> See 2007 DATA, supra note 167, at 1 (stating that in both 1997 and 2007, approximately 30 percent of traffic fatalities involved alcohol); NAT'L HWY. TRAFFIC SAFETY ADMIN., STATISTICAL ANALYSIS OF ALCOHOL-RELATED DRIVING TRENDS, 1982-2005 vii, 40 (2008), <http://www.nhtsa.gov/> (follow "Traffic Safety" hyperlink; then

Collectively, this evidence suggests an extreme danger exception may be unwarranted in this context and calls into question the effectiveness of permitting reliance on anonymous tips about drunk driving.

**2. Drunk driving exception leads to a slippery slope of other exceptions**

Additionally, if an investigatory traffic stop is permitted to be based exclusively on an anonymous allegation of drunk driving, such an allowance cannot readily be limited to tips

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follow "Impaired Driving" hyperlink; then follow "Statistical Analysis of Alcohol-Related Driving Trends, 1982-2005"

hyperlink) (finding that alcohol laws, such as administrative license revocation or Minimum Legal Drinking Age 21, and demographics were responsible for significantly reducing the percentage of intoxicated drivers involved in fatal crashes between 1982 and 2005); NAT'L INST.'S OF HEALTH, FACT SHEET:

ALCOHOL-RELATED TRAFFIC DEATHS 1, <http://www.nih.gov/> (follow "Site Map" hyperlink; then follow "Research Results for the Public" hyperlink; then follow "Alcohol-Related Traffic Deaths" hyperlink) (last visited Feb. 20, 2010) (noting a 50 percent decline in alcohol-related traffic fatalities over the past three decades, due in part to adjustments in the legal drinking age and nationwide enactment of Zero Tolerance laws).

within that context. In J.L., the Court stated that if a bare-boned anonymous tip about firearms could justify a Terry frisk, that reasoning would likely authorize police action in other instances where firearms are likely to be found, such as where a bare-boned anonymous tip alleges illegal drugs.<sup>175</sup> The Court quickly pronounced that such inevitable lateral applications of the original exception would not satisfy the Fourth Amendment.<sup>176</sup> In essence, the Court expressed concern that to allow such an exception would swallow the rule.<sup>177</sup>

To sanction reliance on bare anonymous allegations of drunk driving would also inexorably lead to the use of anonymous tips

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<sup>175</sup> See J.L., 529 U.S. at 273 (extrapolating that an exception for anonymous tips about firearms would lead to similar exceptions for drugs because many jurisdictions recognize that firearms and narcotics often go hand-in-hand).

<sup>176</sup> See id. (indicating that allowing anonymous tips about firearms to be used to rely on anonymous tips in other contexts would not satisfy the requirements of the Fourth Amendment).

<sup>177</sup> See id. (speculating that allowing an exception in one aspect would inevitably lead to numerous other exceptions, thus defeating the purpose of the original rule).

in other analogous contexts.<sup>178</sup> While many jurisdictions recognize that alcohol may be a major contributor to unusual or dangerous driving, they are also aware it is not the only factor.<sup>179</sup> As explained by the Supreme Court of Wisconsin:

To be sure, intoxication is not the only possible cause of erratic driving. Erratic driving can be the result of something as innocuous as the driver waving at a bee in the car or something as serious as the driver having a heart attack. But regardless of the cause, erratic driving can be very dangerous and often is symptomatic of intoxication.<sup>180</sup>

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<sup>178</sup> See, e.g., Anderegg, supra note 72, at 54 (stating that, in general, jurisdictions that permit traffic stops based solely on anonymous tips do not require a specific allegation of drunk driving, but rather any driving that can be characterized as erratic).

<sup>179</sup> See id. (commenting that jurisdictions allowing anonymous tips do not specifically require the caller allege that an erratic driver is drunk).

<sup>180</sup> State v. Rutzinski, 623 N.W.2d 516, 527 n.10 (Wis. 2001) (justifying traffic stops based on allegations of erratic, rather than exclusively drunk, driving).

Thus, if an exception for anonymous tips alleging an intoxicated motorist is valid, certainly a tip simply alleging erratic or dangerous driving would suffice.<sup>181</sup> Furthermore, if an anonymous tip of drunk driving is sufficient, it is reasonable to believe allegations of other behavior that similarly produce dangerous or erratic driving—such as text messaging while driving—might also justify a Terry stop.<sup>182</sup> Consequently, allowing an exception due to the danger posed by potentially drunk drivers invites a multitude of other exceptions with no discernable endpoint: a result specifically condemned by the Supreme Court.<sup>183</sup>

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<sup>181</sup> See id. (voicing that because erratic driving is dangerous and often indicative of intoxication, “an officer may make a traffic stop to investigate observations or reliable reports of erratic driving”).

<sup>182</sup> See Frank A Drews et al., Text Messaging During Simulated Driving, 51 HUMAN FACTORS 1, 5-6 (2009) (addressing behaviors that result from text messaging while driving, which leads to an increased likelihood of vehicle collisions, including: slower reaction time, increased following distance, and inadvertent lane departures).

<sup>183</sup> See Florida v. J.L., 529 U.S. 266, 273 (2000) (declining to create a firearms exception for bare-boned anonymous tips due in

**3. Drunk driving exception would allow tipsters to  
"lie with impunity"<sup>184</sup>**

When a bare-boned anonymous tip asserting drunk driving is given enough weight to automatically permit police action it invites anonymous callers to "lie with impunity,"<sup>185</sup> and can lead government agents to unintentionally harass or annoy innocent people.<sup>186</sup> The Supreme Court has recognized that this threat of misuse significantly overshadows the unconditional acceptance of an anonymous tip based on the danger it alleges.<sup>187</sup> While those in favor of allowing anonymous tips about drunk driving acknowledge this inherent risk of abuse, they argue it is outweighed by the need for preemptive action against the

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part to the ease with which such an exception could be applied elsewhere).

<sup>184</sup> Id. at 275 (Kennedy, J., concurring).

<sup>185</sup> Id. (Kennedy, J., concurring).

<sup>186</sup> See Harris v. Commonwealth, 688 S.E.2d 141, 146 (Va. 2008) (observing that the informant's anonymity meant he could not be subject to penalty for providing false information to police).

<sup>187</sup> See J.L., 529 U.S. at 272 (declining to adopt a firearms exception in part because of the potential for abuse).



imminent danger posed by a possibly intoxicated driver.<sup>188</sup>

However, this erroneously assumes that as the danger alleged by a tipster increases, the more the tip should be considered presumptively reliable.<sup>189</sup> As long as an anonymous tipster's

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<sup>188</sup> See *United States v. Wheat*, 278 F.3d 722, 735 (8th Cir. 2001) (admitting contemporaneous accounts of erratic driving may be completely fabricated to harass other motorists, but arguing that this risk is insufficient to prevent police from conducting investigatory traffic stops); *McChesney v. State*, 988 P.2d 1071, 1077 (Wyo. 1999) (recognizing potential for abuse in anonymous tips of drunk driving). But see *Bloomingtondale v. State*, 842 A.2d 1212, 1220 (Del. 2004) (reasoning that fabricated tips would be unlikely because it requires knowledge of a vehicle, its location, and its direction of travel, and requires police to be readily able to stop the vehicle).

<sup>189</sup> See *Wilson*, supra note 57, at 229-30 (arguing a extreme danger exception is logically flawed because "the more inflammatory and outrageous the 911 report, the more reliable the origin."). But cf. *Bryk*, supra note 3, at 280, 303 (suggesting a sliding scale of reasonableness, in which inherent danger and the need for police corroboration are inversely proportionate, and concluding that an anonymous tip of an

credibility remains untested and they cannot be held accountable for the information they provide, there is an ever-present, unacceptable risk of falsified information.<sup>190</sup> Rather than downplaying the likelihood of fabrication,<sup>191</sup> jurisdictions could work to reduce the anonymity of tips, which would allow police to rely on the information while minimizing the potential for abuse.<sup>192</sup>

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intoxicated motorist is sufficiently inherently dangerous to only require corroboration of basic descriptive information).

<sup>190</sup> See J.L., 529 U.S. at 275 (Kennedy, J., concurring) (commenting that where an informant is completely anonymous, the chance tips will be fabricated is too great to be permitted).

<sup>191</sup> See Reply Brief for Petitioner at 13, Virginia v. Harris, 130 S. Ct. 10 (2009) (No. 08-1385) (“[A]lthough the extent of prank calls of drunk driving is unknown, the fearsome toll taken by drunk drivers is all too obvious.”).

<sup>192</sup> See State v. Rutzinski, 623 N.W.2d 516, 525-26 (Wis. 2001) (upholding stop based on anonymous tip in which the tipster told the police dispatcher his location in relation to the alleged erratic driver, remained on the phone until an officer responded, and then pulled his vehicle over after telling the dispatcher the officer was following the correct vehicle); id. at 528 (Abrahamson, C.J., concurring) (acknowledging policies to

#### IV. Proposal and Conclusion

Rather than attempting to distinguish anonymous tips about intoxicated motorists from tips in other contexts or create circumstance-specific exceptions to Fourth Amendment requirements, a more reasoned solution is to work to reduce the anonymity of anonymous tips about erratic driving.<sup>193</sup> As Justice

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ensure stops based on motorist's tips are lawful, such as having police dispatchers asking the motorist to pull over at the scene); *State v. Marks*, No. MV99407373S, 2000 WL 33298878, at \*5-6 (Conn. Super. Ct. Dec. 7, 2000) (validating stop based entirely on an anonymous tip because the unidentified tipster remained on the phone with police dispatcher for five minutes and "clearly relay[ed] his first hand observations" in extensive detail). But see *Anderson v. Dir., N.D. Dep't of Transp.*, 696 N.W.2d 918, 919 (N.D. 2005) (invalidating a stop in which a tipster reported and described a vehicle they were following that was being erratically driven and then stayed on the phone to provide updates to police). The call here was not completely anonymous as police had a description of the tipster's vehicle and witnessed the tipster's vehicle pull over. Id. at 923.

<sup>193</sup> See *Lisenby*, supra note 73, 183 (arguing that police should make reasonable attempts to establish a caller's identity and further suggesting that the risk of fewer informants—due to the

Kennedy observed nearly ten years ago, police departments can employ a variety of means to reduce a source's anonymity or bolster an anonymous informant's credibility.<sup>194</sup> Certainly, even greater technological resources are at the disposal of police officers today, and improvements to wireless technology might actually mean that anonymity could become a technological impossibility.<sup>195</sup> Yet even in the limited circumstances where

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fear of identification—is outweighed by ensuring officers conduct reasonable searches based on informants' tips). When the source of a tip is less anonymous, it is more likely their reliability can be ascertained and that the tip can be used to establish reasonable suspicion. Cf. Wilson, supra note 57, at 221-22 (reasoning that anonymous tips that are provided in-person allow for establishing credibility, demeanor, knowledge basis, and identity of the tipster).

<sup>194</sup> See J.L., 529 U.S. 275-76 (Kennedy, J., concurring) (suggesting ways to establish the identity or credibility of anonymous callers, such as caller identification systems, call logs and documentation systems, predictive information, and voice recorders).

<sup>195</sup> See FED. COMM'NS COMM'N, WIRELESS 911 SERVICES, <http://www.fcc.gov/cgb/consumerfacts/wireless911srv.html> (last visited February 20, 2010) (stating that approximately half of

anonymity cannot be eliminated,<sup>196</sup> officers can use the tip to focus their attention and resources on a particular area and be on the lookout for suspicious driving. Furthermore, it is not unreasonable to suggest that police, upon receiving an anonymous tip, ask general follow-up questions to learn the source's

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all 911 calls now originate from wireless phones and explaining that mandatory Enhanced 911 rules will allow a caller's location to be pinpointed to within 300 meters); Press Release, Nat'l Highway Transp. Safety Admin., States and U.S. Territories Receive \$40 Million in Grants to Improve 911 Services (Sept. 28, 2009) <http://www.nhtsa.dot.gov/> (follow "NHTSA press room" hyperlink; then follow "Go To 2009" hyperlink; then follow "States and U.S. Territories Receive \$40 Million in Grants to Improve 911 Services" hyperlink) (detailing a proposed 40 million dollar grant authorized under the ENHANCE 911 Act to upgrade state 9-1-1 call centers to provide automatic location information for 9-1-1 calls originating from wireless and Internet-connected telephones).

<sup>196</sup> See, e.g., Petition for a Writ of Certiorari, supra note 15, at 29 (listing several circumstances in which tipsters will remain anonymous, despite technological advances).

identity or basis of knowledge.<sup>197</sup> Thus, where police reduce the anonymity of tips they receive, they should be better able to rely on that information to initiate investigatory traffic stops.<sup>198</sup>

As Chief Justice Roberts commented, “[t]he conflict is clear and the stakes are high.”<sup>199</sup> While this is true, the stakes should be considered as a need to combat the nation’s drunk driving problem in such a way that does not unreasonably interfere with the average citizen’s constitutional rights. Certainly, citizens should be encouraged to report erratic or dangerous motorists, and police should generally be able to act on those tips when they are sufficiently detailed. However,

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<sup>197</sup> See Rutzinski, 623 N.W.2d 528 (Abrahamson, C.J., concurring) (recognizing the adoption of departmental policies designed to promote the reliability of anonymous tips about erratic driving, such as having police dispatchers ask motorists that are anonymously reporting erratic driving to pull over at the scene).

<sup>198</sup> See generally, State v. Sousa, 855 A.2d 1284, 1287 (N.H. 2004) (discussing various mechanisms with which to increase the reliability of anonymous tips).

<sup>199</sup> Virginia v. Harris, 130 S. Ct. 10, 12 (2009) (mem.) (Roberts, C.J., dissenting).

there is a clear division of authority over the role of bare-boned anonymous calls to police about erratic driving, and the rationales relied on by the majority of states that allow reliance on such tips are illogical and inconsistent with Fourth Amendment precedent. As such, the Supreme Court should hear this issue to resolve this discrepancy and provide a uniform law consistent with the traditional application of the Fourth Amendment: when law enforcement cannot establish a caller's credibility, they should be required to take the relatively minor step of corroborating the allegation to ensure there is a reasonable basis for a seizure before initiating an investigatory traffic stop.