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I. Introduction

How much do you trust your fellow drivers? Perhaps you have seen one drift over a lane line or suddenly swerve while accidentally dropping a drive-through meal in a lap, having a vehement discussion on a cell phone, shaving, putting on make-up, or reading a map. How much, for that matter, can you trust your own driving? Have you experienced any of these distractions or driven when exhausted after a long workday or in terrible traffic? Moreover, careless inattention might be the least of your worries. Road rage has become so common and so deadly that it has captured the attention of the United States Department of Transportation.[1] Do we feel comfortable empowering these strangers—distracted, frazzled, and angry—with calling the police and making anonymous accusations that could result in our suddenly being subjected to a traffic stop?

Whatever doubts you might entertain about deputizing all the drivers around you, the Court, in *Navarette v. California*,[2] has placed these motorists, with all of their faults and whims, on the front line of traffic enforcement. If a driver calls police to claim eyewitness knowledge of a single instance of "possibly careless or reckless driving"[3] by a specific car in a particular location,[4] police are now empowered to pull you over. No further information is needed, not even the name of the caller.[5] Some motorists, whether to pursue revenge, fight boredom, or carry out a prank, might find this newfound power—provided without accountability—too hard to resist.

This is just one of the concerns created by the Court's reasoning in *Navarette*, a case in which the Court reinterpreted the Fourth

1. *See* JACK STUSTER, AGGRESSIVE DRIVING ENFORCEMENT: EVALUATION OF TWO DEMONSTRATION PROGRAMS (2004), http://www.nhtsa.gov/people/injury/research/AggDrivingEnf/pages/introduction.html (reporting the increase of aggressive driving cases since the 1990s and the contributing factors to such behavior).

2. 134 S. Ct. 1683 (2014).

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

4. *Id.* at 1689.

5. *Id.* at 1688–89.

Amendment's[6] requirement that police possess "reasonable suspicion" before performing a traffic stop.[7] In basing the lawfulness of its stop on an anonymous tip, *Navarette* eroded reasonable suspicion, relying on little more than bootstrapping from an informant's own assertions. Such credulous acceptance of anonymous accusations should now prompt a reassessment of the facts in an earlier anonymous informant case, *Florida v. J.L.*,[8] for *Navarette*'s new approach could have resulted in finding reasonable suspicion even with *J.L.*'s troubling circumstances. Finally, *Navarette*'s diluted reasonable suspicion standard could encourage passive and sloppy policing, for officers will be tempted to rely on easily acquired anonymous tips rather than engage in arduous collection of evidence.

These concerns will be addressed in this Article. This work begins, in Part II, with a review of the history of stop and frisk rulings based on informant's tips. Part III presents *Navarette* by examining its facts and the Court's opinion. Finally, Part IV critically examines the worrying implications of *Navarette*'s reasoning.

II. The History of Stop and Frisk Based On Informant Tips

A. Creation of the Police Power to Stop and Frisk

The changes in Fourth Amendment doctrine that supported field detentions first occurred in a home rather than on the street and involved a search instead of a seizure. This shift occurred in *Camara v. Municipal Court*, a case in which a homeowner was convicted for refusing warrantless entry to a city health inspector.[9] Rejecting the argument that such routine inspections implicated only "peripheral" Fourth Amendment interests,[10] *Camara* found instead that the "practical effect of this system is to leave the

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6. U.S. CONST. amend. IV. The Fourth Amendment provides:

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

Id.

7. *See Navarette*, 134 S. Ct. at 1689.
8. 529 U.S. 266 (2000).
9. *See Camara v. Municipal Court*, 387 U.S. 523, 525 (1967).
10. *See id.* at 530.

occupant subject to the discretion of the official in the field."[11] The Court therefore held that these "administrative searches" must be supported by a warrant.[12]

Having marched up the hill to establish a warrant requirement for health inspections, the *Camara* Court spent the rest of its opinion making tactical retreats in the face of the practical problems involved in applying a warrant mandate to routine inspections.[13] *Camara* acknowledged that health inspections were fundamentally different from "typical Fourth Amendment cases"[14] because the "only effective way to seek universal compliance" with city codes was through "routine periodic inspections of all structures," regardless of individualized suspicion in any particular dwelling.[15] The Court therefore cast about for an "accommodation between public need and individual rights."[16] Instead of adhering to the traditional standard that an inspector must possess probable cause "that a particular dwelling contains violations,"[17] *Camara* recast probable cause as an inquiry into reasonableness. For these new warrants, the Court transformed probable cause into the following balancing test: "In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of (the) reasonable goals of code enforcement."[18]

Thus, *Camara* found that a routine health inspection of a home implicated interests so central to Fourth Amendment privacy that such a search needed to be restrained by a warrant.[19] The warrant providing the protection, however, was a pale reflection of the warrant mandated in

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11. *Id.* at 532.

12. *See id.* at 534.

13. *Camara* was alert to the problems it faced in imposing the warrant requirement on health inspectors, for it warned that "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task." *Id.* at 528.

14. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967). The Court noted the "unique character of these inspection programs." *Id.*

15. *Id.* at 535–36. *Camara* further explained that the aim of code inspections was to secure "city-wide compliance with minimum physical standards" in order to "prevent even the unintentional development of conditions which are hazardous to public health and safety." *Id.* at 535.

16. *Id.* at 534.

17. *Id.*

18. *Id.* at 535.

19. *Id.* at 540.

criminal investigations, for its probable cause had been diluted to a vague balancing of interests. The Court's new kind of probable cause had little textual basis, for the Fourth Amendment required probable cause for particularly described places, persons, or things.[20] *Camara* sensed the weakness of its new probable cause standard, offering the excuse that, "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[21] Further, the Court explicitly recognized the criticism that its "synthetic search warrant" would "lessen the overall protections of the Fourth Amendment."[22]

This worry came to partial fruition in *Terry v. Ohio*,[23] where a police officer with 39 years' experience stopped and frisked men he suspected of "casing a job, a stick up."[24] In *Terry*, the Court created the right of police to stop[25] and frisk[26] a suspect on less than probable cause.[27] Even when dispensing with probable cause, *Terry* still mandated that police act on individualized suspicion; to stop and frisk, the officer needed "specific and

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20. U.S. CONST, amend. IV ("[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

21. Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967).

22. *Id.* at 538.

23. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that a pat down search by a police officer is reasonable where the officer has reasonable suspicion that the person stopped is armed and dangerous, regardless of whether the officer has probable cause to arrest that individual). In assessing the reasonableness of the officer's conduct in its own case, *Terry* cited *Camara* in noting "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Terry*, 392 U.S. at 21For a full analysis of *Terry's* expansion upon *Camara*, *see* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry* 72 Minn. L. Rev. 383, 396 (1988), in which the author contended, "Because the (*Terry*) Court had not previously relied upon reasonableness as an independent fourth amendment factor, it did not have a reasonableness test to utilize. As a result, the Court turned to its closest example of a reasonableness balancing test -- the *Camara* definition of probable cause."

24. *Id.* at 5.

25. *See id.* at 21–23 (stating that an intrusion upon the constitutionally protected interests of a citizen is justified if specific facts and inferences from those facts reasonably warrant that intrusion).

26. *Id.* at 30.

27. The *Terry* Court criticized the contention that police could not act until "there is probable cause to make an arrest," because "a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime." *Id.* at 25–27.

articulable facts which, taken with rational inferences from those facts,"[28] caused the officer to "reasonably conclude in light of his experience that criminal activity is afoot and that the persons with whom he is dealing may be armed and presently dangerous."[29]

This level of certainty, later termed "reasonable suspicion,"[30] lacked any textual basis in the Fourth Amendment, in which the founders mention only "probable cause."[31] Indeed, the Court itself had previously ruled that probable cause was the "best compromise that has been found to accommodat(e) . . . often opposing interests,"[32] and lauded this Fourth Amendment standard for protecting "both the officer and the citizen."[33] In his dissent, Justice Douglas noted that the Court, in creating the right of stop and frisk on less than probable cause, had provided police with powers denied to judges. He reasoned:

> Had a warrant been sought, a magistrate would . . . have been unauthorized to issue one, he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again.[34]

Defending its innovation, *Terry* cited *Camara's* lament that there was "no ready test for determining reasonableness" other than in balancing the competing interests of a case.[35]

Alert to the door it was opening to more searches and seizures, *Terry* took great care in reaching its conclusion. The Court candidly acknowledged that the case presented "serious questions"[36] which thrust "to the fore difficult and troublesome issues regarding a sensitive area of police activity."[37] The concerns of officers patrolling streets, where "the answer to the police officer may be a bullet," had to be weighed against those of the

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28. *Id.* at 21.

29. *Id*. at 30.

30. Alabama v. White, 496 U.S. 325, 328 (1990).

31. U.S. CONST. amend. IV.

32. Beck v. Ohio, 379 U.S. 89, 91(1964) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

33. Henry v. United States, 361 U.S. 98, 102 (1959).

34. Terry v. Ohio, 392 U.S. 1, 36 (1968) (Douglas, J., dissenting).

35. *Id.* at 21. *Terry* again sought support from *Camara* in applying the Fourth Amendment to official action falling outside the typical norm of custodial arrest. *See id.* at 27.

36. *Id*. at 4.

37. *Id*. at 9.

individual, whose right to possess and control "his own person" was "sacred" and "carefully guarded by the common law."[38] The Court considered the case with humility, "mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street."[39] *Terry* was aware of the institutional constraints on its ability to affect police in the field, even conceding it was "powerless to deter invasions of constitutionally guaranteed rights" if officers were "willing to forgo successful prosecution in the interest of serving some other goal."[40]

However daunting it might be to limit a rule lacking textual anchors, *Terry* attempted to place a series of constraints on police stop and frisks. The Court approved only "restrained investigative conduct" that was based on "ample factual justification."[41] *Terry* insisted on assessing police reasonableness at two stages to ensure that (1) "the officer's action was justified at its inception," and (2) that "it was reasonably related in scope to the circumstances which justified the interference in the first place."[42] To justify the seizure in the first place, *Terry* mandated that an officer "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[43] The Court rejected police reliance on hunches or good faith, finding it "imperative" that official conduct be measured by "an objective standard."[44] While *Terry* allowed police to perform the stop and frisk without prior judicial approval, it expected the official intrusion to be subjected to rigorous examination by a judicial official after the fact, for, "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."[45]

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38. *Id.* (noting "[n]o 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.").

39. *Id*. at 12.

40. *Id*. at 14.

41. *Id*. at 15.

42. *Id.* at 19–20.

43. *Id.* at 21.

44. *Id*. at 21–22.

45. *Id.* at 21. Moreover, the Court still expected police to pursue a warrant "whenever

The additional intrusion involved in a frisk required reasonable suspicion not just of criminality, but of peril—the suspicion had to point to the suspect being "armed and presently dangerous."[46] Even this suspicion only enabled a "carefully limited search" of "outer clothing" for "weapons which might be used to assault" the officer.[47] Thus, reaching into pockets or under waistbands and seeking drugs or other evidence of criminality were beyond the scope of *Terry's* reach.

B. Stop and Frisk Cases Involving Police Informants

In *Terry*, Detective McFadden, the officer who performed the first stop and frisk officially sanctioned by the Court, based his reasonable suspicion entirely on his own observations.[48] Some later stop and frisk cases would lack this luxury. In *Adams v. Williams*, an officer performed a stop and frisk based on a tip given by an informant who visited his patrol car in a high crime area at 2:15 a.m.[49] Acting on the tipster's information that "an individual seated in a nearby vehicle" possessed narcotics and a gun, the officer approached the car and ultimately reached through the driver's window to recover the weapon from the occupant's waistband.[50]

The Court in *Adams* rejected the argument that reasonable suspicion could only be based on an officer's personal observations, instead allowing officers to base a stop and frisk on any tip possessing "enough indicia of reliability."[51] The tip in *Adams* had indicators that proved its reliability.[52] The officer personally knew the informant, having received information from him in the past. [53] The informant potentially exposed himself to immediate arrest for making a false complaint, for the officer could quickly test the truth of his assertions by walking over to the nearby car.[54] The

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practicable." *Id.* at 20.

46. *Id.* at 30.

47. *Id.*

48. *Id.* at 5–7.

49. Adams v. Williams, 407 U.S. 143, 144–45 (1972).

50. *Id.* Sergeant Connolly, the officer in *Adams*, first merely walked up to the vehicle, tapped on the car window, and requested the occupant to open the door. *Id.* at 145. Only when the driver instead rolled down the window did the officer reach in to collect the gun. *Id.*

51. *Id.* at 147.

52. *Id.* at 146–47.

53. *Id.* at 146.

54. *Id.* at 146–47.

Adams Court even noted that the personal presence of a known informant made it "a stronger case than obtains in the case of an anonymous telephone tip."[55]

Anonymous telephone tips went from hypothetical to reality in *Alabama v. White*,[56] in which an unknown person provided a detailed tip that a Vanessa White could be found in possession of cocaine while driving a station wagon to a motel.[57] *White* considered anonymous tips in light of *Illinois v. Gates'* fundamental changes to probable cause analysis.[58] In *Gates*, a case also involving an anonymous tip, the Court criticized an earlier test[59] for probable cause as being so "elaborate"[60] and "rigid"[61] that it would better fit "legal technicians"[62] or scholars in libraries[63] than laypersons hurrying to fill out warrant affidavits.[64] *Gates* instead championed a "totality-of-the-circumstances approach," which had the virtue of presenting a "practical, nontechnical conception" of probable cause.[65]

While *Gates* still considered the two elements of the old test—the informant's veracity and the informant's basis of knowledge—such factors no longer had to be rigidly established separately and independently from each other.[66] Under *Gates'* new test, when assessing all the facts—the "totality of the circumstances"—for probable cause, a deficiency in one of the two prongs "may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some of the indicia of reliability."[67] Thus, if a person has established an unusually consistent track record in predicting certain kinds of criminal activities in a

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55. Adams v. Williams, 407 U.S. 143, 146 (1972).

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

57. *Id.* at 327.

58. Illinois v. Gates, 462 U.S. 213, 230–31 (1983).

59. *Id.* at 229. The earlier "two-pronged" test was formed in light of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969).

60. *Id.*

61. *Id.* at 231.

62. *Id.*

63. *Id.* at 232.

64. Illinois v. Gates, 462 U.S. 213, 235 (1983).

65. *Id.* at 230–31 (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)). The *Gates* Court believed its new test considered human behavior in a common-sense fashion. *Id.* at 231 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

66. *Id.* at 230.

67. *Id.* at 233 (referencing Adams v. Williams, 407 U.S. 143, 146–47 (1972) and United States v. Harris, 403 U.S. 573 (1971) as exemplary cases).

location, this veracity and reliability can compensate for a tipster's failure to explain his basis of knowledge. Likewise, if an informant provides a strong foundation for his basis of knowledge (i.e., "I saw the crime," or "I participated in the sale"), then this inside information can compensate for a failure to otherwise establish truthfulness and reliability.

The *White* Court applied a modified version of the *Gates* standard to decide whether its anonymous telephone tip "exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop."[68] While *White* employed a "totality of the circumstances" analysis,[69] it applied this test to the "reasonable suspicion standard" instead of probable cause.[70] The "less demanding standard" of reasonable suspicion could be met not only with "information that is different in quantity or content" than that needed for probable cause, but also with information that is "less reliable than that required to show probable cause."[71]

White then focused on the anonymous informant in its case, noting that such a person's tip, "alone seldom demonstrates the informant's basis of knowledge or veracity."[72] An anonymous tip, however, could be bolstered by other information.[73] In its own facts, *White* found that "there is more than the tip itself" to support a finding of reasonable suspicion.[74] The informant provided a series of details that, while not as extensive as the informant in *Gates*, did establish a series of facts for police follow up.[75] *White*'s anonymous caller provided a time for White's departure, specified the building from which she would leave, identified the color, make, model, and condition ("broken right taillight") of the vehicle she would drive and the direction in which she would drive it.[76] While not verifying every detail,

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68. Alabama v. White, 496 U.S. 325, 326 (1990).

69. *Id.* at 332.

70. *Id.* at 328–29.

71. *Id.* at 330.

72. *See id.* at 329 (following the opinion in *Gates*, which noted, "the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable." *Gates*, 462 U.S. at 237. *White* followed *Gates* due to the factual similarity of the anonymous tips in both cases).

73. *See id.* (refusing to say that an anonymous tip "could never provide reasonable suspicion").

74. Alabama v. White, 496 U.S. 325, 329 (1990).

75. *Id.*

76. *Id.* at 327.

police "significantly" corroborated many of them.[77] The officers in *White* thus bolstered the reliability of the tip through "independent police work."[78]

The *White* Court was particularly impressed with the tipster's ability to predict the suspect's future conduct.[79] The Court declared, "We think it also important that, as in *Gates*, 'the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future action of third parties ordinarily not easily predicted.'"[80] The ability to foretell future behavior was especially important because "it demonstrated inside information—a special familiarity with [White's] affairs."[81] Specifically, "[t]he general public would have had no way of knowing" that White would leave a particular building at a certain time, get into a particular vehicle, and drive in a particular direction.[82] Because "only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to have access to reliable information about that individual's illegal activities."[83] *White* even contrasted these predictions with an easily "predicted" fact that anyone could have offered the police—that the officers could find "a car precisely matching the caller's description in front of [White's] building."[84] While it could be said that such a tip predicted the future—when police later check in front of the building they could see the car parked there—it was a prediction anyone driving by could hazard about any car parked at a residence, and therefore lacked the insider's knowledge of future behavior.[85] Thus, when *White* expanded the basis for a stop and frisk to include information from anonymous tips,[86] it took care to note that the tip alone would rarely suffice and that the most reliable informants could foresee the future behavior of their subjects.[87]

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77. *Id.* at 326, 331.
78. *Id.* at 330.
79. Alabama v. White, 496 U.S. 325, 331–32 (1990).
80. *Id.* at 332 (quoting *Gates*, 462 U.S. at 245).
81. *Id.* at 332.
82. *Id.*
83. *Id.*
84. Alabama v. White, 496 U.S. 325, 332 (1990).
85. *Id.*
86. *Id.* at 328.
87. *Id.* at 329.

The Court's next anonymous tip case, *Florida v. J.L.*,[88] failed to meet *White*'s standards for reasonable suspicion.[89] In *J.L.*, an anonymous caller told Miami-Dade police that, "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[90] Police arrived six minutes later to find three black males, one of which was wearing a plaid shirt, "just hanging out."[91] Officers approached and searched J.L., who was wearing the plaid shirt, and found a gun in his pocket.[92] Summing up these facts, the Court stated the issue simply as "whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer's stop and frisk of that person."[93]

J.L. concluded that its anonymous tip lacked the necessary indicia of reliability, for beyond the caller's bald assertions, "no predictive information" was offered to enable police to test the informant's knowledge or credibility.[94] While the tipster did accurately describe "the suspect's visible attributes" and his "particular location," such predictions about a person's dress at a specified place did not provide "any basis for believing he had inside information about J.L."[95] Instead, anyone driving by the bus stop—a "readily observable location"—where J.L. was "hanging out" could have informed police about his appearance, clothing, and location.[96] The tip was only credible in its identification of a particular person, not in establishing the "likelihood of criminal activity, which is central in anonymous-tip cases."[97] Thus, the Court's last word on anonymous tips before *Navarette* explicitly forbad reliance on bare assertions of criminal activity from anonymous tipsters who could offer nothing beyond a description of a person's appearance and place.

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

89. *Id.* at 274.

90. *Id.* at 268.

91. *Id.* (quoting Petition for Writ of Certiorari, *J.L.*, 529 U.S. 266 (No. 98-1993)).

92. *Id.* at 268.

93. *Id.*

94. Florida v. J.L., 529 U.S. 271 (2000).

95. *Id.*

96. *Id.*at 268, 271–72.

97. *Id.* at 272 (citing 4 W. LAFAVE, SEARCH AND SEIZURE § 9.4(h), at 213 (3d ed.1996)).

III. Navarette v. California

A. The Facts

On August 23, 2008, Matia Moore and Sharon Odbert, a Mendocino County 911 California Highway Patrol (CHP) dispatch team, received a call from their Humboldt County counterpart that "she had received a 911 call from a citizen who reported being run off the road by a reckless driver."[98] The Humboldt dispatcher's report showed up on Sharon Odbert's computer as follows: "Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago."[99] When the Mendocino County dispatchers broadcast this information at 3:47 p.m., two CHP officers, Officer Williams and Sergeant Francis, separately responded to the call by heading northbound to the location.[100] At 4:00 p.m., Sergeant Francis "advised dispatch that he had passed the truck, which was going in the opposite direction, just south of mile marker 69, approximately 19 miles south of the last sighting."[101] Five minutes later, after having made a U-turn, Sergeant Francis pulled the truck, driven by Lorenzo Navarette, over.[102] After hearing that Sergeant Francis had seen the vehicle, Officer Williams saw his fellow officer following the truck at mile marker 66.[103] Officer Williams made his own U-turn and eventually pulled up behind Sergeant Francis.[104] "There was no evidence that either officer had seen any erratic driving while following the truck."[105] As the officers approached the truck,[106] they smelled marijuana, leading them to search the vehicle and

98. Brief for Respondent at 1, Navarette v. California, 134 S. Ct. 1683 (2014) (No. 12-9490) [hereinafter Initial Brief: Appellee-Respondent].

99. Navarette v. California, 134 S. Ct. 1683, 1686–87 (2014); *see also* Petition for Writ of Certiorari. *Navarette*, 134 S. Ct. 1683 (No. 12-9490), at 3 [hereinafter Petition].

100. Initial Brief: Appellee-Respondent at 4.

101. *Id.*

102. *Navarette*, 134 S. Ct. at 1687.

103. Initial Brief: Appellee-Respondent at 4.

104. *Id.*

105. Initial Brief: Appellant-Petitioner at 5.

106. *Id.* (noting that the vehicle had a "camper shell with darkened windows" through which officers could not see).

recover 30 pounds of marijuana.[107] Police arrested Navarette and his passenger, Jose Prado Navarette.[108]

B. The Court's Opinion

The issue presented in *Navarette* was whether a report from an anonymous 911 caller stating that a truck ran her off the roadway was sufficient, under the totality of the circumstances, to establish the reasonable suspicion needed for a stop.[109] The Court, in an opinion written by Justice Thomas, recognized that such stops required an officer to possess "a particularized and objective basis" for suspecting criminal activity.[110] *Navarette*, however, emphasized that the level of suspicion needed was "'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause."[111]

Navarette candidly acknowledged that an anonymous tip "*alone* seldom" provides a sound basis for reasonable suspicion because such a tipster is "by hypothesis largely unknown and unknowable."[112] The Court, however, noted that *White* accepted an anonymous tip when its officers confirmed some of the informant's "innocent details" because "an informant who is proved to tell the truth about some things is more likely to tell the truth about other things."[113] *Navarette* further declared that *J.L.*'s anonymous "bare-bones tip" failed to establish reasonable suspicion because the "tipster did not explain how he knew about the gun, nor did he suggest that he had any special familiarity with the young man's affairs."[114] Moreover, *J.L.*'s tip "included no predictions of future behavior" that police could corroborate to test the informant's credibility.[115]

When it turned to the facts in *Navarette*, the Court concluded, "the call bore adequate indicia of reliability for the officer to credit the caller's

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107. *Id.* at 4 (noting that the marijuana was found in "four large, closed bags" in the bed of the truck, along with clippers and fertilizer).

108. *Id.*

109. Navarette v. California, 134 S. Ct. 1683, 1686 (2014) (noting that the criminal activity suspected was "that the driver was intoxicated").

110. *Id.* at 1685 (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981).

111. *Id.* at 1687 (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989).

112. *Id.* at 1688 (quoting Alabama v. White, 496 U.S. 325, 329 (1990) (emphasis added)).

113. *Id.*

114. *Id.*

115. *Id.*

account."[116] *Navarette's* anonymous caller reported that "she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925," and therefore claimed "eyewitness knowledge of the alleged dangerous driving."[117] The Court determined that the naming of a particular vehicle at a certain location committing a specific act provided the "basis of knowledge" supporting the tip's reliability.[118] The anonymous caller's veracity was bolstered by the officers' observation of the truck at mile marker 69, which fell within a timeline that coincided with the tipster's report.[119] Not only did the location of the vehicle fit within the caller's narrative, it also suggested "the caller reported the incident soon after she was run off the road."[120] The Court believed the closeness in time between the claimed traffic incident and the 911 call made the tip akin to the hearsay exceptions "present sense impression" and "excited utterance," and thus "especially reliable."[121] *Navarette* also determined that use of the 911 system itself indicated the caller's veracity, because the emergency system possessed "some safeguards" against making false reports, such as the chance that a call might be recorded, the passage of laws criminalizing false reports, and the creation of regulations requiring identification of a "caller's geographic location with increasing specificity."[122] These features, even if partial, could cause a reasonable officer to "conclude that a false tipster would think twice before using the system."[123] Cobbling together all of these facts, *Navarette* concluded, "the indicia of reliability in this case [was] sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road."[124]

Forming reasonable suspicion of "an isolated episode of past recklessness," however, did not satisfy the *Navarette* Court, for it deemed an investigative stop required reasonable suspicion that "criminal activity may be afoot."[125] The 911 caller fulfilled this requirement by alleging behavior that indicated an "ongoing crime" of "drunk driving."[126] Common

116. Navarette v. California, 134 S. Ct. 1683, 1686 (2014).
117. *Id*. at 1689.
118. *Id*. at 1686.
119. *Id*. at 1687.
120. *Id*. at 1689.
121. *Id*.
122. Navarette v. California, 134 S. Ct. 1683, 1689–90 (2014).
123. *Id*. at 1690.
124. *Id*. at 1692
125. *Id*. at 1690 (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).
126. *Id*. at 1693.

sense dictated that "certain driving behaviors," such as crossing the center line or weaving back and forth "are strongly correlated with drunk driving."[127] The even more extreme driving of "running another car off the highway . . . . bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness."[128] Interestingly, "the absence of additional suspicious conduct, after the vehicle was first spotted by an officer" did not dispel reasonable suspicion of drunk driving, because the driver's awareness of the officer's presence "would inspire more careful driving for a time."[129] Therefore, the anonymous tip was reliable and the accusation involved an ongoing offense.[130] This reasoning thus ultimately led *Navarette* to decide that, even though the facts presented a "close case," it was reasonable for the police to make the stop.[131]

IV. Concerns Created by Navarette*'s Reinterpretation of Reasonable Suspicion*

A. Navarette *Bootstrapped Reasonable Suspicion out of Nothing More than the Informant's Assertions, Undermining the Fourth Amendment Mandate that Officers Establish Individualized Suspicion for Fourth Amendment Stops of a Person*

In assessing whether reasonable suspicion existed to stop a truck for drunk driving, *Navarette* offered arguments that amounted to little more than bootstrapping. The Court ultimately found its anonymous informant to be credible and reliable essentially because the tipster claimed to be so. *Navarette* determined that the informant's role as an "eyewitness" lent "significant support to the tip's reliability."[132] The source advising the Court that the informant was an "eyewitness," however, was the tipster herself.[133] *Navarette* relied on *Illinois v. Gates* to note that an informant's "explicit and detailed description of alleged wrongdoing, along with a

127. Navarette v. California, 134 S. Ct. 1683, 1690–91 (2014).

128. *Id*. at 1691.

129. *Id*.

130. *Id.*

131. *Id*. at 1692 (quoting Alabama v. White, 496 U.S. 325, 332 (1990)).

132. *Id.* at 1689.

133. Navarette v. California, 134 S. Ct. 1683, 1692 (2014) (Scalia, J., dissenting) (noting "the caller necessarily claimed eyewitness knowledge").

statement that the event was observed firsthand, entitles [the] tip to greater weight."[134] Yet, here, the event reported—being "run off the road" [135]—was one that was so brief that it offered few details that could be independently verified by police, and so remained untested. This contrasted sharply with the details that could be tested in *Gates*, which involved a multistate marijuana operation that unfolded over at least a few days. *Navarette* also relied on *Spinelli v. United States*' language favoring an informant's personal observations, even though *Spinelli* involved an established bookmaking operation, rather than an event that occurred within seconds.[136] While both *Gates* and *Spinelli* involved probable cause rather than reasonable suspicion, the fact remains that the only testable details *Navarette*'s tipster could offer involved identification of the vehicle, which was "generally available knowledge" to "everyone in the world who saw the car."[137] The Court also believed that "a driver's claim that another vehicle ran her off the road . . . necessarily implies that the informant knows the other car was driven dangerously."[138] The personal knowledge *Navarette* clings to is once again on the shakiest of foundations—an untestable assertion by an anonymous tipster. *Navarette* declared that the informant gave information consistent with the truck's location when found by police, giving "reason to think" she was "telling the truth."[139] Many fellow motorists could have offered this same information, doing nothing more impressive than reporting that the truck "would be heading south on Highway 1."[140] *Navarette*'s circular reasoning cannot bear close scrutiny. The Court determined that the informant could be trusted as reliable because she told police she had personal knowledge of details because she was an eyewitness; the truth about her claims of being an eyewitness with personal knowledge could be believed because the Court assumed these claims to be credible.

Even if the informant saw "a silver Ford F-150 pickup, license plate 8D94925" driving at a particular location on the highway, this information did not have the weight *Navarette* gave it in assessing reasonable

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134. *Id.* at 1689 (majority opinion) (quoting Illinois v. Gates, 462 U.S. 213, 234 (1983)).

135. *Id.*

136. Spinelli v. United States, 393 U.S. 410, 416 (1969).

137. Navarette v. California, 134 S. Ct. 1683, 1693 (2014) (Scalia, J., dissenting).

138. *Id.* at 1689 (majority opinion).

139. *Id.*

140. *Id.* at 1693 (Scalia, J., dissenting) (emphasis deleted).

suspicion.[141] The 911 caller's tip lacked the predictions that gave the anonymous informant in *White* credibility.[142] The *White* Court distinguished between two kinds of predictions.[143] The first kind of prediction merely related to "easily obtained facts and conditions existing at the time of the tip," such as the prediction that officers would find "a car precisely matching the caller's description in front of the 235 building."[144] This first kind of prediction did not impress *White* because "[a]nyone could have 'predicted' that fact because it was a condition presumably existing at the time of the call."[145] In contrast, the second kind of prediction which foretold "future actions of third parties" impressed *White* because the ability to predict a suspect's future behavior "demonstrated inside information" and a "special familiarity" with the suspect's affairs to which the general public would have no access.[146] *Navarette*'s emphasis on its informant's ability to identify a specific car, down to its license plate, and its location, at a particular mile marker[147] contrasts jarringly with *White's* demotion of such predictions to something "anyone" could know.[148] *Navarette*'s misplaced confidence in the informant's predictive abilities demonstrates the Court's inability to currently distinguish between *White*'s two kinds of predictions.

Navarette accepted at face value the assertions of a tipster—a person about whom the only things it knew for certain were her gender and her ability to operate a car and a phone—that she had personal knowledge as an eyewitness of a commission of a crime. The Court then strained to use these untested and untestable accusations to label an anonymous informant as credible. In doing so, *Navarette* accepted a new kind of predictive tip as establishing credibility, a prediction based on easily obtained facts generally available to the public, including those motorists driving with the tipster on Highway 1. Such a lenient look at an anonymous informant's

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141. *Id*. at 1689 (majority opinion).

142. Alabama v. White, 496 U.S. 325, 332 (1990) (noting that "the independent corroboration by the police of significant aspects of the informant's predictions imparted some degree of reliability to the other allegations made by the caller.").

143. *Id*.

144. *Id*.

145. *Id*.

146. *Id*.

147. Navarette v. California, 134 S. Ct. 1683, 1693 (2014) (Scalia, J., dissenting) (noting that "the Court makes a big deal of the fact that the tipster was dead right about the fact that a silver Ford F-150 truck (license plate 8D94925) was travelling south on Highway 1 somewhere near mile marker 88.").

148. Alabama v. White, 496 U.S. 325, 332 (1990).

contentions undermines the rigor of the Court's reasonable suspicion analysis.

B. Navarette*'s Credulous Approach to Anonymous Informants Would Have Caused the Court to Find Reasonable Suspicion in* Florida v. J.L.*'s Tip*

In *J.L.*, the United States proposed a stop-and-frisk should be found reasonable whenever three criteria were met: "(1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip."[149] The Court dismissed such a test as misunderstanding "the reliability needed for a tip to justify a *Terry* stop."[150] In light of *Navarette*'s reasoning, however, today's Court would be quite open to the three-pronged reliability test the United States offered in *J.L.* In fact, a review of the factual analysis in *Navarette* compels the question of whether *J.L.* would be decided differently had it been brought before the *Navarette* Court.

Navarette has largely adopted the three-part test the United States presented in *J.L. Navarette* applied a version of the first part of the rejected *J.L.* test—that the tip provide "a description of a particular person at a particular location illegally carrying a concealed firearm,"[151] when it deemed its informant's reliability bolstered by her identification of "a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925."[152] While *Navarette* emphasized the accurate description of a particular suspected car,[153] *J.L.*'s rejected test focused on the accurate description of a suspected person.[154] Further, the importance *Navarette* placed in the informant's ability to identify the proper location of the suspected car[155]

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149. Florida v. J.L., 529 U.S. 266, 271 (2000). The United States argued as *amicus curiae* in the case.

150. *Id.* at 272.

151. *Id.* at 271.

152. *Navarette*, 134 S. Ct. at 1689.

153. *See id.* ("By reporting that she had been run off the road by a specific vehicle . . . the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving.").

154. *See J.L.*, 529 U.S. at 272 (holding that an accurate description of a subject is reliable but does not show that the informant has knowledge of concealed criminal activity).

155. *See* Navarette v. California, 134 S. Ct. 1683, 1689 (2014) (relating the informant's contemporaneous report to the hearsay exception for "excited utterances").

echoes the approval given to an informant's proper identification of the location of a suspected person in the test rejected in *J.L*. *Navarette* also applied a version of the second part of the rejected *J.L*. test—that the "police promptly verify the pertinent details of the tip except the existence of the firearm."[156] Again, *Navarette* was pleased by the officer's verification of the car's appearance and location while not being troubled by the officer's failure to see any bad driving (here analogous to *J.L's* officers not being able to confirm concealed weapon possession).[157] Finally, as if applying the third part of the rejected *J.L*. test—"there are no factors that cast doubt on the reliability of the tip,"[158] *Navarette* felt compelled to offer several reasons for dismissing the officer's failure to find erratic driving. The Court speculated that, "the appearance of a marked police car would inspire more careful driving for a time."[159] This statement borders on the bizarre, as noted by Justice Scalia's quip that "Whether a drunk driver drives drunkenly, the Court seems to think, is up to him."[160] Next, in a statement that could cast doubt on officer testimony in thousands of driving under the influence cases, *Navarette,* in attempting to discount the driver's failure to betray his intoxication, actually claimed that five minutes of observation was "hardly" sufficient to assess driving behavior.[161] Again, Justice Scalia disagreed heartily, declaring, "Five minutes is a *long* time."[162]

In its final attempt to explain away the legal significance of police observing only proper driving, *Navarette* offered the following assertion: "an officer who already has such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving."[163] While true in the sense that an officer need not gain further information to justify a stop once he or she has obtained reasonable suspicion, *Navarette's* statement fails to address the problem which occurs when an officer *does* perform further surveillance and these observations undermine the initial determination of reasonable suspicion. What if the officer comes across a reported vehicle and learns that the driver was a "volunteer fireman" driving to a fire, a "physician rushing to the hospital or someone who jerked

156. Florida v. J.L., 529 U.S. 271 (2000).
157. *Navarette*, 134 S. Ct. at 1689, 1691.
158. *J.L*., 529 U.S. at 271.
159. *Navarette*, 134 S. Ct. at 1691.
160. *Id*. at 1697 (Scalia, J., dissenting).
161. *Id*. at 1691.
162. *Id*. at 1696.
163. *Id*. at 1691.

from one lane to another due to a "bee in the car or a crying baby."[164] What if the officer followed the driver and found no erratic driving for 30 minutes, an hour, three hours? Could police ignore these facts in order to maintain their grasp on previously formed reasonable suspicion? The force of *Navarette*'s logic flies in the face of a lesson repeatedly emphasized in *Terry* precedent: officers are expected to continue assessing information even after they have obtained reasonable suspicion to believe criminality exits.[165] For police must be able to respond to evolving street encounters.[166] *Adams* defended *Terry* stops as the "essence of good police work" because, "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."[167] The Court again assumed that good police work included an officer gathering and assessing additional information after obtaining reasonable suspicion in *United States v. Brignoni-Ponce*.[168] In this case, the Court held:

> when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion . . . . The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.[169]

In neither *Adams* nor *Brignoni-Ponce* did the Court suggest that the officer could turn a blind eye to exculpatory evidence in order to preserve the reasonable suspicion initially formed.

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164. AAA FOUNDATION FOR TRAFFIC SAFETY, 2 ROAD RAGE: HOW TO AVOID AGGRESSIVE DRIVING, https://www.aaafoundation.org/sites/default/files/RoadRageBrochure.pdf. (last visited Feb. 8, 2015).

165. *See* Adams v. Williams, 407 U.S. 143, 145–46 (1972) (recognizing that in *Terry*, the Court found the officer may make a brief stop of a suspicious individual to obtain more information).

166. *See* Terry v. Evans, 392 U.S. 1, 20 (1968) (describing police conduct as "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat.").

167. Adams v. Williams, 407 U.S. 143, 145–46 (1972).

168. United States v. Brignoni-Ponce, 422 U.S. 873, 881–82 (1975) (holding that a brief stop by an officer to obtain more information from suspicious individuals was reasonable).

169. *Id.* at 881.

When *J.L.* is analyzed by the totality of circumstances approach, in the manner now applied in *Navarette*, the tipster would in all likelihood be found reliable. In *J.L.*, the tipster noted that the suspected juvenile was "wearing a plaid shirt,"[170] a fact analogous to the make and model of the car that so impressed *Navarette*.[171] *J.L.*'s informant placed the suspect at "a particular bus stop"[172] while *Navarette*'s could only locate him within measurements of mile markers.[173] *J.L.*'s anonymous caller gave his tip to police officers[174] likely trained in identifying voices and presumably able to arrest those who offered them false information while *Navarette*'s 911 caller impressed the Court by operating under similar constraints.[175] The fact that police observed J.L. make "no threatening or otherwise unusual movements"[176] would be meaningless because according to *Navarette*, "an officer who already has such a reasonable suspicion need not surveil" the suspect in order to "personally observe" the criminal activity.[177] Through *Navarette*'s lens, the facts in *J.L.*, as weak as they were, would receive a much more generous viewing. Thus, *Navarette*'s new application of the reasonable suspicion standard could open the way to expansion of police power, allowing *Terry* stops in facts quite similar to those in *J.L.*

C. Navarette*'s Erosion of Reasonable Suspicion Based on Anonymous Informants Will Encourage Passive and Lazy Policing*

Navarette will have a negative impact on police professionalism. The Court has long understood the direct link between its rulings and police conduct in the field. In *New York v. Belton*, which defined the scope of search incident to arrest for drivers stopped on the road, the Court took care

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170. Florida v. J.L., 529 U.S. 266, 268 (2000).

171. Navarette v. California, 134 S. Ct. 1683, 1689 (2014).

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

173. *Navarette*, 134 S. Ct. at 1689.

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

175. *Navarette*, 134 S. Ct. at 1689–90. The *Navarette* Court noted that its anonymous caller was not free to lie with impunity, for "A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." *Id*. at 1689. *Navarette* therefore declared, "a reasonable officer could conclude that a false tipster would think twice before using such a system." *Id*. at 1690.

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

177. *Navarette*, 134 S. Ct. at 1691.

to consider how to craft a workable rule for officers.[178] *Belton* noted, "the protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"[179] *Belton* recognized that the Fourth Amendment was "intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged."[180] Similarly, when the *Gates* Court formulated its probable cause test, it was aware that the rule would usually be applied by "nonlawyers in the midst of haste."[181] Such "practical people" as "law enforcement officers" are not "legal technicians."[182]

Rules seemingly aiding police by vesting them with powers can lead to laxity and sloppy police work. For example, in the confessions context, the Court once ruled that the Fifth Amendment[183] did not apply to state law enforcement.[184] Some police abused this lack of accountability when

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178. New York v. Belton, 453 U.S. 454, 458 (1981) ("[A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.") (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979)).

179. *Id*. (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. CT. REV. 127, 142 (1974)).

180. *Belton*, 453 U.S. at 458 (quoting U.S. CONST. amend. IV.).

181. Illinois v. Gates, 462 U.S. 213, 235 (1983) ("[A]ffidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation.").

182. *Id*. at 231–32. Justice Scalia put it even more directly, declaring, "Law enforcement agencies follow closely our judgments on matters such as this." Navarette v. California, 134 S. Ct. 1683, 1692 (2014) (Scalia, J., dissenting).

183. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

184. In Twining v. New Jersey, 211 U.S. 78 (1908), the Court held, "The exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the States." *Id*. at 99.

seeking confessions.[185] Later, the Court lamented, "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence."[186] The Court in *Escobedo v. Illinois* noted:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:
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> "*Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby*. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources.[187]

Navarette, in lowering the bar for establishing reasonable suspicion based on anonymous tips, could encourage officers to increasingly rely on such grounds instead of performing the labor-intensive task of independently building a case for such a stop. In particular, the ease of basing a stop on one tip could cause police to stop pursuing the "patient skills" once honed over months-long investigations of the kind that occurred in *United States v. Cortez*.[188] In *Cortez*, Border Patrol officers in Arizona painstakingly analyzed footprints in the desert over a two-month period[189] to determine that "groups of from 8 to 20 persons had walked north from the Mexican border, across 30 miles of desert and mountains, over a fairly well-defined path."[190] Officers, studying a particular shoeprint that "bore a distinctive and repetitive V-shaped or chevron design," were able to deduce that the person wearing the shoe that made this print was leading the groups across the border.[191] Analysis of the tracks of this leader, whom the officials named "Chevron," indicated he travelled at night (because the obstacles the groups encountered would have been avoided in

185. For an example of a particularly egregious case of local law enforcement coercing confessions, *see Powell v. Alabama*, 287 U.S. 45 (1932).

186. Haynes v. Washington, 373 U.S. 503, 519 (1963).

187. Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964) (emphasis added). *See also* Colorado v. Connelly, 479 U.S. 157, 181 (1986) (Brennan, J., dissenting).

188. United States v. Cortez, 449 U.S. 411, 418–419 (1981).

189. *Id*. at 419.

190. *Id*. at 413.

191. *Id.*

daylight), around weekends, and when the weather was clear.[192] Officers further studied the patterns of the tracks to determine the location where the group would be picked up by a vehicle and the direction the vehicle would move when it was meeting the group.[193] Border patrol agents narrowed the time of pick up to a five-hour window and even determined the size of the vehicle for which they were looking (a pick up large enough to hold 8 to 20 people).[194] Finally, the officers did not pull over the vehicle immediately upon spotting it, but waited to ensure that its driving behavior (returning in an hour and a half and driving in the opposite direction) conformed to the suspected criminal activity.[195] In the wake of *Navarette*, agents at the border might be tempted to dispense with such drudgery, instead asking the public to call in tips, even if anonymous, that could be carried out based on little more than a description of a vehicle's appearance and location. This logic of course can be extended to officers accosting people on the sidewalk and highway patrol agents stopping drivers suspected of being under the influence.

The phrases "reasonable suspicion," "totality of the circumstances," and "objective basis" are powerless abstractions. Such rules are "given meaning only through (their) application to the particular circumstances of a case."[196] *Navarette*'s chief failing occurred during the crucial task of giving content to these rules through actual application. The Court invoked all the right words, speaking of "a particularized and objective basis" for suspecting criminal activity, noting that reasonable suspicion "is dependent upon both the content of the information possessed by police and its degree of reliability," and intoning that "[t]hese principles apply with full force to investigative stops based on information from anonymous tips."[197] *Navarette*, however, drained the authority out of these rules by finding them satisfied by a nameless caller who offered little more than an accusation and a description of a truck's appearance and place.

192. United States v. Cortez, 449 U.S. 411, 413 (1981).

193. *Id*. at 413–14.

194. *Id.* at 414.

195. *Id*. at 415.

196. Ornelas v. United States, 517 U.S. 690, 697 (1996).

197. Navarette v. California, 134 S. Ct. 1683, 1687–88 (2014).

V. Conclusion

In *The Lord of the Flies*, William Golding's novel about young boys marooned on an island in the tropics, one boy, Jack, paints his face with clay before hunting a wild pig.[198] The "mask was a thing on its own, behind which Jack hid, liberated from shame and self-consciousness."[199] The freedom provided by altering or hiding his identity contributed to Jack's ability to commit act of violence—killing the pig.[200] Philip Zimbardo, professor emeritus at Stanford University, has recognized the dramatic psychological consequences of anonymity, warning, "anything, or any situation, that makes people feel anonymous, as though no one knows who they are or cares to know, reduces their sense of personal accountability, thereby creating the potential for evil action."[201] The negative consequences of anonymity have endangered our roadways. The National Highway Traffic Safety Administration has reported that road rage is due in part to the "anonymity provided by motor vehicles."[202] The Automobile Club's research has discovered that over a period of seven years, road rage "resulted in at least 218 murders and another 12,610 injury cases."[203] If the sense of unaccountability that flows from anonymity can contribute to drivers' decisions to attempt murder, it seems quite possible that, among the thousands of motorists who are aggravated by the perceived incompetence or rudeness of other drivers, many could choose to call police with invented stories of reckless driving or worse. There is a curious irony that the *Navarette* decision now empowers informants acting under the cloak of anonymity to combat dangerous driving, a behavior emboldened by anonymity's unaccountability in the first place.

In diluting reasonable suspicion by empowering the anonymous, *Navarette* exploited a weakness in stop and frisk law present from its inception. As previously seen, *Terry* allowed police to seize persons on a

198. WILLIAM GOLDING, LORD OF THE FLIES 67–68 (Riverhead Books 1997).

199. *Id*. at 68–69.

200. *Id*. at 74.

201. PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 301 (Random House Trade Paperbacks, reprint ed., 2008). Zimbardo himself made the connection to *Lord of the Flies*, finding William Golding's insight about "anonymity and aggression" to be "psychologically valid." *Id*. Zimbardo also noted, "any setting that cloaks people in anonymity reduces their sense of personal accountability and civic responsibility for their actions." *Id*. at 25.

202. *See* JACK STUSTER, AGGRESSIVE DRIVING ENFORCEMENT: EVALUATION OF TWO DEMONSTRATION PROGRAMS (2004).

203. *Supra* note 164.

level of certainty less than probable cause, a standard having "roots that are deep in our history"[204] and previously understood to be "the best compromise that has been found for accommodating . . . often opposing interests."[205] When it did so, *Terry* acted without textual backing from the Fourth Amendment, thus creating a rule that was vulnerable to erosion. The elaborate framework *Terry* constructed to limit police powers of stop and frisk began to crumble only four years later, when, in *Adams*, the Court allowed an officer to both rely on another person's observations and to search beneath the "outer clothing"[206] by recovering a gun from a suspect's waistband.[207] Stop and frisk's "totality of the circumstances" analysis, as explained in *White*, placed even more emphasis on the actual application portion of *Terry* litigation.[208] Reasonable suspicion thus "acquired content only through application."[209] This context made *Navarette*'s application of the reasonable suspicion standard to anonymous informants uniquely potent.

Navarette employed this power to limit Fourth Amendment protections still further by enabling police to stop cars on the roadway based on nothing more than an unknown stranger's description of a car, its location, and a bald accusation. Justice Scalia, in noting that the Court purported to adhere to prior Fourth Amendment cases, warned: "Be not deceived."[210] In shrugging off concerns about tips from anonymous informants, *Navarette* failed to appreciate its weakening of the right to be free of unreasonable seizures, the right, in short, "to be let alone."[211] In easing police officers' burdens in establishing reasonable suspicion, the Court missed a fundamental point: "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."[212] The Court, while complacently exalting general Fourth

204. Henry v. United States, 361 U.S. 98, 100 (1959).

205. Beck v. Ohio, 379 U.S. 89, 91(1964).

206. Terry v. Ohio, 392 U.S. 1, 30 (1968).

207. Adams v. Williams, 407 U.S. 143, 145, 149 (1972).

208. Alabama v. White, 496 U.S. 325, 328 (1990).

209. Ornelas v. United States, 517 U.S. 690, 697 (1996).

210. Navarette v. California, 134 S. Ct. 1683, 1692 (2014) (Scalia, J., dissenting).

211. "The makers of our Constitution . . . conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

212. United States v. Di Re, 332 U.S. 581, 595 (1948).

Amendment principles, failed to preserve our rights when it came down to dealing with the details.