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J.L.'S TIME BOMB STILL TICKING: HOW *NAVARETTE*'S NARROW HOLDING FAILED TO ADDRESS IMPORTANT ISSUES REGARDING ANONYMOUS TIPS

Andrew B. Kartchner*

> *The conflict is clear and the stakes are high. The effect of the rule below will be to grant drunk drivers one free swerve before they can legally be pulled over by police. It will be difficult for an officer to explain to the family of a motorist killed by that swerve that the police had a tip that the driver of the other car was drunk, but that they were powerless to pull him over, even for a quick check.*[1]

Five years ago, Chief Justice Roberts offered this emotionally charged rhetoric in dissent from the Supreme Court's refusal to review a Virginia case involving an anonymous tip of drunk driving.[2] The relatively new Chief Justice took issue with the Virginia Supreme Court's ruling that police must corroborate tips of drunk driving before initiating traffic stops.[3] Chief Justice Roberts, pointing out that the Court has "repeatedly emphasized" the danger of drunk driving, urged the Court to resolve this issue, which has "deeply divided" the courts.[4] Although stopping short of implying how he would decide the issue, the language in Chief Justice Roberts's dissent left little doubt that he would favor a rule allowing police to pull over motorists who had been reported to be driving drunk without corroborating the tip.[5]

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1. Virginia v. Harris, 558 U.S. 978, 981 (2009), *denying cert. to* 668 S.E.2d 141 (Va. 2008) (Roberts, C.J., dissenting).
2. *Id.*
3. *See id.*
4. *Id.* at 979.
5. *See id.* at 981 ("[T]he police should have every legitimate tool at their disposal for getting drunk drivers off the road.").

The controversy is rooted in the Court's apprehensive view toward anonymous tips as justification for investigatory stops.[6] Police need "reasonable suspicion" to make an investigative stop, often called a "*Terry* stop,"[7] and questions arise when police base their suspicion on tips from unidentified informants.[8] Identified informants' trustworthiness and basis of knowledge can easily be evaluated based on previous dealings with police, criminal records, or a number of other "indicia of reliability,"[9] but this information is not available for anonymous tipsters.[10] Additionally, anonymous tipsters, unlike identified informants, are not subject to arrest if they make a false complaint.[11] Thus, the Court has historically required police to verify the veracity, reliability, and basis of knowledge of anonymous tips before conducting an investigatory stop,[12] typically by corroborating information in the tip with first-hand police observations.[13] Requiring similar corroboration of tips reporting imminently dangerous activity such as drunk-driving would force police to wait until they observe dangerous behavior before they can do anything to stop it, "by which time it may be too late."[14]

The Court put the issue into the limelight over a decade ago, when Justice Ginsburg explained in dicta, in *Florida v. J.L.*, an anonymous tips case involving a firearms violation:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for

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6. *See, e.g.*, Alabama v. White, 496 U.S. 325, 329 (1990) ("[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'" (quoting Illinois v. Gates, 462 U.S. 213, 237 (1983))).
7. The Court has allowed investigatory stops based on "reasonable suspicion" since its landmark decision in *Terry v. Ohio*. 392 U.S. 1, 30–31 (1968).
8. *E.g.*, *White*, 496 U.S. at 329.
9. *See* Adams v. Williams, 407 U.S. 143, 146–47 (1972).
10. *See White*, 496 U.S. at 329 (citing *Gates*, 462 U.S. at 237).
11. *See Adams*, 407 U.S. at 146–47 (1972); *see also* Florida v. J.L., 529 U.S. 266, 275 (2000) (Kennedy, J., concurring); Harris v. Virginia, 668 S.E.2d 141, 146 (Va. 2008).
12. *See J.L.*, 529 U.S. at 270; *White*, 496 U.S. at 328; *Gates*, 462 U.S. at 225, 246.
13. *J.L.*, 529 U.S. at 270; *see also White*, 496 U.S. at 330–31 ("[W]hen the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion . . . ."); *Gates*, 462 U.S. at 268 ("[P]robable cause may yet be established by independent police investigatory work that corroborates the tip . . . .").
14. Virginia v. Harris, 558 U.S. 978, 978 (2009) (Roberts, C.J., dissenting), *denying cert. to* 668 S.E.2d 141 (Va. 2008) (Roberts, C.J., dissenting).

> example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.[15]

Since *J.L.*, courts have analogized drunk driving to Justice Ginsburg's ticking time bomb hypothetical.[16]

In April 2014, the Court resolved the question of corroboration in *Navarette v. California*, a case out of California involving two brothers[17] who were pulled over by police pursuant to an anonymous tip.[18] The information the tip reported was simple enough: five minutes earlier, a silver Ford F150 truck with license plate number 8D94925 had run the tipster off the road at mile marker 88, heading south on Highway 1.[19] Using the information from the tip, the police were quickly able to find the Navarettes driving a silver Ford F150 with a matching plate number on Highway 1, about twenty miles from where the tipster had reported the reckless driving.[20] But while the identifying information in the tip pointed the police straight to the Navarettes, the officers failed to observe any driving activity to

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15. *J.L.*, 529 U.S. at 273–74. *J.L.* involved an anonymous call to the Miami-Dade police reporting "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id.* at 268. With just that information, the police went to the bus stop, saw a black teenager in a plaid shirt, and conducted a stop-and-frisk which turned up a firearm. *Id.* It turned out the black teenager was "10 days shy of his 16th birthday," so his possession of the firearm as a minor was illegal under Florida law. *Id.* at 269.
    Some courts have held firearm infractions to be "a qualitatively different [i.e., lower] level of danger" than drunk driving. *E.g.*, People v. Wells, 136 P.3d 810, 815 (Cal. 2006); State v. Boyea, 765 A.2d 862, 867 (Vt. 2000).
16. *E.g.*, *Boyea*, 765 A.2d at 867 ("Indeed, a drunk driver is not at all unlike a 'bomb,' and a mobile one at that."); *Wells*, 136 P.3d at 815 (quoting *Boyea*, 765 A.2d at 867).
17. Mark Sherman, *Court: Is Anonymous Tip Enough For Traffic Stop?*, ASSOCIATED PRESS (Oct. 1, 2013, 12:54 PM), http://bigstory.ap.org/article/court-anonymous-tip-enough-traffic-stop.
18. Navarette v. California, 134 S. Ct. 1683, 1687 n.1 (2014). Aside from the sufficiency of the anonymous tip to justify the stop, another issue in the case, which the Supreme Court did not review, is whether the officer fabricated the tip itself. People v. Navarette, No. A132353, 2012 WL 4842651, at *2–3 (Cal. Ct. App. Oct. 12, 2012), *aff'd*, 134 S. Ct. 1683 (2014). The tip in question was made by a driver in Humboldt County to that county's 911 call center. *Navarette*, 134 S. Ct. at 1686. The 911 dispatcher from Humboldt County, apparently realizing that the suspect was heading to Mendocino County, then forwarded the tip to the Mendocino County 911 call center, which then relayed the tip to the police officers that initiated the stop. *Id.*
19. *Navarette*, 134 S. Ct. at 1686–87.
20. *Id.* at 1687.

corroborate the tip's assertion that the Navarettes were driving recklessly.[21]

About a half hour after the tipster made the 911 call, the police had caught up to the Navarette brothers, pulled them over, and requested identification.[22] During the conversation, the police officers smelled marijuana and consequently searched the truck.[23] The search uncovered four large bags of marijuana, fertilizer, hand clippers, and oven bags, which apparently led an expert at the suppression hearing to conclude that the Navarette brothers were looking to sell the drugs.[24] Based on the evidence found in the search, the Navarettes were charged with several drug crimes.[25]

Pre-trial, the Navarettes moved to suppress the fruits of the search, arguing that the police did not have reasonable suspicion to make the traffic stop because the tip "did not provide enough information about the alleged illegal driving to render the tip reliable without corroboration of illegal activity by the officers."[26] After the brothers' motion to suppress the evidence was denied and all interlocutory appeals failed, the brothers pled guilty to transportation of marijuana and appealed the entire case until it reached the Supreme Court of the United States.[27]

The specific question before the Supreme Court in *Navarette* was: "Does the Fourth Amendment require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle?"[28] Justice Thomas drafted a narrow opinion for the deeply divided Court,[29] avoiding some of the more pressing sub-questions that will likely continue to linger in the lower courts.[30] Justice Breyer joined the conservative

21. *Id.* at 1691.
22. *Id.* at 1686–87.
23. *Id.*
24. *Navarette*, 2012 WL 4842651, at *2.
25. *Id.* at *1.
26. *Id.* at *7.
27. Petition for Writ of Certiorari, at 5–6, Navarette v. California, 134 S. Ct. 1683 (2014) (No. 12-9490), 2013 WL 5476824.
28. *Id.* at *i; Navarette v. California, 134 S. Ct. 50, No. 12-9490, 2013 WL 5430499 (U.S. Oct. 1, 2013) (granting certiorari, limited to the first question in the request).
29. *Navarette*, 134 S. Ct. at 1686, 1692.
30. Most notably, Justice Thomas avoided the question posed by Justice Ginsburg in *J.L.* concerning whether the same quantum of suspicion is necessary when imminently dangerous activity is reported by an anonymous tipster. Florida v. J.L., 529 U.S. 266, 273–74 (2000).

majority, trading places with Justice Scalia who wrote a characteristically aggressive and somewhat snarky dissent.[31]

Although the *Navarette* majority resolved the issue of corroboration, its narrowly crafted opinion left unanswered many questions associated with anonymous tips of drunk driving.[32] To give lower courts the guidance they need, however, a more comprehensive approach is necessary.

Some courts have understood the wider picture as they have analyzed anonymous tips.[33] Perhaps the most specific and useful enunciation of a comprehensive approach to anonymous tips is found in a Virginia appellate court decision written by Judge D. Arthur Kelsey.[34] In a 2003 opinion, Judge Kelsey identified three "commonsense principles" by which courts should analyze anonymous tips: "observational reliability," insider information, and public danger.[35] This article uses Judge Kelsey's framework as a suggestion for a more comprehensive approach to anonymous tips, since the Court in *Navarette* only addressed one of these important principles.

Part I of this Article explains what Judge Kelsey called "observational reliability," which was recognized in *Navarette*'s analogy to the Federal Rules of Evidence. A deeper look into the history of hearsay law reveals that the common law has already developed principles, now well established, that shed light on whether certain statements are reliable.[36] These principles have been codified in the Federal Rules of Evidence as the exceptions to the rule against hearsay, which recognize that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness."[37] It makes sense, then, to turn to hearsay law for help in determining what kind of "circumstantial guarantees of trustworthiness" might be present in anonymous tips. Specifically, this Article examines the history, scholarship, and theory behind the Present Sense Impression exception to the rule

31. *Navarette*, 134 S. Ct. at 1686, 1692–97.
32. *See id.* at 1695–96 (Scalia, J., dissenting).
33. The Eighth Circuit, for example, elaborated on a range of factors that courts ought to consider when weighing the reliability of an anonymous tip. United States v. Wheat, 278 F.3d 722, 731–37 (8th Cir. 2001).
34. Jackson v. Commonwealth, 576 S.E.2d 206, 210, 213–14 (Va. Ct. App.), *aff'd on reh'g en banc*, 583 S.E.2d 780 (Va. Ct. App. 2003), *rev'd*, 594 S.E.2d 595 (Va. 2004).
35. *Id.* at 213–14.
36. FED. R. EVID. 803 advisory committee's note.
37. *Id.*

against hearsay and how that exception is useful in the anonymous tips analysis.

Part II of this Article argues something that the Court in *Navarette* completely overlooked: that corroboration is less useful when a tip reports openly observable activity than when it reports concealed crimes such as crimes of possession. When a tipster reports a crime that is not readily observable by the public—as was the case in all the anonymous tips cases the Supreme Court has decided—then corroboration is necessary to prove the tipster's personal knowledge.[38] When, however, a report of observable activity is made, a tipster's personal knowledge is much less suspect.[39]

Part III of this Article explores the most mystifying omission of the *Navarette* decision: the balancing analysis most state courts have conducted to weigh the imminent danger posed by drunk driving against the intrusion of the *Terry* stop. In other words, many state courts have held that the threat of imminent danger changes the quantum of suspicion necessary to make a traffic stop "reasonable" under the Fourth Amendment.[40] This is nothing new in Fourth Amendment jurisprudence, for "exigent circumstances" have long

38. *See, e.g.*, Florida v. J.L. 529 U.S. 266, 270 (2000) (holding that an anonymous tip that only provided general information about J.L. lacked sufficient reliability and corroboration by the police was insufficient because anyone in public could have provided the information; accordingly, the court held that the anonymous tip must provide predictive information about the alleged concealed criminal activity in order to allow sufficient police corroboration); Alabama v. White, 496 U.S. 325, 332 (1990) (holding that the police corroboration of the details provided by the anonymous tip provided sufficient reliability to lawfully permit the officers investigatory stop of the vehicle because the tip contained specific, predictive information about the defendant's concealed criminal activity).

39. *See* State v. Hanning, 296 S.W.3d 44, 51 (Tenn. 2009) ("[A] report of readily observable evidence of reckless driving carries a higher degree of inherent reliability than does a report of a concealed weapon."); Bloomingdale v. State, 842 A.2d 1212, 1220 (Del. 2004) ("We agree that a tip about readily observable evidence of criminal activity, such as erratic driving, is inherently more reliable than a tip about concealed criminal activity. Because the basis of the tipster's knowledge is apparent where the criminal activity is readily observable to other motorists or pedestrians, its reliability is increased.") (footnote omitted).

40. *See* People v. Barbarich, 807 N.W.2d 56, 62 (Mich. Ct. App. 2011) ("[T]he threat of imminent danger [posed by concealed weapons or contraband] is not necessarily as high as in the present case, in which an erratic driver threatened the lives of fellow drivers."); *Bloomingdale*, 842 A.2d at 1221 ("[W]hen deciding whether an anonymous tip of erratic driving provided reasonable suspicion to stop a vehicle, courts should balance the government's interest in responding immediately to reports of unsafe driving against the comparatively modest intrusion on individual liberty that a traffic stop entails. An erratic driver poses a potentially imminent threat of harm to the public.") (footnote omitted).

been held to justify even the most intrusive of searches,[41] and the Supreme Court has already relaxed Fourth Amendment principles when drunk driving is involved.[42] Shockingly, the Court in *Navarette* avoided this discussion altogether.

This Article concludes that by neglecting to address the issues associated with insider information and the dangers of drunk driving, the Court in *Navarette* missed an opportunity to effectively close the book on anonymous tips, leaving many questions unresolved.

I. OBSERVATIONAL RELIABILITY

Judge Kelsey's framework first explains that certain reports should be analyzed based on their content and the circumstances under which the reports were made.[43] Judge Kelsey calls this an inquiry into "observational reliability" because it gives weight to the details of the report rather than the "personal reliability" of the tipster.[44] This commonsense principle flows from the obvious inability of police to validate the personal trustworthiness of an anonymous informant and a policy of encouraging "disinterested," "public-spirited" citizens to quickly report crimes and other dangerous situations.[45] While a paid informer or one who seeks immunity for his reports is inherently unreliable, and should be presumed as such, ordinary tipsters have no such discrediting characteristics and should not be treated with the same scrutiny merely because they decide to not leave their name with the police.[46] Rather, an anonymous tip made during or shortly after the commission of a crime witnessed by

41. *See* Warden v. Hayden, 387 U.S. 294, 298–99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."); Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) ("One well-recognized exception applies when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978) (alteration in original) (internal quotation marks omitted))).

42. *See infra* note 119 and accompanying text.

43. Jackson v. Commonwealth, 576 S.E.2d 206, 213 (Va. Ct. App.), *aff'd on reh'g en banc*, 583 S.E.2d 780 (Va. Ct. App. 2003), *rev'd*, 594 S.E.2d 595 (Va. 2004).

44. *Id.* at 213 (quoting State v. Walshire, 634 N.W.2d 625, 629 (Iowa 2001)).

45. *Id.*; Guzewicz v. Commonwealth, 187 S.E.2d 144, 148 (Va. 1972) ("Public-spirited citizens should be encouraged to furnish to the police information of crimes. Accordingly, we will not apply to citizen informers the same standard of reliability as is applicable when police act on tips from professional informers or those who seek immunity for themselves, whether such citizens are named or, as here, unnamed." (citing People v. Glaubman, 485 P.2d 711 (Colo. 1971))).

46. *Jackson*, 576 S.E.2d at 213.

the tipster ought to be evaluated primarily by analyzing the details of the tip, not the personal characteristics of the tipster.

The Court in *Navarette* recognized this, noting that contemporaneous eyewitness reports have "long been treated as especially reliable."[47] Indeed, this is a principle with deep roots in the common law, and a number of other courts have relied on it to justify *Terry* stops conducted pursuant to anonymous tips.[48] Given the Court's recent tendency to cite legal history in its constitutional opinions,[49] it is unsurprising that Justice Thomas would invoke this deep history to support the holding that contemporaneous eyewitness reports are inherently reliable.[50] Yet, given the brevity of the majority's discussion and the vigor of the dissent in *Navarette*, it is worthwhile to examine the roots of this concept.

1. The Common Law: Res Gestae

"[G]uarantees of trustworthiness . . . form the hallmark of all exceptions to the hearsay rule."[51] And if "circumstantial guarantees of trustworthiness"[52] can save a hearsay statement from its "intrinsic

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

48. United States v. Wheat, 278 F.3d 722, 734 (8th Cir. 2001) ("A careful reading of the Supreme Court's Fourth Amendment jurisprudence suggests that this emphasis on the predictive aspects of an anonymous tip may be less applicable to tips purporting to describe contemporaneous, readily observable criminal actions, as in the case of erratic driving witnessed by another motorist."); Bloomingdale v. State, 842 A.2d 1212, 1220 (Del. 2004) ("Tips reporting erratic driving also may be more reliable because they usually will be made close in time to when the tipster observes the potential criminal activity.") (footnote omitted); People v. Barbarich, 807 N.W.2d 56, 62 (Mich. Ct. App. 2011) ("[W]e must make clear that less information is required from citizen informants reporting contemporaneous incidents . . . ."); State v. Sousa, 855 A.2d 1284, 1290 (N.H. 2004) (finding that a relevant factor in determining "whether the tip is based upon contemporaneous eyewitness observations" is "whether an anonymous tip gives rise to reasonable suspicion"); State v. Hanning, 296 S.W.3d 44, 51 (Tenn. 2009) ("[W]hen a tipster seeks to report the location of a reckless driver at the time the reckless driving is observed or shortly thereafter, the tipster has a very brief amount of time to contact the police, and the likelihood that the allegation is fabricated is proportionately diminished.").

49. District of Columbia v. Heller, 554 U.S. 570, 592–95, 600–03, 606–11 (2008) (describing the history of the right to bear arms); Boumediene v. Bush, 553 U.S. 723, 739–43 (2008) (recounting the "history and origins of the writ [of habeas corpus]"); Crawford v. Washington, 541 U.S. 36, 43–50 (2004) (discussing the history of the Confrontation Clause); Hon. D. Arthur Kelsey, *The Resurgent Role of Legal History in Modern U.S. Supreme Court Cases*, 37 VA. B. ASS'N. NEWS J. 10, 10–13 (2010).

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

51. United States v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998) (quoting Miller v. Keating, 754 F.2d 507, 511 (3d Cir. 1985) (internal quotation marks omitted)).

52. FED. R. EVID. 803 advisory committee's note.

weakness,"[53] then certainly some similar sets of circumstances can show the reliability of a similar type of statement, an anonymous tip. In other words, the rationale behind the hearsay exceptions sheds some light on the type of circumstances that make a normally unreliable statement sufficiently trustworthy. As Justice Thomas noted in *Navarette*, the history and rationale of the present sense impression exception is especially instructive when analyzing anonymous tips.[54]

It is unclear when courts first began to recognize the present sense impression exception, but at least one example predates the Constitution by almost a century.[55] In 1693, the English trial court in *Thompson and Wife v. Trevanion* admitted into evidence a statement made by an assaulted woman, reasoning that she made the statement "immediate[ly] upon the hurt received, and before that she had time to devise or contrive any thing [sic] for her own advantage."[56] *Thompson* seems to be the first court opinion to articulate the rationale of the present-day present sense impression hearsay exception: contemporaneous eyewitness observations are reliable because they are made before the declarant has a chance to forget or change his story.[57]

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53. Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 295–96 (1813) (Marshall, C.J.).

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

55. Thompson v. Trevanion, (1683) 90 Eng. Rep. 179 ¶ 37 (K.B.).

56. *Id.*

57. *Id.* The Advisory Committee on the Federal Rules of Evidence and the *Thompson* court seemed to be more concerned with conscious misrepresentations made after an event than inadvertent changes in memory. *See* FED. R. EVID. 803 advisory committee's notes ("The underlying theory of [the present sense impression] exception is that substantial contemporaneity of event and statement negat[e] the likelihood *of deliberate or conscious misrepresentation*.") (emphasis added). Courts and scholars, however, have recognized that the contemporaneity requirement negatives both deliberate and unconscious distortion of memory. Most notably, in *Houston Oxygen Co. v. Davis*, what many call the "leading case" on present sense impressions, GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 210 (1978); CHARLES MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 298 n.69 (2d ed. E. Clearly 1972); Jon R. Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 IOWA L. REV. 869, 871 n.9 (1980) (citing RICHARD O. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 400 n.94 (1977)), a Texas appellate court quoted from an evidence treatise to explain the "safeguards" that spontaneous declarations have against unreliability:

> In the first place, the report at the moment of the thing then seen, heard, etc., is safe from any error from defect of memory of the declarant. Secondly, there is little or no time for calculated misstatement, and thirdly, the statement will usually be made to

English courts echoed the rule in *Thompson* for over a century,[58] and it even made its way into a United States Supreme Court ruling almost two hundred years later.[59] But the present sense impression concept—and the hearsay rule itself—remained "unsettled at the turn of the eighteenth century."[60] As the concept took shape, it eventually acquired the name: *res gestae* or, in the singular, *res gesta*.[61]

For some time in England, *res gestae* evaded concrete definition.[62] Literally translated "things done,"[63] *res gestae* was a term used to describe all the central facts and circumstances surrounding the event or transaction in a case.[64] Courts admitted the entire *res gestae*, including hearsay statements, based on several rationales.[65] Some statements were admitted because they were an integral part of the event or transaction.[66] Today, such declarations are generally considered statements of "legally operative fact" and outside the hearsay rule entirely.[67] Other statements were admitted because they were "made at the same time with the thing which it imports" and

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> another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement.

Houston Oxygen Co. v. Davis, 161 S.W.2d 474, 476–77 (Tex. Comm'n App. 1942) (quoting CHARLES T. MCCORMICK & ROY ROBERT RAY, TEXAS LAW OF EVIDENCE § 430 (1937)).

58. *See, e.g.*, Aveson v. Kinnaird, (1805) 102 Eng. Rep. 1258 (K.B.) 1261; 6 East. 188, 193–94.

59. Travellers' Ins. Co. of Chi. v. Mosley, 75 U.S. 397, 407 (1869).

60. Waltz, *supra* note 57, at 873.

61. *Id.* at 871. The difference between the singular and plural forms is not insignificant, *see id.* at 873–74, but this Article, for simplicity's sake, will refer to it in its plural form.

62. One scholar opined that the term "gained currency as much for its convenient obscurity as for any better or more readily discernible reason." *Id.* at 873. Another called it a "nebulous concept" until Edmond M. Morgan undertook to "make sense" of it. Dennis D. Prater & Virginia M. Klemme, *Res Gestae Raises Its Ugly Head*, J. KAN. B. ASS'N, Oct. 1996, at 24, 25.

63. BLACK'S LAW DICTIONARY 1310 (7th ed. 1999).

64. *Id.* (citing State v. Fouquette, 221 P.2d 404, 417 (Nev. 1950)).

65. *See* Waltz, *supra* note 57, at 873–74.

66. *Id.* at 873–74.

67. *See, e.g.*, United States v. Pang, 362 F.3d 1187, 1192 (9th Cir. 2004); State v. Beede, 931 A.2d 1258, 1262 (N.H. 2007). The historical understanding of this type of *res gestae* comports with the modern understanding—legally operative words are not hearsay. Waltz, *supra* note 57, at 873–74 ("[W]here the declarant's words are themselves a part of the event or transaction in dispute, a part of the 'thing [singular] done,' *the hearsay rule has no application.*") (alteration in original) (emphasis added) (footnote omitted).

thus were part of the *res gestae* because of their evidentiary value.[68] This second type of *res gestae* laid the foundation for the present sense impression hearsay exception.[69]

Res gestae eventually made its way into American courts and "was used here in an extraordinary variety of situations to allow the admissibility of out-of-court statements and other evidence."[70] After years of inconsistent usage, renowned American evidence scholar James Bradley Thayer undertook to clarify the meaning of *res gestae* and its usefulness as a rule of evidence, with his work culminating in a "brilliant"[71] three-part article on the topic.[72] Thayer's research sprang from the controversy sparked by an 1880 English homicide case in which the judge excluded the statements of the victim, made shortly after her throat was slit, because "it was not part of anything done, or something said while something was being done, but something said after something done."[73] This ruling spawned controversy in the legal community and even prompted the trial judge to compose and publish a defense of his ruling, which Thayer addressed thoroughly.[74] Having given clarity to the nature of contemporaneous eyewitness reports, Thayer's work has been described as the "first careful definition of the [present sense impression] exception by an American."[75]

It was Thayer who first articulated the two types of *res gestae* used by the courts.[76] According to Thayer, the principle behind the second type of *res gestae*—the type that birthed the present sense impression exception—"has always existed."[77] The reasoning behind admitting

68. James B. Thayer, *Bedingfields's Case.—Declarations as a Part of the Res Gesta.* (pt. 3), 15 AM. L. REV. 71, 82 (1881) [hereinafter Thayer III].
69. Waltz, *supra* note 57, at 874.
70. Prater & Klemme, *supra* note 62, at 25.
71. Waltz, *supra* note 57, at 871.
72. James Bradley Thayer, *Bedingfield's Case.—Declarations as a Part of the Res Gesta.* (pt. 1), 14 AM. L. REV. 817 (1880) [hereinafter Thayer I]; James Bradley Thayer, *Bedingfield's Case.—Declarations as a Part of the Res Gesta.* (pt. 2), 15 AM. L. REV. 1 (1881) [hereinafter Thayer II]; Thayer III, *supra* note 68.
73. Waltz, *supra* note 57, at 871 (citing Thayer I, *supra* note 72, at 818). Apparently the case was not officially reported. *Id.* at 871 n.17.
74. *See, e.g.*, Thayer I, *supra* note 72, at 818–19 (discussing the facts and ruling of the *Bedingfield* trial); Thayer II, *supra* note 72, at 4 (noting that neither Chief Justice Cockburn or Mr. Tayler had discussed the historical origins of res gesta); Thayer III, *supra* note 68, at 91 (discussing the use of Chief Justice Cockburn's contemporaneousness requirement).
75. Waltz, *supra* note 57, at 871.
76. *Id.* at 876.
77. Thayer III, *supra* note 68, at 82.

this type of *res gestae* is that it "takes notice of one of these strong elements of authenticity, contemporaneousness."[78]

Thayer's work was followed-up by his student, Edmund Morgan, who, over forty years later, "attempted, in a law review article which matched his mentor's in perceptivity, to revive the Thayer formulation of the present sense impression exception."[79] When the American legal profession was drafting the model rules of evidence in the mid-1900s, Morgan became known as the "leading advocate of the [present sense impression] exception."[80] When the Federal Rules of Evidence were unveiled, Morgan was credited by the Advisory Committee on the Rules for outlining the elements and "underlying theory" of Federal Rule of Evidence 803(1).[81]

2. Res Gestae *in its Modern Form: FRE 803(1) – The Present Sense Impression*

After centuries of confusing and inconsistent precedent, the Advisory Committee on the Federal Rules of Evidence gleaned a handful of important principles from the common law concept of *res gestae*, many of which are contained in Rule 803, entitled "Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness."[82] Section 803 is especially helpful when considering the reliability of anonymous tips, as those exceptions flow from the theory that "under appropriate circumstances a . . . statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant."[83]

Of the 803 exceptions, the "present sense impression" exception in Rule 803(1) is probably the most instructive—it being based largely on the principle that contemporaneous observations are more reliable

78. *Id.* at 83.

79. Waltz, *supra* note 57, at 875 (citing Edward M. Morgan, *A Suggested Classification of Utterance Admissible as Res Gestae*, 31 YALE L.J. 229, 236–37 & n.19 (1922)).

80. M.C. Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 249 (1961).

81. FED. R. EVID. 803 advisory committee's note ("The underlying theory of exception [paragraph] (1) is that substantial contemporaneity of event and statement negat[e] the likelihood of deliberate or conscious misrepresentation.") (citing EDMUND MORGAN, BASIC PROBLEMS OF EVIDENCE 340–41 (1962)).

82. FED. R. EVID. 803; *see also* BLACK'S LAW DICTIONARY 1423 (9th ed. 2009) ("In evidence law, words and statements about the *res gestae* are [usually] admissible under a hearsay exception (such as present sense impression or excited utterance). Where the Federal Rules of Evidence or state rules fashioned after them are in effect, the use of *res gestae* is now out of place.").

83. FED. R. EVID. 803 advisory committee's note.

than past observations.[84] Rule 803(1) was boiled down from over a century of *res gestae* precedent to a few lines:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
> **(1) Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.[85]

Thus, on its face, Rule 803(1) recognizes the value of statements that describe events when those statements are made contemporaneously with the event (or shortly thereafter) and with personal knowledge of the event.[86]

The Advisory Committee Notes on FRE 803(1) explain that "[t]he underlying theory of [the present sense impression] exception is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation."[87] This is so because as time passes, the likelihood increases that a witness of an event will fabricate a new story or the witness's memory will be distorted.[88] Other commentary on the rule indicates that the elements of the present sense impression exception are designed "[t]o assure trustworthiness," and that the contemporaneity of the statement is "perhaps [the] most significant[]" factor in determining whether a statement is reliable.[89] As such, the present sense impression hearsay exception is a great illustration of why contemporaneous reports are presumptively reliable.[90]

Of course, not all contemporaneous eyewitness reports are sufficiently reliable. Notably, the Advisory Committee Notes on FRE 803 express apprehension toward anonymous declarants: "when [a] declarant is an unidentified bystander, the cases indicate hesitancy

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84. *See id.*
85. FED. R. EVID. 803(1).
86. *See id.*
87. Fed. R. Evid. 803 advisory committee's note.
88. 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803.1 (4th ed. 1996) ("[T]he underlying rationale of the present sense impression is that substantial contemporaneity . . . minimizes unreliability due to [the declarant's] defective recollection or conscious fabrication."); United States v. Manfre, 368 F.3d 832, 840 (8th Cir. 2004); *see also supra* note 57.
89. John A. Bourdeau, *When is Hearsay Statement "Present Sense Impression" Admissible Under Rule 803(1) of Federal Rules of Evidence*, 165 A.L.R. FED. 491, 504 (2000).
90. *See* FED. R. EVID. 803 advisory committee's note.

in upholding the statement alone as sufficient."[91] It is important to note, however, that this hesitancy does not arise from any inherent unreliability of anonymous statements, but from the fact that contemporaneity and personal knowledge are difficult to prove (or disprove) when the declarant is not available for questioning.[92] Thus, the Advisory Committee acknowledged that upholding anonymous statements under rule 803 "would under appropriate circumstances be consistent with the rule."[93] While the Committee Notes do not divulge what those circumstances might be, the cases indicate that when the declarant is unidentified, contemporaneity and personal knowledge can be inferred from circumstantial evidence[94] such as the statement's language,[95] timing,[96] or consistency with other evidence presented.[97]

In sum, the present sense impression hearsay exception in the Federal Rules of Evidence, born from centuries of development in the

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91. *Id.* (citing Garrett v. Howden, 387 P.2d 874, 877 (N.M. 1963); Beck v. Dye, 92 P.2d 1113, 1117 (Wash. 1939)).

92. Miller v. Keating, 754 F.2d 507, 510 (3d Cir. 1985) ("We do not conclude, however, that statements by unidentified declarants are ipso facto inadmissible under Fed.R.Evid. 803(2)."); Miller v. Crown Amusements, Inc., 821 F. Supp. 703, 706 (S.D. Ga. 1993) ("Because the declarant who made this call is unidentified and is unavailable to testify, this issue presents a difficult matter to the Court."); Ramrattan v. Burger King Corp., 656 F. Supp. 522, 528 (D. Md. 1987) ("Here, the bystanders are unidentified, and their capacities to observe can neither be substantiated nor attacked.").

93. FED. R. EVID. 803 advisory committee's note.

94. United States v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006) ("Because of the nature of the call and conversation, we hold that the district court did not err in admitting the tape-recording under Federal Rules of Evidence 803(1), present sense impression, and 803(2), excited utterance.").

95. *Keating*, 754 F.2d at 511 ("In some cases, however, the substance of the statement itself does contain words revealing perception. A statement such as, 'I saw that blue truck run down the lady on the corner,' might stand alone to show perception if the trial judge finds, from the particular circumstances, that he is satisfied by a preponderance that the declarant spoke from personal perception."); *Crown Amusements, Inc.*, 821 F. Supp. at 706 ("The caller specifically stated, '[W]e *noticed* [the truck sideswipe a person],' thus indicating actual perception of the accident.") (alteration in original).

96. *Crown Amusements, Inc.*, 821 F. Supp. at 706 ("[T]he timing of the declarant's call, which was received approximately 2 minutes after the call placed by Carper, who was at the scene of the accident, strongly suggests that the declarant observed the accident.").

97. *Compare* Brown v. Keane, 355 F.3d 82, 88–89 (2d Cir. 2004) (finding that the declarant had no personal knowledge of the event described because "no other evidence in the case was compatible with the [declarant's] report"), *with Ramrattan*, 656 F. Supp. at 528 ("[T]his Court infers that if three [declarants] chose to tell [someone] what had happened, then it is likely they saw the accident.").

courts and followed by decades of meticulous scholarship, gives courts a well-established framework by which to determine whether an anonymous tip is reliable enough to constitute reasonable suspicion. Despite considerable debate as to what constitutes the *res gestae* of a case, one thing has been almost unanimously agreed upon by all courts and scholars: contemporaneity of a statement with the event described and personal knowledge of the event are significant indications of the trustworthiness of the report.[98] Thus, despite Justice Scalia's vigorous dissent,[99] the majority in *Navarette* was correct to rely on the rationale of Federal Rule of Evidence 803(1) to show the reliability of an anonymous tip.

II. INSIDE INFORMATION

The second factor in Judge Kelsey's framework involves the amount of inside information a tipster must demonstrate before police may properly rely on the tip to justify a stop.[100] This, Judge Kelsey explained, depends on whether the informant reported a "concealed

98. *See* Navarette v. California, 134 S. Ct. 1683, 1689 ("[W]e generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy . . . ."); *id.* at 1694 (Scalia, J., dissenting) ("The classic 'present sense impression' is the recounting of an event that is occurring before the declarant's eyes, as the declarant is speaking . . . . It is the immediacy that gives the statement some credibility; the declarant has not had time to dissemble or embellish.").

99. Justice Scalia's criticism of the majority's reliance on the Federal Rules of Evidence is a bit overblown. He claims that because the tipster was able to stop the car, record the Navarettes' license plate number, and dial 911, the tip cannot be considered contemporaneous. *Navarette*, 134 S. Ct. at 1694 (Scalia, J., dissenting). But the Advisory Committee notes make it clear that the present sense impression exception "recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable." FED. R. EVID. 803 advisory committee's notes. It seems odd that Justice Scalia would argue that the few seconds it takes to stop a car (which had already been ran to the side of the road), observe a license plate, and call 911 would constitute more than a "slight lapse."
Justice Scalia also argues that FRE 803(1) is not very helpful because, "cases addressing an unidentified declarant's present sense impression 'indicate hesitancy in upholding the statement alone as sufficient' proof of the reported event." *Navarette*, 134 S. Ct. at 1694 (Scalia, J., dissenting). This argument is also unpersuasive. The question in hearsay objections is whether the statement is reliable enough to be admitted into evidence, not whether the statement alone is sufficient to prove the fact asserted. The former is a much lower standard, and therefore much more analogous to the reasonable suspicion standard.

100. Jackson v. Commonwealth, 576 S.E.2d 206, 211–12 (Va. Ct. App.), *aff'd on reh'g en banc*, 583 S.E.2d 780 (Va. Ct. App. 2003), *rev'd*, 594 S.E.2d 595 (Va. 2004).

crime or an open and obvious crime."[101] The idea is that one does not usually know the details of a concealed crime, such as drug trafficking, unless he has "inside information."[102] Thus, reports of concealed crimes, without indications that the tipster has inside information, are less reliable than an eyewitness report of an open crime.[103] Notably, the tips in *Gates*, *White*, and *J.L.* all reported concealed crimes, putting the tipster's basis of knowledge in question.[104]

This distinction between concealed and open crimes has been lost on many courts when ruling on anonymous tips, including the *Navarette* Court.[105] The Court went to great lengths to distinguish the facts of *Navarette* from those in *J.L.*, but neglected one important detail: the tipster in *J.L.* reported a concealed crime (illegal possession),[106] while the tipster in *Navarette* reported an open crime (reckless or impaired driving).[107] Another notable example is provided by the Virginia Supreme Court in *Jackson*, which overturned Judge Kelsey's instructive opinion with very little attention to his analysis.[108] The Virginia Supreme Court insisted that "[r]arely are the facts of two cases as congruent as the facts in *J.L.* and this case,"[109] despite the fact that the tip in *J.L.* reported that the defendant *possessed* a gun (a concealed crime)[110] while the tip in *Jackson* reported that the defendant *brandished* a gun (an open crime).[111]

The Court in *Navarette* missed an opportunity to highlight the importance of the concealed-open crime distinction. Indeed, by recognizing that anonymous tips reporting open crimes are less suspect than tips reporting concealed crimes, the Court in *Navarette* might not have concluded that it was a "close case."[112]

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101. *Id.* at 213.
102. Alabama v. White, 496 U.S. 325, 332 (1990).
103. *Jackson*, 576 S.E.2d at 213.
104. Florida v. J.L., 529 U.S. 266, 268 (2000); *White*, 496 U.S. at 327; Illinois v. Gates, 462 U.S. 213, 225 (1983).
105. *See* Navarette v. California, 134 S. Ct. 1683, 1689 (2014).
106. *J.L.*, 529 U.S. at 268.
107. *Navarette*, 134 S. Ct. at 1686.
108. Jackson v. Commonwealth, 594 S.E.2d 595, 601–03 (Va. 2004).
109. *Id.* at 601 (quoting Jackson v. Commonwealth, 583 S.E.2d 780, 795 (Va. Ct. App. 2003) (Benton, J., dissenting) (internal quotation marks omitted), *rev'd*, 594 S.E.2d 595 (Va. 2004)).
110. *J.L.*, 529 U.S. at 268.
111. *Jackson*, 594 S.E.2d at 597.
112. Navarette v. California, 134 S. Ct. 1683, 1692 (2014) (quoting Alabama v. White, 496 U.S. 325, 332 (1990)).

III. PUBLIC DANGER

Judge Kelsey's final factor to consider when analyzing anonymous tips is the "seriousness of the danger posed by the alleged illegality."[113] When a tip reports activity that presents imminent danger to the public, the amount of corroboration necessary to constitute reasonable suspicion ought to be diminished. The fundamental justification for this principle lies in the text of the Constitution itself; the Fourth Amendment proscribes only *unreasonable* searches and seizures.[114] Reasonableness is, of course, a fluid concept, but it seems clear that searches and seizures are more reasonable when conducted to prevent an imminent threat to the public.[115] Relatedly, searches and seizures are more reasonable when they are limited in scope so as to minimize invasion of privacy.[116] In short, to investigate imminently dangerous activity such as drunk driving, police may act on less evidence, so long as the investigation is limited in scope.[117]

In fact, the Supreme Court has already applied this type of balancing test in another case involving drunk driving.[118] In *Michigan Department of State Police v. Sitz*, the Supreme Court upheld a sobriety checkpoint program because "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program."[119] Central to the Court's holding was the "magnitude of the drunken driving problem" and the

113. Jackson v. Commonwealth, 576 S.E.2d 206, 214 (Va. Ct. App.), *aff'd on reh'g en banc*, 583 S.E.2d 780 (Va. Ct. App. 2003), *rev'd*, 594 S.E.2d 595 (Va. 2004).

114. U.S. CONST. amend. IV; Andrew B. Kartchner, *Virginia in the Driver's Seat: How the Supreme Court of Virginia Can Help the Supreme Court of the United States Finally Establish the Drunk-Driving Exception to Anonymous Tips Law*, 25 REGENT U. L. REV. 185, 206 (2013) ("[T]he Founders intentionally infused a balancing test into the Fourth Amendment by prohibiting only unreasonable searches and seizures.").

115. Payton v. New York, 445 U.S. 573, 583 (1980) ("[An] emergency or dangerous situation, described in our cases as 'exigent circumstances,' . . . would justify a warrantless entry into a home for the purpose of either arrest or search.").

116. State v. Boyea, 765 A.2d 862, 868 (Vt. 2000).

117. People v. Barbarich, 807 N.W.2d 56, 62 (Mich. Ct. App. 2011) ("As noted, such investigative stops of automobiles have been deemed reasonable on the basis of less information because the public's interest in safety of the roadways is high compared to the minimally invasive nature of the investigation.").

118. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

119. *Id.* at 455.

"slight[ness]" of the inconvenience imposed by the checkpoints.[120] Notably, ten years later the Court struck down checkpoints where there was no imminent threat to the public, reasoning that without an imminent danger the normal reasonable suspicion standards cannot be altered.[121]

Courts that have upheld stops of drunk drivers based on anonymous tips have almost always included some sort of balancing test, weighing the danger posed by drunk drivers against the intrusion of a stop.[122] And courts that have struck down traffic stops based on tips of drunk driving have largely ignored the impact that the threat of imminent danger has on reasonable suspicion analysis,[123] leading to Chief Justice Roberts's grave concerns over the tenability of such an approach.[124]

Unfortunately, in an effort to avoid thorny issues in favor of a narrow holding, the Court in *Navarette* ignored the question of whether tips of drunk driving require a lesser quantum of suspicion to justify a stop. Thus, the *Navarette* opinion will be of little help to the lower courts that will undoubtedly continue to face arguments by prosecutors that short traffic stops are justified by the serious threat implicated by drunk driving.

CONCLUSION

Although Justice Scalia was unpersuaded by the *Navarette* majority's recognition that contemporaneous eyewitness reports are inherently reliable,[125] this principle is time-tested and widely

120. *Id.* at 451.

121. City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000) (striking down checkpoints for drug trafficking).

122. *E.g.*, United States v. Wheat, 278 F.3d 722, 737 (8th Cir. 2001) ("[W]e think that there is a substantial government interest in effecting a stop as quickly as possible. That interest must be balanced against the individual's right to remain free from unreasonable government intrusion.") (footnote omitted); State v. Boyea, 765 A.2d 862, 868 (Vt. 2000) ("Balancing the public's interest in safety against the relatively minimal intrusion posed by a brief investigative detention, the scale of justice in this case must favor the stop; a reasonable officer could not have pursued any other prudent course.") (citation omitted).

123. *E.g.*, Harris v. Commonwealth, 668 S.E.2d 141, 150 n.3 (Va. 2008) (Kinser, J., dissenting) (criticizing the majority for ignoring the prosecution's argument "that anonymous tips about incidents of drunk driving require less corroboration than tips concerning matters presenting less imminent danger to the public"); McChesney v. State, 988 P.2d 1071, 1074–78 (Wyo. 1999).

124. Virginia v. Harris, 558 U.S. 978 (2009) (Roberts, C.J., dissenting).

125. Navarette v. California, 134 S. Ct. 1683, 1692–97 (2014) (Scalia, J., dissenting).

accepted.[126] Still, in its attempt to craft a narrow opinion, the Court missed an opportunity to give lower courts some much needed guidance when it neglected to hold that (1) reports of openly observable crimes are more reliable than tips of concealed crimes, and (2) police need a lesser quantum of suspicion to justify stops when acting pursuant to tips of dangerous activity such as drunk driving.

The Court's failure to address the level of suspicion necessary to stop reportedly drunk drivers is particularly strange because it leaves unanswered *J.L.*'s hypothetical question: "[whether] the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability."[127] Indeed, much of the scholarship and commentary has centered on "whether anonymous tips about reckless or drunken driving should be treated differently."[128] And courts that have considered the issue have held that the level of danger implicated by an anonymous tip should at least be a *factor* of the analysis.[129] Judging by the number of times he mentioned it at oral argument, it seemed the Navarettes' appellate counsel was also convinced that this important sub-issue would be decided by the Court.[130] But the Court in *Navarette* ignored the issue completely.

Importantly, recognizing the factors mentioned by this Article would not render *all* anonymous tips of drunk driving reliable, so the potential for fraud by tipsters and police officers[131] under this

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126. *See id.* at 1689 (majority opinion).

127. Florida v. J.L., 529 U.S. 266, 273 (2000).

128. *E.g.*, Cassandre Plantin, *Navarette v. California: Corroborating Anonymous Tips in Regards to Drunk Driving*, CRIM. LAW PRACTITIONER (July 29, 2014), http://wclcriminallawbrief.blogspot.com/2014/07/supreme-court-watch-case-update.html ("[*Navarette*] turns on whether there should be a 'drunk or reckless driver exception' to the corroboration requirement of anonymous tips."); Mark Sherman, *Supreme Court to Rule Whether an Anonymous Tip is Enough for a Traffic Stop*, HUFFINGTON POST (October 1, 2013, 11:23 AM), http://www.huffingtonpost.com/2013/10/01/supreme-court-traffic-stop_n_4023458.html.

129. *See* cases cited *supra* note 122.

130. *See* Transcript of Oral Argument at 21, Navarette v. California, 134 S. Ct. 1683 (2014) (No. 12-9490), 2014 WL 234212 at *20.

131. Justice Stevens expressed similar concerns in *Alabama v. White*:

> Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip about her like the one predicting Vanessa White's excursion. In addition, under the Court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the

approach would be limited. For example, a tip from a motorist who observes a reckless driver but does not notify police until he or she returns home from a long drive would need more corroboration than the tip in *Navarette*, since the report would not be contemporaneous with the crime itself. Similarly, a tip from a conscientious college student who noticed that his drunken friend's car was no longer outside the fraternity would not justify a stop of the car if found, since the tipster would lack personal knowledge. In other words, a comprehensive view of anonymous tips does not create an *exception* to the normal rules; it simply allows courts to recognize that corroboration is not the *only* form of tip validation and to consider the totality of the circumstances in determining whether an officer had reasonable suspicion.[132]

By recognizing that contemporaneous eyewitness reports are reliable, the Court took one step toward closing the book on anonymous tips jurisprudence. But by neglecting other considerations, such as the concealed-open crime distinction and the dangerous nature of drunk driving, the Court has left many questions unanswered. The time bomb mentioned in *J.L.* is still ticking.

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warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed.

Alabama v. White, 496 U.S. 325, 333 (1990) (Stevens, J., dissenting).

132. The biggest test of the value of this approach in balancing the need to safeguard the public from danger against citizens' right to privacy would be a tip of a concealed, dangerous crime not contemporaneously observed by the tipster. For example, a tip reporting that someone is carrying a bomb in the trunk of a car would lack the inherent reliability of a contemporaneous eyewitness report and would require proof of insider information because of the concealed nature of the activity. Such a tip would force the Court to decide whether danger alone can overcome the requirement that anonymous tips be verified.