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*Fourth Amendment — Search and Seizure — Anonymous Tips and  
Suspected Drunk Driving — Navarette v. California*

Alone, anonymous tips generally cannot provide the reasonable suspicion the Fourth Amendment demands police have before conducting a traffic stop.<sup>1</sup> Some commentators urge that the risks of drunk driving warrant lowering the reliability threshold that an informant's claims must clear before prompting constitutionally sufficient suspicion to justify a stop.<sup>2</sup> Yielding to such pressure, some states permit stops based upon anonymous tips that allege behavior that could indicate drunk driving.<sup>3</sup> Last Term, in *Navarette v. California*,<sup>4</sup> the Supreme Court held that an anonymous tipster's claim that a driver had recently run her off the road gave police reasonable suspicion, under the totality of the circumstances, to stop that driver's vehicle because the driver may have been intoxicated.<sup>5</sup> The controversial tip enabled the police to confirm only sparse, public details about lawful behavior, which precedent suggests should not have raised the required suspicion. Yet in applying the totality of the circumstances test, the Court used fine factual distinctions between *Navarette* and earlier cases to illuminate different factors relevant to reliability — a move that may unnecessarily increase law enforcement's broad authority to stop drivers.

On an August afternoon in 2008, a dispatcher at the California Highway Patrol (CHP) call center in Mendocino County answered a call from a counterpart in another county.<sup>6</sup> The caller relayed the details of a recent tip: “[A] silver Ford F150 pickup truck with license

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<sup>1</sup> See *Illinois v. Gates*, 462 U.S. 213, 237 (1983). The Court articulated the reasonable suspicion standard in *Terry v. Ohio*, 392 U.S. 1 (1968), holding that the Fourth Amendment permits a police officer, “for the protection of himself and others,” to stop and frisk an individual whom the officer witnessed engaging in “unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.” *Id.* at 30; see *id.* at 30–31. Traffic stops are a species of *Terry* stop. See *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

<sup>2</sup> See generally, e.g., James Michael Scears, Comment, *Anonymous Tips Alleging Drunk Driving: Why “One Free Swerve” Is One Too Many*, 64 OKLA. L. REV. 759 (2012) (surveying legal issues related to drunk driving).

<sup>3</sup> See Colby J. Morrissey, Note, *Anonymous Tips Reporting Drunk Driving: Rejecting a Fourth Amendment Exception for Investigatory Traffic Stops*, 45 NEW ENG. L. REV. 167, 183–86 (2010) (summarizing exceptions). The Supreme Court declined to approve or reject such exceptions in 2009. See *Virginia v. Harris*, 130 S. Ct. 10, 10 (2009); see also *id.* (Roberts, C.J., dissenting from denial of certiorari) (“I am not sure that the Fourth Amendment requires . . . independent corroboration before the police can act . . . in the special context of anonymous tips reporting drunk driving. This is an important question that is not answered by our past decisions, and that has deeply divided federal and state courts.”).

<sup>4</sup> 134 S. Ct. 1683 (2014).

<sup>5</sup> *Id.* at 1686.

<sup>6</sup> *People v. Navarette*, Nos. 08-86137-02, 08-86137-03, 2012 WL 4842651, at \*1 (Cal. Ct. App. Oct. 12, 2012).

plate number 8D94925 had run an unidentified reporting party off the roadway . . . .”<sup>7</sup> The Mendocino dispatch worker alerted another colleague via computer; that colleague then broadcast the message to CHP officers at 3:47 p.m.<sup>8</sup> By 4:00 p.m., an officer had spotted a vehicle matching the reported description.<sup>9</sup> Although he followed the truck for five minutes without observing any abnormal driving,<sup>10</sup> at around 4:05 p.m. the officer pulled the vehicle over.<sup>11</sup>

The officer, along with a colleague who joined him at the scene, collected identification from the truck’s occupants — Lorenzo Prado Navarette and José Prado Navarette — and returned to a patrol car to verify the documents.<sup>12</sup> Upon circling back for more information, the officers noticed the odor of marijuana.<sup>13</sup> In a subsequent search of the truck, they found thirty pounds of the drug.<sup>14</sup> They arrested both occupants.<sup>15</sup>

Claiming that “the officer lacked reasonable suspicion of criminal activity” when he pulled them over, the defendants sought suppression of the evidence collected during the stop on Fourth Amendment grounds.<sup>16</sup> They asserted that the anonymous “tipster’s report was too vague” to warrant the stop “without further inquiry by the officers.”<sup>17</sup> Furthermore, the officers had not “directly observe[d] any erratic driving.”<sup>18</sup> After their repeated motions to suppress the evidence failed,<sup>19</sup> the defendants pled guilty and received sentences of “90 days in jail plus three years of probation.”<sup>20</sup>

On the appeal of the defendants’ convictions, the California Court of Appeal “conclude[d] that the totality of the circumstances . . . justified the traffic stop.”<sup>21</sup> Observing that (1) the tip “came from the victim of

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*1–2.

<sup>9</sup> *See id.* at \*2.

<sup>10</sup> *Id.* at \*9.

<sup>11</sup> *Id.* at \*2.

<sup>12</sup> *Id.* at \*1–2.

<sup>13</sup> *Navarette*, 134 S. Ct. at 1687.

<sup>14</sup> *Id.* The officers also found “fertilizer, hand clippers, and oven bags.” *Navarette*, 2012 WL 4842651, at \*2.

<sup>15</sup> *Navarette*, 134 S. Ct. at 1687.

<sup>16</sup> *Id.*

<sup>17</sup> *Navarette*, 2012 WL 4842651, at \*2. The tip at issue was not anonymous as a factual matter — since “the reporting party identified herself by name in the 911 call recording” — but rather as a procedural matter — “[b]ecause neither the caller nor the Humboldt County dispatcher who received the call was present at the hearing” to establish a foundation for the recording’s entry into evidence. *Navarette*, 134 S. Ct. at 1687 n.1.

<sup>18</sup> *Navarette*, 2012 WL 4842651, at \*2. The defendants also argued, unsuccessfully, that the government had not proven “that the reported tip was actually received by the Humboldt County CHP” as required by California state law. *Id.*

<sup>19</sup> *See id.* at \*2–3.

<sup>20</sup> *Navarette*, 134 S. Ct. at 1687.

<sup>21</sup> *Navarette*, 2012 WL 4842651, at \*1.

the reported reckless driving”; (2) law enforcement promptly confirmed “significant innocent details of the tip”; and (3) the alleged behavior presented “ongoing danger to other motorists,”<sup>22</sup> the appeals court held that the government had shown that law enforcement “had reasonable suspicion . . . justifying their investigative stop of . . . [the] vehicle.”<sup>23</sup>

The Supreme Court affirmed. Writing for a bare majority of the Court, Justice Thomas<sup>24</sup> found that the “totality of the circumstances” established “reasonable suspicion that the driver was intoxicated.”<sup>25</sup> He first explained that the Fourth Amendment “permits brief investigative stops”<sup>26</sup> when law enforcement has some “particularized and objective basis for suspecting the particular person stopped of criminal activity.”<sup>27</sup> He observed that an anonymous tip, without more, “seldom demonstrates” a sufficient “basis of knowledge or veracity” to justify a stop.<sup>28</sup> However, where a tip bears “sufficient indicia of reliability”<sup>29</sup> and so engenders “reasonable suspicion of criminal activity,”<sup>30</sup> it could warrant a stop.

Justice Thomas identified two precedents — *Alabama v. White*<sup>31</sup> and *Florida v. J.L.*<sup>32</sup> — as “useful guides” for the Court’s analysis.<sup>33</sup> *White* concerned an account by an anonymous tipster who had accurately predicted a range of details about an alleged ongoing crime, many of which the police confirmed before arresting the reported individual.<sup>34</sup> In light of this corroboration, the Court found the tip reliable enough to raise reasonable suspicion for the challenged stop.<sup>35</sup> But in *J.L.*, “a bare-bones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun” failed to convince the Court that

<sup>22</sup> *Id.* at \*7.

<sup>23</sup> *Id.* at \*9.

<sup>24</sup> Justice Thomas was joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito.

<sup>25</sup> *Navarette*, 134 S. Ct. at 1686.

<sup>26</sup> *Id.* at 1687.

<sup>27</sup> *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)) (internal quotation mark omitted).

<sup>28</sup> *Id.* at 1688 (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)) (internal quotation mark omitted).

<sup>29</sup> *Id.* (quoting *White*, 496 U.S. at 327) (internal quotation mark omitted).

<sup>30</sup> *Id.* at 1691.

<sup>31</sup> 496 U.S. 325 (1990).

<sup>32</sup> 529 U.S. 266 (2000).

<sup>33</sup> *Navarette*, 134 S. Ct. at 1688.

<sup>34</sup> *See id.* The anonymous phone tip in *White* notified police that a named individual “would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, . . . going to Dobey’s Motel, and . . . would be in possession of about an ounce of cocaine inside a brown attaché case.” 496 U.S. at 327. Before stopping the vehicle, officers watched the suspect “leave the 235 building . . . enter the station wagon . . . [and] dr[i]ve the most direct route to Dobey’s Motel.” *Id.* The surveillance provided enough confirmation of the innocent details to suggest that the caller was also right about the drugs. *Id.* at 332.

<sup>35</sup> *Navarette*, 134 S. Ct. at 1688.

police had reasonable suspicion to stop and frisk the adolescent.<sup>36</sup> Distinguishing the cases, Justice Thomas noted that the *White* tipster demonstrated familiarity with the suspect's affairs because she had been able to predict future behavior.<sup>37</sup>

Building on these precedents, Justice Thomas's inquiry into the instant case first explored whether the report had sufficient indicia of reliability. He concentrated on three facts that could make this tip seem reliable enough to a reasonable law enforcement officer. First, the reporter had "necessarily claimed eyewitness knowledge of . . . dangerous driving."<sup>38</sup> To the majority, firsthand knowledge was even more indicative of reliability than the information provided in *White*, which contained only "scant evidence that the tipster had . . . observed cocaine in the station wagon."<sup>39</sup> Second, since the police stopped the *Navarette* vehicle less than twenty minutes after the call, and twenty miles south of the reported incident site, the tipster had probably "reported the incident soon after she was run off the road."<sup>40</sup> Justice Thomas allowed that this "indication . . . weigh[ing] in favor of the caller's veracity" had been absent in the earlier cases.<sup>41</sup> But temporal proximity was still an important indicator because the U.S. legal system "generally credit[s]" the notion that "contemporaneous report[s]" will be "especially trustworthy."<sup>42</sup> Third, the "use of the 911 emergency system" suggested the tip was truthful because that system's design makes it possible to "identify[] and trac[e] callers" and "safeguard[] against" false reporting.<sup>43</sup> Thus, "a reasonable officer" might expect a liar to avoid dialing 911.<sup>44</sup>

Justice Thomas then turned to whether the report created the necessary reasonable suspicion of criminal activity. Specifically, he considered whether this report implied "an ongoing crime such as drunk driving" (justifying a stop) or an "episode of past recklessness" (not justifying a stop).<sup>45</sup> He explained that determinations of reasonable suspicion "depend[]" on "practical," not technical, "considerations."<sup>46</sup> This "commonsense approach" allows an inference of intoxication from "certain driving behaviors."<sup>47</sup> After listing state court decisions describing

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<sup>36</sup> *Id.*

<sup>37</sup> *See id.*

<sup>38</sup> *Id.* at 1689.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* Justice Thomas commented that the hearsay exceptions for present sense impressions and excited utterances supported this claim. *See id.* (citing FED. R. EVID. 803(1), 803(2)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1690.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)).

<sup>47</sup> *Id.*

such behaviors,<sup>48</sup> he concluded that law enforcement’s “accumulated experience . . . suggests” that certain “erratic behaviors . . . correlate[] with drunk driving.”<sup>49</sup> Unquestionably, a stop based on an anonymous tip of a lesser “infraction” such as “driving without a seatbelt” would be “constitutionally suspect.”<sup>50</sup> But an allegation of “a specific and dangerous result of the driver’s conduct” could justify a stop.<sup>51</sup> Considering the variety of perilous driving conduct that “[r]unning another vehicle off the road” can imply,<sup>52</sup> Justice Thomas refused to say that this officer “acted unreasonably” by stopping a driver whose reported behavior indicated intoxication.<sup>53</sup>

Furthermore, that the officers had seen no signs of impaired driving was immaterial. They did not have to “rule out the possibility of innocent conduct” that might have explained a brief bout of recklessness.<sup>54</sup> Instead, law enforcement’s presence was likely to “inspire more careful driving,” which made the absence of “additional suspicious conduct” unsurprising.<sup>55</sup> In closing, the opinion raised the specter of the “disastrous consequences” that could arise if officers “allow[ed] a drunk driver a second chance.”<sup>56</sup>

Justice Scalia dissented.<sup>57</sup> He recast the holding as adopting California state law that “‘an anonymous and uncorroborated tip regarding a possibly intoxicated highway driver’ provides without more the reasonable suspicion necessary to justify a stop.”<sup>58</sup> He explained, as a threshold matter, why anonymous tips are so suspect: anonymity dispenses with “accountability.”<sup>59</sup> He found the tip particularly fishy in the case at bar, since a genuine complainant would want to share his identity with the police “so that he [could] accuse and testify when the culprit is caught.”<sup>60</sup>

Justice Scalia next dismissed the majority’s reliance upon *White*. According to him, the *White* tipster’s ability to offer police “the finest

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<sup>48</sup> *Id.* at 1690–91. Justice Thomas referred to cases describing behaviors such as crossing the center line and driving in the median. *See id.*

<sup>49</sup> *Id.* at 1691.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> These included “lane-positioning problems, decreased vigilance, [and] impaired judgment.” *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002)) (internal quotation mark omitted).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1691–92.

<sup>57</sup> Justice Scalia was joined by Justices Ginsburg, Sotomayor, and Kagan.

<sup>58</sup> *Navarette*, 134 S. Ct. at 1692 (Scalia, J., dissenting) (quoting *People v. Wells*, 136 P.3d 810, 812 (Cal. 2006)).

<sup>59</sup> *Id.* (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting)).

<sup>60</sup> *Id.* at 1693.

detail” of the suspect’s imminent behavior was distinguishable from the instant case, where the tipster reported readily observable facts.<sup>61</sup>

Justice Scalia further dismantled the circumstances buttressing the majority’s confidence in the anonymous tip’s reliability. First, he argued that the tipster’s claim to “eyewitness knowledge” was unrelated to the “veracity” of her report.<sup>62</sup> Second, he questioned the majority’s analogies to rules of evidence. Under the rules the majority had cited, “immediacy” lends “credibility” to statements that would otherwise be untrustworthy.<sup>63</sup> That immediacy was absent where the reporter had enough time “to observe the license number,” “to copy down the observed license number,” and possibly “to dial a call to the police from the stopped car.”<sup>64</sup> Third, he doubted the anonymous caller’s dialing 911 signaled reliability because it is unlikely “that your average anonymous 911 tipster is aware that 911 callers are readily identifiable.”<sup>65</sup>

He then attacked the majority’s conclusion that the anonymous tip had alleged an ongoing crime. The vague statement “that the petitioners’ truck [r]an [me] off the roadway”<sup>66</sup> raised no likelihood that the subject of the tip was driving while intoxicated. Estimating that the vast majority of “careless, reckless, or intentional traffic violations committed each day” do not result from drunk driving, he argued that police officers could not reasonably expect that a single instance of erratic vehiculation implied intoxication.<sup>67</sup> Thus, he would have found the stop unjustified.<sup>68</sup>

Even had the officers’ suspicions been justified at first, the five-minute observation preceding the stop “affirmatively undermined” any “suggestion of ongoing drunken driving.”<sup>69</sup> Justice Scalia found untenable the claim that a drunk driver being followed by the police could conform his driving to the law by “mere act of the will.”<sup>70</sup> Labeling the majority opinion a “freedom-destroying cocktail,” he con-

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<sup>61</sup> *Id.* Specifically, the Court had made “a big deal of the fact that the tipster was dead right about” the truck’s direction and rough location. *Id.* However, “everyone in the world who saw the car would have that knowledge.” *Id.*

<sup>62</sup> *Id.* (quoting *id.* at 1689 (majority opinion)) (internal quotation marks omitted).

<sup>63</sup> *Id.* at 1694.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1695 (alterations in original) (quoting Joint Appendix at 36a, *Navarette*, 134 S. Ct. 1683 (No. 12-9490)) (internal quotation marks omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *See id.*

<sup>69</sup> *Id.* at 1696.

<sup>70</sup> *Id.* at 1697; *see id.* at 1696–97. Instead, it is a basic “premise of our intoxicated-driving laws that a driver soused enough to swerve once can be expected to swerve again — and soon.” *Id.* at 1697.

cluded that now “all of us . . . are at risk of having our freedom of movement curtailed on suspicion of drunkenness.”<sup>71</sup>

The *Navarette* Court focused on facts not attended to in its existing Fourth Amendment anonymous-tips jurisprudence. Previously, in determining a source’s reliability, the leading cases compared the precision of the tipster’s prediction with the corroboration of that prediction by law enforcement. Under that framework, the spare report made by the tipster, and its concomitantly limited confirmation by the police, could not have justified the CHP’s stop of Lorenzo Prado Navarette and José Prado Navarette. Underscoring fine differences between the facts of *Navarette* and those of earlier cases — the caller’s claim that she was an eyewitness calling immediately after the incident; her use of the 911 system — allowed the Court to highlight different factors relevant to assessing an anonymous tip’s reliability.

The Court sought guidance from *White* and *J.L.*, but the result in *Navarette* is out of step with the analysis in these cases. In *White*, an anonymous tipster provided a laundry list of details that law enforcement officers could (and did) corroborate.<sup>72</sup> The anonymous tipster in *J.L.*, by contrast, provided only a “bare report”<sup>73</sup> of the alleged perpetrator and criminal activity.<sup>74</sup> What elevated the reliable tip in *White* above the unreliable one in *J.L.* was the specificity and character of the information given to law enforcement. The comprehensive predictions in *White* submitted something for the police to corroborate; once corroborated, the information enhanced the reliability of the tip by suggesting the tipster’s knowledge arose from intimacy with the accused.<sup>75</sup>

The facts of *Navarette* largely track those of *J.L.*: in *Navarette* the tipster predicted details that any outside observer could have noticed.<sup>76</sup> If public details were enough, then the *J.L.* tip should have aroused reasonable suspicion. But the *J.L.* Court helpfully explained why a “description of the suspect’s visible attributes,” however “accurate,” does not establish reasonable suspicion for a stop<sup>77</sup>: to generate suspicion, a “tip [must] be reliable in its assertion of illegality, not just in its tenden-

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<sup>71</sup> *Id.* at 1697.

<sup>72</sup> See *Alabama v. White*, 496 U.S. 325, 327 (1990) (explaining that the tip included, in part, the building name and apartment number from which the alleged perpetrator would emerge, a detailed description of her car, and the destination to which she would likely travel).

<sup>73</sup> *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

<sup>74</sup> See *id.* at 268 (describing tip that included the race, location, and a relatively unexceptional clothing item worn by the alleged perpetrator).

<sup>75</sup> See *id.* at 271 (“[T]he instant case lacked the moderate indicia of reliability present in *White* and essential to the Court’s decision in that case,” as the tip “provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility.”).

<sup>76</sup> Compare *Navarette*, 134 S. Ct. at 1686 (quoting tip as including the location, travel direction, and superficial details of the vehicle driven by the alleged perpetrator), with *J.L.*, 529 U.S. at 268 (describing tip as including the location and appearance of the alleged perpetrator).

<sup>77</sup> *J.L.*, 529 U.S. at 271; see *id.* at 271–72.

cy to identify a determinate person.”<sup>78</sup> The *Navarette* tip suffered from the same flaw: it merely identified a specific vehicle. This similarity helps explain why *J.L.* prompted several lower courts to invalidate laws that had lessened the reliability standard an anonymous tip had to meet before arousing reasonable suspicion of drunk driving.<sup>79</sup>

Faced with a tip lacking the exhaustive, future behavior–predicting detail present in the report at issue in *White*, the *Navarette* majority spotlighted the few facts that could sweep the instant case into the group of scenarios that raise reasonable suspicion. This analysis, in turn, threw into relief additional factors bearing upon a tip’s reliability. Victimization came first. That the reporter “necessarily claimed eyewitness knowledge”<sup>80</sup> of supposed criminal behavior<sup>81</sup> took center stage.<sup>82</sup> This tip apparently differed from the one in *J.L.*, “where the tip provided no basis for concluding that the tipster had actually seen the gun.”<sup>83</sup> The claimed distinction is illusory. Nothing in *Navarette* corroborated the caller’s claim that she was an eyewitness of unlawful activity. An anonymous statement that one is the victim of a crime reveals no more about the caller’s veracity than does an anonymous statement that one knows someone else is committing a crime.<sup>84</sup>

Shoring up the claim of reliability, the Court next highlighted the temporal proximity of the tipster’s report and the alleged crime. Since the officers caught the alleged reckless driver shortly after the tipster’s call, she must have telephoned directly after the incident, and, the Court reasoned, “[t]hat sort of contemporaneous report has long been treated as especially reliable.”<sup>85</sup> But has it? The tip underlying the challenge in *J.L.* stated that the alleged perpetrator was at a particular bus stop — where the police found the soon-to-be defendant.<sup>86</sup> Though the *Navarette* majority acknowledged no indication of contemporaneity in *J.L.*,<sup>87</sup> given the tendency of people at bus stops to

<sup>78</sup> *Id.* at 272.

<sup>79</sup> See Jon A. York, Note, *Search and Seizure: Law Enforcement Officers’ Ability to Conduct Investigative Traffic Stops Based upon an Anonymous Tip Alleging Dangerous Driving When the Officers Do Not Personally Observe Any Traffic Violations*, 34 U. MEM. L. REV. 173, 186 & n.71 (2003) (citing cases invalidating traffic stops that did not allege facts predicting future behavior).

<sup>80</sup> *Navarette*, 134 S. Ct. at 1689.

<sup>81</sup> This assumes what the dissent refused to concede: a claim that someone has run you off the road alleges criminal activity rather than mere carelessness. See *id.* at 1695 (Scalia, J., dissenting).

<sup>82</sup> See *id.* at 1689 (majority opinion). Presumably the *J.L.* reporter also witnessed the alleged crime, as the defendant was ultimately charged with possessing a firearm. See *J.L.*, 529 U.S. at 269.

<sup>83</sup> *Navarette*, 134 S. Ct. at 1689.

<sup>84</sup> See *id.* (interchangeably examining cases involving observations of informants and an alleged victim). This assumes, for the sake of argument, that a call claiming knowledge of an illegal firearm does not imply victimization, such as by recent brandishing.

<sup>85</sup> *Id.*

<sup>86</sup> *J.L.*, 529 U.S. at 268.

<sup>87</sup> *Navarette*, 134 S. Ct. at 1689 (“There was no indication that the tip in *J.L.* (or even in *White*) was contemporaneous with the observation of criminal activity . . .”).



board buses and thereby exit the area, it seems just as likely that the *J.L.* reporter *also* contacted law enforcement near the time of the purported crime.<sup>88</sup> More importantly, reliance upon the contemporaneity of the tip assumes the tip's veracity: Many people travel the same routes regularly. If the reporter happened to be familiar with the vehicle's routine, she could have made a similar report without witnessing the vehicle (hence bearing no resemblance to a present sense impression) and without experiencing distress (hence bearing no resemblance to an excited utterance). Put differently, nothing in *Navarette* actually corroborated the supposed contemporaneity of the caller's claim.

The most tenable difference between the cases, then, was the *Navarette* tipster's use of the 911 emergency call system. The use of the system itself became "[a]nother indicator of veracity."<sup>89</sup> Justice Thomas cited a battery of FCC rules that apparently limit the anonymity of 911 calls.<sup>90</sup> Yet the existence of these rules does not mean that 911 callers know that they are not anonymous, or, crucially, that law enforcement is likely to believe that tipsters are aware of the rules.<sup>91</sup> Although the Court was careful to note that "911 calls are [not] *per se* reliable,"<sup>92</sup> because the use of 911 was one of few distinguishing factors in this case, it is hard to believe that this cabining will be heeded going forward.

Given the obvious similarities between *Navarette* and *J.L.*, what drove the *Navarette* Court to highlight a few factual anomalies and thus find reasonable suspicion? Perhaps, as the dissent intimated, the grave dangers of intoxicated driving moved the Court.<sup>93</sup> Yet even if this were so, it offers little doctrinal justification. Importantly, the Court has not yet allowed the threshold for reliability of an anonymous tipster to vary based on the gravity of the harm.<sup>94</sup> Indeed, the

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<sup>88</sup> *But see J.L.*, 529 U.S. at 268 ("Sometime after the police received the tip — the record does not say how long — two officers were instructed to respond. They arrived at the bus stop about six minutes later . . .").

<sup>89</sup> *Navarette*, 134 S. Ct. at 1689.

<sup>90</sup> *Id.* at 1690. It is perhaps ironic that the Court has chosen to shape the Fourth Amendment's treatment of anonymous tips by appeal to the fact that the challenged tip is probably not even truly anonymous. (Perhaps it is no more ironic than the Court's decision to shape the Fourth Amendment's treatment of anonymous tips in response to a tip that was anonymous only as a procedural, rather than factual, matter. *See id.* at 1687 & n.1.)

<sup>91</sup> *See, e.g.,* Orin Kerr, *Six Thoughts on Navarette v. California*, VOLOKH CONSPIRACY (Apr. 22, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/22/six-thoughts-on-navarette-v-california/> [<http://perma.cc/3ENK-PNHN>].

<sup>92</sup> *Navarette*, 134 S. Ct. at 1690.

<sup>93</sup> *See id.* at 1697 (Scalia, J., dissenting) ("To prevent and detect murder we do not allow . . . targeted *Terry* stops without reasonable suspicion. We should not do so for drunken driving either.")

<sup>94</sup> *See Florida v. J.L.*, 529 U.S. 266, 272–73 (2000) (observing that the "facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability," *id.* at 273).

unlicensed gun in *J.L.* also threatened public safety,<sup>95</sup> yet the *J.L.* Court declined to find reasonable suspicion in that case.

Even assuming the Court's concern for the risk of harm created by intoxicated drivers, *Navarette* may provide only marginal public safety gains. After *Whren v. United States*,<sup>96</sup> in which the Court held that even a pretextual stop does not violate the Fourth Amendment if law enforcement has reason to believe the driver was committing a traffic violation,<sup>97</sup> police may stop nearly anyone they choose.<sup>98</sup> In the instant case, for example, the police would have been able to stop the vehicle had they seen the slightest driving infraction.<sup>99</sup> In this light, *Navarette* protects only in cases where intoxicated drivers are skilled or lucky enough to avoid driving mistakes in front of the police.

Yet *Navarette* may add to the police's already expansive power in at least two ways. First, in this case's wake the police may lawfully stop a person when someone else anonymously claims to be the victim of a crime by that person, despite lacking evidence that a crime even occurred.<sup>100</sup> Second, the police may stop someone who drives flawlessly while being observed by the police. Intoxicated driving is an enormous problem,<sup>101</sup> but even in the name of public safety it seems strange to expand the power of the police to reach the rare individual who drives "irreproachabl[y]" for several minutes.<sup>102</sup> Although Justice Scalia exaggerates in name-calling the majority opinion a "freedom-destroying cocktail,"<sup>103</sup> *Navarette* heralds unwarranted curtailment of Fourth Amendment protections.

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<sup>95</sup> See, e.g., Rob Drummond, Recent Development, *Florida v. J.L.: Phone Calls, Guns, and Searches*, 27 AM. J. CRIM. L. 415, 417-18 (2000).

<sup>96</sup> 517 U.S. 806 (1996).

<sup>97</sup> *Id.* at 819.

<sup>98</sup> See, e.g., Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1869 (2004).

<sup>99</sup> Cf. *Navarette*, 134 S. Ct. at 1696 (Scalia, J., dissenting) (remarking that law enforcement "followed the truck for five minutes, presumably to see if it was being operated recklessly" and calling such behavior "good police work").

<sup>100</sup> The Court in *J.L.* anticipated a similarly troubling result when it refused to create a firearm exception in part because it "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." *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

<sup>101</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, DRINKING AND DRIVING 1 (2011), <http://www.cdc.gov/vitalsigns/pdf/2011-10-vitalsigns.pdf> [<http://perma.cc/5525-EJX7>] ("US adults drank too much and got behind the wheel about 112 million times in 2010.")

<sup>102</sup> *Navarette*, 134 S. Ct. at 1696 (Scalia, J., dissenting).

<sup>103</sup> *Id.* at 1697.