VIRGINIA IN THE DRIVER'S SEAT: HOW THE SUPREME COURT OF VIRGINIA CAN HELP THE SUPREME COURT OF THE UNITED STATES FINALLY ESTABLISH THE DRUNK-DRIVING EXCEPTION TO ANONYMOUS TIPS LAW*

INTRODUCTION

If a police officer receives an anonymous tip that there is a drunk driver on the road, must the officer wait to pull the driver over until the driver swerves? Or may he immediately pull the driver over to quickly avert an accident and potentially save a life? Thankfully, most states[1] and the only federal circuit[2] to rule on the issue have held that police may immediately stop the driver without violating the Constitution. However, a minority of states, including Virginia, have ruled that uncorroborated anonymous tips of drunk driving do not justify a traffic stop.[3] The Supreme Court has punted on the issue and left federal and state courts "deeply divided."[4]

In order to pass constitutional muster under the Fourth Amendment, investigative stops by the police must be supported by at least reasonable suspicion that a crime has been committed.[5] The Supreme Court has held that anonymous tips may give officers reasonable suspicion, but only if sufficiently corroborated by police observations.[6] Basically, anonymous tipsters must provide police with at least some information predicting the behavior of the suspected criminal, and police must subsequently observe at least some of that behavior. For example, an anonymous tip can justify a stop if it informs the police that someone carrying illegal drugs is going to leave a certain location in a

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1 State v. Boyea, 765 A.2d 862, 868 (Vt. 2000); *see also* Denise N. Trauth, Comment, *Requiring Independent Police Corroboration of Anonymous Tips Reporting Drunk Drivers: How Several State Courts Are Endangering the Safety of Motorists*, 76 U. CIN. L. REV. 323, 323 (2007).

2 United States v. Wheat, 278 F.3d 722, 729 (8th Cir. 2001).

3 Harris v. Commonwealth, 668 S.E.2d 141, 146 (Va. 2008); Trauth, *supra* note 1, at 323–24.

4 Virginia v. Harris, 130 S. Ct. 10, 10 (2009) (Roberts, C.J., dissenting from denial of certiorari).

5 Brown v. Texas, 443 U.S. 47, 51 (1979) (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 880–83 (1975)).

6 Alabama v. White, 496 U.S. 325, 326–27 (1990).

certain vehicle and travel to a certain location, but only if the police observe at least some of that behavior and description. In such a scenario, the police have not observed the criminal activity (i.e., trafficking drugs), but have verified the tipster's basis of knowledge by corroborating the predictive information in the tip.

This test becomes troublesome, however, when the anonymous tip involves imminently dangerous activities such as drunk driving. If an anonymous tipster informs the police that they witnessed someone driving "erratically" (i.e., drunk), the police may not stop the vehicle until they have verified the predictions of the tipster; that is, they must observe the suspect drive erratically. Thus, to avoid violating the Fourth Amendment, police officers are forced to follow drunk drivers and "do nothing until they see the driver actually do something unsafe on the road—by which time it may be too late."[7]

The solution to this dilemma is what this Note and other scholarship calls the "drunk-driving exception."[8] Under this principle, as the majority of states and the only federal circuit to officially rule on the issue have held, police officers may act on anonymous tips of drunk driving by conducting traffic stops without independently observing any indicia of intoxication.[9]

Virginia has played a special role in the development of this area of law, originally recognizing the police's right to pull over drivers reported by anonymous tipsters to be drunk[10] and later overturning that conclusion.[11] The United States Supreme Court denied certiorari in the latter case, but Chief Justice Roberts dissented in that denial, expressing a desire to resolve the debate that has "deeply divided" the lower courts.[12] Virginia courts also have the opportunity to play a large role in settling this area of law by using doctrines that are slightly off-point but nonetheless support the drunk-driving exception in principle.

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[7] *Harris*, 130 S. Ct. at 10 (Roberts, C.J., dissenting from denial of certiorari) (emphasis omitted).

[8] *See, e.g.*, Chris La Tronica, Comment, *Could You? Should You?* Florida v. J.L.*: Danger Dicta, Drunken Bombs, and the Universe of Anonymity*, 85 TUL. L. REV. 831, 833 (2011). Although no court has explicitly named it so, this Note will refer to this exception as the "drunk-driving exception." However, this Note does not view this principle as an "exception" in the true sense of the word; it does not argue that when officers receive tips of drunk drivers, they are not subject to the Fourth Amendment. Rather, it argues that officers who receive tips of drunk driving are not confined to an "individual suspicion" requirement in a reasonable-suspicion analysis. In this sense, this Note's analysis might fall into what many call the "special needs" Fourth Amendment cases.

[9] *See supra* notes 1–2 and accompanying text.

[10] Jackson v. Commonwealth, 594 S.E.2d 595, 603 (Va. 2004) (citing State v. Boyea, 765 A.2d 862, 867 (Vt. 2000)).

[11] Harris v. Commonwealth, 668 S.E.2d 141, 146 (Va. 2008).

[12] *Harris*, 130 S. Ct. at 10 (Roberts, C.J., dissenting from denial of certiorari).

Under the "community caretaker" doctrine, Virginia courts recognize that police officers have a duty to protect citizens, pursuant to which they may briefly detain people without reasonable suspicion for the safety of the community.[13] This doctrine, combined with Supreme Court precedent in the checkpoint cases recognizing a similar interest to protect the community from drunk driving,[14] sets the table for a recently restructured Virginia Supreme Court to recognize the drunk-driving exception to anonymous-tips law and give the United States Supreme Court another chance to "answer the question and resolve the conflict."[15]

Part I of this Note briefly describes the basic Fourth Amendment rules regarding investigatory stops and how they apply to anonymous tips. Part II explains the drunk-driving exception by exploring the landmark decisions of two states—Vermont and Virginia—that came to opposite conclusions on the issue. Part III proposes that the Virginia Supreme Court utilize the checkpoint and community caretaker doctrines which, although not directly on point, support the establishment of the drunk-driving exception. Finally, this Note proposes a two-pronged test to determine whether an anonymous tip of drunk or erratic driving justifies an investigatory stop.

I. BACKGROUND

A. Investigatory Stops and Reasonable Suspicion

To understand the law of anonymous tips, it is necessary to review the basics of search and seizure jurisprudence. The Fourth Amendment protects citizens, inter alia, "against unreasonable searches and seizures."[16] Thus, to determine whether a police officer acted within constitutional bounds in the context of an investigatory stop, such as a traffic stop, courts must determine first whether the stop constituted a seizure and then whether that seizure was reasonable.[17]

In its landmark decision in *Terry v. Ohio*, the Supreme Court held that a seizure takes place "whenever a police officer accosts an individual and restrains his freedom to walk away"[18] and that such restraining can be "by means of physical force or show of authority."[19]

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[13] Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995); Barrett v. Commonwealth, 447 S.E.2d 243, 245 (Va. Ct. App. 1994), *rev'd on other grounds*, 462 S.E.2d 109 (Va. 1995).

[14] *E.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990).

[15] *Harris*, 130 S. Ct. at 10 (Roberts, C.J., dissenting from denial of certiorari).

[16] U.S. CONST. amend. IV.

[17] *See id.*; Terry v. Ohio, 392 U.S. 1, 16, 19 (1968).

[18] *Terry*, 392 U.S. at 16.

[19] *Id.* at 19 n.16.

Twelve years later, the Court elaborated on what constitutes a "show of authority" by establishing a totality-of-the-circumstances test to determine whether an officer's behavior constituted a seizure.[20] Under the so-called *Mendenhall* test, a police officer conducts a seizure "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[21] This test is an objective one; that is, the test is "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person."[22] Under this test, it is no surprise that "[t]he law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver 'even though the purpose of the stop is limited and the resulting detention quite brief.'"[23] In other words, traffic stops are quintessential examples of seizures under the Fourth Amendment and, thus, must be reasonable to pass constitutional muster.

Whether a traffic stop is reasonable tends to be the point of contention in search and seizure cases.[24] An officer can justify an investigative stop, such as a traffic stop, with "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity."[25] However, "[t]he officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity."[26] It is also worth noting that because the facts in each reasonable-suspicion case are so different, "one determination will seldom be a useful precedent for another."[27]

B. Anonymous Tips

When police officers personally observe criminal or suspicious driving behavior, whether they have reasonable suspicion to conduct a traffic stop is not a difficult question. Things get tricky, however, when police use anonymous tips rather than personal observations as the basis for conducting the stop.[28] Faced with this issue, the Supreme Court

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[20] United States v. Mendenhall, 446 U.S. 544, 557 (1980).

[21] *Id.* at 554.

[22] California v. Hodari D., 499 U.S. 621, 628 (1991).

[23] Brendlin v. California, 551 U.S. 249, 255 (2007) (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)).

[24] *See, e.g.*, Whren v. United States, 517 U.S. 806, 810 (1996).

[25] Brown v. Texas, 443 U.S. 47, 51 (1979) (citing *Prouse*, 440 U.S. at 663; United States v. Brignoni-Ponce, 422 U.S. 873, 880–83 (1975)).

[26] Illinois v. Wardlow, 528 U.S. 119, 123–24 (2000) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

[27] Ornelas v. United States, 517 U.S. 690, 698 (1996) (internal quotation marks omitted).

[28] *See* Adams v. Williams, 407 U.S. 143, 147 (1972).

established rules to govern whether such tips would constitute reasonable suspicion sufficient to justify traffic stops. In *Illinois v. Gates*, the Supreme Court upheld a search warrant based on an anonymous letter informing police that the defendants were trafficking drugs.[29] Although this case analyzed probable cause (as opposed to reasonable suspicion) and did not involve a traffic stop, it stands as a primary case for analyzing anonymous tips because it abandoned the "rigid" tests previously used to determine whether a tip is sufficient to justify a search or seizure.[30] In place of the old rule, the Court adopted a totality-of-the-circumstances test whereby courts assess the veracity, reliability, and basis of knowledge of the informant.[31]

The Court applied this totality-of-the-circumstances test in *Alabama v. White*, holding that an anonymous tip, partially corroborated by police observations, constituted reasonable suspicion and, thus, justified a traffic stop.[32] In *White*, a tipster told the police that the defendant would be leaving a certain apartment complex at a certain time and heading to a certain destination with an ounce of drugs in her possession.[33] Additionally, the tipster described the defendant's car in detail, including the fact that the right taillight lens was broken.[34] Police located the vehicle the tipster had described that was parked at the location the tipster had described, saw the defendant enter the vehicle (with nothing in her hands), and followed the vehicle as it proceeded along the most direct route to the destination the tipster had reported.[35] Apparently convinced that the tipster was reliable because so much of the information had been corroborated, police stopped the defendant's car just short of the reported destination.[36]

The Court in *White* upheld the defendant's conviction because "the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion."[37] Adopting the totality-of-the-circumstances test established in *Gates* and applying it to its reasonable-suspicion analysis,[38] the Court

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29 462 U.S. 213, 225, 246 (1983).

30 *Id.* at 230–31.

31 *Id.* at 233.

32 496 U.S. 325, 326–27, 332 (1990).

33 *Id.* at 327.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at 331.

38 *Id.* at 328–29. ("*Illinois v. Gates*, 462 U.S. 213 (1983), dealt with an anonymous tip in the probable-cause context. The Court there abandoned the 'two-pronged test' of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), in favor of a 'totality of the circumstances' approach to determining whether an informant's tip establishes probable cause. *Gates* made clear, however, that those factors that had been considered critical under *Aguilar* and *Spinelli*—an informant's 'veracity,' 'reliability,' and

placed heavy emphasis on the predictive nature of the information given by the informant.[39] In other words, the tip predicted the defendant's behavior, and the tip was also corroborated by independent police observations. The Court explained its conclusion:

> When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.
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> Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car.[40]

Thus, the rule emerged that an anonymous tip alone is not enough to justify an investigatory stop,[41] but must be at least partially corroborated by police to verify the reliability and veracity of the tip.[42] To constitute reasonable suspicion—or probable cause—a tip must contain sufficient indicia of reliability, as determined by the totality-of-the-circumstances test found in *White* and *Gates*.[43] This test generally helps determine whether the "quality" and "quantity" of the information in the tip was sufficient to constitute reasonable suspicion.[44] As the United States Court of Appeals for the Eighth Circuit later succinctly put it, "Whether an anonymous tip suffices to give rise to reasonable suspicion depends on both the quantity of information it conveys as well as the quality, or degree of reliability, of that information, viewed under the totality of the circumstances."[45]

There are several reasons for requiring anonymous tips to be of sufficient quality and quantity. First, anonymous tipsters do not make themselves available for prosecution if their tip turns out to be frivolous

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'basis of knowledge'—remain 'highly relevant in determining the value of his report.' 462 U.S. at 230. These factors are also relevant in the reasonable-suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard.").

[39] *Id.* at 331–32 ("[I]t is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller."); *id.* at 331 ("[B]ecause 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." (citing *Gates*, 462 U.S. at 244)).

[40] *Id.* at 332.

[41] *Id.* at 329 ("Simply put, a tip such as this one, standing alone, would not "'warrant a man of reasonable caution in the belief" that [a stop] was appropriate.'" (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).

[42] *See id.* at 332.

[43] *Id.*; *Gates*, 462 U.S. at 233.

[44] *White*, 496 U.S. at 330. The "quality" of the information is also described using terms such as "veracity," "reliability," and "basis of knowledge." *See id.* at 329.

[45] United States v. Wheat, 278 F.3d 722, 726 (8th Cir. 2001) (citing *White*, 496 U.S. at 330).

or false. In *Adams v. Williams*, the Court explained that a case involving an identified informant is

> a stronger case than obtain[ed] in the case of an anonymous telephone tip . . . . Indeed, under Connecticut law, [an identified] informant might have been subject to immediate arrest for making a false complaint had [the officer's] investigation proved the tip incorrect. Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of [the suspect].[46]

In other words, anonymous tipsters have nothing to lose by making false reports to police, so their information should be given less weight than that of an identified informant or the independent observations of a police officer.

In his dissent in *White*, Justice Stevens expressed fear not only of frivolous anonymous tips, but that police might also abuse the rule.[47] "Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip" sufficient to justify a traffic stop and perhaps result in an arrest.[48] Police officers could also simply "testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed."[49] Although he noted that "the vast majority of those in our law enforcement community would not adopt such a practice,"[50] Justice Stevens thought that allowing anonymous tips to support reasonable suspicion "makes a mockery" of Fourth Amendment protections.[51]

II. THE DRUNK-DRIVING EXCEPTION

In light of the rules regarding anonymous tips and reasonable suspicion, police officers are placed in a difficult situation when they receive anonymous tips of imminently dangerous activity such as drunk driving.[52] As Chief Justice Roberts put it, if anonymous tips of drunk driving must be corroborated as they were in *White*, the rule would effectively "command[] that police officers following a driver reported to

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[46] 407 U.S. 143, 146–47 (1972) (footnote and citation omitted).

[47] *White*, 496 U.S. at 333 (Stevens, J., dissenting).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *See* Virginia v. Harris, 130 S. Ct. 10, 10–11 (2009) (Roberts, C.J., dissenting from denial of certiorari).

be drunk *do nothing* until they see the driver actually do something unsafe on the road—by which time it may be too late."[53]

The United States Supreme Court has been reluctant to recognize the drunk-driving exception.[54] In 2000, however, the Supreme Court used language that strongly suggested the possibility of an independent corroboration exception for anonymous tips in situations of imminent danger, but stopped short of confirming that such an exception exists.[55] In *Florida v. J.L.*, the police stopped a juvenile in response to an anonymous tip that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[56] The police arrived at the bus stop, saw the defendant in a plaid shirt "just hanging out," conducted a search, found a gun, and charged the defendant with carrying a concealed firearm without a license and possessing a firearm while under the age of eighteen.[57] The trial court granted the motion to suppress the evidence, but the Supreme Court found that the tip "lacked the moderate indicia of reliability" required by *White* and consequently affirmed the Supreme Court of Florida's overturning of the conviction.[58]

Although *J.L.* did not involve a drunk driver, the Court acknowledged the possibility of a drunk-driving exception but declined to speculate:

> 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. 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. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.[59]

This language, although in dicta, strongly suggests that the Court might at least be willing to consider arguments in favor of the drunk-driving exception.

Despite the Supreme Court's reluctance to rule on the issue,[60] state and federal trial and appellate courts are forced to confront it. In light of

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[53] *Id.* at 10.

[54] *See id.*

[55] Florida v. J.L., 529 U.S. 266, 273–74 (2000).

[56] *Id.* at 268.

[57] *Id.* at 268–69 (internal quotation marks omitted).

[58] *Id.* at 271.

[59] *Id.* at 273–74 (citations omitted).

[60] In addition to the Court's language in *J.L.*, it also denied certiorari in two leading state cases, examined below that produced opposite holdings on the drunk-driving

the danger posed by drunk drivers, many states have held that bare-boned anonymous tips of erratic or drunk driving constitute reasonable suspicion and, thus, justify investigative traffic stops.[61] At least one federal circuit court has held similarly.[62] It is beyond the scope of this Note to analyze every state and federal court decision regarding the drunk-driving exception,[63] but the holdings of two state supreme courts, Vermont's and Virginia's, are particularly helpful in understanding the issue.

In *State v. Boyea*, the Supreme Court of Vermont issued perhaps the most comprehensive justification for allowing traffic stops when officers receive anonymous tips of drunk driving.[64] That court firmly accepted the drunk-driving exception just over eight months after the Supreme Court refused to speculate about the exception in *J.L.*[65]

The facts of *Boyea* were fairly straightforward. The dispatcher informed the officer about an anonymous tip describing the color, make, model, and license plate state of a car with a driver who was driving "erratically" on a certain stretch of road.[66] The officer quickly located the subject of the tip and, without independently observing any indicia of intoxication, initiated a traffic stop.[67] Based on observations made subsequent to the traffic stop, the officer arrested the driver for driving under the influence.[68]

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exception. *See* Virginia v. Harris, 130 S. Ct. 10, 10 (2009) (Roberts, C.J., dissenting from denial of certiorari) (denying certiorari to a Virginia case that rejected the drunk-driving exception); Boyea v. Vermont, 533 U.S. 917 (2001) (denying certiorari to a Vermont case that upheld the drunk-driving exception).

[61] State v. Boyea, 765 A.2d 862, 868 (Vt. 2000); State v. Melanson, 665 A.2d 338, 341 (N.H. 1995); State v. Tucker, 878 P.2d 855, 864 (Kan. Ct. App. 1994); *see also* Trauth, *supra* note 1, at 323.

[62] United States v. Wheat, 278 F.3d 722, 729 (8th Cir. 2001) ("The question we now face is whether, in light of *J.L.*, an anonymous tip about the dangerous operation of a vehicle whose innocent details are accurately described may still possess sufficient indicia of reliability to justify an investigatory stop by a law enforcement officer who does not personally observe any erratic driving. Recognizing the complexity of this issue, we answer affirmatively . . . .").

[63] For a near-comprehensive analysis of the breakdown of states that recognize the drunk-driving exception and the difference in their approaches to the question, see Trauth, *supra* note 1, at 323–24, 329–30.

[64] *Boyea*, 765 A.2d 862. *Boyea* was not the first time the Vermont Supreme Court upheld the drunk-driving exception. Indeed, the court's decision in *Boyea* relies heavily on *State v. Lamb*, 720 A.2d 1101 (Vt. 1998). *See Boyea*, 765 A.2d at 868. *Lamb* is a decision by the Vermont Supreme Court in which the court came to the same conclusion on similar facts. *Lamb*, 720 A.2d at 1106.

[65] Florida v. J.L., 529 U.S. 266, 273–74 (2000) (refusing to consider an exception in March of 2000); *Boyea*, 765 A.2d at 868 (adopting the exception in December of 2000).

[66] *Boyea*, 765 A.2d at 863.

[67] *Id.*

[68] *Id.*

The *Boyea* court carefully framed its discussion to highlight the seriousness of the issue. The majority began its opinion by explaining that an officer placed in this situation had three options:

> He could, as the officer here, stop the vehicle as soon as possible, thereby revealing a driver with a blood alcohol level nearly three times the legal limit and a prior DUI conviction. Or, in the alternative, he could follow the vehicle for some period of time to corroborate the report of erratic driving. This could lead to one of several endings. The vehicle could continue without incident for several miles, leading the officer to abandon the surveillance. The vehicle could drift erratically—though harmlessly—onto the shoulder, providing the corroboration that the officer was seeking for an investigative detention. Or, finally, the vehicle could veer precipitously into oncoming traffic, causing an accident.[69]

The court held that the Constitution does not compel an officer in such a conundrum to "wait, at whatever risk to the driver and the public," for independent corroboration of the tip's veracity.[70] "Rather, an anonymous report of erratic driving must be evaluated in light of the imminent risks that a drunk driver poses to himself and the public."[71]

The court viewed the accuracy of the informant's information—the make, model, color, location, license plate state, and direction of travel of the defendant's car—as "supporting the informant's credibility and the reasonable inference that the caller had personally observed the vehicle."[72] Furthermore, the court noted that the detention, "as in most DUI cases, consisted of a simple motor vehicle stop, 'a temporary and brief detention that is exposed to public view.'"[73] Most importantly, the court distinguished the case from *J.L.*, recognizing that "[i]n 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."[74] Indeed, the court compared a drunk driver to "a 'bomb,' and a mobile one at that."[75]

The court then balanced the urgency of stopping a drunk driver against the intrusion created by the stop, which, in *Boyea*, "consisted initially of a brief motor-vehicle stop and questioning, not a hands-on violation of the person."[76] This intrusion, the court noted, "did not rise to

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69 *Id.* at 862.
70 *Id.* at 862–63.
71 *Id.* at 863.
72 *Id.* at 868.
73 *Id.* (quoting State v. Zumbo, 601 A.2d 986, 988 (Vt. 1991)).
74 *Id.* at 867.
75 *Id.*
76 *Id.* at 868.

the level which confronted the Court in *J.L.*"[77] Therefore, the court concluded, "Balancing the public's interest in safety against the relatively minimal intrusion posed by a brief investigative detention, the scale of justice in this case must favor the stop; a reasonable officer could not have pursued any other prudent course."[78] In short, the court upheld the stop, first, because the informant's information was accurate and, second, because the imminent danger posed by the threat of drunk driving outweighed the relatively small intrusion imposed by the stop.[79] To support this holding, the court cited a litany of cases that recognize the drunk-driving exception[80] and emphasized that the "vast majority" of courts that have taken up the issue have recognized the drunk-driving exception.[81]

Virginia has taken the opposite position as Vermont. While the Vermont Supreme Court took seriously the hints in *J.L.* that a drunk-driving exception exists, the Virginia Supreme Court rejected the exception in 2008 in *Harris v. Commonwealth*.[82]

But the rejection did not come without controversy.[83] Just four years earlier, the Virginia Supreme Court had decided an anonymous-tip case in *Jackson v. Commonwealth*, a case with facts remarkably similar to those in *J.L.*[84] In *Jackson*, several officers were dispatched to a location where an anonymous tipster had reported that "three black males in a white Honda . . . were disorderly and one of the subjects brandished a firearm."[85] When the officers arrived at the location, a white Honda pulled out in front of one officer, allowing the officer's headlights to shine

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77 *Id.*

78 *Id.* (internal citation omitted).

79 *Id.*

80 *Id.* at 864–66. The principle cases the court analogized were *State v. Melanson*, 665 A.2d 338 (N.H. 1995) and *State v. Tucker*, 878 P.2d 855 (Kan. Ct. App. 1994).

81 *Boyea*, 765 A.2d at 868; *see also* Trauth, *supra* note 1, at 323. Interestingly, the court suggests that the case might have turned out differently if the officer had actually attempted to corroborate the tip as the officers did in *White*. *See Boyea*, 765 A.2d at 863. Noting that the officer only had visual contact with the defendant for a limited period of time before initiating the stop, the court explains, "This was not an officer seeking independent verification that a driver was intoxicated, but rather one intent upon catching and stopping as soon as practically possible a driver whom he already suspected of being under the influence." *Id.* In other words, the police officer was exercising his duty to protect the public as opposed to his law enforcement obligations, a fact that apparently altered the court's analysis. This explanation by the court parallels the discussion in this Note about sobriety checkpoints and the community caretaker doctrine. *See infra* Part III and Conclusion.

82 668 S.E.2d 141, 146 (Va. 2008).

83 *See id.* at 148, 150 (Kinser, J., dissenting).

84 594 S.E.2d 595, 601 (Va. 2004).

85 *Id.* at 597 (internal quotations omitted).

into the car so the officer could see three black males.[86] Another officer, patrolling the surrounding area, noticed no other white Honda.[87] The officer, who had identified the vehicle, initiated a traffic stop and noticed a bulge in the shirt of the defendant who was sitting in the front passenger seat.[88] When the defendant did not cooperate with the officer's questioning about the bulge, the officer arrested him, conducted a search subsequent to arrest, and seized a firearm and cocaine on the defendant's person.[89] Based on this evidence, the defendant was convicted of possession of cocaine, possession of a firearm while in possession of a controlled substance, and possession of a concealed weapon.[90] Overturning the conviction of the lower court, the Virginia Supreme Court relied heavily on *J.L.*, noting that "[r]arely are the facts of two cases as congruent as the facts in *J.L.* and this case."[91]

Despite overturning the conviction, the court in *Jackson* found it prudent to express, in dicta, agreement with the Vermont Supreme Court's decision in *Boyea* that "a drunk driver is not at all unlike a 'bomb,' and a mobile one at that."[92] The court explained that the rules of anonymous tips of firearms crimes are different from the rules when the tip is of drunk driving: "We agree that '[i]n 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.'"[93] Thus, the Virginia Supreme Court speculated where the United States Supreme Court in *J.L.* would not, concluding that circumstances exist "'under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability.'"[94]

In 2008, the Virginia Supreme Court got a chance to put its money where its mouth was regarding anonymous tips of drunk driving. But the outcome was far from what the court had indicated just four years earlier in *Jackson*. In *Harris v. Commonwealth*, the court reversed a DUI conviction, holding that an anonymous tip of drunk driving was "not sufficient to create a reasonable suspicion of criminal activity."[95] In *Harris*, the officer responded to a call that there was an intoxicated

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86 *Id.*

87 *Id.* at 597–98.

88 *Id.* at 597.

89 *Id.*

90 *Id.* at 596.

91 *Id.* at 601 (alteration in original) (quoting Jackson v. Commonwealth, 583 S.E.2d 780, 795 (Va. Ct. App. 2003) (Benton, J., dissenting)).

92 *Id.* at 603 (quoting State v. Boyea, 765 A.2d 862, 867 (Vt. 2000)).

93 *Id.* (alteration in original) (quoting *Boyea*, 765 A.2d at 867).

94 *Id.* at 601 (quoting Florida v. J.L., 529 U.S. 266, 273 (2000)).

95 668 S.E.2d 141, 147 (Va. 2008).

driver in a green Altima headed south on Meadowbridge Road.[96] The dispatcher also gave the officer the partial license plate number "Y8066."[97] The officer located and began following a green Altima driving south on Meadowbridge Road with the license plate number "YAR-8046."[98] Although the defendant did not exceed the speed limit or swerve at any time, the officer observed some unusual conduct.[99] First, the defendant "slowed down at an intersection although he had the right of way."[100] Second, the defendant "slowed down as he approached the red traffic light" fifty feet away.[101] Finally, the defendant, for no apparent reason, brought his car to a stop on the side of the road "of his own accord."[102] It was then that the officer activated his emergency lights and pulled behind the defendant's parked car, initiating the stop.[103] Observing signals of intoxication during the traffic stop, the officer arrested the defendant for DUI.[104] Harris argued that the officer's observations were not sufficient to constitute reasonable suspicion and justify a traffic stop.[105] The court agreed and overturned Harris's conviction, ignoring the *Jackson* dicta that indicated the court would recognize the drunk-driving exception.[106]

In fact, the court went further than rejecting the drunk-driving exception, explicitly stating that officers who receive anonymous tips of drunk driving must conduct the stop as though they had not even received the tip: "[T]he 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."[107]

Thus, despite strong indications from both the Virginia Supreme Court and the United States Supreme Court to the contrary, the *Harris*

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96 *Id.* at 144.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.* (internal quotation marks omitted).

101 *Id.* (internal quotation marks omitted).

102 *Id.* The Virginia Supreme Court's language regarding Harris's driving behavior is much more forgiving than that of the Virginia Court of Appeals. While the Virginia Supreme Court called it "subjectively . . . unusual," *id.* at 147, the Virginia Court of Appeals described it as "erratic." Harris v. Commonwealth, No. 2320-06-2, 2008 WL 301334, at *1 (Va. Ct. App. Feb. 5, 2008), *rev'd*, *Harris*, 668 S.E.2d 141.

103 *Harris*, 668 S.E.2d at 144.

104 *Id.*

105 *Id.* at 145.

106 *Id.* at 147; *see also* Jackson v. Commonwealth, 594 S.E.2d 595, 603 (Va. 2004).

107 *Harris,* 668 S.E.2d at 146.

court effectively held that the danger of drunk driving does not outweigh the minor intrusions of a traffic stop.[108]

This holding is seemingly supportable by *White*, but closer inspection reveals that the observations required by the *Harris* court before making a stop are quite different in nature than those required by *White*. True, the *White* Court placed heavy emphasis on the officer's observations that corroborated the informant's tip.[109] However, the *Harris* decision requires observation of the criminal behavior itself (erratic driving indicating intoxication) rather than the predictive information in the tip (where the car is going, where it came from, etc.).[110] Ignoring this difference, the *Harris* court effectively adopted Justice Stevens's dissent in *White* in which he suggested that anonymous tips should not even be factored into reasonable-suspicion analysis.[111]

Given that the majority in *Harris* ignored the dicta Chief Justice Kinser, prior to becoming the chief justice, had written just four years ago for the majority in *Jackson*, it is unsurprising that she wrote a spirited dissent, reprimanding the majority:

> [W]e explained in *Jackson* that "'[i]n 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.'" We further stated, "'[A] drunk driver is not at all unlike a "bomb," and a mobile one at that.'" Although the majority analogizes the case before us to *Jackson*, *it ignores this portion of the* Jackson *opinion and never addresses the distinction between an intoxicated driver on the highway and a person carrying a concealed weapon in terms of the need for prompt action by the police.*[112]

Although the law in Virginia presently rejects the drunk-driving exception, the lack of analysis in *Harris* leaves the question unsettled. Additionally, the sharply divided court in *Harris* has recently received two new justices[113] and the dissent opinion writer, then Justice Kinser, is now the chief justice of the court.[114] It would, therefore, not be surprising if the court decides to take the issue up again and reach the conclusion it espoused in *Jackson*, a position adopted by the majority of states.[115]

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[108] *Id.* at 147.

[109] Alabama v. White, 496 U.S. 325, 330 (1990).

[110] *Harris*, 668 S.E.2d at 146.

[111] *See supra* notes 47–51 and accompanying text.

[112] *Harris*, 668 S.E.2d at 150 (Kinser, J., dissenting) (second and third alteration in original) (emphasis added) (citations omitted).

[113] S. Res. 512, 2011 Leg., 1st Spec. Sess. (Va. 2011).

[114] Press Release, Supreme Court of Va. (Aug. 31, 2010), *available at* http://www.courts.state.va.us/news/items/2010_0831_scv_press_release.pdf.

[115] *See supra* note 61 and accompanying text.

III. OFF-POINT DOCTRINES THE VIRGINIA SUPREME COURT COULD USE TO JUSTIFY THE DRUNK-DRIVING EXCEPTION

A drunk-driving exception would not be without foundation. The United States Supreme Court itself has recognized the dangers of drunk driving and consequently eased reasonable suspicion requirements regarding sobriety checkpoints.[116] Additionally, Virginia courts have recognized that "[p]olice officers have an obligation to aid citizens who are ill or in distress, as well as a duty to protect citizens from criminal activity."[117] These doctrines also take into account the reason for the stop, thus representing a slight departure from the general rule that "[t]he officer's subjective motivation is irrelevant" to Fourth Amendment analysis.[118] By recognizing the danger of drunk driving and the duty of the police to protect the public, these doctrines could pave the way for the Virginia Supreme Court, and perhaps the United States Supreme Court, to recognize the drunk-driving exception.

A. Checkpoints

The Supreme Court has recognized the dangerousness of drunk driving in a number of contexts, most notably in the checkpoint cases.[119] In the 1990 case of *Michigan Department of State Police v. Sitz*, the Supreme Court upheld a sobriety checkpoint program in Michigan because "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program."[120] The Court analyzed both the magnitude of the drunk-driving problem and the level of intrusion the checkpoints created.[121]

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[116] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

[117] *See, e.g.*, Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995).

[118] Brigham City v. Stuart, 547 U.S. 398, 404 (2006); *see also* Bond v. United States, 529 U.S. 334, 338 n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . . [T]he issue is not his state of mind, but the objective effect of his actions."); Whren v. United States, 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers . . . ."); Graham v. Connor, 490 U.S. 386, 397 (1989) ("[T]he subjective motivations of individual officers, which our prior cases make clear[,] [have] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment.").

[119] *E.g.*, *Sitz*, 496 U.S. at 451; South Dakota v. Neville, 459 U.S. 553, 558 (1983); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.").

[120] *Sitz*, 496 U.S. at 455.

[121] *Id.*

Chief Justice Rehnquist, writing for the majority, explained the seriousness of the danger drunk driving poses:

> 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. Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage. For decades, this Court has repeatedly lamented the tragedy.[122]

The Chief Justice then weighed the risks associated with drunk driving against the level of intrusion imposed by the checkpoints in a fashion remarkably similar to the analysis in *Boyea*[123]: "Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight."[124] The Court used this simple balancing test to resolve the central constitutional issue: "whether such seizures are 'reasonable' under the Fourth Amendment."[125] The Court concluded that the great risk of drunk driving outweighed the "slight" intrusion created by the checkpoints and accordingly deemed the sobriety checkpoint program constitutional.[126]

In contrast, in *City of Indianapolis v. Edmond*, the Court struck down a drug-trafficking checkpoint program in Indianapolis "[b]ecause the primary purpose of the . . . checkpoint program [was] to uncover evidence of ordinary criminal wrongdoing."[127] The Court distinguished this decision from its decision in *Sitz* by "drawing the line at roadblocks designed primarily to serve the general interest in crime control" in order to prevent checkpoint intrusions from becoming "a routine part of American life."[128]

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[122] *Id.* at 451 (internal citations and quotation marks omitted).

[123] State v. Boyea, 765 A.2d 862, 868 (Vt. 2000) ("Balancing the public's interest in safety against the relatively minimal intrusion posed by a brief investigative detention, the scale of justice in this case must favor the stop; a reasonable officer could not have pursued any other prudent course." (internal citations omitted)).

[124] *Sitz*, 496 U.S. at 451.

[125] *Id.* at 450.

[126] *Id.* at 455. Notably, the Court declined to review the "effectiveness" of the checkpoint program. *Id.* at 453–54. Such an inquiry would "transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Id.* at 453.

[127] 531 U.S. 32, 41–42 (2000); *see also id.* at 44 ("[W]e decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control."); *id.* at 48 ("Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.").

[128] *Id.* at 42.

Thus, the Supreme Court allowed checkpoints to protect the public against the dangers of drunk driving, but struck them down when used for general crime control. This important distinction illustrates that when police work to combat dangerous activities such as drunk driving, the intent of the police is an important factor in deciding whether the police's efforts are constitutional.[129] In other words, police have greater latitude to stop vehicles without particularized suspicion when they are acting to protect the public rather than to combat crime. The Vermont Supreme Court expressed the same principle in *Boyea* in the context of the drunk-driving exception: "This was not an officer seeking independent verification that a driver was intoxicated, but rather one intent upon catching and stopping as soon as practically possible a driver whom he already suspected of being under the influence."[130]

Therefore, when danger to the public is great enough, and when the officer is not acting "primarily to serve the general interest in crime control,"[131] certain searches are not "unreasonable" under the Fourth Amendment when police fail to make personal observations of criminal behavior. This reasoning can likewise apply to anonymous tips and allow officers to stop drivers reported by anonymous tipsters to be drunk.

B. The Community Caretaker Doctrine

Although the inquiry into the purpose of a checkpoint stop "is not an invitation to probe the minds of individual officers acting at the scene,"[132] the community caretaker doctrine recognized by Virginia courts does justify such an inquiry. This doctrine recognizes that "reasonable suspicion of criminal activity is not the only justification for an investigative seizure"[133] because "police officers have an obligation to aid citizens who are ill or in distress."[134] Pursuant to this duty, the community caretaker doctrine allows police officers to stop individuals "in the routine execution of community-caretaking functions, totally divorced from the detection or investigation of crime."[135] The community caretaker doctrine applies when: "(1) the officer's initial contact or investigation is reasonable; (2) the intrusion is limited; and (3) the officer

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[129] *See id.* at 48. It is important to note that the Court in *Edmond* warned that "the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Id.*

[130] State v. Boyea, 765 A.2d 862, 863 (Vt. 2000); *see also supra* note 81.

[131] *Edmond*, 531 U.S. at 42.

[132] *Id.* at 48.

[133] Barrett v. Commonwealth, 447 S.E.2d 243, 245 (Va. Ct. App. 1994), *rev'd on other grounds*, 462 S.E.2d 109 (Va. 1995).

[134] Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995).

[135] *Id.* at 529 (quoting *Barrett*, 447 S.E.2d at 245).

is not investigating criminal conduct under the pretext of exercising his community caretaker function."[136]

Virginia courts first recognized the community caretaker doctrine in 1994 in *Barrett v. Commonwealth*.[137] In that case, a police officer pulled over a car traveling with its wheels partially on the shoulder of the road and partially in a private yard.[138] The police officer conducted the stop only "to determine whether the driver was experiencing mechanical problems and not to investigate any perceived violation of law," but he subsequently noticed signs of intoxication and arrested the driver for DUI.[139] The Court of Appeals of Virginia found that because the officer "reasonably perceived a situation of mechanical breakdown or personal distress," the officer "acted appropriately in the discharge of his duty as a community caretaker."[140]

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[136] *Id.* at 530.

[137] *Barrett*, 447 S.E.2d at 246.

[138] *Id.* at 244.

[139] *Id.*

[140] *Id.* at 246. The *Barrett* court also cited a number of other jurisdictions that recognize the same or similar rule:

> Other jurisdictions have acknowledged that the duty of the police extends beyond the detection and prevention of crime, to embrace also an obligation to maintain order and to render needed assistance. This duty is aptly termed the community caretaker function. *See State v. Chisholm*, 39 Wash.App. 864, 867, 696 P.2d 41, 43 (1985) (a police officer may stop a vehicle briefly to warn the occupants that an item of their property is in danger. Such a momentary seizure, being "reasonable," does not require the suppression of contraband or other evidence of crime thereby discovered); *State v. Goetaski*, 209 N.J.Super. 362, 507 A.2d 751, *cert. denied*, 104 N.J. 458, 517 A.2d 443 (1986) (upholding the use of evidence disclosed when an officer stopped a vehicle, being driven slowly on the shoulder with left turn signal flashing, to inquire whether there was "something wrong"); *Crauthers v. State*, 727 P.2d 9 (Alaska App.1986) (a car pulled next to a police car. The driver rolled down his window and appeared to seek assistance. The officer activated his flashing lights as a safety precaution and stopped the car to inquire what was needed); *State v. Anderson*, 142 Wis.2d 162, 417 N.W.2d 411 (1987) (police authority to stop a vehicle is not limited to circumstances of criminal investigation); *State v. Pinkham*, 565 A.2d 318 (Me.1989) (upholding evidence obtained during stop to promote safety. "If we were to insist upon suspicion of activity amounting to a criminal or civil infraction . . . , we would be overlooking the police officer's legitimate role as a public servant to assist those in distress and to maintain and foster public safety"); *State v. Quigley*, 226 Ill.App.3d 598, 168 Ill.Dec. 19, 589 N.E.2d 133, *appeal denied*, 146 Ill.2d 645, 176 Ill.Dec. 815, 602 N.E.2d 469 (1992) (upholding an arrest based on evidence obtained when officers stopped a car to investigate an altercation between drivers); *Provo City v. Warden*, 844 P.2d 360 (Utah App.1992) (recognizing community caretaker function as a predicate for investigative seizure, but requiring "circumstances threatening life or safety"); *State v. Marcello*, 157 Vt. 657, 599 A.2d 357 (1991) (upholding the use of evidence obtained upon an investigative stop of a vehicle based upon another motorist's report, "there's something wrong with that man"); *State v. Vistuba*, 251 Kan. 821, 840 P.2d 511 (1992) (upholding the stop of a vehicle being driven

Less than a year later, the Virginia Court of Appeals authored another opinion, based largely on *Barrett*, recognizing the community caretaker doctrine.[141] In *Commonwealth v. Waters*, the court held that a police officer was justified by the community caretaker doctrine when he stopped a man who was "swaying and walking unsteadily" in an apartment complex.[142] In that case, the officer testified that he was concerned for the defendant's safety and that he wanted to make sure the defendant could find his way home.[143] When the officer approached him, the defendant began making threatening gestures, and the officer smelled a strong odor of alcohol.[144] Seeing a bulge in the defendant's pocket, the officer patted down the defendant and discovered "a BB gun and a corncob pipe with an odor of marijuana."[145] The court of appeals reversed the trial court's suppression of the evidence, ruling that the officer had a "reasonable belief that aid or assistance is warranted" and that the officer's initial stop "was brief and limited to voicing his concern and making a determination whether [the defendant] was in distress."[146] Accordingly, the court concluded that the stop was justified by the community caretaker exception.[147]

The community caretaker doctrine was well established by the court of appeals for an entire four months before the Virginia Supreme Court complicated the issue. In September of 1995, the Virginia Supreme Court reversed *Barrett* on other grounds, noting that "we need not decide whether the so-called 'community caretaking functions' doctrine will be applied in Virginia."[148] However, the state's highest court did not

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such that the officer feared that the driver was falling asleep); *United States v. King*, 990 F.2d 1552 (10th Cir.1993) (recognizing the right of an officer to effect an appropriate seizure to maintain order at the scene of a traffic accident).

Id. at 245–46.

141 *Waters*, 456 S.E.2d at 529.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 529, 530–31.

147 *Id.* at 530.

148 Barrett v. Commonwealth, 462 S.E.2d 109, 112 (Va. 1995). This conclusion is particularly vexing given that the United States Supreme Court recognized a similar community caretaker doctrine in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), a case heavily relied on by both the *Barrett* and *Waters* courts. *See Barrett*, 462 S.E.2d at 111; Commonwealth v. Waters, 456 S.E.2d 527, 529–30 (Va. Ct. App. 1995). In *Cady*, officers found evidence used to indict and convict the defendant for murder in an automobile they searched subsequent to an accident. 413 U.S. at 434, 436–39. The Court held that the evidence was admissible because police officers "frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection,

overturn *Waters*, leaving the community caretaker doctrine intact in the lower courts.[149]

Viewing the community caretaker doctrine together with the checkpoint cases, it is clear that police have greater latitude in conducting traffic stops when they are not furthering the state's "general interest in crime control,"[150] but are acting pursuant to their "obligation to aid citizens."[151] While the United States Supreme Court in *Edmond* limited inquiries into police purposes to "programmatic purposes . . . undertaken pursuant to a general scheme,"[152] under the community caretaker doctrine, courts can allow individual police officers to act on anonymous tips of drunk driving so long as the officer is not acting merely to investigate crime.

CONCLUSION

Fourth Amendment analysis does not normally take into account the "[s]ubjective intentions" of the officer,[153] but it may be necessary in some situations. The United States Supreme Court conducted such an inquiry in *Edmond* to draw the line between acceptable and unconstitutional checkpoints.[154] The Virginia Court of Appeals also took the officer's intentions into account when applying the community caretaker doctrine. The common theme in these cases was that the police officers were validly acting to protect the community and not to investigate crime, although criminal activity was subsequently discovered and even perhaps suspected. It is, therefore, not unreasonable for courts to inquire into whether the police acted out of their duty to protect the community or their duty to investigate crime.

It is also sound for courts to conduct a balancing test similar to the ones used by the Supreme Court in *Sitz*[155] and *Boyea*.[156] That is, to weigh the "magnitude of the drunken driving problem" against the level of intrusion imposed by the stop to determine whether the stop was "unreasonable" under the Fourth Amendment.[157] To skip this step, as the

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investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441–43.

149 *See Barrett*, 462 S.E.2d at 112.

150 City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000).

151 *Waters*, 456 S.E.2d at 530.

152 *Edmond*, 531 U.S. at 45–46.

153 Whren v. United States, 517 U.S. 806, 813 (1996).

154 *See Edmond*, 531 U.S. at 44.

155 Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990).

156 State v. Boyea, 765 A.2d 862, 868 (Vt. 2000).

157 *Sitz*, 496 U.S. at 450–51.

Virginia Supreme Court did in *Harris*,[158] is to ignore the danger posed by drunk driving altogether in the analysis.

Thus, the test for whether a stop pursuant to an anonymous tip of drunk driving violates the Fourth Amendment should consist of two prongs. First, courts should determine the purpose of the stop. Was the officer acting to protect the public or to investigate a crime? This prong is supported not only by the checkpoint[159] and community caretaker[160] doctrines, but by the reasoning in *Boyea*.[161] The court in *Boyea* was persuaded by the fact that the officer "was not an officer seeking independent verification that a driver was intoxicated, but rather one intent upon catching and stopping as soon as practically possible a driver whom he already suspected of being under the influence."[162] Thus, permitting a drunk-driving exception only when the police are acting to protect the community and not to investigate crime is a good buffer to prevent abuse.

Second, courts should balance the magnitude of the drunk-driving problem and the level of intrusion imposed by the stop. To determine the magnitude of the drunk-driving problem, courts could take into account facts other than national statistics: Does the community have a particularly bad drunk-driving problem? Did the tip come on a day or time known for excessive drinking such as a holiday or closing time for the bars? Did the tip report the vehicle to be near a location or establishment in the community known for excessive alcohol consumption? Did the tip report the driver to be at a location in the community especially dangerous for drunk drivers, such as windy or unlit roads? Additionally, the level of intrusion should be case-specific and take into account the totality of the circumstances. How long was the stop? Did the officer ask probing questions, or did he simply check the sobriety of the driver? Did the officer search the vehicle or require the driver to exit the vehicle? By asking these and other questions, courts should be able to balance the interest of the state in protecting the community from drunk drivers against the privacy interest of the individual.

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

159 City of Indianapolis v. Edmond, 531 U.S. 32, 44, 48 (2000) (noting the Court's disapproval of a checkpoint program due to Fourth Amendment violations "[b]ecause the primary purpose of the Indianapolis checkpoint program [was] ultimately indistinguishable from the general interest in crime control").

160 Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995) (noting the community caretaker doctrine only applies when "the officer is not investigating criminal conduct under the pretext of exercising his community caretaker function").

161 *Boyea*, 765 A.2d at 863.

162 *Id.*

This balancing test is also supported by the *Boyea* rationale[163] and the checkpoint doctrine.[164] In *Boyea*, the Vermont Supreme Court "[b]alanc[ed] the public's interest in safety against the relatively minimal intrusion posed by a brief investigative detention,"[165] and, in *Sitz,* the United States Supreme Court "balance[d] . . . the State's interest in preventing drunken driving . . . and the degree of intrusion upon individual motorists who are briefly stopped."[166]

Of course, there is a temptation to dismiss such a rule as nothing more than a policy determination subject to the biases of judges.[167] Obviously a bright-line test would be convenient, but the very text of the Fourth Amendment does not support such a test. Rather, the Founders intentionally infused a balancing test into the Fourth Amendment by prohibiting only unreasonable searches and seizures. Thus, the balancing test is not a policy test at all but a weighing of interests legitimately held by both the individual and the state. The gravity of the potential harm being reported by an anonymous tipster, therefore, is relevant to the reasonableness inquiry, and, on the other hand, the greatness of the intrusion must also be considered. Courts have been balancing such interests in multiple areas of law for decades.[168] Inserting the intent prong found in the checkpoint and community caretaker cases is simply an added protection to prevent police from circumventing the Fourth Amendment under the "pretext" of the drunk-driving exception.[169]

In any case, what is an officer to do if he cannot act on anonymous tips without corroborating dangerous activity such as drunk driving? Police officers receiving anonymous tips of drunk driving are placed in a constitutional and moral dilemma; they must either intrude on an individual's privacy or risk serious injury or death to someone. Of course, only law students, professors, and judges find this dilemma difficult. In the real world, the decision is easy. Police officers who receive

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[163] *Id.* at 868.

[164] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

[165] *Boyea*, 765 A.2d at 868.

[166] *Sitz*, 496 U.S. at 455.

[167] La Tronica, *supra* note 8, at 861.

[168] *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 334–35, 347 (1976) (noting that procedural due process analysis "requires analysis of the governmental and private interests that are affected" and an "appropriate due process balance"); Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (noting that the determination of whether forcing a newsman to testify violates freedom of the press requires a "striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct").

[169] Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995) (explaining that the community caretaker doctrine only applies when "the officer is not investigating criminal conduct under the pretext of exercising his community caretaker function").

anonymous tips of drunk driving will likely conduct the stop and risk violating the Constitution rather than risk the life of a community member. Nevertheless, in order to comply with Fourth Amendment jurisprudence, an officer must not only read the complex, fact-intensive, and often cryptic opinions establishing anonymous-tips and reasonable-suspicion law, but he must also put on his lawyer hat and apply those cases to his own unique set of facts before acting on any anonymous tip.[170] Of course, no officers do this; they simply err on the side of safety and receive criticism in the case opinions afterward.[171]

This constitutional dilemma will never be resolved if the United States Supreme Court does not at least hear the issue. Chief Justice Roberts said as much in his dissent to the denial of certiorari in *Harris*:

> I am not sure that the Fourth Amendment requires . . . independent corroboration before the police can act, at least in the special context of anonymous tips reporting drunk driving. This is an important question that is not answered by our past decisions, and that has deeply divided federal and state courts. The Court should grant the petition for certiorari to answer the question and resolve the conflict.[172]

The Virginia Supreme Court is in a particularly convenient position to give Chief Justice Roberts his wish by overturning itself (again) and recognizing the drunk-driving exception (again) using the checkpoint and community caretaker cases for support. If the highest court in Virginia does so, it can kill two birds with one stone by correcting its mistake in *Harris* and officially sanctioning the community caretaker doctrine the court of appeals has recognized for over a decade. Such a case might find its way up to the United States Supreme Court and finally end this debate, hopefully protecting communities from drunk drivers in the process.

Andrew B. Kartchner

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[170] The United States Supreme Court has consistently recognized the need for avoiding cryptic legal standards that confuse law enforcement officers. *See* Illinois v. Lafayette, 462 U.S. 640, 648 (1983) ("'[A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" (quoting New York v. Belton, 453 U.S. 454, 458 (1981))).

[171] *See, e.g.*, Harris v. Commonwealth, 668 S.E.2d 141, 147 (Va. 2008) ("Officer Picard's observations, when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity, and . . . therefore, Harris was stopped in violation of his rights under the Fourth Amendment."); Alabama v. White, 496 U.S. 325, 333 (1990) (Stevens, J., dissenting) ("[E]very citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed.").

[172] Virginia v. Harris, 130 S. Ct. 10, 10 (2009) (Roberts, C.J., dissenting from denial of certiorari).