COMMENT: Could You? Should You? Florida v. J.L.: Danger Dicta, Drunken Bombs, and the Universe of Anonymity

February, 2011

Reporter
85 Tul. L. Rev. 831 *

Length: 18174 words

Author: Chris La Tronica*

 J.D. candidate 2011, Tulane University School of Law; M.Sc. 2006, London School of Economics & Political Science; B.A. 2005, Skidmore College. Many thanks to Peter and Kathy for their support, the members of the Law Review for their help, and to Nicole for being you.

Highlight

Recently, the United States Supreme Court passed on a chance to consider the legitimacy of investigatory stops based on uncorroborated anonymous tips of drunk driving, preferring this issue continue to ferment in the lower courts. When facing this issue, some lower courts seize the opportunity to carve out a drunk-driving exception to the Fourth Amendment based on "danger dicta" found in Florida v. J.L. Other courts hold fast to the corroboration requirement for anonymous informants in Alabama v. White. This Comment considers whether both approaches fail to take full advantage of existing Fourth Amendment jurisprudence so that police can effectively manage the dangers posed by drunk drivers without further eroding Fourth Amendment protections. Rather than polarize informants as either known or anonymous, there is a third classification of informants that are just distinct enough to provide reasonable suspicion for investigatory stops. As Justice Kennedy's concurring opinion in J.L. argued, these quasi-known/quasi-anonymous informants "might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action."

Text

[*832]

I. Introduction

A night out drinking often leads to poor judgment and regrettable decisions. While usually limited to the individual sampling the libations, a growing number of state and federal circuit court decisions demonstrate that these effects are spilling over onto Fourth Amendment judgments and decisions. [1] Recently, the United States Supreme Court passed on a chance to consider the legitimacy of investigatory stops based on uncorroborated anonymous tips of drunk driving, preferring that this issue continue to ferment in the lower courts. [2] However, a strong dissent to the denial of certiorari indicated that, given a more tempting lower court vintage, the Court would not hesitate to satiate its thirst. [3] While this round awaits a proper plaintiff, or at least a defendable drunk, the Fourth Amendment will continue to go "shot for shot" with courts intoxicated by the idea of affecting this fundamental right. However, as with most decisions influenced by alcohol, the crucial inquiry is not whether courts could do so, but rather whether courts should do so.

A person's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches" is a fact-specific determination. [4] The answer depends on the exact issue before the court. Should you search them in a house? [5] Could you pat down on their blouse? [6] Should you search inside a box? [7] Could you open if it locks? [8] Should you? Could you? In a train? [9] Could you, should you [*833] from a plane? [10] Should you, could you after

---

[1] For a sampling of courts that have "tapped" this issue, see Virginia v. Harris, No. 08-1385, at 4 nn.2-4 (U.S. Oct. 20, 2009) (Roberts, C.J., dissenting, joined by Scalia, J.) (denying certiorari).

[2] Id. at 1 (mem.).

[3] See id. (Roberts, C.J., dissenting, joined by Scalia, J.).

[4] U.S. Const. amend. IV.

[5] See Payton v. New York, 445 U.S. 573 (1980); United States v. Santana, 427 U.S. 38 (1976); Silverman v. United States, 365 U.S. 505 (1961).

[6] See Terry v. Ohio, 392 U.S. 1 (1968).

[7] See California v. Acevedo, 500 U.S. 565 (1991); Arkansas v. Sanders, 442 U.S. 753 (1979), abrogated by Acevedo, 500 U.S. 565.

[8] See United States v. Chadwick, 433 U.S. 1 (1977), abrogated by Acevedo, 500 U.S. 565.

[9] See United States v. Dimick, 790 F. Supp. 1543 (D. Colo. 1992), aff'd, 990 F.2d 1164 (10th Cir. 1993), overruled by United States v. Little, 18 F.3d 1499 (10th Cir. 1994); United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988), abrogated by Gozlon-Peretz v. United States, 498 U.S. 395 (1991).

[10] See Florida v. Riley, 488 U.S. 445 (1989); California v. Ciraolo, 476 U.S. 207 (1986).

dark? [11] Should you base it on a nark? [12] Since 1791, the Court has considered these and similar questions concerning the Fourth Amendment - over 869 opinions in all. [13]

With a rate of approximately 3.97 decisions per year since the enactment of the Fourth Amendment, perhaps it is not surprising that its protections are constantly eroding. [14] The sheer number of decisions excepting various locations and scenarios suggest that courts are more concerned with whether they "could" limit the Fourth Amendment and seldom stop to consider whether they "should." It is not surprising then that, after the Supreme Court's decision in Florida v. J.L., some lower courts seized the opportunity to carve out a drunk-driving exception to the Fourth Amendment based on the following dicta:

This case does 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… . For example … a report of a person carrying a bomb need [not] bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. [15]

In the wake of J.L., anonymous tips of cars driven under the influence of alcohol became "intelligence" of "mobile bombs" roving the nation's highways and byways - a threat necessitating yet another Fourth Amendment exception. [16] However, the Court's decision in J.L. makes clear that anonymous tips alleging drunk or erratic driving do not require such a response.

[*834] Courts, practitioners, and academics identify a split among state courts addressing anonymous tips alleging contemporaneous observations of drunk driving. [17] This split is characterized as being between courts requiring an officer to corroborate anonymous tips of drunk driving and those creating an exception to the corroboration requirement. [18] This Comment proposes that this characterization of the split oversimplifies the issue the Court addressed in J.L. because it does not distinguish between those court decisions considering

---

[11] See Gooding v. United States, 416 U.S. 430 (1974).

[12] See Florida v. J.L., 529 U.S. 266 (2000); Alabama v. White, 496 U.S. 325 (1990); Illinois v. Gates, 462 U.S. 213 (1983); Adams v. Williams, 407 U.S. 143 (1972).

[13] Shepardizing the Fourth Amendment on LEXIS and restricting by United States Supreme Court decisions returns 869 opinions.

[14] See Jon M. Sands & Robyn Greenberg Varcoe, Boundaries of the Fourth Amendment: A Warrantless View of Curtilage, Champion, Aug. 2002, at 28, 28-29.

[15] 529 U.S. at 273-74.

[16] See, e.g., Cottrell v. State, 971 So. 2d 735, 745 (Ala. Crim. App. 2006) ("We now join our sister states of Vermont, Iowa, Wisconsin, South Dakota, New Jersey, New Hampshire, Hawaii, Delaware, and Kansas, and hold that an anonymous tip concerning a potential drunk driver may be sufficiently reliable to justify a Terry stop without independent corroboration by the police."); State v. Boyea, 765 A.2d 862, 867 (Vt. 2000) ("[A] drunk driver is not at all unlike a "bomb,' and a mobile one at that.").

[17] Virginia v. Harris, No. 08-1385, at 4 (U.S. Oct. 20, 2009) (Roberts, C.J., dissenting, joined by Scalia, J.) (denying certiorari); Reply Brief for Petitioner at 1, Harris, No. 08-1385, 2009 WL 2173171, at 1; see also Erwin Chemerinsky, Supreme Court Update, 31 N.M. L. Rev. 31, 34 (2001).

[18] Harris, No. 08-1385, at 4.

anony-mous tips that are reliable as to the likelihood of criminal activity and those that are not. Only those decisions finding that an uncorroborated anonymous tip is not reliable as to the likelihood of criminal activity and still holding that the tip provides reasonable suspicion for an investigatory stop are creating a drunk-driving exception to the Fourth Amendment. Conversely, those courts finding that an anonymous tip is reliable as to the likelihood of criminal activity regardless of corroboration, and therefore holding that an anonymous tip provides reasonable suspicion, are not creating a drunk-driving exception. Rather, the latter group is following Supreme Court Fourth Amendment jurisprudence.

In Part II, this Comment describes the relevant Supreme Court precedent addressing anonymous tips, reasonable suspicion, and investigatory stops. Part III examines the framework created in J.L. for determining whether anonymous tips provide reasonable suspicion to conduct an investigatory stop. Part IV applies the J.L. framework to lower court decisions addressing anonymous tips of drunk driving. Finally, Part V considers whether a drunk-driving exception to the Fourth Amendment is necessary.

II. Supreme Court Fourth Amendment Investigatory Stop and Informant Jurisprudence

In Terry v. Ohio, the Supreme Court held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." [19] In order for police to conduct an investigatory stop, an officer must [*835] "observe[] unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." [20] A reasonable suspicion that criminal activity is underway does not rise to the level of probable cause, which requires "a fair probability that contraband or evidence of a crime will be found." [21] Rather, to be justified, under the "totality of the circumstances … officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." [22] Although incapable of precise definition, the Fourth Amendment requires a police officer have a reasonable suspicion of criminal activity prior to conducting an investigatory stop. [23] Because reasonable suspicion depends on the totality of the circumstances, it is easier to reverse engineer a definition from a specific set of facts than it is to conjure up a precise definition applicable to all cases. [24]

In general, investigatory stops result from police receipt of information. [25] The source of this information is either action by police or a third party. [26] Police action includes direct observation

---

[19] 392 U.S. 1, 22 (1968).

[20] Id. at 30.

[21] Illinois v. Gates, 462 U.S. 213, 238 (1983); see also 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 137 (3d ed. 1996).

[22] United States v. Cortez, 449 U.S. 411, 417-18 (1981).

[23] United States v. Sokolow, 490 U.S. 1, 7-8 (1989).

[24] See LaFave, supra note 21, at 152.

[25] Ken Wallentine, Street Legal: A Guide to Pre-Trial Criminal Procedure for Police, Prosecutors, and Defenders 185 (2007).

[26] See LaFave, supra note 21, at 152.

or information revealed by investigation. [27] Third-party action generally consists of information provided by an informant. [28] In Adams v. Williams, the Court rejected the argument that reasonable suspicion "for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person." [29] In that case, a known informant told a police officer that an individual in a nearby car was in possession of a firearm and narcotics. [30] The Court held that the tip provided the officer reasonable suspicion to conduct an investigatory stop and limited protective search of the individual under investigation. [31] The Court reasoned that because the [*836] officer knew the informant, the tip was reliable and provided reasonable suspicion for a stop. [32]

The decision in Adams is criticized because, although the informant was known to the officer, there was nothing "to demonstrate that the informant was known to be trustworthy and … the officer had no idea of the source of the informant's "knowledge."' [33] Nothing in the tip indicated that the informant personally observed the criminal activity or obtained the information from someone who did. [34] So rather than holding that known informants do not require corrobo-ration because they are trustworthy, Adams "appears to allow [an] officer to make a [stop] without any such showing at all." [35]

Despite this criticism, Adams illustrates that the class of informant providing information is a main issue in determining whether a tip provides reasonable suspicion for an investigatory stop. While "informants' tips … come in many shapes and sizes [and] from many different types of persons," [36] they generally fall into one of three categories: citizen, confidential, or anonymous. [37] By definition, the identities of citizen and confidential informants are known to police. [38] On the reliability spectrum, citizen informants are considered the most trustworthy, anonymous informants are deemed the least trustworthy, and confidential informants are subject to judicial scrutiny to determine trustworthiness. [39] Trustworthiness, as a proxy for the identity of an informant, determines the characteristics a tip must possess to provide reasonable suspicion for

---

[27] Wallentine, supra note 25, at 185-89. Whether information from police action provides the reasonable suspicion necessary for investigatory stops is beyond the scope of this Comment.

[28] See LaFave, supra note 21, at 152.

[29] 407 U.S. 143, 147 (1972).

[30] Id. at 144-45.

[31] Id. at 145-46.

[32] Id. at 146.

[33] Id. at 157 (Marshall, J., dissenting, joined by Douglas, J.).

[34] LaFave, supra note 21, at 217.

[35] Id.

[36] Illinois v. Gates, 462 U.S. 213, 232 (1983).

[37] Wallentine, supra note 25, at 185-88.

[38] Id. at 185-86.

[39] Id.

an investigatory stop. [40] Generally, tips from known informants, like the tip in Adams, are self-authenticating. [41] Conversely, anonymous tips usually require some-thing more. [42]

In Alabama v. White, the Court addressed "whether an anony-mous tip may furnish reasonable suspicion for a stop." [43] In that case, police received an anonymous tip that a woman would leave an [*837] apartment at a specific time and drive a station wagon with a broken taillight to a motel with a quantity of cocaine in a brown attache case. [44] The police corroborated the apartment and the vehicle described in the tip. [45] They followed the vehicle in the direction of the motel described in the tip but did not corroborate the destination because they initiated an investigatory stop before the suspect could reach her destination. [46]

The Court held that "although it is a close case … under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of [the] car." [47] The Court reasoned that because the tip predicted the future behavior of the suspect, it demonstrated that the information was probably based on first-hand knowledge. [48] The Court further reasoned that the corroboration of the predictive information strengthened the tip's reliability as to the likelihood of criminal activity because if "an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." [49]

While all tips are evaluated under the totality of the circum-stances, White holds that an anonymous tip must usually contain these elements: (1) be specific enough to conclude it is based on first-hand knowledge, (2) predict some future behavior of the subject, and (3) be corroborated by police. [50] White's holding is criticized on the ground that the predictive information in the anonymous tip was routine and not indicative of criminal activity. [51] However, the effect of the Court's holding was to set a benchmark for the type of corroboration necessary for anonymous tips to provide reasonable suspicion. [52] After White, corroboration of "a contemporaneous condition, such as that a described person or vehicle is at the time of the [tip] at a specified place," is no longer sufficient to provide reasonable suspicion for an investigatory

---

[40] Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation 483-84 (2008).

[41] Id. at 483.

[42] Id. at 484.

[43] 496 U.S. 325, 328 (1990).

[44] Id. at 327.

[45] Id.

[46] Id.

[47] Id. at 332.

[48] Id.

[49] Id. at 331.

[50] See Clancy, supra note 40, at 483-84.

[51] 496 U.S. at 333 (Stevens, J., dissenting).

[52] LaFave, supra note 21, at 228.

stop of the subject of an anonymous tip. [53] Subsequently, courts circumvented anonymous tip requirements by creating case-specific exceptions. For example, a firearm exception to White's [*838] corroboration benchmark developed "so that a gun suspect could be stopped even absent a corroborated prediction of future (as compared with ongoing) events." [54]

In J.L., the Court invalidated this lower-court-created firearm exception. [55] The Court reasoned that this exception to the corrobo-ration requirement for anonymous tips would "enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call." [56] Additionally, the Court reasoned that such an exception could "rove" beyond allegations involving firearms to include uncorrobora-ted anonymous tips alleging other criminal activity. [57]

III. The Universe of Anonymity and the J.L. Framework for Determining Whether Anonymous Tips Provide Reasonable Suspicion To Conduct an Investigatory Stop

J.L. holds that an anonymous tip identifying a person engaged in alleged concealed criminal activity, without more, does not provide the reasonable suspicion necessary for police to conduct a stop and frisk. [58] In that case, an anonymous informant reported to police that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." [59] The state argued that such a "tip [is] reliable because its description of the suspect's visible attributes proved accurate." [60] The Court reasoned that this contention "misapprehends the reliability needed for a tip to justify a Terry stop." [61] Instead, the Court distinguished between "reliability as to identification" and "reliability as to the likelihood of criminal activity." [62]

A. J.L. Framework for Determining Whether Anonymous Tips Provide Reasonable Suspicion To Conduct an Investigatory Stop

In J.L., the Court created a framework for analyzing whether a tip alleging a contemporaneous observation of criminal activity, without [*839] more, provides an officer reasonable suspicion for an investigatory stop. The framework consists of two elements: (1) reliability as to identification and (2) reliability as to the likelihood of criminal activity. The Court reasoned that in the case of a tip alleging contemporaneous observations of criminal activity, both elements are necessary to provide the reasonable suspicion necessary for police to conduct a stop and frisk.

---

[53] Id.

[54] Id. at 230.

[55] 529 U.S. 266, 272 (2000).

[56] Id.

[57] Id. at 272-73.

[58] Id. at 268.

[59] Id.

[60] Id. at 271.

[61] Id. at 272.

[62] Id.

[63] A tip is reliable as to identification when it includes "an accurate description of a subject's readily observable location and appearance." [64] A tip satisfying this element "is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse." [65] Alternatively, a tip is reliable as to the likelihood of criminal activity when it is "reliable in its assertion of illegality." [66] A tip that is only reliable as to identification, and not the likelihood of criminal activity, "does not show that the tipster has knowledge of concealed criminal activity" and therefore does not provide the reasonable suspicion necessary for an investigatory stop. [67] Rather, "the reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, [in addition to] its tendency to identify a determinate person." [68]

Table 1 summarizes the framework created by the Court's reasoning in J.L.

TABLE 1

Characteristics of Informant's Tip & Determination of Reasonable Suspicion

		Reliability as to the Likelihood of Criminal Activity?	
		NO	**YES**
Reliability as to Identification?	**NO**	No Reasonable suspicion	No Police Action
	YES	No Reasonable Suspicion -or- Exception (b/c of danger of alleged criminal activity)	Reasonable Suspicion

As Table 1 illustrates, only those courts finding that a tip is reliable as to identification, but not as to the likelihood of criminal activity, have to decide whether to create an exception to find reasonable suspicion [*840] for an investigatory stop. Generally, for tips alleging contemporaneous observations of criminal activity, only the likelihood of criminal activity is at issue because tips that are truly not reliable as to identity never mature into any police action.[69]

B. The Universe of Anonymity

When determining whether a tip is reliable as to the likelihood of criminal activity, courts first look to the class of informant providing the information. [70] In J.L., the Court held that "an

---

[63] Id. at 274.

[64] Id. at 272.

[65] Id.

[66] Id.

[67] Id.

[68] Id.

[69] See LaFave, supra note 21, at 194-213 (discussing the specificity necessary for a tip to be reliable as to identity). LaFave concluded that "there is a significant body of authority to the effect that … if it appears that [a tip] is so general … that it would not permit the singling out of one person as the probable offender," the police cannot act. Id. at 194.

[70] See J.L., 529 U.S. at 269-70.

anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White does not justify a stop and frisk." [71] White clearly stands for the proposition that corroboration of the innocent predictive details of an anonymous tip provides reasonable suspicion for an investigatory stop. [72] However, it is less clear what the Court means by an anonymous tip lacking the reliability of the kind contemplated in Adams because that case concerned a tip by a known informant. [73] The only other time the J.L. opinion juxtaposes Adams and White is in the following excerpt:

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, see Adams v. Williams, … "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," Alabama v. White… . As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." [74]

Here the Court is discussing the informant-reliability spectrum. [75] In this context, it is arguable that the phrase, "anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White," is invoking the larger notion of a reliability spectrum to analyze different types of tips from anonymous informants. [76]

[*841] Justice Kennedy's concurring opinion reinforces this view, suggesting that "a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action." [77] Thus, the Court is impliedly reasoning that in the universe of anonymity, informants can range from the truly unknown to those just distinct enough to provide reasonable suspicion. [78]

The consequence of differentiating between specific features of anonymous tips is "that if the informant is not really anonymous in the same sense as the White informer was, then perhaps this means that the informant's tale itself carries greater weight, thus necessitating something less in terms of corroboration." [79] In the case of an anony-mous informant alleging a contemporaneous observation of criminal activity, the information contained in the tip itself may

---

[71] Id. at 274.

[72] 496 U.S. 325, 332 (1990).

[73] 407 U.S. 143, 145-46 (1972).

[74] J.L., 529 U.S. at 270 (citation omitted) (quoting White, 496 U.S. at 329).

[75] See Wallentine, supra note 25, at 185-89.

[76] J.L., 529 U.S. at 274.

[77] Id. at 275 (Kennedy, J., concurring, joined by Rehnquist, C.J.).

[78] See LaFave, supra note 21, at 105-06 (Supp. 2004).

[79] Id. at 105.

sufficiently narrow the likely class of informants, for example, those drivers on the road able to see the subject of the tip, so that the White corroboration requirement can be relaxed. [80]

Applying the J.L. framework to the facts of Adams and White shows that tips provided by known informants are presumed reliable as to the likelihood of criminal activity, and tips by anonymous informants are not. In Adams, because the informant was known, the tip was sufficient to justify an investigatory stop. [81] The identity of the informant, regardless of his underlying basis of knowledge or trustworthiness, satisfied the reliability as to the likelihood-of-criminal-activity element. [82] In White, because the informant was anonymous, the tip required police corroboration of predictive information to justify an investigatory stop. [83] Here, the underlying basis of knowledge of the informant, regardless of his identity, satisfied the reliability as to the likelihood-of-criminal-activity element. [84]

While not to a precise mathematical certainty, Adams and White suggest that in the context of the likelihood-of-criminal-activity element, the relationship between the class of informant and the [*842] information contained in the tip is inversely related. Under this inverse relationship, "a deficiency in one may be compensated for … by a strong showing as to the other, or by some other indicia of reliability." [85] However, J.L. makes clear that this is not the only way these two elements interact. In the "universe of anonymity" consideration, there is a direct relationship between the class of informant and the information contained in the tip, such that the more specific the information in the tip, the more narrow the class of likely informant providing the tip. [86] Figure 1 summarizes these two relationships.

---

[80] See id.

[81] 407 U.S. 143, 146 (1972).

[82] See LaFave, supra note 21, at 216-17.

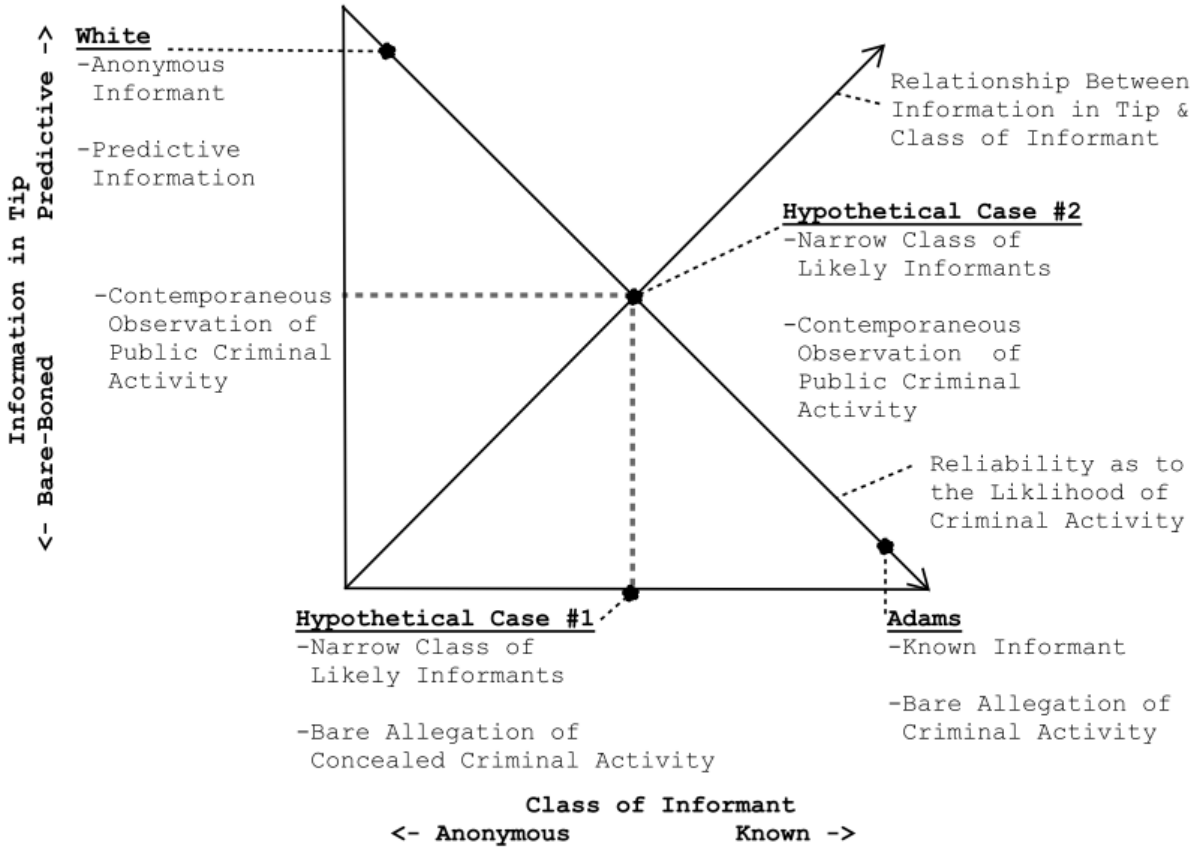
[83] 496 U.S. 325, 331 (1990).

[84] See id.

[85] Illinois v. Gates, 462 U.S. 213, 233 (1983).

[86] Florida v. J.L., 529 U.S. 266, 275 (2000) (Kennedy, J., concurring, joined by Rehnquist, C.J.) ("[A] tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action.").

FIGURE 1



[*843] If Adams and White represent opposing ends of the informant-reliability spectrum, the universe of anonymity occupies the area in between. In Figure 1, the line connecting Adams and White represents the inverse relationship between the class of informant and the specificity of information in the tip. Theoretically, any point along that line has the requisite combination of information and class of informant to make a tip reliable as to the likelihood of criminal activity. The line extending from the origin represents the direct relationship between the class of informant and the specificity of information in the tip. Following the Court's reasoning in J.L., the substance of a tip is a factor in determining where a quasi-known/quasi-anonymous informant falls on this spectrum. [87] The more detailed the tip, the more the informant is treated as being known. [88] Contrast this to the fact that if the informant were actually known, a bare-boned tip would be reliable as to the likelihood of criminal activity. [89] Conversely, the more bare- boned the tip, the more the informant is treated as being anonymous. [90] Again, contrast this to the fact

[87] See LaFave, supra note 21, at 105 (Supp. 2004).

[88] See J.L., 529 U.S. at 275 (Kennedy, J., concurring, joined by Rehnquist, C.J.).

[89] See Adams v. Williams, 407 U.S. 143, 157 (1972) (Marshall, J., dissenting, joined by Douglas, J.).

[90] See J.L., 529 U.S. at 275 (Kennedy, J., concurring, joined by Rehnquist, C.J.).

that if the informant were actually anonymous, only a tip containing predictive details capable of corroboration would be considered reliable as to the likelihood of criminal activity. [91]

In Hypothetical Case #1 (Figure 1), the information in the tip is sufficient to narrow the class of likely informants; however, the tip only contains a bare allegation of concealed criminal activity. For example, this would have been the scenario if the informant in J.L. stated he was watching an individual standing at a bus stop carrying a concealed weapon, without offering any information as to how he personally knew that the suspect was armed. [92] In Hypothetical Case #2 (Figure 1), the information in the tip is sufficient to narrow the class of likely informants, and the tip contains a contemporaneous observation of public criminal activity. For example, this would have been the scenario if the informant in J.L. stated he was personally watching an individual standing at a bus stop carrying an exposed weapon on his belt. This case represents a midpoint between the Adams and White extremes and reflects the argument offered in Justice Kennedy's concurring opinion in J.L. that "a tip might be anonymous in some [*844] sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action." [93]

IV. Application of J.L. Framework to Lower Court Decisions Addressing Anonymous Tips of Drunk Driving

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical." [94] However, the gravity of a government interest does not warrant mischaracterizing the problem at issue to justify a desired outcome. The previous Part draws a distinction between public and concealed criminal activity. To determine whether anonymous tips of drunk driving provide reasonable suspicion for an investigatory stop, it is first necessary to understand the underlying offense. Driving under the influence of alcohol is a concealed crime on par with possessory offenses. [95] Indeed, even a police officer who personally observes an individual finish his drink, close his tab, enter his car, and drive away cannot know if that individual is driving under the influence to a criminal level without the aid of further testing. [96] The National Highway Traffic Safety Administration's (NHTSA) publication The Visual Detection of DWI Motorists supports this conclusion. [97] This publication offers twenty-four visual cues designed to predict whether a driver is intoxicated. [98]

---

[91] See Alabama v. White, 496 U.S. 325, 331 (1990).

[92] 529 U.S. at 268.

[93] Id. at 275 (Kennedy, J., concurring, joined by Rehnquist, C.J.).

[94] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).

[95] See Nat'l Highway Traffic Safety Admin., The Visual Detection of DWI Motorists, http://www.nhtsa.gov/people/injury/alcohol/dwi/dwihtml/cues.htm (last visited Nov. 14, 2010).

[96] This is not meant to suggest that a police officer who personally observes an individual ingest alcohol does not have reasonable suspicion to conduct an investigatory stop. The hypothetical is merely illustrative of the concealed nature of the offense in question.

[97] See Nat'l Highway Traffic Safety Admin., supra note 95.

[98] Id.

Twenty-three of the twenty-four cues are observations of traffic violations. [99] In general, the predicate offense for an arrest for driving under the influence is one of the cues highlighted by the NHTSA. This observation is important because it helps distinguish between tips alleging contemporaneous observations of traffic violations and those containing conclusory allegations that an individual is driving under [*845] the influence. The latter allegation is analogous to Hypothetical Case #1 (Figure 1) because of the concealed nature of the offense. In contrast, the former allegation is analogous to Hypothetical Case #2 because a traffic offense is a readily observable public criminal activity.

A. Application of J.L. Framework to United States v. Wheat

United States v. Wheat is the leading federal court of appeals case addressing whether an uncorroborated anonymous tip alleging a contemporaneous observation of drunk or erratic driving provides the reasonable suspicion necessary for an investigatory stop. [100] In Wheat, the United States Court of Appeals for the Eighth Circuit held that an uncorroborated anonymous tip of erratic driving provided police reasonable suspicion to conduct an investigatory stop. [101] In that case, police received an anonymous tip via a 9-1-1 call from an informant's cell phone. [102] The tip included the car's make, model, and a partial license plate number. [103] In addition, the informant alleged to have personally observed the car "being driven erratically in the northbound lane of Highway 169, eight miles south of Fort Dodge, Iowa … passing on the wrong side of the road, cutting off other cars, and otherwise being driven as if by a "complete maniac."' [104]

The Eighth Circuit reasoned that to provide reasonable suspicion for an investigatory stop, an anonymous tip of this type must be reliable as to identification and as to the likelihood of criminal activity. [105] Under this two-part analysis, the court found that the description of the vehicle satisfied the reliability-as-to-identification element. [106] As for reliability as to the likelihood of criminal activity, because the court assumed it was dealing with an anonymous informant, it determined that satisfying this second element required corroboration. [107] To meet the White corroboration requirement, the [*846] court reasoned that Supreme Court precedent does not require police to corroborate criminal activity predicted in an anonymous tip. [108] Instead, the

---

[99] Id.

[100] See 278 F.3d 722 (8th Cir. 2001); Reply Brief for Petitioner, supra note 17; see also LaFave, supra note 21, at 107 n.406.11 (Supp. 2004).

[101] 278 F.3d at 737.

[102] Id. at 724.

[103] Id.

[104] Id.

[105] Id. at 731-33 ("First, the anonymous tipster must provide a sufficient quantity of information … so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the caller… . The second and far more difficult consideration concerns the quality, or degree of reliability, of the information conveyed in an anonymous tip.").

[106] Id. at 732.

[107] Id. at 733.

[108] Id. at 734.

Eighth Circuit argued 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." [109]

The Eighth Circuit's approach in this case expressly adopts the J.L. framework. However, it does not take into account the expanded universe of anonymity developed in J.L. As a consequence of not differentiating between various classes of anonymous informants, the Eighth Circuit assumes that the informant at issue is analogous to that in White and consequently grafts a corroboration requirement onto its analysis. [110] Conversely, if the court had assumed that the informant fell somewhere in between White and Adams, the information contained in the tip could have supported a finding of reasonable suspicion justifying an investigatory stop. [111] However, the Eighth Circuit's initial assumption creates an additional, and possibly unnecessary, hurdle to determining whether there was reasonable suspicion to conduct an investigatory stop in Wheat.

Interestingly, the Court's opinion in J.L. only uses the word "corroborated" once: when describing the holding of White. [112] Throughout the rest of the opinion, the Court uses the phrase "indicia of reliability" instead. [113] Specifically, the Court held, "An anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White does not justify a stop and frisk … ." [114] The Eighth Circuit's "at least as credible as White" reasoning presupposes that the informant in Wheat was as anonymous as the informant in White. [115] However, the Eighth Circuit expressly acknowledges that "the anonymous caller specifically alleged that he had personally observed several different traffic violations involving erratic driving," demonstrating contemporaneous personal observation of public criminal activity and narrowing the likely class of informants to those [*847] drivers on the road with the subject of the tip. [116] In light of the Court's decision in J.L., acknowledging a difference between the anonymous informant in White and a more determinable anonymous informant, the addition of a corroboration requirement seems excessive. Rather, an easier argument, which the Eighth Circuit did not attempt, is that the anonymous informant in Wheat was more analogous to the informant in Adams. [117]

In Adams, there was nothing to indicate that the known informant personally observed any criminal activity. [118] In White, the anonymous informant predicted routine noncriminal activity.

---

[109] Id. at 735.

[110] Id. at 733.

[111] See supra Figure 1; supra text accompanying note 87.

[112] Florida v. J.L., 529 U.S. 266, 270 (2000).

[113] Id. at 269-71, 273-74.

[114] Id. at 274.

[115] Wheat, 278 F.3d at 735.

[116] Id. at 732.

[117] See id.

[118] Adams v. Williams, 407 U.S. 143, 157 (1972) (Marshall, J., dissenting, joined by Douglas, J.).

[119] In Wheat, the anonymous, but determinable, informant "personally observed several different traffic violations." [120] In comparison, the Wheat informant, though more "known" than the White informant and more "reliable" than the Adams informant, was still subject to the White corroboration requirement and did not benefit from the Adams trustworthiness assumption. [121]

Instead of differentiating from White and analogizing to Adams, the Eighth Circuit latched onto the J.L. "danger alleged in an anonymous tip" dicta. [122] The court reasoned that the extent to which an anonymous tip must be corroborated is inversely related to the level of danger alleged in the tip. [123] By this math, "an allegation of erratic driving will generally [need less corroboration than] a report of a vehicle being driven one mile per hour over the posted limit." [124] Accordingly, it should follow that an anonymous tip alleging that an individual, say waiting at a bus stop, is carrying a concealed machinegun requires less corroboration than a tip that the same individual is carrying a concealed Revolutionary War musket.

While J.L. obviously holds to the contrary, this comparison points out the shortcomings of linking the degree of required corroboration to the level of alleged danger. [125] How many miles per hour over the speed limit must an anonymous tip allege to remove the corroboration [*848] requirement? Is it a one-to-one ratio? Does it depend on weather conditions? Clearly, the "danger dicta" in J.L. is not meant to invoke complex calculations, but refers to "extraordinary dangers [that] sometimes justify unusual precautions." [126]

Still, if drunk driving is a distinguishable offense in that it poses an extraordinary danger, then relaxing the corroboration required of anonymous tips from White-like informants is justified by the J.L. danger dicta. The Eighth Circuit examined several state supreme court decisions dealing with this issue and concluded that drunk driving is an extraordinary danger because "[a] drunk driver is not at all unlike a "bomb,' and a mobile one at that." [127] However, subsequent to the decision in Wheat, the Supreme Court observed that "DUI differs from … crimes involving the use of explosives." [128] In fact, "the number of people who are killed each year by drunk drivers is far greater than the number of murders committed during … offenses involving the use of explosives." [129]

---

[119] 496 U.S. 325, 333 (1990) (Stevens, J., dissenting, joined by Brennan & Marshall, JJ.).

[120] 278 F.3d at 732.

[121] See White, 496 U.S. at 331; Adams, 407 U.S. at 146; Wheat, 278 F.3d at 732-33.

[122] Wheat, 278 F.3d at 729, 732 n.8.

[123] Id.

[124] Id.

[125] 529 U.S. 266, 273-74 (2000).

[126] Id. at 272.

[127] Wheat, 278 F.3d at 729-30, 737 (quoting State v. Boyea, 765 A.2d 862, 867 (Vt. 2000) (internal quotation marks omitted)).

[128] Begay v. United States, No. 06-11543, slip op. at 7 (U.S. Apr. 16, 2008).

[129] Id. at 3 (Alito, J., dissenting).

Aside from simply suggesting that drunk drivers are distinguisha-ble from bombs, the Court's observation suggests that the number of deaths associated with a particular activity is not the sole criteria for determining whether an offense constitutes an extraordinary danger. Arguably then, the danger dicta in J.L. is not identifying all threats that pose an imminent threat of death to the public as a substantial enough government interest to justify relaxing the White corroboration requirement for anonymous informants. [130]

The obvious underlying question is: Why does any of this matter? Regardless of the approach taken by the Eighth Circuit, the investigatory stop in Wheat was justified either because of the danger posed by drunk driving or because the nature of the information in the tip did not require police corroboration for a finding of reasonable suspicion. However, the fact that this distinction is moot to the outcome of the case makes it all the more important when considered in the context of the "could you/should you" debate.

In J.L., the Court rejected a firearm exception to the corroboration requirement out of concern that "an automatic … [*849] exception to [the] established reliability analysis would rove too far." [131] The concern arose from the fact that the informant in J.L. was identical to the informant in White. [132] In J.L.:

All 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. If White was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line. [133]

Table 2 compares the analysis in Adams, White, J.L., and Wheat.

TABLE 2

	Informant		Identification Reliable		Predictive Info Corroborated		Criminal Activity Likely		Exception		Reasonable Suspicion for Stop
Adams:	Known	+	Yes	+	N/A	=	Yes	+	N/A	=	Yes
White:	Anonymous	+	Yes	+	Yes	=	Yes	+	N/A	=	Yes
JL:	Anonymous	+	Yes	+	No	=	No	+	Firearm Exception (Invalidated)	=	No
Wheat:	Anonymous	+	Yes	+	No	=	No	+	Drunk Driving Exception	=	Yes

[130] Contra Wheat, 278 F.3d at 736-37 ("An erratic and possibly drunk driver poses an imminent threat to public safety… . Thus, we think that there is a substantial government interest in effecting a stop as quickly as possible.").

[131] 529 U.S. at 272.

[132] See id. at 271.

[133] Id.

Although the danger dicta in J.L. meant the Eighth Circuit could create an exception, should the court have? Not if it had assumed that the informant in Wheat was more akin to the informant in Adams than to the informant in White. Based on this assumption, the Eighth Circuit could then have concluded the informant was "known." If the Wheat informant is known, as opposed to anonymous, the Wheat factors adding up to the reliability-of-criminal- activity element are identical to those factors in Adams, and no exception is necessary to find reasonable suspicion necessary to justify an investigatory stop. However, by starting from the assumption that the informant was anonymous, the Eighth Circuit forced the facts of Wheat through the White equation. Accordingly, the Eighth Circuit's analysis required the addition of an exception to counter the corroboration requirement in [*850] order to find reasonable suspicion necessary to justify the investigatory stop in Wheat.

B. Application of J.L. Framework to State Supreme Court Cases

The Wheat decision relied heavily on state supreme court cases creating a drunk-driving exception for anonymous tips. [138] For example, Wheat considered State v. Boyea, in which the Vermont Supreme Court held that an uncorroborated anonymous tip provided reasonable suspicion for an officer to conduct an investigatory stop. [139] In that case, a police dispatcher relayed an anonymous tip that a "blue-purple Volkswagen Jetta with New York plates, traveling south on I-89 in between Exits 10 and 11, [was] operating erratically." [140] In a concurring opinion the court noted that "the caller may have used words other than "erratic driving' to describe what was observed, and the dispatcher may have reduced the tipster's information to police lingo before issuing the [radio call]." [141] The court reasoned that information contained in the tip gave rise to a "reasonable inference that the caller had personally observed the vehicle," and "the information that the vehicle was acting "erratically' equally supported a reasonable inference that the driver might be intoxicated or otherwise impaired." [142]

Under the J.L. framework, to determine whether the tip was reliable as to the likelihood of criminal activity, it is first necessary to determine whether the informant in Boyea was more analogous to the informant in Adams or to the informant in White. [143] A dissenting opinion in Boyea points out the similarities between the tip at issue and that in J.L., stating: "Just as J.L. was described as being at a specific bus stop, [here the] defendant's car was described at a particular location … . [Additionally], the allegation of wrongdoing, J.L.'s carrying a gun and Ms. Boyea's "erratic driving,' stands alone, with no explanation of how or why the tipster knows this."

---

[138] See id. at 729.

[139] Id. (discussing State v. Boyea, 765 A.2d 862, 863 (Vt. 2000)).

[140] Boyea, 765 A.2d at 863.

[141] Id. at 875 (Skoglund, J., concurring).

[142] Id. at 868 (majority opinion).

[143] See Florida v. J.L., 529 U.S. 266, 274 (2000).

[144] Conversely, the Boyea majority assumes that the information contained in the tip demonstrated that the informant based his knowledge on personal information. [145]

[*851] In J.L., Justice Kennedy's concurring opinion stressed that "on the record created at the suppression hearing, the Court's decision is correct." [146] The J.L. majority also observed the fact that "so far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant." [147] The lack of anything in the record helping to narrow the identity of the informant led the Court to conclude that the J.L. informant was analogous to the informant in White and therefore required corroboration of predictive information. [148] However, Justice Kennedy's concurring opinion suggests that had the record contained information "narrowing the likely class of informants, … the tip [could have] provided the lawful basis for some police action." [149]

Perhaps the inadequacy of the record in Boyea explains why the majority relies on the J.L. danger dicta to create an imminent-threat-to-public-safety exception to the White corroboration requirement. [150] After concluding that the informant personally observed the erratic driving, therefore narrowing the likely class of informants to those people driving near the subject of the tip, the court reasoned that aspects of the tip demonstrating contemporaneous observation also constitute predictive information. [151] Arguably, it is a prediction when an informant personally observes a speeding car pass by and then predicts where it will be moments later. However, as the dissent in Boyea points out, "the hallmark of a prediction [is] that it is reliable when corroborated," as opposed to a contemporaneous observation, which is reliable when received. [152] Not only does this make the Boyea prediction analogous to that in J.L., and therefore not capable of the type of corroboration the Court required in White, but it also makes the tip analogous to that in Adams, which the Court held was immediately verifiable. [153]

[*852] At the very least, the majority was aware of the argument that the Boyea informant fell somewhere in between White and Adams with respect to the class of the informant. A concurring opinion expressly points out that "the State never obtained evidence from the dispatcher who could have provided more information on the tip… . [Therefore, the court] must

---

[144] Boyea, 765 A.2d at 879 (Johnson, J., dissenting).

[145] Id. at 868 (majority opinion).

[146] J.L., 529 U.S. at 274 (Kennedy, J., concurring, joined by Rehnquist, C.J.).

[147] Id. at 268 (majority opinion).

[148] Id. at 271.

[149] Id. at 275 (Kennedy J., concurring, joined by Rehnquist, C.J.).

[150] See Boyea, 765 A.2d at 867.

[151] See id. at 868.

[152] Id. at 880 (Johnson, J., dissenting).

[153] J.L., 529 U.S. at 271 ("The tip in the instant case lacked the moderate indicia of reliability present in White and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility."); Adams v. Williams, 407 U.S. 143, 146 (1972) ("This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene.").

assume that the tip was anonymous … because the State failed to present evidence from the dispatcher who could have provided more information about the tip." [154] From a precedential standpoint, the court should have crafted a holding incentivizing the presentation of more detailed information about tips at the trial level. If inadequacies in the record compelled the Boyea court to assume the informant was anonymous, creating an imminent-threat-to-public-safety exception to the White corroboration requirement addressed the wrong issues presented in Boyea. [155] In Boyea, if more information about the tip provided by the informant demonstrated some indicia of reliability, the court could have forgone the corroboration requirement in White and would not have needed to rely on the danger dicta in J.L. to create an imminent-public-danger exception to find reasonable suspicion for an investigatory stop. [156]

In contrast to Boyea, where the anonymous tip alleged that the subject of the tip was driving erratically, are those cases in which the informant provides a conclusory allegation that the subject of the tip is driving under the influence of alcohol. For example, in Harris v. Commonwealth, the Virginia Supreme Court held that the combination of an officer's observations and an anonymous tip did not create a reasonable suspicion of criminal activity. [157] The anonymous tip, relayed by a police dispatcher, (1) identified the defendant by name; (2) described his clothing, vehicle, location, direction of travel, and part of the license plate; and (3) alleged the driver was intoxicated. [158] The tip did not indicate the informant's identity or provide predictive information about the defendant's behavior. [159]

[*853] The officer corroborated the vehicle's description, direction of travel, and partial license plate description. [160] However, he did not observe any conduct that the court found indicative of intoxication. [161]

While following [the suspect's] car, [the o]fficer … observed the car's brake lights flash three times[:] … at an intersection although [the defendant] had the right of way[,] … approximately 50 feet prior to a red traffic light[, and] when [the defendant] brought the car to a complete stop for the red traffic light … . [162]

The court reasoned that, in order to justify an investigatory stop, "an anonymous tip need not include predictive information when an informant reports readily observable criminal actions."

---

[154] Boyea, 765 A.2d at 876 n.5 (Skoglund, J., concurring) (internal quotation marks omitted).

[155] See id. at 868 (majority opinion).

[156] J.L., 529 U.S. at 275 (Kennedy, J., concurring, joined by Rehnquist, C.J.); LaFave, supra note 21, at 105 (Supp. 2004).

[157] Harris v. Commonwealth, 668 S.E.2d 141, 147 (Va. 2008), cert. denied, No. 08-1385 (U.S. Oct. 20, 2009).

[158] Id. at 146.

[159] Id.

[160] Id. at 144.

[161] Id. at 146.

[162] Id. at 144.

[163] However, the court continued, driving under the influence is only "readily observable" when an officer actually observes objective conduct indicating the driver is intoxicated. [164]

Without explicitly evoking the J.L. framework discussed above, the court implicitly analyzed whether the anonymous tip satisfied the reliability-as-to-the-likelihood-of-criminal-activity element. [165] Like in Boyea, the court assumed that the informant providing the tip was anonymous. [166] The dissent also characterized the informant as anonymous but took issue with the majority for not considering specific information in the tip indicating the informant based his allegations on personal observations. [167] Specifically, the tip included that the subject was "in the 3400 block of Meadowbridge Road." [168] The dissent argued that "to know the exact location and direction of the [subject] indicates that the informant personally observed the vehicle." [169]

If the Harris dissent is correct and the information contained in the tip "narrowed the likely class of informants," then both the majority and dissent mischaracterized the class of informant in Harris. [170] Instead of being characterized as anonymous, that informant should have fallen in between the class of informants in White and [*854] Adams. Because this determination depends on the specific information provided in a tip, Table 3 compares the information provided by the informant in Harris with information from informants in previously discussed cases.

---

[163] Id. at 146.

[164] Id.

[165] See id. at 145-46.

[166] Id. at 145.

[167] Id. at 148 (Kinser, J., dissenting, joined by Lemons & Millette, JJ.).

[168] Id. at 144 (majority opinion).

[169] Id. at 148 (Kinser, J., dissenting, joined by Lemons & Millette, JJ.).

[170] Florida v. J.L., 529 U.S. 266, 275 (2000) (Kennedy, J., concurring, joined by Rehnquist, C.J.).

TABLE 3

Case	Description	Location	Criminal Activity	Class of Informant
J.L	A young black male wearing a plaid shirt	Standing at a particular bus stop	Carrying a gun	Anonymous
Wheat	A tan-and cream-colored Nissan Stanza, whose license plate began with the letters W-O-C	In the northbound lane of Highway 169, eight miles south of Fort Dodge, Iowa.	Being driven erratically: passing on the wrong side of the road, cutting off other cars, and otherwise being driven as if by a "complete maniac"	Anonymous -or- Narrowed
Boyea	Blue-purple Volkswagen Jetta with New York plates	Traveling south on I-89 in between Exits 10 and 11	Driving erratically	Anonymous -or- Narrowed
Harris	Driver named Joseph Harris; wearing a striped shirt; driving a green Altima with partial license plate number of "Y8066"	In the 3400 block of Meadowbridge Road headed south, towards the city, possibly towards the south side	Driving while intoxicated	?

The tip in Harris contains at least as much information concerning the description and location of the subject as the tips in Boyea and Wheat. All three tips describe the color and type of vehicle. Additionally, all three give a partial description of the vehicle's license plate number. Compared to J.L., the specificity of information as to description and location is much greater in these three cases. In J.L., the Court reasoned that this information - description and location - [*855] demonstrated that a tip was only reliable as to identification. [175] With respect to the information describing criminal activity, Harris diverges from Boyea and Wheat. Where in Boyea and Wheat the tip included contemporaneous observations of public criminal activity and traffic violations, [176] the tip in Harris simply alleged that the subject of the tip was driving while intoxicated. [177]

As discussed above, the state of being intoxicated to a level making it a criminal offense to operate a motor vehicle is more akin to a concealed possessory offense than a readily observable public crime. [178] The majority opinion in Harris directly supports this conclusion:

[175] 529 U.S. at 272.

[176] Wheat, 278 F.3d at 724; Boyea, 765 A.2d at 863.

[177] Harris v. Commonwealth, 668 S.E.2d at 144.

[178] See Nat'l Highway Traffic Safety Admin., supra note 95.

"The crime of driving while intoxicated is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated; such conduct must be observed before an investigatory stop is justified." [179] Moreover, the dissent in Harris indirectly supports the observation that driving while intoxicated is a concealed crime by arguing that "in erratic driving cases the basis of the tipster's knowledge is likely to be apparent. Almost always, it comes from his eyewitness observations, and there is no need to verify that he possesses inside information." [180] The dissent is absolutely correct that erratic driving is a public crime; however, because the tip in Harris alleged the subject was driving while intoxicated, as opposed to driving erratically, this argument misses the mark. [181] Rather, the conclusory allegation of concealed criminal activity in the Harris tip makes it analogous to the tips in J.L. and White, which the Court held were not reliable as to the likelihood of criminal activity absent police corroboration of predictive information. [182]

This comparison demonstrates that, after J.L., whether an anonymous informant is considered analogous to the informant in White hinges on the nature of information in the tip pertaining to criminal activity. If an anonymous tip only contains allegations of concealed criminal activity without any indication of how or why the informant knows this, then the informant is analogous to the one in [*856] White, and the tip must be corroborated to justify an investigatory stop. [183] In contrast, if an anonymous tip alleges a personal contemporaneous observation of a public crime, it is immediately verifiable as to how or why the informant knows a crime is occurring, and the informant is more analogous to that in Adams because the likely class of informants is narrowed to those observing the subject of the tip. [184]

Because the tip in Harris only alleged concealed criminal activity, the majority and dissent both correctly characterized the informant as anonymous. [185] However, the dissent is incorrect in asserting that the information pertaining to the subject's description and location "narrowed the likely class of informants," because under J.L., allegations of concealed criminal activity are insufficient. [186] Additionally, the corroboration of the description and location information was insufficient to provide reasonable suspicion for an investigatory stop because contemporaneous observations are not predictions capable of satisfying the White corroboration require-ment. [187]

The decision in Harris, in the context of the "could you/should you" danger dicta debate, is only significant if the court was actually aware that it could create an imminent-threat-to-public- safety

---

[179] Harris v. Commonwealth, 668 S.E.2d at 146.

[180] Id. at 149 (Kinser, J., dissenting, joined by Lemons, & Millette, JJ.) (quoting Wheat, 278 F.3d at 734).

[181] Id. at 144 (majority opinion).

[182] Florida v. J.L., 529 U.S. 266, 272 (2000).

[183] Id. at 270.

[184] See id. at 275 (Kennedy, J., concurring, joined by Rehnquist, C.J.).

[185] Harris v. Commonwealth, 668 S.E.2d at 145, 148 (Kinser, J., dissenting, joined by Lemons & Millette, JJ.).

[186] J.L., 529 U.S. at 275 (Kennedy, J., concurring, joined by Rehnquist, C.J.); Harris v. Commonwealth, 668 S.E.2d at 148 (Kinser, J., dissenting, joined by Lemons & Millette, JJ.).

[187] J.L., 529 U.S. at 272; Alabama v. White, 496 U.S. 325, 331-32 (1990).

exception to the Fourth Amendment but refrained. Unlike in Boyea, where the specificity of information in the informant's tip did not require corroboration to justify an investigatory stop, the conclusory and anonymous nature of the tip in Harris required some corroboration. [188] The Harris court was aware of this option. In an earlier case it expressly agreed that ""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."' [189] Additionally, the Harris dissent specifically points to this language [*857] from the earlier case as well as to the Boyea drunk-driver-bomb analogy. [190] However, the majority in Harris ignores the dissent's criticism that it failed to address this issue. [191] While there is no way to determine why the majority did not even consider a danger exception to the Fourth Amendment, perhaps the reason is that law enforcement already has the ability to use anonymous tips of drunk driving effectively without a judicially created exception.

V. Is a Drunk-Driving Exception to the Fourth Amendment Necessary?

In the context of the Fourth Amendment, "the real question is not what "could have been achieved,' but whether the Fourth Amendment requires such steps; it is not [the Court's] function to write a [police] manual … . [The Court's] role is to assure against violations of the Constitution." [192] However, the serious repercussions of drunk driving cause public policy concerns to overshadow constitutional considerations. In the denial of certiorari for Harris, the dissent reasoned that "the decision [by the Virginia Supreme Court] 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." [193] However, creating a rule of police procedure is exactly what the decision did not do. Instead, the court in Harris confined its analysis to whether the investigatory stop was constitutionally justified. [194]

If the Harris line of cases is read to create a rule requiring corroboration, then, at the very least, the Wheat and Boyea line of cases must be read as creating a rule commanding police officers to conduct an investigatory stop of every subject of an anonymous tip of drunk driving. The dissent in the Harris denial of certiorari observed that "it will be difficult for an officer to explain to the family of a motorist killed by [a corroborating] swerve that the police had a tip that the driver of the other car was drunk, but that they were powerless to pull him over, even for a quick check." [195] However, it would be [*858] equally difficult for an officer to explain to that family that the tip did not seem credible, so he decided not to pull over the driver.

---

[188] State v. Boyea, 765 A.2d 862, 868 (Vt. 2000); Harris v. Commonwealth, 668 S.E.2d at 147.

[189] Jackson v. Commonwealth, 594 S.E.2d 595, 603 (Va. 2004) (quoting Boyea, 765 A.2d at 867).

[190] Harris v. Commonwealth, 668 S.E.2d at 150 (Kinser, J., dissenting, joined by Lemons & Millette, JJ.).

[191] Id.

[192] Illinois v. Lafayette, 462 U.S. 640, 647 (1983).

[193] Virginia v. Harris, No. 08-1385, at 3 (U.S. Oct. 20, 2009) (Roberts, C.J., dissenting, joined by Scalia, J.) (denying certiorari).

[194] Harris v. Commonwealth, 668 S.E.2d at 147.

[195] Virginia v. Harris, No. 08-1385, at 5.

Rather than boil down cases into their resultant effects on police procedure, it seems more logical to determine the constitutional question and then observe how police procedure adapts to meet this change. Following the denial of certiorari for Harris, Police Magazine published an article addressing the holding in Harris. [196] In a section entitled "Increasing the Odds," the article suggests procedures "to increase the chances that a reviewing court will find an anonymous tip sufficient to justify stopping a suspected drunk driver" in jurisdictions following the Harris line of cases. [197] Specifically, the article suggests officers perform several steps: (1) "Ask the caller to ID him/herself"; (2) "Take a detailed description of both the vehicle and the driving"; (3) "Ask whether the errant driver has caused any near-misses, or is forcing other motorists to take defensive actions"; and (4) "Ask the caller, "Did you see all this yourself?"' [198]

These suggestions represent how police are reacting to decisions, like Harris, interpreting the Fourth Amendment. Assuming this Police Magazine article is representative of the general response by police in jurisdictions without a drunk-driving exception, the practical impact of Harris can be understood by considering the actual impact of these suggestions. Under the first suggestion, if an officer asks for and is provided an informant's identity, the police are then dealing with an Adams informant and the tip is self-authenticating. [199] Under the second through fourth suggestions, if the informant provides any of this information, he is "narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action." [200] Therefore, it seems that instead of creating a rule requiring that police officers wait for traffic accidents to corroborate anonymous tips of drunk driving, the Harris decision is encouraging police officers to investigate anonymous tips so that they comply with the framework proposed in J.L.

[*859] If the actual effect of the decision in Harris is to incentivize police investigation of anonymous tips, what is the effect of the decisions in Boyea and Wheat? In jurisdictions with a drunk-driving exception to the White corroboration requirement, the above suggestions to aid police investigations would not be necessary to justify an investigatory stop based on an anonymous tip. This suggests that the creation of exceptions to the Fourth Amendment may create a disincentive for certain police practices. Additionally, while the state does not have a constitutional duty "to protect an individual against private violence," it may however "acquire[] a duty under state tort law to provide … adequate protection against that danger." [201] While it is remote that a state court would find liability here, briefly assuming there is liability provides an interesting hypothetical.

---

[196] Devallis Rutledge, Beware of False Headlines: What You Read About the Law Is Not Always Accurate, Police Mag., Jan. 2010, available at http://www.policemag.com/Channel/ Patrol/Articles/Print/Story/2010/01/Beware-of-False-Headlines.aspx. Police Magazine is targeted at law enforcement officers and provides information designed to help officers perform their jobs. Columns are written by police and legal experts.

[197] Id.

[198] Id.

[199] See Adams v. Williams, 407 U.S. 143, 146 (1972).

[200] See Florida v. J.L., 529 U.S. 266, 275 (2000) (Kennedy, J., concurring, joined by Rehnquist, C.J.).

[201] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197, 201-02 (1989).

If the state is liable to those individuals injured by intoxicated motorists about whom the police received anonymous tips, the incentive to conduct investigatory stops is high. In comparison, the cost of conducting investigatory stops is relatively low. Because of the exception, police no longer need to ensure that tips are reliable as to the likelihood of criminal activity for an investigatory stop. Therefore, police must only ensure that tips are reliable as to identification, which "is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse." [202] Because the informant does not have to identify the subject of the tip definitively, but merely help identify the subject, it is in the interest of the state for police to conduct an investigatory stop of all subjects remotely fitting the description in the tip.

Now, replace the assumption that the state is liable to those individuals injured by intoxicated motorists about whom the police received anonymous tips with the more probable assumption that police are "engaged in the often competitive enterprise of ferreting out crime." [203] Under this assumption, the incentive to conduct investi-gatory stops is still high, and the cost is still relatively low. The fact that a certain car resembles the subject described in an anonymous tip of drunk driving becomes a pretext for conducting an investigatory stop without reasonable suspicion. If the automatic firearm exception at issue in J.L. "would rove too far [because it] would enable any person seeking to harass another to set in motion an intrusive, [*860] embarrassing police search of the targeted person simply by placing an anonymous call," an automatic drunk-driving exception is a wanderer as well. [204] Because "the constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved," an anonymous tip of drunk driving could give police carte blanche to conduct an investigatory stop of any vehicle unfortunate enough to resemble the subject of the tip. [205]

Despite the risk of abuse, the dissent to the denial of certiorari for Harris reasoned that "the police should have every legitimate tool at their disposal for getting drunk drivers off the road." [206] This Comment suggests that a drunk-driving exception is not a legitimate tool for a variety of reasons; however, perhaps the most convincing argument against this exception is not constitutional or hypothetical, but technological. In J.L., Justice Kennedy's concurring opinion concluded with the following observation:

Instant caller identification is widely available to police, and, if anonymous tips are proving unreliable and distracting to police, squad cars can be sent within seconds to the location of the telephone used by the informant. Voice recording of telephone tips might, in appropriate cases,

---

[202] J.L., 529 U.S. at 272.

[203] Johnson v. United States, 333 U.S. 10, 14 (1948).

[204] J.L., 529 U.S. at 272.

[205] Whren v. United States, 517 U.S. 806, 813 (1996); see also Jason Kyle 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. C.R. L.J. 277, 308 & n.200 (2003) (explaining that during the hunt for the D.C. sniper, the author, then employed by the Arlington County Virginia Police Department, "was personally involved in the stopping of over 100 vehicles and individuals based on anonymous information" and that these anonymous tips "resulted in scores of completely innocent individuals being seized based on anonymous and often vague information").

[206] Virginia v. Harris, No. 08-1385, at 5 (U.S. Oct. 20, 2009) (Roberts, C.J., dissenting, joined by Scalia, J.) (denying certiorari).

be used by police to locate the caller. It is unlawful to make false reports to the police … and the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips. [207]

Simply put, advances in technology may be making the White informant a thing of the past. "Nothing in the Fourth Amendment prohibits the police from [using] technology" [208] that is in general public use. [209] If in White, the record included the fact that the tip came from a specified address, or in Boyea, if the informant placed the 9-1-1 [*861] call from a cell phone registered to a particular individual, or even in Harris, if the tip could be traced to the bar the subject had just left, then these informants would not have been completely anonymous, and the justifications for the stops would not have hinged on corroboration.

VI. Conclusion

In the context of the "could you/should you" debate, the reasonableness of a drunk-driving exception to the Fourth Amendment depends on the weight of "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen, for there is no ready test for determining reasonableness other than by balancing the need to search … against the invasion which the search … entails." [210] This is essentially a public policy determination of whether a court believes the interest in the danger averted outweighs the individual interest in remaining free from governmental intrusion. The problem with this test is its vulnerability to judicial rhetoric, designed to tip the scales in favor of a predetermined outcome.

The dissent to the denial of certiorari in Harris intimated that in the context of drunk driving, the government interest is rather weighty when compared to the private interest upon which it intrudes. [211] This is the dissent's predetermined outcome. On the government side of the scales, the interest is "that drunk driving is a serious and potentially deadly crime." [212] On the private individual side, the interest is not specifically defined. Rather, it is characterized as being diminished relative to the government interest because of (1) "the especially grave and imminent dangers posed by drunk driving," (2) "the fact that traffic stops are typically less invasive than [other] searches," and (3) "the diminished expectation of privacy enjoyed by individuals driving their cars on public roads." [213] Defining the private interest in these terms rigs the scales in favor of the government interest so that any balancing test is nothing more than a ruse to reach a predeter-mined outcome.

---

[207] 529 U.S. at 276 (Kennedy, J., concurring, joined by Rehnquist, C.J.) (citation omitted).

[208] United States v. Knotts, 460 U.S. 276, 282 (1983).

[209] Kyllo v. United States, 533 U.S. 27, 40 (2001).

[210] Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (internal quotation marks omitted).

[211] See Virginia v. Harris, No. 08-1385, at 3.

[212] Id.

[213] Id. at 4.

A true balancing test requires that the scales be zeroed from the outset. So what is the nature of the private interest at issue? Justice Jackson's dissent in Brinegar v. United States offers a fair and accurate assessment of this interest:
[*862]

The right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers … stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress… .

Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty… . So a search against [a specific] car must be regarded as a search of the car of Everyman.

[Courts] must remember that the extent of any privilege of search and seizure … which [they] sustain, the officers interpret and apply themselves and will push to the limit… .

… .

… The authority which [courts] concede to conduct searches … may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies. [214]

This is the private interest at stake. It is clear that courts could find the government interest more substantial than the private interest. However, the more important question is, should courts reach this conclusion?

Whether a court should create a drunk-driving exception depends, in part, on the impact an exception would have on the drunk-driving problem. The impact of an exception depends on how frequently police receive anonymous tips of drunk driving. In March 2007 the NHTSA published a study entitled Programs Across the United States That Aid Motorists in the Reporting of Impaired Drivers to Law Enforcement. [215] This study surveyed cellular-drunk-driving-reporting programs across fifty-seven U.S. territories and states. [216] The problems reported include: (1) incomplete information from callers, (2) too few patrol officers to attend to the calls, (3) the length of time necessary to locate the suspected vehicle, (4) joke calls or other nonemergency calls, (5) multiple calls for the same incident, (6) financial problems, and (7) that

---

[214] 338 U.S. 160, 181-82 (1949) (Jackson, J., dissenting).

[215] Nat'l Highway Traffic Safety Admin., Programs Across the United States That Aid Motorists in the Reporting of Impaired Drivers to Law Enforcement (Mar. 2007), http://www.nhtsa.gov/staticfiles/nti/pdf/810750.pdf.

[216] Id. at 2.

officers lacked probable cause to [*863] stop the vehicle. [217] Only Idaho, Maryland, Montana, South Dakota, and Virginia reported no probable cause to stop a vehicle as a problem encountered by their programs. [218] None of these states reported the percentage of calls resulting in arrest, prosecution, or conviction. [219] Additionally, these states did not report the number of calls received. [220] Therefore, other than the fact that a minority of states report a problem with officers not having probable cause to stop a vehicle in an unknown number of cases, this study offers no empirical evidence supporting the conclusion that a drunk-driving exception would affect the drunk-driving problem.

Existing Fourth Amendment jurisprudence only requires that officers give the subject of anonymous tips of drunk driving one free swerve in a narrow, and possibly diminishing, set of cases involving anonymous informants akin to that in White. Over fifty-two of the states or territories included in the 2007 NHTSA study report that operators employed by their programs receive impaired-driving-reporting training. [221] While it does not indicate the curriculum of these training programs, the NHTSA report only inquires whether programs ask callers for the following information: license plate, location, driver characteristics, passenger information, and vehicle information. [222] There is no data on whether these reporting programs ask callers if they have personally observed any traffic violations or other types of erratic driving.

Rather than assume that the magnitude of the drunk-driving problem justifies an exception to the Fourth Amendment, there should be some understanding of the potential impact of the exception. Current Fourth Amendment jurisprudence provides a viable frame-work for courts and the police to combat this issue. When the Court eventually does grant certiorari on this issue, it should not base the decision solely on public policy. At a minimum, the Court should fold constitutional, technological, and empirical considerations into its analysis to properly balance the government's interests against those of "Everyman."

End of Document

---

[217] Id. at 5-52. Clearly, probable cause is not required to conduct an investigatory stop. This Comment assumes that the use of the term "probable cause" in the 2007 NHTSA study means "reasonable suspicion."

[218] Id. at 16, 25, 31, 45, 48.

[219] Id.

[220] Id.

[221] Id. at 53-62.

[222] Id.