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Articles

Since When is Dicta Enough to Trump Fourth Amendment Rights? The Aftermath of *Florida v. J.L.*

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> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.[1]

This sentiment was expressed by Justice Douglas in 1968 in his dissenting opinion in *Terry v. Ohio*,[2] a case in which the United States Supreme Court struggled to decide whether or not a police officer violated the Fourth Amendment when, without probable cause, he stopped and subsequently frisked a man the officer suspected of "casing" a store in preparation for a robbery.[3] Justice Douglas declared these ideas long before anthrax scares and

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1. Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).
2. *See Terry*, 392 U.S. 1.
3. *See id.* at 6–7.

prior to a time when Americans learned to live with a persistent and viable threat of bio-terrorism. Justice Douglas' classic sentiment, as expressed in 1968, remains true today.

The right of the people to be secure in their persons, which is guaranteed by the Fourth Amendment, is an "inestimable right of personal security [, which] belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."[4] "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'"[5]

Unfortunately for individual liberty, and the inestimable right to personal security, the Supreme Court's extraneous language in its otherwise, well-reasoned decision in *Florida v. J.L.*,[6] and the lower federal courts' interpretation of that extraneous language, have jeopardized the Constitutional right to be free from capricious stops and frivolous frisks, both of which necessarily intrude on the sanctity of the person and sometimes "inflict great indignity and arouse strong resentment . . . ."[7] When read logically and narrowly, the *J.L.* decision holds that an anonymous telephone tip, alone, does not give law enforcement a sufficient legal basis to stop or frisk a suspect.[8] Nevertheless, in dicta, the Court hypothesized about some extreme danger to the public that might justify a warrantless search based on an anonymous tip, even without probable cause and absent any showing that the anonymous tip was reliable.[9] Based on that dicta in *J.L.*, the Eleventh Circuit Court of Appeals approved a warrantless search of a suspect's home "based largely on information provided by an anonymous caller" who reported that arguing and gunshots were emanating from a specific address.[10] The Eleventh Circuit justified the search by construing the report as one of "a serious threat to human life."[11]

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4. *Id.* at 8–9.

5. *See id.* at 9 (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)); *see also* Davis v. Mississippi, 394 U.S. 721, 726–27 (1969) ("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'").

6. 529 U.S. 266 (2000).

7. *See Terry*, 392 U.S. at 16–17 ("[I]t is simply fantastic to urge that such a [frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person . . . .") (citation omitted). In *Terry*, the Court warned that such a frisk is not to be "undertaken lightly." *Id.* at 17.

8. *See* Florida v. J.L., 529 U.S. 266 (2000).

9. *See id.* at 273–74.

10. *See* United States v. Holloway, 290 F.3d 1331, 1339 (11th Cir. 2002).

11. *Id.*

If federal courts adopt the reasoning from the dicta in *J.L.*, the protections of the Fourth Amendment will vanish. Permitting law enforcement officers to conduct a *Terry* stop or, worse, a search of someone's home based on an anonymous, but urgent, report of danger or criminal conduct would "convert the *Terry* decision from a narrow exception . . . into one that swallows the general rule that searches are 'reasonable' only if based on probable cause."[12]

I. THE FOURTH AMENDMENT AND *TERRY* STOPS

The Fourth Amendment of the Federal Constitution prohibits the government from conducting "unreasonable searches and seizures."[13] Usually, therefore, a search or seizure, whether supported by a warrant, or not, must be based on "probable cause."[14] Despite the general mandate that the government have probable cause for any search it conducts or any seizure it makes, the Supreme Court has recognized that mere "reasonable suspicion"[15] under the totality of some circumstances can provide the police with an adequate legal basis to temporarily detain someone and to conduct a limited pat-down-type search of the person.[16]

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12. *See* Maryland v. Buie, 494 U.S. 325, 340 (1990) (internal quotations and brackets omitted) (Brennan, J., dissenting).

13. The Fourth Amendment states:

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

U.S. CONST. amend. IV; *see also* Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)) ("The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

14. *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (noting that "[o]rdinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon 'probable cause' to believe that a violation of the law has occurred."); *see also Mincey*, 437 U.S. at 390 (searches conducted without a warrant are per se unreasonable—subject to "a few specifically established and well-delineated exceptions.").

15. Reasonable suspicion is considerably less proof than a preponderance of the evidence. *See* Alabama v. White, 496 U.S. 325, 329–30 (1990).

16. *See Terry*, 392 U.S. 1; *see also T.L.O.*, 469 U.S. at 340 (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973)) (noting that while a search ordinarily requires "probable cause," the fundamental command of the Fourth Amendment is that searches and seizures "be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search,'" under the right circumstances, neither a warrant nor probable cause is required by the Fourth Amendment); Adams v. Williams, 407 U.S. 143, 145 (1972) (noting that a police officer may, under proper circumstances, approach a person to investigate possible criminal behavior without probable cause to arrest); *accord* Hiibel v. Sixth Judicial District Court of Nevada, 124 S. Ct. 2451, 2465 (2004) (Breyer, J., dissenting) (quoting *Terry*, 392 U.S. at 9) ("[T]he Fourth Amendment protects the 'right of every individual to the possession and control of his own person.'") (internal quotation omitted).

In *Terry v. Ohio*,[17] the Court authorized such a limited stop and search, which later became known as a "*Terry* stop."[18] During a *Terry* stop, law enforcement officers temporarily detain someone based on an officer's observation of conduct or receipt of other information that *reasonably* leads him to conclude that a crime is, or has been, committed.[19] Under the authority of *Terry*, an officer may stop a person reasonably suspected of criminal activity, question him briefly, and frisk him for weapons, as long as the frisk is necessary to protect the officer or other persons present.[20] Although such a stop and frisk is legal, an officer must have an objectively reasonable basis for the stop.[21]

In analyzing what evidence would support a valid *Terry* stop, in 1990 the United States Supreme Court, in *Alabama v. White*,[22] concluded that an anonymous telephone tip, coupled with independent police work immediately following the tip, which corroborated "significant aspects of the informer's predictions," provides the reasonable suspicion necessary to allow such a stop.[23] Ten years later, the Supreme Court held, in *Florida v. J.L.*,[24] that an anonymous telephone tip, without other corroborating evidence of a crime, does not give law enforcement *reasonable* suspicion sufficient to support a

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17. 392 U.S. 1 (1968).

18. In *Terry*, the *Terry* stop or "stop and frisk" was equated with "an on-the-street stop, [to] interrogate and pat down for weapons . . . ." *Id.* at 12. The validity and legality of a *Terry* stop is assessed under a "totality of the circumstances" standard. *See* United States v. Sokolow, 490 U.S. 1, 8 (1989) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)) (in evaluating the legality of a *Terry* stop, courts consider "'the totality of the circumstances—the whole picture.'").

19. *Terry*, 392 U.S. at 22 (emphasis added); *see also* U.S. v. Acosta, 363 F.3d 1141, 1144–45 (11th Cir. 2004) (interpreting *Terry* as establishing a two-part inquiry—first whether the officer's action was justified at its inception, (that determination turns on whether the officer had a reasonable suspicion that the defendant had engaged, or was about to engage, in a crime) and second whether the stop went too far and matured into an arrest without probable cause).

20. *Terry*, 392 U.S. at 22–24. *Terry* was premised on the fact that there is a difference between "police conduct subject to the Warrant Clause of the Fourth Amendment[]" and police action predicated on "the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *See id.* at 20. The purpose of the limited search, or "frisk," is not to discover evidence of a crime but to protect the officer while he investigates. *Adams*, 407 U.S. at 146.

21. *Terry*, 392 U.S. at 21–22; *see also Buie*, 494 U.S. at 332 (recognizing that a patdown for weapons is legally authorized "where a reasonably prudent officer" would be justified in believing that a person possessed a weapon based on specific and articulable facts, not on a mere "inchoate and unparticularized suspicion or hunch").

22. 496 U.S. 325 (1990).

23. *See id.* at 331–32.

24. 529 U.S. 266 (2000). *J.L.* was a unanimous decision. 529 U.S. at 267. But Justice Kennedy wrote a concurring opinion in which Justice Rehnquist joined. *Id.*

legal *Terry* stop.[25] In short, *J.L.* established the evidentiary floor for a stop-and-frisk.

In *J.L.*, someone anonymously called the Miami-Dade Police and reported that a young black male at a designated bus stop was carrying a gun.[26] The caller generally described the young man's physical appearance and said that the young man was wearing a plaid shirt.[27] The caller did not give her name or phone number.[28] The police did not record the conversation, and they had no other information about the informant.[29] Thus, "[a]part from the tip, the officers had no reason to suspect . . . [the young man at the bus stop] of illegal conduct."[30] An unknown time after the police received the tip, officers went to the bus station and saw three black males "hanging out."[31]

One was wearing a plaid shirt.[32] Based on the phone tip, alone, the officers approached J.L., (the young man in the plaid shirt), frisked him, and found a gun in his pocket.[33] J.L. was charged in a Florida state court with carrying a concealed firearm without a license.[34] He moved to suppress the gun.[35] Once the case percolated up through the state court system,[36] the United States Supreme Court held that an anonymous tip, lacking other indicia of reliability, does not provide the necessary legal basis to support a stop-and-

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25. *See id.* at 270 (emphasis added). In *United States v. Johnson*, 364 F.3d 1185, (10th Cir. 2004), the court aptly explained the flaws in accepting an anonymous tip, alone, as grounds to detain someone. First, a tipster who refuses to identify himself "may simply be making up the story, perhaps trying to use the police to harass another citizen." *Id.* at 1190. Second, generic tips (without specificity) could give police excessive discretion to stop and search large numbers of citizens. *Id.* at 1191. Tips without details could certainly provide police with an excuse to search a large number of young men. *Id.*

26. *J.L.*, 529 U.S. at 268.

27. *Id.*

28. *Id.* at 270.

29. *Id.* at 268.

30. *Id.*

31. *J.L.*, 529 U.S. at 268.

32. *Id.*

33. *Id.*

34. *Id.* at 269.

35. *Id.*

36. The case arose in Florida from state charges. The Florida trial court granted the defendant's motion to suppress the gun. *See J.L.*, 529 U.S. at 269. The Florida appellate court reversed. *Id.* The Supreme Court of Florida "quashed" that decision and held the search invalid under the Fourth Amendment. *Id.* The decision of the Florida Supreme Court was upheld by the United States Supreme Court. *Id.* at 268.

frisk designed to uncover a gun.[37] Accordingly, the court concluded that the trial court should have suppressed the gun.

J.L. announced an evidentiary floor for *Terry* stops and, thereby, provided certainty for defendants, law enforcement officers and prosecutors. After *J.L.*, officers knew that an anonymous telephone tip, without more, did not give them sufficient legal grounds to detain a suspect or to search a person, no matter how brief the search and no matter how limited the pat down.[38] *J.L.* provided bright-line guidance to officers. When officers received an anonymous, non-emergency, phone tip about guns or drugs, they were obligated to conduct an independent follow-up investigation to corroborate the tip, before stopping, frisking, or arresting anyone.[39] The holding in *J.L.* was logical, well-reasoned, and rested soundly within the Court's prior Fourth Amendment *Terry*-stop precedent, which had emphasized that *Terry* stops cannot rest on "inarticulate hunches," or other speculative notions.[40]

II. EMERGENCY SITUATIONS AFTER *J.L.*

Unfortunately for individual liberty, the Court in *J.L.* did not confine its comments to the facts before it. In dicta, the Court gratuitously observed that "extraordinary dangers sometimes justify unusual precautions,"[41] and the Court expressed the possibility that an anonymous tipster could allege such an

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37. *Id.* at 274. *See also* Illinois v. Gates, 462 U.S. 213, 227–28 (1983) (considering the application of the Fourth Amendment to issuance of a search warrant based on a partially corroborated anonymous tip and deciding that standing alone, an anonymous, written tip did not provide probable cause for a search warrant but that with additional corroboration, it might).

38. In evaluating where the line between constitutional and unconstitutional detentions fall, law enforcement officers should *compare Gates* and *J.L. with* Alabama v. White, 496 U.S. 325, 327–28 (1990). *White* concluded that the stop at issue, which uncovered marijuana, was authorized because it was supported by reasonable suspicion. *White*, 496 U.S. at 327; *see also* Adams v. Williams, 407 U.S. 143, 146–47 (1972) (recognizing that a legally sustainable stop-and-frisk can be based on a tip from a known informant whose reputation a law enforcement officer can assess and who can be held accountable for fabricated information).

39. *See generally J.L.*, 529 U.S. 266. Of course, the Supreme Court's decision in *J.L.* does not preclude the states from requiring even more evidence for a stop and frisk. *See, e.g.*, State v. Davenport, 603 S.E.2d 324 (Ga. Ct. App. 2004) (holding that police officers lacked reasonable, articulable suspicion to conduct a traffic stop despite an in-person tip that led police to conduct independent investigation leading officers to find drugs in a suspect's car).

40. *See, e.g.*, *Terry*, 392 U.S. at 22.

41. *See J.L.*, 529 U.S. at 272. Interestingly, just recently in another *Terry* stop case, *Hiibel v. Sixth Jud. Dist. Ct. of Nevada*, the Supreme Court found itself distancing itself from its prior dicta by stating "[w]e do not read these statements as controlling . . . . [W]e cannot view the dicta in Berkemer [v. McCarty, 468 U.S. 420 (1984),] or Justice White's concurrence in *Terry* as answering the question . . . ." *Hiibel*, 124 S. Ct. at 2459.

extreme danger "as to justify a search even without a showing of reliability."[42] Although acknowledging that "[t]he facts of . . . [*J.L.*] d[id] not require [the Court] to speculate about the circumstances under which the danger[s] alleged in an anonymous tip might be so great . . .[,]"[43] the Court continued: "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."[44]

Despite its musings, the Court rejected the government's argument that an extraordinary danger exception should apply to cases involving automatic firearms,[45] remarking that "[s]uch an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun."[46] Although the Court in *J.L.* correctly decided the case before it, the damage from its dicta was done.[47]

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42. *See J.L.*, 529 U.S. at 273.

43. *Id.*

44. *Id.*

45. *Id.* at 272.

46. *Id.* The Court also recognized that it would be difficult to restrict an extraordinary danger exception to guns. *J.L.*, 529 U.S. at 272. "Nor could one securely confine such an exception to allegations involving firearms." *Id.* "'[T]he reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others,' thus allowing the exception to swallow the rule[]." *Id.* at 273 (quoting Richards v. Wisconsin, 520 U.S. 385, 393–94 (1997)).

47. The Court's steady precedent had already provided a legally appropriate exception to the warrant requirement for emergency situations and other exigencies. *See Mincey*, 437 U.S. at 392 (recognizing that both "state and federal cases have [acknowledged] that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid []" and noting that "'[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'") (quoting Wayne v. United States, 318 F.2d 205, 212 (1963))). *See also* Michigan v. Tyler, 436 U.S. 499, 509 (1978) (holding that a burning building presents an exigency sufficient to render a warrantless entry of a commercial building reasonable.); Warden v. Hayden, 387 U.S. 294, 298 (1967) (recognizing that the exigencies of the situation involving the pursuit of an armed robber into a home permitted the entry without a warrant); Johnson v. United States, 333 U.S. 10, 14–15 (1948) (noting in the context of an unconstitutional, warrantless search of a hotel room that "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."). But the Court's prior exceptions have all been premised on an officer entering or searching based on his or her *reasonable* belief that an emergency or exigency exists. The Court's dicta in *J.L.* would permit law enforcement officers to search and/or seize without any reliable information and without any reasonable basis.

III. THE LOWER FEDERAL COURT'S RESPONSE TO *J.L.*

Circuit Decisions Generally—Even aside from the context of emergent situations, after *J.L.*, as long as an officer conducts a *Terry* stop on the basis of some piece of reliable evidence beyond an anonymous phone tip, courts regularly deny a defendant's motion to suppress evidence found during such a stop. In short, federal court decisions after *J.L.* demonstrate that an anonymous tip, plus any other indicator of reliability, will suffice as "reasonable suspicion" necessary for a legal *Terry* stop.[48] I call the federal courts' application of the holding in *J.L.*, the "anonymous tip + 1-standard."

A. Anonymous In-person Tips Are Considered Inherently More Reliable Than Anonymous Telephone Tips.

The circuit courts have decidedly declared that *in-person*, anonymous tips are inherently more reliable than anonymous *telephone* tips. Thus, the federal courts have regularly held that anonymous in-person tips are legal authorization for a *Terry* stop. In fact, the federal courts have generally *presumed* the reliability of in-person tips, even when such tips lack any other indicia of reliability.

In *United States v. Heard*,[49] the Eleventh Circuit affirmed the district court's decision denying a defendant's motion to suppress a gun, (which a police officer found in the defendant's waistband during a stop-and-frisk), based on an anonymous in-person tip.[50] The police officer, who worked for the Atlanta metropolitan rail system[51] was patrolling an in-town rail station when a patron reported a fight within the station.[52] The officer investigated the fight and soon observed a woman and man in a heated dispute.[53] The officer approached the two embroiled in the conflict and asked what was happening.[54] The woman claimed that the man owed her fifty dollars; the man agreed that he owed the money.[55]

While the officer was still present, the man paid the woman the money he owed and after the argument was resolved, the officer walked from the

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48. This holds true in cases involving guns, drugs, and other common contraband.
49. 367 F.3d 1275 (11th Cir. 2004).
50. *See id.* at 1278.
51. *Id.* at 1276–77. The system, which operates in Atlanta, Georgia, is commonly called MARTA.
52. *Id.*
53. *Id.* at 1277.
54. *Heard*, 367 F.3d at 1277.
55. *Id.*

scene with the woman.[56] As the two walked away, the woman told the officer that the man was carrying a gun.[57] Based on the woman's tip, the officer turned toward the man, made eye contact with him, and told him to "get his hands up."[58] The man complied, but, as he did, the woman entered an arriving MARTA train and left the transit station. The officer did not obtain the woman's name or any other information from her.[59] Because the woman fled the station, the officer thought her tip about the gun might not be reliable. But for his own safety and for the safety of the other commuters within the MARTA station, the officer placed the man in handcuffs and frisked him.[60] During the frisk, the officer found a .38 Special in the man's waistband.[61]

Citing *J.L.*, the man moved to suppress the gun, arguing that the woman's anonymous tip was legally insufficient for the frisk, because the tip was inherently unreliable in light of its anonymity. The Eleventh Circuit rejected the man's anonymity argument and quickly distinguished the *J.L.* decision.[62] The Eleventh Circuit concluded that unlike the situation in *J.L.*, the officer in *Heard* "had an opportunity to judge the reliability of the face-to-face informant . . . ."[63] In fact, the Eleventh Circuit "presumed"[64] that a face-to-face anonymous tip is more reliable than an anonymous telephone tip "because the officers receiving the information have an opportunity to observe the demeanor and perceived credibility of the informant."[65] In other words, in *Heard*, there was an anonymous tip about a gun, plus one other factor of reliability —the ability of the officer to judge the reliability of the anonymous informant first hand. Accordingly, the Eleventh Circuit deemed the anonymous tip sufficiently reliable to support a valid *Terry* stop.

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Heard*, 367 F.3d at 1277.
60. *Id.*
61. *Id.* at 1277–78.
62. *Id.* at 1278.
63. *Id.* at 1279.
64. In presuming that the face-to-face tip was more reliable than a telephone tip, the court was favorably impressed by the reasoning of several other circuit courts that had decided similar cases. In this regard, *Heard* cited the following: United States v. Valentine, 232 F.3d 350, 354 (3d Cir. 2000) (distinguishing *J.L* and finding that an anonymous face-to-face tip is inherently more reliable than an anonymous telephone tip); United States v. Christmas, 222 F.3d 141, 143–44 (4th Cir. 2000) (distinguishing *J.L.* and holding that an officer's face-to-face encounter with a neighbor is altogether different from an anonymous tip); and United States v. Sierra-Hernandez, 581 F.2d 760, 763 (9th Cir. 1978) (noting that while "there is no per se rule of reliability[,]" information from a citizen who confronts an officer in-person to advise that a designated individual is committing a specific crime should be given serious attention and great weight by an officer).
65. *Heard*, 367 F.3d at 1279; *see also Valentine*, 232 F.3d at 354.

Many other circuits have also ruled that anonymous in-person tips are sufficiently reliable to authorize a *Terry* stop. For instance, in *United States v. Valentine*,[66] the Third Circuit Court of Appeals held that an anonymous face-to-face tip validates a stop-and-frisk.[67] The Third Circuit distinguished the facts of *J.L.*, and emphasized the freshness of an in-person tip.[68] The court also concluded that a face-to-face tip is inherently more reliable than an anonymous telephone call.[69]

Similar to the holdings in *Heard* and *Valentine*, in *United States v. Dotson*,[70] the Seventh Circuit blessed a *Terry* stop and evidence found during that stop, because the anonymous tip was relayed face-to-face.[71] As in *Heard* and *Valentine*, the *Dotson* court distinguished *J.L.* "[T]he outcome of *J.L.* is not controlling here, both because the Court itself was not addressing the reliability of a face-to-face tip, and because there are additional facts in Dotson's case that contribute to the finding of reasonable suspicion."[72] In approving the search in question, the Seventh Circuit appeared to place the greatest weight on the fact that the tip was face-to-face. "[T]he nature of the

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66. *Valentine*, 232 F.3d at 350.

67. *Id.* In *Valentine*, two police officers were patrolling a neighborhood known for violent crime, when a young man flagged them down and told the officers that he had just seen a man with a gun. *Id.* at 352. The tipster described the man's physical appearance in great detail but refused to give his own name, claiming that he was afraid of retribution from the man with the gun. *Id.* at 352. The police investigated further. While the officers looked for the man with the gun, the tipster disappeared. When the police found a man matching the description given by the anonymous tipster, the officers ordered the man to walk over and place his hands on the police car. The man said, "Who me?" and ran toward one of the officers. *Id.* at 355. The officers stopped the man and wrestled him to the ground. *Valentine*, 232 F.3d at 355. As they did, they heard his gun "ting" against the ground. *Id.* When the officers frisked the man, they found a gun. *Id.* at 353. Relying on the *J.L.* decision, the district court suppressed the gun. *Id.* at 352.

68. *See id.* at 354 (citing Adams v. Williams, 407 U.S. 143, 147 (1972)) (noting the importance of a witness's "recent report."); *see also Adams*, 407 U.S. at 146 (emphasizing the importance of an "immediately verifiable" tip).

69. *Valentine*, 232 F.3d at 354.

70. No. 03-4352, 2004 WL 1435203, at *2 (7th Cir. June 25, 2004).

71. *Id.* In *Dotson*, an Indianapolis police officer was on patrol in a residential neighborhood. *Id.* at *1. The officer approached an intersection and noticed several people huddled together and what appeared to be an altercation. *Id.* The officer saw a woman attempting to restrain a man (the defendant) from assaulting another woman. *Id.* When the officer got out of his patrol car and approached the group, the group scattered. *Dotson*, No. 03-4352, 2003 WL 1435203, at *1. After the defendant walked away from the area of the altercation, the defendant entered a parked car and drove off. *Id.* One lone bystander remained behind. *Id.* That bystander reported that people gathered as a result of a domestic dispute and said that the man who had just driven off (the defendant) "has a gun." *Id.* When a second officer arrived at the scene, the first officer shouted to stop the car driven by the defendant, indicating that the defendant/driver had been involved in a fight and might be armed. *Id.* Ultimately, the police stopped the defendant and found a gun under the driver's seat of the car he was driving. *Dotson*, No. 03-4352, 2003 WL 1435203, at *1.

72. *Id.*

tip that [the officer] received about Dotson differs crucially from the tip received in *J.L.*—namely, in how it was delivered."[73]

The circuit courts' consistent distinction between anonymous calls and "anonymous" in-person tips is consistent with the language in both *J.L.*'s majority opinion and Justice Kennedy's concurring opinion. In *J.L.*, the Court distinguished cases in which the officers' suspicion of illegal conduct arises from "observations of their own."[74] Justice Kennedy also distinguished such circumstances, noting that "a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action."[75] Justice Kennedy also said that cases in which "an informant places his anonymity at risk" were different.[76] He gave an example: "An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring."[77]

Although arguably grounded on dicta, the circuit courts' disparate treatment of the two types of "anonymous" tips is justified from both a legal and common sense perspective, because an in-person tip is not truly anonymous, as long as a law enforcement officer has a reasonable likelihood of identifying the tipster later.[78] As the Seventh Circuit noted in addressing whether a face-to-face anonymous tip is sufficient to justify a *Terry* stop, there are many reasons to credit a face-to-face tip, when the same information delivered anonymously by phone might not deserve credibility.[79] "First, when a tip is given in person, an officer can 'size up' the credibility of the tipster by

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73. *Id. See also* United States v. Gay, 240 F.3d 1222, 1227 (10th Cir. 2001) (emphasizing the important difference between an anonymous tip and one received by officers during face-to-face discussions with an unnamed informant); United States v. Thompson, 234 F.3d 725, 729 (D.C. Cir. 2000) (holding that in-person tip was "inherently more trustworthy" than the tip from the unidentified caller in *J.L.* and noting that the tip demonstrated the "recency and the proximity of [the tipster's] claimed observation."); United States v. Christmas, 222 F.3d 141, 144 (4th Cir. 2000) (denying the defendant's motion to suppress evidence, noting that a face-to-face encounter with an anonymous tipster does not pose the same credibility problems seen in *J.L.*).

74. *See J.L.*, 529 U.S. at 270.

75. *Id.* at 275 (Kennedy, J., concurring).

76. *Id.* at 276 (Kennedy, J., concurring).

77. *Id.* (Kennedy, J., concurring).

78. *See* United States v. Jenkins, 313 F.3d 549, 556 (10th Cir. 2002) (noting that informant risked his anonymity by repeatedly meeting with police to give detailed tips); *see also* United States v. Robertson, 305 F.3d 164 (3d Cir. 2002) (affirming district court's decision denying motion to suppress evidence found during *Terry* stop of public bus during police officer's hot pursuit of two suspects based on a van-driver's in-person tip, although van-driver did not give his name or other information before telling officers that suspects just boarded bus).

79. *See Dotson*, discussed *supra* notes 70–73.

observing [his] demeanor and by asking [follow-up] questions."[80] Second, during a face-to-face anonymous tip, an officer will typically be able to determine how the tipster would know of the alleged criminal behavior and will be able to tell if the information is sufficiently fresh.[81] Third, when a tipster delivers a tip in-person, the tipster risks that the police officer will be able to identify him or her, by using a physical description and a physical location to find the tipster later.[82]

In sum, after *J.L.*, the federal appellate courts have routinely and consistently distinguished cases involving mere anonymous phone tips and have held that "anonymous" in-person tips are legally different. In fact, many courts have presumed that a face-to-face tip provides law enforcement with the reasonable suspicion they need to temporarily detain a suspect and to pat the suspect down for weapons.

B. *Anonymous Phone Tip, Plus Defendant's Own Conduct or Police's Additional Investigation, Will Support a* Terry *Stop.*

After *J.L.*, the federal appellate courts have also routinely held that an anonymous phone tip, coupled with one other factor of corroboration and/or reliability (not present in *J.L.*), provides sufficient legal grounds to support an officer's stop-and-frisk. For instance, in *United States v. Johnson*,[83] the Tenth Circuit upheld a stop-and-frisk that originated with an anonymous phone call because "accompanying information relayed to [an officer], which included the dispatch's priority level and a description of the people and situation," were deemed adequately reliable; therefore, the court concluded, the district court erred in suppressing a .22 caliber pistol found on the defendant during a pat down.[84]

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80. *See Dotson*, No. 03-4352, 2004 WL 1435203 at *3; *see also Heard*, 367 F.3d at 1279–80 (noting that officers have a chance to observe the demeanor and perceived credibility of an in-person informant).

81. *See Dotson*, No. 03-4352, 2004 WL 1435103 at *3.

82. *See id.* The court's reasoning in *Dotson* is consistent with the concurring opinion in *J.L.*: "[T]here are many indicia of reliability respecting anonymous tips that we have yet to explore in our cases." *J.L.*, 529 U.S. at 1380–81 (Kennedy, J., concurring).

83. 364 F.3d 1185 (10th Cir. 2004).

84. *Id.* at 1119. In *Johnson*, the police received a call from a citizen who reported that a middle-aged man was forcing a pre-teen girl to walk down Copper and Pennsylvania Avenues in Albuquerque. *Id.* at 1187. The caller reported watching the pair, and he described their actions in detail to the police dispatcher. *Id.* The caller also stayed on the line for about eight minutes, until a marked police car approached the two. *Id.* Finally, when asked, the caller gave the dispatcher his cell phone number, and he answered all questions of him "forthrightly." *Johnson*, 364 F.3d at 1187.

Likewise, in *United States v. Perkins*,[85] the Fourth Circuit held that an anonymous call containing details not present in *J.L.* was sufficient to support a *Terry* stop and a subsequent search.[86] Based on that reasoning, the Fourth Circuit affirmed the district court's decision, denying the defendant's pre-trial motion to suppress evidence, which included two guns, a rifle, knives, and drug paraphernalia.[87] In *Perkins*, a woman, who did not give her name, called police and reported that there were two white males in the front yard of a particular duplex, pointing and displaying rifles.[88] The female caller reported that the men had arrived in a red car with a silver or white stripe.[89] The police dispatcher reported the call and its contents to two officers patrolling the area.[90] One of the officers was familiar with the area generally and with the specific duplex identified by the anonymous caller.[91] The officer knew the area to be a high crime area, used for drug trafficking, and he knew that the second portion of the duplex was under investigation for drug activity.[92] "Although the caller did not identify herself," one of the officers thought he knew the caller's identity, based on the specificity of the report, which indicated that the caller was close to the scene, and based on the fact that one particular neighbor had previously called and made reliable reports of illegal activity at the same address.[93]

In analyzing whether the tip and the other information known by the officers permitted the *Terry* stop at issue, the Fourth Circuit noted that "[w]here a tip is anonymous, it must be accompanied by some corroborative elements that establish the tip's reliability."[94] In deciding that the tip in *Perkins* was sufficiently corroborated, the court distinguished *J.L.*, emphasizing that in contrast to the "purely anonymous call" in *J.L.*, in *Perkins* the officer "did not rely solely upon a call made by an unknown person from an unknown location."[95] The reviewing court was satisfied that the caller had revealed her general location (and the basis of her tip) by the content of her tip; therefore, the court resolved that the officer "reasonably assumed" that the

85. 363 F.3d 317 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3397 (U.S. Jan. 10, 2005) (No. 04-5795).

86. *See id.*

87. *Id.* at 319.

88. *Id.*

89. *Id.*

90. *Perkins*, 363 F.3d at 319.

91. *Id.* at 319–20.

92. *Id.*

93. *Id.* at 320.

94. *Id.* at 323 (citing *J.L.*, 529 U.S. at 270).

95. *Perkins*, 363 F.3d at 324.

caller was the same tipster who had proved reliable in the past.[96] The Fourth Circuit concluded:

> Unlike in *J.L.*, [the officer] suitably corroborated the tip, and it was accompanied by a number of other relevant factors that indicated the potential for criminal activity. The tip, whether "anonymous"[97] or not, carried sufficient indicia of reliability to form part of [the officer's] reasonable suspicion. We cannot say under these circumstances that he was unjustified in conducting the *Terry* stop.[98]

Similar to the Fourth and Tenth Circuits that have found certain anonymous telephone tips adequately reliable for a *Terry* stop, in *United States v. Hernandez*,[99] the Second Circuit denied a motion to suppress evidence even though the search was based on an anonymous telephone tip.[100] In deciding that evidence seized during the stop was not suppressible, the Second Circuit first agreed that the anonymous 911 call was insufficient under *J.L.* to warrant the stop of the car, because the "911 call had not yet been corroborated, and did not have sufficient indicia of reliability to justify [the officer's] stop of the car."[101] But the Second Circuit did not stop its analysis there. The court next focused on several of the defendant's actions, including that he exited the car, left the door open, walked away hastily, looked back at the officer and disclaimed, falsely, that he did not speak English.[102] The defendant then returned to the officer and started speaking English.[103] Coupling these facts with the

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96. *Id.*

97. The court debated whether the tip was a "purely anonymous" one. *Id.* at 323. The court acknowledged that the tip had some characteristics of an anonymous tip because the lady caller did not give her name. *Id.* "On the other hand . . . [the officer] reasonably assumed the caller's identity." *Id.*

98. *Perkins*, 363 F.3d at 324. *See also* United States v. Quarles, 330 F.3d 650, 655–57 (4th Cir. 2003), *cert. denied*, 540 U.S. 977 (2003) (upholding the district court's decision, which distinguished *J.L.*, and holding that 911 call in which caller did not give his name but during which he stayed on the line fourteen minutes, arranged to meet police after stop, and provided detailed information about the defendant's current actions and the caller's own circumstances was sufficient to support legal *Terry* stop).

99. No. 02-1261, 2003 WL 1868759 (2d Cir. Apr. 10, 2003) (summary order, not selected for publication). In *Hernandez*, a 911 dispatcher received an anonymous telephone call and, in turn, relayed the call to the police on patrol. *Id.* at * 8. The caller reported that a Puerto Rican man had a gun at 43 York Street. *Id.* Based on information provided from the caller, the operator reported to the patrolling officers that the suspect/man was riding in a gray, four-door Nissan and that a woman was driving the Nissan, going south on West Street. *Id.* An officer spotted a gray, four-door Mazda, heading south on West Street. *Id.* A man was driving the Mazda and another man was sitting in the front passenger seat; a woman was in the back seat. *Hernandez*, No. 02-1261, 2003 WL 1868759, at *8. The driver stopped the car in front of a convenience store. *Id.* at *9. The police pulled behind the parked car and turned on its emergency lights. *Id.*

100. *See id.* at *11.

101. *Id. at* *9 (citing *JL.*, 529 U.S. at 270–71).

102. *Hernandez*, No. 02-1261, 2003 WL 1868759, at *9.

103. *Id.*

anonymous 911 report, the Second Circuit concluded that "these unusual actions gave [the officer] reasonable suspicion to justify a *Terry* stop of [the defendant], after [the defendant] had left his car."[104] In reaching its conclusion, the Second Circuit engaged in some legal gymnastics. Because it first deemed the officer's stop of the car a "seizure" for purposes of the Fourth Amendment,[105] the court then offered that the defendant "himself was not 'seized' until he turned around, walked back toward [the officer], and submitted to [the officer's] order to halt."[106] In short, the court worked hard to avoid the application of *J.L.* and in doing so effectively applied an "anonymous tip +1-type" analysis to deny the defendant's suppression motion.

Although these circuit court decisions are unquestionably liberal applications of the bright-line rule drawn in *J.L.*, the decisions do not slip beneath the constitutional floor set by *J.L.* Nevertheless, these decisions illustrate the federal courts' general willingness to stretch to find evidence to support a constitutional *Terry* stop in borderline cases.

IV. DETERIORATION OF THE FOURTH AMENDMENT'S PROTECTIONS

Up to this point, this article has discussed the federal courts' reasonable, albeit liberal, interpretation of the holding in *J.L.* Whether or not you applaud the *J.L.* decision, the cases discussed above follow logically from its holding. Sadly, however, the incidental comments in the dicta in *J.L.* have created a path for the deterioration of the sacred right of personal freedom secured by the Fourth Amendment. The Eleventh Circuit has already taken, and arguably expanded, that path so as to jeopardize those invaluable rights.

In deciding whether a 911 call, during which the caller reported arguing and gunshots at a specified address, provided a constitutional basis for a subsequent warrantless search of a home, the Eleventh Circuit in *United States v. Holloway*,[107] construed *J.L.* to mean that when an anonymous telephone caller reports that there is an on-going emergency requiring immediate action, the unverified, anonymous "emergency" report, alone, can justify the govern-

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104. *Id.*

105. *Id.*

106. *Id.* (citing California v. Hodari D., 499 U.S. 621, 624–29 (1991)).

107. 290 F.3d 1331 (11th Cir. 2002). In *Holloway*, someone called "911" around 10:22 p.m. and reported "gunshots and arguing" from 3785 Washington Street. *Id.* at 1332. The police were dispatched to the reported address. *Id.* While en route, someone called "911" again and reported that the arguing and gunshots continued. *Id.* When police arrived at the 3785 address, a man and woman were sitting on the porch of a mobile home at the address. *Id.* The officer immediately detained each of them and a neighbor who wandered onto the property. *Holloway*, 290 F.3d at 1332–33. Once the officer secured the people, he approached the home "to check for victims and weapons" inside. *Id.* at 1333. When he approached, he found some shotgun shells and later a shotgun. *Id.*

ment to search and seize.[108] The Eleventh Circuit declared: "[W]hen an *emergency* is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller."[109] The court concluded that "[i]n light of the nature of the 911 call, a lesser showing of reliability than demanded in *J.L.* was appropriate in order to justify the search of [defendant]'s home."[110] According to the court in *Holloway*, "[T]he information given by the caller involved a serious threat to human life."[111] Essentially, because of the extreme nature of the reported threat, the Eleventh Circuit assumed that the anonymous 911 caller was credible. "Because the police had no reason to doubt the veracity of the 911 call, particularly in light of the personal observations of the officers once they arrived on the scene, their warrantless search for victims was constitutional."[112]

Although the Eleventh Circuit concluded that the police had no reason to doubt the 911 caller's veracity, the opposite conclusion was equally true—the police had no reason to credit the 911 caller's version of events. The caller may have been an estranged boyfriend, a disgruntled employee, a drunk, or someone committed to "set in motion an intrusive, embarrassing police search . . . simply by placing an anonymous call falsely reporting"[113] gunshots. In ruling that a warrantless search of a home was constitutionally sanctioned, the *Holloway* court distinguished the facts of *J.L.* as "not based on an emergency situation[,]"[114] relied heavily on the dicta in *J.L.*,[115] and cited eighteen cases that pre-dated *J.L.*,[116] and one decided six days after the

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108. *Id.* at 1339. At one point in the *Holloway* decision, the Eleventh Circuit suggests that its ruling was based on an exigency necessitating immediate search, "information conveyed by the 911 caller *and* the personal observations of the officers." *Id.* at 1338 (emphasis added). The court later expressly acknowledged that the warrantless search of the defendant's home was "based largely on information provided by an anonymous caller." *Holloway*, 290 F.3d at 1339. Moreover, a fair reading of the decision demonstrates that the court approved of the officer's decision to search and seize, which was made as soon as he arrived at the defendant's home and before he had time to personally observe behaviors and circumstances that might have legally supported such a search. *See id.* at 1332–33.

109. *Id.* at 1339 (citing *J.L.*, 529 U.S. at 273–74).

110. *Id.*

111. *Id.*

112. *Holloway*, 290 F.3d at 1339.

113. *See J.L.*, 529 U.S. at 272.

114. *Holloway*, 290 F.3d at 1338.

115. *Id.* (citing *J.L.*, 529 U.S. at 273–74).

116. The *Holloway* decision cites United States v. Cunningham, 133 F.3d 1070 (8th Cir. 1998); United States v. Gwinn, 46 F. Supp.2d 479 (S.D. W. Va. 1999); United States v. Guarente, 810 F. Supp. 350 (D. Me. 1993). *See Holloway*, 290 F.3d at 1339 n.6. *Holloway* also relies on the following: United States v. Hughes, 993 F.2d 1313 (7th Cir. 1993); United States v. Gillenwaters, 890 F.2d 679 (4th Cir. 1989); United States v. Martin, 781 F.2d 671 (9th Cir. 1985); Mann v. Cannon, 731 F.2d 54 (1st Cir. 1984); United States v. Riccio, 726 F.2d 638 (10th Cir. 1984); United States v. Jones, 635 F.2d 1357 (8th Cir. 1980); United States v. Barone, 330 F.2d 543 (2d Cir. 1964); United States v. Searle, 974 F. Supp.

decision in *J.L.*,[117] which failed to even acknowledge the *J.L.* decision. Ultimately, the court decided: "As long as the officers reasonably believe an emergency situation necessitates their warrantless search, whether through information provided by a 911 call or otherwise, such actions must be upheld as constitutional."[118]

The first obvious flaw with the holding in *Holloway* is that it assumes, without any legal or factual support, that an officer acts "reasonably" in conducting a search based on an anonymous telephone tip in which an emergency is reported.[119] As *J.L.* undeniably teaches, while there are "situations in which an anonymous tip, *suitably corroborated*, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to [support an] investigatory stop[,]'"[120] standing alone, a "bare report of an unknown, unaccountable" caller does not provide officers with a *reasonable*[121] basis to stop and frisk

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1433 (M.D. Fla. 1997); United States v. Herndon, 390 F. Supp. 1017 (S.D. Fla. 1975); United States v. Hogue, 283 F. Supp. 846 (N.D. Ga. 1968); Johnson v. State, 386 So. 2d 302 (Fla. App. 1980); State v. Carlson, 548 N.W.2d 138 (Iowa 1996); State v. Butler, 676 S.W.2d 809 (Mo. 1984); State v. Mackins, 266 S.E.2d 694 (N.C. App. 1980); State v. Max, 263 N.W.2d 685 (S.D. 1978). *See Holloway* at 1336–37.

117. United States v. Richardson, 208 F.3d 626 (7th Cir. 2000). The *Holloway* decision also fails to acknowledge that *Richardson* could be construed quite narrowly so as to offer no support for the result in *Holloway*. *Richardson* involved a 911 call from a man identifying himself as Anthony Carter, who reported that a 19-year-old African-American man named "Lucky" had raped and murdered a female and that the victim could be found in the basement of a "drug house." *Richardson*, 208 F.3d at 627–28. The caller provided an address and reported that he lived in the same house where the body was located. 208 F.3d at 628. Thus, *Richardson* did not involve an anonymous 911 call. The same is true with regard to the *Cunningham* decision. *See Cunningham*, 133 F.3d at 1070. The caller in that case was not anonymous. The caller identified herself as Lachonda Williams and said that she was being held against her will. *Cunningham*, 133 F.3d at 1071. As the dissent in United States v. Beaudoin, 362 F.3d 60, 85–86 (1st Cir. 2004), noted, although several circuit courts have purported to apply an emergency doctrine to uphold a warrantless search or seizure, in each case the call at issue was more than a bare-bones anonymous call. In some cases, the caller was not anonymous in any sense. *See, e.g.*, *Richardson*, 208 F.3d at 628 and *Cunningham*, 133 F.3d at 1071. In other cases, the caller's address was verified with caller identification, *see* Anthony v. New York, 339 F.3d 129, 136 (2d Cir. 2003), or the police were able to corroborate an emergency with their own investigation, *see* United States v. Jenkins, 329 F.3d 579, 580–81 (7th Cir. 2003).

118. *Holloway*, 290 F.3d. at 1340.

119. The First Circuit has recognized the "valid concerns about the harm to Fourth Amendment interests from a generous interpretation of the emergency doctrine as an exception to the warrant requirement." *See Beaudoin*, 362 F.3d at 71. The First Circuit's concern is well-grounded in the Constitution. *See* United States v. Mendenhall, 446 U.S. 544, 551 (1980) (citing Davis v. Mississippi, 394 U.S. 721 (1969)) ("The Fourth Amendment's requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person, 'including seizures that involve only a brief detention short of traditional arrest.'") (citations omitted).

120. *J.L.*, 529 U.S. at 270.

121. The Supreme Court has described reasonable suspicion as "'a particularized and objective basis' for suspecting the person stopped of criminal activity . . . ." *See* Ornelas v. United States, 517 U.S. 690, 696 (1981); *see also* United States v. Arvizu, 534 U.S. 266, 273 (2002) (In evaluating reasonable suspicion,

someone.[122] "To invoke th[e] so-called 'emergency doctrine,' the person making entry must have had an *objectively reasonable belief* that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within."[123] A fair reading of the holding in *J.L.*, as opposed to the dicta, shows that an uncorroborated anonymous report of an emergency does not provide officers with a *reasonable* basis to search or seize. *J.L.* does not hold that an anonymous call about a crisis makes such a report more credible (or more reasonable to rely upon) than an uncorroborated, anonymous report of a run-of-the-mill crime. While the fact that a report of an emergency, which potentially puts life at risk, should factor into any response a police officer makes and, thereby, impact on the reasonableness analysis,[124] a mere report of an emergency cannot, by itself, support a constitutionally based *Terry* stop, let alone a warrantless search of a home.[125] The fact that a call is labeled a "911" or emergent call is a distinction without a difference.[126]

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courts "must look at the totality of the circumstances to see whether the detaining officer has a particularized and objective basis" for suspecting illegal activity.); *Mendenhall*, 446 U.S. at 552 (noting that a seizure is "constitutional only if officers reasonably suspect[] the [person] of wrongdoing."). Reasonableness is the key ingredient to a constitutional search. *See generally* Illinois v. McArthur, 531 U.S. 326 (2001) (police acted constitutionally detaining a suspect outside his home for about two hours warrantless as police had probable cause to believe suspect would destroy contraband if allowed to enter the home and officers made reasonable efforts to accommodate the suspect).

122. *See J.L.*, 529 U.S. at 271 (emphasis added).

123. *See* United States v. Moss, 963 F.2d 673, 678 (4th Cir. 1992) (emphasis added); *see also Beaudoin*, 362 F.3d at 66 ("Generally, under the emergency doctrine, there must be a reasonable basis, sometimes said to be approximating probable cause, both to believe in the existence of the emergency and to associate that emergency with the area or place to be searched.").

124. *See also Buie*, 494 U.S. at 331 (In order to determine what constitutes reasonableness in the search and seizure context, the Court has "balanced the intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests."). For instance, the fact that New York had been experiencing the mailing of anthrax-tainted letters in October, 2001, contributed to the district court's finding in United States v. Ullah, No. 02-CR 899 (JFK), 2003 WL 1396300 (S.D.N.Y. March 20, 2003), that an officer acted reasonably in detaining a suspect who was dressed in a dirty mail carrier uniform and was dropping "scores of letters" into public mailboxes. The district court's conclusion was proper because the officer acted based on "the objectively reasonable belief that there was probable cause that the defendant was carrying envelopes with anthrax in his mailbag . . . ." *Id.* at *5–6.

125. The Court in *Terry* predicted this issue. "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." *Terry*, 392 U.S. at 19 n.15.

126. *See* Kerman v. New York, 261 F.3d 229, 236 (2d Cir. 2001) (an anonymous 911 call describing an imminent threat of harm, uncorroborated by other police work, is legally inadequate to authorize a warrantless entry into an apartment home based upon Fourth Amendment privacy protections).

V. CONCLUSION

When evaluating the reasonableness of a *Terry* stop, the first inquiry is what governmental interest allegedly justifies the official intrusion upon a private citizen's constitutionally protected interests.[127] The government interest is then weighed against the invasion which the search entails.[128] In balancing these interests,

> it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result [the Supreme] Court has consistently refused to sanction.[129]

The Fourth Amendment "is indispensable to the full enjoyment of personal security, personal liberty and private property."[130] A *Terry* stop already permits a law enforcement officer to stop someone and conduct a limited personal and invasive search based merely on reasonable suspicion. To rule that an anonymous, but urgent, 911 call without any other indicia of believability or reliability removes the Fourth Amendment reasonable suspicion requirement would be to abolish the protections of the Fourth Amendment altogether.[131] Under such a standard, "'the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers and effects," only in the discretion of the police.'"[132] Furthermore, as the Court recognized in *J.L.*, as it rejected the government's argument in favor of an exception to the reliability analysis for automatic firearms, "[s]uch an excep-

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127. *Terry*, 392 U.S. at 20–21.

128. *Id.* at 21. *See also Hiibel*, 124 S. Ct. at 2459 ("The reasonableness of a seizure under the Fourth Amendment is determined 'by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'"). There is no "ready test" for determining reasonableness other than by balancing the need to search against the invasion the search entails. *Buie*, 494 U.S. at 332.

129. *Terry*, at 21–22 (citations omitted).

130. Johnson v. United States, 333 U.S. 10, 17 n.8 (1948) (citing Gouled v. United States, 255 U.S. 298, 304 (1921)).

131. As the dissenter noted in *Beaudoin*, the emergency exception "does not dispense with the Fourth Amendment's probable cause requirement" when the issue is one of a warrantless search of a residence. *Beaudoin*, 362 F.3d at 79. Likewise, the emergency exception does not dispense with the reasonableness requirement for a stop and frisk. "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *See Johnson*, 333 U.S. at 14.

132. *Terry*, 392 U.S. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).

tion would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful [conduct]."[133] Applying such an analysis, the more inflammatory and outrageous the 911 report, the more reliable its origin. A false report of an imminent anthrax distribution or the manufacturing of a biological weapon would automatically subject an innocent citizen to an intrusive and humiliating search. Such a result is not only an illogical extension of the Supreme Court's precedent, but also an unconstitutional infringement on personal liberty. Such searches cannot be tolerated in a civilized society in which police are expected to be authorized by law, not above it. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."[134] Otherwise, our form of government, "where officers are under the law"[135] would effectively be abolished. Instead, we would find ourselves in a "police-state where [law enforcement officers] are the law."[136] In sum, if the Fourth Amendment is to afford any privacy protection, the ends of a search must not be allowed to justify the search itself.

133. *J.L.*, 529 U.S. at 272.

134. *Johnson*, 333 U.S. at 14.

135. *Id.* at 17 (in the context of rejecting a warrantless search of a hotel room as violative of the Fourth Amendment, the Court explained why such a warrantless search could not stand under our system of government).

136. *Id.*