To Breathe, or Not to Breathe: Passive Alcohol Sensors and the Fourth Amendment*

I. INTRODUCTION

The P.A.S.™ Passive Alcohol Sensor III (nicknamed the "Sniffer") stepped into the technology arena to do battle with drunk driving. Like any good battle, the fans are divided, with the Sniffer's maker, PAS Systems International, Inc., and law enforcement officials on one side and civil liberties groups and drivers on the other. The Sniffer

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is a hand-held, battery-powered flashlight with a built-in alcohol sensor.¹ As a police officer shines the flashlight in a driver’s face, the Sniffer samples exhaled breath as the driver speaks, analyzing it for the presence of alcohol.² In a matter of seconds, a color-coded display on the flashlight alerts the officer to the presence of alcohol and provides an approximate blood alcohol concentration (BAC).³ Because the driver’s active participation is not needed to produce a BAC reading, the Sniffer is heralded as a “passive” device.⁴ The Sniffer can detect alcohol in a person’s breath as well as alcohol that may be in the ambient air inside a vehicle due to exhaled breath in the enclosed space or open containers of alcohol.⁵ The point of this “nonintrusive” device is to help police officers formulate the probable cause needed to warrant an arrest without the driver’s active involvement.⁶

This usage, however, is the very reason battle lines are being drawn. Let the Sniffer be the swords of the law enforcement officials, and the Fourth Amendment becomes the shield to those who would oppose its use. The Fourth Amendment to the United States Constitution⁷ protects

2. Id. The Web site provides, “The P.A.S.™ III, unlike active hand-held breath analyzers, samples air in front of and around an individual just as a person may smell another’s breath. The P.A.S.™ III does not touch a person in any way.” Id.
3. Id. The Web site shows a picture of the Sniffer and supplies directions for its use: Taking a Breath Sample: 1) Hold the P.A.S. about 5-7 inches from subject’s mouth[;] 2) Have subject speak for 5 to 10 seconds (example: have subject give name, address, and date of birth)[;] 3) Tap power switch once and release while the subject is speaking[;] 4) Watch bars light up; wait about 20 seconds until peak reading is established; Note this reading[;] 5) Tap power switch again to turn off the sensor[;] 6) See reverse side for approximate B.A.C. Id. On the flashlight’s color-coded display, an approximate B.A.C. of .01 or .02 shows a green light; approximate B.A.C.’s of .03, .04, .05, and .06 show a yellow light; and approximate B.A.C.’s of .08, .10, and .12 show a red light. Id.
4. Id. Arguably, by requiring a breath sample from the driver which presumably is going to come from the driver’s act of speaking, the driver is “actively” participating in the Sniffer’s operation. The contrast between having the driver speak to generate breath samples for the Sniffer and having the driver actively blow into a traditional breathalyzer is likely the distinguishing characteristic that makes the Sniffer a “passive” device.
5. Id. Furthermore, the Sniffer’s alcohol sensor is “unaffected by acetone, paint and glue fumes, foods, confectionery, methane and practically any other substance likely to be found in the breath (other than alcohol).” Id.
6. Id. The Web site provides: “there should be no question of a ‘trespass’ or ‘intrusion’ into the privacy of an individual. It is not an evidential test and its results should not be presented as such.” Id.
7. The Fourth Amendment is applicable to the states through the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 27–28 (1949); see also Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the exclusionary rule of the Fourth Amendment is also applicable to the states).
against unreasonable searches and seizures. A seizure takes place when a police officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Additionally, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Following the Supreme Court's paramount decision in *Katz v. United States*, for a search to have occurred, a person must be able to claim a reasonable expectation of privacy into which the government has intruded. A reasonable expectation of privacy is recognized where a person has an actual, subjective expectation of privacy, which is objectively reasonable. Where no reasonable expectation of privacy exists, governmental action does not constitute a search under the Fourth Amendment. Moreover, once classified as a search, governmental action is only proscribed by

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8. U.S. CONST. amend. IV. In full, it states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Id.*


12. This test has evolved from Justice Harlan's statement in his concurring opinion in *Katz* that "a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring); *see also* *Smith v. Maryland*, 442 U.S. 735, 740 (1979) ("Consistently with Katz, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action.").

13. *Smith*, 442 U.S. at 740. In construing the meaning of a reasonable expectation of privacy, the Court said:

[As Mr. Justice Harlan aptly noted in his Katz concurrence, [this inquiry] normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy,"—whether, in the words of the Katz majority, the individual has shown that "he seeks to preserve [something] as private." The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'"—whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.* (alteration in original) (citations omitted).]

14. *E.g.*, *id.* at 745–46 (holding that the installation and use of a pen register was not a search under the Fourth Amendment because the defendant had "no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not" objectively reasonable).
the Fourth Amendment if it constitutes an unreasonable search. The reasonableness of a governmental search, in turn, depends upon "balancing its intrusion on [an] individual's Fourth Amendment interests against [the search's] promotion of legitimate governmental interests." In construing this balancing test, the Supreme Court delineated three factors to be examined in each particular case to assess reasonableness—the nature of the individual's privacy interest, the character of the intrusion, and the nature and immediacy of the governmental interest at issue.

Lurking somewhere in the gamut of Fourth Amendment jurisprudence lies the framework under which the constitutionality of the Sniffer will be tested. Because opponents and proponents of the Sniffer both find and proclaim different aspects of Fourth Amendment law to justify their conflicting positions over the Sniffer, the battle, which has yet to make it inside any court, is a complicated tangle of constitutional interpretation. In simplest terms, the issue to be addressed is whether the use of the Sniffer is constitutionally permissible under the Fourth Amendment.

A brief overview of the various arguments for and against the Sniffer may be useful at this point to highlight some of the areas that will be addressed. Opponents of the Sniffer take issue with the fact that police officers who utilize these flashlights can ascertain a driver's BAC without the driver having consented to testing and without the driver even knowing that such testing has commenced. With the more traditional Breathalyzer™, which requires the driver to blow into a device, and with field sobriety tests, which require the driver to perform physical tests, the driver has implicitly consented and presumably knows the officer's purpose is to ascertain intoxication. With the Sniffer, as the argument goes, officers are able to conduct searches without the
driver’s knowledge or consent, perhaps even before the driver has done anything which would suggest to an officer that the driver has been drinking. After the Sniffer has provided the officer with a BAC reading, the officer is possibly only then armed with probable cause to believe the driver has been drinking and may then require the driver to undergo further alcohol testing to assess whether the driver should be arrested.

Civil liberties groups and defense lawyers argue that the hidden breath alcohol screening instrument inside the flashlight violates the driver’s right to privacy when it tests a breath sample. As long as the driver’s breath is still in the car, that breath is “in a zone of privacy.” Other arguments suggesting that use of the Sniffer constitutes an unreasonable search and seizure have included the following: in using the Sniffer, officers are impermissibly enhancing their sense of smell to reveal the presence of alcohol; for drivers who are pulled over because of minor traffic violations, the use of the Sniffer becomes a fishing expedition to catch alcohol-impaired drivers; because a trained officer can use his or her own natural senses in observing and speaking to a driver to assess whether field sobriety tests or Breathalyzer tests are needed, sticking the flashlight in a driver’s face is intrusive; and, the Sniffer gives officers discretion to decide whether any particular driver will be tested and hence discretion to invade a person’s privacy.

Proponents of the Sniffer find no fault with a device that “is nothing more than an extension of an officer’s nose.” The Sniffer is meant to help an officer establish probable cause to make an arrest and is not intended to replace traditional Breathalyzer and field sobriety tests.

20. Id.
22. Id.
23. Id.
25. Id.
26. See id.
27. Id.
29. Id.
The device is used only to determine whether further testing is needed.\textsuperscript{30} Other arguments backing the Sniffer include: the probable cause determination can be made faster by utilizing a Sniffer than by leaving the officers to their own natural senses;\textsuperscript{31} more drunk drivers will be caught when officers are using the device because it is more objective than other police procedures;\textsuperscript{32} detecting more drunk drivers justifies the "minor inconvenience to drivers;"\textsuperscript{33} all the device is doing is sampling air that has already left the driver's body;\textsuperscript{34} drivers do not enjoy a reasonable expectation of privacy in their exhaled breath;\textsuperscript{35} exhaled breath is "abandoned property" and thus not protected under the Fourth Amendment;\textsuperscript{36} the "plain sight doctrine" allows the officer to observe, with his senses, breath which is in plain sight without violating the Fourth Amendment;\textsuperscript{37} and finally, the results of the Sniffer are not admissible as evidence of guilt in court.\textsuperscript{38}

The purpose of this Comment is to assess how the United States Supreme Court would ultimately decide where the Sniffer stands vis-à-vis Fourth Amendment privacy rights. The benefit of a device that can assist police officers in detecting more drunk drivers must not also function as an affront to Fourth Amendment protections. The analysis will flush out the various arguments supporting and denouncing the constitutionality of the Sniffer and attempt to decipher how these arguments square with the current state of the law.

This Comment will start with a short overview of the drunk driving problem in the United States by referring to the statistical data of the National Highway Traffic Safety Administration (NHTSA). The standards of probable cause and reasonable suspicion will be briefly discussed to demonstrate what is required of an officer to lawfully stop a motorist and to classify the types of drivers who may be stopped by the police. A more in-depth discussion of the law with regard to seizures and searches will follow, focusing on what laws govern the use of flashlights and devices used to determine the alcohol content of a breath sample. An assessment of where the Sniffer falls in the search law arena will be included. As part of a reasonableness inquiry, which necessitates


\textsuperscript{32} See Masters & Jackman, \textit{supra} note 30, at B1.

\textsuperscript{33} Richey, \textit{supra} note 21, at 2.

\textsuperscript{34} Masters & Jackman, \textit{supra} note 30, at B1.

\textsuperscript{35} Richey, \textit{supra} note 21, at 2.

\textsuperscript{36} Id.

\textsuperscript{37} See id.

\textsuperscript{38} Masters & Jackman, \textit{supra} note 30, at B1.
the use of a balancing test, the various arguments will be analyzed to distinguish those which are legitimate from others which may be less sound. Ultimately, this Comment will use a classification of the various types of drivers who may be subjected to the Sniffer search depending on the reasons for their initial detention to conclude that as to some drivers the instrument may be constitutional, while as to others, it transgresses Fourth Amendment protections.

II. A BRIEF OVERVIEW OF AMERICA'S DRUNK DRIVING PROBLEM

The statistical data on the prevalence of alcohol-related fatalities\textsuperscript{39} attests to the tragedy of drunk driving. For the year 1999, over 41,000 persons were killed in traffic fatalities; of these, 15,976 were alcohol-related, representing 38% of total traffic fatalities.\textsuperscript{40} In 1998, 15,935 persons were killed in alcohol-related fatalities, again representing 38% of total traffic fatalities for the year.\textsuperscript{41} This figure, however, represents a 33% reduction in alcohol-related fatalities from the 23,626 persons killed in 1988.\textsuperscript{42} Looking further back, in 1997, 16,189 persons were killed in alcohol-related fatalities;\textsuperscript{43} in 1996, 17,126 persons were killed in alcohol-related crashes;\textsuperscript{44} and in 1995, 17,274 persons were killed in

\textsuperscript{39} National Highway Traffic Safety Administration (NHTSA) identifies a fatal traffic crash as alcohol related "if either a driver or a nonoccupant (e.g., pedestrian) had a blood alcohol concentration (BAC) of 0.01 grams per deciliter (g/dl) or greater in a police-reported traffic crash. Persons with a BAC of 0.10 g/dl or greater involved in fatal crashes are considered to be intoxicated." Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., \textit{Traffic Safety Facts 1998: Alcohol}, at http://www.nhtsa.dot.gov/people/ncsa/FactPrev/pdf/Alcohol98.pdf (last visited Apr. 19, 2002) [hereinafter \textit{Traffic Safety Facts 1998}].

\textsuperscript{40} Mothers Against Drunk Driving, \textit{Total Traffic Fatality vs. Alcohol Related Traffic Fatality}, at http://www.madd.org/stats/0,1056,1298,00.html (last visited Apr. 19, 2002) (figures provided by NHTSA).

\textsuperscript{41} \textit{Traffic Safety Facts 1998}, supra note 39. The 15,935 fatalities "represent an average of one alcohol-related fatality every 33 minutes." \textit{Id.} In 1998, total traffic fatalities equaled 41,471 persons. \textit{Id.} Of these, 12,456 persons (30% of all traffic fatalities) were killed in crashes where at least one driver or nonoccupant had a BAC of 0.10 g/dl or greater, 3479 persons (8% of all traffic fatalities) were killed in crashes where at least one driver or nonoccupant had a BAC between 0.01 and 0.09 g/dl, and the remaining 25,536 traffic fatalities were not alcohol related. \textit{Id.}

\textsuperscript{42} \textit{Id.} This represents 50% of the total traffic fatalities for 1988. \textit{Id.}


alcohol-related crashes. Thus, according to these figures, from 1995 through 1999, alcohol-related traffic fatalities were decreasing. In 2000, however, 16,653 persons were killed in alcohol-related traffic fatalities, an increase of 4% from 1999.

In 2000, "an estimated 310,000 persons were injured in crashes where police reported that alcohol was present." According to the NHTSA, "the rate of alcohol involvement in fatal crashes is more than 3 times as high at night as during the day." For all crashes the alcohol involvement rate is more than 4 times as high at night [as during the day].

Recognizing the alarming prevalence of drunk driving accidents, the Supreme Court noted: "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."

Indicative of America's continuing interest in diminishing the often tragic incidents of drunk driving, in 2000, President Clinton signed into law a measure that sets a national standard of a .08 BAC as the legal level for drunk driving. The measure requires states to adopt a .08 BAC standard by 2004. States failing to act in accordance with the

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47. Id.

48. Id. (61% at night versus 18% during the day).

49. Id. (17% at night versus 4% during the day).

50. Breithaupt v. Abram, 352 U.S. 432, 439 (1957); see also Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical.").

51. Drunk-Driving Limit Is Signed into Law, WASH. POST, Oct. 24, 2000, at A5, 2000 WL 25424190. Citing the NHTSA, Mothers Against Drunk Driving claims, "[a] 170-pound male typically would have to consume more than four drinks in one hour on an empty stomach to reach a BAC of .08. A 137-pound female typically would have to consume three drinks in the same time frame" to reach a .08 BAC. Mothers Against Drunk Driving, Stats & Resources, at http://www.madd.org/stats/0,1056,1767,00.html (last visited Mar. 31, 2002).

52. Scott Bowles, National Drunken-Driving Standard Passes, USA TODAY, Oct. 4, 2000, at 3A, 2000 WL 5791494. As of October 2000, eighteen states and the District of Columbia had a .08 BAC level for drunk driving and thirty-one states had a .10 level; Massachusetts deem a .08 BAC "evidence but not proof of drunkenness." Id. As of July 2001, the NHTSA reports that since the passage of the .08 BAC law in October 2000, "ten [additional] states have passed laws or have a law pending the Governor's signature" adopting the .08 BAC standard, bringing the total to twenty-eight states complying with the new law (two states have laws awaiting the Governor's signature), as well as Puerto Rico and the District of Columbia. Nat'l Highway Traffic Safety Admin. U.S. Dep't of Transp., National Highway Traffic
new national standard could lose millions of dollars in federal highway funds.\textsuperscript{53} Clinton said, “this .08 standard is the biggest step to toughen drunk driving laws and reduce alcohol related crashes since a national minimum drinking age was established a generation ago.”\textsuperscript{54} The new law, according to Clinton, is reasonable and will be effective in making drivers more careful of drinking and driving.\textsuperscript{55} The President noted that, “[a]lcohol is still the single greatest factor in motor vehicle deaths and injuries. This law, .08, is simply a common sense way to help stop that.”\textsuperscript{56} Stopping “that” is, of course, a most laudable goal, one which proponents of the Sniffer hope can be achieved by detecting more drunk drivers in the beam of a flashlight. Where the Sniffer is concerned, however, reducing the number of alcohol-related fatalities is not the problem. No one can deny the societal benefits of eradicating drunk driving. The problem, if there is one, is in the manner by which the Sniffer detects the drunk drivers in the first place.

III. SEIZING THE DRIVER

A. The Initial Stop of the Driver

Quite obviously, before a driver gazes into the “high intensity” flashlight beam of the Sniffer and unwittingly provides a breath sample for the alcohol sensor, a police officer must have stopped the driver. Stopping a motorist implicates the Fourth Amendment because, as the Court pointed out in Delaware v. Prouse,\textsuperscript{57} “stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth Amendment] even though the purpose of the stop is limited and the resulting detention quite brief.”\textsuperscript{58} In Prouse, a police officer stopped

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\item Bowles, supra note 52, at 3A. States failing to adopt the .08 BAC as the legal level for drunk driving by 2004 will lose 2\% of their federal highway funds. Id. By 2007, the penalty for noncompliance will increase to an 8\% loss of federal highway funds. Id.
\item Clinton’s Remarks on Drunk Driving Standard, U.S. NEWSWIRE, Oct. 23, 2000, at 10:05 am EDT, 2000 WL 26850117. The President said experts who have studied the .08 standard estimate that it will save at least 500 lives a year. Id.
\item Id.
\item Id.
\item 440 U.S. 648 (1979).
\item Id. at 653; see also Whren v. United States, 517 U.S. 806 (1996). In Whren,
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a vehicle merely to check the driver's license and registration and as a result of the stop, seized some marijuana in plain view in the car. The trial court granted the driver's motion to suppress the seized narcotics after finding the stop to be in violation of the Fourth Amendment. The Delaware Supreme Court affirmed, holding "that 'a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution.'" The Supreme Court affirmed, holding that stopping a vehicle only to check a license and registration, where there is neither probable cause to believe the driver is violating the law nor reasonable suspicion to believe the driver is unlicensed or the car unregistered, amounts to an unreasonable seizure under the Fourth Amendment.

The Supreme Court upholds suspicionless seizures of motorists only in limited situations. In *Michigan Department of State Police v. Sitz*, the Court found no Fourth Amendment violation with regard to a

the Court stated:

Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of [the Fourth Amendment]. An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances.

*Id.* at 809-10 (citations omitted).


60. *Id.* at 651.

61. *Id.* As enunciated in *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)), the typical formulation of reasonable suspicion is ""where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . ., the officer may briefly stop the suspicious person and make 'reasonable inquiries' aimed at confirming or dispelling his suspicions."" In *Alabama v. White*, 496 U.S. 325, 330 (1990), the Court said:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

62. *Prouse*, 440 U.S. at 661, 663. The Court noted that such stops would give officers too much discretion to stop motorists and intrude upon privacy interests guaranteed by the Fourth Amendment. *Id.* at 661-63. The Court did state, however, in dictum, that its holding did not prevent the State of Delaware or other states ""from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion."" *Id.* at 663. The Court suggested that stopping and questioning all traffic at roadblocks may be a constitutional alternative to the random seizures it struck down in the case. *Id.;* see Richard A. Ifft, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1459 (1983) (suggesting that lower federal and state courts have relied on the *Prouse* dictum to uphold roadblock stops).

sobriety checkpoint program that allowed police to stop all vehicles and check all drivers for signs of intoxication even in the absence of individualized suspicion that any particular driver was intoxicated. The Court determined that "the balance of the State’s interest in preventing drunken driving, the extent to which [the checkpoints could] reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped" justified the State’s sobriety checkpoint program.

Suspicionless seizures of motorists were also upheld in *United States v. Martinez-Fuerte* where the Court rejected a Fourth Amendment challenge to the operation of fixed checkpoints near the Mexican border that allowed police to stop and briefly question motorists about their citizenship without any individualized suspicion that any particular car contained illegal aliens. Here too, the Court engaged in a balancing analysis, weighing the public interest against the individual’s Fourth Amendment interest in being free from arbitrary governmental intrusions.

Motorists may be stopped on the basis of a reasonable articulable suspicion. In *United States v. Hunnicutt*, a police officer followed a vehicle for about five miles as it weaved across the shoulder and center

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64. *See id.* at 447, 455. The program provided that "[a]ll vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication." *Id.* at 447. Drivers not showing any signs of intoxication would be permitted to go on their way. If, however, an "officer detected signs of intoxication, the motorist would be directed to [pull aside] where an officer would check the motorist’s driver’s license and car registration and, if warranted, conduct [field] sobriety tests." *Id.* An arrest would be made where the combination of the officer’s observations and the field sobriety tests suggested intoxication. *Id.*

65. *Id.* at 455. This balancing test was derived from *Brown v. Texas*, 443 U.S. 47, 50–51 (1979), where the court set out that "[t]he reasonableness of seizures that are less intrusive than a traditional arrest" depends on a balance between "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”


67. *Id.* at 555.


Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose “observations lead him reasonably to suspect” that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to “investigate the circumstances that provoke suspicion.” *Id.* at 439 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (footnote omitted)).

69. 135 F.3d 1345 (10th Cir. 1998).
The officer stopped the vehicle, suspecting that the driver was under the influence of alcohol. The driver argued that the stop was in contravention of the Fourth Amendment because no traffic violations had transpired and the lane weaving was merely a pretext to search the vehicle. The tenth circuit disagreed; to justify the stop, the government was not required to show an actual traffic violation. The court said:

An initial traffic stop is valid under the Fourth Amendment not only if based on an observed traffic violation, but also if the officer has a reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring. Our sole inquiry is whether the particular officer had reasonable suspicion that the particular motorist violated "any... of the multitude of applicable traffic and equipment regulations" of the jurisdiction.

The court found the stop consistent with the Fourth Amendment because the officer had both a reasonable articulable suspicion that the driver had violated a traffic law pertaining to the proper use of lanes and a reasonable articulable suspicion that the driver was under the influence of alcohol.

Thus, for the initial stop to be lawful, the driver must have been pulled over because the officer: (1) had probable cause to believe the driver had committed a traffic violation; or (2) had a reasonable articulable suspicion that the driver had committed a traffic violation or was under the influence of alcohol. Also, the officer might pull over a motorist for a traffic violation and, in the course of investigating that violation, circumstances may give rise to a reasonable articulable suspicion that the driver is intoxicated or under the influence of alcohol. Following Prouse, a driver may not be pulled over for no reason (excluding sobriety checkpoints and fixed interior border checkpoints).

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70. *Id.* at 1347.
71. *Id.* at 1348.
72. *Id.*
73. *Id.* (citations omitted) (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979)).
74. *Id.* In Carlsen v. Duron, No. 99-4065, 2000 U.S. App. LEXIS 21428, at *2, *6-7 (10th Cir. Aug. 24, 2000). officers stopped the driver for making a wide right hand turn in violation of a Utah statute, driving too slow, and braking for no reason. The court concluded the stop was not only supported by probable cause due to the observed traffic law violation but also by a reasonable suspicion that the driver was under the influence of alcohol.
75. Another case reproving random, suspicionless stops of motorists for investigatory purposes is United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975), which requires roving border patrol agents to have a reasonable suspicion that an illegal alien is in the car to stop and question motorists.
B. Arresting the Driver

To subsequently arrest a driver who has been lawfully stopped for a traffic violation, a police officer must have probable cause. The Warrant Clause of the Fourth Amendment provides, "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." Hence, an arrest warrant must be based upon probable cause. A warrantless arrest must also be supported by probable cause. "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Once a lawful arrest is made, police officers are authorized to perform a full body search of the arrestee, pursuant to the "search incident to arrest" exception to the warrant requirement. Therefore, to effectuate a valid drunk driving arrest, an officer must lawfully stop the driver and the vehicle and then ascertain "facts and circumstances" giving rise to probable cause to warrant such an arrest.

76. U.S. Const. amend. IV.
77. Rule 4(a) of the Federal Rules of Criminal Procedure states:
If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it.
78. E.g., United States v. Watson, 423 U.S. 411, 415 (1976) (stating that 18 U.S.C. § 3061 "represents a judgment by Congress that it is not unreasonable under the Fourth Amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so"); Beck v. Ohio, 379 U.S. 89, 91 (1964) (noting that the validity of Beck's arrest, where the officers had no arrest warrant, depended on whether the officers had probable cause to make such an arrest); Draper v. United States, 358 U.S. 307, 309–10, 314 (1959) (explaining that because a federal narcotic agent had probable cause under the Fourth Amendment and reasonable grounds under section 104(a) of the Narcotic Control Act of 1956 to believe that Draper had committed a violation of narcotics laws, Draper's arrest "was therefore lawful").
79. Draper, 358 U.S. at 313 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).
80. Chimel v. California, 395 U.S. 752, 762–63 (1969). Following an arrest, a police officer may search the arrestee and the area "'within his immediate control'" to remove any weapons and seize any evidence in the arrestee's possession to prevent its destruction. Id. at 763.
IV. THE LAW AS IT PERTAINS TO SEARCHES

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Writing for the majority in *Katz v. United States,* Justice Stewart, in determining when a search occurs, wrote: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Justice Harlan, writing a concurring opinion, hung the question of what constitutes a search on a privacy rung. He stated: "[A] person has a constitutionally protected reasonable expectation of privacy." A reasonable expectation of privacy is based on a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Thus, to implicate the Fourth Amendment, the Sniffer must be found to infringe upon a driver's reasonable expectation of privacy which, in turn, is based upon the existence of a subjective expectation of privacy that society deems legitimate. If the Sniffer's operation constitutes a search, then a further inquiry of whether such a search may be unreasonable is required.

At the outset of the Fourth Amendment analysis, the question stands whether the Sniffer's operation can be said to constitute a search. With its dual capabilities, that of a flashlight and an alcohol sensor, the answer is perhaps not immediately apparent. This Part will first explore the law surrounding the use of flashlights and then look at how breath alcohol screening instruments square with search law before attempting

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81. U.S. CONST. amend. IV (emphasis added).
82. 389 U.S. 347 (1967).
83. *Id.* at 348, 351–52 (citations omitted). In *Katz,* the Court found the electronic monitoring of the defendant's conversations constituted a search. Although the defendant could be seen inside the phone booth, what he sought to preserve as private was his conversation, which he did by shutting the door to the booth. *See id.* at 352–53.
84. *Id.* at 360. In *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965), the Court found a right of privacy to exist within the penumbras of the specific guarantees of the Bill of Rights. The Court noted that "the Fourth Amendment . . . creat[es] a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'" *Id.* at 485 (quoting *Mapp v. Ohio,* 367 U.S. 643, 656 (1961)). Writing for the dissent in *Schmerber v. California,* 384 U.S. 757, 778–79 (1966), Justice Douglas wrote, "the Fourth Amendment recognizes that right [of privacy] when it guarantees the right of the people to be secure 'in their persons.'"
86. *Id.* at 361.
87. See supra text accompanying notes 1–3.
to predict where the Sniffer, which is, in effect, a combination of the two, will come out.

A. Flashlights

Assuming a car is first lawfully stopped, a police officer's subsequent use of a flashlight to illuminate the interior of the vehicle has been consistently upheld as a nonsearch under the Fourth Amendment. In *Texas v. Brown*, an officer stopped respondent Brown's vehicle during a routine driver's license checkpoint. The officer asked Brown for his license and shined his flashlight into the car whereupon he observed Brown remove his hand from his pocket with a green balloon wrapped between his two fingers. Brown dropped the balloon onto his seat and reached across to open the glove compartment, at which point the officer "shifted his position in order to obtain a better view of the interior of the glove compartment." Reversing the judgment of the Texas Court of Criminal Appeals, the Supreme Court stated:

88. A driver who has been pulled over by a police officer has been "seized" within the meaning of *Terry v. Ohio*. 392 U.S. 1, 19 n.16 (1968) (stating that a seizure takes place when the officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen"); see also *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (explaining that "stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief"). Because a vehicle stop constitutes a seizure, it must not be unreasonable under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). Such a seizure can be reasonable and therefore lawful when based on probable cause or the lesser standard of reasonable suspicion. See supra Part III.A.

89. *E.g.*, *United States v. Booker*, 461 F.2d 990, 992 (6th Cir. 1972) (stating that "[f]lashing the flashlight in the rear of the car did not constitute a search of the car"); *United States v. Kim*, 430 F.2d 58, 61 (9th Cir. 1970) ("[T]he officer flashed his flashlight into the car, which he had a right to do for his own protection if for no other reason. Such conduct does not constitute a search.") (citation omitted); *State v. Lamp*, 322 N.W.2d 48, 52 (Iowa 1982) (explaining that the use of artificial light to "illuminate articles that would be readily visible in daylight" does not render invalid the observation of items in plain view inside a vehicle, and thus does not constitute a search); *State v. Shevchuk*, 191 N.W.2d 557, 558-59 (Minn. 1971) (holding an officer's observation of a firearm in plain sight in defendant's automobile, where the officer shined his flashlight into the vehicle, was not a search within the meaning of the Fourth Amendment).


91. Id. at 733.

92. Id. at 733-34.
It is . . . beyond dispute that [the officer's] action in shining his flashlight to illuminate the interior of Brown's car trenched upon no right secured to the latter by the Fourth Amendment. The Court said in *United States v. Lee*: "[The] use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.93

Moreover, whatever officers may discover by utilizing a flashlight to illuminate the inside of the vehicle is said to fall within the plain view doctrine.94 In *United States v. Johnson*,95 officers stopped a vehicle for running a stop sign.96 One officer shined a flashlight into the vehicle to perform an inventory search after arresting the driver on an outstanding warrant. A sawed-off shotgun appeared to be lodged between the cushions of the back seat and the officer seized it.97 Applying the plain view doctrine, the eighth circuit upheld the district court's denial of the driver's motion to suppress the shotgun as having been retrieved pursuant to a warrantless search of the vehicle.98 The court said: "Under the 'plain view' doctrine, a plain view observation made by a police officer from a position where the officer is entitled to be is not a 'search' within the meaning of the Fourth Amendment. Consequently, the restrictions of the Fourth Amendment are not applicable."99 The court reasoned that the officer had a right to be in a position to view the inside of the vehicle because of the traffic stop and upheld his use of the flashlight.100 The court stated: "The fact that the contents of the vehicle may not have been visible without the use of artificial illumination does

93. *Id.* at 739–40 (citation omitted). Wayne R. LaFave offers the following explanation for why courts treat the use of a flashlight as a nonsearch: "[T]he owner or operator of an automobile parked or being operated upon a public thoroughfare does not have a justified expectation that such a common device as a flashlight would not be used during the nighttime to see what would be visible without such illumination during daylight hours." WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.2(b) (3d ed. 1996).

94. *E.g.*, *United States v. Landry*, 903 F.2d 334, 337 (5th Cir. 1990) ("After Polk got out of the truck, Officer Roy shined his flashlight into the cab of the truck and discovered the money which was in plain view. His use of the flashlight to aid his vision did not transform an otherwise valid plain view observation into an illegal search."); *United States v. Hood*, 493 F.2d 677, 680 (9th Cir. 1974) ("An officer shined his flashlight in the car and saw vials of pills in plain view in Mrs. Hood's open purse. His use of the flashlight did not constitute a search and what he saw was encompassed within the plain view doctrine."); *Booker*, 461 F.2d at 992 ("Since it would not constitute a search for the officer to observe objects in plain view in the automobile in daylight, it ought not to constitute a search for him to flash a light in the car as he was walking past it in the night season.").

95. 506 F.2d 674 (8th Cir. 1974).

96. *Id.* at 675.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 676.
not preclude such observation from application of the ‘plain view’ doctrine.”

By illuminating the inside of a vehicle, the case law makes clear that the Sniffer, as a flashlight, is not performing any search proscribed by the Fourth Amendment. Any objects of an apparently criminal nature would presumably be subject to seizure under the plain view doctrine as if the officer were using a plain flashlight with no alcohol-sensing capabilities. When the beam of the Sniffer’s flashlight is turned on, the driver, at this point, has no Fourth Amendment shield to raise; the necessity for its protections has yet to come into play.

B. Breath Alcohol Screening Instruments

Once the driver is asked to speak so that the Sniffer’s alcohol sensor may sample his breath and provide the officer with an approximate BAC, the landscape begins to change. Laying the foundation for the law as it pertains to governmental intrusions into the human body, in Schmerber v. California, the Supreme Court held that a compulsory blood test constituted a search under the Fourth Amendment. Following an automobile accident, the petitioner was arrested at a hospital for driving under the influence of alcohol because based on the petitioner’s “symptoms of drunkenness” both at the scene and at the hospital, “there was plainly probable cause for the officer to arrest petitioner.” The officer ordered a physician to take a blood sample despite the petitioner’s refusal, and subsequent chemical testing of the sample revealed intoxication. The results of this testing were later used at trial.

In addressing the petitioner’s argument that the blood test transgressed his right to be free of unreasonable searches and seizures under the Fourth Amendment, the Court noted that blood tests “plainly constitute

101. Id.; see also Marshall v. United States, 422 F.2d 185 (5th Cir. 1970).
When the circumstances of a particular case are such that the police officer’s observation would not have constituted a search had it occurred in daylight, then the fact that the officer used a flashlight to pierce the nighttime darkness does not transform his observation into a search. Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned... The plain view rule does not go into hibernation at sunset.

103. Id. at 768–69.
104. Id. at 758–59.
searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." The Court, in its analysis, undertook a dual inquiry of "whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." As to the first question, the Court, commenting on "searches involving intrusions beyond the body's surface," stated:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Here, the Court said that the facts supporting the probable cause determination "suggested the required relevance and likely success of a test of petitioner's blood for alcohol." The officer was not required to obtain a search warrant prior to requesting the administration of the blood test due to the exigencies of the situation; the delay in doing so might have "threatened 'the destruction of evidence.'" The Court upheld the blood test as a valid search incident to petitioner's lawful arrest; no Fourth Amendment violation was found to exist.

Subsequent to the Schmerber decision, the Supreme Court similarly determined Breathalyzer tests to constitute searches within the meaning of the Fourth Amendment in Skinner v. Railway Labor Executives' Ass'n. The Federal Railroad Administration (FRA) adopted regulations that authorized breath and urine tests of employees who

105. Id. at 767.
106. Id. at 768.
107. Id. at 769.
108. Id. at 769–70.
109. Id. at 770.
110. Id. (quoting Preston v. United States, 376 U.S. 364, 367 (1964)). The Court stated: "We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." Id. Because of the time required in this particular case to bring the petitioner to the hospital, "there was no time to seek out a magistrate and secure a warrant." Id. at 771.
111. Id. As to the second inquiry, the Court said the blood test was a reasonable way of ascertaining the petitioner's BAC and the actual test was administered reasonably. Id.
112. Id. at 772. The Court made a point of noting the narrowness of its holding to the facts of this case. The Court stated: "That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." Id.
violated safety rules and mandated blood and urine tests of employees involved in certain train accidents. The issue before the Court was whether these regulations were in contravention of the Fourth Amendment. As an initial matter, the Court assessed whether the various tests constituted searches or seizures before conducting a reasonableness inquiry. The Court stated:

We have long recognized that a “compelled intrusio[n] into the body for blood to be analyzed for alcohol content” must be deemed a Fourth Amendment search. In light of our society’s concern for the security of one’s person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee’s privacy interests. Much the same is true of the breath-testing procedures . . . . Subjecting a person to a Breathalyzer test, which generally requires the production of alveolar or “deep lung” breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search.

C. The Sniffer

For Fourth Amendment purposes, the Sniffer’s alcohol-sensing device is functionally equivalent to a Breathalyzer test. A Breathalyzer requires a person to blow into the device and provides an officer with a BAC. The Sniffer’s alcohol sensor analyzes a breath sample and provides the officer with an approximate BAC. Some posit that what the Sniffer does is justified by the plain view doctrine, and therefore argue that it is not necessary to reach a conclusion as to whether the Sniffer is performing a search. The driver’s breath is in plain view of the officer who has a right to be in a position to view that breath, assuming the stop of the vehicle is lawful. The breath is, therefore, subject to seizure under the plain view doctrine and no search of the person transpires.

The plain view doctrine is an exception to the warrant requirement

114. Id. at 606.
115. Id. at 614.
116. Id. at 616–17 (alteration in original) (emphasis added) (citations omitted); see also Commonwealth v. Quarles, 324 A.2d 452, 460 n.4 (Pa. Super. Ct. 1974) (explaining that the “Commonwealth treats the administration of a breathalyzer test as a search and seizure” because there is a seizure of air and “the material seized comes from within the suspect’s body”).
118. See supra text accompanying notes 1–3.
that justifies seizures of "evidence incriminating the accused," where the police officer has "a prior justification for [the] intrusion" that brings the officer within plain view of the item(s) to be seized. In *Harris v. United States*, the Court stated: "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Application of the plain view doctrine depends upon the following three factors: first, the officer must lawfully be in a position to view the object subject to seizure; second, the officer must have a lawful right of access to the object itself; and third, the incriminating character of the object in plain view must be "immediately apparent" to the officer. Where these three factors are satisfied, the police officer may validly seize the incriminating evidence without a warrant.

An officer who lawfully stops a vehicle based on probable cause or reasonable suspicion will lawfully be in a position to view an object in plain view inside a vehicle. Likewise, the officer will have a lawful right of access to the object itself. As to the third prong, that the incriminating character of the object be immediately apparent to the officer, the Court in *Texas v. Brown* explained that immediately apparent means only that the officer has probable cause to believe the object in plain view is evidence of a crime. While an officer cannot see breath and determine that it is likely incriminatory due to alcohol consumption, the officer certainly may smell alcohol in a driver's breath, thus giving rise to probable cause to believe the driver is intoxicated.

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119. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971). "The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure." *Id.* at 466.

120. 390 U.S. 234 (1968).

121. *Id.* at 236 (emphasis added).


   It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view, its incriminating character must also be "immediately apparent." ... Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.

*Id.* (citations omitted) (quoting *Texas v. Brown*, 460 U.S. 730, 466 (1983)).

123. *Id.*

124. See, e.g., *United States v. Johnson*, 506 F.2d 674, 676 (8th Cir. 1974).


126. *Id.* at 741-42.
In *United States v. Martinez-Miramontes*, a customs agent approached a vehicle on the roadside abandoned by two individuals and sniffed around the trunk which was "hanging pretty low." He detected the odor of marijuana. The ninth circuit disagreed with the appellant that the agent's act of sniffing around the trunk constituted a search in violation of the Fourth Amendment. The court said: "We find no distinction of substance between leaning down and turning the head to look inside a motor vehicle to see articles which then come within the 'plain view' doctrine, and leaning down and sniffing to detect the odor of marijuana." The court concluded that no Fourth Amendment intrusion took place because the agent, "by the use of [his] ordinary senses while standing in a place where [he] had a right to be standing," was allowed to "detect the nature" of whatever was contained inside the trunk. *Martinez-Miramontes* was subsequently cited with approval by the court in *United States v. Pagán* as "very persuasive on the point of the extension of the 'plain view' doctrine to the use of other senses to establish probable cause." The court continued: "No longer is an officer restricted to seizing evidence that is in 'plain view.' Now the doctrine has been expanded to cover that evidence that can be perceived by the sense of smell."

Accepting this extension of the plain view doctrine, an officer who smells alcohol on a driver's breath will satisfy the third prong of the plain view doctrine because the officer could establish probable cause to believe the driver is under the influence of alcohol. Having satisfied the three requirements of the plain view doctrine by the use of olfactory senses, the officer can seize that breath without a warrant, meaning the officer can use the information he picks up by smelling alcohol as part of his overall probable cause determination to possibly make an arrest for drunk driving. Smelling the alcoholic breath in plain view of the officer

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127. 494 F.2d 808 (9th Cir. 1974).
128. *Id.* at 809.
129. *Id.* at 809-10.
130. *Id.* at 810.
131. *Id.* (citation omitted).
132. *Id.*
134. *Id.* at 1060.
135. *Id.* at 1060-61; see also United States v. Pierre, 958 F.2d 1304, 1310 (5th Cir. 1992) ("[Border Patrol Agent] Hillin was lawfully within the car when he smelled the burned marijuana. Thus, the evidence falls within the plain view (or plain smell) exception to the warrant or probable cause requirement.").
gives the officer probable cause at this point in the detention, depending on what other factors have already transpired, to arrest the driver, or at least it gives the officer a reasonable suspicion to conduct further inquiries, such as requiring the driver to perform field sobriety tests.\textsuperscript{136} The seizure of the breath, however, does not justify a subsequent search of the breath by the Sniffer's alcohol sensor, absent consent on the part of the driver.\textsuperscript{137} The driver's breath is sucked into the alcohol sensor, put through a chemical analysis, and then the sensor provides the officer with information about the driver's BAC. The driver is therefore subjected to a search; the Sniffer is performing a search of the driver, apart from the officer's own ability to smell for the presence of alcohol.\textsuperscript{138}

V. THE REASONABLENESS INQUIRY

If the argument is accepted that, based on \textit{Skinner},\textsuperscript{139} the Sniffer is performing a search of the person within the meaning of the Fourth Amendment. The officer need only have a reasonable suspicion of intoxication to require a lawfully detained driver to submit to field sobriety tests. \textit{E.g.}, Kinberg v. District of Columbia, No. 94-2516 (PLF), 1998 WL 10364, at *28 (D.D.C. Jan. 5, 1998), \textit{aff'd sub nom.} Rogala v. District of Columbia, 161 F.3d 44 (D.C. Cir. 1998).

\textsuperscript{136} The officer need only have a reasonable suspicion of intoxication to require a lawfully detained driver to submit to field sobriety tests. \textit{E.g.}, Kinberg v. District of Columbia, No. 94-2516 (PLF), 1998 WL 10364, at *28 (D.D.C. Jan. 5, 1998), \textit{aff'd sub nom.} Rogala v. District of Columbia, 161 F.3d 44 (D.C. Cir. 1998).

\textsuperscript{137} One might argue that exhaled breath is abandoned property and therefore is not protected under the Fourth Amendment. The Fourth Amendment does not protect abandoned property. Edward G. Mascolo, \textit{The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis}, 20 BUFF. L. REV. 399, 400–01 (1970) ("In short, the theory of abandonment is that no issue of search is presented in such a situation, and the property so abandoned may be seized without probable cause."). This argument, however, is unpersuasive. In \textit{City of St. Paul v. Vaughn}, 237 N.W.2d 365, 371 (Minn. 1975), the court explained that in the context of search and seizure, the question of abandonment is whether the defendant has "relinquished his reasonable expectation of privacy" in the discarded property "so that its seizure and search is reasonable within the limits of the Fourth Amendment. . . . What is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein." A driver's breath, exhaled from the body as the driver speaks to the officer does not constitute abandoned property because the driver certainly maintains a reasonable expectation of privacy therein, insofar as it has the capacity to reveal the driver's BAC. Furthermore, considering the driver has no choice but to exhale as part of the normal function of his respiratory system, application of the abandoned property doctrine in this context is inherently unfair.

\textsuperscript{138} In June of 2001, the Supreme Court held that the use of thermal imaging devices to measure heat emissions from private homes constitutes a search within the meaning of the Fourth Amendment and is thus presumptively unreasonable without a warrant. \textit{Kyllo v. United States}, 533 U.S. 27, 29, 40 (2001). Justice Scalia, writing for the majority, stated: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use." \textit{Id.} at 34 (citation omitted) (quoting \textit{Silverman v. United States}, 365 U.S. 505, 512 (1961)). By analogy, the Sniffer is obtaining information regarding the interior of a person—the BAC of a person's breath—and hence can be said to constitute a search.

\textsuperscript{139} 489 U.S. 602 (1989).
Amendment, then that Amendment’s protections are implicated and further analysis is required. Because “what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures,” the fate of the Sniffer falls upon a reasonableness inquiry. The Court in *Delaware v. Prouse* stated: “The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order ‘to safeguard the privacy and security of individuals against arbitrary invasions.’” The Court continued: “Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” Citing the *Prouse* balancing test as the standard for assessing the reasonableness of a governmental search, the Court in *Vernonia School District 47J v. Acton* broke the reasonableness test up into the following three factors: first, “the nature of the privacy interest upon which the search here at issue intrudes”; second, “the character of the intrusion that is complained of”; and third, “the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it.”

### A. The Privacy Interest

As to the first factor, the *Vernonia* Court explained that the Fourth Amendment only protects subjective expectations of privacy that “society recognizes as ‘legitimate.’” Furthermore, “[w]hat expectations are

140. Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)). “[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” *Id.* at 19.
143. *Id.* at 654; see also *Terry*, 392 U.S. at 21 (“[T]here is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’” (alterations in original) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967))).
145. *Id.* at 653–54.
146. *Id.* at 658.
147. *Id.* at 660.
148. *Id.* at 654 (citations omitted) (quoting New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).
legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park.” 149 Quite obviously, the individuals asserting the privacy interest at issue here—the drivers being subjected to a Sniffer search—are in cars. Drivers and passengers alike, the Supreme Court has pointed out, have “a reduced expectation of privacy” inside a vehicle. 150 Yet the justification for this reduced expectation of privacy has no logical bearing on a driver’s privacy expectation in his or her breath. As the Court noted in Robbins v. California, 151 the reduced expectation of privacy that inheres in a vehicle “arises from the facts that a car is used for transportation and not as a residence or a repository of personal effects, that a car’s occupants and contents travel in plain view, and that automobiles are necessarily highly regulated by government.” 152 A driver’s breath cannot seriously be taken to constitute “content” in plain view or a “personal effect” inside a vehicle within the meaning likely intended by the Court. 153 Moreover, the Court already decided in Skinner 154 that a person has a legitimate expectation of privacy with regard to intrusions into the body for breath. 155 Indeed, classifying Breathalyzers as searches within the meaning of the Fourth Amendment in Skinner necessarily required the Court, in light of Katz, 156 to recognize that a person has a reasonable expectation of privacy in his or her breath. This reasonable expectation of privacy would be based on a person’s actual subjective expectation of privacy which is objectively reasonable. 157 Thus, the first prong of the reasonableness inquiry can be satisfied—a driver has a subjective, legitimate, expectation of privacy in his or her breath as far as it reveals information about the state of the driver’s body, regardless of whether the individual is sitting in a vehicle or walking down the street.

149. Id. (citations omitted).
150. Wyoming v. Houghton, 526 U.S. 295, 303 (1999) (noting that drivers and passengers have a “reduced expectation of privacy with regard to the property that they transport in cars” given that cars use public roadways, are subject to be stopped and examined by law enforcement officials, aren’t intended to be warehouses for personal belongings, and are “exposed to traffic accidents that may render all their contents open to public scrutiny”).
152. Id. at 424.
153. Breath is not like an umbrella, a sawed-off shotgun, or drug paraphernalia thrown on the floor of a car.
154. See supra text accompanying notes 113–16.
156. See supra notes 11–13 and accompanying text.
Turning to the second prong, the "character of the intrusion that is complained of," merely requiring the driver to talk for a few seconds to generate the breath sample presents no apparent hardship or risk of embarrassment. Furthermore, use of the Sniffer may very well prevent an officer from making an arrest he would otherwise have made in the absence of the information provided by the instrument by dispelling a suspicion of intoxication. Perhaps most noteworthy is the fact that the Sniffer's approximate BAC reading is not admissible evidence in court. As such, the Sniffer is not providing information of an evidential nature to be used against the driver in a criminal proceeding; rather, the Sniffer's reading is meant only to provide the officer with another factor to consider in the officer's overall assessment of whether probable cause exists to arrest the driver for drunk driving. The intrusion, in the sense that the officer has knowledge of the driver's BAC, does not appear so jarring when due recognition is given to the fact that the Sniffer's results cannot be used in court.


158. Somewhat pertaining to the touted inadmissibility of the Sniffer's results is Volk v. United States, 51 F. Supp. 2d 888 (N.D. Cal. 1999), where an officer, upon stopping a driver for a traffic violation and subsequently detecting the odor of alcohol on the driver's breath, administered a series of field sobriety tests, the last of which was a "preliminary alcohol screen test." Id. at 890–91. This test required the driver to blow into a small device that provided the officer with a reading of the driver's estimated blood alcohol. The specific results of the preliminary alcohol screen test were not introduced at the driver's consequent trial on charges of driving under the influence of alcohol; however, the officer who performed the field sobriety testing did testify that the reading confirmed that the driver had consumed alcohol. Id. at 891. The preliminary alcohol screen test differs from the Sniffer in that the driver has knowledge that his or her breath is being tested to ascertain a blood alcohol level; the hallmark of the Sniffer is that it provides the officer with an approximate BAC without the driver's knowledge. Nevertheless, it is foreseeable that although officers may not testify at trial to the specific numerical reading provided by the Sniffer, they may testify, as in Volk, that the Sniffer confirmed their suspicions of intoxication. Such a statement likely has the same incriminating effect as does testimony of the specific number produced by the Sniffer. The intrusion, therefore, may not be so minimal where the Sniffer's operation can affect the results of a trial and not just serve to aid solely the officer in assessing probable cause to arrest.

159. Presumably, the makers had in mind that once the officer had probable cause to arrest the driver and did in fact arrest the driver, the officer could then administer a Breathalyzer or some other test for BAC pursuant to the state's implied consent law, the
Yet, the Sniffer is still revealing private information to the police officer about the state of the driver’s body, namely, the driver’s approximate BAC. This information is being revealed without the driver’s knowledge or consent to be tested and inform the officer of the driver’s BAC. Moreover, officers have discretion to tap the power switch on the flashlight that triggers the breath analysis of every driver they pull over, regardless of whether suspicion of alcohol consumption was a factor justifying the stop.

Furthermore, the surreptitious manner in which the Sniffer operates obviates any opportunity on the driver’s part to refuse to be subject to such testing. The Sniffer has the effect of bypassing state implied consent laws which authorize police to administer Breathalyzers only after making an arrest. Even implied consent laws provide the driver with the option of refusing to take the Breathalyzer test, although the driver will be faced with possible license suspension and like sanctions. The intrusion into a driver’s privacy is greater in a situation where the Sniffer is used as compared to a situation where it is not and the implied consent law is followed.

As to the latter scenario, the officer has to acquire probable cause to make an arrest for drunk driving, presumably using his own observations and field sobriety tests. Once the officer has made the arrest, only then may the officer request the arrested driver to submit to a Breathalyzer test. The driver may refuse to take the test.

In the Sniffer situation, on the other hand, the officer is able to conduct a search and collect an approximate BAC as part of the officer’s probable cause determination, before any arrest is made. The officer perhaps is able to make an arrest where he might not have without the aid of the Sniffer because the approximate BAC provided can bolster the probable cause determination. Of course, the officer still needs to take a

results of which are admissible in court.

160. E.g., FLA. STAT. ANN. § 316.1932 (West 2001). Section 316.1932(1)(a) provides that a driver in the state is deemed to have given consent to submit to a chemical or physical test to determine blood alcohol content “if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages.” Id. Section 316.1932(1)(a) further states: “The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving ... while under the influence of alcoholic beverages.” Id.; see also MICH. COMP. LAWS ANN. § 257.625c (West 2001).

161. For Example, section 316.1932(1)(a) states that the arrestee must be informed that the “failure to submit to any lawful test of his or her breath ... will result in the suspension of the person’s privilege to operate a motor vehicle for a period of 1 year.” FLA. STAT. ANN. § 316.1932(1)(a). Furthermore, “[t]he refusal to submit to a chemical or physical breath test ... is admissible into evidence in any criminal proceeding.” Id.
postarrest Breathalyzer reading to have admissible evidence in court, because the Sniffer’s results are not admissible. So the driver in the Sniffer situation is searched twice. Even if the drivers in both situations refuse to submit to the postarrest breath tests, the driver’s BAC in the Sniffer situation is at least already made known to the officer. 162

In those states where the implied consent laws do not require an arrest before a Breathalyzer test may be administered, 163 the need to use the Sniffer may be obviated if the police officer can administer a Breathalyzer test anyway. Pennsylvania, for example, requires the officer to have reasonable grounds before administering a breath test. 164 Under such circumstances, the argument can be made that using the Sniffer may aid the officer in forming the requisite reasonable grounds to administer the breath test. This argument, however, overlooks the fact that the Sniffer is still performing a search of the driver.

PAS Systems International, Inc., the Sniffer’s maker, posits on its Web site that the Sniffer’s purpose is to help the officer “formulate probable cause without the subject’s active involvement.” 165 Presumptively, the hope is that the officer, having utilized the Sniffer to garner probable cause, now may lawfully arrest the driver if the BAC reading indicates the appropriateness of so doing. If the argument is accepted, however, that the Sniffer performs a search of the driver, then the situation becomes one where the officer is performing a search to gather evidence to justify a subsequent arrest of the driver. That is, the officer is conducting a search to gather probable cause to make an arrest. This series of events is somewhat backwards from the typical “search incident to arrest” scenario where the officer, already armed with probable cause, makes an arrest and then searches incident to that arrest. 166

162. Moreover, even if both drivers refuse to submit to postarrest breath tests, for the driver in the Sniffer situation, the officer could still testify at trial that the reading provided by the Sniffer confirmed the consumption of alcohol, even though the officer does not testify to the specific number provided. See discussion supra note 158.

163. E.g., 75 Pa. Cons. Stat. Ann. § 1547 (West 1996 & Supp. 2001). Section 1547(a) provides that any person driving in the state is deemed to have given consent to a chemical test of breath to determine blood alcohol content “if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a motor vehicle: ... while under the influence of alcohol.” Id. In Commonwealth v. Quarles, 324 A.2d 452, 466 (Pa. Super. Ct. 1974), the court construed “reasonable grounds” to mean “probable cause.”

164. See discussion supra note 163.


The Court, in *Sibron v. New York*,\(^ {167}\) stated: "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."\(^ {168}\) Further expanding on this principle, Justice Harlan, concurring in the case, wrote:

> Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."\(^ {169}\)

*Sibron*, therefore, helps to shape the following conclusions: if the officer has no probable cause to make an arrest prior to using the Sniffer, then the officer will be executing an impermissible incident search in subsequently utilizing the Sniffer to gather the requisite probable cause to justify an arrest; if, however, the officer has probable cause to make an arrest for drunk driving prior to using the Sniffer, then the search, assuming it is reasonableness, could be justified as incident to a lawful arrest, even if the arrest is not made until after the search is conducted.\(^ {170}\)

### C. The Governmental Interests

Finally, the third prong of the reasonableness inquiry considers the "nature and immediacy of the governmental concern at issue here, and
the efficacy of this means for meeting it.” Without question, drunk driving poses a serious concern to the entire nation. Indeed, as the Court recognized in *South Dakota v. Neville*: “The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation’s highways. The carnage caused by drunk drivers is well documented... This Court... has repeatedly lamented the tragedy.” Efforts to reduce the devastating and tragic consequences of drunk driving certainly should be applauded and encouraged. The nature of the government’s concern—reducing alcohol related accidents and fatalities and making the roadways safer for all drivers—is of paramount importance. The immediacy of the concern is no less striking; the statistical data attesting to over 15,000 deaths in both 1998 and 1999, and over 16,000 deaths in 2000, is cause for alarm. President Clinton’s signing into law a national standard that declares all drivers to be considered drunk at a BAC of .08 further speaks to the magnitude of the interest in ameliorating safety on the roadways.

On the one hand, the argument stands that drunk driving is an acute problem in which the public has a legitimate, vested interest in seeing eradicated; if the Sniffer can help ferret out drunk drivers and get them off the road, then the balance must be tipped in the public’s favor. The only catch is that constitutional protections must not be thrown out the window, even for a laudable cause. While mitigating the tragedy of

173. *Id.* at 558.
174. See Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 459 (1990) (Brennan, J., dissenting) (“[C]onsensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis.”); see also New Jersey v. T.L.O., 469 U.S. 325 (1985). In *T.L.O.*, Justice Brennan stated:

The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some “balancing test” than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the “reasonable” requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”

*Id.* at 361–62 (Brennan, J., concurring in part and dissenting in part) (footnote omitted) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
drunk driving is a shared national interest, the efficacy of the Sniffer as a means to achieve this goal must not transgress the constitutional protections residing in the Fourth Amendment.

The pressing need for the Sniffer may be questionable in light of already existing testing procedures for routing out drunk drivers. Apart from the officer's own sensory perceptions of the driver, field sobriety tests can be used to aid the probable cause assessment prior to making an arrest for drunk driving. In *Kinberg v. District of Columbia*, a police officer, having lawfully stopped a vehicle for running a red light, ordered the driver out of the car for a field sobriety test after observing the driver's "glossy" eyes and "bloated" face. The United States District Court for the District of Columbia addressed the issue of what "level of suspicion [is] required for the detention of a lawfully stopped

175. "The most important test for determining intoxication or degree of intoxication has always been the subjective conclusion of the person making the determination based upon the clinical symptoms." L. Poindexter Watts, *Some Observations on Police-Administered Tests for Intoxication*, 45 N.C. L. Rev. 34, 41 (1966–1967). In a footnote, Watts states that "'clinical symptoms' is a phrase widely used in chemical-testing circles to indicate symptoms of intoxication that could be detected simply by careful observation." *Id.* at n.21.

176. *See* Stone v. City of Huntsville, 656 So. 2d 404, 409 (Ala. Crim. App. 1994). [A] stop of a motorist whom an officer reasonably suspects of driving under the influence of alcohol or drugs is no different from a *Terry* stop. Once the stop is effected, the detaining officer may, as part of the "moderate number of questions" asked of the motorist, request the motorist "to perform a simple balancing test," to recite the alphabet, and/or to perform a balancing exercise while counting aloud. If the officer's suspicions are dispelled during the brief detention and questioning, he must release the motorist. If the officer's suspicions are confirmed, he may charge the motorist with driving under the influence.


178. *Id.* at *2. The officer first instructed the driver to count to five and back on the fingers of one hand, referred to as the "'finger count' test." Next, the driver was asked to perform an "'alphabet test'" by "reciting the alphabet from H to Z with his head tilted backwards." *Id.*
driver for a field sobriety test.” 179 The court stated:

Because of the significant public interest in preventing a motorist whom an officer reasonably believes may be intoxicated from continuing to drive, and because further detention for a field sobriety test is a minimal intrusion on an already stopped individual’s privacy... many state courts have held that an officer may detain a motorist for such testing so long as there is reasonable suspicion that the driver may be intoxicated. 180

The court then adopted the reasonable suspicion standard 181 for conducting field sobriety tests and concluded that the test administered in this case satisfied that standard based on the officer’s observations of the driver and the fact that the driver ran a red light. 182

The tenth circuit similarly embraced the reasonable suspicion standard in Carlsen v. Duron. 183 Here, police officers stopped Mr. Carlsen on a suspicion that he was either intoxicated or under the influence of alcohol after observing a traffic violation and unusual driving behavior. Field sobriety tests were given and Mr. Carlsen was arrested for driving under the influence of alcohol. 184 The tenth circuit disagreed with Mr. Carlsen that his Fourth Amendment rights had been violated by requiring him to submit to the field sobriety tests. Citing the Kinberg decision, the court said that the “requisite level of suspicion for Officer Harris to conduct field sobriety tests” was met where the initial stop was justified by a reasonable suspicion of intoxication, an observed traffic violation, and “slow driving and braking.” 185

179. Id. at *8. The court stated that “[t]he [U.S.] Supreme Court has not directly addressed” this issue. Id. The Supreme Court has only stated that, while police may detain all drivers at sobriety checkpoints without any individualized suspicion, “d[etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard.” Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 451 (1990).


181. For an overview of the reasonable suspicion standard, see discussion supra note 61.


184. Id. at *2–3. Mr. Carlsen was stopped around 1:20 a.m. after making a wide right hand turn in violation of a Utah statute, driving 20 m.p.h. in a 30 m.p.h. speed zone, and tapping his brakes twice to slow down for no apparent reason. Id. at *2. He failed his field sobriety tests. Id. at *3.

185. Id. at *9.
If a police officer can require a driver to perform field sobriety tests based on only a reasonable suspicion that the driver is under the influence, and if, as a result of such testing and the officer’s own subjective observations, the officer is able to form probable cause, the Sniffer becomes almost superfluous. Probable cause to arrest the driver for drunk driving only requires “a reasonable ground for belief of guilt,” which “means less than evidence which would justify condemnation or conviction.” It does not require the officer’s assessment of intoxication to be right. “Probable cause is a flexible, common-sense standard. . . . It does not demand any showing that such a belief be correct or more likely true than false.”

D. Balancing the Vernonia Factors

The balance to be struck in weighing these three factors, the privacy interest and level of intrusion on the one hand and the governmental interests on the other, remains somewhat precarious. Initially, it is difficult to denounce an instrument that has the potential to save lives and make the roadways safer for all motorists. However, safeguarding the right to privacy can be no less important.

While all drivers may hold a privacy expectation in their breath, the level of intrusion imposed by a Sniffer search upon that privacy expectation and, concomitantly, the efficacy of the Sniffer in achieving the governmental interests, may differ, depending on the reasons a driver is stopped in the first place. A stop of a motorist is lawful when the police officer has a reasonable suspicion that the driver is operating the vehicle under the influence of alcohol. If a driver is observed weaving wildly in and out of lanes and otherwise driving erratically, appears drunk to the officer upon being stopped, slurs his speech, has glassy eyes, reeks of alcohol, and falls over upon exiting the vehicle, the driver likely gives the officer the requisite probable cause to make an arrest before a Sniffer is even operated. Such a driver falls into what shall be called the “obviously” drunk drivers.

Then there are drivers who are pulled over because they are suspected of driving under the influence even though the officer does not have immediate probable cause to make an arrest. Also falling into this

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187. Brinegar, 338 U.S. at 175 (quoting Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813)). “In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” Id.
category are drivers who are stopped for traffic violations—running a stop sign or driving with a broken taillight—and the officers, through their own observations in the course of investigating the infraction, come to suspect possible intoxication. These are the “maybe” drunk drivers, of whom officers, in addition to making their own subjective observations, may require field sobriety tests be performed. The Sniffer in this situation would augment the officer’s probable cause assessment by providing the officer with an approximate BAC.

Finally, there are those drivers who are pulled over for traffic violations and are never even suspected of having been driving under the influence of alcohol until the officer operates the Sniffer hidden inside the flashlight and gets a reading indicating the presence of alcohol. Imagine, for example, a person who has two glasses of wine at dinner and on his way home drives perfectly, although he runs through a stop sign not because he is drunk but because he is simply a bad driver, or was playing with his radio, or talking on a cellular phone. The officer pulls this man over to issue a citation for running the stop sign and never reasonably suspects alcohol to be a factor. Yet simply because he has the technology at hand, the officer turns on the Sniffer and now knows the man’s BAC. For purposes of classification, these persons will be labeled the “bad” drivers.

As to the obviously drunk drivers, the level of intrusion on their privacy interest in informing the officer of their BAC is minimized by the fact that the individuals clearly exhibit no interest in keeping their drunkenness hidden from public view. Considering that the probable cause to justify an arrest already exists, the Sniffer actually is not even needed. The officer’s own subjective observations will be enough. So while the efficacy of the Sniffer in meeting the government’s interest in detecting drunk drivers as to this particular group of drivers is questionable, the Sniffer is really not making known any information the obviously drunk driver has not already revealed. Surely it will be no surprise to the officer to discover the driver’s BAC indicates intoxication. Moreover, once arrested, the driver can be required to submit to chemical testing of blood, breath or urine depending on the state’s implied consent law. The intrusion into the privacy expectation of obviously drunk drivers is negligible; the governmental interest in getting these drivers off the road must be greater. As to these drivers, the Sniffer could be constitutional.
As to the maybe drunk drivers, the Sniffer likely admits to the same result when the government’s interests are weighed against the individual’s interest. Undoubtedly, some drivers who would have been able to slip through the cracks before by performing field sobriety tests perfectly and otherwise dispelling the suspicion of intoxication may now be arrested where the Sniffer’s BAC is a dispositive factor in the officer’s evaluation of the situation; the officer may decide, upon seeing the Sniffer’s results, that the BAC along with the officer’s observations is enough to warrant an arrest. Presumably more drunk drivers will now be arrested because it will not be as easy to fool law enforcement officials. The intrusion is likely greater here than it is for the obviously drunk drivers but probably not enough to push the Sniffer into unconstitutional territory.

The maybe drunk drivers are already suspected of being under the influence of alcohol before the Sniffer is operated. They can be asked to perform field sobriety tests, which must be at least as intrusive as a search of their breath. The Sniffer is operated only to inform the officer’s probable cause assessment; while its results may lead to an arrest, they may also serve to dispel a suspicion of intoxication and then the driver is free to go. So while these maybe drunk drivers will lift their Fourth Amendment shields and decry the intrusion into their privacy, the government’s interests once again will likely prevail.

Raising those same shields even higher are the bad drivers, for it is in this context that the intrusion seems most egregious. The use of the Sniffer becomes somewhat of a fishing expedition to catch drivers who have consumed alcohol in any amount. The officer can get a BAC even though without the Sniffer he never would have suspected alcohol to be involved; if any amount of alcohol is indicated giving the officer a reasonable suspicion that the driver has been drinking, the driver can be hassled to get out of the car and perform field sobriety tests. But for this technology, however, the driver would have gotten a ticket for the traffic violation and gone on the driver’s way.

When a driver is stopped, the scope of the officer’s investigation is dependent on the circumstances that led to the detention. 189 An officer searching a person who just ran a stop sign or who was driving with a broken taillight for a BAC when that officer has no reasonable basis for

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189. Cupp v. Murphy, 412 U.S. 291, 299 (1973) (Marshall, J., concurring) ("When a person is detained, but not arrested, the detention must be justified by particularized police interests other than a desire to initiate a criminal proceeding against the person they detain. The police therefore cannot do more than investigate the circumstances that occasion the detention."); see also United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) ("[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" (quoting Terry v. Ohio, 392 U.S. 1, 29 (1968))).
suspecting alcohol consumption is exceeding the permissible scope of his investigation. The intrusion into matters the driver seeks to keep private, namely, the driver’s BAC, is hardly palatable. The Sniffer is revealing information that would not otherwise have been disclosed and possibly leading to further testing of a driver who was merely expecting a ticket and a slap on the wrist.

For these drivers, the Sniffer has invaded their legitimate expectations of privacy as to the state of their bodies by impermissibly conducting a clandestine search of their persons and revealing their BAC to the detaining officer. The privacy interests of the bad drivers, in light of the fact that other means already exist to ferret out drunk drivers, might be important enough to render the Sniffer an unconstitutional violation of their Fourth Amendment rights.

VI. CONCLUSION

A technological device that is constitutional as to some drivers and unconstitutional as to others treads into dangerous territory where an officer has discretion to decide who can and cannot be lawfully tested. It is foreseeable that an officer could justify his use of the Sniffer on a bad driver by falsely articulating generalized statements that suggest the officer had a suspicion of alcohol consumption, thereby turning a bad driver into a maybe drunk driver.

In *Breithaupt v. Abram*190 the Court said:

> Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous.191

Such “modern scientific methods” as passive alcohol sensors must, however, recognize the constitutional protections afforded every citizen of the United States. At the rate technology is moving forward, the privacy interests protected by the Fourth Amendment must be strictly safeguarded. As the Supreme Court ever so aptly stated: “The question we confront today is what limits there are upon [the] power of

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191. *Id.* at 439 (footnote omitted).
technology to shrink the realm of guaranteed privacy." Imagine a device that could test a driver’s blood for a BAC without the driver’s knowledge and without the driver feeling a thing. Surely such a technological innovation seems intrusive. A point must exist when the individual’s privacy interests trump the technological means that would render the Fourth Amendment nothing more than mere words that had force in a world technologically ignorant from the present one. Technology has the ability to step all over whatever shreds of privacy individuals can manage to hold onto in the twenty-first century. Yet because the purpose of some of these devices, such as the Sniffer, is to aid law enforcement in decreasing crime and increasing safety for all citizens alike, exactly where the balance between privacy and crime-prevention will be drawn is hard to say. Ultimately, the Supreme Court will have to tackle the issue and if the people’s Fourth Amendment shields fall this time, given the speed of technological innovation, surely they will rise again.

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