Texting While Driving: The Textalyzer's Unreasonable Search and Seizure

*Theresa Dalmut Small**

Introduction

Imagine you are driving to the grocery store on a Sunday afternoon with a friend. While driving, your phone beeps to alert you that you have a new text message. You ask your friend to check your phone. She kindly unlocks your phone and opens the text messages application. Suddenly, a car rear-ends you. You pull over to the side of the road. Shortly after, the police evaluate the accident and draw up the accident report. You were focused on the road and were clearly not at fault. However, the officer approaches and informs you that there is a new protocol allowing the officer to plug your phone into a device called the textalyzer. This device reads all activities that occurred on the phone prior to the accident. The officer plugs your phone into the device, and the textalyzer detects that, just seconds before the accident, the text message application was activated on your phone. You inform the officer your friend was using your phone, but now the officer believes you may have been a distracted driver.

This scenario illustrates a new threat to a person's Fourth Amendment rights.[1] The textalyzer, a recent technology, poses a constitutional problem to an individual's right to privacy, among other rights.[2] The textalyzer is described as a breathalyzer that detects cell phone use.[3] The police can attach the device to your phone and, within ninety seconds, obtain not only a summary of which applications were open and used, but also a summary of every screen tap or

* Antonin Scalia Law School, J.D. 2019.

1 U.S. Const. amend. IV.

2 *See* Tamara Kurtzman, *Textalyzer Technology Faces Privacy Roadblocks*, Law360 (Aug. 7, 2017, 2:57 PM), https://www.law360.com/articles/951936/textalyzer-technology-faces-privacy-roadblocks.

3 *See* David Schaper, *'Textalyzer' Aims To Curb Distracted Driving, But What About Privacy?*, NPR (Apr. 27, 2017, 7:21 AM), http://www.npr.org/sections/alltechconsidered/2017/04/27/525729013/textalyzer-aims-to-curb-distracted-driving-but-what-about-privacy.

swipe within a certain period.[4] Currently, the New York Legislature is attempting to pass Bill S6325A, which will allow the police to use the textalyzer when they arrive at motor vehicle accidents to determine if the participants were using their phones immediately before or during the accident.[5] The purpose of the bill—which was introduced by Senator Terrance Murphy on January 6, 2016—is to "increase enforcement of existing prohibitions on the use of mobile telephones and/or personal electronic devices while driving through the creation of a field test that law enforcement may conduct at the scene of the accident."[6]

The proposed bill allows officers to use the device at the scene of the accident; therefore, allowing them to access the cell phone without a warrant.[7] Since the officer does not need a warrant, he would be accessing the phone without probable cause, but the bill operates under the theory of implied consent.[8] Implied consent is the presumption that, by driving on the state's roads, a person consents to take a test evaluating whether the person is an impaired driver.[9] Advocates of the textalyzer believe using the device does not violate the Fourth Amendment because officers only use it to access the phone's metadata[10]—not to store information or access the phone's content.[11]

The textalyzer is built to extract the phone's metadata in order to determine if the person was actively using the cell phone at the time of the accident.[12] Although textalyzer use is currently limited to acces-

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4 *Id.*

5 *'Textalyzer' Lets Police Scan Driver's Phone,* FOX5NY (Apr. 12, 2016, 9:20 PM), http://www.fox9.com/news/121787429-story; *see also* S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016), https://www.nysenate.gov/legislation/bills/2015/s6325/amendment/a.

6 SPONSOR MEMO, S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016), https://www.nysenate.gov/legislation/bills/2015/s6325/amendment/a; *see also* S.B. S6325A, 2015-2016 Leg., Reg. Sess. (N.Y. 2016).

7 *See* David Kravets, *First Came the Breathalyzer, Now Meet the Roadside Police 'Textalyzer'*, ARS TECHNICA (Apr. 11, 2016, 4:00 PM), https://arstechnica.com/tech-policy/2016/04/first-came-the-breathalyzer-now-meet-the-roadside-police-textalyzer. *See also* S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016) at § 2.

8 *See id.*

9 *Implied-Consent Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

10 "Metadata includes information about a phone call—who, where, when, and how long—but not the content of the conversation." Joseph D. Mornin, *NSA Metadata Collection and the Fourth Amendment*, 29 BERKELEY TECH. L.J. 985, 985-86 (2014).

11 *See* U.S. CONST. amend. IV. *See also* Jason Tashea, *Checking Texting: N.Y. Considers 'Textalyzer' Bill That Allows Police to Learn Whether Drivers in Crashes Were Texting Behind the Wheel*, 102 A.B.A.J. 18, 19 (2016).

12 Tashea, *supra* note 11, at 18.

sing metadata after car accidents, this technology has the capability to be used in routine traffic stops and to receive information beyond metadata, such as the content of a message and the name of the texter.[13] Accessing the cell phone's content without a warrant would be a clear violation of the Fourth Amendment per *Riley v. California.*[14] However, even the mere collection of metadata poses a threat to privacy. One study found that, even through the collection of only metadata and the use of a search engine, the personal details of the study's subjects could be discovered.[15] Accessing these personal details through metadata—and without a warrant—should be considered a violation of the Fourth Amendment.[16]

Suppose that you, as the driver in the above scenario, decided to refuse the textalyzer. Perhaps you are an advocate for privacy, or perhaps you knew the information might seem incriminating because your friend accessed the cell phone immediately before the crash. Either way, your refusal would result in mandatory punishment as a result of imposed implied consent laws associated with the textalyzer.[17] States have instituted refusal laws allowing individuals to refuse to take the impairment test, but also imposed a mandatory punishment for refusing.[18] The United States Supreme Court has found that refusal statutes—in the context of drunk driving—are constitutional because the government has a legitimate interest in obtaining the evidence being metabolized by a person's body.[19]

The consequences of refusing the test can vary, from license suspension to jail time, depending on the state's specific refusal law.[20]

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[13] *Id.*

[14] *See* Riley v. California, 573 U.S. 373, 403 (2014).

[15] *See* Jonathan Mayer & Patrick Mutchler, *MetaPhone: The Sensitivity of Telephone Metadata*, WEB POLICY (Mar. 12, 2014), http://webpolicy.org/2014/03/12/metaphone-the-sensitivity-of-telephone-metadata/ (discovering that an individual had multiple sclerosis merely from calls to specialty pharmacies and local neurology groups, an individual bought an AR semi-automatic weapon through a series of calls to a firearm store and a manufacturer of semi-automatic weapons, and an individual suffered from cardiac arrhythmia due to calls to a medical center, received calls from a pharmacy and called a company that sells medical devices that monitor cardiac arrhythmia).

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

[17] *See* S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016), at §3(B)(1).

[18] *See* FLEM K. WHITED III, DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 8:7 (2d ed. 2018).

[19] *See* Mackey v. Montrym, 443 U.S. 1, 18-19 (1979).

[20] *See, e.g.,* ALASKA STAT. ANN. § 28.35.032 (West 2018); KAN. STAT. ANN. § 8-1014 (West 2019).

The proposed legislation in New York imposes the same punishment for a textalyzer refusal as for a breathalyzer refusal.[21] In New York, that punishment would be a license suspension.[22] If other states also begin using the same punishment for textalyzer refusals as they do for breathalyzer refusals, excessive punishments would result in some states. There would also be inequitable punishments across states. While a driver may receive both jail time and a mandatory ignition interlock device[23] in one state[24], he may only receive an ignition interlock device in another state.[25] In sum, refusal laws vary by both state and punishment.[26]

The textalyzer violates individuals' Fourth Amendment rights because individuals have a subjective expectation of privacy in their cell phone's metadata and content, and society recognizes an objective expectation of that privacy as cell phones hold intimate details not provided to the cell phone companies. Therefore, a warrantless search of a cell phone by a textalyzer is unconstitutional. The refusal laws associated with the textalyzer should not be implemented because distracted driving does not present the same policy concerns as drunk driving. While the evidence of intoxication is metabolized in a person's body, the evidence of distracted driving is stored in the cell phone and can be gathered at a later time through subpoena or warrant. Lastly, the punishments associated with textalyzer refusal in some states are excessive.

This Comment will address the concerns surrounding this new technology—including privacy issues, refusal laws, and the severity of punishment for refusal. Part I of this Comment provides an overview of the textalyzer's development, Fourth Amendment jurisprudence,

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21 *Compare* S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016), *with* N.Y. VEH. & TRAF. LAW § 1193 (McKinney 2011).

22 Tashea, *supra* note 11, at 18.

23 An ignition interlock device is installed in the car and will not allow the car to start until the individual has blown into the mouthpiece and the breath-alcohol concentration is under the legal limit. *See Ignition Interlock Device*, DMV.ORG, https://www.dmv.org/automotive-law/dui/ignition-interlock-device.php.

24 *See* ALASKA STAT. ANN. § 28.35.032 (West 2018).

25 *See* KAN. STAT. ANN. § 8-1014 (West 2019).

26 *See, e.g.*, ALASKA STAT. ANN. § 28.35.032 (West 2018) (mandating jail time, ignition interlock, and fines when refusal to take a breathalyzer); KAN. STAT. ANN. § 8-1014 (West 2019) (issuing an ignition interlock device and license suspension for refusal); 31 R.I. GEN. LAWS ANN. § 31-27-2.1 (West 2017) (sentencing individuals for refusal to take a breathalyzer to community service, license suspension, a fine, and possible jail time); VA. CODE ANN. § 18.2-268.3 (West 2017) (mandating only a license suspension for refusal to take a breathalyzer).

and the current refusal laws in Alaska, Kansas, Rhode Island, and Virginia. Part II of this Comment analyzes the privacy concerns associated with the textalyzer and demonstrates how the extraction of metadata from individuals' cell phones after car accidents violates the Fourth Amendment. This Comment also examines various textalyzer refusal laws and the effects these laws will have if states implement the same punishments for both breathalyzer and textalyzer refusals. Although the New York bill limits the use of the textalyzer to metadata, even permitting officers to access drivers' metadata violates constitutional rights.[27]

I. BACKGROUND

A. *Rising Concerns About Distracted Driving—and the Legislative Response*

Distracted driving has become a prevalent issue in our society. In 2015, 3,477 people were killed—and 391,000 people were injured—in motor vehicle crashes involving a distracted driver.[28] Also in 2015, 10% of motor vehicle deaths—and 16% of motor vehicle injuries—resulted from distracted driving.[29] Any time your mind or eyes are off the road, you are considered a distracted driver.[30] Distracted driving is defined by the following activities: "[r]eaching for your phone, [c]hanging the music, [u]sing an app. . . [c]hecking your GPS or map, [t]aking a photo, [c]hecking email or posting to social media sites, [e]ating and drinking, [p]utting on makeup/grooming . . . Even talking to a passenger in your car can be a distraction."[31] When you use a mobile device while driving, you are three times more likely to get into an accident.[32] For instance, if you are driving 55 MPH and you look down at your cell phone for only five seconds to send a text, you have just driven the length of a football field without your eyes on the road.[33]

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[27] *See* S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016).

[28] NATIONAL CENTER FOR STATISTICS AND ANALYSIS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DISTRACTED DRIVING 2015 (Mar. 2017), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812381.

[29] *Id.*

[30] *See Distracted Driving*, DMV.ORG, http://www.dmv.org/distracted-driving.php.

[31] *Id.*

[32] *Id.* (citing Va. Tech. Trans. Inst.).

[33] *Id.* (citing U.S. Dept. of Trans.).

In response to the rising number of deaths and injuries from distracted driving, states have instituted laws to combat this issue. Forty-six states have already passed laws which ban texting while driving.[34] Fourteen states have additional laws banning the use of any type of handheld device while driving.[35] Even so, some advocates demand that more be done to ensure citizens obey these laws.[36]

By introducing the textalyzer, New York is attempting to take the ban on cell phone use one step further in a continued effort to disincentivize drivers' use of mobile devices.[37] In New York, between 2011 and 2015, distracted drivers using cell phones while driving caused 12 deaths and 2,784 injuries in car accidents.[38] At the same time, the New York police issued approximately 1.2 million tickets related to texting and driving.[39] One of these accidents involved Evan Lieberman, a teenaged boy, who was killed by a distracted driver.[40]

Evan was a passenger in a head-on-crash in which the driver of the other car stated that he had fallen asleep at the wheel.[41] Through subpoenaed cell phone records, the court eventually discovered the driver was actually using his cell phone while driving.[42] Although the judge did not cite the cell phone use as the specific contributing factor to the crash, the driver's license was suspended.[43] After the litigation of his son's case, Evan's father, Ben Lieberman, co-founded the organization Distracted Operators Risk Casualties (DORC) to raise awareness of the issue.[44] Through intense lobbying by DORC, the New York Legislature introduced "Evan's Law" to combat distracted driving through the use of the textalyzer.[45]

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[34] Anna Gronewold, *'Textalyzer' Targets Drivers' Cellphones; Privacy Advocates Worry Over Data Access*, NAT'L POST, May 15, 2017, at A12.

[35] *Id.*

[36] *Id.*

[37] *See* S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016).

[38] Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, *New York to Study Textalyzer to Find Out if a Driver was Texting Before an Accident Occurred*, N.Y. PERS. INJ. ATT'YS BLOG (July 27, 2017), https://www.newyorkpersonalinjuryattorneysblog.com/2017/07/new-york-study-textalyzer-find-driver-texting-accident-occured.html.

[39] *Id.*

[40] *See* Kravets, *supra* note 7.

[41] Terence Corcoran, *N.Y. Family Who Lost Son Fights Distracted Driving*, USA TODAY (May 29, 2013, 8:26 PM), https://www.usatoday.com/story/news/nation/2013/05/29/ny-father-fights-distracted-driving/2370837/.

[42] *See id. See also* Schaper, *supra* note 3.

[43] *See* Corcoran, *supra* note 41.

[44] *Id.*

[45] *See* Kravets, *supra* note 7.

From the result of Evan's wrongful death suit, Mr. Lieberman found that cell phone records were not enough to prove fault in a distracted driving case.[46] Cell phone records only reflect text messages and phone calls, and do not report email, social media, or internet use.[47] Mr. Lieberman equates the need for the textalyzer to the need for the breathalyzer: "When people were held accountable for drunk driving, that's when positive change occurred . . . It's time to recognize that distracted driving is a similar impairment and should be dealt with in a similar fashion."[48] The National Highway Traffic Safety Administration estimated that a driver who is texting is five times more dangerous than a driver who is driving under the influence.[49] Additionally, the American Automobile Association reported that as many as 67% of drivers engage in this behavior.[50]

The textalyzer is described as a breathalyzer for your cell phone.[51] Officers seeking to use the textalyzer would rely on the same concept of implied consent to have grounds to test a cell phone for distracted driving without a warrant.[52] The textalyzer is like a tablet or laptop with a connecting cord that plugs into the cell phone.[53] The device reads only the operating system logs, which means it would show the taps and swipes of the screen.[54] In theory, the individual would not have to surrender her cell phone—the officer would just connect a wire to the cell phone.[55] The officer would then tap a button on the device and, in about ninety seconds, the textalyzer would show the last activities on the cell phone with time stamps.[56] The device would "tell if someone physically clicked or swiped the phone during the time of

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46 Schaper, *supra* note 3.

47 *See id.*

48 Kravets, *supra* note 7.

49 *New York State Legislators and Alliance Combating Distracted Driving Seek Progress in Combating Distracted Driving Epidemic with Legislation and "Textalyzer" Prototype*, BUS. WIRE (Apr. 13, 2017, 2:42 PM), https://www.businesswire.com/news/home/20170413006067/en/New-York-State-Legislators-Alliance-Combating-Distracted.

50 *Id.*

51 Kravets, *supra* note 7.

52 *Id.*

53 *Are Textalyzers the Answer to Curbing Distracted Driving?*, HARDISON & COCHRAN, https://www.lawyernc.com/blog/2016/11/are-textalyzers-the-answer-to-curbing-distracted-driving/.

54 *See id.*

55 Schaper, *supra* note 3.

56 *Id.*

the accident."[57] There are contentions, however, that the operating system on cell phones does not distinguish between someone physically touching the cell phone to open an application and someone opening an application by voice command.[58]

From the recent activity of taps and swipes on the phone, the police would determine whether they should obtain a warrant to extract more detailed information about the content of the usage.[59] Cellebrite, an Israeli company working with New York to develop the technology, states that the device should not violate privacy rights because it will only determine usage and will not access content.[60] The chief executive officer of Cellebrite USA stated, "For this device, the whole purpose is not to get any data . . . So no, police won't be able to, unless they rewrite our code."[61]

B. *Fourth Amendment Jurisprudence*

While the textalyzer is a relatively new technology, it has already presented several Fourth Amendment concerns. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[62]

This right to privacy involves two basic issues: (1) searches and seizures must be reasonable, and (2) if the police perform a search, they must possess a warrant showing probable cause.[63] Originally, the Fourth Amendment was interpreted strictly to protect only people

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[57] Julie Jacobson, *New York Eyes 'Textalyzer' to Combat Distracted Driving*, CBS NEWS, (May 14, 2017, 4:46 PM) https://www.nbcnews.com/tech/tech-news/new-york-eyes-textalyzer-combat-distracted-driving-n759336.

[58] *See* Jay Stanley, *Anti-Distracted Driving 'Textalyzer' Technology: Not as Simple as it Seems*, ACLU (Aug. 24, 2017, 9:30 AM), https://www.aclu.org/blog/privacy-technology/internet-privacy/anti-distracted-driving-textalyzer-technology-not-simple-it.

[59] *Id.*

[60] *See id*.

[61] *Id.*

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

[63] *See id.*

and homes from physical searches.[64] This interpretation of the Fourth Amendment has been difficult to apply in many cases, due to technological advancements that the Framers could not have envisioned.[65]

1. Fourth Amendment Development Prior to the 21st Century

The Supreme Court has found that "the Fourth Amendment protects people, not places."[66] *Katz v. United States* was the first case to address an individual's expectation of privacy.[67] In this case, federal agents attached a listening device, without a warrant, to the outside of a telephone booth to intercept calls made within the booth.[68] Within the traditional view of the Fourth Amendment, there would be no need for a warrant here because there was no search—which had been defined, up to that point, as only occurring when there was a physical penetration.[69] However, the Court in *Katz* found that actions which an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[70] Therefore, the defendant's conversation—which was held within the closed telephone booth—was protected by the Fourth Amendment, and the police violated the defendant's constitutional rights by using the listening device.[71] Justice Harlan's concurrence in *Katz* stated the requirements for finding an expectation of privacy: "(1) that a person [has] exhibited an actual (subjective) expectation of privacy, and, (2) that the expectation be one that society is prepared to recognize as reasonable."[72] The Supreme Court later adopted this two-pronged test in *Smith v. Maryland*.[73]

Once the Court decided on the two-prong analysis for privacy, it next had to define what society deemed to be reasonable—given the

64 *See* Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 MISS. L.J. 1131, 1138-1139 (2011). *See also* U.S. CONST. amend. IV.

65 *See* Weaver, *supra* note 64, at 1134.

66 Katz v. United States, 389 U.S. 347, 351 (1967).

67 *See id.* at 360 (Harlan, J., concurring).

68 *See id.* at 348.

69 *See id.* at 352-53 (citing Olmstead v. United States, 277 U.S. 438, 464-66 (1928)).

70 *Id.* at 351-52 (citing Rios v. United States, 364 U.S. 253 (1960); Ex Parte Jackson, 96 U.S. 727, 733 (1877)).

71 *See id.* at 353.

72 Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

73 *See* Smith v. Maryland, 442 U.S. 735 (1979).

evolution of technology.[74] For instance, a few years later, the Court heard a case regarding an individual wearing a wire.[75] While a wiretapping seems similar to the facts in *Katz*, the Court's decision came out differently.[76] In *United States v. White*, the Court found that information disclosed to a third-party could not be protected under a reasonable expectation of privacy.[77] Although an individual may have an expectation that a private conversation will remain private, the Court found that—in any instance of someone disclosing information to a third-party—that information would no longer be considered private.[78]

In *White*, an informant wearing a wire conversed with the defendant, and the police were able to discover pertinent evidence to convict the defendant.[79] The Court reasoned that the information obtained from the informant's wire could have also been obtained by the informant relaying the information to the police.[80] The defendant had no expectation of privacy in the information given to the informant because the defendant could not control what the informant would do with that information.[81] Since the wire produced the same result as the informant relaying the information, the wire use did not violate the Fourth Amendment.[82] This concept was eventually called the third-party doctrine, as information voluntarily given to a third-party is not protected by the Fourth Amendment.[83]

The third-party doctrine was later expanded to encompass documents, not just conversations.[84] In *United States v. Miller*, the Court found that records held at a bank were not protected by the Fourth Amendment.[85] The Court stated:

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74 *See id*. *See also* United States v. Miller, 425 U.S. 435 (1976); United States v. White, 401 U.S. 745 (1971).

75 *See White*, 401 U.S. at 746-47.

76 *Compare id.* at 754, *with Katz*, 389 U.S. at 353.

77 *See White*, 401 U.S. at 752.

78 *Id.*

79 *Id.* at 746-47.

80 *Id.* at 749.

81 *Id.*

82 *Id.* at 753.

83 *See* Simon Stern, *The Third-Party Doctrine and the Third Person*, 16 NEW CRIM. L. REV. 364, 364-365 (2013).

84 *See* United States v. Miller, 425 U.S. 435, 443 (1976).

85 *Id.* at 443.

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.[86]

Since the defendant company willingly gave over its documents to a bank—a third party—the company's expectation of privacy was nonexistent.[87]

With the development of cell phones in 1973, the Court was faced with the task of determining how the third-party doctrine applied to information given to cell phone companies. In *Smith v. Maryland*, the police used a pen register to gather information on the defendant.[88] A pen register is a device that monitors electrical impulses to record the numbers dialed on a telephone, but not the content of the discussion.[89] The Court distinguished the pen register from a listening device because a pen register only disclosed the telephone numbers dialed and not the content of the communication.[90] The pen register did not even indicate whether the call was completed, and did not record the identities of the caller or the recipient of the call.[91] The Court rejected the defendant's argument that the defendant had a reasonable expectation of privacy in the telephone numbers he dialed.[92] The Court relied on the third-party doctrine to establish that dialed phone numbers were not private because they were exposed to the phone company; thus, there was no expectation of privacy regarding the phone numbers and no warrant was needed to obtain the information.[93] The Court stated that, although the individual may have had a subjective expectation of privacy, society did not view that expectation as reasonable.[94]

The Court also had to analyze what society deemed reasonable for privacy concerns with the evolution of tracking devices. In one

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86 *Id.*
87 *Id.* at 443-43.
88 *See* Smith v. Maryland, 442 U.S. 735, 737 (1979).
89 United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977).
90 *Smith*, 442 U.S. at 741.
91 *Id.*
92 *Id.* at 742.
93 *See id.*
94 *Id.* at 743.

instance, the police used a beeper, a radio transmitter that "emits periodic signals that can be picked up by a radio receiver," to monitor the movements of illicit drugs.[95] The police placed the beeper in a container of chloroform purchased by one of the defendants, which was transported to a secluded cabin owned by another defendant.[96] The police used visual surveillance, and the beeper, to monitor the location of the transporting car.[97] The defendants were able to lose the police officers and both the visual surveillance and the beeper failed to track the defendants.[98] However, through the use of a helicopter, the police picked up the signal from the beeper and tracked it to the cabin.[99] While the Court of Appeals for the Eighth Circuit found the beeper use violated the defendant's Fourth Amendment rights, the Supreme Court found that the defendants had no reasonable expectation of privacy.[100] The Court reasoned that the beeper was equivalent to someone being followed by an automobile on public streets and highways.[101] The Court stated, "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."[102] Further, the Court explained, "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."[103]

In 1984, the Court produced two decisions effectively limiting what society deemed reasonable. First, the Court found that the expectation of privacy must go beyond a subjective expectation.[104] In *Oliver v. United States*, the defendant argued that he had a reasonable expectation of privacy in the field outside his home because he had a "No Trespassing" sign along the boundaries of his property.[105] The Court disagreed with him.[106] The Court found that although he had a

95 United States v. Knotts, 460 U.S. 276, 277 (1983).
96 *See id.* at 278.
97 *See id.*
98 *Id.*
99 *Id.*
100 *Id.* at 279, 280; *see also* United States v. Knotts, 662 F.2d 515 (8th Cir. 1981).
101 United States v. Knotts, 460 U.S. 276, 281 (1983).
102 *Id.* (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion)).
103 *Id.* at 282.
104 Oliver v. United States, 466 U.S. 170, 177 (1984).
105 *Id.* at 173.
106 *Id.* at 179, 181.

subjective expectation of privacy, society was unwilling to accept privacy interests not within the curtilage of the home.[107] The Court contrasted the contents of the home and the contents of an open field, stating, "[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[108] The Court placed great weight on what society was willing to accept as private.[109]

Next, the Court yet again narrowed the expectation of privacy in open fields in its decision in *Dow Chemical Company v. United States*.[110] The Environmental Protection Agency (EPA) used flyovers to detect whether a company was responsible for violations of the Clean Air Act.[111] The Court affirmed the Court of Appeals for the Sixth Circuit's decision, which found a Fourth Amendment search analysis "focuses on whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solitude and hence give rise to a 'reasonable' expectation of privacy."[112] The Sixth Circuit further noted that in determining whether there is a privacy interest, it can be useful to first determine if there are any "objective manifestations of any claimed privacy expectation."[113]

Lastly, the Court distinguished the area around a home and the area around a company because "[t]he home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways."[114] The Supreme Court affirmed the Sixth Circuit's finding that the area around the plant was more akin to an open field rather than curtilage.[115] The intimate details of the home do not extend to the outdoor walkways of a manufacturing company.[116] Additionally, the Court considered the fact that the EPA

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107 *Id.* at 179-80.

108 *Id.* at 179.

109 *See id.* at 178-79.

110 *See* Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986).

111 *Id.* at 229.

112 Dow Chem. Co. v. United States, 749 F.2d 307, 312 (6th Cir. 1984).

113 *Id.* (*citing* Dow Chem. Co. v. United States, 536 F. Supp. 1355, 1364 (E.D. Mich. 1982)).

114 *Id.* at 314.

115 *Dow Chem. Co.*, 476 U.S. at 239.

116 *Id.* at 236.

utilized "methods of observation commonly available to the public at large . . ."[117]

On the same day, the Court considered another flyover case, *California v. Ciraolo.*[118] In this case, police received an anonymous tip that a neighbor was growing marijuana in his backyard.[119] The police used a private plane to fly over the area and they sighted marijuana plants in the backyard.[120] With this information, the police obtained a search warrant to search the property.[121] The Court found the flyover did not violate the defendant's Fourth Amendment rights because the garden was visible to any individual who flew in the same airspace above the garden.[122] Although he had a ten-foot fence and an individual could not see the plants when walking past his home, the plants were visible if someone were peering in from a second story.[123] Since the defendant did not obstruct all observation, there was no expectation of privacy.[124]

By the end of the 20th century, the Court had seen a series of cases involving technology and the Fourth Amendment.[125] The Court developed the third-party doctrine, eliminating an individual's expectation of privacy if he freely gave information to a third-party—including dialed phone numbers received by phone companies.[126] The Court found that the use of a new technology was constitutional when the technology gathered information that a police officer could otherwise have gathered without the assistance of the device.[127] Lastly, the Court found that there was no privacy expectation in open fields—or in anything that could be viewed from the street or from publicly navigable airspace.[128] These areas differed from the privacy of the home

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117 *Id.* at 234.

118 See California v. Ciraolo, 476 U.S. 207, 209 (1986).

119 *Id.*

120 *Id.*

121 *Id.*

122 *See id.* at 213-14. *See also* U.S. CONST. amend. IV.

123 *Id.* at 211.

124 *See* California v. Ciraolo, 476 U.S. 207, 216 (1986).

125 *See id.* at 225. *See also* United States v. Knotts, 460 U.S. 276, 288 (1983); Smith v. Maryland, 442 U.S. 735, 736 (1979); United States v. White, 401 U.S. 745, 790 (1971); Katz v. United States, 389 U.S. 347, 350 (1967).

126 *See Smith*, 442 U.S. at 742-43.

127 *See Knotts*, 460 U.S. at 282.

128 *See Ciraolo*, 476 U.S. at 213, 215; Oliver v. United States, 466 U.S. 170, 180 (1984).

because the home is where relationships are fostered and people engage in intimate details of their lives.[129]

2. 21st Century Developments in Fourth Amendment Jurisprudence

The 21st century began with the Court considering the implications of physical examination—not just mere observation—in public places.[130] One of the first cases the Court reviewed involved the physical search of a bag by touch.[131] While the defendant was on a bus traveling from California to Arkansas, the bus reached a permanent Border Patrol checkpoint near the Texas-Mexico border.[132] The Border Patrol agents not only checked the immigration status of each passenger, but also took time to squeeze the luggage above each seat.[133] When the agents examined the defendant's bag, the officer felt a "brick-like object."[134] The Court found that a "physically invasive inspection is simply more intrusive than purely visual inspection."[135] Although the bag was not a part of the defendant's physical body, the Court concluded the defendant had a reasonable expectation of privacy regarding the bag's contents because bags typically contain personal items.[136] The defendant had a reasonable expectation that the agent would not feel the bag to examine the contents within it.[137] Therefore, the Court found that the examination of the bag violated the defendant's Fourth Amendment rights.[138]

The Court further expanded Fourth Amendment jurisprudence after the introduction of thermal imaging technology.[139] In *Kyllo v. United States*, the police used thermal imaging to detect heat lamps—used for growing marijuana—in the defendant's home.[140] In finding this search to be violative of the Fourth Amendment, the Court stated: "Where, as here, the Government uses a device that is not in general

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129 Dow Chem. Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984).
130 *See* Bond v. United States, 529 U.S. 334, 335 (2000).
131 *See id.*
132 *Id.*
133 *See id.*
134 *Id.* at 336.
135 *Id.* at 334.
136 *See* Bond v. United States, 529 U.S. 334, 337-38 (2000).
137 *See id.* at 338.
138 *Id.* at 339.
139 *See* Kyllo v. United States, 533 U.S. 27 (2001).
140 *See id.* at 29.

public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[141] *Kyllo* introduced the concept of intimate details—the details of an individual's life that are sacred to that person and the intrusion of which, without a warrant, violates the Fourth Amendment.[142] The Court stated that all activities within the home constitute intimate details.[143] However, the Court did not limit its analysis of the constitutionality of the thermal imager to the presence of intimate details because it would have been impractical to apply.[144] The Court also relied on the bright line rule of privacy within the home and the use of a technology that is not accessible to the general public.[145]

The Court also confronted Fourth Amendment questions following developments with police dogs' ability to detect drugs.[146] In *Illinois v. Caballes*, the Court examined the constitutionality of using dogs to detect drugs when an individual was pulled over for routine traffic violations.[147] The police pulled over the defendant for speeding and during the traffic stop, a police dog alerted the officers to the trunk of the car.[148] After searching the trunk, the officers found marijuana and arrested the defendant.[149] The Court found that the officers' use of the dog during the traffic stop did not violate the defendant's Fourth Amendment rights because the dog could only detect contraband items.[150] Individuals have no reasonable expectation of privacy for contraband items.[151] The Court noted that if the dog could detect other items that would otherwise remain hidden from public view, the Court's analysis of the case would change and the Fourth Amendment would likely be implicated.[152] The Court distinguished the dog sniff from the thermal imaging device in *Kyllo*

141 *Id.* at 40.

142 *See id.*

143 *See id.* at 28.

144 *Id.* at 38.

145 *See* Kyllo v. United States, 533 U.S. 27, 40 (2001).

146 *See* Illinois v. Caballes, 543 U.S. 405, 406 (2005).

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 409.

151 *See id.* at 410.

152 *See* Illinois v. Caballes, 543 U.S. 405, 409 (2005).

because the thermal imaging device could detect otherwise lawful activities, such as items *other than* the marijuana heat lamps.[153]

As the use of surveillance cameras became more prevalent, the Montana Supreme Court had to decide whether the Fourth Amendment protected the activities and information captured by surveillance cameras. For example, in *Mont. State Fund v. Simms*, the Supreme Court of Montana held that the Fourth Amendment did not protect information taken from videos of public places when an individual took no action to conceal his identity or activities—such that the person did not assert a privacy interest in his actions.[154] The Montana court concluded that society did not view activities performed on public roads or sidewalks as reasonably deserving Fourth Amendment protection.[155]

Next, the development of Global Positioning Systems (GPS) called for further Fourth Amendment analysis. In *United States v. Jones*, the Court heard a case concerning police officers' use of a GPS tracking device to monitor an individual's movements.[156] The Court discussed whether visual observation of an individual for long periods of time was an invasion of privacy—especially considering that combining separate data points allowed the police to make inferences about an individual's life.[157] Ultimately, the majority side-stepped that issue, stating the case did not require the Court to determine whether extended visual observation through electronic devices was an invasion of privacy.[158] Instead, the Court based its decision on the traditional Fourth Amendment basis that this case included a physical trespass.[159] However, the concurrence stated that extended observation via GPS violated the Fourth Amendment because such monitoring would reveal intimate details about the individual—as discussed in *Kyllo*.[160] In her concurrence, Justice Sotomayor stated: "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[161]

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153 *Id.*
154 Mont. State Fund v. Simms, 270 P.3d 64, 68 (Mont. 2012).
155 *Id.*
156 United States v. Jones, 565 U.S. 400, 402 (2012).
157 *See id.* at 415 (Sotomayor, J., concurring).
158 *See id.* at 413.
159 *See id.* at 412-13.
160 *Id.* at 415 (Sotomayor, J., concurring).
161 *Id.*

With the rapid development of cell phones, the Court has had to determine whether the police could seize information from an arrestee's cell phone.[162] Applying the "intimate details" concept discussed in *Kyllo*, the Court assessed the collection of cell phone data.[163] The Court stated:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.[164]

The Court found that the private information stored within a cell phone is so important that the police could not seize the information without a warrant.[165]

Recently, the Supreme Court decided *Carpenter v. United States*, and found the acquisition of the defendant's cell-site records was a Fourth Amendment violation.[166] Even though the cell phone company held the information, the Court found the third-party doctrine did not overcome the Fourth Amendment violation.[167] The Court found that "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[168] However, the Court noted it was not overturning the third-party doctrine, and the holding is narrowly construed for cell-site records.[169]

After the invention of the breathalyzer, the Court analyzed whether its use incident to arrest violated the Fourth Amendment.[170]

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162 *See* Riley v. California, 573 U.S. 373, 378 (2014).

163 *See id.* at 390-92, 400-01; Kyllo v. United States, 533 U.S. 27, 39 (2001).

164 *Riley*, 573 U.S. at 403.

165 *See id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

166 *See* Carpenter v. United States, 138 S. Ct. 2206 (2018).

167 *Id.* at 2217.

168 *Id.* (citing United States v. Jones, 565 U.S. 400, 415 (2012)).

169 *Id.* at 2220.

170 Birchfield v. North Dakota, 136 S. Ct. 2160, 2172-73 (2016); *see also* U.S. CONST. amend. IV.

In *Birchfield v. North Dakota*, the Court found the Fourth Amendment permitted warrantless breath tests incident to arrest to aid in determining drunk driving.[171] One of the Court's primary concerns was that the body naturally metabolizes alcohol and, with every elapsing minute, "evidence" would be destroyed.[172]

The Court in *Birchfield* also considered whether administering blood tests, without the consent of the driver, was constitutional in the context of a drunk driving stop.[173] There, the Court concluded that because blood tests are more intrusive and provide information about the person other than his level of intoxication at the time of arrest, blood tests may not "be administered as a search incident to a lawful arrest for drunk driving."[174] In coming to this conclusion, the *Birchfield* Court largely used a similar policy analysis for blood tests as they did for breath tests. In previous cases, the Court has not used the same policy argument as it has with breathalyzers and has stated: "In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."[175] The Court found that motorists do not consent to a blood test purely by virtue of driving on public roads.[176] The police officers needed to obtain a warrant to take a blood test of a motorist.[177]

Fourth Amendment jurisprudence continues to change with the development of new technology. In the 21st century, the Court has seen several new technological developments—like thermal imaging, drug-sniffing dogs, surveillance cameras, global positioning systems, breathalyzers, and much more.[178] In each of these cases, the Court had to assess the capabilities of each device as well as what information the device was gathering.[179] The Court found the drug-sniffing dogs to be a constitutional search because their only ability was to

171 *Birchfield*, 136 S. Ct. at 2184.

172 *Id.* at 2182.

173 *See id.* at 2184-85.

174 *See id.* at 2185; Stanley, *supra* note 58.

175 *See* Missouri v. McNeely, 569 U.S. 141, 165 (2013).

176 *Birchfield*, 136 S. Ct. at 2185, 2186.

177 *Id.* at 2184.

178 *See id.* at 2186; United States v. Jones, 565 U.S. 400, 402 (2012); Illinois v. Caballes, 543 U.S. 405, 407 (2005); Kyllo v. United States, 533 U.S. 27, 29 (2001); Mont. State Fund v. Simms, 270 P.3d 64, 65 (Mont. 2012).

179 *See Birchfield*, 136 S. Ct. at 2168; *Jones*, 565 U.S. at 402; *Caballes*, 543 U.S. at 409; *Kyllo*, 533 U.S. at 30-37; *Simms*, 270 P.3d at 65.

detect contraband.[180] In conducting a privacy analysis concerning new technologies, the Court will assess the full range of capabilities of each new device and will consider whether the device can capture intimate details of a citizen's life.

C. *Refusal Laws*

To deter people from driving while intoxicated, some states have enacted statutes that criminalize the refusal to take a blood alcohol test.[181] As a result, refusal statutes highly incentivize drivers to take breathalyzer tests.[182] Refusing to take a breathalyzer is a "separate and distinct" offense from driving while intoxicated.[183] The penalties incurred from refusing to take a breathalyzer are imposed in addition to the penalties imposed for convictions of driving under the influence.[184] Even if an offender pleads guilty to, or is acquitted of, a drinking while driving charge, the offender would still be criminally liable for refusing a breathalyzer.[185]

States institute refusal penalties to criminalize the destruction of evidence.[186] Refusal of a breathalyzer prevents the acquisition of evidence that could be used in drunk driving investigations.[187] The Supreme Court has found that refusal statutes are constitutional because "criminalizing refusals bears a fair and substantial relation to the legitimate governmental objective for gathering evidence of possible drunken driving."[188] The Court must balance an individual's right of privacy and the state's interest in intruding on that privacy in certain circumstances.[189] When the intrusion occurs in an effort to protect the state's residents from drunk drivers and to preserve disappearing evidence, the balance weighs in favor of the state; therefore, breathalyzers are deemed legal without a warrant.[190]

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180 *See Caballes*, 543 U.S. at 408-09.

181 *See* WHITED, III, supra note 18 at § 8:7.

182 *See id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *See id.*

187 *See* WHITED, III, supra note 18 at § 8:7.

188 *See id.* (quoting Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986) (internal quotation marks omitted)).

189 *See id.* (quoting South Dakota v. Neville, 459 U.S. 553 (1983)).

190 *Id.*

1. Alaska

States vary in the penalties they impose for refusal to take a breathalyzer. Alaska has one of the harshest sets of penalties compared to Kansas, Rhode Island, and Virginia.[191] For example, an individual's first offense includes sentencing of: (1) a minimum of 72 consecutive hours of imprisonment, (2) the installation of a mandatory ignition interlock device in the individual's vehicle for a minimum of six months once the individual regains the privilege of driving, and (3) a minimum fine of $1,500.[192] An individual's second offense includes sentencing of: (1) a minimum of 20 days of imprisonment, (2) the installation of a mandatory ignition interlock device in the individual's vehicle for a minimum of twelve months once the individual regains the privilege of driving, and (3) a minimum fine of $3,000.[193] An individual's third offense includes sentencing of: (1) a minimum of 60 days of imprisonment, (2) the installation of a mandatory ignition interlock device in the individual's vehicle for a minimum of eighteen months once the individual regains the privilege of driving, and (3) a minimum fine of $4,000.[194] The court may not suspend the imposition of the sentence, fine, or ignition interlock device and may only allow probation if the individual serves the minimum requirements for imprisonment and fines.[195]

2. Kansas

As a penalty for refusing a breathalyzer, Kansas implements a blend of license suspension and ignition interlock devices.[196] An individual's first offense requires a suspension of her driver's license for one year.[197] After the year is concluded, the individual must use an

191 *See* ALASKA STAT. ANN. § 28.35.032 (West 2018) (mandating jail time, ignition interlock, and fines when refusal to take a breathalyzer); KAN. STAT. ANN. § 8-1014 (West 2019) (issuing an ignition interlock device and license suspension for refusal); 31 R.I. GEN. LAWS ANN. § 31-27-2.1 (West 2017) (sentencing individuals for refusal to take a breathalyzer to community service, license suspension, a fine, and possible jail time); VA. CODE ANN. § 18.2-268.3 (West 2017) (mandating only a license suspension for refusal to take a breathalyzer).

192 ALASKA STAT. ANN. § 28.35.032 (West 2018).

193 *Id.*

194 *Id.*

195 *Id.*

196 KAN. STAT. ANN. § 8-1014 (West 2019).

197 *Id.*

ignition interlock system on her car for two years.[198] An individual's second offense also requires the suspension of her driver's license for one year, but extends the ignition interlock system to a period of three years after the license is re-invoked.[199] An individual's third offense extends the ignition interlock system requirement to a period of four years after the one-year license suspension.[200]

For an individual to be punished for refusing to take a breathalyzer in Kansas, there are four requirements: (1) "There existed reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2, 128, and amendments thereto, or is under 21 years of age while having alcohol or other drugs in such person's system," (2) "the person had been placed under arrest, was in custody or had been involved in a vehicle accident or collision," (3) a "law enforcement officer had presented the person with oral and written notice pursuant to K.S.A. 8-1001," and (4) "the person refused to submit to and complete a test as requested by a law enforcement officer."[201] If all four requirements are satisfied, individuals are subject to the punishments of either license suspension or ignition interlock system installation discussed above.[202]

3. Rhode Island

Similarly, Rhode Island punishes the refusal of a breathalyzer with a fine and suspension of the driver's license, but also uses restorative justice by requiring the individual to complete community service.[203] The first violation requires a fine between $200 and $500, and the person must complete ten to sixty hours of public community service.[204] Additionally, the individual's driver's license is suspended for six months to one year, and the individual must participate in a special course about driving while intoxicated.[205] The judge may thereafter

198 *Id.*
199 *Id.*
200 *Id.*
201 KAN. STAT. ANN. § 8-1002(a)(1) (2018).
202 *Id.* § 8-1002(c) (2018).
203 31 R.I. GEN. LAWS ANN. § 31-27-2.1 (West 2017).
204 *Id.*
205 *Id.*

also demand that the individual use an ignition interlock system as provided in § 31-27-2.8.[206]

If the individual incurs a second offense within five years of her first offense, the punishment exponentially increases.[207] The second offense is classified as a misdemeanor, and the offender can be imprisoned for up to six months.[208] Additionally, the offender must not only pay a fine of between $600 and $1,000, but also must complete sixty to one hundred hours of public community service, and her driver's license will be suspended for one to two years.[209] Optionally, the judge may require alcohol treatment and an ignition interlock system.[210]

If the offender is convicted of a third violation within a five-year period, the imprisonment time is lengthened to one year, the fine becomes $800 to $1,000, and the offender must complete at least one hundred hours of community service.[211] The individual's driver's license is thereafter suspended for two to five years, and the judge may require alcohol treatment and an ignition interlock system.[212]

4. Virginia

Virginia imposes much less severe punishments for the refusal to take a breathalyzer, requiring only a license suspension.[213] The first violation results in only a civil offense and requires the license to be suspended for one year.[214] If the individual has a second offense within ten years of the first offense, the individual is guilty of a Class 1 misdemeanor.[215] In this instance, the first offense could either result from a breathalyzer refusal or a conviction of driving while intoxicated.[216] The punishment is a license suspension for a period of three years.[217]

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206 *Id.*
207 *See id.*
208 *Id.*
209 31 R.I. GEN. LAWS ANN. § 31-27-2.1 (West 2018).
210 *Id.*
211 *Id.*
212 *Id.*
213 VA. Code ANN. § 18.2-268.3 (2017).
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*

II. ANALYSIS

A. *The Textalyzer Violates the Fourth Amendment*

The Court should determine the constitutionality of the textalyzer consistent with the two-prong test set forth in *Katz*. The two-prong test is: "(1) that a person [has] exhibited an actual (subjective) expectation of privacy, and (2) that the expectation [is] one that society is prepared to recognize as 'reasonable.'"[218] Satisfying the first prong of the test, an individual has a subjective expectation of privacy in her cell phone. An individual demonstrates this subjective expectation of privacy by providing barriers or security to the item.[219] Individuals provide security to their cell phone by using passwords or fingerprints to lock their device.[220] As the Supreme Court of Montana found in *Mont. State Fund*, the Fourth Amendment does not protect information taken from videos of public places when the individual took no action to assert a privacy interest in his actions.[221] However, individuals who use passwords to protect the information on their cell phones do assert a privacy interest in their device.[222]

The Court, however, should not limit a finding of a subjective expectation of privacy to only those people who use passwords, due to the very intimate and personal details stored in cell phones. The Court has found items containing such details should not be searched without a warrant.[223] If the Court allowed the warrantless searches of cell phones at traffic accidents, then "every fender bender would become a pretense for gobbling up people's private cell phone information, and we know that cell phones typically contain our entire lives."[224]

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218 Katz v. United States, 389 U.S. 347, 361 (1976) (Harlan, J., concurring).

219 California v. Ciraolo, 476 U.S. 207, 211 (1986); Oliver v. United States, 466 U.S. 170, 180 (1984); Dow Chem. Co. v. United States, 749 F.2d 307, 312 (6th Cir.1984).

220 *See* Matthew J. Weber, *Warning–Weak Password: The Courts' Indecipherable Approach to Encryption and the Fifth Amendment*, 2016 U. ILL. J.L. TECH & POL'Y 455, 471 (2016).

221 Mont. State Fund v. Simms, 270 P.3d 64, 68 (Mont. 2012).

222 *See* United States v. Buckner, 473 F.3d 551, 554 n.2 (4th Cir. 2007); United States v. Howe, 2011 U.S. Dist. LEXIS 57491, at *19 (W.D.N.Y. May 27, 2011).

223 *See* Riley v. California, 573 U.S. 373, 403 (2014) (finding the content of a cell phone is intimate information that cannot be accessed without a warrant).

224 Gronewold, *supra* note 34, at A12 (quoting Donna Lieberman, who is no relation to Ben Lieberman).

Once the Court finds that the individual has expressed a subjective expectation of privacy, the Court assesses whether society believes that expectation is reasonable.[225] The Court looks at many factors when assessing society's acceptance of a privacy expectation, including the principles of the third-party doctrine.[226] When information is given to a third-party, either orally or in written form, society does not recognize an expectation of privacy in that information.[227] Therefore, an individual text message or social media post may not be protected under the Fourth Amendment—but a cell phone holding *all* of that information (and more) should be protected.

The Court has found that because pen registers can only collect information that would otherwise be given to a cell phone company, like dialed numbers, their use does not constitute a Fourth Amendment search.[228] However, the textalyzer is distinguishable from the pen register. The pen register only reports the numbers dialed, not the identity of the recipient nor whether the call was actually completed.[229] While the textalyzer may not reveal the content of the messages, it does inform the police of whether cell phone calls were placed, whether messages were sent, and what applications were opened.[230] The textalyzer's abilities surpass the abilities of the pen register. Because the textalyzer picks up information not communicated to the cell phone company,[231] the third-party doctrine should not apply to the information retrieved by the textalyzer.

The Court also considers the manner of the investigation and the senses used in detecting information.[232] In *United States v. Knotts*, the Court concluded that a search was reasonable because it acquired information a police officer could have detected with his own vision.[233] The Court came to the same conclusion in *California v. Ciraolo*,

225 Katz v. United States, 389 U.S. 347, 361 (1967).

226 United States v. White, 401 U.S. 745, 752 (1971).

227 United States v. Miller, 425 U.S. 435, 443 (1976); *White*, 401 U.S. at 752.

228 Smith v. Maryland, 442 U.S. 735, 741 (1979).

229 *Id.*

230 Gronewold, *supra* note 34, at A12.

231 *See What Information Does Your Service Provider Collect and Store?*, CONSUMER FED'N OF CAL. EDUC. FOUND., https://consumercal.org/about-cfc/cfc-education-foundation/what-information-does-your-service-provider-collect-and-store/ (stating that cell phone companies retrieve information like ingoing and outgoing text messages and calls).

232 *See* Bond v. United States, 529 U.S. 334, 334, 337; California v. Ciraolo, 476 U.S. 207, 211 (1986); United States v. Knotts, 460 U.S. 276, 282 (1983).

233 *Knotts*, 460 U.S. at 282.

where the information an aircraft obtained was the same as the information a person could have obtained by standing on the second floor of a nearby building.[234] In that case, an anonymous tip was insufficient for a warrant, but the police obtained visual confirmation of the defendant's marijuana production before obtaining a warrant to further search the premises.[235]

Although the New York bill would only allow the police to use the textalyzer after a car accident has occurred, the police should be required to obtain more information, other than the existence of the accident, to be able to access the information on the driver's cell phone.[236] The occurrence of the car accident is like a mere anonymous tip. Like the tip, an accident indicates there *may* be some illegal activity, but it is not proof. The police should be required to find additional evidence of illegal action before conducting a textalyzer search of the driver's cell phone. The New York bill attempts to use the information gathered from the textalyzer to justify a full search of the cell phone.

However, a physical invasion, like using the textalyzer to extract information, is more severe than a visual observation.[237] The Court found an officer's physical manipulation and examination of a closed bag, to discover the contents of the bag without opening it, was an unreasonable search.[238] The textalyzer is a similar physical invasion of the cell phone. An officer could not gather the information the textalyzer provides by simply looking at the outside of the cell phone. By using the textalyzer, the police are examining and manipulating the cell phone—like the agent handled the bag in *Bond*—to acquire probable cause to justify a full search of the cell phone.[239] In *Bond*, the Court reasoned the search was unreasonable due to the individual's expectation of privacy in the contents of the bag.[240] Since individuals have an expectation of privacy in their cell phones, the textalyzer's physical invasion constitutes an unreasonable search.

Additionally, in determining whether a search is unreasonable, the Court also considers whether the information or the location

234 *Ciraolo*, 476 U.S. at 211.
235 *Id.* at 209.
236 S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016).
237 *Bond*, 529 U.S. at 337.
238 *Id.* at 337-38.
239 *See id.*
240 *Id.*

searched contains intimate activities.[241] Although activities on public roads are typically not protected because of the open nature of the location,[242] mandating an individual turn over his cell phone to the police surpasses the reach of this doctrine. In *Knotts*, the Court stated that motor vehicles receive a lesser expectation of privacy because, *inter alia*, they are not a "repository of personal effects."[243] A cell phone, however, is such a repository. The Court stressed that places of intimacy, confidence, trust, and solitude are locations that should receive Fourth Amendment protections.[244] A cell phone has developed into a device allowing people to confide in others, write personal details, and express themselves in intimate ways.[245] Therefore, when an officer uses a textalyzer to extract details from a cell phone, it is imperative that the Court consider the significance that a cell phone has to an individual.

Even extracting *only* metadata can still reveal personal information about an individual. A Stanford University study analyzed whether metadata could be used to discover personal information.[246] The study found that metadata could reveal information such as medical conditions, guns purchased, potential pregnancies, and other information.[247] This information could be discovered merely by obtaining the numbers dialed, length of the calls, and number of times called.[248] Additionally, the original data collected can be used to infer facts about people "'two hops' away, meaning not just who the suspect calls, but also who the suspect's contacts call."[249] This result reflects the concerns articulated in *Jones*, where the Court reasoned that GPS tracking could enable officers to amalgamate separate data points to make broader inferences about an individual's life.[250] Using the textalyzer to extract metadata from a driver's cell phone would similarly enable the police to make inferences about that person's life.

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241 Oliver v. United States, 466 U.S. 170, 179 (1984); Dow Chem. Co. v. United States, 749 F.2d 307, 313 (1984).

242 Mont. State Fund v. Simms, 270 P.3d 64, 68 (Mont. 2012).

243 United States v. Knotts, 460 U.S. 276, 281 (1983) (citing Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion)) (emphasis added).

244 *See Oliver*, 466 U.S. at 179; *Dow Chem. Co.*, 749 F.2d at 313.

245 Riley v. California, 134 S. Ct. at 2494-95.

246 Mayer & Mutchler, *supra* note 15.

247 *Id.*

248 *Id.*

249 HARDISON & COCHRAN, *supra* note 53.

250 United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

The cell phone's metadata could reveal personal information about a driver when the police had no initial reason to believe that he was using his cell phone—he was simply in a car accident.

Another factor the Court weighs is whether a device gathers information other than the illegal activity.[251] To constitute a reasonable search, the device must only capture the illegal activity.[252] For example, using drug-sniffing dogs during routine traffic stops is a reasonable search because the dogs are trained only to detect illegal drugs.[253] However, using thermal imaging is an unreasonable search because the imaging detects information other than the illegal activity.[254] In *Kyllo,* the Court decided that the thermal imaging device processed what was unknown to the human eye, and the police officers could not know if they were uncovering intimate details of the individual *prior* to using the device—thus, the police would be unable to know in advance whether the search was constitutional.[255] Additionally, the Court in *Kyllo* found the use of the thermal imaging to be an unreasonable search because it was a technology that was not in general public use.[256] The textalyzer is not an item in general public use since it is still being developed and is intended specifically for police activity.[257]

In the case of the textalyzer, the police would scan the cell phone without any evidence that the cell phone contributed to the car accident. As the New York bill is currently proposed, the police will be able to scan the cell phones of everyone involved in the accident, including both the victim and the responsible party.[258] It is only when the police scan the cell phone that they will be able to tell whether the scan is uncovering intimate details, or merely capturing illegal activity. The justification for the textalyzer relies on the assumption that the car accident was most likely caused by the driver using his cell phone while driving. Searching someone's private cell phone information

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251 Illinois v. Caballes, 543 U.S. 405, 409 (2005); Kyllo v. United States, 533 U.S. 27, 39 (2001).

252 *Caballes*, 543 U.S. at 409-10.

253 *Id.*

254 *Id.* at 409-10; *Kyllo*, 533 U.S. at 39.

255 *Kyllo*, 533 U.S. at 39.

256 *Id.* at 40.

257 *See* Jay Stanley, *Anti-Distracted Driving 'Textalyzer' Technology: Not as Simple as it Seems*, ACLU (Aug. 24, 2017, 9:30 AM), https://www.aclu.org/blog/privacy-technology/internet-privacy/anti-distracted-driving-textalyzer-technology-not-simple-it.

258 *See* S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016).

without a warrant, however, should not be based upon a "most likely" standard, but rather one of certainty.

Additionally, even if the textalyzer is designed so that the owner does not have to release the cell phone from his hand, there is no guarantee that the officer will not take the cell phone from the owner. Not all citizens will know their rights,[259] especially with respect to a new technology.[260] Once the police have your cell phone in their hands, there is nothing to prevent them from fully searching the device. While the developer of the textalyzer stated that it is designed to only extract certain data, the developer also stated the police could hypothetically rewrite the textalyzer's code.[261] Therefore, the police could potentially have the ability to rewrite the textalyzer's code to obtain other information—information private to individuals.[262]

Under the *Katz*'s two-part test, the textalyzer performs an unreasonable search. Individuals have a subjective expectation of privacy when it comes to their cell phones. The third-party doctrine does not apply because not all of the information that the textalyzer obtains is given to the cell phone companies, and the textalyzer's abilities surpass the Court's reasoning for the constitutionality of the pen register. Additionally, the information the textalyzer obtains could *not* be detected by visual observation only. Rather, the textalyzer gathers the information through a physical examination of the cell phone. The contents of the cell phone are highly intimate and even extracting only metadata can reveal a person's private information. Lastly, the textalyzer obtains information other than the illegal activity. An officer can only know whether the textalyzer will obtain additional, personal information *after* the search has already been conducted. Therefore, the Court should find that use of the textalyzer—as permitted in the New York bill—violates the Fourth Amendment.[263]

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259 HARDISON & COCHRAN, *supra* note 53.

260 *See* Christopher E. Smith, *Criminal Justice and the 1996-97 U.S. Supreme Court Term*, 23 U. DAYTON L. REV. 29, 47 (1997) (discussing the Court creating *Miranda* warnings because it was not expected that all citizens would know their rights).

261 Gronewold, *supra* note 34, at A12.

262 *Id.*

263 *See* S.B. S6325A, 2015-2016 Leg. Reg. Sess. (N.Y. 2016). *See also* U.S. CONST. amend. IV.

B. *Textalyzer Refusal Laws Do Not Have the Same Policy Concerns as Drunk Driving and Textalyzer Refusal Punishments Cannot Be Excessive*

While the consequences of distracted driving may be the same as drunk driving, distracted driving is distinguishable. First, the evidence in drunk driving is being metabolized every moment, while the evidence in distracted driving cases involving cell phone use is stored on the cell phone.[264] If a field sobriety test is not performed in the case of drunk driving, the evidence of the alcohol disappears forever.[265] The imperative of obtaining evidence at the scene of the accident is not nearly as strong in the case of distracted driving as it is in drunk driving cases. Breathalyzer refusal laws exist to impose severe punishment for allowing the destruction of evidence.[266] Textalyzer refusal laws cannot be supported by the same logic.

Second, allowing an intoxicated driver to continue driving after refusing a breathalyzer is a matter of public safety.[267] The purpose of the breathalyzer is to determine whether the person is currently intoxicated, and therefore, inherently more dangerous as a driver.[268] However, allowing a driver who refused a textalyzer to continue driving after the refusal does not pose the same threat to public safety. The driver who was using his cell phone while driving is not in a physically impaired state that inevitably takes time to mitigate, unlike a drunk driver.

The textalyzer is more akin to a blood test than a breathalyzer. A blood test is more intrusive and gathers personal information about the individual.[269] Similarly, the textalyzer is very intrusive and gathers personal information from the cell phone. The Supreme Court found that administering blood tests to drivers, without a warrant, was unconstitutional.[270] Just as there is no implied consent to have your blood drawn when you decide to drive on public roads,[271] driving on public roads should not imply your consent to have your cell phone

264 HARDISON & COCHRAN, *supra* note 53.
265 *Id.*
266 *See* WHITED, III, *supra* note 18.
267 *Id.*
268 Birchfield v. North Dakota, 136 S. Ct. 2160, 2182 (2016).
269 *Id.* at 2184; Stanley, *supra* note 58.
270 *Birchfield*, 136 S. Ct. at 2185.
271 *Id.* at 2186.

searched. The cell phone has turned into something individuals hold very close to their person—both physically and metaphorically—and some may say a cell phone holds more personal information than a blood sample from their own body. Therefore, taking information from a driver's cell phone without a warrant is a violation of individual privacy and is unconstitutional.

Furthermore, the textalyzer gathers information that could be subpoenaed from the cell phone company.[272] Advocates of the textalyzer argue that not only do subpoenas take a long time, but also that there is information stored in the cell phone that does not appear in subpoenaed phone records.[273] An inability to retrieve certain information from phone records is not the same problem as alcohol metabolization in a drunk driving case. The information of your blood alcohol content can never be reproduced or discovered unless the information is obtained at that very moment.[274] Data, on the other hand, is stored on your cell phone and does not automatically disappear through normal bodily functions.[275] Fourth Amendment rights should not be violated when evidence can be obtained in another way.

Currently, cell phone providers only log phone calls and text messages.[276] With the constantly growing array of new applications,[277] the legislature should draft statutes requiring cell phone companies to store data on application use, rather than drafting statutes encouraging unconstitutional searches. Alternatively, the legislature could detail some other process for obtaining data stored within a cell phone regarding the use of applications. Then, when criminal or civil proceedings occur based upon the suspicion of distracted driving, those records could be subpoenaed.

Some argue that requiring officers to obtain a warrant or subpoena for every car accident is burdensome,[278] but this burden should not outweigh individual rights. The Fourth Amendment ensures indis-

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272 Tashea, *supra* note 11, at 19.

273 *Id.*; Schaper, *supra* note 3.

274 *Birchfield*, 136 S. Ct. at 2182.

275 *See* HARDISON & COCHRAN, *supra* note 53 (discussing the storing of the information obtained by the textalyzer in the operating system of the cell phone).

276 CONSUMER FED'N OF CAL. EDUC. FOUND., *supra* note 231.

277 Stacey Golmack, *Current Trends and Future Prospects of the Mobile App Market*, SMASHING MAGAZINE (Feb. 20, 2017), https://www.smashingmagazine.com/2017/02/current-trends-future-prospects-mobile-app-market/.

278 Birchfield v. North Dakota, 136 S. Ct. 2160, 2181-82 (2016).

pensable freedoms protecting citizens from unreasonable searches that could "crush the spirit of the individual and put terror in every heart."[279] Therefore, the Court should err on the side of caution when considering violations to citizens' Fourth Amendment rights.

If other states follow New York's example of imposing the same punishment for breathalyzer and textalyzer refusals, issues of unreasonable and excessive punishment will arise. As stated above, the policy reasons behind the breathalyzer justify the punishment of jail time for a breathalyzer refusal.[280] The textalyzer does not have the same policy concerns supporting its use; thus, jail time for textalyzer refusal would be excessive.[281] An ignition interlock device would also not be an appropriate penalty for a textalyzer refusal, but there are useful alternatives.[282] For example, the eye tracker system—designed by the Australian company, Seeing Machines, Inc.—monitors the eye movement of the driver and vibrates the steering wheel when the driver is distracted or drowsy.[283] Requiring a driver to install the eye tracker system in his car as a penalty for refusing a textalyzer, would be analogous to installing the ignition interlock system after a person refuses a breathalyzer. However, there are some privacy concerns regarding the eye tracker system, including the system's potential to determine when a driver's eyes are bloodshot and whether that means the driver is impaired.[284]

Additional solutions can be found in various cell phone applications. LifeSaver, for example, locks your cell phone while you are driving.[285] The obvious problem with LifeSaver, however, is that it could lock your cell phone when you are just the passenger. To solve

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279 John M. Burkoff, *A Flame of Fire: The Fourth Amendment in Perilous Times*, 74 MISS. L.J. 631, 631-32 (2004).

280 WHITED, III, supra note 18.

281 Coker v. Georgia, 433 U.S. 584, 592 (1977) ("A punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless importation of pain and suffering; or (2) is grossly out of proportion to the severity of the crime").

282 Ignition interlock devices determine the breath alcohol concentration before allowing the driver to start the vehicle. *Ignition Interlock Program*, KAN. DEP'T PATROL, https://www.kansashighwaypatrol.org/476/Ignition-Interlock-Program.

283 *World Leading Driver Monitoring Technology for Safer Roads*, SEEING MACHINES, https://www.seeingmachines.com/about/ (last visited Mar. 18, 2019).

284 Scott Schober, *Technology Versus Privacy Issues in Preventing Distracted Driver Accidents*, 104 PROCEEDINGS OF THE IEEE 896, 897 (2016).

285 *Changing the Culture of Distracted Driving*, LIFESAVER, https://lifesaver-app.com/ (last visited Nov. 1, 2017).

this problem, the application could use a solution—similar to the one utilized by the GPS navigation application, Waze—that prompts you to select the "passenger" button or the "driver" button.[286] This selection should be stored in your data so that, if you lie, you receive a heightened punishment for circumventing the device.

Some cell phone providers are already implementing solutions like LifeSaver. New iPhone updates allow users to enable a "Do Not Disturb While Driving" mode that prevents notifications and texts from interrupting you while you are behind the wheel.[287] The mode keeps your screen dark even when receiving incoming messages.[288] The mode also sends a response message to any incoming messages informing the person you are currently driving. However, if the message is urgent, the sender can respond by marking the message as "urgent," and the notification will pop up on the driver's cell phone.[289] This mode, however, must be manually turned on within the cell phone's settings.[290]

While applications to prevent distracted driving are still being designed, the most reasonable punishments for a textalyzer refusal are license suspensions and fines. If the goal is to keep distracted drivers off the road, license suspensions for drivers that use their cell phones while on the road is important. Thus, drunk driving and distracted driving should not be treated and punished the same as a policy matter.

CONCLUSION

While distracted driving is a major concern in our society, the textalyzer is not the answer. Even acquiring limited information from an individual's cell phone infringes on her privacy by accessing the metadata on her cell phone. The textalyzer's search is also unconstitutional because the police have no evidence—aside from the occur-

286 Waze is an application that provides driving directions. The application requires you to confirm that you are a passenger if you are typing within the application while the vehicle is in movement. *See* Ballio Chan, *How to Stop Texting and Driving–Native Driving Mode on Mobile OS*, MEDIUM (August 19, 2016), https://medium.com/@ballio/how-to-stop-texting-and-driving-native-driving-mode-on-mobile-os-5674ec5e8772.

287 *How to Use the Do Not Disturb While Driving,* APPLE (September 17, 2017), https://support.apple.com/en-us/HT208090.

288 *Id.*

289 *Id.*

290 *Id.*

rence of an accident—that a driver was using her cell phone before they decide to use the textalyzer. While distracted driving and drunk driving can both result in needless and unfortunate injuries and deaths, distracted and drunk driving are not the same. A drunk driver is in a physical state that, at every moment, is transitioning from intoxication to sobriety. A breathalyzer is necessary to capture the fleeting evidence of blood alcohol content. A textalyzer, however, obtains information that could be accessed in the future instead, after police obtain a warrant. Therefore, the use of the textalyzer is an unreasonable search and seizure and imposing the same punishments for textalyzer refusal as for breathalyzer refusal is excessive. Texting while driving is incredibly dangerous and should be avoided—but the same can be said for violating our Fourth Amendment protections.