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## ESSAY

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### PROBABLE CAUSE AND REASONABLE SUSPICION: TOTALITY TESTS OR RIGID RULES?

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#### INTRODUCTION

Since its decision more than thirty years ago in *Illinois v. Gates*,<sup>1</sup> the Supreme Court has emphasized that the Fourth Amendment’s suspicion requirements—the probable cause required to arrest and search, the reasonable suspicion needed to stop and frisk—are totality-of-the-circumstances tests. *Gates* overturned Supreme Court precedent that had held for nearly two decades that a tip did not give rise to probable cause absent evidence that the informant both (1) was honest and (2) had a reliable basis for her information.<sup>2</sup> Rejecting this “rigid” two-part test, the *Gates* Court stressed that probable cause is a “fluid,” “practical, common-sense” concept that is “not readily, or even usefully, reduced to a neat set of legal rules.”<sup>3</sup>

The Court has used similar language to explain the totality-of-the-circumstances analysis applied when measuring the lower quantum of proof necessary to create reasonable suspicion.<sup>4</sup> With the exception of one outlier—*Illinois v. Wardlow*, which articulated the sweeping rule that “[h]eadlong flight” in a “high crime area” constitutes reasonable suspicion<sup>5</sup>—

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<sup>1</sup> 462 U.S. 213 (1983).

<sup>2</sup> *Id.* at 228-39 (overturning *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964)).

<sup>3</sup> *Id.* at 231-32, 238.

<sup>4</sup> *See United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (observing that “the totality of the circumstances—the whole picture—must be taken into account”).

<sup>5</sup> 528 U.S. 119, 124 (2000).

the Court has repeatedly recited the common-sense, totality-of-the-circumstances mantra when defining both probable cause and reasonable suspicion.<sup>6</sup>

In two recent opinions, however, the Court has strayed from this path, leaning towards reliance on bright-line rules to define probable cause and reasonable suspicion. Perhaps not surprisingly, these deviations have come in cases where a totality-of-the-circumstances approach is more likely to favor criminal defendants. And both times, the tests that have emerged from the Court's rulings have tended to oversimplify by exaggerating the reliability of the information used by the police.

### I. THE ROAD TO *NAVARETTE*

In the first case, *Florida v. Harris*, a unanimous Supreme Court held, in essence, that a positive alert by a certified or recently trained narcotics-detection dog creates probable cause to search.<sup>7</sup> In so doing, the Court exhibited overconfidence in the accuracy of drug dogs and glossed over questions about their reliability.<sup>8</sup> The Court claimed that its opinion called for an examination of “all the facts surrounding a dog’s alert,” just like “every inquiry into probable cause.”<sup>9</sup> But that assertion was presumably based on the Court’s caveat that defendants must be given an opportunity to present “conflicting evidence”—either by cross-examining the dog’s handler or presenting their own witnesses at the suppression hearing.<sup>10</sup>

As I have previously argued, this proviso does not give defendants a meaningful opportunity to contest the prosecution’s probable cause showing, because defense counsel is unlikely to have access to the critical information about a dog’s training and field performance needed to mount a credible challenge to its reliability.<sup>11</sup> For all practical purposes, then, *Harris* resembles a bright-line test, like the rules *Gates* and its progeny avoided, and not the “more flexible, all-things-considered approach” the *Harris* Court purported to use.<sup>12</sup>

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<sup>6</sup> See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003); *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996).

<sup>7</sup> 133 S. Ct. 1050, 1057 (2013).

<sup>8</sup> See Kit Kinports, *The Dog Days of Fourth Amendment Jurisprudence*, 108 NW. U. L. REV. COLLOQUY 64, 67 (2013) (“Though the scientific understanding of drug-detection dogs is still developing, research has shown that a significant percentage of positive alerts do not lead to the discovery of narcotics.” (footnotes omitted)).

<sup>9</sup> *Harris*, 133 S. Ct. at 1058.

<sup>10</sup> *Id.* at 1057.

<sup>11</sup> Kinports, *supra* note 8, at 65-66.

<sup>12</sup> *Harris*, 133 S. Ct. at 1055-56.

This trend continued, though somewhat less blatantly, with last Term's opinion in *Navarette v. California*.<sup>13</sup> The question on which the Court granted certiorari was whether the Fourth Amendment "require[s] an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle."<sup>14</sup>

The stage for *Navarette* was set in *Florida v. J.L.*, where the Court unanimously held that an anonymous tip claiming that a certain individual is carrying a weapon does not, "without more," create the reasonable suspicion necessary for a *Terry* stop and frisk.<sup>15</sup> Justice Ginsburg's majority opinion in that case concluded that an anonymous call, which reported that a young African-American male wearing a plaid shirt was at a bus stop and in possession of a weapon, lacked the requisite "indicia of reliability" to give rise to reasonable suspicion.<sup>16</sup> Although the police were able to corroborate that someone matching the caller's description was at the designated bus stop, the Court explained that reasonable suspicion mandates that "a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."<sup>17</sup>

The *J.L.* Court thus distinguished *Alabama v. White*,<sup>18</sup> an earlier decision involving an anonymous phone call that accused a woman of possessing cocaine. The *White* Court had characterized that case as a "close" one and cautioned that the tip alone was insufficient to create reasonable suspicion.<sup>19</sup> But the majority ultimately found that the police were justified in conducting a *Terry* stop, once they were able to corroborate that the informant had correctly predicted the woman would leave a particular apartment complex at a specified time and had accurately described the vehicle she was driving and the direction in which she was heading.<sup>20</sup> Notably, the *White* Court did not consider the description of the woman's vehicle to be particularly significant, given that "[a]nyone could have 'predicted' that fact because it was a condition presumably existing at the time of the call."<sup>21</sup> Nevertheless, the informant's "ability to predict [White's] *future behavior*"—something "[t]he general public would have no way of knowing"—suggested that the

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<sup>13</sup> 134 S. Ct. 1683 (2014).

<sup>14</sup> Petition for a Writ of Certiorari at i, *Navarette*, 134 S. Ct. 1683 (No. 12-9490).

<sup>15</sup> 529 U.S. 266, 268 (2000) (interpreting *Terry v. Ohio*, 392 U.S. 1 (1968), which established the legal standards for stops and frisks).

<sup>16</sup> *Id.* at 271.

<sup>17</sup> *Id.* at 272.

<sup>18</sup> 496 U.S. 325 (1990).

<sup>19</sup> *Id.* at 329, 332; see also *J.L.*, 529 U.S. at 271 (calling *White* a "borderline" case).

<sup>20</sup> *White*, 496 U.S. at 331-32.

<sup>21</sup> *Id.* at 332.

informant had “inside information” and therefore made it “likely” that the caller also had “access to reliable information about [White’s] illegal activities.”<sup>22</sup>

When *J.L.* distinguished *White* ten years later, the Court recognized the dangers associated with weapons, but refused to create a “firearm exception” to the traditional standards governing reasonable suspicion.<sup>23</sup> Nevertheless, the *J.L.* Court admonished that “extraordinary dangers sometimes justify unusual precautions” and declined to “speculate” whether other circumstances—such as an anonymous tip concerning a bomb—might present a “danger . . . so great as to justify a search even without a showing of reliability.”<sup>24</sup>

Picking up on that dictum, a number of lower courts began to endorse a drunk-driving exception that allowed the police to stop a vehicle based solely on an anonymous tip.<sup>25</sup> The issue attracted the Supreme Court’s attention in 2009, when Chief Justice Roberts, joined by Justice Scalia, dissented from the denial of certiorari in a case involving the validity of a drunk-driving stop.<sup>26</sup> The two Justices hinted strongly that they disapproved of the lower court’s conclusion that reasonable suspicion demanded that a law enforcement official personally witness erratic driving: they reasoned that drunk driving generates more immediate risks than the concealed weapon in *J.L.*, and that requiring the police to give intoxicated drivers “one free swerve” may lead to a fatal accident.<sup>27</sup>

## II. THE RULING IN *NAVARETTE*

When the same question returned to the Court last Term in *Navarette*, the majority ultimately purported to duck it by holding only that, under the totality of the circumstances, the police had reasonable suspicion of drunk driving on the facts of the case.<sup>28</sup> (Interestingly, this ruling seems more responsive to the second issue raised in the petition for certiorari,<sup>29</sup> a more

<sup>22</sup> *Id.* But see *id.* at 333 (Stevens, J., dissenting) (arguing that many commuters leave home at the same time and travel in a certain direction on a daily basis).

<sup>23</sup> *J.L.*, 529 U.S. at 272.

<sup>24</sup> *Id.* at 272-73.

<sup>25</sup> See *Virginia v. Harris*, 130 S. Ct. 10, 11 n.2 (2009) (Roberts, C.J., dissenting from denial of certiorari) (citing an opinion from the Eighth Circuit and nine state supreme court decisions).

<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.* at 12.

<sup>28</sup> *Navarette v. California*, 134 S. Ct. 1683, 1686, 1692 (2014).

<sup>29</sup> See Petition for a Writ of Certiorari at i, *Navarette*, 134 S. Ct. 1683 (No. 12-9490) (“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?”).

fact-specific question which the Court declined to review.)<sup>30</sup> But, as noted in the dissent written by Justice Scalia and joined by Justices Ginsburg, Sotomayor, and Kagan, “[b]e not deceived.”<sup>31</sup> Notwithstanding the majority’s assertion, *Navarette*, like the prior Term’s drug-dog ruling in *Florida v. Harris*, is likely to have the practical effect of creating a bright-line rule: that reasonable suspicion of drunk driving arises whenever an informant claims to have witnessed even a single instance of certain risky driving behaviors. And, like *Harris*, this test tends to oversimplify by exaggerating the reliability of the information in the hands of the police, a misstep that will only prove more damaging if the lower courts later take steps to further dilute the rule.

The anonymous tip in *Navarette* was a 911 call claiming that the driver of a silver Ford 150 pickup truck had run the informant off an undivided two-lane road five minutes earlier.<sup>32</sup> The caller provided the truck’s license number, location, and direction of travel.<sup>33</sup> Approximately eighteen minutes after the reported incident, the police located the truck nineteen miles up the road.<sup>34</sup> An officer followed the vehicle for approximately five minutes without observing any traffic violations or erratic driving, then pulled the truck over.<sup>35</sup> The police smelled marijuana surrounding the vehicle and ultimately discovered thirty pounds of that drug in the truck.<sup>36</sup>

In initially finding sufficient “indicia of reliability” to allow the police “to credit the caller’s account,” Justice Thomas’s opinion for the majority relied on three factors.<sup>37</sup> First, the caller was an actual witness to the dangerous driving behavior and thus had a credible basis for her information.<sup>38</sup> Second, the tip was relatively contemporaneous, enhancing its reliability.<sup>39</sup> Finally, 911 tips are less likely to be fraudulent because today’s 911 system permits law enforcement to record calls and identify a caller’s phone number and location, thereby preventing dishonest informants from relying on their anonymity.<sup>40</sup>

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<sup>30</sup> See *Navarette v. California*, 134 S. Ct. 50 (2013) (granting review on only the first question presented in the petition for certiorari).

<sup>31</sup> *Navarette*, 134 S. Ct. at 1692 (Scalia, J., dissenting). Although the lineup in *Navarette* may seem somewhat strange, Justice Scalia has increasingly joined forces with the three more liberal female Justices in Fourth Amendment cases. See, e.g., *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013); *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013).

<sup>32</sup> *Navarette*, 134 S. Ct. at 1686-87.

<sup>33</sup> *Id.* at 1686.

<sup>34</sup> See *id.* at 1687.

<sup>35</sup> See *id.*

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

<sup>37</sup> *Id.* at 1688.

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

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

<sup>40</sup> *Id.* at 1689-90.

The majority next concluded that the police had reasonable suspicion that the driver of the truck was intoxicated because the tip involved “more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving.”<sup>41</sup> The Court reasoned that, like weaving and driving in the wrong lane (and unlike seatbelt and minor speeding violations), running another car off the road is a form of “erratic behavior[] . . . strongly correlated with drunk driving” and not merely “an isolated example of recklessness.”<sup>42</sup> Additionally, the Court rejected the Petitioners’ argument that reasonable suspicion was undermined by the police officer’s inability to corroborate any dangerous driving even after following the truck for five minutes. Rather, the Court found it “hardly surprising that the appearance of a marked police car would inspire more careful driving for a time.”<sup>43</sup>

### III. THE IMPLICATIONS OF *NAVARETTE*

Rather than picking up on *J.L.*’s dictum and expressly recognizing a “drunk driving exception” to the usual standards governing reasonable suspicion, the *Navarette* Court distinguished *J.L.* on the grounds that the tip in *Navarette* was supported by “stronger” evidence of reliability.<sup>44</sup> The Court likewise devoted little attention to the State of California’s primary contentions that driving while intoxicated is a peculiarly dangerous crime (creating a “grave and imminent threat” compared to the “inchoate risk” present in *J.L.*) and that the severity of the crime is a relevant factor to be balanced in assessing reasonable suspicion.<sup>45</sup> The majority’s sole reference to the dangers of drunk driving came towards the end of its opinion, where Justice Thomas mentioned that *Navarette* would be a “particularly inappropriate” vehicle for deviating from the standard doctrine that police may conduct a stop as soon as they have reasonable suspicion, because

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<sup>41</sup> *Id.* at 1691.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* *But see id.* at 1697 (Scalia, J., dissenting) (pointing out that “no mere act of the will can resist” the effects of intoxication on driving).

<sup>44</sup> *Id.* at 1692 (majority opinion).; *cf.* *Missouri v. McNeely*, 133 S. Ct. 1552, 1565 (2013) (plurality opinion) (refusing to recognize a *per se* exigency in drunk driving cases because, although the crime “exact[s] a terrible toll . . . the general importance of the government’s interest . . . does not justify departing from” the standard approach to the exigent circumstances exception to the warrant requirement).

<sup>45</sup> *See* Respondent’s Brief on the Merits at 30-32, *Navarette*, 134 S. Ct. 1683 (No. 12-9490); *see also* Brief for the United States as Amicus Curiae Supporting Respondent at 19-21, *Navarette*, 134 S. Ct. 1683 (No. 12-9490) (taking a similar position).

“allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.”<sup>46</sup>

The Court wisely chose not to venture down the path suggested by the State. A number of Fourth Amendment scholars have advocated a similar sliding-scale approach, with the requisite quantum of proof varying based on not only the gravity of the crime, but also factors such as the intrusiveness of the police action and the immediacy of the need for police intervention.<sup>47</sup> But the Court has steered clear of this amorphous, ad hoc approach, which “could only produce more slide than scale.”<sup>48</sup> The Court has never envisioned that judges would conduct a balancing test or apply differing definitions of probable cause and reasonable suspicion based on the severity of the crime.<sup>49</sup>

Thus, the briefs filed by the State and the federal government in *Navarette* were forced to resort to irrelevant Supreme Court precedent.<sup>50</sup> They cited cases like *Terry v. Ohio*, in which the Court balanced the competing interests at stake in deciding “as a general proposition” that the Fourth Amendment allows certain exceptions to the warrant and probable cause requirements.<sup>51</sup> The briefs also relied on opinions that applied a balancing

<sup>46</sup> *Navarette*, 134 S. Ct. at 1691-92.

<sup>47</sup> See, e.g., Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 323 (2004) (advocating that “the fiction of one uniform definition of probable cause . . . be replaced with a flexible sliding scale that takes into account the severity of the intrusion and the magnitude of the threat”); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 1014 (2003) (proposing “a reasonableness framework for analyzing questions of probable cause that draws upon Learned Hand’s test for evaluating claims of negligence”); Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 609 (2007) (criticizing the “unitary probable cause standard”).

<sup>48</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974).

<sup>49</sup> See, e.g., *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (noting that “[t]he ‘long-prevailing standards’ of probable cause embodied ‘the best compromise’” of competing interests, and therefore “[this] standard [of probable cause] applied to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations” (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949))).

<sup>50</sup> See Respondent’s Brief on the Merits at 10-12, 26-28, *Navarette*, 134 S. Ct. 1683 (No. 12-9490); Brief for the United States as Amicus Curiae Supporting Respondent at 19-26, *Navarette*, 134 S. Ct. 1683 (No. 12-9490).

<sup>51</sup> *Terry v. Ohio*, 392 U.S. 1, 20 (1968); see also *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 187-88 (2004) (upholding a state statute that required suspects to disclose their names during *Terry* stops); *Wyoming v. Houghton*, 526 U.S. 295, 303-06 (1999) (extending the automobile exception to the warrant requirement to searches of passengers’ belongings); *California v. Carney*, 471 U.S. 386, 392-93 (1985) (allowing warrantless searches of automobiles when “the overriding standard of probable cause is met”); *United States v. Hensley*, 469 U.S. 221, 229-31 (1985) (permitting *Terry* stops to investigate past felony offenses); *United States v. Place*, 462 U.S. 696, 700-06 (1983) (authorizing the brief detention of luggage at airports based on reasonable suspicion).

test in assessing the constitutionality of administrative inspection programs,<sup>52</sup> as well as cases considering the severity of the threat posed by a defendant when evaluating the reasonableness of a police officer's use of force.<sup>53</sup> On none of these occasions, however, did the Court use a balancing test to determine whether reasonable suspicion or probable cause existed on a given set of facts.<sup>54</sup>

In a few isolated circumstances, the Court has inexplicably chosen to resolve a Fourth Amendment case by using a free-wheeling balancing test—on the theory that “[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.”<sup>55</sup> Those decisions, however, were limited to permitting certain searches on the understanding that reasonable suspicion already existed or was not required.<sup>56</sup> Admittedly, the most recent of those opinions, *Maryland v. King*, purported to restrict DNA testing to suspects who had been arrested for “a serious offense.”<sup>57</sup> But the Court's recitation of the government interests served by identifying arrestees through DNA tests had little to do with the gravity of the crime of arrest.<sup>58</sup> In fact, the majority repeatedly mentioned the importance of ascertaining whether someone detained for a minor offense had a violent criminal history.<sup>59</sup> This reasoning prompted the dissenters to observe that “an entirely predictable consequence” of the Court's ruling is to allow DNA testing of all arrestees because no “principle could possibly justify” confining the holding to serious crimes.<sup>60</sup>

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<sup>52</sup> See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (allowing sobriety roadblocks); *Bell v. Wolfish*, 441 U.S. 520, 559-60 (1979) (permitting body-cavity inspections of pretrial detainees); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-63 (1976) (upholding immigration checkpoints).

<sup>53</sup> See *Scott v. Harris*, 550 U.S. 372, 383-84 (2007); *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

<sup>54</sup> See Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 655 (2009) (noting that *Terry* and its progeny did not anticipate the use of a balancing test to analyze the existence of reasonable suspicion).

<sup>55</sup> *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); see also *Maryland v. King*, 133 S. Ct. 1958, 1969-70 (2013); *United States v. Knights*, 534 U.S. 112, 118-19 (2001).

<sup>56</sup> See *King*, 133 S. Ct. at 1980 (allowing DNA testing of suspects arrested for “serious offense[s]”); *Samson*, 547 U.S. at 846 (upholding state statute authorizing suspicionless searches of parolees); *Knights*, 534 U.S. at 121-22 (permitting searches of a probationer's person and property based on reasonable suspicion).

<sup>57</sup> *King*, 133 S. Ct. at 1980.

<sup>58</sup> See *id.* at 1970-75 (citing the government interests in determining the arrestee's identity, preventing harm to jailhouse staff and detainees, guaranteeing the defendant's presence at trial, assisting in bail decisions, and exonerating innocent persons).

<sup>59</sup> See *id.* at 1971-74.

<sup>60</sup> *Id.* at 1989 (Scalia, J., dissenting).



Thus, there is no precedent in the Court's Fourth Amendment jurisprudence for applying a balancing approach or considering the severity of the crime when assessing reasonable suspicion or probable cause. Any move towards a sliding-scale approach would create intractable line-drawing problems, for, as Justice Kagan observed during oral argument in *Navarette*, "all crime represents a threat to public safety."<sup>61</sup>

The *Navarette* majority not only declined to create a drunk-driving exception to the standards governing reasonable suspicion, but also refused to explicitly endorse the rigid rules advocated by the State of California and the federal government. Both of them claimed that their views were consistent with the Court's traditional totality-of-the-circumstances analysis,<sup>62</sup> and, ironically, even accused the Petitioners of deviating from that approach by calling for police corroboration of anonymous tips.<sup>63</sup> In fact, however, both the State and the Solicitor General actually proposed sweeping rules. The State argued that reasonable suspicion arises whenever an anonymous 911 call "report[s] the caller's personal observation of drunk or reckless driving and provid[es] a detailed description of the vehicle, its location, and direction of travel" and the police find a vehicle matching that description in the vicinity.<sup>64</sup> The Solicitor General urged the Court to articulate an even broader version of this rule, which would not require the informant to specify that she had personally witnessed any erratic driving.<sup>65</sup> The Solicitor General defended this position on the ground that a "description of the

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<sup>61</sup> Transcript of Oral Argument at 47, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490); see also *Navarette*, 134 S. Ct. at 1697 (Scalia, J., dissenting) (noting that the Court has not recognized exceptions to probable cause and reasonable suspicion even to "prevent and detect murder"); *Florida v. J.L.*, 529 U.S. 266, 272-73 (2000) (warning that a weapons exception to the reasonable suspicion requirement could not be "securely confine[d]," thereby "allowing the exception to swallow the rule").

<sup>62</sup> Respondent's Brief on the Merits at 24-25, *Navarette*, 134 S. Ct. 1683 (No. 12-9490); Brief for the United States as Amicus Curiae Supporting Respondent at 28-29, *Navarette*, 134 S. Ct. 1683 (No. 12-9490).

<sup>63</sup> See Respondent's Brief on the Merits at 33, *Navarette*, 134 S. Ct. 1683 (No. 12-9490) (arguing that Petitioners "fail[ed] to consider the differences between tips reporting possessory offenses and those reporting observation of drunk driving"); Brief for the United States as Amicus Curiae Supporting Respondent at 29, *Navarette*, 134 S. Ct. 1683 (No. 12-9490) (asserting that Petitioners would "mak[e] future predictions the sole acceptable index of reliability in cases where officers do not witness criminal activity themselves").

<sup>64</sup> Respondent's Brief on the Merits at 24, *Navarette*, 134 S. Ct. 1683 (No. 12-9490).

<sup>65</sup> See Brief for the United States as Amicus Curiae Supporting Respondent at 12, *Navarette*, 134 S. Ct. 1683 (No. 12-9490) (arguing that law enforcement officials have reasonable suspicion when "an anonymous 911 call report[s] reckless or drunken driving" and they "corroborate the location and description of the vehicle").

details of a reckless or drunken driving episode . . . supports an inference that the caller's basis of knowledge is eyewitness observation."<sup>66</sup>

Although the *Navarette* dissenters accused the majority of adopting the views of the Solicitor General,<sup>67</sup> that claim is something of an overstatement. As noted above, the majority relied heavily on the proposition that the 911 caller in *Navarette* was an actual eyewitness to the erratic driving.<sup>68</sup> Just as in *J.L.*, then, the Court rejected the federal government's argument that reasonable suspicion arises whenever an anonymous tip "provides a description of a particular person at a particular location illegally carrying a concealed firearm" (or, in *Navarette*, driving under the influence) and "police promptly verify the pertinent details of the tip except the existence of the firearm" (or, here, reckless driving behavior).<sup>69</sup>

Whether the Court's opinion in essence endorsed the rule advanced by the State is a closer question. Admittedly, the Court cited two factors beyond the test proposed by the State in reaching its initial conclusion that the 911 call contained sufficient indicia of reliability for the police to give it credence: (1) the timing of the tip and (2) law enforcement's ability to trace 911 calls.<sup>70</sup> But those factors do not differentiate *Navarette*'s facts from most other cases involving anonymous tips. Even the information provided in *J.L.* was presumably contemporaneous given that the police found a young man matching the caller's description when they arrived at the bus stop.<sup>71</sup> Moreover, caller ID is "widely available" to law enforcement generally, not just the 911 emergency system.<sup>72</sup> As an officer informed Seth Rogen's character in the film *Neighbors*, "We have caller ID, we're cops, everybody has caller ID."<sup>73</sup>

Nevertheless, the second part of the Court's analysis—which found that the tip in *Navarette* created reasonable suspicion of driving under the influence—does deviate from the State's position. As explained above, the

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<sup>66</sup> *Id.*

<sup>67</sup> See *Navarette*, 134 S. Ct. at 1692 (Scalia, J., dissenting) (interpreting the majority as finding the reasonable suspicion requirement satisfied whenever a 911 caller reports "a single instance of possibly careless or reckless driving," "[s]o long as the caller identifies where the car is").

<sup>68</sup> See *supra* note 38 and accompanying text.

<sup>69</sup> *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 16, *J.L.*, 529 U.S. 266 (No. 98-1993)).

<sup>70</sup> See *supra* notes 39-40 and accompanying text.

<sup>71</sup> See *J.L.*, 529 U.S. at 268 (explaining that officers arrived at the bus stop six minutes after being dispatched, but noting that the record did not indicate how much time had elapsed since the phone call).

<sup>72</sup> See *id.* at 276 (Kennedy, J., concurring).

<sup>73</sup> *Neighbors (I)* (2014) Quotes, IMDB, [http://www.imdb.com/title/tt2004420/trivia?tab=qt&ref\\_=tt\\_trv\\_qu](http://www.imdb.com/title/tt2004420/trivia?tab=qt&ref_=tt_trv_qu) (last visited Sept. 15, 2014), archived at <http://perma.cc/9NK8-CKFM>.

Court reasoned that driving another vehicle off the road is not merely “a conclusory allegation of drunk or reckless driving” or “an isolated example of recklessness.”<sup>74</sup> The State, by contrast, took the view that reasonable suspicion can be based on a tip about “reckless driving,”<sup>75</sup> which seems the paradigmatic illustration of a “conclusory allegation” of reckless driving. Moreover, as Justice Alito noted at oral argument, informants typically are not “able to say” a particular driver is drunk because “all they [can] observe is what they see.”<sup>76</sup>

Thus, Orin Kerr correctly pointed out that the Court did not give the State “the bright-line rule that [it] really wanted.”<sup>77</sup> The Court did not pick up on the *J.L.* dictum and decide that drunk driving poses such “extraordinary dangers”<sup>78</sup> that the usual rules do not apply, and it did not defend the sweeping statement that reasonable suspicion arises whenever a 911 caller reports having observed drunk or reckless driving. But it is less clear that Professor Kerr was right to applaud the majority for deciding the case on “appropriately narrow grounds,” applying a totality-of-the-circumstances analysis rather than articulating a less extreme bright-line test.<sup>79</sup>

In fact, it is not much of a stretch to read *Navarette* as announcing a rule that reasonable suspicion of drunk driving arises from any anonymous tip that (1) describes a car and its location, (2) claims to have observed (3) a single incident of behavior like weaving between lanes, and (4) proves to be accurate with respect to the car and its location. There is nothing inherently objectionable about bright lines, though the Court can be criticized for selectively endorsing only those rules that tend to favor the prosecution. More problematic, however, is the fact that any further dilution of the second or third requirement effectively would give the State what it “really wanted” and runs counter to the unanimous ruling in *J.L.*

The anonymous tip in *J.L.* was missing only the second of these four factors. It was, in the Court’s words, just “the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about *J.L.*”<sup>80</sup> Thus, it was the *Navarette* caller’s personal observation that, like the

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<sup>74</sup> *Navarette v. California*, 134 S. Ct. 1683, 1691 (2014); see *supra* notes 41-42 and accompanying text.

<sup>75</sup> Transcript of Oral Argument at 29, *Navarette*, 134 S. Ct. 1683 (No. 12-9490).

<sup>76</sup> *Id.* at 45.

<sup>77</sup> Orin Kerr, *Six Thoughts on Navarette v. California*, THE VOLOKH CONSPIRACY (Apr. 22, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/22/six-thoughts-on-navarette-v-california>, archived at <http://perma.cc/7DW4-8P4X>.

<sup>78</sup> *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

<sup>79</sup> Kerr, *supra* note 77.

<sup>80</sup> *J.L.*, 529 U.S. at 271.

prediction of future behavior in *Alabama v. White* and *Illinois v. Gates*,<sup>81</sup> suggested she had a reliable basis for her information. Without evidence of the informant's eyewitness status, the tip merely "tend[ed] to identify a determinate person,"<sup>82</sup> providing the same type of information "[a]nyone could have" supplied,<sup>83</sup> that the *White* Court considered unhelpful<sup>84</sup> and the *J.L.* Court found inadequate.<sup>85</sup>

Similarly, any expansion of the type of driving behavior that satisfies the third element of the *Navarette* rule increases the risk of targeting innocent activity. Even the conduct that the Court suggested can create reasonable suspicion of drunk driving—swerving and weaving between lanes<sup>86</sup>—has a number of credible explanations other than intoxication. The driver may be trying to avoid hitting a pothole or an animal, checking on a child in the back seat, or changing the radio station.<sup>87</sup> These alternative scenarios become even more plausible if the police are unable to verify anything other than impeccable driving over a five-minute period—especially given that concealing a weapon is easier than either masking a high blood-alcohol level or driving without committing some petty traffic violation. If courts allow vaguer observations or more minor infractions to satisfy this third element, the definition of reasonable suspicion emerging from *Navarette* becomes susceptible to even greater overinclusiveness.

## CONCLUSION

Thus, notwithstanding its protestations, the Court's recent rulings defining probable cause and reasonable suspicion have deviated from *Gates* and its progeny, creating drug-dog and drunk-driving exceptions to the totality-of-

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<sup>81</sup> See *Alabama v. White*, 496 U.S. 325, 332 (1990); *Illinois v. Gates*, 462 U.S. 213, 245 (1983).

<sup>82</sup> *J.L.*, 529 U.S. at 272.

<sup>83</sup> *White*, 496 U.S. at 332; see also *Navarette v. California*, 134 S. Ct. 1683, 1693 (2014) (Scalia, J., dissenting) (pointing out that the description of the Petitioners' vehicle and location conveyed "generally available" information that "everyone in the world who saw the car would have" and that "anyone who wanted the car stopped would have to provide").

<sup>84</sup> See *supra* note 21 and accompanying text.

<sup>85</sup> See *supra* note 17 and accompanying text.

<sup>86</sup> *Navarette*, 134 S. Ct. at 1690-91.

<sup>87</sup> See *id.* at 1695 (Scalia, J., dissenting) (noting that Petitioners' "truck might have swerved to avoid an animal, a pothole, or a jaywalking pedestrian"); Brief of National Association of Criminal Defense Lawyers & National Association of Federal Defenders as Amici Curiae in Support of Petitioners at 14-15, *Navarette*, 134 S. Ct. 1683 (No. 12-9490) (observing that seemingly erratic driving could result from "momentary inattention while adjusting the radio, justifiable distraction from a dangerous insect, swerving quickly to miss an animal running onto the road, and a flat tire or other car trouble").

the-circumstances approach. *Florida v. Harris* has the practical effect of adopting the sweeping rule that a positive alert by a certified or recently trained drug dog gives rise to probable cause. *Navarette v. California* essentially articulated a rigid test that reasonable suspicion of driving under the influence arises whenever an anonymous informant reports having observed even one instance of certain reckless driving behaviors. In both decisions, the Court exhibited overconfidence in the reliability of narcotics dogs and 911 callers. The Court's miscalculation threatens to become even more problematic if, in the wake of *Navarette*, courts loosely interpret the requirement that informants must assert eyewitness status or expand the types of careless driving behaviors allowed to create reasonable suspicion of drunk driving. Any such extension of *Navarette* would lead to an even broader bright-line rule that runs directly counter to *J.L.* and effectively endorses a drunk-driving exception to the Fourth Amendment's suspicion requirements.

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Preferred Citation: Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75 (2014), <http://www.pennlawreview.com/online/163-U-Pa-L-Rev-Online-75.pdf>.