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Erika L. Lukenbill

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NOTE

NAVARETTE V. CALIFORNIA: THE SUPREME COURT WALKS A WOBBLY LINE IN THE FACE OF DRUNK DRIVING ANONYMOUS TIPS

Erika L. Lukenbill[†]

I. INTRODUCTION

On August 23, 2008, California Highway Patrol (CHP) pulled over a vehicle on the basis of an anonymous tip, and subsequently arrested the occupants of the vehicle for possession of marijuana.¹ The anonymous tipster reported that a silver Ford F-150 pickup bearing license plate number 8D94925 had run the caller off the roadway.² She also reported that she had last seen the vehicle five minutes prior going southbound on Highway 1 at mile marker 88.³ Dispatch broadcasted the information to California Highway Patrol (“CHP”) at 3:47 p.m.⁴ Already on Highway 1 and heading north, a CHP officer spotted the reported vehicle at 4:00 p.m.⁵ The officer turned around and at 4:05 p.m. he pulled over the F-150, approximately twenty-three minutes after the call was placed.⁶ That officer was joined by a second, and as the two officers approached the vehicle they smelled marijuana.⁷ The officers searched the truck bed, found 30 pounds of marijuana, and arrested the two occupants of the truck.⁸ The men eventually

[†] *Managing Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 10. J.D. Candidate, Liberty University School of Law (2016); B.A., German and B.A., Law and Society, University of Calgary (2012).

1. *Navarette v. California*, 134 S. Ct. 1683, 1686-87 (2014). The original tip was received by Humboldt County Dispatch and was not an anonymous call; the tipster identified herself by name and Humboldt County had a recording of the conversation. *Id.* at 1687 n.1. At the evidentiary hearing, however, the prosecution failed to call both the tipster and the Humboldt County dispatcher who took the call. *Id.* As a result, the court proceeded to treat the call as an anonymous tip and it made its way to the Supreme Court of the United States as an anonymous tip. *Id.*

2. *Id.* at 1686-87. At no point in the phone call did the anonymous tipster claim that the driver of the reported vehicle was intoxicated.

3. *Id.* at 1686.

4. *Id.* at 1687.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

“[pled] guilty to transporting marijuana and were sentenced to 90 days in jail plus three years of probation.”⁹

Even though the officers knew nothing about the tipster—not her name nor how to locate her—the prosecution argued that the tip provided by the unknown and unaccountable informant provided the officers with enough reliable information to create reasonable suspicion for the original investigatory stop.¹⁰ By the time the case reached the Supreme Court of the United States, Justice Thomas, writing for the majority, presented the issue as “whether the 911 call was sufficiently reliable to credit the allegation the petitioners’ truck ran the caller off the roadway.”¹¹ The issue, as presented, only leads to more questions. What factors demonstrate reliability? What is a “sufficient” level of reliability? What kind of details must the caller provide? Is the crime open or concealed?¹² Does the crime alleged affect the level of reliability required, or will the potential risk of harm outweigh the need for reliability? Does the expectation of privacy of the suspect play a role? Historically, courts have wrestled with these issues in attempting to lay out a workable standard.

Unfortunately, the jurisprudence from the Supreme Court and state supreme courts has been less than clear. Under the “totality of the circumstances” test to determine reasonable suspicion,¹³ every fact is relevant. The courts have provided guidance through case law, adjusting and refining the standard over time. But the courts can take months to determine whether a particular set of facts provided reasonable suspicion; law enforcement officers do not have that luxury. Often, an officer only has a

9. *Id.*

10. *Navarette*, 134 S. Ct. at 1692 (Scalia, J., dissenting). There was some indication at the lower court that the anonymous tipster was a woman, beyond that the identity was unknown. *Id.* at 1697 n.1.

11. *Id.* at 1688 (internal quotation marks omitted). The dissent phrased the question as “whether the ‘content of information possessed by police and its degree of reliability,’ gave the officers reasonable suspicion that the driver of the truck . . . was committing an ongoing crime.” *Id.* at 1693 (Scalia, J. dissenting) (emphasis added) (citation omitted). Note the significant difference between the majority’s question, which looks at the reliability of an allegation of a single instance of being run off the road, and the dissent’s question, which looks at the reliability of an allegation of an ongoing crime. This is particularly relevant because the Court relied heavily on the fact that driving while intoxicated is an ongoing crime.

12. See Andrew B. Kartchner, J.L.’s *Time Bomb Still Ticking: How Navarette’s Narrow Holding Failed to Address Important Issues Regarding Anonymous Tips*, 44 U. BALT. L. REV. 1, 16 (2014) (noting that a tip about a concealed crime is less reliable because it requires inside information while an open crime is more reliable because it is visible to all).

13. *Navarette*, 134 S. Ct. at 1687 (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

split-second to make that decision. There is no time to wait and investigate further.

This note contends that the standard, as interpreted by *Navarette v. California*, has created more confusion for law enforcement officers. This note will first discuss the background of the Fourth Amendment in general, as well as the progression of cases “resolving” anonymous tip and reasonable suspicion issues. Second, this note will review state and federal circuit court cases that have directly considered this issue, focusing mainly on the roles that privacy and danger play in the analysis. Third, after analyzing the opinion in *Navarette*, this note will examine the effect *Navarette* has had on the lower courts and law enforcement. Finally, this note will conclude that the Supreme Court did not resolve the issue, but rather made it more difficult to determine whether reasonable suspicion exists.

II. BACKGROUND

Drunk driving poses a very serious public threat; thousands of people are killed every year as a result of drunk driving.¹⁴ The Supreme Court has recognized, and no one can dispute, the state’s interest in preventing drunk driving.¹⁵ On the other hand, it is indisputable that the Fourth Amendment protects individuals from unreasonable searches and seizures.¹⁶ The relevant question is whether an investigatory stop based on an anonymous tip of drunk driving, without more, constitutes a reasonable search under the Fourth Amendment. If the answer to that question is no, then what is required of an anonymous tip in order for it to provide the reasonable suspicion necessary to instigate an investigatory stop?

A. *General History of the Fourth Amendment*

The text of 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

14. Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., DOT HS 811 870, *Traffic Safety Facts 2012 Data: Alcohol-Impaired Driving* (2013), <http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf>.

15. Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 451 (1990) (“Media reports of alcohol-related death and mutilation on the Nation’s roads are legion.”).

16. U.S. CONST. amend. IV. The Fourth Amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. See *Wolf v. Colo.*, 338 U.S. 25, 27-28 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961).

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁷

The original impetus of the Fourth Amendment was the result of England's use of general warrants and writs of assistance in America.¹⁸ These warrants and writs were open-ended and "issued without any suspicion of illegal activity and permitted those holding a writ to go anywhere they chose."¹⁹ These writs allowed government officials to enter any home for any reason. These arbitrary government invasions led the Framers to draft the Fourth Amendment to protect the privacy of individuals.

The Framers divided the Fourth Amendment into two clauses: the reasonableness clause and the warrant clause.²⁰ The reasonableness clause prohibits unreasonable searches and seizures, and the warrant clause requires a warrant to be supported by probable cause.²¹ These clauses were intended to protect individual privacy and curtail unrestrained government intrusion.²² Justice Jackson stated that the "Fourth Amendment freedoms . . . are not mere second-class rights but belong in the catalog of indispensable freedoms."²³ Jackson believed Fourth Amendment rights were indispensable because "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."²⁴

Historically, courts interpreted the Fourth Amendment to require the police to obtain a warrant from the judiciary by demonstrating probable cause to suspect that criminal activity may have occurred.²⁵ That requirement took the decision-making power out of the hands of the police, "whose judgment is necessarily colored by their primary involvement in the often

17. U.S. CONST. amend. IV.

18. THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 32 (2008).

19. *Id.* at 28.

20. U.S. CONST. amend. IV.

21. *Id.*

22. Colby J. Morrissey, Note, *Anonymous Tips Reporting Drunk Driving: Rejecting A Fourth Amendment Exception for Investigatory Traffic Stops*, 45 *NEW ENG. L. REV.* 167, 171 (2010).

23. *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). *See also* *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("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.").

24. *Brinegar*, 338 U.S. at 180.

25. 68 *Am. Jur.* 2d *Searches and Seizures* § 191 (2015).

competitive enterprise of ferreting out crime.”²⁶ But the Fourth Amendment does not protect from all searches and seizures, only *unreasonable* searches and seizures.²⁷ Typically, to determine what is reasonable, courts conduct a balancing test, weighing the individual’s right to privacy against the legitimate interests of the government.²⁸ Over time, the Supreme Court’s interpretation of the Fourth Amendment allowed law enforcement officers to conduct protective searches under standards lower than probable cause, such as reasonable suspicion.²⁹ Additionally, in the course of balancing interests, the Court has created numerous exceptions to the warrant requirement, such as the automobile exception.³⁰

B. *The Automobile Exception*

In 1925, the Supreme Court first recognized an exception for searching automobiles.³¹ Due to their mobility, the Court recognized the impracticality of obtaining a warrant before a driver could move his vehicle out of the jurisdiction.³² Therefore, in determining whether a warrantless search of an auto was valid, the Court looked to whether “the seizing officer [had] reasonable or probable cause for believing that the automobile which he stop[ped] and seize[ed] ha[d] contraband”³³ Since then, however, courts have further justified the automobile exception on the ground that “[t]he public is fully aware that it is accorded less privacy in its automobiles”³⁴ The decreased expectation of privacy is a result of both the government’s

26. *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

27. *Id.* at 9 (citing *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

28. *See, e.g., Terry*, 392 U.S. at 27 (balancing the interests of the government in protecting police officers and the individual’s interests in privacy).

29. *See, e.g., Maryland v. Buie*, 494 U.S. 325 (1990) (allowing officers to make a brief in-home protective sweep in conjunction with a lawful arrest when an officer has reasonable belief that he or she is in danger); *Michigan v. Long*, 463 U.S. 1032 (1983) (allowing a protective search of the passenger compartment of an automobile during a lawful investigatory stop); *Terry*, 392 U.S. 1 (1968) (allowing officers to pat down a suspect to search for weapons based on reasonable suspicion).

30. *See, e.g., Kentucky v. King*, 131 S. Ct. 1849 (2011) (allowing an exception to the warrant requirement to prevent the destruction of evidence); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (creating the plain view exception).

31. *Carroll v. United States*, 267 U.S. 132 (1925).

32. *Id.* at 153.

33. *Id.* at 156.

34. *California v. Carney*, 471 U.S. 386, 392 (1985).

compelling need to regulate roadways and the relatively open configuration of vehicles.³⁵

Indeed, so long as the officers have probable cause, the automobile exception even extends so far as to allow officers to search every part of the vehicle, including the contents of any containers the police may find.³⁶ Further, if the driver of a vehicle is arrested, the officer may search the vehicle without probable cause so long as the driver is in reaching distance of the passenger compartment or it is reasonable to believe the vehicle contains evidence of the offense of the arrest.³⁷ Because of the location—an automobile—the courts have been lenient in finding searches and seizures reasonable under the Fourth Amendment.

C. *Terry v. Ohio*

While the investigatory stop based on reasonable suspicion has developed over time, it originated in *Terry v. Ohio*.³⁸ On October 31, 1963, a plainclothes officer was patrolling the downtown streets when he noticed three individuals acting suspiciously in a manner that he described as “casing a job.”³⁹ After observing for a while, the officer detained the three individuals and asked for their names.⁴⁰ Because of his observations, and out of concern for his own safety, the officer patted down the outside of their clothing and found that two of the men were armed.⁴¹ After being charged with carrying a concealed weapon,⁴² one of the men, Terry, attempted to suppress the introduction of the weapons into evidence.⁴³ The district court denied his motion to suppress and Terry appealed.⁴⁴

The issue presented to the Supreme Court was one of first impression.⁴⁵ The Court had to consider an entire area of police conduct: “necessarily swift action predicated upon the on-the-spot observations of the officer on the

35. *Id.*

36. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

37. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

38. *Terry v. Ohio*, 392 U.S. 1 (1968).

39. *Id.* at 5-6. The behavior consisted of individually walking back and forth and glancing in a particular store window. After each individual made a walk-by, they would confer. This behavior continued for 10-12 minutes. *Id.*

40. *Id.* at 6-7.

41. *Id.* at 7.

42. *Id.* at 7.

43. *Id.* at 7-8.

44. *Id.*

45. *Id.* at 9-10.

beat.”⁴⁶ The Court decided that a police officer, having *reasonable suspicion* that a suspect was armed and dangerous, could conduct a limited search for weapons.⁴⁷ As courts have interpreted *Terry*, it has come to stand for the proposition that an officer can conduct a brief investigatory stop if the officer has a “particularized and objective basis for suspecting the particular person [he has] stopped [is involved in] criminal activity.”⁴⁸ These investigatory stops have come to be called “Terry stops.”⁴⁹ While a mere “hunch” is not enough,⁵⁰ courts have held that the standard is “obviously less” stringent than probable cause.⁵¹ In *Terry*, the Court applied a balancing test, finding that the state’s interest in officer safety outweighed the minimal intrusion on an individual’s privacy.⁵²

D. Alabama v. White

In *Alabama v. White*, the Supreme Court first considered the anonymous tip and its effect on Terry stops.⁵³ On April 22, 1987, law enforcement received an anonymous tip that Vanessa White would leave her apartment at a specific time, enter a specific car, and drive to a specific location, all while

46. *Id.* at 20.

47. *Id.* at 30.

48. *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014).

49. *See, e.g., Navarette*, 134 S. Ct. at 1697; *Florida v. J.L.*, 529 U.S. 266, 270 (2000).

50. *Terry*, 392 U.S. at 27.

51. *See, e.g., Navarette*, 134 S. Ct. at 1687; *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

To see the distinction between reasonable suspicion and probable cause, or perhaps the difficulty in distinguishing the two, consider the definitions used in New Jersey:

probable cause determinations require an assessment based on the totality of the circumstances and an objective standard of reasonableness. Probable cause is defined as a well-grounded suspicion that a criminal offense has been or is being committed. It is more than a bare suspicion, but less than the legal evidence necessary to convict beyond a reasonable doubt.

Robert Ramsey, *Probable cause and reasonable suspicion, defined*, NJ Drunk Driving L. § 16:7 (2015 ed.). Reasonable suspicion is defined as:

an objective level of proof that is deemed to be less than probable cause. In determining whether an officer acts reasonably in circumstances where this level of proof is required, the court must give weight to specific, reasonable inferences which the officer is entitled to draw from the facts in light of his or her experience. An officer’s inchoate and unparticularized suspicion or hunch is insufficient, as a matter of law, to establish a reasonable suspicion.

Id.

52. *Terry*, 392 U.S. at 27, 30.

53. *Alabama v. White*, 496 U.S. 325 (1990).

carrying a brown attaché case containing cocaine.⁵⁴ Responding officers proceeded to the apartment, and saw the described car in the parking lot. Shortly after, at the prescribed time, the officers watched as White came out of the apartment, without any attaché case, and entered the vehicle.⁵⁵ The officers corroborated the tip by following White as she drove the most direct route to the location the anonymous caller had identified.⁵⁶ Just before White turned into the location, the officers instigated an investigatory stop.⁵⁷

Recognizing that “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity,”⁵⁸ the Court concluded it was nevertheless possible for an “anonymous caller [to] provide the reasonable suspicion necessary for a *Terry* stop.”⁵⁹ Noting that reasonable suspicion is “obviously less demanding than . . . probable cause,”⁶⁰ the Court proceeded to consider both the quantity and quality of information provided by the anonymous tip.⁶¹ Applying the totality of the circumstances test, the Court found that law enforcement was able to corroborate the innocent details of the tip through observation.⁶² More importantly, however, the officers were able to corroborate White’s destination.⁶³ This was important for two reasons. First, and most important, the tip contained predictive details that were not “easily obtained facts and conditions existing at the time of the tip, but [informed law enforcement of] future actions of third parties ordinarily not easily predicted.”⁶⁴ This was important because it demonstrated that the informant had inside knowledge and a “special familiarity with [the suspect’s] affairs.”⁶⁵ This information allowed the police to make an

54. *Id.* at 327.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 329. The Court relied heavily on its reasoning in *Illinois v. Gates*, a case that dealt with anonymous tips in the probable cause context. 462 U.S. 213 (1983).

59. *White*, 496 U.S. at 329.

60. *Id.* at 330.

61. *Id.*

62. *Id.* at 331.

63. *Id.* While the officers stopped White just before the reported destination, the fact that she travelled the most direct route, which required numerous turns and spanned four miles, was sufficient to corroborate the destination. *Id.*

64. *Id.* at 332. This discussion of descriptive information led many of the lower courts to find that an informant’s ability to “predict” the location and direction of a moving car was sufficient to constitute “predictive information” and therefore give the tip sufficient reliability. *See, e.g., State v. Boyea*, 765 A.2d 862, 867 (Vt. 2000).

65. *White*, 496 U.S. at 332.

assumption that a person having such “information is likely to also have access to reliable information about the [suspect’s] illegal activities.”⁶⁶ Second, the Court noted that when the “informant is shown to be right about some things, [it means] he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity,” and therefore the Court imparted “some degree of reliability to the other allegations made by the caller.”⁶⁷ Under these circumstances, the Court held that the anonymous tip was sufficiently reliable to create the reasonable suspicion necessary to justify the stop, but that it was a “close case.”⁶⁸

For the next ten years, *White* was the leading case on anonymous tips providing reasonable suspicion. In 2000, the Supreme Court decided *Florida v. J.L.*,⁶⁹ an opinion that would lead both the lower federal courts and state supreme courts into disagreement as to its application.

E. The Beginning of the Problem: Florida v. J.L. and the “Exceptions” to Reliability

In *Florida v. J.L.*, the Court concluded that an anonymous tip was not reliable enough to justify an investigatory stop.⁷⁰ In *J.L.*, the police received an anonymous tip that “a young black male standing at a particular bus stop

66. *Id.* This also goes to the previously mentioned distinction between open and concealed crimes. While reporting a concealed crime would be more unreliable, it was sufficiently reliable in *White* because of the predictive information provided.

67. *Id.* at 331-32.

68. *Id.* at 332. While the majority found that the call was sufficiently reliable, Justice Stevens dissented. *Id.* at 333 (Stevens, J. dissenting). Justice Stevens argued that people have routines as to departure and probable destination such that their neighbors could accurately predict their movements without knowing they are in possession of an illegal substance. *Id.* Justice Stevens further states that:

Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip about her like the one predicting Vanessa White’s excursion. In addition, under the Court’s holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed. Fortunately, the vast majority of those in our law enforcement community would not adopt such a practice. But the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.

Id.

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

70. *Id.* at 268.

and wearing a plaid shirt was carrying a gun.”⁷¹ The record in the case was unclear as to how long after the call it was before the officers received instruction to respond,⁷² however, it was probably soon after because the officers located the individual when they arrived. Although the officers did not see a firearm or unusual movements, one of the officers approached J.L., the young man in the plaid shirt, and frisked him.⁷³ The officer discovered that J.L. was carrying a firearm, as reported by the anonymous caller,⁷⁴ and charged him with carrying a concealed firearm without a permit and for possessing a firearm under the age of eighteen.⁷⁵

The Court held that the tip lacked even the moderate indicia of reliability that was present in *White*.⁷⁶ The information provided was sufficient in a limited sense, as “[i]t [would] help the police correctly identify the person whom the tipster [meant] to accuse.”⁷⁷ Reasonable suspicion, however, “requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”⁷⁸ The tip provided in *J.L.* did not fit in that category because it did not contain predictive information, as *White* did, that would allow the police to corroborate or test the informant’s knowledge or credibility.⁷⁹

Notably, the Supreme Court firmly rejected an automatic firearms exception to the reliability requirement.⁸⁰ Justice Ginsburg acknowledged the danger of firearms, and the risk that armed criminals may pose to the public.⁸¹ However, an automatic exception would “rove too far” for two primary reasons.⁸² First, it would allow any individual to “set in motion an intrusive, embarrassing police search of the targeted person simply by placing

71. *Id.*

72. *Id.* However, given that the suspects were still at the bus stop, it is likely that the call was contemporaneous. The officers arrived at the bus stop six minutes after receiving the instruction to respond. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 269.

76. *Id.* at 271.

77. *Id.* at 272.

78. *Id.* (citing 4. W. LAFAVE, SEARCH AND SEIZURE § 9.4(h), at 213 (3d ed. 1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases.)).

79. *Id.* at 271.

80. *Id.* at 272.

81. *Id.*

82. *Id.*

an anonymous call”⁸³ Second, the exception could not be securely confined to firearms, but would likely carry to other areas such as possession of illegal drugs.⁸⁴

After expressly rejecting an automatic firearm exception, the Court went on to state that:

[t]he 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*. 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. Nor do we hold that public safety officials in quarters where the *reasonable expectation of Fourth Amendment privacy is diminished*, such as airports and schools, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.⁸⁵

This short statement led to two exceptions: (1) where the danger is so great the normal reliability is not required, and (2) where privacy interests are lower. Ironically, despite the Court’s express concerns about the inability to limit an exception to firearms, lower courts have relied on the above statement from *J.L.* as the basis for considering a drunk driving exception.⁸⁶ This statement created an inconsistency and the lower courts split in determining what level of reliability was required for anonymous tips of driving under the influence.

83. *Id.*

84. *Id.* at 273.

85. *J.L.*, 529 U.S. at 273-74 (citations omitted) (emphasis added). In discussing situations where the reasonable expectation of privacy is diminished such that the same level of reliability is not required, the Court cites to two cases: *Florida v. Rodriguez*, 469 U.S. 1 (1984) and *New Jersey v. TLO*, 469 U.S. 325 (1985). However, in both cases, the Court still required reasonable suspicion. In *New Jersey v. TLO*, the Court affirmed a search of a student’s purse because the school had a reasonable belief that the student was, or had been, committing a crime. 469 U.S. at 341-342. In *Florida v. Rodriguez*, the Court assumed, without deciding, that a seizure had occurred, and found that it was justified by reasonable suspicion. 469 U.S. at 6 (using the term articulable suspicion interchangeably with reasonable suspicion).

86. See *United States v. Wheat*, 278 F.3d 722, 729 (8th Cir. 2001); *State v. Boyea*, 765 A.2d 862, 868 (Vt. 2000).

III. THE PROBLEM

A. *The Lower Courts Split*

Following *J.L.*, the lower courts struggled to find a consistent interpretation and application of the standard. The majority of states considering the issue relied heavily on the scenarios outlined in *J.L.*, finding that the danger of drunk driving and the reduced privacy expectation in automobiles justified the investigatory stops.⁸⁷ Despite these conclusions, these courts stopped short of creating an express drunk driving exception, but in applying balancing tests heavily weighted the privacy and danger concerns, essentially creating an exception in application. A small number of courts appeared to apply a more traditional reliability test.⁸⁸ The more traditional test is a totality of the circumstances test, considering the privacy and danger equally with other circumstances.

1. The majority position: Acknowledging the grave danger and reduced expectation of privacy involved in drunk driving scenarios

Since an express exception was not created by *J.L.*, the courts still required some showing of reliability in an anonymous tip situation. What level of reliability should be required, however, continues to be an open question. Specifically, for anonymous tips about drunk driving, the question is whether an anonymous tip, which would ordinarily be insufficient to justify a search, would be sufficient in the drunk driving context to fit a *J.L.* exception. Presumably, because drunk driving fits into the *J.L.* exceptions, the courts required a lower showing of reliability. At the very least, the grave danger and reduced privacy exceptions played a role in determining the reliability in each case—either because the courts simply required a reduced level of reliability, or because they gave greater weight to information that the anonymous caller did provide in finding that there was grave danger.⁸⁹

87. *Wheat*, 278 F.3d at 736-37; *People v. Wells*, 136 P.3d 810, 815-16 (Cal. 2006); *Bloomington v. State*, 842 A.2d 1212, 1213 (Del. 2004); *State v. Prendergast*, 83 P.3d 714, 724 (Haw. 2004); *State v. Crawford*, 67 P.3d 115, 119 (Kan. 2003); *State v. Walshire*, 634 N.W.2d 625, 630 (Iowa 2001); *State v. Rutzinski*, 623 N.W.2d 516, 519, 527-28 (Wis. 2001); *Boyea*, 765 A.2d at 867-68.

88. *State v. Kooima*, 833 N.W.2d 202, 208-09 (Iowa 2013); *Harris v. Commonwealth*, 668 S.E.2d 141, 147 (Va. 2008); *State v. Lee*, 938 P.2d 637, 640 (Mont. 1997); *State v. Miller*, 510 N.W.2d 638, 645 (N.D. 1994).

89. See, e.g., *Wheat*, 278 F.3d at 736-37; *People v. Wells*, 136 P.3d 810, 815-16 (Cal. 2006).

a. Drunk driving is a grave and imminent danger

(1) *State v. Boyea*

In 2000, the same year *J.L.* was decided, the Vermont Supreme Court became the first court to apply the *J.L.* exceptions in the context of an anonymous tip of drunk driving.⁹⁰ The court emphasized the danger of driving under the influence from the very first words of the opinion. The court sketched out the facts—an anonymous report of a specific vehicle, in a specific location, operating erratically—and posed two alternative scenarios.⁹¹ In the first scenario, the officer pulled the vehicle over as soon as possible, “revealing a driver with a blood alcohol level nearly three times the legal limit and a prior DUI conviction.”⁹² In the second scenario, the officer followed the vehicle in an attempt to corroborate the report, but eventually abandoned the surveillance. The driver then veered into oncoming traffic and caused an accident.⁹³ The court determined that the gravity of potential harm must be considered, and that the officer’s ability to wait and observe incriminating behavior was limited by the exigency of the situation.⁹⁴ The result of drunk driving is “death and destruction on the highways. This is not a risk which the Fourth Amendment requires the public to take.”⁹⁵ Holding with the tone of the hypothetical, the court distinguished a drunk driver from the concealed firearm in *J.L.* by describing a drunk driver as “not at all unlike a ‘bomb,’ and a mobile one at that.”⁹⁶

(2) *United States v. Wheat*

The Eighth Circuit Court of Appeals followed the lead of the Vermont Supreme Court. Acknowledging that the Supreme Court had expressly rejected both a firearm exception and the idea that confirmation of visual attributes provided sufficient corroboration, the Eighth Circuit nevertheless concluded that the anonymous tip provided sufficient reliability to create reasonable suspicion.⁹⁷ The court found an anonymous report that a driver was passing on the wrong side of the road, cutting off other cars, and driving like a “complete maniac,” likely established that there was a drunk driver

90. *Boyea*, 765 A.2d at 867.

91. *Id.* at 862.

92. *Id.*

93. *Id.*

94. *Id.* at 864-65 (quoting *State v. Melanson*, 665 A.2d 338, 340 (N.H. 1995)).

95. *Id.* at 865 (quoting *State v. Tucker*, 878 P.2d 855 (Kan. Ct. App. 1994)).

96. *Id.* at 867.

97. *United States v. Wheat*, 278 F.3d 722, 728-29 (8th Cir. 2001).

posing “an imminent threat to public safety.”⁹⁸ The critical difference between a drunk driver and a report of a concealed weapon is that an officer responding to a report of drunk driving does not have a less invasive option. Unlike a drunk driving situation, an officer responding to a possessory offense, such as firearm possession, may initiate a simple consensual encounter or quietly observe the individual for a period of time.⁹⁹ Despite the presence of numerous other factors weighing in favor of the defendant’s privacy, including that the officers had only corroborated visual attributes and not the illegality of the defendant’s conduct, the court heavily weighted the danger of the defendant’s alleged offense in its analysis.

(3) *People v. Wells*

In *Wells*, the CHP received a report of a “possibly intoxicated driver ‘weaving all over the roadway.’”¹⁰⁰ This is one of the few cases where the caller actually indicated that the driver may have been intoxicated; in other cases, the anonymous callers simply described the driver’s behavior. In *Wells*, the responding officer did not observe any erratic or suspicious behavior prior to stopping the van.¹⁰¹ Since the officer followed the van and did not observe erratic driving, one would expect that the reliability of the anonymous tip would decrease. Yet the California Supreme Court concluded that an anonymous tip was sufficiently reliable to create reasonable suspicion if: (1) the tipster supplies sufficient identifying information regarding the vehicle and its location, and (2) the tip indicates the caller witnessed a contemporaneous traffic violation, rather than mere speculation as to unlawful activity, and (3) at least the “innocent details” of the tip are corroborated by the officers.¹⁰² Further, the court agreed that drunk driving was a more serious risk than “passive gun possession,”¹⁰³ and that “[p]olice officers undoubtedly would be severely criticized for failing to stop and investigate a reported drunk driver if an accident subsequently occurred.”¹⁰⁴

98. *Id.* at 724, 736.

99. *Id.* at 736.

100. *People v. Wells*, 136 P.3d 810, 811 (Cal. 2006).

101. *Id.* at 812.

102. *Id.* at 815.

103. *Id.*

104. *Id.* The court further states that the “public rightfully expects a police officer to inquire into such circumstances . . .” *Id.* But the Fourth Amendment is not based on what the public expects. For example, the people expect the police to arrest and charge a murderer, but in some circumstances the discovery of a murder weapon or other important evidence is excluded if law enforcement officers fail to comply with the Fourth Amendment. Instead it is based on a

The three cases discussed above are just a small sampling of cases coming to the same conclusion. Reasonable suspicion requires less than probable cause, drunk driving is an extreme danger to the public, and drunk driving is nothing like a firearm. These courts concluded that drunk driving is not bound by *J.L.*, but rather falls into the hypothetical posed by Justice Ginsburg requiring a lower showing of reliability. Despite considering other factors, each court relied primarily on the grave danger drunk driving posed to the public.

b. Individuals have a reduced expectation of privacy in a vehicle

Although the lower courts found that driving under the influence was sufficiently dangerous to fit into the first *J.L.* exception, they went one step further to find that driving under the influence also fit within the second alleged exception: a reduced expectation of privacy. The courts did not explain whether the reduced expectation of privacy alone was enough to establish reliability, or whether it was reduced privacy in conjunction with the dangers of drunk driving. The courts nonetheless found that the tips were sufficiently reliable. In *State v. Boyea*, the court described the seizure in driving under the influence cases as “a simple motor vehicle stop, a temporary and brief detention that is exposed to public view.”¹⁰⁵ This minimal intrusion did not rise to the level of a “hands-on violation of the person” that was present in *J.L.*¹⁰⁶ Similarly, the California Supreme Court found that the “level of intrusion of personal privacy and inconvenience involved in a brief vehicle stop is considerably less than [an] embarrassing police search on a public street.”¹⁰⁷ Further, in keeping with the language of the second exception in *J.L.*, the court stated that “individuals generally have a reduced expectation of privacy while driving a vehicle on public thoroughfares.”¹⁰⁸

The reasoning by these courts is consistent with the Supreme Court’s jurisprudence on the automobile exception. However, if the reduced expectation of privacy in an automobile was, by itself, enough to reduce the level of reliability required, then it would seem that an anonymous tip reporting any crime involving an automobile would automatically be entitled to greater weight in a reasonable suspicion analysis. For example, an

balancing test of the individual right invaded and the government interest, regardless of public expectations. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 27 (1960).

105. *State v. Boyea*, 765 A.2d 862, 868 (Vt. 2000) (internal quotation marks omitted).

106. *Id.* *See also Wheat*, 278 F.3d at 737 (vehicular stops “are considerably less invasive, both physically and psychologically, than the frisk on a public corner . . .”).

107. *Wells*, 136 P.3d at 816 (internal quotation marks omitted).

108. *Id.*

anonymous report of texting while driving or speeding would provide the officer with reasonable suspicion for a stop—because both actions took place in a car. Despite the significance that the courts gave to privacy in the analysis, the discussion in *State v. Boyea* was relegated to a few short sentences.

Despite the lack of discussion, it is clear from the above cases that the reduced expectation of privacy played a significant role in the outcome of the case. These holdings provided a consistency for law enforcement officers. Regardless of whether a “drunk driving exception” was created, officers could at least rely on the fact that an anonymous tip of drunk driving was sufficient to provide reasonable suspicion. At the very least, the standard was a clear rule for officers to enforce. The focus on weighing privacy interests against grave danger fell closely in line with the traditional Fourth Amendment balancing test: privacy interests of the individual against the government’s interest. In these cases, the test came out in favor of the government. Other courts, however, weighed the balance and came out in favor of the individual.

2. The minority position: Focusing less on the danger and more on the totality of the circumstances

Other jurisdictions allocated less significance to the danger and privacy interest exceptions from *J.L.* and applied what appears to be a more traditional totality of the circumstances test. In fact, these courts found other factors relevant in determining that reasonable suspicion did not exist when based on the anonymous tip.

a. *Harris v. Commonwealth*

In *Harris*, the Supreme Court of Virginia determined that an anonymous tip sufficiently describing a vehicle that was subsequently located by law enforcement was insufficient to justify a stop. In addition to describing the vehicle and the location, the anonymous tipster went so far as to provide the name of the driver, describe the shirt the driver was wearing, and provided a partial license plate number.¹⁰⁹ When the officer located the vehicle, he noticed that the plate number was similar but not identical to the one reported.¹¹⁰ The officer followed the vehicle for a short time and did not notice the vehicle swerving, exceeding the posted speed, or otherwise acting suspicious.¹¹¹

109. *Harris v. Commonwealth*, 668 S.E.2d 141, 144 (Va. 2008).

110. *Id.* The caller reported that the license plate contained Y8066 while the license of the vehicle pulled over was YAR-8046. *Id.*

111. *Id.*

The court ultimately concluded that the anonymous source was not sufficiently reliable.¹¹² The call did not contain predictive information sufficient to allow the officer to verify the informant's credibility.¹¹³ The court noted that an anonymous tip does not require predictive information if the informant was reporting readily observable information.¹¹⁴ "However, the crime of driving while intoxicated is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated; such conduct must be observed before an investigatory stop is justified."¹¹⁵ The anonymous caller merely reported that the driver was drunk, but did not allege any behavior such as weaving or swerving.¹¹⁶ Since the conduct was not readily observable, and the officer himself did not witness any suspicious activity, the officer did not have reasonable suspicion to instigate an investigatory stop.¹¹⁷

The Commonwealth appealed to the Supreme Court of the United States, but its petition for certiorari was denied.¹¹⁸ Chief Justice Roberts dissented from the denial, arguing that the rule would "grant drunk drivers 'one free swerve' before they can legally be pulled over by police," and that it would be "difficult for an officer to explain to the family of a motorist killed by that swerve that the police had a tip that the driver of the other car was drunk, but that they were powerless to pull him over, even for a quick check."¹¹⁹ Even here, the danger presented by drunk driving plays an important role in Roberts' dissent. His concerns followed the same refrain as the lower federal courts that driving under the influence is dangerous and, therefore, officers should be able to act on anonymous tips. Yet there was little mention of reliability or an individual's right to privacy. Chief Justice Roberts even noted that anti-drunk driving policies had frequently been upheld, despite the fact

112. *Id.* at 147.

113. *Id.* at 146. This is contradictory to *Boyea*, where the court found that the ability to "predict" the location of a moving vehicle was sufficient predictive information. *State v. Boyea*, 765 A.2d 862, 867 (2000).

114. *Harris v. Commonwealth*, 668 S.E.2d 141, 146 (Va. 2008) (citing *Jackson v. Commonwealth*, 594 S.E.2d 595, 603 (Va. 2004)).

115. *Harris*, 668 S.E.2d at 146.

116. *Id.* at 144.

117. *Id.* at 147. The officer reported that the driver stayed within the posted speed limit and did not swerve at any time. *Id.* However, the officer did observe the driver brake at three different times before voluntarily pulling the vehicle to the side of the road. *Id.* While the behavior was unusual, the court noted that the officer did not describe it as erratic, nor does it indicate involvement in the criminal act of driving under the influence. *Id.*

118. *Virginia v. Harris*, 558 U.S. 978 (2009).

119. *Id.* at 981.

that the policies would have been “constitutionally problematic” in other circumstances.¹²⁰ Based on his dissent, it would appear Roberts was suggesting that there should be a lower standard for anonymous tips of drunk driving.

b. *State v. Kooima*: Pre-cursor to *Navarette*?

A decade after the Iowa Supreme Court followed a reduced reliability requirement,¹²¹ that court decided to focus less on the danger of drunk driving and more on the anonymous tip itself.¹²² In making its decision, the court collected and analyzed all the relevant cases and identified three elements that seemed to be present in all cases where the anonymous tip was sufficiently reliable: (1) the anonymous caller provided “an accurate description of the vehicle, including its location, so the police could identify the vehicle,” (2) the information had to be based on “personal, eyewitness information [that was] made contemporaneously with a crime in progress,” and (3) the caller had to describe specific traffic violations, which would indicate that the allegation was more than a mere hunch.¹²³ In looking for eyewitness information, the court was in line with *White* and *J.L.*, where the basis of the anonymous tipster’s knowledge was important to the reliability determination.

Kooima left law enforcement in the difficult position of deciding whether the same factors would play a role in anonymous tips of other crimes. Would an anonymous tip of texting and driving be sufficient? It is still a specific traffic violation, an eyewitness can see it, and the same identifying information could be provided. Or are police required to have a little something more before reasonable suspicion exists? This case served as a precursor to *Navarette*, which was decided the following year.

IV. DID *NAVARETTE V. CALIFORNIA* REALLY SOLVE THE PROBLEM?

As usual, the Supreme Court had to resolve the split among the circuits and state supreme courts. On one side, the majority of jurisdictions were overwhelmingly concerned with the danger of drunk driving. On the other side, a minority of jurisdictions attempted to apply the totality of the

120. *Id.* at 978. (Roberts, C.J., dissenting); *see, e.g.*, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (allowing roadside check stops without an individualized finding of reasonable suspicion).

121. *See State v. Walshire*, 634 N.W.2d 625 (Iowa 2001).

122. *State v. Kooima*, 833 N.W.2d 202, 208 (Iowa 2013).

123. *Id.* at 208-209. The three factors laid out in *Kooima* are very similar to the factors eventually applied by the Supreme Court in *Navarette*.

circumstances test as if driving under the influence was the same as any other crime. Which still left the question: what is required for an anonymous tip to provide reasonable suspicion? One would have expected the court to answer this question; indeed, based on the petition for certiorari, as well as the briefs and oral arguments, the parties before the Court also expected the question to be answered.¹²⁴ The Court, however, declined to fully answer it.¹²⁵ Instead, *Navarette* was only intended to answer whether an officer had to corroborate dangerous driving before stopping a vehicle on the basis of an anonymous tip.¹²⁶ The Court's answer, unfortunately, only spawned more confusion. The Court held that corroboration of an anonymous tip is not required. If corroboration was not required, but the stop was still permissible, it necessarily means that the reasonable suspicion justifying the stop existed prior to corroboration. If that is true, then the reasonable suspicion was provided only by the anonymous tip and discovery of the reported vehicle at the location reported. Accordingly, one would still expect some discussion of the relevant factors, and the Court did indeed discuss the factors making the tip reliable. However, the inherent danger of driving under the influence and the reduced privacy expectation in vehicles were not the prevalent factors.

A *Bright Line Totality of the Circumstances Test*

The majority firmly rejected the idea that reasonable suspicion had to be based on an officer's own observations, rather than on the observations or information of other individuals.¹²⁷ Therefore, corroboration is not always necessary. The Court outlined three specific factors that made this particular anonymous tip reliable. First, the court determined that the eyewitness had claimed eyewitness knowledge of the alleged dangerous driving.¹²⁸

124. Two questions were presented to the court:

1. Does the Fourth Amendment require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle?

2. Does an anonymous tip that a specific vehicle ran someone off the road provide reasonable suspicion to stop a vehicle, where the detaining officer was only advised to be on the lookout for a reckless driver, and the officer could not corroborate dangerous driving despite following the suspect vehicle for several miles?

Petition for certiorari, *Navarette v. California*, 134 S. Ct. 1683 (2014).

125. *Navarette v. California*, 134 S. Ct. 50 (2013) (granting cert only as to the first question presented).

126. *Id.*

127. *Navarette v. California*, 134 S. Ct. 1683, 1688 (2014).

128. *Id.* at 1689.

Accordingly, the Court accorded greater weight to the tip.¹²⁹ Second, the anonymous tip appeared to be contemporaneous with the event because the vehicle was located only a short distance from where it was reported only eighteen minutes after the call.¹³⁰ This contemporaneity negated the likelihood that the tip was deliberately misrepresented or a prank of some sort.¹³¹ The third and final factor was the use of the 911 emergency call system.¹³² The Court believed that the technological capabilities of the 911 system—such as the ability to record, transcribe, and trace—made the call more reliable.¹³³ Additionally, the Court stated that the anonymous call must report “more than a minor traffic infraction and *more than a conclusory allegation of drunk or reckless driving*. Instead, [the caller must] allege[] a specific and dangerous result of the driver’s conduct.”¹³⁴ Finally the Court noted that it was a report of an ongoing crime.¹³⁵

Despite declaring that it was applying a totality of the circumstances test, Justice Scalia rightly noted that, in reality, the Court stated a new rule that law enforcement would be quick to realize.¹³⁶ “So long as the caller identifies where the car is, anonymous 911 calls reporting a single instance of possibly careless or reckless driving will support a traffic stop.”¹³⁷ This is where the

129. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 234 (1983); *Spinelli v. United States*, 393 U.S. 410, 416 (1969)).

130. *Navarette*, 134 S. Ct. at 1689. Contemporaneity refers to the time between the incident reported and the actual report to law enforcement.

131. *Id.* The Court made reference to the present sense impressions and excited utterance exceptions to the hearsay rule and the rationale behind those exceptions. *See* FED. R. EVID. 803(1) & (2):

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

Interestingly, although the Court uses these rules to support the reliability of the tip, Justice Scalia points out that the comments to the Rules indicate hesitancy in applying these exceptions when the declarant is unknown. *Navarette*, 134 S. Ct. at 1694 (Scalia, J., dissenting).

132. *Id.*, 134 S. Ct. at 1689.

133. *Id.* at 1689-90. The Court did note, however, that the use of the 911 system did not make the call per se reliable, but “a reasonable officer could conclude that a false tipster would think twice before using such a system.” *Id.* at 1690.

134. *Id.* at 1691 (emphasis added).

135. *Id.*

136. *Id.* at 1692 (Scalia, J., dissenting).

137. *Id.* (Scalia, J., dissenting).

difficulty for law enforcement comes in: is *Navarette*'s holding a rule with three elements, or is it a totality of the circumstances test where even if those factors are present, other factors may outweigh them?

But several factors are present here that should at least raise concern as to whether the Court's three factors are sufficient for reliability. The conduct reported was only that a vehicle had run the anonymous caller off of the roadway, not that the driver was drunk.¹³⁸ Yet it was important to the Court's decision that the caller reported an ongoing crime.¹³⁹ The Court concluded that specific conduct such as weaving, crossing the centerline, or as in this case, running someone off the road, is the type of erratic behavior that the "accumulated experience of thousands of officers" suggests is "strongly correlated with drunk driving."¹⁴⁰ Other signs, such as speeding or not wearing a seatbelt would not be sufficient. And yet, under the Court's reasoning, not wearing a seatbelt is an ongoing traffic violation. Imagine that an anonymous caller described a vehicle and location, alleged that the driver was not wearing a seatbelt, and used the 911 system. Would it be sufficient to justify a traffic stop if the officer located the vehicle? Under *Navarette* the officer would not be required to justify the stop. But that seems ridiculous. Shouldn't the seriousness or danger of the alleged wrongdoing matter? And why does saying someone swerved on the road make a tip reliable, but saying someone is driving drunk does not? In any case, the reliability of an anonymous phone call, at least in this case, is based on an inference that a single instance of someone swerving on the road means that the driver is intoxicated.

In his dissent, Justice Scalia points out that the officer had good reason to *know* that the tip was unreliable, or to question its reliability, because the officer followed the truck for five minutes without seeing any suspicious behavior.¹⁴¹ Discounting that idea, the Court found it eminently reasonable that the presence of a marked police car would inspire careful driving.¹⁴² While following a suspect for an extended time may dispel reasonable suspicion, the mere five minutes in this case was not sufficient.¹⁴³ Justice Scalia countered that the ability of a drunk driver to drive carefully, simply because he observes a police car, undermines the very danger of drunk driving: the effects of intoxication on the body—"effects that no mere act of

138. *Id.* at 1686-87 (majority opinion).

139. *Id.* at 1690.

140. *Id.* at 1691.

141. *Id.* at 1695 (Scalia, J., dissenting).

142. *Id.* at 1691 (majority opinion).

143. *Id.*

the will can resist.”¹⁴⁴ Failure to repeat the alleged traffic violation should be significant.

Finally, the Court seemed to discount the entire problem with anonymous tips in the first place. Anonymous individuals cannot be held accountable for their actions.¹⁴⁵ The anonymity is especially relevant in this case, because though the tipster claimed eyewitness knowledge, the information provided was of the type that “everyone in the world who saw the car would have” and “anyone who wanted the car stopped would have to provide that information.”¹⁴⁶ The point being, if someone wanted to play a prank or harass an individual, they could do so simply by providing this information. Providing the general location of a vehicle on the road is not the same quality of predictive information generally credited to insiders, and it does not allow the officer to certify the veracity of the tip. The Court simply stated that reasonable suspicion merely provides the means to investigate; it does not preclude the possibility of innocent behavior.¹⁴⁷

Discounting these problems, the Court determined the call was sufficiently reliable based on the three factors discussed above. Accordingly, because this reliable call alleged an “ongoing” crime, the officer had reasonable suspicion to stop the car. The Court spent little time or attention discussing the danger of driving while intoxicated and the privacy expectations in an automobile. In fact, the Court’s mention of danger was limited to one sentence stating that this would be an inappropriate context to require an officer to use less intrusive investigatory techniques “because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.”¹⁴⁸

IV. SO WHERE DOES THAT LEAVE US?: ANALYSIS AND IMPLICATIONS OF *NAVARETTE*

The Supreme Court has spoken. There is only one problem: what did it say? What is the state of anonymous calls after *Navarette*? The Court clearly

144. *Id.* at 1697 (Scalia, J., dissenting).

145. *Id.* at 1692 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 385 (1995)).

146. *Id.* at 1693. Regardless of whether the call can be traced, what matters is the view of the caller. If the caller believes that the call is anonymous, he believes he is escaping accountability, notwithstanding the reality of whether the call is traceable. As Justice Scalia notes, “When does a victim complain to the police about an arguably criminal act (running the victim off the road) without giving his identity, so that he can accuse and testify when the culprit is caught?” *Id.*

147. *Id.* at 1691 (citing *United States v. Arvizu*, 534 U.S. 266, 277 (2002)).

148. *Id.* at 1691-92.

states that it subscribes to a totality of the circumstances test for reasonable suspicion. But does it really? In finding reliability, the Court pointed to three important factors: (1) the caller necessarily claimed eyewitness knowledge; (2) the call was contemporaneous; and (3) the caller used the 911 call system.¹⁴⁹ The question becomes, then, did the Court unintentionally create a bright-line rule for reliability? Does it apply only to anonymous tips alleging driving under the influence? Or is it a rule that can be used in other circumstances? Did the danger of driving while intoxicated play any role? Did the reduced privacy expectation play any role?

After determining that the call was reliable, the only other circumstance present was that the anonymous caller alleged something other than a conclusory allegation, something a reasonable officer would know suggests drunk driving.¹⁵⁰ Since *Navarette* was characterized as a “close case,” it would seem that any anonymous call would have to have, at minimum, the three factors present in *Navarette* in order to be reliable. It then follows that if the call has those three factors and the allegation was some driving activity symptomatic of drunk driving, then reasonable suspicion exists. Fourth Amendment tests tend towards being totality of the circumstances test. Indeed, under *Navarette*, the Court still applied this rule like a totality of the circumstances test. Yet, going forward this rule appears to function more like a bright-line rule.

A. *The Confusion Persists: Interpreting Navarette*

Since *Navarette* was decided in April 2014, 217 cases have cited to it.¹⁵¹ Many cases simply cite it for standards such as the totality of the circumstances test. Others, however, have applied the test like a bright-line rule. Take, for example, *United States v. Edwards* from the Ninth Circuit Court of Appeals.¹⁵² *Edwards* was arrested after an anonymous tipster called

149. *Id.* at 1688-90.

150. *Id.* at 1691.

151. As of January 11, 2016.

152. *United States v. Edwards*, 761 F.3d 977 (9th Cir. 2014). Additionally, in *Jackson v. United States*, the court considered an anonymous report that a man with a gun was at a bus stop. 109 A.3d 1105, 1106 (D.C. 2015). The anonymous caller provided a location and description, but when the officer arrived at the bus stop she did not see anyone nearby. *Id.* She did, however, see someone matching the description a short way up the street. *Id.* The only real difference between *Jackson* and *Florida v. J.L.*, is that the eyewitness caller in *Jackson* specifically stated that she had seen the gun. Because the caller claimed eyewitness knowledge and used the 911 system, the court concluded that the officer had reasonable suspicion for the stop. *Id.* at 1108. In *J.L.*, the facts simply state that the anonymous caller reported to the police department. 529 U.S. 266, 268 (2000).

911 to report a shooting.¹⁵³ He was found in the vicinity of the reported shooting and matched the description of the suspect.¹⁵⁴ In deciding that reasonable suspicion existed, the court mechanically applied the *Navarette* factors; the tip was a “911 call from an eyewitness reporting an ongoing and dangerous situation,”¹⁵⁵ therefore, the officer was reasonable in relying on the anonymous tip.¹⁵⁶ The Ninth Circuit categorized an ongoing shooting situation as “even more dangerous than the suspected drunk driving in *Navarette*.”¹⁵⁷ Despite the mechanical application, this statement indicates that the danger of the crime continues to play a role.

A Texas court suggested that *Navarette* did not create a new rule, but simply applied Fourth Amendment precedent to the facts existing in that case.¹⁵⁸ But that court still proceeded to use the factors outlined as a bright-line rule for determining reliability.¹⁵⁹ Courts have even used the factors in cases where the call was not anonymous to bolster the reliability.¹⁶⁰

While a bright-line rule would perhaps make things easier for law enforcement, the use of this particular rule overwhelms any expectation of privacy and renders the Fourth Amendment protections useless, since almost any 911 call can be used to provide the necessary reasonable suspicion—especially if courts broadly interpret any of the three factors.¹⁶¹ For example, in *United States v. Robinson*, an anonymous call was placed to the police department and the secretary transferred the call to an officer to investigate further.¹⁶² Because the tipster claimed eyewitness knowledge, which was contemporaneous, the court stated the call contained sufficient indicia of reliability.¹⁶³ In discounting the fact that the call was not placed through the 911 system, the court noted that it was “still much more than a ‘bare-boned’ tip about guns like the *J.L.* tip.”¹⁶⁴ Instead of acknowledging that the

153. *Edwards*, 761 F.3d. at 979.

154. *Id.*

155. *Id.* at 984.

156. *Id.*

157. *Id.*

158. *See, e.g.*, *Waldon v. Stephens*, No. H-13-3752, 2014 U.S. Dist. LEXIS 181230, at *28 n.2 (S.D. Tex. Dec. 8, 2014).

159. *Id.* at *26-27.

160. *See, e.g.*, *Tankersley v. State*, 453 S.W.3d 699 (Ark. Ct. App. 2015).

161. Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75, 85 (2014).

162. *United States v. Robinson*, No. 3:14-CR-28, 2014 U.S. Dist. LEXIS 112383, at *1 (N.D. W. Va. Aug. 14, 2014).

163. *Id.* at *7-8.

164. *Id.* at *9.

Navarette case was a close case and the lack of the use of the 911 system could make the difference between a reliable and unreliable anonymous tip, the district court instead chose to distinguish *J.L.*¹⁶⁵

Similarly, in *United States v. Aviles-Vega*, the First Circuit Court of Appeals broadly interpreted the 911 factor, finding that a call to a desk sergeant was sufficiently reliable due to other circumstances.¹⁶⁶ The ongoing crime requirement was interpreted differently as well. The crime alleged in *Aviles-Vega* was that two passengers of a vehicle openly passed a pistol between them.¹⁶⁷ Because Puerto Rico is a concealed carry jurisdiction, the court determined that the open passing was a crime sufficient to pass the test.¹⁶⁸ The facts, however, do not indicate whether the pistol was then concealed or whether it remained in the open. Had the pistol been immediately concealed, the crime would no longer be ongoing, and, therefore, would be distinguishable from *Navarette*. The court did not mention privacy expectations, but had an opportunity to do so, considering the crime occurred in an automobile.

This sampling of cases indicates that *Navarette* adopted a three-part test. While not all jurisdictions apply each part identically, they are largely abiding by the test. This again brings to the forefront the question: did the reduced expectation of privacy and the danger of drunk driving play any role in determining the reliability of the call? If it did not, then the rule should apply across the spectrum of crimes. But if privacy and gravity of harm played any role in reducing the amount of reliability required, which it at least appears to have played some role, then the Court needs to clarify that issue. Considering that reasonableness under the Fourth Amendment is a balancing of interests, and the Court consistently weighs the expectation of privacy against the government's interest, one would think that a balancing test should play a role. And if it does play a role, then the factors from *Navarette* should not be applied across the spectrum of the crimes. And yet, *Robinson*, *Aviles-Vegas*, and *Edwards* did not involve driving under the influence.

B. So How Does the Rule Apply Outside the Drunk Driving Context?

The test for whether an anonymous tip is reliable should be a consistent standard regardless of what crime is reported. The facts and circumstances

165. *Id.*

166. *United States v. Aviles-Vega*, 783 F.3d 69, 72, 76 (1st Cir. 2015).

167. *Id.* at 73.

168. *Id.* But see *State v. Rodriguez*, 852 N.W.2d 705, 714 (Neb. 2014) (recognizing that the fact the reported crime was ongoing was critical to the outcome of *Navarette*).

might change, the crime might change, but the standard should not. If the factors that make an anonymous tip reliable are that it is an eyewitness and contemporaneous account of a crime conveyed over the 911 system, then those factors should make a call reliable regardless of what the crime is. The only difference should be whether the call is sufficient to provide the reasonable suspicion necessary to make the stop. Consider the following hypothetical.¹⁶⁹

An anonymous tipster places a call to 911 from a phone booth, giving a reportedly contemporaneous eyewitness account that a man hit a woman, retrieved a shotgun, and threatened the woman with the gun.¹⁷⁰ When officers respond to the call, the lights in the home are off and there is no movement inside.¹⁷¹ Due to the “potentially significant threat to public safety,” the police decide to treat the tip seriously, despite any question as to the reliability of the call.¹⁷² Officers use a loudspeaker to coax the suspect out of the house.¹⁷³ The suspect complies, no weapons are found on him, and he is placed in a patrol car.¹⁷⁴ Police proceed to ask him questions and discover that he unlawfully possesses a firearm.¹⁷⁵

Under *Navarette*, the call is sufficiently reliable because the caller claimed eyewitness knowledge to the crime, called contemporaneous to the incident, and used the 911 call system. Because the police were easily able to locate the home, much like the police in *Navarette* located the vehicle, it would appear the police had reasonable suspicion to seize the man, just as the officers in *Navarette* had reasonable suspicion to make the stop. This application treats the *Navarette* rule like a bright line rule. But it does not deal with the major differences. People undoubtedly have a greater expectation of privacy in their homes than in their vehicles. A drunk driver on the road presents a far greater

169. The hypothetical is based on the facts and holding of the Court of Appeals of Washington in *State v. Sagers*, 332 P.3d 1034 (Wash. Ct. App. 2014).

170. *Id.* at 1036. Thirty minutes prior to the anonymous tip, an identified individual had called and informed officers that he needed to get his belongings from a home at the same address where the incident occurred. During that call, the tipster had made a comment about “people having guns with domestic violence stuff.” *Id.* While this was relevant in the reliability determination, it was not this information that led to the reasonable suspicion dissipating. *Id.* at 1041. Though it is interesting to note that the Court found the use of the 911 system did not increase the reliability of the anonymous tip because it was placed through a pay phone instead of a cell phone. *Id.* at 1037.

171. *Id.* at 1036.

172. *Id.* at 1041.

173. *Id.* at 1037.

174. *Id.*

175. *Id.* at 1037.

danger to the public than does one armed man in a domestic dispute. Because *Navarette* failed to discuss privacy and danger as factors, it appears that they played an insignificant role in analyzing the stop. Yet, in the case in which the above hypothetical is based, the court did take note of the danger to the public.¹⁷⁶ More significantly, the court determined that reasonable suspicion had dissipated by the time the officer questioned the suspect about his firearm. In *Navarette*, the Court found that following the vehicle for five minutes without seeing any suspicious behavior did not dissipate the reasonable suspicion.¹⁷⁷

Even though the Court in *Navarette* noted observation might dispel reasonable suspicion, the fact that the officer had followed the suspected drunk driver for five minutes—without noticing any signs of driving under the influence—did not dissipate the reasonable suspicion.¹⁷⁸ The Court did note that an extended observation might dispel reasonable suspicion.¹⁷⁹ While the majority thought it reasonable to assume that an individual spotting a patrol car would drive more carefully, as Justice Scalia pointed out, the entire problem with intoxication is the lack of control over the body and its reactions.¹⁸⁰ If we assume it is reasonable that a driver may alter his or her behavior for a time, it should be equally reasonable to assume that an individual would have time to hide a firearm or alter his behavior upon hearing police officers instruct him to come out of his home over a loudspeaker.

This brings the argument full circle back to the question of why the same inferences are permissible in the drunk driving context that are not permissible in other contexts. This seems to bring us right back to *Florida v. J.L.*, except the Supreme Court has added an extra loop in the analysis. Does the danger of an alleged crime play a role in the level of reliability and reasonable suspicion required? Does the expectation of privacy an individual has play any role in the level of reliability and reasonable suspicion? Despite the fact that the issues were present in *Navarette*, the Supreme Court avoided all discussion on the topic. The Court addressed the limited question of whether the “Fourth Amendment require[s] an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate

176. *Id.* at 1041.

177. *Id.* at 1040.

178. *Navarette v. California*, 134 S. Ct. 1683, 1691 (2014).

179. *Id.*

180. *Id.* at 1697 (Scalia, J., dissenting) (noting the “sever[e] impair[ment]’ of ‘[b]alance, speech, hearing, and reaction time,’ as well as one’s general ‘ability to drive a motor vehicle’” for individuals with blood alcohol content between 0.08 and 0.109) (internal citations omitted).

dangerous driving before stopping the vehicle.”¹⁸¹ Perhaps the Court was trying to narrow its holding, but in doing so it failed to give any guidance to the lower courts or to the law enforcement officers trying to navigate through the murky waters of reasonable suspicion.¹⁸²

C. How Does This Uncertainty Affect our Law Enforcement Officers?

The murky confusion of anonymous tips, reliability, and reasonable suspicion wreak havoc on the ability of law enforcement officers to do their jobs effectively. The role of law enforcement officers is “to Protect and to Serve.”¹⁸³ This includes protecting the public from crime and danger, but also extends to the protection of constitutional rights. In fact, the first level of constitutional protection often comes from law enforcement officers. When an officer is evaluating whether to conduct an investigatory stop, he must balance the interests of the public against the privacy interests of the individual, consider all of the relevant facts and circumstances, and make a determination as to whether he has the required reasonable suspicion of a crime. The voluminous court opinions evaluating each factor and its significance reflect the difficulty of making these decisions. It becomes even more difficult when an officer has to first determine whether an anonymous tip is reliable. Even courts have struggled with and disagree about what goes into this consideration. Now add to the officer’s predicament the time factor. He must often make this decision in a matter of minutes—sometimes even seconds.

An unclear standard simply adds another layer of complexity to the officer’s determinations, the officer is unsure of the outcome, and one of two things may occur. First, an officer unsure of whether he has reasonable suspicion may rush in and instigate a stop notwithstanding his uncertainties. In this situation, an officer may just assume that it can be sorted out later. In the second situation, an officer, unsure of whether reasonable suspicion

181. Petition for Writ of Certiorari, *Navarette*, 134 S. Ct. 1683 (No. 12-9490). See also *Navarette v. California*, 134 S. Ct. 50 (2013) (granting certiorari limited to the first question presented to the Court). Based on the briefs prepared by the Petitioner and Respondent, as well as the oral arguments made, it appears counsel for both parties expected the danger and automobile issues to be resolved. See Brief for Petitioner, *Navarette*, 134 S. Ct. 1683 (No. 12-9490); Brief for Respondent, *Navarette*, 134 S. Ct. 1683 (No. 12-9490); Transcript of Oral Argument, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-9490_2cp3.pdf.

182. See Kartchner, *supra* note 12.

183. *The Origin of the LAPD Motto*, LOS ANGELES POLICE DEPARTMENT, http://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128. (last visited Oct. 6, 2015).

exists, may decide not to investigate further.¹⁸⁴ In one instance, the Fourth Amendment rights of individuals will be repeatedly trampled. In the other, the constitutional rights are protected, but numerous individuals may get away with dangerous crimes.

This problem can be seen in the wake of the Ferguson protests.¹⁸⁵ Obviously being pulled over based on an anonymous tip is not the same as racial discrimination. My point is simply that when individuals do not know what standard the police are applying, or believe that the police are applying unfair standards, tension arises between the public and law enforcement. People stop trusting police officers and those same police officers go on the defensive, especially when those officers perceive a lack of support from government officials. Notably, the arrest rate in New York dropped significantly compared with other years following the death of Eric Garner.¹⁸⁶ Most attribute the decrease to a protest by the officers over the mayor's lack of political support,¹⁸⁷ and they are probably right. But the point is that as tensions rose, an increasingly unstable and distrustful relationship developed between law enforcement and the public.

Now let's transplant that into the anonymous tips in the drunk driving context. Officers have to determine whether a call is reliable and whether reasonable suspicion exists. They have to take what guidance they have from the courts and apply that standard. If the rule set out in *Navarette* was a bright-line rule, then applying the standard, at least in the drunk driving context, would undoubtedly be easier. But if it is not a bright-line rule, then

184. See George M. Dery III & Kevin Meehan, *The Devil is in the Details: The Supreme Court Erodes the Fourth Amendment in Applying Reasonable Suspicion in Navarette v. California*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 275, 296-97 (2015) (contending that the erosion of the Fourth Amendment leads to passive and lazy policing).

185. "The Ferguson protests" refers to a series of protests after the police shot and killed an unarmed black teenager. The police contend that the shot was fired when the teenager grabbed the officer's gun. Others claim it was racial profiling. See Q & A: *What Happened in Ferguson*, NYTIMES.COM (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

186. Brendan Cheney, *Police Activity Dropped Before Major Slowdown*, CAPITAL (Jan. 8, 2015), <http://www.capitalnewyork.com/article/city-hall/2015/01/8559634/police-activity-dropped-major-slowdown>. Eric Garner suffocated while police officers were subduing him. He was black and unarmed. This too sparked racial protests. See Al Baker, J. David Goodman, & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, NYTIMES.COM (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0.

187. See J. David Goodman & Al Baker, *For Second Week, Arrests Plummet in New York City*, NEW YORK TIMES (Jan. 5, 2015), http://www.nytimes.com/2015/01/06/nyregion/decrease-in-new-york-police-arrests-continues-for-a-second-week.html?_r=0.

what other factors come into consideration? Is it the danger caused by drunk driving? If individuals do not even trust law enforcement at a check point, where every single car is pulled over, what kind of tension exists when an officer pulls a single individual over based on a simple anonymous tip and the officer cannot explain exactly why he is permitted to do so?

Admittedly, the Court has created other exceptions for officers investigating driving under the influence.¹⁸⁸ Because of the grave and imminent danger of drunk driving, weighed against the minimal intrusion of the check stop, the Supreme Court found that check stops were constitutionally permissible.¹⁸⁹ But the Court noted that further testing might require an individualized suspicion standard.¹⁹⁰ Even there, where the Supreme Court has clearly stated that the initial stop is valid, people are unsure of exactly what that individualized standard is in regards to further sobriety testing. In Florida, a movement is gaining traction that encourages individuals to refuse to talk to police at a check stop.¹⁹¹ In fact, the movement encourages individuals to hold a flyer up to the window stating that they are stopping in compliance with the law, but that they are not required to roll down the window and talk to the police.¹⁹²

188. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (allowing officers to use checkpoints to investigate drunk driving).

189. *Id.* at 455.

190. *Id.* at 451.

191. Melanie Moon, *Loophole helping drivers skip DUI checkpoints*, Fox2Now (Feb. 20, 2015, 6:50 p.m.), <http://fox2now.com/2015/02/20/loophole-helping-drivers-skip-dui-checkpoints/> (hereinafter "Loophole"). See also <http://fairdui.org/>.

192. *Loophole*, *supra* note 191. A lawyer has prepared several versions of the flyer to comply with the laws of various states. The full text of the FAIRDUI flyer for Missouri states:

YOU HAVE DIRECTED ME INTO A DWI CHECKPOINT

I am not in an Intoxicated Condition as defined by Section 577.001.3, RSMo.

Pursuant to *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) and *State v. Dixon*, 218 S.W.3d 14, 19 (Mo. App. W.D. 2007) you have no basis for suspecting me of a traffic offense or crime; therefore I do not have to supply my license and insurance card to you.

However, based on my respect for law enforcement please see my license and insurance card on the window below.

If you believe Missouri has a law requiring me to roll down my window, speak to you, and hand you my license and insurance card, please understand that law would be unconstitutional pursuant to the 4th Amendment under *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 188 (2004).

The attorney responsible for the movement stated that it's "[b]ecause the second you open your window they can say they smell alcohol."¹⁹³ This demonstrates a distinct lack of trust in law enforcement officers. But further, it demonstrates distrust in how officers apply the standard of reasonable suspicion. The statement clearly indicates a belief that an officer can and will simply make up information and facts that amount to reasonable suspicion in order to meet the individualized suspicion standard to do further sobriety testing. If that is the case at a check stop where everyone is pulled over, then imagine the belief when individuals are being pulled over solely on the basis of an anonymous call.

To be fair, the Supreme Court only certified the question of whether an anonymous tip had to be corroborated.¹⁹⁴ And they answered that question: Law enforcement officers are not required to personally observe the illegal activity in order to meet the reasonable suspicion standard.¹⁹⁵ The Court did not certify the question of whether the danger and decreased expectation of privacy resulted in a drunk driving exception under *J.L.* But in determining the anonymous tip was reliable and the reasonable suspicion standard was met, the Court did set a standard, albeit an unclear one, for law enforcement to follow. Providing officers with factors to follow is extremely important. But as Justice Scalia stated, the *Navarette* decision is inconsistent with *Alabama v. White* and *Florida v. J.L.*¹⁹⁶ At least in those cases, the Court was clear about what the officers should be looking for: the anonymous tipster's basis of knowledge for making the claim.¹⁹⁷ Specifically, the Court was looking for this so they could determine the reliability of the tip, both in

With all due respect, I will not roll down my window or unlock my car unless you present me with an arrest warrant or search warrant.

Please let me know when I am free to leave your DWI Checkpoint that you directed me into against my will.

Thank you for your time, and have a nice evening.

Id.

193. *Id.*

194. Petition for Writ of Certiorari, *Navarette*, 134 S. Ct. 1683 (No. 12-9490). *See also* *Navarette v. California*, 134 S. Ct. 50 (2013) (granting certiorari limited to the first question presented to the Court).

195. *Navarette v. California*, 134 S. Ct. 1683, 1692 (2014).

196. *Id.*

197. *Florida v. J.L.*, 529 U.S. 266, 271 (2000); *Alabama v. White*, 496 U.S. 325, 332 (1990).

regards to the innocent details and in regards to the allegation of criminality.¹⁹⁸

The grounds upon which *Navarette* was decided do not conform to the common theme from previous anonymous tip cases. In one aspect, requiring the tipster to claim eyewitness knowledge does comply with the basis of knowledge requirement. However, that the officer need only verify the location of the vehicle is inconsistent with the idea of reliability as to the illegality of the accusation. In essence, *Navarette* contradicts the determination that the anonymous tip must be reliable in more than the innocent details. At least in the drunk driving context, so long as the officer is able to locate the vehicle described—a mere confirmation of the innocent details—then the officer is permitted to conduct the stop. Instead of looking for a way to test the reliability, the officer is simply looking for the factors set out in *Navarette*.

V. CONCLUSION

The state of reliability and reasonable suspicion in the drunk driving context is a mess. Notwithstanding the Supreme Court's holding that the proper test for reasonable suspicion is a totality of the circumstances test, some courts have applied *Navaratte* like a bright line rule. Other courts use it as an analytical framework, still managing to take other circumstances into consideration. But the biggest problem is that the Court has been unclear as to what roles, if any, the reduced expectation of privacy and the danger of the underlying crime have on the determination of reliability of an anonymous tip and its ability to provide reasonable suspicion.

While the Court was quite clear that officers need not corroborate an anonymous tip of drunk driving, that standard may or may not apply in investigating anonymous tips of other crimes. If lower courts apply the factors as elements, then the officers will have an easier time determining whether reasonable suspicion exists. But from a rights based perspective, officers will have almost unlimited power to conduct stops based on anonymous tips, so long as the caller uses 911 and claims to have witnessed something. Additionally, if courts loosely interpret each factor, then an officer's power expands even further (such as interpreting a call to a hotline or to the police dispatcher to be equivalent to a 911 call).¹⁹⁹ But if the lower courts apply the factors less mechanically, then the officer is still in the unenviable position of trying to weigh whether reasonable suspicion exists in

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

199. Kinports, *supra* note 161, at 85.

a split second, while courts will continue to evaluate their decisions after-the-fact based on incomplete and vague decisions.

As it appears now, based on the holding in *Navarette*, the Court at the very minimum has created a drunk driving exception in which the standard for reliability, and therefore reasonable suspicion, is considerably lower than for other crimes. If that is the case, the Court need simply acknowledge such an exception and the role that the risk of harm and privacy play. If *Navarette* established, instead, a bright line rule that applies regardless of the crime, then that too must be acknowledged. Regardless of what is intended, the Court must provide guidance, both to lower courts and to officers on the streets. Otherwise, the precarious balance between protecting the public and protecting individuals' privacy will tip in one direction or the other.

