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## The Textalyzer: The Constitutional Cost of Law Enforcement Technology

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## NOTE

# THE TEXTALYZER: THE CONSTITUTIONAL COST OF LAW ENFORCEMENT TECHNOLOGY

### I. INTRODUCTION

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment.<sup>1</sup>

The unlawful use of mobile telephones, especially “smartphones”<sup>2</sup> (as well as other portable electronic devices),<sup>3</sup> has drastically increased the prevalence of distracted driving.<sup>4</sup> Statistics from the National Safety Council (“Council”) found that motor vehicle deaths were eight percent higher in 2015 than 2014—the largest year-over-year increase in fifty years.<sup>5</sup> The Council estimated 38,300 people were killed and 4.4 million were seriously injured on U.S. roads in 2015, making 2015 the deadliest driving year since 2008.<sup>6</sup> In 2001, the New York State Legislature enacted a law prohibiting the use of mobile telephones (and subsequently amended the law to include portable electronic devices) while driving.<sup>7</sup>

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1. *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting).

2. Fredrick Kunkle, *More Evidence that Smartphones and Driving Don't Mix*, WASH. POST (Apr. 4, 2017), [https://www.washingtonpost.com/news/tripping/wp/2017/04/04/more-evidence-that-smartphones-and-driving-dont-mix/?utm\\_term=.e5656bdfc03c](https://www.washingtonpost.com/news/tripping/wp/2017/04/04/more-evidence-that-smartphones-and-driving-dont-mix/?utm_term=.e5656bdfc03c) (citing statistical data to support the proposition that “smartphones” have made the nation’s highways significantly more dangerous).

3. See N.Y. VEH. & TRAF. L. § 1225-c(1)(a) (McKinney 2018) (defining “mobile telephone” for purposes of statute); *id.* § 1225-c(1)(c) (codifying unlawful use of mobile telephones while driving); *id.* § 1225-d (codifying unlawful use of portable electronic devices while driving).

4. Fred Myatt, *10 Causes of Distracted Driving*, ZURICH INS. (June 6, 2017), <https://www.zurichna.com/en/knowledge/articles/2017/06/top-10-causes-of-distracted-driving>.

5. *Motor Vehicle Deaths Increase by Largest Percent in 50 Years*, NAT’L SAFETY COUNCIL (Feb. 17, 2016), <https://www.nsc.org/in-the-newsroom/motor-vehicle-deaths-increase-by-largest-percent-in-50-years>.

6. *Id.*

7. See VEH. & TRAF. L. § 1225-c (mobile telephones); *id.* § 1225-d (portable electronic

Notwithstanding such enactment, recent reports indicate that sixty-seven percent of drivers admit to continued use of their cell phones while driving, despite knowledge of the inherent danger that comes with distracted driving.<sup>8</sup> State law enforcement has encountered great difficulty in enforcing current bans against mobile phone use while driving,<sup>9</sup> which led to legislative efforts in New York to empower law enforcement with “electronic scanning device” technology.<sup>10</sup> An electronic scanning device can immediately identify recent mobile phone usage at the scene of a motor vehicle accident, which would facilitate enforcement of the pertinent Vehicle and Traffic Laws in the state.<sup>11</sup> The specific device at issue in this Note has been dubbed “the Textalyzer,”<sup>12</sup> given its similarities to the device used for combatting drunk driving, known as “the Breathalyzer.”<sup>13</sup>

However, the categorical use of electronic scanning technology would not come without significant privacy implications.<sup>14</sup> Notably, the U.S. Supreme Court has recently decided legal issues involving the administration of warrantless breath tests,<sup>15</sup> as well as a seminal case

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devices).

8. See N.Y. Legis. S.B. A6325, Reg. Sess. 2015-2016 (proposed Jan. 6, 2016); N.Y. Assemb. B. A8613, Reg. Sess. 2015-2016 (proposed Dec. 16, 2015). Section 1 of both the New York State Senate and Assembly proposals, entitled “Legislative Intent,” cites these statistics to justify the legislation, which aims to treat the impairment of distracted driving with similar methodology to that of drunk driving. See N.Y.S.B. A6325 (Section 1); N.Y. Assemb. B. A8613 (Section 1).

9. Talea Miller, *Enforcement of Texting-While-Driving Ban Proves a Tough Task*, PBS NEWSHOUR (Oct. 1, 2009), [http://www.pbs.org/newshour/updates/transportation-july-dec09-texting\\_10-01](http://www.pbs.org/newshour/updates/transportation-july-dec09-texting_10-01).

10. See Janet Burns, *New York Could Adopt “Textalyzer” Device for Busting Distracted Drivers*, FORBES (May 15, 2017), <https://www.forbes.com/sites/janetwburns/2017/05/15/new-york-could-be-first-to-adopt-textalyzer-for-catching-distracted-drivers/#580eaac94415>.

11. Interview by Jeff Rossen with Jim Grady, CEO, Cellebrite USA Corp, in Glen Rock, NJ (NBC television broadcast June 21, 2017), <https://www.today.com/money/rossen-reports-how-textalyzer-can-tell-if-you-were-texting-t112973>.

12. See Matt Richtel, *On Your Phone at the Wheel? Watch Out for the Textalyzer*, N.Y. TIMES, Apr. 28, 2016, at A1.

13. See N.Y.S.B. A6325 (Section 1); N.Y. Assemb. B. A8613 (Section 1). Section 1 of both legislative proposals indicates that studies have shown texting while driving impairs a driver to the level functionally equivalent to that of .08 blood alcohol content and that it is in the State’s interest to treat distracted driving with a similar methodology used to combat drunk driving. See N.Y.S.B. A6325 (Section 1); N.Y. Assemb. B. A8613 (Section 1).

14. See generally Karen Turner, *A Proposed “Textalyzer” Bill Might Give Cops the Right to Access Your Cellphone*, WASH. POST (Apr. 13, 2016), [https://www.washingtonpost.com/news/the-switch/wp/2016/04/13/a-proposed-textalyzer-bill-might-give-cops-the-right-to-access-your-cellphone/?utm\\_term=.f951f0a42030](https://www.washingtonpost.com/news/the-switch/wp/2016/04/13/a-proposed-textalyzer-bill-might-give-cops-the-right-to-access-your-cellphone/?utm_term=.f951f0a42030) (discussing the New York proposal and highlighting the pertinent Fourth Amendment privacy concerns).

15. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166-67 (2016); *Skinner v. Railway Labor Excs. Ass’n*, 489 U.S. 602, 606 (1989).

implicating Fourth Amendment protections concerning warrantless searches of digital contents stored on cell phones.<sup>16</sup> The nation's highest Court also, in its 2017 term, heard a landmark digital privacy case, the effects of which could be felt for generations—irrefutable proof that the twenty-first century legal battle over digital privacy is just beginning.<sup>17</sup> An article in the *New York Times* has opined that the New York “Textalyzer” plan to combat distracted driving is the most provocative yet.<sup>18</sup> Not only would this legislative proposal provide law enforcement officers with *unfettered discretion* to field test—without any indicia of individualized suspicion—the cell phones of both drivers involved at every motor vehicle accident, but drivers could also have their licenses suspended for refusing to turn over their devices for testing upon request from an officer.<sup>19</sup>

This Note argues that the proposed New York Textalyzer legislation—specifically the concept of field-testing a cell phone—under its current framework (that is, at any accident), constitutes an unreasonable search under the Fourth Amendment of the U.S. Constitution.<sup>20</sup> This Note posits a novel solution to make the New York legislation less intrusive under the Fourth Amendment,<sup>21</sup> which may ensure the constitutionality of the device's use.<sup>22</sup> This solution will utilize, *inter alia*, the law and jurisprudence concerning warrantless breath (and chemical) searches in drinking and driving cases as a guide to measure how to achieve constitutionality in the context of the Textalyzer.<sup>23</sup>

Part II reviews the current law governing tests and searches regarding drinking and driving<sup>24</sup> and provides an impartial overview of the proposed New York Legislation<sup>25</sup> and the relevant Fourth

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16. See generally *Riley v. California*, 134 S. Ct. 2473 (2014) (unanimously holding that the warrantless search exception following a lawful arrest exists for the purposes of protecting officer safety and preserving evidence, neither of which is at issue in the search of digital data on a cell phone).

17. Jeffrey Rosen, *A Liberal-Conservative Alliance on the Supreme Court Against Digital Surveillance*, ATLANTIC (Nov. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/11/bipartisanship-supreme-court/547124>.

18. Richtel, *supra* note 12.

19. See N.Y. Legis. S.B. A6325, Reg. Sess. 2015-2016 (proposed Jan. 6, 2016); N.Y. Assemb. B. A8613, Reg. Sess. 2015-2016 (proposed Dec. 16, 2015) (the New York State Senate and Assembly proposals of the bill, respectively).

20. See *infra* Part III.

21. See *infra* Part IV.A.

22. See *infra* Part IV.B.

23. See *infra* Part IV.B.

24. See *infra* Part II.A.

25. See *infra* Part II.B.

Amendment doctrines that would govern the application of such a device in the circumstances of texting and driving.<sup>26</sup> Part III underscores the legal issues surrounding the proposed New York legislation,<sup>27</sup> including the extremely broad permissibility of field-testing,<sup>28</sup> the strong impact of the U.S. Supreme Court's 2014 decision in *Riley v. California*,<sup>29</sup> and the key distinctions between the New York proposal and other New York State (and federal) laws and cases regarding driving under the influence of alcohol.<sup>30</sup> Part IV advocates for further protections, under the New York proposal, to be afforded to privacy at the expense of law enforcement efficiency;<sup>31</sup> namely imposing an elevated standard of individualized suspicion on police officers as a prerequisite to administering a constitutionally permissible field test of a driver's cell phone at an accident.<sup>32</sup> The goal of this Note is not to underestimate the horrific dangers posed by distracted driving.<sup>33</sup> Instead, this Note attempts to answer a difficult question: How far may (and should) the police go, under the Fourth Amendment of the U.S. Constitution, when enforcing vehicle and traffic laws proscribing distracted driving?<sup>34</sup>

## II. THE FOURTH AMENDMENT: FIELD-TESTING AND THE DIGITAL ERA

Before examining the more captivating Fourth Amendment doctrine<sup>35</sup> and legal issues<sup>36</sup> inherent in the New York legislative proposal, a basic review of the concept of field-testing is necessary to fully appreciate what is at stake with the Textalyzer.<sup>37</sup> New York Vehicle and Traffic Law ("VTL") Section 1192 codifies the illegality of operating a motor vehicle while under the influence of alcohol or drugs.<sup>38</sup> To aid in the enforcement of this law, Section 1194 was

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26. See *infra* Part II.C.

27. See *infra* Part III.

28. See *infra* Part III.A.

29. 134 S. Ct. 2473 (2014); see *infra* Section III.B (eliciting pertinent viewpoints from the Court's unanimous opinion to argue against warrantless searches of digital contents stored on cell phones, as proposed in the New York legislation at issue).

30. See *infra* Part III.C.

31. See *infra* Part IV.

32. See *infra* Part IV.B.

33. See *infra* Part V.

34. See *infra* Part V.

35. See *infra* Part II.C (reviewing how the Fourth Amendment would apply to field-testing of cell phones).

36. See *infra* Part III (suggesting that the current New York Textalyzer proposal contravenes the Fourth Amendment of the U.S. Constitution).

37. See *infra* Part II.A–B.

38. N.Y. VEH. & TRAF. L. § 1192 (McKinney 2011).

adopted, which enumerates the procedures applicable to the administration of, *inter alia*, a breath test.<sup>39</sup> Section 1225-c(2)(a) prohibits the operation of a motor vehicle while using a mobile phone,<sup>40</sup> and Section 1225-d precludes the operation of a motor vehicle while using any other portable electronic device.<sup>41</sup> Subpart A discusses the history and current status of the law with respect to breath tests (for example, field tests for alcohol).<sup>42</sup> Subpart B highlights the legislative effort in New York to adopt VTL Section 1225-e,<sup>43</sup> which would aid in enforcing the ban on the use of mobile phones while driving (that is, the Textalyzer).<sup>44</sup> Finally, Subpart C discusses how the Fourth Amendment would apply in the context of field-testing cellphones, the cornerstone of this Note.<sup>45</sup>

#### *A. How We Got Here:*

##### *Current State Legislation Involving Field-Testing for Alcohol*

Under the New York Vehicle and Traffic Law, the “breath test” refers to a precursory test of a suspected drunk driver’s breath for the mere presence (or absence) of alcohol by using a preliminary breath screening device (“PBT”).<sup>46</sup> Conversely, “chemical test” is the phrase used to describe a test of alcohol content of a suspect’s blood using an instrument other than a PBT.<sup>47</sup> Thus, blood alcohol tests conducted using a “breathalyzer” are referred to as chemical tests, not breath tests, because they measure blood alcohol content, not mere presence of alcohol.<sup>48</sup> The VTL indicates that any person who operates a motor vehicle in the State shall be deemed to have consented to a chemical test

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39. *See id.* § 1194 (governing the administration of blood tests, the report of refusal, and court orders regarding chemical testing).

40. *See id.* § 1225-c(2)(a).

41. *See id.* § 1225-d.

42. *See infra* Part II.A.

43. *See infra* Part II.B.

44. *See* N.Y. Legis. S.B. A6325, Reg. Sess. 2015-2016 (proposed Jan. 6, 2016); N.Y. Assemb. B. A8613, Reg. Sess. 2015-2016 (proposed Dec. 16, 2015). The legislative intent portion, comprising Section 1 of both the New York State Senate and Assembly proposals, opines that the field-testing of cell phones to determine whether a driver has been distracted prior to a motor vehicle accident would help law enforcement officers overcome the difficulty they currently face in enforcing VTL § 1225-c. *See* N.Y.S.B. A6325 (Section 1); N.Y. Assemb. B. A8613 (Section 1).

45. *See infra* Part II.C.

46. PETER GERSTENZANG & ERIC SILLS, HANDLING THE DWI CASE IN NEW YORK 140 (2012-2013 ed. 2012).

47. *Id.*

48. *Id.*

(administered under the requirements of the statute)—the notion of implied consent.<sup>49</sup> The Textalyzer legislation utilizes implied consent in an attempt to justify the broad permissibility of field-testing cell phones.<sup>50</sup> The New York Court of Appeals has held this legal theory to be constitutional in the context of blood alcohol testing, subject to certain limitations.<sup>51</sup>

The PBT is generally used to help establish probable cause for a driving while intoxicated (“DWI”) arrest and is usually the final field test administered to a suspect at the scene prior to her arrest.<sup>52</sup> When initially determining whether there is cause to believe that a person is driving while intoxicated, many police departments use preliminary field sobriety tests before administering a PBT.<sup>53</sup> These tests generally entail requesting the suspect to engage in a number of physical acts, which are designed to test the person’s coordination in order to determine whether probable cause to believe a person is intoxicated exists.<sup>54</sup> Such physical acts include the finger-to-nose, one-leg stand, walk-and-turn, and finger count.<sup>55</sup>

A driver is not required by law to participate in requested field sobriety tests.<sup>56</sup> Although a driver is deemed to have given consent to a chemical test,<sup>57</sup> field tests are not as intrusive as chemical tests.<sup>58</sup> One premise for permissibly obtaining a chemical test is the existence of reasonable grounds to believe that the suspect has operated a vehicle in violation of Section 1192 of the VTL.<sup>59</sup> Chemical testing is governed by Section 1194(2).<sup>60</sup> A plain reading of this statute suggests that a positive field test can be used to request a DWI suspect to submit to a chemical test, even in the absence of probable cause to believe there was a violation of Section 1192.<sup>61</sup> However, New York courts have

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49. N.Y. VEH. & TRAF. L. § 1194(2)(a) (McKinney 2010).

50. See N.Y. Legis. S.B. A6325, Reg. Sess. 2015-2016 (proposed Jan. 6, 2016); N.Y. Assemb. B. A8613, Reg. Sess. 2015-2016 (proposed Dec. 16, 2015). Section 1 of both proposals cites to the notion of implied consent as an accepted mechanism in combatting drinking and driving, and it posits the viewpoint that the dangers associated with distracted driving are analogous to that of driving while intoxicated. See *supra* notes 8, 13.

51. *People v. Kates*, 428 N.E.2d 852, 854 (N.Y. 1981).

52. GERSTENZANG & SILLS, *supra* note 46, at 140.

53. *Id.* at 122.

54. *Id.*

55. *Id.*

56. *Id.* at 123.

57. N.Y. VEH. & TRAF. L. § 1194(2) (McKinney 2011).

58. See GERSTENZANG & SILLS, *supra* note 46, at 123.

59. VEH. & TRAF. L. § 1194(2)(a).

60. See *id.*

61. See generally *id.*

demonstrated grave skepticism as to the constitutionality of the statute if it were applied in this manner.<sup>62</sup> Thus, in practice, breath screening tests are used to help establish probable cause for a DWI suspect's arrest, not as a probable cause substitute.<sup>63</sup>

Importantly, the New York Textalyzer legislation contains no probable cause requirement.<sup>64</sup> Probable cause to arrest (or search) exists where the facts and circumstances within the officers' knowledge, including reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed by (or unlawful contraband or evidence of an offense will be found on) the person to be arrested (or searched).<sup>65</sup> As the Bronx County New York Supreme Court has noted, the New York Legislature intended to differentiate between preliminary tests performed at the scene (that is, breath tests) and those conducted back at the station house (in other words, chemical tests).<sup>66</sup> Notably, the court opined that the rationale for this distinction is based on the conditions surrounding a field test, which do not give the same assurance of reliability and accuracy as those in a controlled environment.<sup>67</sup>

### *B. Where We Are Headed: New York's Textalyzer Proposal*

On June 16, 2011, driver Michael Fiddle crashed his car on the way to a summer job in Woodbury, New York.<sup>68</sup> A passenger in the vehicle, nineteen-year-old Evan Lieberman, was severely injured in the accident.<sup>69</sup> Evan unfortunately died thirty-two days later from those injuries.<sup>70</sup> State law enforcement officials did not criminally charge Fiddle as a result of the accident.<sup>71</sup> However, in a subsequent civil suit,

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62. GERSTENZANG & SILLS, *supra* note 46, at 141; *see also infra* Part III.C (offering New York DWI case law to support the argument that unfettered discretion for law enforcement officers to perform field-testing of either drivers' cell phone at the scene of any accident, absent any indicia of individualized suspicion, amounts to an unconstitutional practice).

63. GERSTENZANG & SILLS, *supra* note 46, at 140-41.

64. *See generally* N.Y. Legis. S.B. A6325, Reg. Sess. 2015-2016 (proposed Jan. 6, 2016); N.Y. Assemb. B. A8613, Reg. Sess. 2015-2016 (proposed Dec. 16, 2015); *infra* Part II.B.

65. *See* *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (holding in the context of the Textalyzer proposal, the constitutional focus is on the search); *infra* Part II.B.

66. *People v. Reed*, No. 2003BX039117, 2004 WL 2954905, at \*7 (N.Y. Sup. Ct. 2004).

67. *Id.*

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

69. *Id.*

70. *Id.*

71. *Id.*



Evan's father, Ben Lieberman, obtained Fiddle's cell phone records from the accident date.<sup>72</sup> At a hearing before the New York State Department of Motor Vehicles, an administrative law judge ruled that Fiddle violated several laws, including use of his mobile phone while driving.<sup>73</sup> According to a *USA Today* article examining the incident, Rockland County Sheriff Louis Falco indicated that his deputies seek mobile phone records *if they suspect* that phone use contributed to a crash, but he also noted that it is not standard procedure to do so absent individualized suspicion.<sup>74</sup> In late 2015, Assistant Speaker of the New York State Assembly Felix Ortiz introduced a bipartisan bill to help create a protocol for police officers to more vigorously enforce the VTL.<sup>75</sup> This bill would allow the police to promptly field-test drivers' cell phones to determine if the drivers were distracted immediately preceding—or during—an accident.<sup>76</sup> This "Textalyzer" bill has been designated as "Evan's Law."<sup>77</sup>

In a video interview with NBC's Jeff Rossen, the CEO of Cellebrite (an Israeli data extraction technology company which manufactures the Textalyzer) demonstrated how the device works.<sup>78</sup> While Rossen drove around a parking lot, he sent a message on Whatsapp (a messaging application), completed a phone call, and surfed Facebook.<sup>79</sup> Afterwards, Rossen's phone was plugged into the Textalyzer—which looks quite similar to an iPad.<sup>80</sup> Once the results loaded in a matter of seconds, it was clear the Textalyzer device was able to accurately identify both the exact timing and nature of each electronic action, including each time Rossen simply swiped his phone screen.<sup>81</sup> Although the device allegedly does not gather data concerning "what" was typed or "who" was called—that is, content,<sup>82</sup>—it can accurately identify what application was being used down to the exact time (in other words, metadata).<sup>83</sup>

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Evan's Law Would Allow Cops to Use 'Textalyzer' to Probe Distracted Driving Allegations*, CBS NEW YORK (Apr. 7, 2016), <http://newyork.cbslocal.com/2016/04/07/evans-law-textalyzer>.

76. *Id.*

77. *Id.*

78. Interview with Jim Grady, *supra* note 11.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* For a comprehensive debate concerning the constitutional significance of the content and metadata distinction in the context of digital searches, see *The Future of Digital Privacy*, NAT'L CONST. CTR. (Nov. 22, 2017), [https://constitutioncenter.org/debate/podcasts/the-future-of-digital-](https://constitutioncenter.org/debate/podcasts/the-future-of-digital-privacy)

New York's proposed legislation would grant a police officer unfettered discretion to utilize this electronic scanning device at the scene of any motor vehicle accident.<sup>84</sup>

*C. The Fourth Amendment:  
How it Applies to Field-Testing of Cell Phones*

The protections provided by the Fourth Amendment apply to governmental action amounting to "searches and seizures,"<sup>85</sup> although it is not always clear what kind of police inquiries may actually constitute a search or seizure.<sup>86</sup> As recently as 2016, the U.S. Supreme Court considered whether the police may compel a motorist, suspected of drunk driving, to submit to a blood sample (or to a breath test) incident to arrest.<sup>87</sup> Prior to that case, the Supreme Court has held that the administration of a breath test constitutes a search governed by the Fourth Amendment.<sup>88</sup> Such cases are of great significance, but before addressing the legal arguments implicated by the Textalyzer in Part III, underlying Fourth Amendment law must be initially examined.<sup>89</sup> Subpart 1 touches on the initial question, "is it a search and/or seizure?" and analyzes the ramifications of the answer.<sup>90</sup> Subpart 2 discusses exceptions to the warrant requirement.<sup>91</sup>

1. Passing the Threshold of Fourth Amendment Protection

The Textalyzer proposal may only be deemed unconstitutional under the Fourth Amendment if attaching an electronic scanning device to a phone, for the purpose of determining whether a driver was

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privacy.

84. N.Y. VEH. & TRAF. L. § 1225-e(2) (McKinney Proposed 2016).

85. U.S. CONST. amend. IV. The full text of the Fourth Amendment reads:

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

U.S. CONST. amend. IV.

86. Compare *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (holding that the installation and use of a pen register is not a "search" within the meaning of the Fourth Amendment), with *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (extending the Fourth Amendment protection from unreasonable searches and seizures to protect individuals with a "reasonable expectation of privacy," such as one who enters a public phone booth, closes the door, and places a phone call).

87. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166-67 (2016).

88. *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 616 (1988).

89. See *infra* Part II.C.

90. See *infra* Part II.C.1.

91. See *infra* Part II.C.2.

distracted, is a “search” or “seizure,” since the protections afforded under the Fourth Amendment are only triggered when police conduct constitutes a search or a seizure.<sup>92</sup> Under *United States v. Jones*,<sup>93</sup> there are two ways police conduct can be deemed a search implicating Fourth Amendment protection.<sup>94</sup> One way is if the government physically intrudes on an “effect” for the purpose of obtaining information.<sup>95</sup> Importantly, a cell phone has been deemed a constitutionally protected “effect.”<sup>96</sup> Another method is if the police conduct violates an individual’s “reasonable expectation of privacy.”<sup>97</sup> Police conduct violates an individual’s reasonable expectation of privacy if: (1) the individual manifested an actual expectation of privacy; and (2) the manifested expectation is one that society is prepared to recognize as reasonable.<sup>98</sup> The reasonable expectation of privacy test challenges, but does not displace, the physical intrusion test, and thus both tests can be used to discern whether the Textalyzer field test constitutes a search under the Fourth Amendment.<sup>99</sup>

Fourth Amendment protection also applies to seizures of personal property, such as a cell phone.<sup>100</sup> A seizure of personal property “occurs when ‘there is some meaningful interference with an individual’s possessory interest[] in that property.’”<sup>101</sup> If the electronic scanning device at issue in the New York proposal either violates a reasonable expectation of privacy, physically intrudes on a constitutionally protected effect in an effort to obtain information, or meaningfully interferes with an individual’s possessory interest in her cell phone, Fourth Amendment protections will apply.<sup>102</sup>

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92. Christopher Slobogin, *Is the Fourth Amendment Relevant in a Technological Age? The Future of the Constitution 2* (Vanderbilt Law Sch. Pub. Law & Legal Theory, Working Paper No. 10-64, 2010).

93. 565 U.S. 400 (2012).

94. *See id.* at 405-06.

95. *Id.* at 406.

96. *Riley v. California*, 134 S. Ct. 2473, 2492 (2014).

97. Slobogin, *supra* note 92, at 3.

98. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see* Slobogin, *supra* note 92, at 3. Justice Harlan’s concurrence in *Katz* has ultimately become the touchstone of Fourth Amendment analysis. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

99. *United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring).

100. *See United States v. Place*, 462 U.S. 696, 708 (1983).

101. *United States v. Karo*, 468 U.S. 705, 712 (1984) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

102. *United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring).

## 2. Exceptions to the Warrant and Probable Cause Requirements

Despite most Americans' skepticism towards technological surveillance, many searches are carried out without a warrant.<sup>103</sup> Just because police conduct constitutes a search does not always mean a warrant is required.<sup>104</sup> Consent is one exception to both the warrant and probable cause requirements.<sup>105</sup> Although not the salient basis of this Note, it is worth noting that if a motorist voluntarily allows a police officer at an accident or traffic stop to conduct a field test of her cell phone, the search is constitutionally permissible.<sup>106</sup> Another notable exception to the warrant requirement are exigent circumstances.<sup>107</sup> Exigencies of a situation may permit a warrantless search in a situation presenting hot pursuit of a fleeing felon, the risk of imminent destruction of evidence, the need to prevent a suspect's escape, or the presence of danger to police officers or other persons.<sup>108</sup>

The Supreme Court has held that the natural dissipation of alcohol from the blood stream sometimes, but not always, amounts to an exigency justifying the warrantless taking of a blood sample.<sup>109</sup> The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving.<sup>110</sup> This is primarily because concern about the destruction of evidence in a drunk driving investigation (that is, the natural dissipation of alcohol in the blood stream) sometimes constitutes an "exigent circumstance" justifying a search without a warrant.<sup>111</sup> Generally, the exigent circumstance exception permits a warrantless search when an emergency leaves a law enforcement officer with insufficient time to seek a warrant.<sup>112</sup> In the context of a warrantless search, the question is whether the search was reasonable.<sup>113</sup> Because the search incident to arrest doctrine does not permit a warrantless search of

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103. Slobogin, *supra* note 92, at 9.

104. *Kentucky v. King*, 563 U.S. 452, 459 (2011).

105. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

106. *Id.*

107. *King*, 563 U.S. at 460.

108. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

109. *Compare Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (permitting a warrantless blood test under the exigent circumstances exception to prevent the destruction of alcohol in the blood stream through the body's natural metabolic processes), *with Missouri v. McNeely*, 569 U.S. 141, 145 (2013) (holding that the natural dissipation of blood-alcohol levels in the body after one stops drinking does not amount to a per se exigency permitting an officer to order a blood test without first obtaining a warrant).

110. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2177-78 (2016).

111. *Id.* at 2173-74.

112. *See Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

113. *See Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

digital data stored on a cell phone,<sup>114</sup> another exception to the warrant requirement must apply for the Textalyzer concept to be deemed constitutional.<sup>115</sup>

Another exception to the warrant requirement is the special needs doctrine, which permits a warrantless, and often suspicionless, search when a perceived need, beyond the normal need for criminal law enforcement, makes compliance with the warrant and/or probable cause requirements impractical.<sup>116</sup> The New York legislative proposal explicitly indicates that law enforcement has had a difficult time enforcing laws forbidding distracted driving, lending credence to the notion that any legal justification for the Textalyzer concept would not extend beyond the normal need for law enforcement.<sup>117</sup> However, proponents of the concept will point to sobriety checkpoint cases, which upheld suspicionless and warrantless sobriety checkpoints despite Fourth Amendment challenges.<sup>118</sup> If the Textalyzer concept in the New York legislative proposal does not precisely fall under an exception to the warrant and/or probable cause requirement, it cannot pass constitutional muster under its current framework.<sup>119</sup>

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114. *Riley v. California*, 134 S. Ct. 2473, 2484-85 (2014) (holding that, absent exigent circumstances, a warrantless search of digital data on a cell phone, during a search incident to a lawful arrest, constitutes a violation of the Fourth Amendment). The search incident to arrest is another example of a permissible warrantless search. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). The search incident to arrest exception to the warrant requirement permits an officer to search the arrestee's person and any containers found on her, absent any additional justification besides the execution of a lawful arrest. *United States v. Robinson*, 414 U.S. 218, 235 (1973). Importantly, the Textalyzer concept does not generally implicate the search incident to arrest doctrine, which significantly limits the government's ability to conduct a warrantless search. *See infra* Part III.B. Even during a search incident to a lawful arrest, a cell phone is not analogous to a permissibly searchable container, as a cigarette pack was in *Robinson*. *See Riley*, 134 S. Ct. at 2491.

115. *See infra* Part III.B.

116. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

117. N.Y. Legis. S.B. A6325, Reg. Sess. 2015-2016 (proposed Jan. 6, 2016); N.Y. Assemb. B. A8613, Reg. Sess. 2015-2016 (proposed Dec. 16, 2015); *see infra* note 150 and accompanying text. Section 1 of both the New York State Senate and Assembly proposals, entitled Legislative Intent, indicates that electronic scanning device technology will help law enforcement enforce bans on mobile telephone use while driving. *See* N.Y.S.B. A6325 (Section 1); N.Y. Assemb. B. A8613 (Section 1).

118. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding alcohol sobriety checkpoints because the government's interest in *preventing* accidents caused by drunk driving outweighs the minimal intrusion on an individual's privacy caused by the checkpoint). Notably, in the Textalyzer context under New York's proposal, the interest in *preventing* accidents is seemingly moot, as the accident had to have already occurred in order for an electronic field test to be administered. *See* N.Y. VEH. & TRAF. L. § 1225-e (McKinney Proposed 2016).

119. *See infra* Part III.

### III. UNFETTERED DISCRETION AND SUSPICIONLESS FIELD-TESTING OF CELL PHONES: AN UNREASONABLE SEARCH

New York's Textalyzer proposal has been criticized by the American Civil Liberties Union as having enormous potential for invasion of privacy.<sup>120</sup> Moreover, participants in a recent study—concerning privacy in the digital age—opined that cell phone data should be afforded the highest overall level of privacy (when compared to other categories of digital information).<sup>121</sup> This Part delineates the constitutional problems presented by the Textalyzer concept, as proposed by the New York Legislature.<sup>122</sup> Subpart A argues that the proposed New York legislation is an unreasonable warrantless and suspicionless search, constituting a violation of the Fourth Amendment of the U.S. Constitution.<sup>123</sup> Subpart B focuses primarily on the 2014 U.S. Supreme Court case *Riley v. California* to further support that notion and to emphasize that warrantless searches of digital data stored on cell phones are almost always unreasonable absent exigent circumstances or other appropriate exceptions to the warrant requirement.<sup>124</sup> Finally, Subpart C highlights the legal (and practical) significance of factual and procedural distinctions between field-testing for alcohol and field-testing for digital data.<sup>125</sup> Specifically, Subpart C explains that the latter, in the context of distracted driving, does not qualify as an exigent circumstance like the body's natural dissipation of alcohol does.<sup>126</sup>

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120. Jay Stanley, *Anti-Distracted Driving "Textalyzer" Technology: Not as Simple as it Seems*, AM. CIV. LIBERTIES UNION: PRIV. & TECH. (Aug. 24, 2017), <https://www.aclu.org/blog/privacy-technology/internet-privacy/anti-distracted-driving-textalyzer-technology-not-simple-it>.

121. Christine S. Scott-Hayward, Henry F. Fradella & Ryan G. Fischer, *Does Privacy Require Secrecy? Societal Expectations of Privacy in The Digital Age*, 43 AM. J. CRIM. L. 19, 49, 55 (2015). The survey was approved for administration by the Institutional Review Board at California State University, Long Beach and developed for online administration using Qualtrics software. *Id.* at 51. Once approved for administration, participants were acquired from Amazon's Mechanical Turk, a means for finding survey participants which is experiencing growing popularity. *Id.* In the context of transactional surveillance, participants were surveyed on their expectations of privacy concerning: (1) email; (2) social media; (3) web-browsing history; (4) cloud-based storage files; and (5) cell phone messages. *Id.* at 54-55. Notably, over ninety percent of participants felt that law enforcement should either never have access or at least require an elevated level of suspicion equivalent of probable cause to obtain access to cell phone messages. *Id.* at 55.

122. *See infra* Part III.

123. *See infra* Part III.A.

124. *See infra* Part III.B.

125. *See infra* Part III.C.

126. *See infra* Part III.C.

*A. Textalyzer for Distracted Drivers: Appeasable Yet Unreasonable*

It is well settled that intrusions into the body constitute searches and seizures implicating Fourth Amendment protections.<sup>127</sup> The bodily intrusion must be conducted pursuant to a warrant or fit within a recognized exception to the warrant requirement.<sup>128</sup> For example, in *Schmerber v. California*,<sup>129</sup> the Supreme Court upheld the warrantless extraction of blood because: (i) the police officer had probable cause to believe the driver, who had just been involved in an accident, was intoxicated; and (ii) the time required to secure a warrant would result in the lowering of the drivers' blood alcohol content (that is, destruction of evidence).<sup>130</sup> In sharp contrast, New York's Textalyzer bill would authorize a search of a cell phone absent both probable cause and concern about evidence preservation.<sup>131</sup> Because the electronic field-test of a cell phone constitutes a Fourth Amendment search,<sup>132</sup> granting police officers suspicionless, unfettered discretion to conduct such a search would violate the Fourth Amendment's prohibition of unreasonable searches and seizures.<sup>133</sup>

In *Birchfield v. North Dakota*,<sup>134</sup> the most recent U.S. Supreme Court field-testing case, the Court held that the PBT breath test, which is the less intrusive bodily test, constitutes a Fourth Amendment search (albeit a permissible one absent a warrant).<sup>135</sup> Under the logic of *Birchfield* and *Riley*, administering a Textalyzer field test of a cell phone at the scene of an accident, for the purpose of discerning whether a driver was using her device immediately before the accident, is most definitely a Fourth Amendment "search."<sup>136</sup> Notwithstanding these

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127. See, e.g., *Schmerber v. California*, 384 U.S. 757, 770 (1966) (holding that an involuntary extraction of a blood sample to establish whether a motor vehicle operator was driving while intoxicated constituted a search and a seizure requiring legal justification, such as an exigent circumstance, an exception to the warrant requirement).

128. *Id.* at 770.

129. *Id.*

130. *Id.* at 770-71.

131. See N.Y. VEH. & TRAF. L. § 1225-e (McKinney Proposed 2016) (the proposed amendment to the VTL permitting on-the-scene field-testing of the cell phones of either driver involved in a motor vehicle accident).

132. *Riley v. California*, 134 S. Ct. 2473, 2493 (2014); see *supra* Part III.A.

133. Stanley, *supra* note 120.

134. 136 S. Ct. 2160 (2016).

135. *Id.* at 2185.

136. See *id.* (holding that a breath test for presence of alcohol is a Fourth Amendment search); *Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (holding that a police officer's physical search of arrestee's cell phone was a search). As the New York legislative proposal itself explicitly states that the Textalyzer concept was based off of methods already in place involving field-testing for alcohol, it is unlikely any reviewing court would deem the electronic scanning device to not amount to a

cases, the New York Legislature seems to believe that, like the breath field-test for alcohol at issue in *Birchfield*, the Textalyzer search falls under an exception to the warrant and probable cause requirements.<sup>137</sup> If ultimately challenged in court, the State of New York will likely argue that the justification for the Textalyzer is similar to the underlying rationale for the sobriety checkpoint search, which is a constitutionally permissible, warrantless, and suspicionless law enforcement search.<sup>138</sup>

One of the primary justifications of sobriety checkpoints is that the government's interest in preventing motor vehicle accidents caused by drunk driving outweighs the minimal intrusion on an individual's privacy and the added delay caused by the checkpoint.<sup>139</sup> Such a justification is markedly attenuated from the New York proposal—in order to lawfully administer an electronic field test of a cell phone, the accident must have already happened!<sup>140</sup> Thus, the true purpose of the Textalyzer is not to prevent motor vehicle accidents; rather, the true—and explicit—purpose of the New York proposal is to enforce traffic laws already on the books<sup>141</sup> and to punish offenders more effectively.<sup>142</sup>

Although the Supreme Court has upheld alcohol sobriety checkpoints as constitutional, it has found vehicle checkpoints established as part of a general law enforcement effort to discover unlawful drugs and drug traffickers unconstitutional.<sup>143</sup> Despite the outward similarities in how sobriety checkpoints and drug checkpoints are carried out by law enforcement officers, the Supreme Court distinguished each, as the primary purpose of the latter checkpoint was

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Fourth Amendment search. See N.Y. Legis. S.B. A6325, Reg. Sess. 2015-2016 (proposed Jan. 6, 2016); N.Y. Assemb. B. A8613, Reg. Sess. 2015-2016 (proposed Dec. 16, 2015). Statistics cited in Section 1 of both proposals underscore the dangers of distracted driving in an apparent attempt to justify the legislation, which expressly approaches the impairment of distracted driving with similar methodology to that used to combat drunk driving. See N.Y.S.B. A6325 (Section 1); N.Y. Assemb. B. A8613 (Section 1); see also *supra* notes 8, 13.

137. N.Y. VEH. & TRAF. L. § 1225-e (McKinney Proposed 2016) (permitting the warrantless field-testing of the cell phones, of either driver involved, at the scene of any accident, absent individualized suspicion of violation of pertinent distracted driving laws); *Birchfield*, 136 S. Ct. at 2184.

138. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding alcohol sobriety checkpoints because the government interest in preventing accidents caused by drunk driving outweighs the minimal intrusion on an individual's privacy caused by the checkpoint).

139. *Id.*

140. See VEH. & TRAF. § 1225-e.

141. See N.Y.S.B. A6325 (Section 1); N.Y. Assemb. B. A8613 (Section 1). Both proposals indicate that electronic scanning device technology will help police enforce bans on mobile telephone use while driving more effectively. See N.Y.S.B. A6325 (Section 1); N.Y. Assemb. B. A8613 (Section 1).

142. See VEH. & TRAF. § 1225-e.

143. *City of Indianapolis v. Edmond*, 531 U.S. 32, 36 (2000).



to uncover evidence of ordinary criminal wrongdoing.<sup>144</sup> Although the criminal nature of texting while driving and trafficking narcotics is concededly different, the distinction between the primary rationale that ultimately justified the sobriety checkpoint in *Michigan State Department of State Police v. Sitz*<sup>145</sup> and the technology—especially the methodology used to implement it—at issue in the New York Textalyzer proposal remains significant; one *prevents* accidents and the other *punishes* drivers involved in them.<sup>146</sup> For this reason, the use of an electronic scanning device at the scene of an accident, for the purpose of enforcing traffic laws, is more like the checkpoints in *Edmond*<sup>147</sup> than in *Sitz* and therefore amounts to an unreasonable search under the Fourth Amendment.<sup>148</sup>

*B. Cutting Back on Warrantless Searches of Digital Data:  
Riley v. California*

In 2001, the U.S. Supreme Court recognized that the degree of privacy secured to citizens by the Fourth Amendment has been threatened by technological advancements.<sup>149</sup> Justice Scalia, writing for a majority of the Court, explicitly acknowledged the negative impact relatively new “sense-enhancing technology” could have on Fourth Amendment protections.<sup>150</sup> Just over a decade later, in *Riley v. California*, the Supreme Court grappled with the question of whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested as a search incident to a lawful arrest, a valid exception to the warrant requirement.<sup>151</sup> In a

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144. *Id.* at 38.

145. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

146. *Compare id.* (upholding sobriety checkpoints because the government interest in preventing accidents caused by drunk driving outweighs the minimal intrusion on an individual’s privacy caused by the checkpoint), with N.Y.S.B. A6325 (Section 1), and N.Y. Assemb. B. A8613 (Section 1). Section 1 of both proposals indicates that electronic scanning device technology will help law enforcement enforce bans on mobile telephone use while driving. *See Edmond*, 531 U.S. at 44 (declining to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint that is justified only on the mere possibility that the inquiry may reveal that any given motorist has violated some law, as the primary purpose of such a program is ultimately indistinguishable from the general interest in crime control); *supra* note 141.

147. *Edmond*, 531 U.S. at 36.

148. *Compare Edmond*, 531 U.S. at 44 (striking down suspicionless checkpoint with general law enforcement purpose), with *Sitz*, 496 U.S. at 455 (upholding suspicionless checkpoint because it prevents accidents).

149. *See Kyllo v. United States*, 533 U.S. 27, 34 (2001).

150. *Id.* at 34-35.

151. *Riley v. California*, 134 S. Ct. 2473, 2480 (2014).

unanimous opinion, the Court answered this question in the negative.<sup>152</sup> *Riley* is a significant roadblock that the New York Legislature must overcome in order to constitutionally implement the Textalyzer legislation, specifically because the Supreme Court expressly declined to utilize a valid warrant exception when it came to searching an arrestee's cell phone.<sup>153</sup> The New York Legislature is attempting to codify a warrantless search of the cell phone of an individual, irrespective of whether the individual is arrested or not.<sup>154</sup> Such logic runs far afoul of *Riley*, and the nature of such a search may be even more intrusive than the one at issue in *Riley* itself.<sup>155</sup>

Like the Textalyzer legislation,<sup>156</sup> the *Riley* case concerned the "reasonableness" of a warrantless search of digital data contained on a cell phone.<sup>157</sup> Two factors the Court focused on to determine reasonableness, in the context of a search incident to arrest, were police officer safety and potential loss of evidence.<sup>158</sup> The *Riley* Court recognized that digital data stored on a cell phone couldn't itself be used to harm police officers.<sup>159</sup> The Court further noted that officers were free to examine the physical aspects of a phone to ensure it wasn't hiding a weapon, such as a razorblade.<sup>160</sup> Officer safety considerations are of little concern in the context of the Textalyzer,<sup>161</sup> as they were in *Riley*.<sup>162</sup> Thus, in *Riley*, the Court was primarily focused on law enforcement's interest in preventing the destruction of evidence.<sup>163</sup>

It is unclear whether the Textalyzer's field-testing results would be influenced by the deletion of text messages and/or call logs.<sup>164</sup> However,

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152. *Id.* at 2485. The full majority opinion consisted of eight justices. *Id.* The ninth, Justice Alito, concurred in the judgment, agreeing that law enforcement officers, in conducting a lawful search incident to arrest, must generally obtain a warrant before searching information stored or accessible on a cell phone. *Id.* at 2495 (Alito, J., concurring).

153. *Id.* at 2485.

154. N.Y. VEH. & TRAF. L. § 1225-e (McKinney Proposed 2016).

155. *See supra* note 114 and accompanying text.

156. *See supra* Part II.C.

157. *Riley*, 134 S. Ct. at 2482.

158. *Id.* at 2486; *see infra* Part III.C. (arguing that, because police officer safety and destruction of evidence generally are not at issue in the Textalyzer context, those exigent circumstances do not justify the warrantless field-testing of cell phones).

159. *Riley*, 134 S. Ct. at 2485.

160. *Id.*

161. *See infra* Part III.C.

162. *Riley*, 134 S. Ct. at 2485.

163. *Id.* at 2486.

164. Interview with Jim Grady, *supra* note 11 (the video interview does not address the question of whether an individual can preclude the finding of recent cell phone use or maliciously alter the test results in any way by deleting previous digital entries and/or actions).

as early as 1979, the U.S. Supreme Court recognized that phone companies have the capabilities to ensure permanent and detailed records manifesting telephone use.<sup>165</sup> It is also unlikely that an individual can permanently preclude either the government or service provider from accessing her phone use records simply by deleting entries from her personal device.<sup>166</sup> Importantly, it is worth noting that Ben Lieberman,<sup>167</sup> in the civil suit concerning his son's death, ultimately obtained the driver's phone records from his phone company, allowing Mr. Lieberman to prove the driver was texting while driving.<sup>168</sup> Mr. Lieberman currently argues that the Textalyzer will provide law enforcement with less information than a phone record and that emails and social media use would not show up on a phone record.<sup>169</sup> Privacy advocates respond that police should nonetheless obtain a warrant before accessing a cell phone, which contains all aspects of private life.<sup>170</sup> Additionally, 1.2 million tickets were issued for cell phone violations between 2011 and 2015, and in 2015 alone, 217,000 tickets were issued for cell phone violations.<sup>171</sup> Moreover, thirty-nine percent of those violations were for texting while driving.<sup>172</sup> Such empirical research suggests police have had some success in this area of enforcement, irrespective of the nature of such unlawful cell phone use (in other words, whether the offender was sending emails or texting), and thus efforts to completely bypass *Riley* are misguided and unjustified.<sup>173</sup>

Two methods of evidence destruction the *Riley* Court addressed were remote wiping and data encryption.<sup>174</sup> Remote wiping involves a signal being sent by a third party or when a phone is preprogrammed to delete data upon ingress or egress of a certain geographic area.<sup>175</sup> Encryption is a security feature most smart phones contain in addition to passwords, rendering data on a phone absolutely protected unless police

165. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (recognizing that phone companies routinely compile permanent records for the purposes of billing, detecting fraud, and preventing violations of the law, all of which the Court considered legitimate business purposes).

166. David Goldman, *How Police Can Find Your Deleted Text Messages*, CNN (May 22, 2013), <http://money.cnn.com/2013/05/22/technology/mobile/smartphone-forensics/index.html>.

167. See *supra* Part II.B.

168. Richtel, *supra* note 12.

169. Allison Dunne, *NYS Holds Public Sessions to Study Textalyzer Technology*, WAMC: NORTHEAST PUB. RADIO MIDDAY MAG. (Oct. 5, 2017), <http://wamc.org/post/nys-holds-public-sessions-study-textalyzer-technology>.

170. *Id.*

171. *Id.*

172. *Id.*

173. See *infra* Part III.C.

174. *Riley v. California*, 134 S. Ct. 2473, 2486 (2014).

175. *Id.*

know the password.<sup>176</sup> With respect to both scenarios, the *Riley* Court recognized that their occurrence is unlikely (namely remote wiping), and, in any event, preventable when police truly need access to the digital information at issue.<sup>177</sup> Upon these determinations, the Court subsequently weighed the government's law enforcement interests versus individual privacy interests.<sup>178</sup>

The U.S. Supreme Court has held that a physical search of an arrestee's clothing and subsequent inspection of the cigarette pack found in his pocket (in the search incident to arrest context) constituted only a minor intrusion of privacy when compared to the governmental interest at stake when performing the search.<sup>179</sup> In *Riley*, the government asserted that a search of data stored on a cell phone found on the arrestee was materially indistinguishable from searches of physical items found on an arrestee.<sup>180</sup> However, acknowledging the extraordinary differences between searching a cell phone and searching a cigarette pack,<sup>181</sup> the Court struck down the government's argument.<sup>182</sup> Under this reasoning, it can be contended that categorically implementing the concept of field-testing a cell phone at every motor vehicle accident is a significant intrusion of privacy.<sup>183</sup> While law enforcement may be able to enforce Section 1225-c(1)(c) of New York's Vehicle and Traffic Law<sup>184</sup> more effectively with the assistance of the Textalyzer legislation,<sup>185</sup> the damage that would be done to societal privacy interests renders it imprudent.<sup>186</sup>

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176. *Id.* But see Nick Statt, *FBI Won't Have to Reveal Details on Iphone Hacking Tool Used in San Bernardino Case*, VERGE (Oct. 1, 2017), <https://www.theverge.com/2017/10/1/16393074/apple-iphone-fbi-hacking-tool-san-bernardino-case-secret-court-order> (offering example of when law enforcement was able to bypass encryption protection).

177. *Riley*, 134 S. Ct. at 2486.

178. *Id.* at 2488.

179. *United States v. Robinson*, 414 U.S. 218, 236 (1973).

180. *Riley*, 134 S. Ct. at 2488.

181. *Id.* at 2488-91 (opining that, in demonstrating the infringement on privacy that would come by way of a warrantless search of digital data stored on a cell phone, a cell phone search would likely provide the government access to far more intimate details of a person's life than the most exhaustive search of a house).

182. *Id.* at 2491.

183. See, e.g., *Riley*, 134 S. Ct. at 2493 ("We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones . . . can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost."); Stanley, *supra* note 120.

184. See *supra* note 3 and accompanying text.

185. Interview with Jim Grady, *supra* note 11.

186. Stanley, *supra* note 120 (arguing that the Textalyzer is conceptually too intrusive to be constitutionally administered without a warrant).

When weighing the governmental interests against privacy interests, the *Riley* Court afforded due consideration to the differences between physical searches and digital searches.<sup>187</sup> The Supreme Court noted that, in the seemingly pre-historic times preceding the digital era, individuals did not typically carry around a stockpile of physical records comprising sensitive personal information throughout a routine day.<sup>188</sup> Empowering law enforcement to search the digital contents of a cell phone is qualitatively analogous to permitting police to search through the most intimate aspects of many people's lives.<sup>189</sup> In spite of this argument, those in favor of the Textalyzer proposal argue that the device is only determining cell phone use, simply pinpointing a particular action down to a particular time, and thus the intrusion on privacy is minimal.<sup>190</sup>

Disclosure of cell phone data can, however, help reconstruct an individual's specific movements down to the precise minute, permitting the revelation of detailed information about all aspects of a person's life.<sup>191</sup> Moreover, the average smart phone user has installed thirty-three "apps," and identifying the nature and use of such apps can together reveal sensitive information concerning the user's life.<sup>192</sup> In June 2018, the U.S. Supreme Court decided *Carpenter v. United States*,<sup>193</sup> a seminal case which determined that the government contravenes the Fourth Amendment by accessing, without a warrant, an individual's historical cell phone location records.<sup>194</sup> That pro-privacy ruling further protects personal information that happens to be digital.<sup>195</sup> The outcome seems to undermine the New York Legislature's rationale for the Textalyzer

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187. *Riley*, 134 S. Ct. at 2490.

188. *Id.*

189. *Id.*

190. Interview with Jim Grady, *supra* note 11.

191. *Riley*, 134 S. Ct. at 2490; *see also* *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (noting the relevance to a constitutional analysis of whether an individual reasonably expects their movements to be recorded and aggregated in a manner that enables the government to discern their political and religious beliefs, sexual habits, and other personally identifiable information).

192. Brief for the Center for Democracy and Technology as Amicus Curiae supporting Petitioner at 22, 24, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402). There are over one million apps available in each of the two major app stores (Apple and Android platforms), and such apps offer a plethora of ways to document sensitive and intimate information concerning a person's life. *Id.* at 9. Such data could implicate significant privacy concerns if disclosed to law enforcement, regardless of the nature of such disclosure. *Id.*

193. 138 S. Ct. 2206 (2018).

194. *See* Adam Liptak, *Warrant Required for Cellphone Tracking Data*, N.Y. TIMES, Jun. 22, 2018, at A1.

195. *See id.*

proposal—imposing limits on the ability of law enforcement to obtain cell phone activity data (like locational data) because of the sensitive nature of data stored on cell phones, further protecting digital privacy in a way a unanimous Court in *Riley* did not.<sup>196</sup>

Although the government may implement the legislation with intent to simply unearth instances of distracted driving, it may very well be the opening of Pandora's box if the government is given the opportunity to use the device in a stricter criminal enforcement context.<sup>197</sup> The likelihood that a field test of a cell phone would reveal reams of private information is great,<sup>198</sup> and such digital data stored on cell phones is constitutionally protected from warrantless searches absent exigent circumstances.<sup>199</sup> As the *Riley* Court recognized that the exigent circumstances exception (as opposed to the search incident to arrest exception, which does not apply to cell phones under *Riley*) might justify a warrantless search of a particular phone,<sup>200</sup> arguments that texting and driving constitute an exigent circumstance must be addressed.<sup>201</sup>

### *C. Distinguishing the Breath Test from the Phone Test: Why it Matters*

Another exception to the warrant requirement, which allows police to conduct a warrantless search, is the “exigent circumstances” exception.<sup>202</sup> This exception allows for broader application of much of the logic that justifies the search incident to arrest exception at issue in *Riley*.<sup>203</sup> The New York Court of Appeals has found an exigency to exist whenever an emergency makes it impossible to obtain a warrant in

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196. See Rosen, *supra* note 17.

197. See, e.g., *Maryland v. King*, 569 U.S. 435 (2013). When King was arrested for an assault, the police obtained a sample of his DNA, pursuant to a state statute, and uploaded the genetic information to a state database. *Id.* at 441. The taking and analyzing of the DNA sample was compared by the Supreme Court to fingerprinting and photographing, a legitimate police booking procedure. *Id.* at 465-66. Despite amounting to a Fourth Amendment “search,” the taking of the DNA sample was upheld as reasonable as it provided law enforcement officers with a safe and accurate way to process and identify the arrestee. *Id.* at 465. Subsequently, the DNA sample matched one taken from the victim of an unsolved rape. *Id.* at 441. King was ultimately charged with the previously unsolved rape. *Id.* This case demonstrates that law enforcement technology, despite becoming available for a seemingly limited purpose, could ultimately be utilized in ways not originally envisioned—the concept at issue in *King* ultimately became federal law in 2017. See H.R. Res. 510, 115th Cong. (2017) (enacted as Rapid DNA Act of 2017).

198. Stanley, *supra* note 120.

199. *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014).

200. *Id.* at 2494.

201. See *infra* Part III.C.

202. *Riley*, 134 S. Ct., at 2488.

203. *Id.*

sufficient time to preserve evidence at risk of destruction.<sup>204</sup> Although similar to the concerns at issue in *Riley* (and search incident to arrest more generally),<sup>205</sup> exigent circumstances are different from searches incident to arrest (which are allowed under a categorical rule)<sup>206</sup> as they are determined on a case-by-case, totality-of-the-factual-circumstances basis.<sup>207</sup> Despite this exception, the current Textalyzer legislation does not address a valid, categorical exigent circumstance, like efforts to prevent drunk driving do, according to the case law.<sup>208</sup>

Administering a breath test for alcohol analysis constitutes a search within the meaning of the Fourth Amendment.<sup>209</sup> As such, a motorist cannot lawfully be compelled to submit to a breath test in the absence of probable cause.<sup>210</sup> Although New York State generally attempts to use a PBT breath test to help *establish* probable cause for a DWI suspect's arrest, there is a valid argument to be made that probable cause must already exist before a breath test can lawfully be requested.<sup>211</sup> Whether there is a dispositive answer to this issue in the context of DWI investigations is uncertain.<sup>212</sup> Assuming *arguendo*, a successful Fourth Amendment challenge can be made to VTL Section 1194(1)(b) for lack of an individualized suspicion requirement, such an aspiration is beyond the scope of this paper.<sup>213</sup> Rather, the goal of this Note is more modest: to emphasize that field-testing data on cell phones is entirely different,

204. *People v. Knapp*, 422 N.E.2d 531, 534-35 (N.Y. 1981).

205. *See supra* Part III.B (arguing that concerns for police officer safety and potential destruction of relevant evidence do not justify warrantless searches of digital contents stored on cell phones, irrespective of whether or not the search occurs incident to a lawful arrest).

206. *See supra* note 114 and accompanying text.

207. JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 274 (6th ed. 2016).

208. *See supra* Part III.A.

209. *Skinner v. Railway Labor Excs. Ass'n*, 489 U.S. 602, 616-17 (1988).

210. *See People v. Pecora*, 473 N.Y.S.2d 320, 322 (Wappinger Town Ct. 1984) (holding VTL § 1194(1)(b) unconstitutional as applied, as the statute authorized a breath test even in the absence of probable or reasonable cause); *see also People v. Kates*, 428 N.E.2d 852, 854 (N.Y. 1981) (holding that, *so long as probable cause or exigent circumstances are present*, a chemical test was constitutional); *People v. Brockum*, 451 N.Y.S.2d 326, 327 (App. Div. 1982) (finding of fact that the police officer had probable cause to believe defendant was driving under the influence, and thus offering no opinion on defendant's argument that a breath test, absent probable cause that he was driving while intoxicated, constituted an unreasonable search).

211. GERSTENZANG & SILLS, *supra* note 46, at 143-44. New York courts have generally sidestepped Fourth Amendment concerns with respect to alleged administration of breath tests absent probable cause, by finding probable cause existed in cases that uphold the constitutionality of breath tests. *Id.* at 144. Those courts have held Section 1194(1)(b) of the VTL unconstitutional, as applied, in the absence of probable or reasonable cause. *See supra* note 210 and accompanying text.

212. GERSTENZANG & SILLS, *supra* note 46, at 143.

213. *See infra* Part V.

and more intrusive, than field-testing for alcohol<sup>214</sup> and to underscore that law enforcement must harbor an elevated level of suspicion—that a motorist has been driving in violation of VTL Section 1225-c—before a field test of a cell phone can constitutionally be administered.<sup>215</sup>

When, in dicta, the Supreme Court in *Riley* addressed the future possibility of an exigent circumstance justifying a warrantless search of cell phone data, it was in the context of extreme emergencies.<sup>216</sup> Examples of such emergencies include a suspect texting an accomplice who is preparing to detonate a bomb, and a child abductor who may have information about the child's location on his cell phone.<sup>217</sup> In the exceptionally attenuated possibility that such an emergency arises while officers are at the scene of a motor vehicle accident, and the Textalyzer device can be useful in unearthing and thwarting an exigency of this nature, such a search would likely be reasonable given the exigency dicta in *Riley*.<sup>218</sup> But in all other instances, routinely warrantless digital searches of cell phones are far more intrusive than warrantless breath searches for alcohol.<sup>219</sup>

One justification for upholding warrantless breath tests, incident to arrest for drunk driving, is that the physical bodily intrusion that comes with such testing is “almost negligible.”<sup>220</sup> Justice Alito, writing for the majority in *Birchfield v. North Dakota*,<sup>221</sup> analogized a breath test to the use of a straw to drink beverages, “a common practice and one to which few object.”<sup>222</sup> He further opined that people do not “assert a possessory interest in or any emotional attachment to *any* of the air in their lungs.”<sup>223</sup> Finally, he stated that the testing process does not result in “any great enhancement in the embarrassment that is inherent in any arrest.”<sup>224</sup> However, the majority also held that warrantless blood tests were not permissible.<sup>225</sup> Justice Alito stated: “a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information

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214. See *supra* Part III.B.

215. See *infra* Part IV.

216. *Riley v. California*, 134 S. Ct. 2473, 2494 (2014).

217. *Id.*

218. *Id.*

219. See *supra* Part III.B.

220. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176 (2016).

221. *Id.*

222. *Id.* at 2177.

223. *Id.*

224. *Id.*

225. *Id.* at 2184.



beyond” the driver’s blood alcohol content.<sup>226</sup> The majority felt that, with respect to a blood test for alcohol content, the State offered no reasonable justification for demanding the more intrusive alternative without a warrant.<sup>227</sup>

These are incredibly powerful and important words, from which an immediate comparison can be drawn to the warrantless Textalyzer cell phone search.<sup>228</sup> A phone field test, unlike a breath test, may very well place in the hands of law enforcement content that can be preserved and from which it may ultimately be possible to extract information far beyond whether the driver was distracted during an accident.<sup>229</sup> Unlike the minimal possessory interest to air in their lungs, but similar to the possessory interest to their own DNA samples, individuals possess a high privacy interest in the digital data of their own creation stored on their cell phones.<sup>230</sup> At least one current Supreme Court Justice is of the opinion that disclosure of non-content information on cell phones, commonly referred to as metadata, potentially subjects an individual to the embarrassment that concerned Justice Alito about blood tests in *Birchfield*.<sup>231</sup> Another current Justice espoused views that individual cell phone users may have a property right in their digital metadata, and if so, a search of such data constitutes a search of a constitutionally protected “effect.”<sup>232</sup> And empirical evidence shows that even guiltless individuals are wary of their friends, family and significant others rummaging through their, potentially embarrassing, cell phones

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226. *Id.* at 2178.

227. *Id.* at 2184.

228. *See supra* Part II.

229. *See supra* note 197 and accompanying text.

230. *See* Scott-Hayward, Fradella & Fischer, *supra* note 121, at 55; *see supra* note 121 and accompanying text.

231. *Birchfield*, 136 S. Ct. at 2185; Transcript of Oral Argument at 42-43, *Carpenter v. United States*, 138 S. Ct. 2206 (2017) (No. 16-402). At oral argument, Justice Sotomayor expressed the view that warrantless disclosure of cell phone metadata could potentially unearth private information such as trips to the bathroom and timing of intimate activities, pushing back against the notion that only digital “contents,” such as what was said in a communication, could embarrass an individual. *Id.*

232. Transcript of Oral Argument, *supra* note 231, at 52. Newly appointed Justice Gorsuch seemed interested in the idea that a user may possess a property right in digital metadata of their own creation and that the government may not exploit such data without an individual’s consent. *Id.* Justice Gorsuch also seemed to entertain the idea that a government subpoena to obtain an individual’s metadata from a third party, without a warrant, was analogous to an unconstitutional writ of assistance—such a view, despite seemingly being a minority viewpoint at the argument, can only discourage New York State lawmakers who feel that a warrant is not required to access cell phone use information from drivers at the scene of any accident. *See id.* at 83.

contents—it is hard to imagine they would feel differently when the police do the rummaging.<sup>233</sup>

An additional issue discussed in the case upholding the warrantless breath test and striking down the warrantless blood test, involved the concurrence's discussion of how such tests temporally work in practice—the *Birchfield* concurring opinion noted that most preliminary breath tests occur forty-five minutes to two hours after an arrest (for drunk driving) is effectuated.<sup>234</sup> The concurrence opined that this time delay, coupled with technological advancements that facilitate expeditious processing, made it relatively easier for the police to seek warrants.<sup>235</sup> It must be remembered that, despite holding that the breath test is a permissible warrantless search because the body's natural dissipation of alcohol presents a risk to evidence preservation, the warrantless chemical test was deemed unconstitutional despite the evidence preservation exigency.<sup>236</sup> As evidence preservation is likely not at issue—as it is with alcohol dissipation—when it comes to the Textalyzer,<sup>237</sup> and technology has made it possible for police to procure warrants essentially on demand,<sup>238</sup> the notion that a warrantless search of a cell phone is more like a breath test than a chemical test is dubious at best.<sup>239</sup> The distinction between the two is critical, as one action is permissible absent a warrant, while the other requires a warrant supported by probable cause.<sup>240</sup>

Another legal, and practical, roadblock for the Textalyzer proposal is the fact that no level of individualized suspicion (such as probable cause) is required before an electronic field test may be administered—all that must occur is an individual who owns a cell phone be involved in a motor vehicle accident.<sup>241</sup> Putting aside the warrant requirement for a moment, it is important to remember that a warrant *unsupported by probable cause* will generally be deemed invalid.<sup>242</sup> The rationale behind requiring a warrant supported by probable cause is to prevent arbitrary

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233. Ira Hyman, *Don't Touch My Phone!*, PSYCHOL. TODAY (Nov. 8, 2014), <https://www.psychologytoday.com/blog/mental-mishaps/201411/dont-touch-my-phone>.

234. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2192 (2016) (Sotomayor, J., concurring).

235. *Id.*

236. *Id.* at 2184.

237. Goldman, *supra* note 166.

238. *Birchfield*, 136 S. Ct. at 2192 (Sotomayor, J., concurring).

239. See *supra* Part III.A.

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

241. N.Y. VEH. & TRAF. L. § 1225-e(2) (McKinney Proposed 2016).

242. See *Illinois v. Gates*, 462 U.S. 213, 227-29 (1983) (establishing the modern-day legal standard under federal law for discerning whether probable cause exists and reiterating that, despite lowering the standard, a warrant unsupported by probable cause is invalid).

government intrusion of constitutionally protected places and to ensure such intrusions are justified due to their limited nature and scope.<sup>243</sup> Recall that, in the context of drunk driving investigations, New York courts generally *prefer* some level of particularized suspicion, derived from either the smell of alcohol or poor physical coordination in a field sobriety test, before the police administer a field test for alcohol.<sup>244</sup> Such level of protection is seemingly absent in the Textalyzer legislation, which gives police unfettered discretion to administer the device as they wish.<sup>245</sup> Such discretion will inevitably subject non-offenders to the negative consequences that come with a violation of the VTL against distracted driving.<sup>246</sup> The categorical implementation of an electronic scanning device that could potentially present such perverse incentives, while significantly intruding on one's digital privacy, cannot be justified on the basis of a few artificial similarities to the concept of field-testing for alcohol in a drunk driving investigation.<sup>247</sup> There has to be "a limit to the consequences that motorists may be deemed to have consented to by virtue of a decision to drive on public roads."<sup>248</sup>

#### IV. SOLUTION: GETTING TO REASONABLE SUSPICION

The foregoing issues discussed lead to the proposed solution to impose an elevated level of suspicion requirement on a police officer as a prerequisite to administer an electronic field test of a cell phone.<sup>249</sup> Once the application of the Textalyzer is statutorily limited to a situation where an officer has reason to believe the driver was distracted by her cell phone and that such distraction contributed to an accident involving said driver, opponents of the concept seemingly have less plausible constitutional objections.<sup>250</sup> Subpart A offers initial insight into the

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243. *Skinner v. Railway Labor Excs. Ass'n*, 489 U.S. 602, 622 (1989).

244. GERSTENZANG & SILLS, *supra* note 46, at 243–44.

245. *See supra* Part II.B.

246. *See Stanley, supra* note 120. In his critique of the proposed New York legislation, Jay Stanley provides the following examples where innocent drivers, engaged in relatively common practices, may be subject to discipline under a plain reading of the proposal: (i) individuals who lawfully use phones while driving by way of hands-free operation such as Bluetooth and speech-to-text; and (ii) individuals who request a passenger to control the music and/or respond to an important message. Stanley, *supra* note 120. Other important questions are whether the device would detect unlawful use of those who use non-smart phones and how police would know if someone hands over her work (or other spare) phone, in place of her personal phone, for testing. Stanley, *supra* note 120.

247. *See supra* Part III.

248. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016).

249. *See infra* Part IV.

250. *See infra* Part IV.

concept of reasonable suspicion and why it would legally make a difference in the Textalyzer context.<sup>251</sup> Subpart B offers an overview of how such a standard would work in practice.<sup>252</sup>

### *A. Reasonable Suspicion: How It Works*

The level of justification required for a search (or an arrest), pursuant to a warrant, is probable cause.<sup>253</sup> However, much police activity does not amount to the intrusiveness of an arrest or Fourth Amendment search that would generally require issuance of a warrant.<sup>254</sup> Police routinely stop citizens on the street or pull them over in their automobiles for the purpose of brief questioning or enforcing traffic laws.<sup>255</sup> Requiring the higher standard of probable cause in these situations would render most investigative stops impermissible.<sup>256</sup> Despite being the lower standard in contrast to probable cause,<sup>257</sup> a reasonable suspicion, that a driver was operating a motor vehicle in violation of VTL Section 1225-c(1)(c),<sup>258</sup> requirement would provide drivers with important level of constitutional protection against arbitrary and unreasonable use of the Textalyzer.<sup>259</sup>

In *Terry v. Ohio*,<sup>260</sup> the U.S. Supreme Court—for the first time in a criminal investigative context—recognized an exception to the requirement that Fourth Amendment searches (and seizures) of persons must be based on probable cause.<sup>261</sup> This exception has been recognized

251. See *infra* Part IV.A.

252. See *infra* Part IV.B.

253. U.S. CONST. amend. IV.

254. *Terry v. Ohio*, 392 U.S. 1, 13-14 (1968) (opining that encounters between police officers and citizens are rich in diversity, and observing that not every encounter, or investigative technique, amounts to an unconstitutional intrusion).

255. Wayne R. LaFare, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1875-76 (2004).

256. *Id.* at 1851.

257. See generally Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133 (1998) (offering a critical analysis of the *Terry* opinion, particularly with the case's novel departure from the probable cause requirement in the criminal investigatory context).

258. N.Y. VEH. & TRAF. L. § 1225-c(1)(c) (McKinney 2011) (codifying unlawful use of mobile telephones while driving).

259. See *infra* Part IV.B.

260. 392 U.S. 1 (1968).

261. See *id.* at 30-31 (departing from traditional Fourth Amendment analysis by: (i) defining a special category of Fourth Amendment seizures so substantially less intrusive than arrests that the general rule requiring probable cause to effectuate Fourth Amendment seizures reasonably could be replaced by a balancing test; and (ii) applying this balancing test in a way for the Court to approve this narrowly defined, less intrusive seizure, on grounds less rigorous than probable cause).

as the notion of reasonable suspicion.<sup>262</sup> In the years since the *Terry* case was decided, the reasonable suspicion standard has permeated Fourth Amendment jurisprudence and has become a legally accepted concept (at least by the Supreme Court).<sup>263</sup> *Terry*, and most cases interpreting it, involved circumstances in which law enforcement sought to unearth ongoing criminal activity.<sup>264</sup> The Supreme Court has since ruled that the *Terry* doctrine also applies when an officer seeks to investigate a completed offense.<sup>265</sup> In 1983, the Supreme Court further extended the *Terry* analysis of temporary searches and seizures of persons to personal property.<sup>266</sup>

Categorical opponents of the Textalyzer legislation argue that the concept could never be constitutional absent a warrant.<sup>267</sup> However one can fervently argue in favor of a warrant, such utopian (and admittedly revered) views are simply not the current law in the drinking and driving field-testing context,<sup>268</sup> and reasonable suspicion could very well serve as an effective condition precedent to ensure the constitutionality of the subject proposal.<sup>269</sup> Therefore, the New York State Legislature should amend its proposal to require that a police officer harbor an articulable level of reasonable suspicion that a person was driving in violation of Section 1225-c of the VTL<sup>270</sup> prior to administering the field test of that driver's cell phone at the scene of an accident.<sup>271</sup> Given the jurisprudence surrounding reasonable suspicion, it is conceivable that the Textalyzer field test would be deemed a reasonable search provided a police officer possessed such a level of suspicion.<sup>272</sup>

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262. See *Alabama v. White*, 496 U.S. 325, 330 (1990) (holding that reasonable suspicion can be established with information different in quantity or content than that required to establish probable cause and that reasonable suspicion can arise from information that is less reliable than that required to show probable cause).

263. See *Sundby*, *supra* note 257, at 1135-36 (highlighting the long-term consequences of the *Terry* opinion).

264. DRESSLER & THOMAS III, *supra* note 207, at 405.

265. *United States v. Hensley*, 469 U.S. 221, 229 (1985).

266. See *United States v. Place*, 462 U.S. 696, 706 (1983) (opining that the *Terry* principle allows a law enforcement officer with reasonable belief, based on the officer's own observations, that a traveler is carrying luggage containing drugs, to briefly detain the luggage to investigate the circumstances that aroused the officer's suspicion). Despite extending *Terry* to personal property, the Court found the detention at issue to be invalid. *Id.* at 710.

267. *Stanley*, *supra* note 120 (arguing that the Textalyzer concept is categorically too intrusive to be constitutionally administered without a warrant).

268. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016).

269. See *infra* Part IV.B.

270. See N.Y. VEH. & TRAF. L. § 1225-c(1)(c) (McKinney 2011) (codifying unlawful use of mobile telephones while driving).

271. See *infra* Part IV.B.

272. See *infra* Part IV.B.

*B. Reasonable Suspicion Typified in the Textalyzer Context*

In order to visualize how this concept will work in practice—consider the following illustrations.<sup>273</sup> A police officer's observation of a vehicle swerving between lanes for a significant distance has been deemed to constitute a reasonable suspicion, in New York, that the driver was intoxicated.<sup>274</sup> Comparably, an officer who observes a driver swerving, or driving erratically, would meet the requisite level of reasonable suspicion required to administer a constitutionally permissible Textalyzer field test under my proposal.<sup>275</sup> Multiple eyewitnesses who opine that one driver was swerving before an accident may meet the reasonable suspicion threshold, as would the admission of a driver concerning her own unlawful actions.<sup>276</sup> At nighttime, an officer (or live witness) who observes light being emitted from the suspected vehicle would also have reasonable suspicion that a driver was distracted while driving due to cell phone use.<sup>277</sup> Essentially, such reasonable suspicion will derive from the visible observation of someone with firsthand knowledge of the accident's occurrence.<sup>278</sup>

Suppose a law-abiding driver, "Driver A," gives her phone to the front-seat passenger for the purpose of picking the songs on a road-trip.<sup>279</sup> Now suppose, as the passenger is picking a song and completing an important phone call for the driver, their vehicle is struck by an erratic, albeit non-technologically-distracted, driver ("Driver B").<sup>280</sup> Under the current New York proposal, the police officer who arrives at the scene can administer a field test of both drivers' cell phones, which would result in the erroneous finding that Driver A was in violation of the traffic law and thus at fault (assuming no other cause for the accident was unearthed).<sup>281</sup> Driver A would then be liable for any negative consequences that come with such a finding of fault.<sup>282</sup> This result should not be permitted when simple limitations, that when crafted into the current legislative proposal, would likely prevent such an

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273. See *infra* notes 284-89.

274. *People v. Brockum*, 451 N.Y.S.2d 326, 327 (App. Div. 3d Dep't 1982).

275. See *supra* Part IV.A.

276. See *supra* Part IV.A.

277. See *supra* Part IV.A.

278. See *supra* Part IV.A.

279. See *supra* Part IV.A.

280. See *supra* Part IV.A.

281. See N.Y. VEH. & TRAF. L. § 1225-e (McKinney Proposed 2016); see *supra* note 246 and accompanying text.

282. See VEH. & TRAF. § 1225-e; N.Y. Legis. S.B. A6325, Reg. Sess. 2015-2016 (proposed Jan. 6, 2016); N.Y. Assemb. B. A8613, Reg. Sess. 2015-2016 (proposed Dec. 16, 2015).

outcome.<sup>283</sup> If the police officer in the hypothetical (which may very well become non-fictional if the New York proposal comes to fruition)<sup>284</sup> arrived at the scene of the accident, without any immediately discernable indication which driver was at fault, the Textalyzer field test of each driver's cell phone should not be permitted, absent consent of either driver to the search of his or her respective phone.<sup>285</sup>

One avenue to avoid such an outcome is for the New York Legislature to slightly amend its proposal.<sup>286</sup> Such an amendment could be incorporated into the field-testing portion of the legislation,<sup>287</sup> after removing the text permitting unfettered discretion to field test cell phones at any accident, as follows:

(E) When Authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a field test, of their mobile telephone and/or portable electronic device, solely for the purposes set forth in subpart A of this section (determining whether the operator of a motor vehicle was using a mobile telephone or portable electronic device, in violation of either sections twelve hundred twenty-five-c, or twelve hundred twenty-five-d of this article, at or near the time of the accident), at the scene of an accident or collision involving damage to real or personal property, personal injury or death, at the request of a police officer, *provided such police officer:*

(1) has reasonable suspicion to believe such person to have been operating a motor vehicle in violation of either sections twelve hundred twenty-five-c, or twelve hundred twenty-five-d of this article; or

(2) obtains informed consent, from the person operating a motor vehicle involved in an accident or collision involving damage to real or personal property, personal injury or death, to the field-testing of that person's mobile telephone or portable electronic device. For purposes of a field test administered pursuant to informed consent, such police officer need not have reasonable suspicion, as set forth in subsection (F)(1).

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283. See *supra* Part IV.A.

284. See Stanley, *supra* note 120 (offering critically important inquiries concerning the concept, one being whether the Textalyzer device would discern if it was in fact the driver, or passenger, who was operating a cellular device preceding an accident); *supra* note 246 and accompanying text.

285. See *supra* Part III.

286. See *supra* Part IV.A.

287. See N.Y. VEH. & TRAF. L. § 1225-e (McKinney Proposed 2016).

(F)(1) “Reasonable suspicion” to believe such person to have been operating a motor vehicle in violation of either sections twelve hundred twenty-five-c, or twelve hundred twenty-five-d, of this article, shall be determined by any visible indication of distracted driving on part of the operator, the sworn statement of any witness to the accident or collision, provided such witness is not privy to the parties involved in the accident or collision, and/or any other evidence surrounding the circumstances of the incident which indicates that the operator has been operating a motor vehicle in violation of either sections twelve hundred twenty-five-c, or twelve hundred twenty-five-d of this article. The burden of proof regarding the presence of reasonable suspicion shall be on the police officer that administered the field test at issue.

(2) Informed consent shall mean that such motor vehicle operator, prior to consenting to the field test of their mobile telephone and/or mobile electronic device, has been informed that they have the right to decline such testing. A consenting driver need not be informed as to the nature and scope of such field test; such nature and scope is set forth in subpart A of this section.

(G) In the event that a field test of a mobile telephone and/or portable electronic device, at the scene of an accident or collision involving damage to real or personal property, personal injury or death, is not administered, or is deemed by a reviewing court to be legally invalid, the finding of fault regarding the accident, and/or the finding of guilt regarding the violation of any pertinent traffic laws in connection with such incident, shall be determined by the default traffic laws already in place, not those involving field-testing mobile telephones and/or portable electronic devices.<sup>288</sup>

A police officer’s procurement of reasonable suspicion that a driver was operating a motor vehicle in violation of Section 1225-c(1)(c) of the VTL immediately prior to an accident,<sup>289</sup> before administering the electronic field test of a cell phone, would provide the millions of drivers in New York State greater constitutional protection under the Fourth Amendment when compared with the proposed suspicionless search at

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288. Compare *id.* § 1225-e (the section setting forth the concept of field-testing under the current New York proposal), with *id.* § 1194 (the section setting forth the concepts of field and chemical testing for alcohol which is currently the law in this area). The proposed statute offered above provides greater constitutional protection to motor vehicle operators, while still permitting law enforcement to combat distracted driving more effectively than currently practicable under the present Vehicle and Traffic Law. See *supra* Part I.

289. VEH. & TRAF. § 1225-c(1)(c) (codifying unlawful use of mobile telephones while driving).



issue.<sup>290</sup> Such protection may tip the scale from an unreasonable search to one that is reasonable, which would ensure the constitutionality of the legislative proposal at issue.<sup>291</sup>

## V. CONCLUSION

Tension between advancements in law enforcement technology and constitutional expectations of privacy that individuals possess is here to stay.<sup>292</sup> The objective of this Note is to facilitate a constructive debate and to demonstrate the importance of the Fourth Amendment in light of recent technological advancements.<sup>293</sup> Fourth Amendment issues are inherently complex and do not always break down along ideological lines, making line drawing in this context even more difficult.<sup>294</sup> The solution proposed in this Note focuses on how to better achieve constitutionality with respect to a novel piece of law enforcement technology in the State of New York.<sup>295</sup> However, acting proactively as a legislature, while being vigilant for the safety of its own citizens, are key characteristics of any effective governing body.<sup>296</sup> The dangers of distracted driving are quite horrific,<sup>297</sup> and this Note does not intend to minimize this hazard, nor does it intend to diminish the potential benefits

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290. See e.g., *People v. Pecora*, 473 N.Y.S.2d 320, 322 (Wappinger Town Ct. 1984) (holding VTL § 1194(1)(b) unconstitutional as applied, as the statute authorized a breath test even in the absence of probable or reasonable cause); see also VEH. & TRAF. § 1194(1)(b) (permitting, on its face, the police officer at the scene of any accident to administer a breath test for the purpose of determining whether a motor vehicle operator has consumed alcohol prior to an accident). Given the grave skepticism towards warrantless searches of digital content on cell phones during a search incident to arrest, as demonstrated in *Riley v. California*, 134 S. Ct. 2473, 2493 (2014), coupled with the fact that a non-arrest situation further limits a law enforcement officer's ability to conduct a warrantless search than it would in an arrest situation, imposing a reasonable suspicion requirement would significantly lessen the chances of a reviewing court deeming the Textalyzer unconstitutional. See *supra* Part IV.

291. See *supra* Part IV.

292. See Scott-Hayward, Fradella & Fischer, *supra* note 121, at 55; *supra* note 120 and accompanying text.

293. See *supra* Part I.

294. Daniel Epps, *What the 'Bailey' Case May Reveal About Supreme Court Ideology*, ATLANTIC (Oct. 31, 2012), <https://www.theatlantic.com/national/archive/2012/10/what-the-bailey-case-may-reveal-about-supreme-court-ideology/264339> (offering an overview of recently decided U.S. Supreme Court Fourth Amendment cases to demonstrate that, when it comes to search and seizure issues, the justices' opinions don't always fall along typically predictable liberal/conservative divides).

295. See *supra* Part IV.

296. See *15 Tips for Being an Effective Legislator: January 2011*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/15-tips-for-being-an-effective-legislator.aspx> (last visited Nov. 10, 2017).

297. See *supra* Part I.

technological advancements can reap on behalf of society.<sup>298</sup> Rather, this Note emphasizes legal concerns that come with the use of a specific law enforcement device<sup>299</sup> and offers a novel legal solution to address such concerns.<sup>300</sup>

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298. *See supra* Part I.

299. *See supra* Part III.

300. *See supra* Part IV.

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