GET A WARRANT: BALANCING INDIVIDUAL PRIVACY RIGHTS AGAINST GOVERNMENTAL INTERESTS THROUGH TEXTALYZER TECHNOLOGY

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I. INTRODUCTION

On June 16, 2011, around 7:50 a.m., Michael Fiddle ("Michael") was driving to a summer job in Woodbury, New York with three passengers[1] when his vehicle drifted into oncoming traffic and hit another vehicle head-on.[2] Passenger Evan Lieberman ("Evan"), who was sitting in the back seat with his seatbelt on, suffered massive internal injuries and unfortunately died a month later.[3]

Michael told police he fell asleep behind the wheel, but Evan's father, Ben Lieberman ("Lieberman"), suspected that distracted driving may have been responsible for his son's untimely passing.[4] Lieberman says police were unable to check Michael's phone to see if he was lying about the cause of the accident because they needed probable cause to get a warrant,[5] which takes paperwork and time.[6] Hence, Michael's phone was left in the wrecked vehicle at a tow yard for weeks[7] and the state police never charged or cited Michael in the crash.[8]

Through a civil suit filed against Michael, Lieberman subpoenaed Michael's cellphone records,[9] which took six months to obtain.[10] The records revealed "a consistent usage of a cellphone device texting in and out for the period that [Michael] was operating the vehicle up until when the accident happened."[11] The records also showed that the browser on Michael's phone, which can be used to access social media, was on from 7 a.m. right up to the crash.[12] However, the crash happened in a dead cell zone, so it could not be determined what Michael's exact activity was when the crash occurred.[13] Hence, Lieberman sought the assistance of New York legislature and digital forensics company Cellebrite to affect new legislation and technology to retrieve a motorist's cellphone activity immediately at the site of the accident.[14]

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1. 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.
2. *Id.*
3. David Schaper, *'Textalyzer' Aims to Curb Distracted Driving, But What About Privacy?*, NPR (Apr. 27, 2017), https://www.npr.org/sections/alltechconsidered/2017/04/27/525729013/textalyzer-aims-to-curb-distracted-driving-but-what-about-privacy.
4. *Id.*
5. *Id.*
6. Mike McAndrew, *Proposed NY Law Would Let Police Check Drivers' Cell Phones After Crashes*, SYRACUSE (Apr. 14, 2016), https://www.syracuse.com/news/2016/04/proposed_ny_law_lets_police_to_check_drivers_cell_phones_after_crashes.html.
7. Schaper, *supra* note 3.
8. Corcoran, *supra* note 1.
9. Schaper, *supra* note 3.
10. McAndrew, *supra* note 6.
11. Corcoran, *supra* note 1.
12. *Id.*
13. Beth Besen, *Working Toward Change: Chappaqua Dad & Distracted Driving Awareness Advocate Ben Lieberman*, INSIDE PRESS (June 1, 2018), https://www.theinsidepress.com/working-toward-change-chappaqua-dad-distracted-driving-awareness-advocate-ben-lieberman/.
14. *See* Janus Rose, *New York Wants Cops to Use 'Textalyzers' to Scan Your Phone After a Car Accident*, MOTHERBOARD (Apr. 12, 2016), https://motherboard.vice.com/en_us/article/vv7bdj/new-york-textalyzers-cellebrite (discussing how Lieberman's father wants new regulations to regulate distracted driving).

New York legislature proposed the road safety bill called "Evan's law" in honor of Lieberman's son. This bill is intended to help facilitate the enforcement of existing laws against unlawful phone use while driving[15] by requiring all drivers in the state to impliedly consent to having officers digitally scan their phones with a "textalyzer" after an accident occurs.[16] The bill would allow officers to conduct a warrantless field test on a motorist's cellphone to determine if the motorist used the phone right before or when an accident occurred.[17] The most recent "Evan's law" bill was introduced on January 28, 2019, and is in assembly committee.[18]

Merely a prototype at this time, Cellebrite is developing the "Textalyzer," which is a mobile, tablet-like device that plugs into a cellphone and scans for any activity (such as texting and browsing) that occurred in proximity to the device.[19] Textalyzer proponents consider the device to be a breathalyzer for texting,[20] and defend the Textalyzer's legality using the same framework used to permit officers to conduct field alcohol testing and chemical testing through implied consent.[21] Critics express concerns about Textalyzer technology due to its potential to interfere with people's privacy rights by scanning their cellphones, which carry personal and private information,[22] but Cellebrite dismisses such concerns claiming the device would not grant officers access to underlying content of people's cellphones.[23]

Other locales are mulling similar legislation to combat texting while driving, including Chicago.[24] At Lieberman's request, Chicago City Council's Public Safety Committee approved a resolution urging Chicago Police officials to address Textalyzer technology before the panel.[25] The resolution triggered a discussion among Chicago aldermen on January 10, 2018, where 14th Ward Ald. Edward Burke conveyed that "textalyzers" could allow officers to tell whether

15. Alice Gainer, *Evan's Law Would Allow Cops to Use 'Textalyzer' to Probe Distracted Driving Allegations*, CBS N.Y. (Apr. 7, 2016, 7:09 PM), http://newyork.cbslocal.com/2016/04/07/evans-law-textalyzer.

16. *See* Rose, *supra* note 14; Implied-Consent Law, *Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw (discussing how all drivers registering in the state would automatically consent to police scanning their phones).

17. Gainer, *supra* note 15.

18. N.Y. Legis. S.B. A3201, Reg. Sess. 2019-2020 (proposed Jan. 28, 2019).

19. Hamza Shaban, *'Breathalyzer for Texting': Nevada Weighs Controversial Technology to Curb Distracted Driving*, WASH. POST (Mar. 18, 2019), https://www.washingtonpost.com/technology/2019/03/18/breathalyzyer-texting-nevada-weighs-controversial-technology-curb-distracted-driving/.

20. Tamara Kurtzman, *Textalyzer Technology Faces Privacy Roadblocks*, LAW360 (Aug. 7, 2017, 2:57 PM), https://www.law360.com/articles/951936/textalyzer-technology-faces-privacy-roadblocks.

21. *See* 625 ILL. COMP. STAT. 5/11–501 (2018) (promulgating testing standards).

22. Riley v. California, 573 U.S. 373, 396–97 (2014) ("[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house . . . ."); Schaper, *supra* note 3.

23. *See Should Cops Check Your Phone After a Crash? Nevada Considers Law Allowing 'Textalyzer' Test*, FOX 5 ATLANTA (Mar. 18, 2019, 6:01 PM), http://www.fox5atlanta.com/politics/should-cops-check-your-phone-after-a-crash-nevada-considers-law-allowing-textalyzer-test (noting the technology would not provide access to the phone's contents).

24. Shaban, *supra* note 19.

25. Fran Spielman, *NY Dad Who Lost Son to Distracted Driver Wants Chicago to Adopt 'Textalyzer'*, CHI. SUN-TIMES (Jan. 11, 2018), https://chicago.suntimes.com/business/new-york-father-who-lost-son-urges-chicago-to-consider-textalyzer/.

a phone was in use at the time of an accident.[26] However, 2nd Ward Ald. Brian Hopkins was unconvinced that the Textalyzer would be a significant deterrent, expressing the need for a cultural change in how distracted driving is viewed.[27] No decision has been made on the Textalyzer in Illinois.[28]

This Note concerns Chicago's interest in using Textalyzer technology to reduce accidents caused by distracted driving— particularly unlawful cellphone use. This Note will argue that Illinois should avoid adopting Textalyzer technology under the current framework proposed in "Evan's law" because the bill would enable law enforcement to conduct unconstitutional and immoral searches, thereby infringing upon motorists' privacy rights and subjecting motorists to unfair penalties.

Part II of this Note explores "Evan's law" in relation to existing Illinois field-testing and implied consent laws; Fourth Amendment privacy protections against unreasonable searches and seizures; and exceptions to the Fourth Amendment's warrant requirement. Part III discusses how a Textalyzer scan is a search that cannot constitutionally operate under the existing "Evan's law" framework, which foregoes individualized suspicion and does not fall under recognized warrant exceptions. Further, "Evan's law" conflicts with existing Illinois laws, and threatens to enhance tension between the state's police officers and citizens through manipulative enforcement and unfair penalties. Part IV advocates for Illinois to avoid adopting Textalyzer technology in favor of less intrusive alternatives more geared toward curbing distracted driving. But if "Evan's law" were adopted, officers in the field should be required to get a warrant before the Textalyzer could be used.

II. BACKGROUND

A. Textalyzer Framework

Following any car accident, the responding officer would ask for the motorist's phone.[29] According to Cellebrite CEO Jim Grady, "[t]he police would let the driver continue to hold their own phone and ask them to unlock [it] . . . ."[30] Then, the police would plug the tablet-like device into the driver's

26. John Byrne, *Chicago Aldermen Kick Around Concept of Arming Police with 'Textalyzers'*, CHI. TRIB. (Jan. 11, 2018), https://www.chicagotribune.com/news/local/politics/ct-met-police-phone-texting-tester-20180111-story.html.

27. *Chicago City Council Takes Further Action to Stop Texting while Driving*, GWC INJ. LAW. (Jan. 29, 2018), https://www.gwclaw.com/blog/texting-while-driving-chicago-city-council/.

28. Katie Pyzyk, *'Textalyzers' May Help Chicago Police Reduce Distracted Driving*, INDUS. DIVE (Jan. 16, 2018), https://www.smartcitiesdive.com/news/textalyzer-tech-chicago-police-reduce-distracted-driving/514792/.

29. K. Reakes & Joe Lombardi, *Spurred By Westchester Teen Death Crash Investigations May Get Textalyzers*, ARMONK (May 1, 2017, 7:00 AM), https://armonk.dailyvoice.com/politics/spurred-by-westchester-teen-death-crash-investigations-may-get-textalyzers/709070/.

30. Matthew Wisner, *New York Mulls 'Textalyzer' Legislation to Bust Texting Drivers*, FOX BUS. (May 16, 2017), https://www.foxbusiness.com/features/new-york-mulls-textalyzer-legislation-to-bust-texting-drivers.

phone.[31] Within ninety seconds or so,[32] the computer-generated program would tap into the phone's operating system to check for "all recent activity."[33] Upon the scan's completion, the device would display a summary of apps that were open and in use, as well as screen taps and swipes, including the source, the timestamp, and whether a communication was incoming or outgoing.[34] After the scan, the app's title would appear on the Textalyzer screen near the timestamp.[35] Cellebrite claims the Textalyzer would not download the phone's sensitive content (like conversations or call logs), but would indicate whether a driver was using a phone legally, hands-free,[36] by only reading surface-level content (or metadata).[37]

"Evan's law," in part, reads as follows:

> Every person operating a motor vehicle which has been involved in an accident or collision involving damage to real or personal property, personal injury, or death, and who has in [their] possession at or near the time of such accident or collision, a mobile telephone or personal electronic device, shall at the request of a police officer, surrender [their] . . . device to the police officer solely for the purpose of field testing such . . . device. If such field testing determines that the operator of the motor vehicle was using [their] device . . . the results of such testing shall constitute evidence of any such violation. . . . Suspension or revocation is based upon refusal to surrender a mobile telephone or portable electronic device for field testing.[38]

Notably, "Evan's law" does not explicitly mention any degree of individualized suspicion required before the Textalyzer is used, nor a warning from the officer to the motorist informing the motorist of the consequences for refusing to surrender a phone for field testing.

In Illinois, a motorist who has operated a motor vehicle on a roadway while using an electronic communication device and caused great bodily harm, permanent disability, disfigurement, or the death of another person is known as "aggravated use of an electronic communication device."[39] Aggravated violations carry criminal penalties including fines and jail time.[40]

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31. Elizabeth Chuck, *Textalyzer' May Bust Distracted Drivers—But at What Cost to Privacy?*, NBC NEWS (July 18, 2017), https://www.nbcnews.com/news/us-news/textalyzer-may-bust-distracted-drivers-what-cost-privacy-n787136.

32. Schaper, *supra* note 3.

33. Reakes & Lombardi, *supra* note 29.

34. Schaper, *supra* note 3.

35. *Id*.

36. *Id*.

37. *Should Cops Check Your Phone After a Crash? Nevada Considers Law Allowing 'Textalyzer' Test*, *supra* note 23; NYSenate, *NYS Legislature Hosts Distracted Driving Lobby Day Event*, YOUTUBE (Apr. 24, 2017), https://www.youtube.com/watch?v=r3N0TL_WEtE (showing Cellebrite Solutions Engineer Lee Papathanasiou explain what information the Textalyzer would obtain).

38. N.Y. Legis. S.B. A3201, Reg. Sess. 2019-2020 (proposed Jan. 28, 2019) (demonstrating that the Textalyzer is intended to operate in the field without a warrant under implied consent laws, which subjects motorists to penalties upon refusing to take the test, to obtain evidence of a motorist's unlawful phone activity that would be used to prosecute the motorist).

39. 625 ILL. COMP. STAT. 5/12–610.2 (2019).

40. People v. Ikerman, 973 N.E.2d 1008, 1010 (5th Dist. 2012); *Illinois's Cellphone-Use & Texting-While-Driving Laws*, NOLO, https://www.drivinglaws.org/ill.php (last visited Oct. 13, 2019).

Illinois statute 625 ILCS 5/12-610.2 states that "[a] person may not operate a motor vehicle on a roadway while using an electronic communication device,"[41] which is "an electronic device, including but not limited to a hand-held wireless telephone . . . ."[42] Section 12–610.2 does not apply to a driver using such a device by pressing a single button to initiate or terminate a voice communication.[43]

Determining how the Textalyzer might operate in Illinois can occur through analyzing existing implied consent and field-testing search laws within Illinois that cover matters involving driving under the influence. Illinois Vehicle Code Section 11-501 codifies the illegality of operating a motor vehicle while under the influence of alcohol.[44] To aid in the enforcement of this law, section 11-501.1 and 11-501.5 were adopted, which lay out the procedures applicable to the administration of a "chemical test" and Preliminary Breath Screening Test ("PBT") respectively.[45] A breath test is a search within the meaning of the Fourth Amendment.[46] Both tests require individualized suspicion before they may be used on motorists.[47]

1. Implied Consent through Chemical Tests

"Chemical tests" are administered to persons suspected of drinking and driving.[48] Chemical tests are tests of blood, breath, or other bodily substance performed for the purpose of determining the blood alcohol content (BAC) of an arrested person.[49] If an officer has probable cause to believe the person was under the influence of alcohol, the officer shall request a chemical test which shall be administered at the direction of the arresting officer.[50]

Illinois law states that a person requested to submit to a chemical test shall "be warned that a refusal to submit to the test, when the person was involved in a motor vehicle accident that caused personal injury or death to another, will result in the statutory summary revocation of the person's privilege to operate a motor vehicle"[51]—the effect of Illinois's implied consent law.[52] If an officer has

41. 625 ILL. COMP. STAT. 5/12–610.2 (2019).
42. 625 ILL. COMP. STAT. 5/12–610.2(a) (2019).
43. 625 ILL. COMP. STAT. 5/12–610.2(d)(9) (2019).
44. 625 ILL. COMP. STAT. 5/11–501 (2019).
45. *See id.* (discussing Illinois's PBT and chemical testing laws regarding implied consent).
46. People v. Gaede, 2014 IL App (4th) 130346, at ¶ 21 (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616–17 (1989)).
47. *See id.* at ¶ 18 (quoting 625 ILCS 5/11-11-501.1(a)) ("If a law enforcement officer has probable cause to believe the person was under the influence of alcohol, other drug or drugs, intoxicating compound or compounds, or any combination thereof, the law enforcement officer shall request a chemical test or tests which shall be administered at the direction of the arresting officer.").
48. 625 ILL. COMP. STAT. 5/11–501.1 (2019).
49. 625 ILL. COMP. STAT. 5/11–501.1(a) (2019).
50. *Id.*
51. 625 ILL. COMP. STAT. 5/11–501.1(c) (2019).
52. 625 ILL. COMP. STAT. 5/11–501.1 (2019); N.Y. Legis. A.B. A3201, Reg. Sess. 2019–2020 (proposed Jan. 28, 2019) ("[A] driver's license is a privilege granted by the state, and maintaining such privilege requires continued compliance with established conditions enumerated in law."); *Is a Warrantless Blood Test Allowed in Illinois?*, GOLDMAN & ASSOCIATES (May 13, 2013), https://www.criminallawyer-chicago.com/blog/is-a-warrantless-blood-test-allowed-in-illinois/ ("[P]rovides that if you are lawfully arrested for a DUI based on

probable cause to believe a motorist may have been driving under the influence, the motorist has impliedly consented to taking a chemical test at the officer's request to determine the motorist's BAC.[53]

Once a person has been placed under arrest for driving under the influence, they will be taken either to the police station or jail.[54] Breath tests are taken either at the station or jail, while blood tests may be taken at the police station, jail, or in the hospital.[55] "Chemical test results are admissible [in the State's case in chief in criminal DUI prosecutions] . . . . [T]o prove intoxication, the prosecution may utilize both the test results and the refusal to take the test."[56]

2. Field Testing under Illinois Vehicle Code through PBTs

A PBT is a device administered to conduct a field sobriety test. Section 11-501.5(a) permits an officer to use a PBT only if (1) the officer has reasonable suspicion[57] that the suspected motorist was driving while under the influence of alcohol and (2) the suspect consents to the test.[58] A motorist is free to refuse the test with no repercussion,[59] but an officer is not required to inform motorists of their right to refuse without consequence.[60] The State may not introduce the results of a PBT or the defendant's refusal to submit to a PBT in its case in chief in a criminal prosecution for DUI,[61] but the results of a PBT are admissible on the issue of probable cause in a proceeding where that determination is challenged.[62]

The PBT is used to justify arrest and later testing at the police station, where the more reliable chemical test can be performed.[63] A motorist consenting to a PBT merely gives law enforcement an additional opportunity to establish probable cause.[64]

B. Fourth Amendment

The Fourth Amendment of the U.S. Constitution provides:

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probable cause, consent is implied to conduct the necessary tests to establish blood alcohol concentration (BAC).").

53. 625 ILL. COMP. STAT. 5/11–501.1(a) (2019).

54. *Chemical DUI Testing: Blood, Breath and Urine*, GORELICK LAW OFFICES, https://www.gorelick-law.com/chemical-dui-testing-blood-breath-and-urine (last visited Oct. 1, 2019).

55. *Id.*

56. People v. Brooks, 334 Ill. App. 3d at 722, 729 (5th Dist. 2002).

57. People v. Timmsen, 2016 IL 118181, ¶ 13–16 (stating that a reasonable suspicion determination must be based on commonsense judgments, inferences about human behavior, and the totality of the circumstances.).

58. People v. Rozela, 802 N.E.2d 372, 377–79 (Ill. App. Ct. 2003).

59. *Id.* at 377.

60. People v. Gutierrez, 2015 IL App (3d) 140194, at ¶ 21 (explaining that whether an officer is required to inform the suspect that he or she may refuse had been discussed and firmly rejected during the debate on the bill, citing 91st Ill. Gen. Assem., Senate Proceedings, Feb. 25, 2000, at 62).

61. *Brooks*, 334 Ill. App. 3d at 729.

62. *Rozela*, 345 Ill. App. 3d at 380.

63. GORELICK, *supra* note 54; *What is the Procedure for the Evidentiary Breathalyzer Test in a DUI?*, MACNEIL FIRM LTD., https://www.macneilfirm.com/dui-defense/what-is-the-procedure-for-the-evidentiary-breathalyzer-test-in-a-dui/ (last visited Oct. 13, 2019).

64. Fischer v. Ozaukee County Circuit Court, 741 F. Supp. 2d 944, 956 (E.D. Wis. 2010).

> 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.[65]

The Fourth Amendment was implemented for the purpose of protecting people's right to privacy and freedom from unreasonable intrusions by the government.[66] During the British Revolution, British authorities permitted the issuance of general warrants to officials, enabling any holder to search virtually an endless range of places for smuggled goods—this amendment was intended to limit the broad scope.[67]

A warrant ensures the neutrality of an investigation since the judge issuing it is generally detached from the investigation, whereas an officer may be more interested in "ferreting out crime."[68] Under the Fourth Amendment, a warrantless search is *per se* unreasonable.[69] "Some level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action."[70] However, a warrantless search may be deemed reasonable if it falls within a specific exception to the warrant requirement.[71]

"Where Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context," as demonstrated in *Mich. Dep't of State Police v. Sitz*.[72] Additionally, two exceptions that may relate to the function of "Evan's law" are exigent circumstances and consent.

In 1990, the *Sitz* Court ruled that Michigan State Police's use of sobriety checkpoints to catch drunk driving was consistent with the Fourth Amendment.[73] In *Sitz*, during the operation, officers at the checkpoint would stop all cars and inspect all drivers for signs of intoxication without any individualized suspicion that a specific driver was intoxicated.[74] While briefly questioning and observing the driver in their vehicle, if an officer suspected the motorist was intoxicated, the motorist would be sent off for a field sobriety test.[75] A group of Michigan residents argued that their Fourth Amendment rights prohibiting unreasonable search and seizure were being violated by the checkpoints for lack of probable cause or reasonable suspicion, and there must

65. U.S. CONST. amend. IV.
66. United States v. Leon, 468 U.S. 897, 931 (1984).
67. Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 9–10 (2000).
68. Riley v. California, 573 U.S. 373, 382 (2014).
69. *Id.*
70. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 457 (1990) (Brennan, J., dissenting).
71. *Riley*, 573 U.S. at 382.
72. *Sitz*, 496 U.S. at 449–50.
73. *Id.* at 447.
74. *Id.* at 449–50.
75. *Id.* at 447.

be some governmental need beyond the normal need before a balancing analysis was appropriate.[76]

The *Sitz* Court reached its decision that the state's use of sobriety checkpoints to catch drunk driving was consistent with the Fourth Amendment by using a three-prong test balancing the (1) the State's interest in preventing drunk driving, (2) the extent to which the system could reasonably be said to advance that interest, and (3) the degree of intrusion on individual liberties caused by the checkpoints.[77] Analyzing Textalyzer scans through these factors can determine whether Textalyzers could operate constitutionally without a warrant requirement.

By "Evan's law" foregoing any individualized suspicion requirement in the bill's language, the New York legislature appears to imply that the warrantless Textalyzer search calls for and satisfies the balancing analysis in *Sitz*, or falls under a separate well-recognized exception to the Fourth Amendment's warrant requirement.[78] In Part III, this Note will establish that a Textalyzer scan would be a search under the Fourth Amendment and fail to satisfy the balancing analysis or fall within an exception that would validate the Textalyzer scan's constitutionality.

III. ANALYSIS

Under current "Evan's law" framework, the constitutionality of the Textalyzer's proposed use is to be analyzed under the Fourth Amendment if attaching the Textalyzer to a motorist's phone after an accident and scanning for metadata constitutes a "search."[79] Whether an officer has conducted a search when using a Textalyzer in this manner can be determined using two methods from previous U.S. Supreme Court rulings.

A. Is a Textalyzer Scan a Search?

Under *United States v. Jones*, a search occurs if the government intrudes on an "effect" for the purpose of obtaining information.[80] Under *Katz v. United States*, a search occurs if officer conduct violates an individual's "reasonable expectation of privacy."[81]

1. Jones Test

Under the *Jones* test, it is fairly obvious that a search occurs when the Textalyzer is used to scan a cellphone for data. Vehicles and cellphones have

76. *Id.* at 450.
77. *Id.* at 455.
78. N.Y. Legis. A.B. A3201, Reg. Sess. 2019–2020 (proposed Jan. 28, 2019) (lacking any indication that individualized suspicion is required for the Textalyzer to be used on a motorist).
79. U.S. CONST. amend. IV (indicating that protections afforded under the Fourth Amendment are only triggered when police conduct constitutes a search or a seizure).
80. United States v. Jones, 565 U.S. 400, 400–04 (2012).
81. Katz v. United States, 389 U.S. 347, 360–61 (1967).

been deemed constitutionally protected "effects."[82] In *Jones*, the Court considered the Government's installing a tracking device on a person's private vehicle and the use of that device to monitor the vehicle's movements to be activity establishing a Fourth Amendment search.[83] Accordingly, an officer's attaching the Textalyzer to a motorist's cellphone for the purpose of obtaining evidence of a motorist's activity in proximity with their phone is likely a search under *Jones*. In both instances, there are physical intrusions for the goal of obtaining information of a person's activity related to the respective "effect."

2. Katz Test

The two-part reasonable expectation of privacy test in *Katz* is as follows: (1) an individual has exhibited an actual (subjective) expectation of privacy, and (2) the expectation is one that society is prepared to recognize as "reasonable."[84]

Regarding the first prong, an actual expectation of privacy in cellphones would precede most motorists. The Court in *Riley v. California* stated that "officers are very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity,"[85] indicating that even if a person does not intentionally establish security settings within the phone, they can rely on the phone developer's security measures. Further, Cellebrite stated that "[t]he police would . . . ask [the driver] to unlock [the phone],"[86] alluding to the idea that people expect privacy within their phones, which would presumptively already be in a "locked" status before the officer tried to use the Textalyzer. Thus, the typical driver being investigated by an officer would have little difficulty expressing their subjective expectation of privacy even before a verbal utterance stating as much.

Regarding the second prong—society's recognition of the expectation being reasonable—the Supreme Court has ruled that people have an expectation of privacy in their cellphones. The *Riley* Court found that "the police may not . . . without a warrant, search digital information on a cellphone seized from an individual,"[87] reasoning that a cellphone contains "a digital record of nearly every aspect of [a person's life]."[88] This ruling proves that people have an expectation of privacy in digital information stored within a cellphone.

Although Cellebrite alleges that Textalyzer technology only scans for a summary of what apps were open and in use, screen taps, and swipes,[89] and is not "getting anything about what was said in the text, or who it was sent to,"[90]

82. Riley v. California, 573 U.S. 373, 399 (2014).
83. *Jones*, 565 U.S. at 404.
84. *Katz*, 389 U.S. at 360–61.
85. *Riley*, 573 U.S. at 389.
86. Fox Business, *'Textalyzer' Could Become Reality in 6 Months, CEO Says*, YOUTUBE (May 16, 2017), https:// www.youtube.com/watch?v=W5dAhpoQwbs.
87. *Riley*, 573 U.S. at 378 (citing to the syllabus).
88. *Id.* at 395.
89. Schaper, *supra* note 3.
90. Chuck, *supra* note 31.

the metadata may still constitute the "digital information" protected by the *Riley* decision.[91] The Court expressed concern over how an Internet search or browsing history on a phone "could reveal an individual's private interest or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD,"[92] thereby "form[ing] a revealing montage of the user's life."[93]

To expand on the Court's reasoning, there are highly sensitive and private applications on cellphones that operate on the basis that the user can maintain anonymity and such disclosure of the driver's use of these apps would be considered intrusive and embarrassing. For example, the Suicide Crisis Support app is designed for people having suicidal thoughts and are afraid to seek help; its effectiveness is based on preserving anonymity and assuring its users that their privacy will not be compromised.[94] Another example is the "12 Steps AA Companion" app, which again promises anonymity and a 12-step program to help its users combat personal issues that they expect to keep private.[95] Apps like these have titles that are self-revealing without having to obtain deeper content.

Allowing the government to observe metadata that reveals phone apps a person intended to keep private to promote and maintain their own health and safety is a severe privacy infringement.[96] Merely accessing a list of apps people use for anything from religious to sexual purposes would be intrusive.[97] Whether the officer looks at the actual content or just surface-level activity (metadata) on the phone is irrelevant—the officer still searches the phone by plugging the Textalyzer into a driver's phone to scan for information.

An officer physically plugging in a Textalyzer to scan for a motorist's activity infringes upon the driver's privacy, hence constituting a search that the

91. Theresa D. Small, Comment, *Texting While Driving*, 29 GEO. MASON U. CIV. RTS. L.J. 301, 303 (2019) ("[T]hrough the collection of only metadata and the use of a search engine, the personal details of the study's subjects could be discovered."); Joseph D. Mornin, *Privacy Law: NSA Metadata Collection and the Fourth Amendment*, 29 BERKELEY TECH. L.J. 985, 985–86 (2014) ("Metadata includes information about a phone call - who, where, when, and how long - but not the content of the conversation.").

92. *Riley*, 573 U.S. at 395–96.

93. *Id.* at 396.

94. Alia E. Dastagir, *What Actually Happens When You Call the National Suicide Prevention Lifeline*, USA TODAY (Dec. 17, 2018), https://www.usatoday.com/story/news/2018/09/10/suicide-hotline-national-suicide-prevention-lifeline-what-happens-when-you-call/966151002/; *see also* Arthur J. Siegel, *Suicide Prevention by Smartphone*, 129 AM. J. OF MEDICINE 145 (2016) ("Smartphone-based life-alert technology might be adapted to reduce suicide, which is the only cause of death among the top 10 in the US for which age-adjusted mortality rates increased between 2005 and 2012.").

95. Jessica Timmons, *The Best Alcohol Addiction Recovery Apps of 2019*, HEALTHLINE (Apr. 24, 2019), https://www.healthline.com/health/addiction/top-alcoholism-iphone-android-apps#I-Am-Sober ("This is the most comprehensive sobriety tool available for members of Alcoholics Anonymous. Features include a Big Book reader, search tool, sobriety calculator, notes, AA contacts database, and more.").

96. *See* NYSenate, *NYS Legislature Hosts Distracted Driving Lobby Day Event*, YOUTUBE (Apr. 24, 2017), https://www.youtube.com/watch?v=r3N0TL_WEtE (showing that a Textalyzer scan will reveal a phone's activity by displaying an app's icon and title).

97. Sally Hersh ips, *New Device Detects Texting While Driving, But Is It Legal?*, MARKETPLACE (Oct. 16, 2017), https://www.marketplace.org/2017/10/16/life/device-detect-texting-while-driving-raises-legal-questions; *see* Small, *supra* note 91 (arguing that even extracting metadata exclusively can still reveal personal information about an individual and using the Textalyzer to extract metadata from a driver's cellphone would enable officers to make inferences about that person's life).

Fourth Amendment likely protects. Since a Textalyzer scan is a search under the Fourth Amendment, an officer would need a warrant supported by probable cause to constitutionally scan a driver's cellphone,[98] unless the warrantless search satisfies a balancing test or falls under an exception to the warrant requirement.[99]

B. Balancing Test in Sitz

In *Sitz*, the U.S. Supreme Court ruled in the State's favor, holding that (1) Michigan had a "substantial government interest" to advance in stopping drunk driving, (2) the checkpoint system was rationally related to achieving that goal, and (3) the brief questioning to gain "reasonable suspicion" had a negligible impact on the drivers' Fourth Amendment right from unreasonable search, implying that any more detailed or invasive searches would be treated differently.[100] In reaching its decision in favor of the program, the Court reasoned through each factor as follows:

(1) the magnitude of the drunk driving problem and the states' interest in eradicating it were indisputable;

(2) the advancement of the state's interest in preventing drunken driving was sufficiently shown by (a) the fact that, in the one checkpoint conducted under the program, approximately 1.5 percent of all the drivers stopped were arrested for drunk driving, and (b) expert testimony that experience in other states demonstrated that checkpoints resulted in the arrest of about one percent of all drivers stopped; and

(3) the "objective" intrusion resulting from the checkpoint, measured by the duration of the seizure and the intensity of the investigation, was minimal, while the "subjective" intrusion resulting from the checkpoint program—which was to be evaluated in terms of the fear and surprise engendered in law-abiding motorists by the nature of the stop—was also minimally intrusive.[101]

Using the same three factors considered in *Sitz*, the Textalyzer fails to satisfy the balance analysis.

1. The State's interest in preventing texting and driving

Although the State's focus may be disproportionately aimed towards curbing texting and driving rather than distracted driving more generally,[102] this Note concedes that texting and driving is a major government concern that must

98. U.S. CONST. amend. IV (stating that a warrant must be supported by probable cause).

99. Riley v. California, 573 U.S. 373, 382 (2014).

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

101. *Id.* at 451–52, 455.

102. *Distracted Driving*, NHTSA, https://www.nhtsa.gov/risky-driving/distracted-driving (last visited Mar. 23, 2019) (explaining that in 2017, according to the National Highway Traffic Safety Administration, distracted driving contributed to 3,166 auto fatalities in 2017); Kopfstein, *supra* note 14.

be addressed.[103] Thus, this factor would weigh in favor of the Textalyzer's warrantless use being constitutional.

2. The extent to which the Textalyzer could reasonably be said to advance the interest of preventing texting and driving

The Textalyzer has not yet been implemented, so no credible statistics exist to verify its effectiveness. Yet, based on the language in the "Evan's law" bill and explanations on the Textalyzer's function, it can be determined that its warrantless use cannot be reasonably said to advance the prevention of texting and driving.

Firstly, the language in "Evan's law" contains its policy consideration, stating that "[t]he state's invested interest in promoting public safety and *preventing* senseless loss of life justifies the creation of Evan's Law,"[104] but the bill is not properly tailored to effectively address the problem. "Evan's law" aims to curb distracted driving by using a Textalyzer on motorists involved in accidents *after* accidents have already taken place.[105] A Volvo study shows that 71% of Americans admit to using their phone while driving despite knowing it is illegal.[106] It is reasonable that these Americans understand the consequences of breaking the law, yet they still text while driving at alarming rates.[107] Hence, the bill's attempt to punish specific drivers involved in accidents with a Textalyzer scan would fail to generally deter more motorists from committing the illicit act.

Under "Evan's law," the Textalyzer merely acts as an investigatory tool to obtain evidence for subsequent prosecution.[108] Nothing in the bill's framework suggests that motorists will experience greater apprehension and deterrence than that already existing from the risk of property damage, substantial bodily harm, or death, yet these obvious dangers fail to stop motorists' unlawful behavior.

Secondly, the Textalyzer's potential for false positives enhances the likelihood that innocent motorists will be implicated in criminal proceedings. Chicago Alderman Chris Talliaferro, a former police officer, testified at a City Hall hearing on the Textalyzer about the difficulty of attempting to pinpoint exactly who in the car was using the phone.[109]

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103. *See Distracted Driving*, NHTSA, https://www.nhtsa.gov/risky-driving/distracted-driving (last visited Mar. 23, 2019) ("Distracted driving is dangerous, claiming 3,166 lives in 2017 alone."); Ben Szalinkski, *Illinoisans Face Suspended License for Texting While Driving Under New State Law*, ILL. POLICY (July 18, 2019), https://www.illinoispolicy.org/illinoisans-face-suspended-license-for-texting-while-driving-under-new-state-law/ (explaining how a study by Volvo found that 71% of Americans admit to using their phone while driving despite knowing it is illegal).

104. N.Y. Legis. S.B. A3201 § 1, Reg. Sess. 2019–2020 (N.Y. 2019) (emphasis added).

105. Kopfstein, *supra* note 14.

106. Szalinkski, *supra* note 103.

107. *Id.*

108. *See* N.Y. Legis. S.B. A3201 § 6, Reg. Sess. 2019–2020 (N.Y. 2019) ("If such field testing determines that the operator of the motor vehicle was using his or her mobile telephone or portable electronic device in violation of section twelve hundred twenty-five-c or twelve hundred twenty-five-d of this article, the results of such testing shall constitute evidence of any such violation.").

109. Bill Cameron, *Hearing Produces Issues with Textalyzer*, WLS-AM (Jan. 11, 2018), http://www.wlsam.com/2018/01/11/hearing-produces-issues-with-textalyzer/.

Consider a scenario where Michael Fiddle has his cellphone scanned immediately after an officer arrives on the scene of the accident illustrated in this Note's introduction. The results would display "a consistent usage of [his] cellphone device texting in and out for the period that [Michael] was operating the vehicle up until when the accident happened."[110] Yet, there were three other passengers in the vehicle.[111]

The metadata would fail to accurately inform the officer, or the trier of fact in a criminal proceeding, of whether Michael was the user of the cellphone during that timeframe—the phone usage could reasonably be pinned on anyone in the vehicle and, without individualized suspicion, the Textalyzer fails to establish that Michael caused the accident by using his phone unlawfully. Even if drivers' phones were revealed to have been swiped, tapped, or used to send a message shortly before or at the time of the accident, it would be practically impossible to match a timestamp to the exact moment of the crash (especially when witnesses are unavailable), or which motorist caused the accident (assuming multiple were involved). "Evan's law" contains no safeguard against an officer arbitrarily scanning all motorists' devices just because they were in an accident.

The Textalyzer's results would prejudice the suspected motorist by confusing and misleading the jury to make improper decisions based on unclear evidence. Courts would likely prohibit the admission of such evidence for its prejudicial nature under evidentiary Rule 403.[112] Yet, "Evan's law" forgoes the integral individualized suspicion component of the Fourth Amendment. Again, even if the Textalyzer were to properly pinpoint a driver who texted while driving to cause an accident, the damage would have already been done—no accident will be prevented under the current framework in "Evan's law."

In contrast, in the DUI context, an officer with enough individualized suspicion to subject a suspected drunk driver to a field sobriety test can be certain that the results indicate the driver's drunken condition (through observed motor skills and BAC). In *Sitz*, the individualized suspicion that existed after the brief questioning occurred made it possible for officers to accurately pinpoint the precise motorists who were drinking and driving.[113]

When driving, the act of texting compared to the condition of being drunk are distinctive impairments. The checkpoints in *Sitz* prevented drunk driving by identifying and removing drunk drivers from the road who were a danger to others and themselves and could not be liberated from the drunken state until enough time had passed. However, the Textalyzer fails to prevent people from texting while driving in the same manner because there is no impaired condition—simply putting the phone down removes the danger element. Further, *Sitz* checkpoints were designed to prevent harm from occurring, but Textalyzers are used to punish motorists for harm that has already occurred.

110. Corcoran, *supra* note 1.
111. *Id*.
112. FED. R. EVID. 403; ILL. R. EVID. 403.
113. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450–51 (1990).

Thus, this factor would weigh in favor of the Textalyzer scan being unconstitutional.

3. The intrusion on individual liberties

In *Sitz*, the objective intrusion resulting from the checkpoint was deemed to be minimal based on the short duration of the seizure and the low intensity of the questioning.[114] Further, the subjective intrusion was also considered minimal, which was based on the fear and surprise experienced by motorists caused by the nature of the stop.[115] The intrusion that would be involved in a Textalyzer scan is far more severe than searches and seizures in *Sitz*.

As discussed above, people have an actual expectation of privacy in their cellphone, and the expectation is one that society is prepared to recognize as "reasonable."[116] The Textalyzer scanning a motorist's cellphone for the purpose of obtaining information is a far greater intrusion than a motorist being stopped and questioned briefly at a checkpoint, like in *Sitz*. The Textalyzer purports to scan for "all recent activity,"[117] yet it is unknown how much activity the metadata would reveal. This factor would also weigh in favor of the Textalyzer scan being unconstitutional.

Thus, the Textalyzer under Evan's law would fail to fall under the warrant exception that occurred in *Sitz*. Although the State has an interest in curbing texting while driving,[118] the Textalyzer scan is not rationally related to preventing such an interest and it would be far more intrusive than the searches and seizures that occurred in the checkpoint context. The remaining exceptions that would arguably apply to the Textalyzer are exigent circumstances and consent.

C. Exigent Circumstances

The U.S. Supreme Court's analysis on exigent chemical tests in the DUI context and phone searches will establish that Textalyzer scans would not fall under the exigent circumstance exception.

In *Missouri v. McNeely*, the U.S. Supreme Court rejected a categorical approach to warrantless blood draws based on the exigency of dissipation of alcohol in the blood over time, but noted that natural dissipation of alcohol in the blood may support a finding of exigency in a specific case based on the totality of the circumstances.[119] In other words, a warrantless search may be

114. *Id*. at 451–52.

115. *Id*.

116. *See supra* Part III.A (discussing how people have a subjective and objective expectation of privacy in cellphones due to the sensitive and intimate information contained in the device); *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).

117. Reakes & Lombardi, *supra* note 29.

118. *See* N.Y. Legis. S.B. A3201, Reg. Sess. 2019-2020 (N.Y. 2019) ("[t]he state's invested interest in promoting public safety and preventing senseless loss of life justifies the creation of Evan's Law.").

119. Missouri v. McNeely, 569 U.S. 141, 145 (2013); People v. Eubanks, 2017 IL App (1st) 142837, at ¶ 66 ("Under *McNeely*, 625 ILCS 5/11–501.2(c)(2) (2008) is unconstitutional on its face, insofar as it permits

reasonable when there is compelling need for official action and no time to secure a warrant. Although the dissipation of alcohol in the blood could support an exigency finding that might justify the use of a chemical test when the concern is driving under the influence,[120] the exigent need for an officer to use the Textalyzer on a driver's cellphone to preserve evidence of texting while driving is unfounded.

In *Riley*, the Court held that officers generally may not, without a warrant, search digital information on a cellphone from any individual who has been arrested.[121] Officers must generally secure a warrant before conducting a search of data on cellphones,[122] yet cellphone searches might be permitted in an emergency when the government's interests are so compelling that a search would be reasonable.[123] The Court elaborated on what sort of exigency could validate a warrantless phone search, such as "the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury."[124] None of these emergencies are applicable to the search of a cellphone's metadata.

A Textalyzer scan fails to further law enforcement's interest in managing any of the emergencies that the *Riley* court discussed. Purportedly, the Textalyzer's only purpose and capability is scanning for metadata to determine whether a driver caused an accident by texting and driving. Cellebrite claimed that Textalyzer technology would be incapable of uncovering more personal data that may include conversations or call logs.[125] Further, if a scenario called for the emergency retrieval of a motorist's cellphone data, it is highly unlikely that timestamps of screen taps and swipes, or even when messages were sent, would offer any value. In an instance where law enforcement suspected that a cellphone contained information regarding a bomb about to detonate, or an abducted child's whereabouts, content revealing text message details and contact logs would be more likely to provide critical information, which the Textalyzer would be unable to provide.[126]

There is no reasonable concern that waiting for a warrant would risk the destruction of evidence or officer safety, and accordingly there is no reasonable emergency that would permit a warrantless search for metadata in a person's phone. Thus, the exigent circumstances exception is unlikely to permit the warrantless use of a Textalyzer.

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compelled chemical testing without a warrant in all cases where an officer has probable cause to believe that a driver under the influence has caused death or personal injury to another.").

120. *Id*. ("[W]e hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.").

121. Riley v. California, 573 U.S. 373, 403 (2014).

122. *Id*. at 386.

123. *Id*. at 402.

124. *Id*.

125. *Should Cops Check Your Phone After a Crash? Nevada Considers Law Allowing 'Textalyzer' Test*, FOX 5 ATLANTA (Mar. 18, 2019, 6:01 PM), http://www.fox5atlanta.com/politics/should-cops-check-your-phone-after-a-crash-nevada-considers-law-allowing-textalyzer-test.

126. *See Riley*, 573 U.S. at 402 (identifying specific scenarios where a warrantless search of a cellphone may be deemed appropriate).

D. Consent

In *People v. Gaede*, the defendant was arrested for driving under the influence.[127] The defendant was taken to Macon County jail where he refused to take the chemical breath test.[128] The defendant argued that under 625 ILCS 5/11-501.2(c), Illinois's implied-consent statutory scheme unconstitutionally circumvented his constitutional rights by punishing him for exercising his Fourth Amendment right to refuse chemical analysis because his driver's license was suspended and his refusal was introduced as evidence against him at his criminal trial.[129] The Illinois Fourth District Court found that defendant's argument was built on a false premise, stating that the Defendant erroneously believed he always has a constitutional right to refuse a breath test.[130] Citing *McNeely*, the court reasoned that while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, it did not do so categorically.[131]

However, if the defendant in *Gaede* refused a Textalyzer instead, the court's ruling on the constitutionality of implied consent in "Evan's law" might have been different—there is no exigent circumstance where law enforcement would need to use a Textalyzer.[132] Metadata evidence of a motorist's cellphone activity, albeit marginally effective, could be obtained by law enforcement through a subpoena or a warrant. Since there is no concern over the destruction of evidence in the Textalyzer context, there is no rush to obtain immediate evidence through a warrantless Textalyzer scan.[133]

Without a compelling need for official action or a lack of time to secure a warrant,[134] implied consent serves no real purpose in the Textalyzer context. Thus, it is likely that the implied consent concept in "Evan's law" would be found unconstitutional.[135]

In 2018, McHenry and Lake County planned to adopt a policy where, instead of allowing motorists suspected of driving under the influence to simply accept a civil penalty upon refusing a chemical test, the arresting officer would seek an instant warrant for the blood test.[136] Accordingly, it is conceivable that a defendant refusing a chemical test, like the defendant in *Gaede*, would be punished by losing his license, having his refusal introduced as evidence, *and*

127. People v. Gaede, 2014 IL App (4th) 130346, at ¶ 3 (4th Dist. 2014).

128. *Id.* at ¶ 9.

129. *Id.* at ¶ 25.

130. *Id*.

131. *Id*. at ¶ 25 (citing *McNeely*, 569 U.S. at 145).

132. *See supra* Part III.C (discussing how the Textalyzer has no value in exigent circumstances, therefore failing to fall within the warrantless search exception under the Fourth Amendment).

133. *Id.*

134. *See* Palatine Technology Group, https://www.palasys.com/anywhere-ewarrant (demonstrating how quickly warrants can now be requested); Robert McCopin, *New DUI Policy: Refuse Breath Test, Cop Will Seek Instant Warrant for Blood Test*, CHI. TRIBUNE (Apr. 13, 2018, 8:50 AM), https://www.chicagotribune.com/news/breaking/ct-met-dui-no-refusal-20180412-story.html (showing that warrants can be requested quickly).

135. *See supra* Part III.C (discussing how the Textalyzer has no value in exigent circumstances, therefore failing to fall within the warrantless search exception under the Fourth Amendment).

136. McCopin, *supra* note 134 ("Many police departments in the Chicago area already will seek blood draws from those who decline breath tests.").

having the evidence of his blood alcohol content admitted. After all, "[t]o prove intoxication, the prosecution may utilize both the test results and the refusal to take the test."[137]

In the Textalyzer context, this scenario would be even worse. Not only would the refusing motorist's license be suspended and evidence of a refusal likely be used against the motorist,[138] but an officer could then seek an instant warrant and compel the cellphone evidence anyway.[139] The fact that McHenry and Lake County are allowing compelled blood tests makes it likely that a motorist's verbal refusal would not be respected under the Textalyzer context and a search would still occur. This scenario highlights the illusion of consent and how officers can use manipulation to cause more harm to suspected motorists.

Many people consent to police requests because they think they are obligated, while others fear the consequences of refusing to consent, leading a large number of motorists to consent when asked for compliance by police.[140] Uncontrolled police discretion under "Evan's law" may subject motorists to choosing between the loss of their driving privileges, having intimate parts of their life indiscriminately exposed, criminal charges, or some combination of the three.

The City of Chicago is already plagued with cynical perspectives toward law enforcement[141] and arming officers with Textalyzer technology that essentially entraps motorists with its implied consent concept would exacerbate already-existing issues. Research shows that minority groups consistently show less trust in law enforcement.[142] Chicago is comprised of 60% Blacks and Hispanics.[143] Further, according to the American Civil Liberties Union (ACLU) of Illinois, Black and Hispanic motorists were over four times more likely than white motorists to have their vehicles consent searched by Chicago Police Department in 2013, and a report showed a "dramatic racial disparity in police use of so-called 'consent search' . . . ."[144] The lack of trust undermines the

137. People v. Brooks, 334 Ill. App. 3d 722, 728.

138. *Id.* at 727 (showing that in Illinois, prosecution may utilize both the test results and the refusal to take a chemical test against a motorist). It is important to note that the prosecutor's ability to use a chemical test refusal against a defendant is not explicitly stated in Illinois Vehicle Code Section 11-501.1, but it exists. Hence, "Evan's law" not including the language indicates that refusing a Textalyzer may also be allowed into evidence against a defendant.

139. *See* Small, *supra* note 91, at 331 ("[S]ome may say a cellphone holds more personal information than a blood sample from their own body.").

140. *Racial Disparity in Consent Searches and Dog Sniff Searches*, ACLU OF ILL. (Aug. 13, 2014), https://www.aclu-il.org/en/publications/racial-disparity-consent-searches-and-dog-sniff-searches.

141. *71 Shot, and No Arrests? Chicago Pays High Price for Police Mistrust*, CHI. SUN-TIMES (Aug. 7, 2018, 8:50 PM), https://chicago.suntimes.com/news/chicago-police-reform-police-academy-rudy-giuliani.

142. Michael Friedman, *What Happens When We Don't Trust Law Enforcement?*, PSYCHOL. TODAY (Sept. 9, 2014), https://www.psychologytoday.com/us/blog/brick-brick/201409/what-happens-when-we-dont-trust-law-enforcement-0.

143. *QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/chicagocityillinois (last visited Sept. 31, 2019).

144. *Racial Disparity*, *supra* note 140.

legitimacy of law enforcement and makes people feel suspicious and distrustful in their interactions with law enforcement.[145]

Beyond the potential unconstitutionality of the implied consent concept used by the Textalyzer, Illinois legislature should avoid adopting "Evan's law" to prevent the needless addition to social problems that already exist in its major city.[146]

E. Current Illinois Law Conflicts with Evan's Law

"Evan's law," which states that the Textalyzer is a field-testing device that operates with implied consent, is inconsistent with the Illinois's implied consent and field-testing laws.[147] In Illinois, the PBT requires the lowest standard of individualized suspicion—reasonable suspicion—for an officer to request its use on a suspected drunk-driving motorist.[148] Although no warning-of-rights requirement is attached to PBT use, the motorist may refuse the PBT with no repercussion.[149] Even if a driver consents to a PBT, its results or refusal cannot be used against the motorist in court. Although chemical test results can be used against a driver, the chemical test requires a higher degree of suspicion—probable cause.[150] Further, the chemical test requires a suspected motorist to be warned of his right to refuse and the repercussions for refusal.[151]

"Evan's law" under its current framework sits awkwardly alongside existing Illinois law. To use the Textalyzer, an officer is not required to have any level of individualized suspicion whatsoever. There is no explicit requirement in the section 11-501.1 language mandating that a motorist be warned of his right to refuse or repercussions for refusal.[152] Moreover, a refusal has immediate civil repercussions and may be used in criminal proceedings against the motorist. The inconsistency of existing law on breath tests and chemical tests compared to the proposed Textalyzer law is alarming because the driver's privacy within his phone is arguably greater than the privacy intruded upon by a chemical test,[153] hence a higher standard is warranted. It is nonsensical that the Textalyzer would operate more liberally than the low-standard PBT when Textalyzers are plausibly more intrusive than chemical tests[154] and require no degree of individualized suspicion.[155]

145. Friedman, *supra* note 142.
146. 625 ILCS 5/11-501.1(c) (2019).
147. *Id.*
148. *See* People v. Ward, 371 Ill. App. 3d 382, 396 (1st Dist. 2007) ("[P]olice knew they did not have sufficient probable cause, a higher standard than reasonable suspicion . . . .").
149. People v. Rozela, 345 Ill. App. 3d 217, 224 (3d Dist. 2003).
150. *Ward*, 371 Ill. App. 3d at 396.
151. 625 ILCS 5/11-501.1(c) (2019).
152. *Id.*
153. *See* Small, *supra* note 91, at 331 ("[S]ome may say a cellphone holds more personal information than a blood sample from their own body.").
154. *Id.*
155. N.Y. Legis. A.B. A3201, Reg. Sess. 2019–2020 (proposed Jan. 28, 2019) (lacking any indication that individualized suspicion is required for the Textalyzer to be used on a motorist).

Not only will the Textalyzer be deemed unconstitutional for its failure to fall under one of the warrant exceptions, but its current framework does not align sensibly with existing Illinois law.

IV. RECOMMENDATION

The current framework of "Evan's law" aims to curb distracted driving by subjecting drivers involved in accidents to a Textalyzer scan *after* the accident has already taken place.[156] In 2011, 45% of all students age sixteen and older reported that they had texted or emailed while driving during the past thirty days.[157] Surveys show that most drivers know the dangers of using their phones while driving but that many do it anyway.[158] As Ald. Brian Hopkins suggested, there is a need for a cultural change in how distracted driving is viewed,[159] and it should be Illinois legislature's focus to effectively curb distracted driving accidents. The Textalyzer's use will likely be deemed unconstitutional for its infringement on motorists' Fourth Amendment rights. However, there are superior options to preventing distracted driving outside of implementing "Evan's law."

A. Appreciate Risks of Driving

The first step to promoting public safety and preventing senseless loss of life from distracted driving is to appreciate the dangers associated with operating a motor vehicle. In 2017, in the U.S., there were 37,247 recorded motor vehicle crash deaths and 11.4 crash deaths that occurred per 100,000 population.[160] Comparatively, in 2017, there were 39,773 recorded U.S. gun deaths.[161] The two fatality rates are largely similar in size, yet legislatures in several states have failed to take a comparatively tough position on controlling an individual's conduct behind the wheel as they have with gun matters.[162] The luxury of advanced technology like cellphones should not supersede the legitimate government interest of protecting the public against distracted drivers.[163] Illinois should focus on appreciating the inherent dangers of operating a moving vehicle and enforce existing laws more to ensure increased safety on the roads.

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156. Kopfstein, *supra* note 14.

157. Spielman, *supra* note 25.

158. *Police Forced to Get Creative in Battle to Make Drivers to Put Down Their Phones*, FOX NEWS (Sept. 2, 2016), https://www.foxnews.com/us/police-forced-to-get-creative-in-battle-to-make-drivers-to-put-down-their-phones.

159. *Chicago City Council Takes Further Action to Stop Texting While Driving*, GWC INJURY LAWYERS (Jan. 29, 2018), https://www.gwclaw.com/blog/texting-while-driving-chicago-city-council/.

160. *Fatality Facts 2017*, IIHS.ORG, https://www.iihs.org/iihs/topics/t/general-statistics/fatalityfacts/state-by-state-overview (last visited Sept. 31, 2019).

161. Sarah Mervosh, *Nearly 40,000 People Died From Guns in U.S. Last Year, Highest in 50 Years*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/gun-deaths.html.

162. *See* Matthew Hartvigsen, *10 States with the Strictest Gun Laws*, DESERET NEWS (Apr. 17, 2013, 10:36 AM), https://www.deseretnews.com/top/1428/2/Illinois-10-states-with-the-strictest-gun-laws.html (listing Illinois as top ten states with the strictest gun laws).

163. *See, e.g.*, Tara M. Franklin, Comment, *Done with Distracted Driving: Implications of Pennsylvania's Ban on Text-Based Communication While Driving Under the State Constitution*, 117 PENN. ST. L. REV. 171, 171 (stating that "roadway safety is a legitimate and important governmental objective").

B. Alternative Legislation

In addition to enforcing existing laws, Illinois legislature should enact bright-line laws that alter behavior to curb distracted driving instead of prohibiting the use of a small subset of "distracted driving."

Merely 14%, or 444, of distracted deaths in 2016 were linked to cellphone use.[164] The remaining 86% of deaths represent what should be the main focus—curbing distracted driving and not just "texting while driving" violations.[165] The Illinois Department of Motor Vehicles acknowledges that beyond texting and talking on the phone while driving, "many other types of distractions are just as harmful, such as grooming, tuning the radio, eating or drinking, or reaching for items in the vehicle's glove compartment."[166] In fact, a driver in Illinois can lawfully press a finger against their cellphone for the purpose of activating a voice communication with a single press.[167] A law should exist that prohibits many of the other distractions that drivers experience.

The extreme resolution is to make a law preventing cellphones from being in plain view within a vehicle. Laws have been on the books to keep guns out of plain view for years and there is no reason why it should not also apply for cellphones—a world *did* exist without cellphones, after all.[168] Legislature must balance the convenience of technology with the lives of its citizens.

C. Modify "Evan's Law"

If Illinois legislature decides to adopt "Evan's law," it should at least consider modifying the way it functions.

Firstly, implied consent should not operate in a framework involving the Textalyzer. Consent searches are coercive and invasive of the motorists' privacy.[169] Consent searches cause racial disparity, especially in Chicago, and this will likely continue if officers are given unfettered discretion on when and how officers request consent.[170] The high frequency of motorists consenting to law enforcement's search requests when there is no tangible upside for the submitting motorist is a telling tale.[171] Intimidation and manipulation must have a role in people senselessly supplying officers with self-incriminating evidence, especially when they are innocent, but the evidence may tell a different narrative.

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164. Kopfstein, *supra* note 14.

165. *Facts + Statistics: Distracted driving*, INS. INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-distracted-driving (last visited Oct. 13, 2019).

166. *Distracted Driving Laws in Illinois*, DMV.COM, https://www.dmv.com/il/illinois/distracted-driving-laws (last visited Nov. 27, 2018).

167. 625 ILCS 5/12–610.2(9) (2019). Such a lawful tap may trigger a response from a Textalyzer scan that could be used against a driver in a criminal prosecution.

168. People v. Chandler, 238 Ill. App. 3d 855, 856 (1st Dist. 1992).

169. *See Racial Disparity*, *supra* note 144 ("Consent searches are coercive and invasive of the privacy of motorists of all races.").

170. *See id.* (explaining that consent searches cause racial disparity due to the high level of officer subjectivity in deciding when to request consent).

171. *Id.*

If any form of consent should exist under "Evan's law," it should be parallel to the functionality of Illinois's PBT statute.[172] Accordingly, an officer should be required to have probable cause to even request that a motorist allow a Textalyzer scan. Allowing an officer to scan a motorist's cellphone with the Textalyzer merely because an accident took place without any individualized suspicion of unlawful phone use should be avoided.[173] Further, an officer should be required to warn a motorist that they do not need to take the test and that no consequences would occur if the motorist chose to refuse.

The bottom line: if an officer is authorized through probable cause or has a warrant, the officer is qualified to perform the act.[174] There should be a uniform, no-questions-asked approach instead of carrying on the illusion that people have a degree of consent in dealings with police when many still elect not to exercise their rights to self-preservation.

D. Get a Warrant

In a statement advocating for the Textalyzer, Lieberman stated, "We often hear, 'just get a warrant' or 'just get the phone records' . . . The implication is that the warrant is like filling out some minor form. It's not."[175] But it *is* that simple.[176] Officers can take advantage of technology that allows police to generate an "e-warrant" that can be sent electronically to a judge for review from a curbside traffic stop.[177] Moreover, the Court in *Riley* acknowledged that U.S. case law has historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency."[178] Courts have not recognized an exigent circumstance that would require the urgent need for a phone's metadata and the Textalyzer is meant to be used as an investigatory tool to investigate car accidents.

Thus, even if obtaining a warrant took an undesirable amount of time to obtain (which it does not), authorizing Textalyzer use in the field to bypass law enforcement's "inconvenience" of having to wait does not hold more weight than protecting the rights of citizens under the Fourth Amendment. Restrictions in accordance with the Fourth Amendment on Textalyzer use would keep police power in check and separate their enforcement duties from the courts' role and give effect to Framers' intent.[179]

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172. 625 ILCS 5/11–501.5 (2019).
173. Franklin, *supra* note 164.
174. *Id*.
175. Schaper, *supra* note 3.
176. *Electronic Warrant*, PALATINE TECH. GRP., https://www.palasys.com/anywhere-ewarrant (last visited Oct. 1, 2019).
177. McCoppin, *supra* note 136.
178. Riley v. California, 573 U.S. 373, 401 (2014) (citing Coolidge v. New Hampshire, 403 U. S. 443, 481 (1971)).
179. United States v. Wurie, 728 F.3d 1, 3 (1st Cir. 2013).

V. CONCLUSION

There is no debate—texting while driving has dire consequences and law enforcement has not been entirely effective in controlling such conduct. But allowing officers to use Textalyzer technology without limits (aside from being limited to *after* an accident has occurred) is not the answer. The reactive method proposed in "Evan's law" cannot and will not effectively deter people from texting while driving, but it will succeed in infringing upon the privacy rights of citizens. Illinois would benefit from enforcing existing laws more deliberately and taking a stance against distracted driving as a whole, not merely the use of cellphones. Still, as far as cellphones are concerned, the most effective solution to prevent cellphones from causing accidents is to prevent their use from occurring inside of a vehicle entirely.

For the aforementioned reasons, the city of Chicago should not adopt Textalyzer technology under the proposed "Evan's law." However, if Illinois legislature decides to adopt the bill, its language should be modified to minimize the risk of a Fourth Amendment violation.