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PROBABLE CAUSE REVISITED: SOME DISTURBING IMPLICATIONS EMANATING FROM *ILLINOIS v. GATES*

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I. INTRODUCTION

In *Illinois v. Gates*,[1] a sharply divided Supreme Court articulated a new, more flexible standard for evaluating the facial sufficiency of supporting affidavits for warrants based on hearsay evidence contained in informant's tips. In doing so, the Court rejected a rigid application of the two-pronged test established in *Aguilar v. Texas*[2] and *Spinelli v. United States*,[3] replacing it with a totality-of-the-circumstances approach that placed strong emphasis upon a practical and commonsense assessment of the existence of probable cause for the issuance of a warrant.[4]

It is the thesis of this article that the result reached in *Gates*, and, in particular, the underlying theme implicit in the Court's rationale, constitutes, collectively, a wholesale assault upon the continued vitality of the fourth amendment of the United States Constitution.[5] Further, it is the contention of this study that in espousing the cause of common sense and effective law enforcement, the Court in *Gates* embarked upon a course that can result only in a

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1. 103 S. Ct. 2317 (1983).

2. 378 U.S. 108 (1964).

3. 393 U.S. 410 (1969).

4. 103 S. Ct. at 2332; *see* United States v. Kolodziej, 712 F.2d 975, 977 (5th Cir. 1983)(per curiam).

5. U.S. CONST. amend. IV:

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

diminished role for judicial officers in making determinations of probable cause; in a reduction of the independence and integrity of the magistrates in the warrant process, and in a lowered standard of probable cause for the issuance of warrants under the fourth amendment. The net result will be an evisceration of the core value of human dignity and personal liberty secured by the amendment.

This article will first review the function served by probable cause in protecting the individual's security and privacy from arbitrary intrusions by government agents, and the crucial role performed by an independent judiciary in preserving the standard of probable cause. An examination of the reasoned concern on the Supreme Court for the continued vitality of an independent judiciary that led to the establishment of the *Aguilar-Spinelli* rules will also be reviewed in the context of their purpose: to guide magistrates in making proper determinations of probable cause in cases involving hearsay reports of criminal activity received by the police from informants. This examination will reveal, however, that the two-pronged test articulated by *Aguilar-Spinelli*—to implement the general constitutional requirement that probable cause determinations are to be made by neutral and detached magistrates, and not by law enforcement officers—was being applied in an overly-technical manner by certain courts. This insistence upon rigid application of the *Aguilar-Spinelli* rules laid the ideological groundwork for the decision in *Gates*.

The *Gates* decision and the separate and concurring opinions registered by four members of the Court will be reviewed in detail. An analysis and critique of the position adopted by the majority in *Gates* will demonstrate that the majority position will lead to a dismantlement of the "warrant machinery contemplated by the [f]ourth [a]mendment."[6] This article concludes with a call to the states to reject, under the authority of their own constitutions, the suggestion ("invitation" may be a more accurate term) implicit in *Gates* to drastically reduce the security of the individual from arbitrary and unwarranted intrusions upon his privacy by government agents.

Although this article discusses the past, it is not about the past. Rather, it is about the present, and a portent of what lies ahead for fourth amendment jurisprudence. It does not end on a pessimistic note, however, but rather in a firm belief that the decision in *Gates* will afford the states an opportunity to reassert the continued vitality

6. Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

of personal security from unreasonable searches and seizures *under state law*.

II. PROBABLE CAUSE AND AN INDEPENDENT JUDICIARY

The genius of the American constitutional scheme lies in its separation of powers and its concomitant insistence upon an independent judiciary. The role of the judiciary has been to guard against the excesses of the coordinate branches of government by preserving the supremacy of the Constitution through the rule of law and the judiciary's power to invalidate any executive or legislative act in conflict with the fundamental law of the land.[7] The need for judicial independence has particular relevance to the dictates of the fourth amendment, and to the protections that it secures.[8]

Lying at the "core" of fourth amendment interests is the security of an individual's privacy against unwarranted intrusions by officers of the state.[9] Because of the fundamental nature of this guarantee, it has been characterized as being "basic" to a free and democratic society.[10]

The fourth amendment operates as a limitation upon the official exercise of power[11] by erecting a "constitutional barrier" between citizen and government.[12] By imposing a standard of reasonableness[13] upon the exercise of discretion by law enforcement officers,

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7. *See* United States v. Nixon, 418 U.S. 683, 703-09 (1974); United States v. Brown, 381 U.S. 437, 442-46 & n.20, 462 (1965); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638-40 (1943); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 173-80 (1803); I. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 8-10 (1965); G. DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 171-75 & n.191 (1960); THE FEDERALIST No. 78, at 491-92 (A. Hamilton) (B. Wright ed. 1961); *Id.* No. 81, at 506-07; T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 123-24 (1832); *see also* J. Frese, Writs of Assistance in the American Colonies (1660-1776) 196-97, 296-97 (1951) (unpublished manuscript) (available in Harvard University Archives, Pusey Library) (real significance of the opposition to executive abuses associated with the writs of assistance was the constitutional stand taken by the American colonists: that acts of Parliament in violation of the natural and the common law were void, and that it was the office of the judiciary to invalidate them).

8. *See Aguilar*, 378 U.S. at 110-15; Johnson v. United States, 333 U.S. 10, 13-14 (1948).

9. Wolf v. Colorado, 338 U.S. 25, 27 (1949); *accord*, Schmerber v. California, 384 U.S. 757, 767 (1966).

10. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

11. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 392 (1971); *see* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976); Terry v. Ohio, 392 U.S. 1, 28-29 (1968); Amsterdam, *Perspectives on the Fourth Amentment*, 58 MINN. L. REV. 349, 353, 400 (1974).

12. McDonald v. United States, 335 U.S. 451, 455 (1948).

13. The touchstone of fourth amendment analysis is the reasonableness, in the

the amendment preserves privacy interests of individuals against arbitrary interference by the state.[14] The standard of reasonableness requires that the facts relied upon to justify an intrusion "be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test."[15] Similarly, a determination of probable cause must be based on "objective facts" that justify the issuance of a warrant by a magistrate, and "not merely on the subjective good faith of the police".[16] This ensures that an individual's security and privacy interests are not subject to the discretionary mercy of law enforcement officials.[17]

A critical component of the reasonableness standard is the requirement of probable cause.[18] The central importance of requiring

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light of the surrounding circumstances, of the particular governmental intrusion of an individual's privacy and security. *See* Michigan v. Long, 103 S. Ct. 3469, 3481 (1983); Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977) (per curiam); United States v. Chadwick, 433 U.S. 1, 9 (1977); Terry v. Ohio, 392 U.S. 1, 19 (1968). Reasonableness, in the setting of police activity subject to fourth amendment strictures, will be determined on the basis of a balance between the public interest in effective law enforcement and the individual's right to be secure from arbitrary interference by government agents. *See* United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2579 (1983); *Mimms*, 434 U.S. at 109; United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); *Terry*, 392 U.S. at 20-21; Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967).

14. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); *see* United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (plurality opinion); Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976); Terry v. Ohio, 392 U.S. 1, 19 (1968); Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

One commentator, however, has argued that the fourth amendment was less a response to privacy concerns than it was a harbinger of equal protection values. The thesis here is that the framers were concerned that law enforcement officers would discriminate between the privileged and the poor in determining whose lives and homes would be disrupted in ferreting out crime. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 481-82 (1978).

15. Delaware v. Prouse, 440 U.S. 648, 654 (1979); *see* Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

16. Unites States v. Ross, 456 U.S. 798, 808 (1982); *see* Carroll v. United States, 267 U.S. 132, 161-62 (1925); Director General v. Kastenbaum, 263 U.S. 25, 28 (1923).

17. Delaware v. Prouse, 440 U.S. 648, 654-55 (1979); Camara v. Municipal Court, 387 U.S. 523, 532 (1967); *Aguilar*, 278 U.S. at 110-11.

18. *See* Dunaway v. New York, 442 U.S. 200, 207-16 (1979) (warrantless full-scale arrests constitutionally unreasonable unless supported by probable cause); United States v. Ventresca, 380 U.S. 102, 107 (1965) (a warrant may issue only upon probable cause); United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983) (per curiam) ("search warrant must be supported by probable cause"); United States v. Tate, 694 F.2d 1217, 1219 (9th Cir. 1982) (to comply with constitutional precepts, search warrants must be based on probable cause); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 129 (1937); *see also* Terry v. Ohio, 392 U.S. 1, 20 (1968) (dictum) ("If this case involved police conduct subject to the [w]arrant [c]lause of the [f]ourth [a]mendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place"); *cf.* Florida

probable cause for reasonable searches and seizures under the fourth amendment is to safeguard the privacy concerns of citizens from arbitrary intrusions by the police.[19] It is "the standard by which privacy is reasonably invaded,"[20] for it establishes the criteria for testing a particular decision to search or seize against the constitutional precept of reasonableness.[21]

At the same time, the criteria established for the existence of probable cause seek to accommodate the competing interests of society in effective law enforcement. Thus, probable cause has served as an effective compromise for accommodating the often opposing interests of the individual and society.[22] This standard has embodied "the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in [search-and-seizure activity] 'reasonable' under the [f]ourth [a]mendment."[23] To require more would unduly hamper effective law enforcement, while sanctioning less would subject the privacy interests of the individual to the capricious mercy of government agents.[24]

As this analysis has demonstrated, the existence of probable cause is crucial to the vitality of the fourth amendment. But, the requirement that such cause satisfy the concept of resonableness under the amendment would be an empty gesture if the determination were left to the subjective good faith of law enforcement officers. It is in this particular setting that "the warrant machinery contem-

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v. Royer, 103 S. Ct 1319, 1325 (1983) (plurality opinion) (full-scale arrests and full-blown searches on suspicion are violative of the fourth amendment).

19. *See* Dunaway v. New York, 442 U.S. 200, 208, 213 (1979); Brinegar v. United States, 338 U.S. 160, 176 (1949). The requirement of probable cause for reasonable searches and seizures is specifically mandated by the warrant clause of the fourth amendment, which established "the root principle of judicial superintendence of searches and seizures." Lopez v. United States, 373 U.S. 427, 454 n.6 (1963) (Brennan, J., dissenting).

20. Mascolo, *Specificity Requirements for Warrants Under The Fourth Amendment: Defining the Zone of Privacy*, 73 DICK. L. REV. 1, 6 (1968); *see* N. LASSON, *supra* note 18, at 120.

21. Camara v. Municipal Court, 387 U.S. 523, 534 (1967). For an analysis of the "working relationship" between probable cause and the requirement of specificity for warrants, see Mascolo, *supra* note 20, at 5-7.

22. Dunaway v. New York, 442 U.S. 200, 208 (1979) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)); Gerstein v. Pugh, 420 U. S. 103, 112 (1975) (standard of probable cause "represents a necessary accommodation between the individual's right to liberty and the [s]tate's duty to control crime").

23. Dunaway v. New York, 442 U.S. 200, 208 (1979).

24. Brinegar v. United States, 338 U.S. 160, 176 (1949); *see* Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967); *Aguilar*, 378 U.S. at 110-11; McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

plated by the [f]ourth [a]mendment"[25] takes on added significance.

The general command of fourth amendment jurisprudence is the requirement of a warrant.[26] The insistence upon the presence of a warrant acknowledges the significant role played by the judicial warrant in the constitutional scheme of protecting the individual from arbitrary governmental intrusions upon his security and privacy.[27] In the first place, the requirement of a warrant provides the detached scrutiny of an impartial magistrate to make the all-important determination of probable cause. It entrusts to a judicial officer the task of assessing the quantum of evidence that will justify a breach of an individual's zone of privacy.[28] Ferreting out crime was deemed too competitive an enterprise to qualify zealous law enforcement officers for the degree of detachment and objectivity required for reasonable assessments of probable cause. As a result, the fourth amendment interposes a magistrate between the citizen and the police, in the belief that an objective mind might better determine the need to invade the individual's security and privacy in order to enforce the law.[29] Thus, a determination of probable cause must be based on "objective facts" that justify the issuance of a warrant by a magistrate, and "not merely on the subjective good faith" of government agents.[30]

The second purpose served by the warrant requirement is that it defines and limits the scope of intrusion that law enforcement of-

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25. Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

26. *See* United States v. Ross, 456 U.S. 798, 824-25 (1982); Mincey v. Arizona, 437 U.S. 385, 390 (1978); Katz v. United States, 389 U.S. 347, 357 (1967) (subject only to "a few" exceptions, warrantless searches are *per se* unreasonable).

27. *See* United States v. Lockett, 674 F.2d 843, 845-46 (11th Cir. 1982).

28. *See* United States v. Chadwick, 433 U.S. 1, 9 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976)(a crucial purpose of the warrant requirement is the substitution of the judgment of an impartial magistrate for that of the police); Schmerber v. California, 384 U.S. 757, 770 (1966) (requirement that a warrant be obtained is a requirement that the inferences to support a search or seizure be drawn by an impartial judicial officer and not by zealous law enforcement officers); J. HALL, SEARCH AND SEIZURE § 6:4, at 182-83 (1982 & Supp. 1983).

29. *See Gates*, 103 S. Ct. at 2351-52, 2355, 2356 n.6 (Brennan, J., dissenting); *Aguilar*, 378 U.S. at 110-15 (A contrary rule would leave the security of individual privacy at the discretionary mercy of police officers, and would undermine the independence of the magistrate.); McDonald v. United States, 335 U.S. 451, 455-56 (1948) (right of privacy deemed too precious to be entrusted to the discretion of law officers); Johnson v. United States, 333 U.S. 10, 13-14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (protection against unlawful searches more likely to be obtained by resort to search warrants than by reliance upon the "sagacity of petty officers" acting under the "excitement" attendant upon the capture of persons accused of crime); J. HALL, *supra* note 28, § 6:3, at 178-79.

30. United States v. Ross, 456 U.S. 798, 808 (1982).

ficers are permitted to make, thereby increasing the probability that a particular search or seizure, once commenced, will not exceed the bounds of reasonableness.[31] Finally, the presence of a warrant assures the individual, whose security and privacy have been invaded, of the lawful authority of the executing officer, his need to intrude upon the individual's security and privacy, and the limits of his power to do so.[32]

The right not to be searched or seized without a neutral decision that probable cause exists is basic to a free and enlightened society. This guarantee, by removing from the discretion of law officers the determination as to what evidence justifies an invasion of the individual's privacy, and entrusting it to a judicial officer,[33] seeks to implement the prime aim and purpose of the fourth amendment: personal security from unreasonable governmental intrusions upon the privacy of the individual.[34] Thus, the framers of the fourth amendment placed their trust in the neutral magistrate, who, by judicious use of the warrant power, would endeavor to strike the proper balance between the privacy interests of the individual and the concerns of society for effective law enforcement.[35] But, this trust implicitly rejected any acquiescent or secondary role for the magistrate. To the contrary, his role was to be central to the issuance of warrants, and would not allow for unquestioning or rubber-stamped deference to the judgment of police officers.[36] This meant, at a minimum, that the magistrate would insist upon a substantial basis for a judicial determination that probable cause existed.[37] Mere conclusory allegations of wrongdoing, as the Supreme Court has observed, are not sufficient.[38]

In *Nathanson v. United States*,[39] the Supreme Court held for the first time that a warrant that is issued on the basis of a supporting affidavit, that shows no facts upon which to base a finding of prob-

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31. United States v. Chadwick, 433 U.S. 1, 9 (1977).

32. *Id.*; Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

33. *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 47 (1966); N. LASSON, *supra* note 18, at 120.

34. *See* United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) (L. Hand, J.); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 68 (1969).

35. J. LANDYNSKI, *supra* note 33, at 47.

36. *See Aguilar*, 378 U.S. at 110-15; Giordenello v. United States, 357 U.S. 480, 486 (1958); J. HALL, *supra* note 28, § 6:5, at 183.

37. *See Gates*, 103 S. Ct. at 2332.

38. *See* Whiteley v. Warden, 401 U.S. 560, 564-65 (1971); United States v. Ventresca, 380 U.S. 102, 108-09 (1965) (dictum).

39. 290 U.S. 41 (1933).

able cause, is unreasonable under the fourth amendment.[40] The Court reasoned that since a valid warrant must be supported by probable cause, this standard could be satisfied only if a judicial officer found such cause from the "facts or circumstances presented to him under oath or affirmation."[41]

The *Nathanson* Court distinguished *Locke v. United States*,[42] upon which the government relied, by noting that *Locke* was a proceeding to forfeit a cargo of goods seized for violation of the revenue laws. "It presented," the Court observed, "no question concerning the validity of a warrant."[43] Moreover, the government could take nothing from the fact that the *Locke* search involved the seizure of goods smuggled into the country in fraud of the revenue laws. While the practice of sanctioning searches for such contraband on the basis of affidavits of *suspicion* or belief has "been sustained from the earliest times," the search in *Nathanson* was of a private residence.[44] In the judgment of the Court, there was "nothing in [the revenue] statutes [governing smuggled goods that] indicate[d] that a warrant to search a private dwelling [might] rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances."[45]

Nathanson, then, stands for the principle that mere conclusory allegations of wrongdoing are insufficient to show or establish probable cause.

The Supreme Court affirmed the *Nathanson* principle in *Giordenello v. United States*.[46] The Court was confronted, once again, with a mere conclusory affidavit, in the form of a written complaint, under oath, for an arrest warrant pursuant to the Federal Rules of Criminal Procedure.[47]

The Court concluded that the complaint did "not pass [constitutional] muster," because it did not provide any basis for a judicial determination that probable cause existed.[48] The Court reasoned that fourth amendment principles governed applications for arrest warrants, as well as for search warrants, and that those principles

40. *Id.* at 47.
41. *Id.*
42. 11 U.S. (7 Cranch) 339 (1813).
43. 290 U.S. at 47.
44. *Id.*
45. *Id.*
46. 357 U.S. 480 (1958).
47. FED. R. CRIM. P. 3, 4.
48. 357 U.S. at 486.

required that probable cause determinations be made by independent judicial officers.[49] Simply put, it was not the function of the magistrate to accept "without question" mere conclusory statements by law officers of criminal wrongdoing. Rather, the Court thought that the magistrate "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause."[50]

Applying these criteria to the complaint at hand, the *Giordenello* Court found the complaint to be clearly deficient. It contained no "affirmative allegation" that the affiant had personal knowledge of the information given.[51] Nor did the complaint "indicate any sources for the complainant's belief" of criminal activity. Finally, the complaint failed to "set forth any other sufficient basis upon which a finding of probable cause could be made."[52]

The Court observed that it was difficult to understand how a judicial officer could independently assess the probability of criminal activity on the part of the defendant.[53] Indeed, concluded the Court, if such a complaint were upheld, the substantive protections surrounding the issuance of warrants would be seriously compromised, and the complaint process would be "of only formal significance, entitled to perfunctory approval" by a magistrate.[54] This, in the Court's opinion, "would not comport with the protective purposes which a complaint [or a supporting affidavit] is designed to achieve."[55]

Certain principles emerge from *Nathanson* and *Giordenello*. First, and foremost, is the independence and the integrity required of the reviewing magistrate. His role is both crucial and fundamental to the warrant process. Not only must he not passively defer to the subjective requests of law officers, but also he should not sanction any attempt from any source to usurp the functions of his office. If the commands of the fourth amendment are to have any meaning, then, clearly, an independent and viably functional judiciary must be interposed between the police and the citizenry. To do otherwise would reduce probable cause determinations to subjective assessments colored by the competitive zeal of law enforcement officers.[56]

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49. *Id.* at 485-86.
50. *Id.* at 486.
51. *Id.*
52. *Id.*
53. *Id* at 486-87.
54. *Id.* at 487.
55. *Id.*
56. *See Aguilar*, 378 U.S. at 110-15; McDonald v. United States, 335 U.S. 451, 455-

This, in turn, would lead to a reduced expectation of privacy on the part of the individual; for, if an individual is protected in the knowledge that his privacy interests are only as secure as the police desire them to be, then that individual is protected in name only. The Constitution was intended to be more than mere words, and was never intended to convey empty promises. Thus, an independent judiciary secures for the individual both the procedural and the substantive guarantees of the Constitution. This, in substance, is the cardinal tenet of *Nathanson-Giordenello*.

Closely allied to this is the second command of *Nathanson-Giordenello*. If an independent judiciary is to discharge its role of objectively determining when the privacy interests of the individual are to be subordinated to the effective enforcement of the criminal laws, then the judiciary must be provided with a substantial factual basis upon which to predicate its decision. It is here that the role of probable cause is crucial to the warrant process, for it is "the standard by which privacy is *reasonably* invaded."[57] Probable cause cannot be based on mere conclusions, suppositions, or suspicions. As is true of other constitutional protections, the standard of probable cause is one of substance and meaning. This standard was not satisfied by the "bare bones" affidavits contained in *Nathanson* and *Giordenello*. Consequently, the magistrate was prevented from truly discharging his constitutional role of objectively determining whether there was sufficient cause to justify a reasonable intrusion upon the individual's privacy interests.

Aguilar-Spinelli represented a serious effort by the Supreme Court to implement the commands of *Nathanson* and *Giordenello*, by requiring law officers to provide certain information to magistrates, and by structuring probable cause inquiries in a manner that would assure the independence of the judiciary as well as ensure a greater degree of accuracy in probable cause determinations. The focal point of inquiry in *Aguilar-Spinelli* was the troublesome area of hearsay evidence contained in tips received by the police from informants.

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56 (1948); Johnson v. United States, 333 U.S. 10, 13-14 (1948); United States v. Leftowitz, 285 U.S. 452, 464 (1932).

57. Mascolo, *supra* note 20, at 6 (emphasis added).

III. *AGUILAR-SPINELLI*

A. Aguilar v. Texas

In *Aguilar v. Texas*,[58] the Supreme Court was required to assess the constitutional sufficiency of a supporting affidavit for a search warrant that, in relevant part, recited that the affiants "received reliable information from a credible person and do believe that . . . narcotics . . . are being [illegally] kept at the above described premises . . . ."[59]

The Court began its discussion with a reaffirmation of the principle that searches conducted under the authority of a warrant " 'are to be preferred over the hurried action' " and discretionary judgment of law enforcement officers.[60] A contrary rule would reduce the fourth amendment " 'to a nullity,' "[61] compromise the security interests of the individual against unreasonable searches,[62] and discourage resort to warrants.[63] Thus, when a search is conducted under the authority of a warrant, a "reviewing court[] will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting. . .without a warrant'. . . and will sustain the judicial determination [of probable cause provided] 'there was [a] substantial basis for [the magistrate] to [have] conclud[ed]' " that probable cause existed.[64]

The Court then sounded a cautionary note that, while a reviewing court would pay "substantial deference to judicial determinations of probable cause," the magistrate would still be required to "perform his 'neutral and detached' function and [should] not serve merely as a rubber stamp for the police."[65]

Applying these principles to the case at hand, the Court concluded that the affidavit under review was constitutionally deficient and suffered from the same conclusory vice that had infected the

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58. 378 U.S. 108 (1964).

59. *Id.* at 109 (footnote omitted).

60. *Id.* at 110-11 (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)).

61. 378 U.S. at 111 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

62. *See* 378 U.S. at 111; *cf.* United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (security against illegal searches "more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers").

63. 378 U.S. at 111; *cf.* Jones v. United States, 362 U.S. 257, 270 (1960) (if a peace officer had to present evidence "of a more judicially competent or persuasive character" to obtain a warrant than would have justified his "acting on his own without a warrant," resort to warrants "would ultimately be discouraged").

64. 378 U.S. at 111 (quoting Jones v. United States, 362 U.S. 257, 271 (1960)).

65. *Id.*

affidavits in *Nathanson* and *Giordenello*.[66] The mere affirmance of belief that the defendant possessed narcotics was not the belief of the affiants themselves; it was that of an unidentified informant.[67] Moreover, the affidavit contained " 'no affirmative allegation that the affiant[s] [had] personal knowledge of the matters contained therein.' "[68] In fact, noted the Court, the affidavit did not even contain an affirmative claim or allegation that the unidentified informant had such knowledge.[69] "For all that appears," commented the Court, the informant "merely suspected, believed or concluded" that the defendant had narcotics in his possession.[70] This was simply an inadequate basis upon which the reviewing magistrate could be expected to assess independently the existence of probable cause. Hence, "he [must have] necessarily accepted 'without question' the informant's. . . 'mere conclusion.' "[71]

To guard against such deficiencies, and to prevent their reoccurrence, the Court held that a reviewing magistrate "must be informed of some of the underlying circumstances from which the informant concluded" that evidence subject to seizure was where he said it was, and "some of the underlying circumstances" from which the affiant concluded that the informant "was 'credible' or his information 'reliable.' "[72] Otherwise, the Court feared, " 'the inferences from the facts which lead to the complaint' " will be drawn, not by the neutral and detached magistrate as required by the Constitution, but, rather, by police officers " 'engaged in the often competitive enterprise of ferreting out crime,' " or worse, by informants.[73]

The Court, in *Aguilar*, thus established a two-pronged test to implement the constitutional requirement that probable cause determinations be made by neutral and detached magistrates, and not by law enforcement officers,[74] and to assess the legal sufficiency, pursuant to the standard of probable cause, of an informant's tip. These prongs have come to be known, respectively, as the "basis-of-knowl-

66. *Id.* at 112-15.

67. *Id.* at 113.

68. *Id.* (quoting *Giordenello*, 357 U.S. at 486).

69. *Id.* at 113; *see* Giordenello, 357 U.S. at 486.

70. 378 U.S. at 113-14.

71. *Id.* at 114; *see Giordenello*, 357 U.S. at 486-87.

72. 378 U.S. at 114 (footnote omitted).

73. *Id.* at 114-15 (quoting *Giordenello*, 357 U.S. at 486; and Johnson v. United States, 333 U.S. 10, 14 (1948)).

74. *Spinelli*, 393 U.S. at 415-16.

edge" prong and the "veracity" prong.[75]

The basis-of-knowledge prong, on the one hand, requires that the supporting affidavit disclose the underlying circumstances from which the informer drew his conclusion of criminal wrongdoing so as to permit an objective evaluation by an independent judicial officer.[76] The veracity prong, on the other hand, requires that the reliability of the informant be shown or established.[77]

As to the basis-of-knowledge prong, an affidavit based on an informant's tip or report, standing alone, will not provide probable cause for the issuance of a search warrant, unless the tip includes information that apprises the reviewing magistrate of the informer's *basis* for concluding that the evidence subject to seizure is where he claims it is.[78] A statement from the informant that he personally observed the criminal activity in question would be sufficient or, if the informant came by his information indirectly, and provided a satisfactory explanation as to why his sources were reliable, then the prong would be satisfied.[79] In the absence of a statement detailing the circumstances in which the information had been obtained or gathered, the basis-of-knowledge prong may nevertheless be satisfied by a detailed description of the defendant's criminal activity from which the magistrate may reasonably infer that the informer was relying upon something more substantial than a casual rumor or an individual's general reputation.[80]

The veracity prong requires that the affiant inform the magis-

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75. *E.g.*, United States v. Sellers, 483 F.2d 37, 39-40 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

76. *Id.*

77. *Id.*

78. *Gates*, 103 S. Ct. at 2347 (White, J., concurring in the judgment); *see Spinelli*, 393 U.S. at 412-13, 416; United States v. Marino, 682 F.2d 449, 452 (3d Cir. 1982).

79. 103 S. Ct. at 2347 n.20 (White, J., concurring in the judgment); *see* United States v. Marino, 682 F.2d 449, 453 (3d Cir. 1982).

80. *Gates*, 103 S. Ct. at 2347 n.20 (White, J., concurring in the judgment); *Spinelli*, 393 U.S. at 416-17; United States v. Anderson, 500 F.2d 1311, 1315 (5th Cir. 1974); United States v. Sellers, 483 F.2d 37, 40-41 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

It has been argued that independent corroboration should not be considered by a magistrate in applying the basis-of-knowledge prong, because while corroboration may indicate an informant's truthfulness, it will not establish that his knowledge has been obtained in a reliable way. Stanley v. State, 19 Md. App. 507, 531-33, 313 A.2d 847, 861-62, *cert. denied*, 271 Md. 745 (1974); Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958, 963 n.30 (1969). But, surely, corroboration, where shown in substantial detail suggestive of inside information, should be sufficient to permit a magistrate to reasonably infer both veracity and reliability. *See Gates*, 103 S. Ct. at 2349 n.22 (White, J., concurring in the judgment); Draper v. United States, 358 U.S. 307, 313 (1959).

trate of *his basis* for concluding or believing that the informant is credible, or that the informant's information is reliable.[81] The reliability of the tip may be verified by independent corroboration,[82] or independent investigation.[83] Such verification tends to dispel any notion that an informer's report has been fabricated.[84]

The veracity prong may also be satisfied by a recitation in the affidavit that the informant previously supplied accurate information to the authorities.[85] Alternatively, it may be satisfied by proof that the tip contains information against the informant's penal interest.[86]

Under the *Aguilar* equation, probable cause for the issuance of a warrant may be based exclusively upon an informer's tip or report only if *both* the informant's basis of knowledge and his credibility are specified in the supporting affidavit.[87]

B. Spinelli v. United States

The *Aguilar* standards were refined and explicated in *Spinelli v. United States*,[88] which involved a somewhat detailed affidavit containing both a tip from an anonymous informant and a report of an independent FBI investigation which partially corroborated the tip. The information imparted in the tip, however, was largely innocuous, thereby making the informer's report a crucial element in the

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81. *See Gates*, 103 S. Ct. at 2347 (White, J., concurring in the judgment); *Spinelli*, 393 U.S. at 412-13, 416; United States v. Marino, 682 F.2d 449, 452 (3d Cir. 1982).

82. United States v. One 56-Foot Motor Yacht Named the Tahuna, 702 F.2d 1276, 1284 (9th Cir. 1983); *see* United States v. Anderson, 500 F.2d 1311, 1315-16 (5th Cir. 1974).

83. United States v. Prueitt, 540 F.2d 995, 1005 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); *see* United States v. Anderson, 500 F.2d 1311, 1316 (5th Cir. 1974).

84. *See* United States v. Anderson, 500 F.2d 1311, 1316 (5th Cir. 1974).

85. *Gates*, 103 S. Ct. at 2347 n.20 (White, J., concurring in the judgment); United States v. Zucco, 694 F.2d 44, 47 (2d Cir. 1982); United States v. Marino, 682 F.2d 449, 453 (3d Cir. 1982); United States v. Swan, 545 F. Supp. 799, 807 (D. Del. 1982); *see* McCray v. Illinois, 386 U.S. 300, 303-04 (1967); United States v. Bagaric, 706 F.2d 42, 66 (2d Cir. 1983).

86. *Gates*, 103 S. Ct. at 2347 n.20 (White, J., concurring in the judgment); United States v. One 56-Foot Motor Yacht Named the Tahuna, 702 F.2d 1276, 1284 (9th Cir. 1983)(dictum); *see* United States v. Harris, 403 U.S. 573, 583-84 (1971) (plurality opinion).

87. United States v. Marino, 682 F.2d 449, 452 (3d Cir. 1982); United States v. Bush, 647 F.2d 357, 362 (3d Cir. 1981); United States v. Hill, 500 F.2d 733, 739 (5th Cir. 1974), *cert. denied*, 420 U.S. 952 (1975); *see* United States v. Harris, 403 U.S. 573, 587-88 (1971) (Harlan, J., dissenting); United States v. Sellers, 483 F.2d 37, 39 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974) (affidavit must contain "sufficient objective assertions from which a detached magistrate may reasonably conclude that the hearsay should be credited").

88. 393 U.S. 410 (1969).

probable cause equation.[89]

Because a magistrate reviewing a *Spinelli*-type affidavit would have to assess the probative value of the tip in conjunction with the independent law enforcement investigation, the Supreme Court first measured the informer's tip against the *Aguilar* standards,[90] and found that the report received from the informant failed both prongs of *Aguilar*.[91]

The first standard was not satisfied because there was no showing of the informant's basis of knowledge. There was no way to determine how the FBI's source had received his information — whether through direct observation or personal involvement in the defendant's bookmaking venture. Moreover, if the informer had come by the information indirectly, there was no explanation for why his own sources of information were reliable.[92]

The *Spinelli* Court did recognize that, in the absence of a statement detailing the manner in which the information had been gathered, the basis-of-knowledge requirement could be satisfied by the detail of the informant's tip.[93] But here, the Court cautioned, "it [was] especially important that the tip describe the . . . criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor . . . or an accusation based merely on an individual's general reputation."[94] Thus, a magistrate, when presented with sufficient detail, will be able to reasonably infer that the informant had obtained his information in a reliable way.[95]

The Court did not believe, however, that such an inference could be made "in the present case."[96] The "only facts supplied" were that the defendant was using two specified telephones, and that these telephones were being employed in gambling operations. To the Court, "[t]his meager report could easily have been obtained from an offhand remark heard at a neighborhood bar."[97]

The Court also found that *Aguilar*'s veracity prong had not been satisfied. Although the affiant had sworn that his source was

89. *See id.* at 414-15.
90. *Id.* at 415-16.
91. *Id.*
92. *Id.* at 416.
93. *Id.*
94. *Id.*
95. *Id.* at 417; *see* United States v. Smith, 598 F.2d 936, 939 (5th Cir. 1979).
96. 393 U.S. at 417.
97. *Id.*

" 'reliable' ", he offered the magistrate no supporting basis for this conclusion.[98]

The *Spinelli* analysis supplemented the *Aguilar* requirements by addressing the question of whether the FBI's independent investigative efforts had been sufficiently successful to establish the informant's reliability. In so doing, the Court observed that a magistrate's constitutional responsibilities require that he rely on something more than an informant's report which fails, even when partially corroborated, to measure up to the *Aguilar* standards. Such a report is not as reliable as one which would satisfy the *Aguilar* tests standing alone.[99]

When it considered the allegations detailing the FBI's independent investigative efforts, the Court believed that "the patent doubts" that *Aguilar* raised concerning the tip's reliability had not been "adequately resolved."[100] "At most," the Court observed, the allegations indicated only that the defendant could have used the telephones specified by the informer "for some purpose."[101] But this, by itself, was simply insufficient to support both the inference that the informant was "generally trustworthy" and that he had made his accusation on the basis of information obtained in a reliable way.[102] More would be required to show that the informer "had not been fabricating his report out of whole cloth" and that the information was of the sort which "in common experience may be recognized as having been obtained in a reliable way."[103]

The Court, in *Spinelli*, thus concluded that the tip, even when partially corroborated, was insufficient to provide the basis for a finding of probable cause.[104] This did not mean, however, that the tip could not properly have counted in the magistrate's determination. "Rather, it needed some further support."[105] This support, the Court believed, was lacking in the corroboration that was provided to the magistrate. In short, the Court could find "nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed."[106] To the contrary, the corroboration was of some "in-

98. *Id.* at 416.
99. *Id.* at 415-16; *see* United States v. Smith, 598 F.2d 936, 938 (5th Cir. 1979).
100. 393 U.S. at 417.
101. *Id.*
102. *Id.*
103. *Id.* at 417-18.
104. *Id.* at 418.
105. *Id.*
106. *Id.*

nocent-seeming activity and data,"[107] not criminal conduct, and thus failed to demonstrate reliability.[108]

In concluding that the affidavit did not measure up to the *Aguilar* standards, the Court observed that it could not "sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."[109]

Justice White, concurring in *Spinelli*, was "inclined to agree with the majority" that there are "limited special circumstances in which an 'honest' informant's report, if sufficiently detailed, will in effect verify itself," so as to permit a reviewing magistrate to reasonably infer that the information had been obtained in a reliable way.[110] But even when this is not the case, the tip can be sustained if it is supplemented by sufficient corroboration. Thus, to Justice White, verification of an informant's report "relates to the reliability of the source: because an informer is right about some things, he is more probably right about other facts, usually the critical, unverified facts."[111]

The *Spinelli* elaboration and refinement of the *Aguilar* tests provided that if an informant's report or tip failed under either or both of the two *Aguilar* prongs, probable cause could still be established by independent police investigatory work if it corroborated the tip to such an extent that it supported "both the inference that the informer

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107. *Id.* at 414.

108. *See id.* at 417-19.

109. *Id.* at 419 (footnote omitted).

110. *Id.* at 425 (White, J., concurring in the judgment).

111. *Id.* at 427.

In his opinion concurring in the judgement in *Gates*, Justice White amplified upon his *Spinelli* concurrence by correcting Justice Brennan's interpretation, contained in the latter's dissent in *Gates*, 103 S. Ct. at 2354-55, of the *Spinelli* concurrence as "espousing the view that 'corroboration of certain details in a tip may be sufficient to satisfy the veracity, but not the basis of knowledge, prong of *Aguilar*.'" Justice White denied this, stating:

> I did not say that corroboration could *never* satisfy the basis of knowledge prong. My concern was, and still is, that the prong might be deemed satisfied on the basis of corroboration of information that does not in any way suggest that the informant had an adequate basis of knowledge for his report. If, however,. . .the police corroborat[ed] information from which it [could] be inferred that the informant's tip was grounded on inside information, this corroboration [would be] sufficient to satisfy the basis of knowledge prong. . . .The rules would indeed be strange if, as Justice Brennan suggest[ed] [in his *Gates* dissent, 103 S. Ct. at 2356,] the basis of knowledge prong could be satisfied by detail in the tip alone, but not by independent police work.

Id. at 2349 n.22 (White, J., concurring in the judgment).

was generally trustworthy and that he had made his charge. . . on the basis of information obtained in a reliable way."[112] In addition, a sufficiently detailed tip may provide a proper foundation for a magistrate to conclude that the informant based his allegations on adequate or substantial knowledge, and not on mere rumor or suspicion.[113] In instances in which law enforcement officers rely upon corroboration, the "ultimate question" will be whether the corroborated tip is as trustworthy as a tip that would satisfy the *Aguilar* requirements without independent corroboration.[114]

Under the *Aguilar-Spinelli* tests, an officer who applies for a warrant on the basis of an informant's tip or report must first show either that the informer is credible or that his information is reliable. Second, the applicant-affiant must set forth some of the facts upon which the informant based his conclusion or allegations of criminal activity. Finally, if the informant's tip fails to satisfy either or both of these tests, probable cause may still be established by independent police investigatory work that is sufficiently corroborative of the report to make up or compensate for any deficiencies contained in the report.[115]

C. *A Certain Rigidity in Applying* Aguilar-Spinelli

Although the *Aguilar-Spinelli* rules enhanced the integrity of the warrant process by preserving the independence and objectivity of

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112. *See Gates*, 103 S. Ct. at 2347-48 (White, J., concurring in the judgment); *Spinelli*, 393 U.S. at 417.

113. *See Spinelli*, 393 U.S. at 416-17; United States v. Zucco, 694 F.2d 44, 47 (2d Cir. 1982); United States v. Marino, 682 F.2d 449, 453 (3d Cir. 1982); United States v. Swan, 545 F. Supp. 799, 807 (D. Del. 1982).

It has been argued, however, that since it is easy to fabricate even a wealth of detail, a defect in the veracity prong cannot be rehabilitated by self-verifying detail. Stanley v. State, 19 Md. App. 507, 533, 313 A.2d 847, 862, *cert. denied*, 271 Md. 745 (1974); J. HALL, *supra* note 28, § 5:20, at 163; Note, *Probable Cause and the First-time Informer*, 43 U. COLO. L. REV. 357, 362 (1972). *But see* United States v. Harris, 403 U.S. 573, 589 (1971) (Harlan, J., dissenting)(suggesting that a wealth of detail may be sufficient to satisfy both the basis test and the trustworthiness test).

According to one commentator, only corroboration of incriminating detail will suffice to permit an inference of reliability. Note, *supra*, at 362; *see* J. HALL, *supra* note 28, § 5:20, at 162-63.

114. *Gates*, 103 S. Ct. at 2348 (White, J., concurring in the judgment); *see Spinelli*, 393 U.S. at 415.

115. For further discussion of *Aguilar-Spinelli*, see J. HALL, *supra* note 28, at §§ 5:17-25; 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3 (1978 and Supps. 1983, 1984); LaFave, *Probable Cause from Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1; Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974); Note, *supra* note 113; Note, *supra* note 80.

the magistrate,[116] they did generate controversy and a certain confusion among the lower courts. This particularly arose from difficulties in properly applying the basis-of-knowledge prong. The result was, in the words of the *Gates* majority, "an excessively technical dissection of informants' tips"[117] that "reflect[ed] a rigid application of [the *Aguilar-Spinelli*] rules."[118]

Because the *Gates* majority singled out three lower-court decisions[119] as being reflective of such "rigid application," these cases warrant further attention as harbingers of the *Gates* decision.

In *Bridger v. State*,[120] the court invalidated an affidavit which alleged that the defendant's apartment contained implements for the purpose of aiding in the commission of the crime of robbery with firearms. The basis for this information was a statement of McCall, an accomplice of the defendant in the specific bank robbery who had turned over to the officer-affiant $800.00 taken in the robbery. The informant stated that the defendant had the gun, a .38 caliber revolver, and two ski masks that had been used in the commission of the offense. These items, the affiant alleged, were hidden in the apartment.[121]

The *Bridger* court concluded that the affidavit demonstrated "no more than a suspicion on the part of the informer."[122] The affidavit was deficient, reasoned the court, because it did not relate the basis of the informer's information, either by personal observation or incriminating statements, and because it did not provide "any other underlying facts or circumstances" that lent credence to the informant's report.[123]

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116. *See Spinelli*, 393 U.S. at 415; *cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (one purpose of the warrant requirement is to substitute the judgment of an impartial magistrate for that of the police).

117. 103 S. Ct. at 2330 (footnote omitted).

118. *Id.* at 2330 n.9.

119. Justice Rehnquist, writing for the majority in *Gates*, cited People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971) (en banc); People v. Palanza, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (1978); and Bridger v. State, 503 S.W.2d 801 (Tex. Crim. App. 1974), as appropriate examples of "rigid application" that had been "brought to our attention by the [s]tate." 103 S. Ct. at 2330 n.9. Justice White also believed that *Palanza* and *Bridger* were "excellent examples of overly-technical applications of the *Aguilar-Spinelli* standard," and that the "holdings in these cases could easily be disapproved without reliance on a 'totality of the circumstances' analysis." *Id.* at 2350 n.26 (White, J., concurring).

120. 503 S.W.2d 801 (Tex. Crim. App. 1974).

121. *Id.* at 803.

122. *Id.*

123. *Id.*

Personal observation by an informant of the facts contained in his tip will satisfy the basis-of-knowledge prong of *Aguilar-Spinelli*. *See Spinelli*, 393 U.S. at 416. It will also

The analysis of the *Bridger* affidavit was too narrow and unrealistic.[124] Viewed as a whole, the "total atmosphere"[125] of the affidavit, the full import of the statement by the informant, McCall, was clearly against his penal interest, and carried its own indicia of credibility for purposes of supporting a finding of probable cause.[126] In the first place, the statement established that the source of the information was an accomplice of the defendant in the commission of a serious and violent felony — the armed robbery of a bank. Secondly, the informant had already turned over to the affiant part of the loot or criminal proceeds of his joint venture in crime with the defendant. This, in itself, confirmed the accuracy of his admitted involvement in the robbery, and lent credence to his claim that the implements used to aid in the commission of the offense were in fact hidden in the defendant's apartment. Furthermore, McCall described the weapon used in the robbery as a .38 caliber revolver, and also described the two ski masks employed in the commission of the offense. Who was better qualified to do this than a participant in the crime?

As to the reliability of the basis of McCall's information, this could have been inferred readily and reasonably from the informant's unique relationship with the defendant. Thus, it would have been reasonable for the magistrate to have inferred that McCall had personally observed the revolver and the ski masks in the apartment, had witnessed their secretion in the apartment, or that the defendant himself had imparted this information. Obviously, the weapon and the masks were items of highly incriminating evidence, and it would have been perfectly natural for McCall and the defendant to have been concerned about their discovery by the police, and anxious to provide a place for their safekeeping.[127]

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be sufficient to "establish the reliability of the evidence upon which the informer base[s] his conclusions" of wrongdoing. United States v. Harris, 403 U.S. 573, 589 (1971) (Harlan, J., dissenting).

124. *Cf.* United States v. Ventresca, 380 U.S. 102, 108 (1965) (if the constitutional policy of according preference to searches and seizures under a warrant is to be served, then affidavits for warrants "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion").

125. United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

126. United States v. Harris, 403 U.S. 573, 583-84 (1971) (plurality opinion); United States v. One 56-Foot Motor Yacht Named the Tahuna, 702 F.2d 1276, 1284 (9th Cir. 1983) (dictum); *see Spinelli*, 393 U.S. at 425 (White, J., concurring in the judgment) ("[I]f, for example, the informer's hearsay comes from one of the actors in the crime in the nature of admission against interest, the affidavit giving this information should be held sufficient.").

127. *See Gates*, 103 S. Ct. at 2348-49 (White, J., concurring in the judgment);

Granted that McCall was already in police custody and was undoubtedly anxious to curry favor with the authorities by making the best deal for himself. Nevertheless, these factors do not detract from the aura of credibility surrounding a statement that was clearly against McCall's penal interest.[128]

The second case cited by the *Gates* majority as reflecting a "rigid application" of *Aguilar-Spinelli* rules was *People v. Palanza*.[129] The *Palanza* affidavit, submitted in support of an application for a search warrant, stated that an informant of previous and demonstrated reliability had seen, on specifically described premises, " 'within the past 72 hours,. . . a quantity of a white crystalline substance which was represented to the informant by a white male occupant of the premises to be cocaine.' "[130] Further, it was alleged that the informer " 'has observed cocaine on numerous occasions in the past, . . . is thoroughly familiar with its appearance[,]' " and " 'that the white crystalline powder he observed in the. . . premises appeared to him to be cocaine.' "[131]

The *Palanza* court, noting that no question had been raised concerning the reliability or credibility of the informant,[132] nevertheless ruled that the warrant was defective, because there was "no indication" as to how the informer, or any other person, could determine whether a particular substance was in fact cocaine "and not some other white substance such as sugar or salt."[133] "Had the substance been unique in appearance," the court acknowledged, "we believe the complaint for a search warrant would have been sufficient."[134] It would have been sufficient, according to the *Palanza* court, "even absent the uniqueness of the substance's appearance," had the informant identified the occupant of the premises, who had represented the substance to be cocaine, to be one of the possessors of the substance, thereby establishing, "an admission against penal interests."[135]

By subjecting the affidavit to a hypercritical assessment, the

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Spinelli, 393 U.S. at 416-18; United States v. Sellers, 483 F.2d 37, 41 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); United States v. King, 564 F. Supp. 25, 29-30 (S.D.N.Y. 1982).

128. *See* United States v. Harris, 403 U.S. 573, 583-84 (1971) (plurality opinion).
129. 55 Ill. App. 3d 1028, 371 N.E.2d 687 (1978).
130. *Id.* at 1029, 371 N.E.2d at 688.
131. *Id.*
132. *Id.*
133. *Id.* at 1030, 371 N.E.2d at 689.
134. *Id.* at 1031, 371 N.E.2d at 689.
135. *Id.*

Palanza court committed fundamental error. The court held that the affidavit had not satisfied *Aguilar*'s basis-of-knowledge test. Yet, the affidavit had done just that. In formulating its two-pronged test in *Aguilar*, the Supreme Court mandated that "the magistrate must be informed of some of the underlying circumstances from which the informant [could conclude] that the narcotics were where he claimed *they were*, and some of the underlying circumstances from which the officer [could conclude] that the informant. . .was 'credible' or his information 'reliable.' "[136] The prosecution satisfied the basis-of-knowledge prong in *Palanza* by informing the magistrate, through the personal observation of an experienced informant, of "the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were."[137] Direct personal observation by an informer of criminal activity satisfies the basis-of-knowledge prong,[138] and is sufficient to establish the reliability of the evidence upon which the informant based his conclusions of wrongdoing.[139] Furthermore, this direct personal observation was confirmed by an occupant of the premises. Therefore, the affidavit clearly satisfied the basis-of-knowledge prong, and the court, in *Palanza*, should have so held, rather than engage in an unwarranted refinement of the knowledge test.[140]

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136. *Aguilar*, 378 U.S. at 114 (footnote omitted) (emphasis added).

137. *Id.*; *see* 55 Ill. App. 3d at 1029-30, 371 N.E.2d at 688.

138. *See Spinelli*, 393 U.S. at 416.

139. United States v. Harris, 403 U.S. 573, 589 (1971) (Harlan, J., dissenting) ("alleged direct personal observation of the informant [is] surely a sufficient basis upon which to predicate a finding of reliability [of evidence] under any test").

140. *See* United States v. Cates, 663 F.2d 947, 948 (9th Cir. 1981); United States v. House, 604 F.2d 1135, 1142 (8th Cir. 1979), *cert. denied*, 445 U.S. 931 (1980); United States v. Shipstead, 433 F.2d 368, 372 (9th Cir. 1970).

As an example, among several others, of how an affiant may properly demonstrate the basis of knowledge of his informant, the *Palanza* court quoted, with approval, one commentator's observation that the informer "may be shown to know that the substance was a narcotic substance by. . .'a use of a part of the substance by the informant followed by the effects to be expected if it is what the informant says it is.' " 55 Ill. App. 3d at 1030-31, 371 N.E.2d at 689 (quoting LaFave, *Probable Cause from Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1, 39-40).

Such an unrealistic approach undoubtedly contributed to the demise of *Aguilar-Spinelli* in *Gates*. *See Shipstead*, 433 F.2d at 372 ("[t]he suggestion that a search warrant affidavit must allege how the informant knew the drug was methamphetamine is hypercritical and falls before the [United States v. Ventresca, 380 U.S. 102, 108 (1965)] admonitions. . .that such affidavits 'must be tested. . .in a common sense and realistic fashion' and '[t]echnical requirements of elaborate specificity. . .have no proper place in this area' "); *accord*, *Cates*, 663 F.2d at 948 (informant related personally observed facts; "[i]t is not critical that he did not state how he knew that the contraband was a controlled substance") (citations omitted); *House*, 604 F.2d at 1142 (an omission in the affidavit as to how the informer identified the drugs is not "fatal" to a finding of probable cause).

The third, and final, case cited by the *Gates* majority to illustrate the "rigid application" of the *Aguilar-Spinelli* rules was *People v. Brethauer*.[141] In *Brethauer*, the Supreme Court of Colorado invalidated a warrant that had been issued on the basis of an affidavit

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This unrealistic approach ignored the fact that the standard of probable cause is " 'only the probability, and not a prima facie showing,' " *Gates*, 103 S. Ct. at 2330 (quoting *Spinelli*, 393 U.S. at 419); *see Locke*, 11 U.S. (7 Cranch) at 348, or "proof beyond a reasonable doubt or by a preponderance of the evidence," *Gates*, 103 S. Ct. at 2330, of criminal activity.

Although it is true that the basis-of-knowledge prong of *Aguilar-Spinelli* may be satisfied by an informant injecting himself with a part of the alleged narcotic substance, followed by the effects to be expected from the injection of narcotics, Foxall v. State, 157 Ind. App. 19, 24-25, 298 N.E.2d 470, 472-73 (1973), it does not follow that this method of proof sets "a minimum standard" by which all methods of satisfying the knowledge test are to be measured. Hoskins v. State, 174 Ind. App. 475, 479, 367 N.E.2d 1388, 1390 (1977) (observing that were the rule otherwise, the affidavit in *Foxall* would itself have been deficient "because the informant did not state how he knew what a heroin reaction was like"). Nor is it appropriate to argue, as one commentator has, that insistence upon some showing that the informant knew that the substance he observed was, in fact, a narcotic, is not hypercritical because such a showing of knowledge may be made in a variety of ways. LaFave, *supra* note 115, 1977 U. ILL. L.F. at 39. The *ease* with which the basis-of-knowledge requirement may be satisfied by a particular method in a particular factual setting is not the issue. Rather, the issue is whether the standard of probable cause has been satisfied by the particular method employed in that particular setting. Resolution of this issue will depend upon the surrounding facts and circumstances. Here, both magistrates and reviewing courts should be guided by the Supreme Court's admonition in Brinegar v. United States, 338 U.S. 160 (1949):

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, *not legal technicians*, act. The standard of proof is accordingly *correlative* to what must be proved.

Id. at 175 (emphasis added).

The Court has remained faithful to this command by insisting that affidavits for warrants "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." United States v. Ventresca, 380 U.S. 102, 108 (1965); *see Gates*, 103 S. Ct. at 2330-31, 2332. Such documents are "normally drafted by nonlawyers in the midst and haste of a criminal investigation," and "[t]echnical requirements of elaborate specificity" would have "no proper place in this area." *Ventresca*, 380 U.S. at 108; *see Gates*, 103 S. Ct. at 2330. Furthermore, a "grudging or negative attitude by reviewing courts toward warrants will tend to discourage [law enforcement officers] from submitting their evidence to a judicial officer before acting," *Ventresca*, 380 U.S. at 108, which is what the Supreme Court has encouraged them to do. *See* United States v. Watson, 423 U.S. 411, 423 (1976); *Ventresca*, 380 U.S. at 106-09; *see also* Jones v. United States, 362 U.S. 257, 270-71 (1960). The short of it is, that if the police are to be encouraged to seek warrants, they should not simultaneously be discouraged from doing so by rigid insistence upon hypertechnical assesments of probable cause. *See Ventresca*, 380 U.S. at 108-09; Gonzales v. Beto, 425 F.2d 963, 970 (5th Cir.), *cert. denied*, 400 U.S. 928 (1970). Similarly, they should not be restricted to any particular method, regardless of its degree of reliability, of establishing the basis of knowledge of an informant's tip.

141. 174 Colo. 29, 482 P.2d 369 (1971) (en banc).

containing an informant's tip. The affiant stated that he knew the informant " 'to be reliable, based on past information supplied by the informer which has proved to be accurate.' "[142] The informer claimed that L.S.D. and marijuana were located on specified premises, as well as in two motor vehicles, and the affiant alleged that the informant had purchased, on two occasions, L.S.D. and S.T.P. " 'within the past five days.' "[143] The affiant also stated that the purchased capsules were delivered to the " 'Weld County Sheriff's Office, [and] were tested and did contain L.S.D. and S.T.P.' "[144] Further, that at the time of purchase, the informer saw other capsules containing L.S.D. and S.T.P., " 'and the party making the sale said he had two ounces of marijuana.' "[145] The seller also told the informant that he was going to obtain one hundred additional capsules of L.S.D. and two kilograms of marijuana, " 'and offered to sell to the informer one kilogram of marijuana.' "[146] Finally, the informant, who " 'also saw instruments for use in smoking marijuana on the premises, [is] to make the purchase today.' "[147]

The court found the affidavit to be "fatally defective" under both prongs of *Aguilar-Spinelli*, as the reliability of the informant was never established, nor was any basis set forth to show the source of his information.[148] Furthermore, the court reasoned, while the affidavit referred to three locations, namely, two motor vehicles and a house, there was nothing in the affidavit which indicated how the informer had concluded that the drugs were present in the house, or that there existed a connection between the defendants and the house or the vehicles.[149] In addition, the affidavit did not show whether the information obtained by the informant was through his own observations or from another person. Nor did the affidavit contain a statement "as to whether" the "alleged" purchases had taken place on the premises or had involved persons who were "in any way" related to or associated with the premises.[150] Finally, the court concluded, nothing appeared in the affidavit to establish whether the capsules and marijuana had been observed by the informer or by someone else, or to establish where the " 'instruments' "

142. *Id.* at 34, 482 P.2d at 371.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 34-35, 482 P.2d at 371.
150. *Id.* at 35, 482 P.2d at 371.

had been observed.[151]

Justice Hodges, dissenting, correctly complained that the majority was requiring "supertechnical drafting of affidavits," and had failed to perceive from the affidavit the connection between "the described [drug] transactions [and] the described premises."[152] But, argued Justice Hodges, "the affidavit describes that the informant [had] stated that there [were] L.S.D. and S.T.P. capsules and marijuana at the premises; that the informant [had] made purchases of the same; and [that] the informant also saw instruments for use in smoking marijuana on the premises."[153] Moreover, the first sentence of the affidavit specifically stated the address of the premises. Thus, he interpreted the majority opinion as apparently requiring every clause of the affidavit to be followed by a specific reference to the address of the premises.[154]

Decisions such as *Brethauer*, *Palanza*, and *Bridger* place law enforcement officers between a rock and a hard place. On the one hand, the Supreme Court has admonished them to seek warrants wherever reasonably feasible.[155] Accordingly, to encourage the practice of seeking warrants, the Court has expressed a preference for searches and seizures conducted under the authority of a warrant by noting that, in doubtful or marginal cases, a search or seizure under a warrant may be sustained where, without one, it would be invalidated.[156] On the other hand, if affidavits for search warrants are not tested and interpreted by magistrates and courts "in a commonsense and realistic fashion," but rather, are subjected to "[t]echnical requirements of elaborate specificity," as reflected in a "grudging or negative attitude by reviewing courts toward warrants," police officers will be reluctant to submit this evidence of wrongdoing to prior judicial scrutiny.[157] This is precisely the vice of

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151. *Id.*

152. *Id.* at 42, 482 P.2d at 375 (Hodges, J., dissenting).

153. *Id.*

154. *Id.*

155. Katz v. United States, 389 U.S. 347, 357 (1967) (subject only to "a few" exceptions, warrantless searches are *per se* unreasonable); United States v. Ventresca, 380 U.S. 102, 106-09 (1965) (strongly supporting preference to be accorded to searches under a warrant).

156. *See* United States v. Watson, 423 U.S. 411, 423 (1976) (arrest warrant); *Ventresca*, 380 U.S. at 106-09 (search warrant); *see also* Jones v. United States, 362 U.S. 257, 270-71 (1960) (in doubtful cases, where there is lacking "clearly convincing evidence" justifying immediate need to search, it is "most important that resort be had to a warrant," so that determinations of probable cause can be made by "an independent judicial officer").

157. *Ventresca*, 380 U.S. at 108; United States v. Shipstead, 433 F.2d 368, 372 (9th

the decisions in *Brethauer*, *Palanza*, and *Bridger*. By subjecting the basis-of-knowledge prong of *Aguilar-Spinelli* to a hypercritical assessment of probable cause, the courts in these cases effectively discouraged the police from submitting their evidence to a judicial officer prior to acting.

Constitutional rules and principles were established to guarantee fundamental rights, not to encourage the facilitation of crime. The net result of applying the *Aguilar-Spinelli* rules in an excessively technical and unrealistic fashion has been to breed disrespect for the lofty ideals the Supreme Court sought to implement by fashioning the rules, and to thwart the Court's attempts to encourage the police to submit their evidence of crime to prior judicial scrutiny.

And so, the stage was set for *Gates*.

IV. *ILLINOIS V. GATES*

In *Illinois v. Gates*,[158] the Supreme Court "squarely addressed," for the first time, the application of the *Aguilar-Spinelli* standards to tips from anonymous informants.[159] At issue was the constitutional sufficiency of an anonymous, but partially corroborated, message received by the police.[160]

Bloomingdale, Illinois, is a suburb of Chicago, and is located in Du Page County. On May 3, 1978, the Bloomingdale Police Department received by mail an anonymous handwritten letter which stated that the defendants, Lance and Susan Gates, were residents of " 'your town [who] strictly make their living on selling drugs.' "[161] The tip further alleged that the defendants lived " 'on Greenway, off Bloomingdale Rd. in the condominiums.' "[162]

Cir. 1970) *Brethauer*, 174 Colo. at 42-43, 482 P.2d at 375 (Hodges, J., dissenting); *see* Gonzales v. Beto, 425 F.2d 963, 970 (5th Cir.), *cert. denied*, 400 U.S. 928 (1970).

158. 103 S. Ct. 2317 (1983).

159. *Id.* at 2356 (Brennan, J., dissenting).

160. The specific question presented for review was whether "detailed information provide to police by an anonymous informer, coupled with government corroboration of the information, provide probable cause for the issuance of a search warrant?" Petitioner's Opening Brief on Merits at i, Illinois v. Gates, 103 S. Ct. 2317 (1983).

After receiving briefs and hearing oral arguments on this issue, the Court ordered the parties in *Gates* to address the question of whether the exclusionary rule should be modified to permit the admissibility of evidence obtained by law enforcement officers in the reasonable belief that their search-and-seizure conduct was consistent with the fourth amendment. The Court, however, "with apologies to all," declined to address this good-faith exception to the exclusionary rule, on the ground that it was never raised before, nor passed upon by, the Illinois courts. *Gates*, 103 S. Ct. at 2321.

161. *Gates*, 103 S. Ct. at 2325.

162. *Id.*

The message went on to relate that the defendants made most of their drug purchases in Florida, with Susan Gates driving the family car to Florida and leaving it there to be " 'loaded up' " with drugs.[163] Lance Gates would then fly down to Florida and drive the vehicle back home. Meanwhile, Susan Gates would fly back to Illinois, after having dropped the car off in Florida.[164]

In addition, the tip predicted that Susan would be driving down to Florida on " 'May 3,' " and that Lance would be " 'flying down in a few days to drive it back.' "[165] The tip then alleged that when Lance " 'drives the car back[,] he has the trunk loaded with over $100,000.00 in drugs.' " Further, stated the message, the Gates' presently " 'have over $100,000.00 worth of drugs in their basement.' "[166]

The report imparted the fact that the Gates' bragged that they never had to work, making their " 'entire living on pushers,' " and concluded with the " 'guarantee [that] if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their home often.' "[167]

The letter was referred to Detective Mader, who decided to pursue the tip. Mader's investigation revealed that Lance Gates had an Illinois driver's license, and was residing with his wife in Bloomingdale. He also learned from a police officer assigned to O'Hare Airport that one "L. Gates" had made a reservation on Eastern Airlines flight 245 to West Palm Beach, Florida, scheduled to depart from Chicago on May 5th at 4:15 p.m.[168]

Mader then made arrangements with an agent of the Drug Enforcement Administration (DEA) to place the May 5th Eastern Airlines flight under surveillance. The Agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxicab to a nearby Holiday Inn. The agents further reported that Gates went to a room registered to a Susan Gates, and that, at 7:00 a.m. the next day, Gates and an unidentified woman left the hotel in a Mercury automobile bearing Illinois registration plates and drove northbound on an interstate highway frequently used by travelers driving the Chicago area. In addition, the DEA agent advised Mader that the registration plate number on the Mercury was registered to a Hornet

163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*

station wagon owned by Gates. The agent also informed Mader that the driving time between West Palm Beach and Bloomingdale was approximately twenty to twenty-four hours.[169]

Mader then executed an affidavit setting forth the foregoing facts, and submitted it to an Illinois magistrate, along with a copy of the anonymous letter. The magistrate, making a finding of probable cause on the basis of the tip, as corroborated by the law enforcement investigation, issued a search warrant for the Gates' residence and for their motor vehicle.[170]

On May 7th, at 5:15 a.m., approximately thirty-six hours after he had departed from Chicago by air, Lance Gates, along with his wife Susan, returned to his residence in Bloomingdale, driving the motor vehicle in which they had left West Palm Beach some twenty-two hours earlier. The Bloomingdale police were waiting for them, and conducted a search of the trunk of the Mercury which uncovered a large quantity of marijuana. A search of the defendants' home revealed additional marijuana, as well as weapons and other contraband.[171]

The defendants successfully moved to suppress the fruits of these searches, persuading the Illinois courts that the warrant had been issued without probable cause.[172] A majority of the Supreme Court of Illinois observed that, standing alone, the anonymous tip could not provide the basis for a magistrate's detemination of the existence of probable cause.[173] The majority found that the letter to the Bloomingdale Police Department was deficient in establishing that its author was credible or his information reliable, and in providing an adequate basis for the writer's predictions regarding the criminal activities of the defendants. Thus, the tip failed to satisfy either the veracity or the basis-of-knowledge prong of the *Aguilar* test.[174]

The majority opinion next analyzed Detective Mader's affidavit to determine whether it might be capable of supplementing the tip with information sufficient to permit a finding of probable cause. Again, however, it concluded that there was lacking sufficient information, even as supplemented by the affidavit, to sustain a detemina-

169. *Id.* at 2325-26.

170. *See id.* at 2326.

171. *Id.*

172. People v. Gates, 85 Ill. 2d 376, 390, 423 N.E.2d 887, 893 (1981).

173. *Id.* at 386, 423 N.E.2d at 891.

174. *Id.* at 384-86, 423 N.E.2d at 890-91. The Supreme Court of the United States was "inclined to agree" with this assessment. 103 S. Ct. at 2326.

tion of probable cause.[175] First, the majority opinion found that the *Aguilar-Spinelli* veracity prong had not been satisfied because there was no legitimate basis for a determination by either the magistrate or Detective Mader that the anonymous informant was credible.[176] It rejected the notion that self-verifying detail in an informer's report may be resorted to to establish the credibility of an informant or the reliability of his information, thereby satisfying the veracity prong of *Aguilar-Spinelli*. To the court, a fabricated story could just as easily be based upon fine detail as it could be upon a rough outline. Hence, minute detail did not inform the court about veracity.[177]

In addition, the Supreme Court of Illinois determined that the letter from the anonymous informer gave no indication to the reviewing magistrate of the basis of its writer's knowledge of the defendants' criminal activities.[178] Not only had the report failed to supply sufficient detail to permit an inference that the informant had a reliable basis for his allegations, but also the corroborative evidence contained in Detective Mader's affidavit was only of innocent activity.[179] Therefore, because the anonymous tip had failed to satisfy both prongs of the *Aguilar-Spinelli* inquiry,[180] and the corroborative evidence contained in the supporting affidavit was insufficient to cure the deficiency in either prong, there was an absence of probable cause for the warrant.[181]

After comparing the specific detail of the tip and the corroborating information in the *Gates* affidavit with the situation presented in *Draper v. United States*,[182] Justice Moran was persuaded that the *Draper* analysis was dispositive of the issue raised. In his dissent in *Gates*, he argued that the specificity of detail in the letter, coupled with the corroboration of every detail of the informant's report by the police investigation, was sufficient to satisfy the underlying basis-of-knowledge prong of *Aguilar-Spinelli*.[183] Furthermore, the specific information contained in the tip, subsequently verified by the law enforcement officers, demonstrated the credibility and reliability of the informer's allegations, thereby satisfying the veracity prong of

175. 85 Ill. 2d at 386-87, 423 N.E.2d at 891-92.

176. *Id.* at 385, 423 N.E.2d at 891.

177. *Id.* at 388, 423 N.E.2d at 892. The court did observe that self-verifying detail may be used to satisfy the basis-of-knowledge test. *Id.*

178. *Id.* at 389, 423 N.E.2d at 893.

179. *Id.* at 389-90, 423 N.E.2d at 893.

180. *See id.* at 384, 423 N.E.2d at 891; *see also Gates*, 103 S. Ct. at 2326-27.

181. *See* 85 Ill.2d at 389-90, 423 N.E.2d at 893.

182. 358 U.S. 307 (1959); *see infra* text accompanying notes 220-28.

183. 85 Ill. 2d at 393-94, 423 N.E.2d at 895 (Moran, J., dissenting).

Aguilar-Spinelli.[184] Although Justice Moran acknowledged that the corroborating information related to innocent activity, it was, in this case, "endowed with an aura of suspicion by virtue of the informant's tip."[185]

To Justice Moran, then, the "determining factor" in complying with both prongs of *Aguilar-Spinelli* and establishing probable cause is "the specificity of the tip combined with the police verification by investigation."[186] Because that had been accomplished in this case, and the issuance of the warrant in question was consistent with the rationale underlying *Aguilar-Spinelli*, the defendants' right to be free from unreasonable searches and seizures was not violated.[187]

On appeal, the Supreme Court reversed. In so doing, the Court repudiated the two-prong analysis developed and refined in *Aguilar-Spinelli*, and replaced it with a totality-of-the-circumstances approach in which the elements of an informant's "veracity," "reliability," and "basis of knowledge" would not be treated as "entirely separate and independent requirements to be rigidly exacted in every case."[188] Although the Court considered these elements as being "highly relevant" in assessing the value of an informant's tip, it nevertheless believed that they should be examined as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' " for the issuance of a warrant.[189]

Writing for a five-member majority, Justice Rehnquist opined that probable cause was too "fluid" a concept — "turning on the assessment of probabilities in particular factual contexts" — to lend itself to "a neat set" of legal commands.[190] Compounding this lack of fixity is the variability of informants' tips,[191] which "doubtless come in many shapes and sizes from many different types of persons."[192] It was readily apparent, therefore, to the majority, that "[r]igid legal rules are ill-suited to an area of such diversity."[193]

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184. *Id.* at 394, 423 N.E.2d at 895.

185. *Id.* at 395, 423 N.E.2d at 896.

186. *Id.* at 395, 423 N.E.2d at 895.

187. *Id.* at 396, 423 N.E.2d at 896.

188. 103 S. Ct. at 2327-28 (footnote omitted).

189. *Id.* at 2328.

190. *Id.* In Wong Sun v. United States, 371 U.S. 471 (1963), the Court had observed that the "quantum of information which constitutes probable cause. . *must* be measured by the *facts* of the particular case." *Id.* at 479 (emphasis added).

191. 103 S. Ct. at 2329.

192. *Id.* at 2328.

193. *Id.* at 2329.

Moreover, continued Justice Rehnquist, there are "persuasive arguments" against according the elements of an informant's veracity or reliability and his basis of knowledge the independent status required by the *Aguilar-Spinelli* analysis. Instead, these elements are "better understood" as relevant considerations in the totality-of-the-circumstances approach that should guide determinations of probable cause. Thus, under this approach, a deficiency in one element may be compensated, in assessing the overall reliability of an informer's report or tip, by a strong showing as to the other, "or by some other indicia of reliability."[194]

Justice Rehnquist cited the following as illustrative examples of the totality-of-the-circumstances analysis:

> (a) if an informant is known for the "unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip";
>
> (b) if a report of criminal activity is received from an "unquestionably honest citizen . . .—which if fabricated would subject him to criminal liability—" it will not be necessary to subject the basis of his knowledge to "rigorous scrutiny"; and
>
> (c) even if some doubt is entertained as to a particular informant's motives, his "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case."[195]

These examples, then, demonstrate the "balanced assesment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip"[196] sanctioned under the totality-of-the-circumstances approach. In contrast, reasoned Justice Rehnquist, the *Aguilar-Spinelli* two-pronged test has "encouraged an excessively technical dissection of informants tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to [a reviewing] magistrate."[197]

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194. *Id.* This analysis is a variation of the standard of reasonableness, determined by "the facts and circumstances - the total atmosphere of the case," adopted by the court in United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

195. 103 S. Ct. at 2329-30.

196. *Id.* at 2330.

197. *Id.* As examples of such "dissection," reflecting a "rigid application" of the *Aguilar-Spinelli* rules, the majority cited People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971) (en banc); People v. Palanza, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (1978); and

Because only the probability of criminal wrongdoing is the standard of probable cause,[198] and the warrant process involves numerous laymen applying "nontechnical, common-sense judgments," technical requirements of elaborate specificity, appropriate to more formal legal proceedings, are inappropriate to proceedings involving determinations of probable cause.[199] Moreover, the majority observed, the inherent subtleties of the two-pronged test, compounded by the informal, "often hurried context" in which it must be applied, are "particularly unlikely to assist magistrates in determining probable cause."[200]

Similarly, Justice Rehnquist continued, reviewing courts should pay great deference to a magistrate's finding of probable cause, and should not subject the constitutional sufficiency of supporting affidavits for warrants to an "after-the-fact-scrutiny" that takes the form of a "*de novo*" review.[201] For a court to engage in a " 'grudging or negative attitude' " towards warrants, by interpreting supporting " 'affidavits in a hypertechnical, rather than a commonsense, manner,' " would run counter to the strong preference of the fourth amendment for searches conducted pursuant to a warrant.[202] The net result might be an increased reliance by law enforcement officers on warrantless searches and seizures.[203]

Reflecting this preference for the warrant process, Justice Rehnquist noted that the "traditional [in contrast with the *Aguilar-Spinelli*] standard" for reviewing a magistrate's determination of probable cause has been that the fourth amendment requires only a substantial basis for a finding of probable cause.[204] Accordingly, reaffirmation of this standard will "better serve[]" the purpose of encouraging the police to seek recourse to the warrant procedure, and

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Bridger v. State, 503 S.W.2d 801 (Tex. Crim. App. 1974). *See supra* text accompanying notes 120-57.

198. Although probability is the acknowledged standard of probable cause, *Gates*, 103 S. Ct. at 2330; Texas v. Brown, 103 S. Ct. 1535, 1543 (1983) (plurality opinion) (a " 'practical, nontechnical' probability"); *Spinelli*, 393 U.S. at 419, Justice Rehnquist quoted, with approval, Chief Justice Marshall's observation in *Locke* that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation. . . .It imports a seizure made under circumstances which warrant *suspicion*." 103 S. Ct. at 2330 (citing *Locke*, 11 U.S. (7 Cranch) at 348)(emphasis added).

199. 103 S. Ct. at 2330-31.

200. *Id.* at 2331.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

is "more consistent" with a reviewing court's deference to determinations of probable cause by magistrates than is the two-pronged test of *Aguilar-Spinelli*.[205]

Of final relevance to the majority's repudiation of *Aguilar-Spinelli* was the belief that the strictures which "inevitably accompany" the two-pronged test cannot avoid "seriously impeding" the task of effective law enforcement.[206] If that test must be "rigorously" applied in every case, anonymous tips will prove to be of "greatly diminished value in police work."[207] In the opinion of the majority, it could not be expected of "[o]rdinary citizens [to provide] extensive recitations of the basis of their everyday observations."[208] Likewise, noted the majority, the veracity of anonymous informants is "by hypothesis largely unknown, and unknowable."[209] Consequently, tips from such persons seldom could survive a "rigorous application" of either of the *Aguilar-Spinelli* prongs. Yet, such reports, particularly when supplemented by independent police investigation, will contribute frequently to the solution of crimes. While a "conscientious assessment" of the basis for crediting anonymous tips is required by fourth amendment jurisprudence, a standard that leaves "virtually no place for anonymous *citizen* informants is not."[210]

"For all these reasons," concluded the majority, it was "wiser to abandon" the *Aguilar-Spinelli* two-pronged test, and, in its place, to "reaffirm" the totality-of-the-circumstances analysis that "traditionally" has informed determinations of probable cause.[211] This will require a magistrate, passing upon an application for a warrant,

> simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[212]

And, it will be the duty of a reviewing court "simply to ensure" that there was a substantial basis for the magistrate's conclusion that probable cause existed.[213]

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205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 2331-32.
210. *Id.* at 2332 (emphasis added).
211. *Id.*
212. *Id.*
213. *Id.*

"We are convinced," observed the majority, that this "flexible, easily applied standard" will "better achieve" the accomodation of private and public interests that the fourth amendment requires than does the *Aguilar-Spinelli* approach.[214]

Although the *Gates* majority referred to its totality-of-the-circumstances analysis as a "standard," it never provided meaningful structure or guidelines for probable cause inquiries by magistrates reviewing applications for warrants, other than a general endorsement of "a practical, common-sense" assessment of probable cause,[215] and an admonition that " 'bare bones' affidavits" would not be sufficient to establish probable cause.[216] Thus, once a magistrate determines that an affidavit contains more than "bare conclusions,"[217] he will have to decide, "based solely on 'practical[ity]' and 'common-sense,' whether there is a fair probability that contraband will be found in a particular place."[218] This means, then, that the question of whether the probable cause standard is to be "diluted" in informant cases will be left solely to the commonsense judgements of magistrates, and "some showing of facts" that an informer is a credible person who has obtained his information in a reliable way would not be an express prerequisite to the issuance of a warrant.[219]

Applying the totality-of-the-circumstances analysis to the affidavit in *Gates*, the majority had no difficulty in determining that the corroboration of details of the informant's tip by independent police work was sufficient to establish probable cause. Believing that the approach developed in *Draper v. United States*,[220] the "classic case" on the importance and value of corroborative efforts of law enforcement officials,[221] represented controlling precedent, the *Gates* majority briefly summarized the *Draper* analysis.

In *Draper*, an informant named Hereford, who had previously provided accurate and reliable information, reported to law officers on September 3d that the defendant had recently taken up residence

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214. *Id.*

215. *Id.*

216. *Id.* at 2332-33.

217. *Id.* at 2332.

218. *Id.* at 2350 (White, J., concurring in the judgment) (brackets in original); *see id.* at 2332-33 ("area" beyond the " 'bare bones' affidavits" does not lend itself to "a prescribed set of rules," such as that developed from *Spinelli*; rather, "the flexible, common-sense standard. . .better serves the purposes of the . . . probable cause requirement").

219. *See* 103 S. Ct at 2350 (White, J., concurring in the judgment).

220. 358 U.S. 307 (1959).

221. 103 S. Ct. at 2334.

in Denver and " 'was peddling narcotics to several addicts' in that city."[222] Four days later, on September 7th, Hereford further reported that the defendant had gone to Chicago the day before by train, and would be returning by train with three ounces of heroin, either on the morning of September 8th or the morning of the 9th.[223] Hereford also gave a detailed physical description of the defendant and of the clothing he would be wearing, describing Draper as a Negro of light brown complexion, 27 years of age, 5 feet, 8 inches in height, weighing approximately 160 pounds, and wearing a light colored coat, brown slacks, and black shoes. He also advised that Draper habitually " 'walked real fast.' "[224] It does not appear, however, that Hereford provided any indication of the basis for his information.

Law officers took up suveillance at the Denver Union Station on the morning of September 8th, but did not see anyone fitting the description that Hereford had supplied. Repeating the process the following morning, the officers spotted a person, having "the exact physical attributes" and wearing the "precise clothing" described by the informant, alight from an incoming Chicago train and start walking " 'fast' " toward the exit.[225] He was carrying a tan zipper bag in his right hand, and his left hand was thrust in the pocket of his raincoat. The officers intercepted the passenger, and placed him under arrest. An incidental search uncovered two envelopes containing heroin clutched in his left hand, and a syringe in the tan zipper bag.[226]

In sustaining the legality of the warrantless arrest, the Supreme Court noted that in the process of investigating a tip from an informer of proven reliability, the officers, had "personally verified every facet of the information" imparted, except whether the defendant had accomplished his mission and had the three ounces of heroin on his person or in his bag.[227] The Court reasoned that "surely, with every other bit of Hereford's information being thus personally verified," the officers had probable cause to believe that "the remaining unverified bit of Hereford's information— that Draper would have the heroin with him— was likewise true."[228]

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222. 358 U.S. at 309.
223. *Id.*
224. *Id.* at 309 & n.2.
225. *Id.* at 309-10.
226. *Id.* at 310.
227. *Id.* at 313.
228. *Id.*

Applying the *Draper* analysis to the showing of probable cause in *Gates*, the majority argued that the facts obtained through independent law enforcement investigation "at least suggested" that the defendants were involved in drug trafficking.[229] The Court took note of the fact that Florida is "well-known as a source" of illegal drugs.[230] Furthermore, Lance Gates' flight to Palm Beach, his brief, overnight stay in a hotel, and "apparent immediate return north to Chicago in the family car, conveniently awaiting him in West Palm Beach," was as suggestive of a prearranged drug run as it was of an innocent vacation trip.[231]

In addition, the *Gates* majority reasoned that the magistrate could rely upon the information contained in the anonymous letter, which had been corroborated "in major part" by the investigating officers.[232] Although the informant in *Draper* had supplied reliable information on previous occasions, while the credibility and reliability of the anonymous informant in *Gates* were unknown to the Bloomingdale police, this distinction, to the majority, became "far less significant" after the independent investigative work of Detective Mader had occured.[233] "The corroboration of the letter's predictions that the Gates' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the [family] car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions were also true."[234] Because the informer had been proven accurate about some predictions, it was more likely that he was probably right about the other facts.[235] Therefore, in the opinion of the majority, this type of

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229. 103 S. Ct. at 2334.

230. *Id.*

231. *Id.*

232. *Id.* at 2334-35. The fact that the verification of details contained in the letter amounted only to corroboration of seemingly innocent activity was of little moment to the majority. In the first place, the activity, while seemingly innocent, took on a suspicious character in the light of the initial tip. *Id.* at 2335 n.13. Secondly, the standard of probable cause is one only of "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* From this the majority reasoned, "[b]y hypothesis, [that innocent behavior] frequently will provide the basis for a showing of probable cause." *Id.* To require otherwise, thought the majority, would be to "*sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Id.* Therefore, "the relevant inquiry," to the majority, in making a determination of probable cause, "is not whether particular conduct is 'innocent' or 'guilty,' but the degree of *suspicion* that attaches to particular types of non-criminal acts." *Id.* (emphasis added); *see* United States v. Anderson, 500 F.2d 1311, 1316 (5th Cir. 1974).

233. 103 S. Ct. at 2335.

234. *Id.*

235. *Id.*; *see Spinelli*, 393 U.S. at 427 (White, J., concurring).

" 'reliability' " or " 'veracity,' " while not necessarily adequate to satisfy "some views" of the veracity prong of *Aguilar-Spinelli*, was sufficient for the "practical, common-sense judgement called for in making a probable cause determination."[236] The majority was satisfied that, for purposes of assessing probable cause, it was enough that corroboration through other sources of information be sufficient to establish a substantial basis for crediting the tip.[237]

Applying these criteria to the *Gates* tip, the majority found that "the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but [also] to future actions of third parties ordinarily not easily predicted."[238] Moreover, "[t]he letter writer's accurate information as to the travel plans of each of the Gates was of a character likely obtained only from the Gates themselves, or from someone familiar with their not entirely ordinary travel plans."[239] Thus, a magistrate could properly conclude that "[i]f the informant had access to accurate information of this type. . .it was not unlikely that he also had access to reliable information of the Gates' alleged criminal activities."[240] Although there was no certainty that the Gates' travel plans had not been "learned from a talkative neighbor or travel agent," it was enough, for purposes of probable cause analysis, that there existed a "fair probability that the writer of the anonymous letter had obtained his entire story either from the Gates or someone they trusted."[241] "[J]ust this probability" was provided by corroboration of "major portions of the letter's predictions."[242] The majority concluded "that the judge issuing the warrant had a 'substantial basis for. . .conclud[ing]' that probable cause to search the Gates' home and car existed."[243]

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236. 103 S. Ct. at 2335.

237. *Id.*; *see* Jones v. United States, 362 U.S. 257, 269, 271 (1960).

238. 103 S. Ct. at 2335.

239. *Id.*

240. *Id.*

241. *Id.* at 2336.

242. *Id.*

243. *Id.* Justice Blackmun provided the fifth, and crucial, vote to overrule the *Aguilar-Spinelli* rules. His decision to join the majority was not surprising. In his concurring opinion in United States v. Harris, 403 U.S. 573 (1971), Justice Blackmun expressed his displeasure with *Spinelli* in strong terms. Not only did he believe that *Spinelli* had been "wrongly decided," at the Supreme Court level, but also that, if the decision were his to make, he "would overrule it." *Id.* at 586 (Blackmun, J., concurring). Of further interest is the fact that Justice Blackmun had been a member of the majority of the Eighth Circuit who had upheld the legality of the *Spinelli* affidavit. *Id.* at 585-86. Of such little ironies is legal history made.

Justice White concurred in the judgement in *Gates*, because he believed that the good-faith exception to the exclusionary rule governed the result in this case.[244] However, Justice White's opinion amounted to a dissent on the issue of rejecting the *Aguilar-Spinelli* standards. While he agreed that the warrant was properly issued under the circumstances, he believed that this conclusion was consistent with *Aguilar-Spinelli*.[245]

To Justice White, the lower court's characterization of the Gates' activities as being innocent was "dubious."[246] To the contrary, he viewed their behavior as being "quite suspicious."[247] Lance Gates' flight to an area notorious for narcotic trafficking, the brief overnight stay in a hotel, and apparent immediate return trip north, suggested a pattern that has been recognized by trained law enforcement officers as indicative of illegal drug-dealing activity.[248]

But Justice White would have upheld the warrant even if only "completely innocuous activities" had been corroborated.[249] To him, the "critical issue" was not whether the activities observed by the investigating law officers were "innocent or suspicious."[250] Rather, the issue was whether it could be inferred from the actions of the suspects, that the informant is "credible" and that he has obtained his information "in a reliable manner."[251] Moreover, this corroboration, based upon independent police work, could satisfy both the veracity and basis-of-knowledge prongs of the *Aguilar-Spinelli* test.[252]

Justice White believed that the police investigation in *Gates* "satisfactorily demonstrated," as it had in *Draper v. United States*,[253] that the informer's tip was as trustworthy as one that would alone have satisfied the *Aguilar-Spinelli* rules.[254] The police had corroborated the defendant's travel plans, as detailed in the anonymous letter. From this, Justice White argued, the reviewing magistrate "could

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244. 103 S. Ct. at 2336 (White, J., concurring in the judgment).
245. *Id.* at 2347.
246. *Id.* at 2348.
247. *Id.*
248. *Id.* at 2348; *see* United States v. Smith, 598 F.2d 936, 938 (5th Cir. 1979).
249. 103 S. Ct. at 2348 (White, J., concurring in the judgment).
250. *Id.*
251. *Id.*; *see* United States v. Anderson, 500 F.2d at 1316.
252. 103 S. Ct. at 2349 n.22. Justice White disagreed with Justice Brennan, who, in his dissenting *Gates* opinion, appeared to suggest that "the basis of knowledge prong could be satisfied by detail in the tip alone, but not by independant police work." *Id.*; *see id.* at 2354-55 (Brennan, J., dissenting). Justice White believed that the "rules would indeed be strange" if this were the case. *Id.* at 2349 n.22.
253. 358 U.S. 307 (1959).
254. 103 S. Ct. at 2349 (White, J., concurring in the judgment).

reasonably have inferred" that the informant, who had "specific knowledge" of the defendants' "unusual" itinerary, had not fabricated his story, and that his information had been obtained in a reliable way.[255] This, observed Justice White, was sufficient to satisfy the *Aguilar-Spinelli* standard of probability of criminal activity.[256] He therefore concluded that the judgement of the Supreme Court of Illinois, invalidating the warrant, had to be reversed.[257]

Because Justice White reached his conclusion within the framework of *Aguilar-Spinelli*, he did not believe it was necessary to overrule *Aguilar-Spinelli* in order to arrive at the correct result in *Gates*.[258] Justice White believed that, when properly applied, the *Aguilar-Spinelli* rules play "an appropriate role" in determinations of probable cause. He was concerned, moreover, that the position adopted by the majority "may foretell an evisceration of the probable cause standard."[259]

Justice White took strong exception to the majority's attempt to integrate the veracity and basis-of-knowledge tests, so that a deficiency in one could be compensated by a strong showing in the other.[260] He was particularly uncomfortable with the prospect of a finding of probable cause based solely on a tip from an informant of previously demonstrated reliability or "an unquestionably honest citizen," when the report "thoroughly" fails to establish the basis upon which the information had been obtained.[261] If this is so, reasoned Justice White, "then it must follow *a fortiori*" that a purely conclusory affidavit from a law enforcement officer, known by the magistrate to be honest and experienced, must also be acceptable. It would be "quixotic," indeed, if such a statement from an honest informer, but not from an honest law officer, could furnish probable cause.[262] The Supreme Court, however, has recognized that mere conclusory assertions or beliefs of law officers do not satisfy the probable cause requirement,[263] and Justice White feared that the majority's holding could be interpreted as "implicitly rejecting"

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255. *Id.*
256. *Id.*
257. *Id.* at 2349-50.
258. *Id.* at 2350.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. Whiteley v. Warden, 401 U.S. 560, 564-65 (1971); *Ventresca*, 380 U.S. at 108-09 (dictum); *Nathanson*, 290 U.S. at 47.

those prior teachings.[264]

Justice White acknowledged that the majority may not have intended "so drastic a result," and noted that the *Gates* Court had expressly reaffirmed the validity of cases, such as *Nathanson v. United States*,[265] that have held that, no matter how reliable an affiant-officer may be, a warrant may not issue unless the affidavit discloses a supporting factual basis.[266] He interpreted the majority position as limiting these cases to situations involving affidavits containing only "bare conclusions" and holding that, if an affidavit contains "anything more," it should be left to the reviewing magistrate to decide, "based solely on 'practical[ity]' and 'common-sense,' " whether there is "a fair probability" that objects subject to seizure will be found in a particular place.[267]

Thus, it appeared to Justice White, from his reading of the majority opinion, that the question of whether the probable cause standard is "to be diluted" was to be entrusted to "the common-sense judgments of issuing magistrates."[268] He was "reluctant," however, to approve any standard that did not "expressly" require, as a prerequisite to the issuance of a warrant in cases involving tips from informants, "some showing of facts from which an inference may be drawn" that the informer is a credible person whose information has been obtained in a reliable way.[269]

In conclusion, while Justice White agreed that the Court was "correctly concerned with the fact that some lower courts ha[d] been applying *Aguilar-Spinelli* in an unduly rigid manner," he still believed that, "with clarification of the rule of corroborating information, the lower courts are fully able to properly interpret *Aguilar-Spinelli* and avoid such unduly-rigid applications."[270] "I may be wrong," Justice White was frank to acknowledge, and "it ultimately may prove to be the case that the only profitable instruction we can provide to magistrates is to rely on common sense."[271] Still, "the question [of] whether a particular anonymous tip provides the basis for [the] issuance of a warrant will often be a difficult one," and Justice White would "at least attempt to provide more adequate gui-

264. 103 S. Ct. at 2350 (White, J., concurring in the judgment).
265. 290 U.S. 41 (1933).
266. 103 S. Ct. at 2350 (White, J., concurring in the judgment).
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 2350-51.
271. *Id.* at 2351.

dance by clarifying *Aguilar-Spinelli* and the relationship of those cases with *Draper* before *totally abdicating our responsibility* in this area."[272] "Hence," he could not join the majority opinion, "rejecting the *Aguilar-Spinelli* rules."[273]

Justice Stevens, joined by Justice Brennan, dissented, because Detective Mader's affidavit failed to satisfy even the new relaxed standard announced by the majority.[274] First, the dissent argued that the informant's accuracy had been compromised by the discrepancy between his allegation that Susan Gates would drive the family car to Florida, where she would leave it to be loaded up with drugs, and then fly back home, and the fact that Detective Mader's affidavit reported that she "left the West Palm Beach area driving the Mercury northbound."[275] To Justice Stevens, this "material mistake" undermined the reasonableness of relying upon the tip as a basis for making a forcible entry into a private residence.[276] Moreover, it "cast doubt" on the informer's hypothesis that the defendants had " 'over $100,000 worth of drugs in their basement.' "[277] The informant's prediction, of an itinerary that always kept one defendant in Bloomingdale, suggested that the defendants were reluctant to leave their home unguarded because they had something valuable hidden there. That inference, reasoned Justice Stevens, "obviously" could not be drawn once it became known that the defendants were "actually together over a thousand miles from home."[278] Finally, Justice Stevens believed that the discrepancy made the Gates' conduct appear "substantially less unusual" than the informer had described it. In short, he could find nothing "unusual" or "probative of criminal activity" in the "mere facts" that Mrs. Gates was in West Palm Beach with the family car, that she was subsequently joined by her husband at the Holiday Inn, and that the couple drove north together the following morning.[279]

Accordingly, Justice Stevens could not accept the majority's "casual conclusion" that, prior to the arrival of the defendants in

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272. *Id.* (emphasis added).

273. *Id.*

274. *Id.* at 2360 (Stevens, J., dissenting).

275. *Id.* Justice Rehnquist, in his majority opinion, dismissed this complaint, noting that the Court has never required that "informants used by the police be infallible," and that probable cause, particularly when law enforcement oficers have obtained a warrant, does "not require the perfection the dissent finds necessary." *Id.* at 2335 n.14.

276. *Id.* at 2360 (Stevens, J., dissenting).

277. *Id.*

278. *Id.*

279. *Id.*

Bloomingdale, there was probable cause to justify a valid entry and search of their home.[280] He noted that no one knew who the informant in this case was, or what had motivated him to write the letter. Furthermore, given that the report's predictions were "faulty in one significant respect," and were corroborated by nothing more than "ordinary innocent activity," Justice Stevens could only "surmise" that the majority's evaluation of the warrant's validity had been "colored by subsequent events."[281]

Justice Stevens also rejected the majority's attempt to find support for its holding in the *Draper* analysis.[282] He observed that *Draper* was readily distinguishable because that case involved the proven reliability of a known informant. Here, by contrast, the police were dealing with an anonymous informer, and some of his information was neither accurate nor reliable.[283]

Justice Stevens concluded that, "[i]n a fact-bound inquiry of this sort, the judgment of three levels of state courts, all of whom are better able to evaluate the probable reliability of anonymous informants in Bloomingdale, Illinois, than we are, should be entitled to at least a presumption of accuracy."[284] Although the veracity and basis-of-knowledge factors were now to be considered together, under the majority's analysis, "as circumstances whose totality must be appraised," the lower courts had found "neither factor present."[285] In addition, the "supposed 'other indicia' " took the form of activity that was not "particularly remarkable."[286] Therefore, Justice Stevens could "not understand how the Court [could] find that the 'totality' so far exceeds the sum of its 'circumstances.' "[287]

Justice Brennan, joined by Justice Marshall, authored the principal dissent in *Gates*. He characterized the majority's rejection of the *Aguilar-Spinelli* two-pronged test as a method for evaluating the

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280. *Id.* at 2361.
281. *Id.* (footnote omitted).
282. *Id.* at 2361 n. 7.
283. *Id.*
284. *Id.* at 2361-62 (footnote omitted).
285. *Id.* at 2362 n. 8.
286. *Id.*
287. *Id.* Justice Stevens would have vacated the judgment of the Supreme Court of Illinois and remanded the case for reconsideration on the issue of the validity of a warrantless search of the defendants' automobile in the light of the intervening decision in United States v. Ross, 456 U.S. 798 (1982). Under *Ross*, the search of the Gates' automobile may have been valid if the officers had probable cause, after the defendants had arrived back in Bloomingdale, to believe that the vehicle contained contraband. 103 S. Ct. at 2361, 2362 (Stevens, J., dissenting); *see Ross*, 456 U.S. at 800, 806-09, 817-21, 823-25.

validity of a warrant based on hearsay as "unjustified and ill-advised."[288] In similar vein, he chastised the majority for overstating its case that *Aguilar-Spinelli* had seriously impeded effective law enforcement and rendered anonymous tips "valueless in police work."[289]

As Justice Brennan viewed the situation, the way in which the *Aguilar-Spinelli* standards had been repudiated had to be a matter "of particular concern to all Americans," because such a repudiation had given "virtually no consideration to the value of insuring that findings of probable cause are based on information that a magistrate can reasonably say has been obtained in a reliable way by an honest or credible person."[290] Thus, he shared Justice White's fear that the repudiation of *Aguilar-Spinelli* in favor of the totality-of-the-circumstances test " 'may foretell an evisceration of the probable cause standard. . . .' "[291]

To Justice Brennan, the majority's "complete failure to provide any persuasive reason for rejecting *Aguilar* and *Spinelli* doubtlessly reflects impatience with what it perceives to be 'overly technical' rules governing searches and seizures under the [f]ourth [a]mendment."[292] Hence, he interpreted words such as " 'practical,' 'nontechnical,' and 'commonsense,' as used in the Court's opinion, [as] but code words for an overly permissive attitude towards [law enforcement] practices in derogation of the rights secured by the [f]ourth [a]mendment."[293]

Neither was he impressed with "the Court's concern over the horrors of drug trafficking," as apparent justification for curing social evils by a reduction of individual rights.[294] To take this path, in his opinion, even in innocence, could well lead to the irretrievable impairment of fundamental constitutional protections.[295]

Justice Brennan believed that the rejection of *Aguilar-Spinelli*

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288. 103 S. Ct. at 2351 (Brennan, J., dissenting).
289. *Id.* at 2359.
290. *Id.*
291. *Id.* (quoting *id.* at 2350 (White, J., concurring in the judgment).
292. *Id.* at 2359 (Brennan, J., dissenting).
293. *Id.*
294. *Id.*
295. *Id.* For a recent example of the Court's "concern" over these "horrors," see United States v. Place, 103 S. Ct. 2637 (1983), where the Court, in its desire to legitimize unorthodox law enforcement methods of combatting drug trafficking, reached out to resolve the constitutionality of the seizure of personal luggage on less than probable cause and the exposure of that luggage to a trained narcotics detection dog. *See id.* at 2646 (Brennan, J., concurring); *see also id.* at 2652-53 (Blackmun, J., concurring)(criticizing the Court's "haste to resolve the dog-sniff issue").

struck at the heart of "the judiciary's role as the only effective guardian of [f]ourth [a]mendment rights."[296] In recognition of this role, the Supreme Court had developed a set of coherent rules governing a magistrate's assessment of applications for warrants and the showings that are required to support a finding of probable cause.[297] This was deemed necessary to ensure that only a neutral and detached magistrate should determine whether there is probable cause to support the issuance of a warrant.[298] The Supreme Court, in order to emphasize the role of the magistrate as "an independent arbiter" of probable cause, and to insure that searches and seizures are not effected on less than probable cause, has insisted, as Justice Brennan noted, that law enforcement officers provide magistrates with the underlying facts and circumstances that support their conclusions of criminal activity or wrongdoing.[299] This insistence resulted in the *Aguilar-Spinelli* rules, which have served to advance the substantive value, under fourth amendment jurisprudence, that findings of probable cause, and attendant intrusions upon individual security and privacy, should not be sanctioned unless there has been some assurance that the information on which they are based has been obtained in a reliable way by a credible person.[300]

As applied to police officers, Justice Brennan explained, the *Aguilar-Spinelli* standards focus on the way in which the information has been acquired. As applied to informants, the rules focus on the credibility or honesty of the informant and on the reliability of the way in which the information has been obtained.[301]

Insofar as it is more complicated, Justice Brennan observed, an evaluation of affidavits based on hearsay information involves "a more difficult inquiry."[302] Thus, the nature of the process suggests a need to structure the inquiry to ensure a greater degree of accuracy. The standards announced in *Aguilar*, and refined by *Spinelli*, have fulfilled that need.[303] The standards inform law officers of what information they have to provide and inform magistrates of what information "they should demand."[304] Further, continued Justice Brennan, the standards also inform magistrates of the subsidiary

296. 103 S. Ct. at 2351 (Brennan, J., dissenting).
297. *Id.*
298. *Id.*
299. *Id.* at 2352.
300. *Id.* at 2355.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*

findings they are required to make in order to make an ultimate finding of probable cause.[305] Accordingly, by requiring law officers to provide certain crucial information to magistrates, and by structuring probable cause inquiries by magistrates, the *Aguilar-Spinelli* standards function to assure the role of the magistrate as an "independent arbiter" of probable cause, ensure a greater degree of accuracy in probable cause determinations, and advance the "important process value, which is intimately related to substantive [f]ourth [a]mendment concerns," of having neutral and independent magistrates, and not the police, or informants, determine whether there exists probable cause to support the issuance of a warrant.[306]

It was apparent, therefore, to Justice Brennan, that the tests established by *Aguilar* and *Spinelli* structure the magistrate's probable cause inquiry and, more importantly, guard against arbitrary intrusions upon the security and privacy of the individual that are supported by inadequate findings of probable cause.[307] To Justice Brennan, there was nothing inconsistent between the rules and their "effects" and a " 'practical, nontechnical' conception of probable cause."[308] Once a magistrate has determined, argued Justice Brennan, that he has been presented with information that he can reasonably conclude has been obtained in a reliable way by a credible person, he will have "ample room to use his common sense and to apply a practical, nontechnical conception of probable cause."[309]

Justice Brennan found the structure provided by *Aguilar-Spinelli* particularly beneficial to probable cause analysis of tips from anonymous informants. "By definition, nothing is known about an anonymous informant's identity, honesty, or reliability."[310] There was no basis for treating such persons as presumptively reliable, and it could not be assumed that information provided by them had been obtained in a reliable way. Certainly, as Justice Brennan viewed the situation, if conclusory allegations of wrongdoing are un-

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305. *Id.*

306. *Id.* at 2355, 2356 n.6; *see Spinelli*, 393 U.S. at 415-16.

307. 103 S. Ct. at 2356 n.6 (Brennan, J., dissenting).

308. *Id.* at 2357.

309. *Id.* at 2357-58.

310. *Id.* at 2356. It has been suggested that anonymous informants should be treated as presumptively unreliable, as their motives cannot be properly assessed by either the police or magistrates, and neither the police nor magistrates can possibly know how informants have obtained their information, or be able to secure additional information from them. *See* Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the* Spinelli/Draper *Dichotomy in* Ilinois v. Gates, 20 AM. CRIM. L. REV. 99, 107 (1982).

acceptable when provided by the police, who are presumptively reliable, or from known informants, then there could not "possibly be any rational basis for accepting conclusory allegations from anonymous informants."[311] Hence, as a means of assuring that probable cause findings, and attendant intrusions, are based on information provided by credible or honest persons who have acquired the information in reliable way, the *Aguilar-Spinelli* rules "must be applied" to tips from anonymous informants.[312]

The majority claimed that the *Aguilar-Spinelli* rules could not be reconciled with the fact that laymen frequently serve as magistrates.[313] Justice Brennan rejected this claim and argued that the rules not only helped to structure probable cause inquiries, but also, if "properly interpreted," could actually assist the nonlawyer magistrate in making determinations of probable cause.[314]

Justice Brennan closed his dissenting opinion by taking the majority to task for replacing *Aguilar-Spinelli* with a test that provided no assurance that magistrates rather than police, or informants, would continue to make determinations of probable cause; that imposed no structure on probable cause inquiries by magistrates; and that invited "the possibility that intrusions [might] be justified on less than reliable information from an honest or credible person."[315] "[T]oday's decision," in his opinion, "threatens to 'obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they *are* the law.' "[316]

The most unremarkable aspect of *Gates* was the result it reached. Granted that the informant was anonymous, and did not have a prior record of reliability; nevertheless, his report did contain considerable detail about the operation of an interstate drug enterprise. Furthermore, his tip contained information of a character likely obtained only from the defendants themselves, or from someone familiar with the inner workings of their operation. Thus, it would have been proper for a magistrate to conclude that the informer, while anonymous and with no prior record of trustworthi-

311. 103 S. Ct. at 2356 (Brennan, J., dissenting).

312. *Id.*

313. *Id.* at 2358 (Brennan, J., dissenting); *see id.* at 2330-31.

314. *Id.* at 2358 (Brennan, J., dissenting).

315. *Id.* at 2359 (Brennan, J., dissenting); *see Spinelli*, 393 U.S. at 415-16.

316. 103 S. Ct. at 2539 (Brennan, J., dissenting) (quoting Johnson v. United States, 333 U.S. 10, 17 (1948)) (emphasis added).

ness, had access to reliable information of the Gates' alleged drug activities.

Although nothing was known of the informant's honesty or the reliability of his sources, any deficiences were compensated by the substantial amount of corroboration of the tip by independent police work. Hence, when the magistrate was presented with such a range of details, coupled with the degree of corroboration developed through police investigation, he had before him a substantial showing of facts from which an inference could reasonably be drawn that the informer was a credible person who had gathered his information in a reliable way. Accordingly, probable cause had been established for the issuance of the warrant.

Although *Gates* represents a step backward in fourth amendment jurisprudence, it was a step which gained impetus from decisions such as *Brethauer*, *Palanza*, and *Bridger*.[317] An excessive desire to exploit an ever-expanding concept of individual liberties has already brought about a backlash resulting in a retrenchment of fifth amendment[318] and habeas corpus[319] protections. Unfortunately, as the holding in *Gates* demonstrates, an "overly technical view"[320] of supporting affidavits for warrants may also lead to "an evisceration of the probable cause standard" under the fourth amendment.[321] In our zeal to strictly enforce procedural rules, and to devise remedies for real or imagined injustices, we, of the legal and judicial communities, have lost sight of substantive justice, and have invited both the condemnation of the public[322] and the counter-attacks of reactionary ideologues who, under the banners of effective law enforcement and common sense, are busily engaged in dismantling the basic constitutional structure of this country.

V. ANALYSIS AND CRITIQUE

In *Gates*, Justice Rehnquist mounted a three-pronged attack on the warrant machinery contemplated by the fourth amendment.

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317. *See supra* text accompanying notes 120-57.

318. *See, e.g.*, Oregon v. Bradshaw, 103 S. Ct. 2830, 2834-35 (1983) (plurality opinion).

319. *See* Sumner v. Mata, 449 U.S. 539, 546-47, 549-52 (1981); Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977), *reh'g denied*, 434 U.S. 880 (1977); Francis v. Henderson, 425 U.S. 536, 542 (1976).

320. United States v. Harris, 403 U.S. 573, 589 (1971) (Harlan, J., dissenting).

321. *Gates*, 103 S. Ct. at 2350 (White, J., concurring).

322. *See* Morris v. Slappy, 103 S. Ct. 1610, 1618 (1983); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA ANNUAL REP. 395, 404-06 (1906).

First, he relaxed the standard for evaluating the probable cause sufficiency of affidavits containing hearsay information from informants. Second, he diminished the role of the independent magistrate in the warrant process, by having him adopt a more sympathetic and permissive view toward police practices in the name of common sense and effective law enforcement. Finally, he laid the groundwork for altering the meaning of probable cause, to the detriment of individual rights. It is this multi-faceted assault on the warrant machinery, and its long-term implications for fourth amendment jurisprudence, that is so disturbing about *Gates*.

The *Aguilar-Spinelli* rules were established as a reaction of the Supreme Court to "bare bones" affidavits containing mere conclusory allegations of criminal wrongdoing. The standards laid down by the rules reflected the Court's concern that the crucial role of an independent judiciary in conducting probable cause inquiries was being compromised by magistrates who were paying undue deference to claims of probable cause by law enforcement officers that were not supported by a substantial factual basis. Thus, the standards were designed to enhance the integrity of the warrant process by preserving the independence and objectivity of the judiciary, and to ensure a greater degree of accuracy in probable cause determinations.

The *Aguilar-Spinelli* rules, however, were not written in stone, and certainly could have been improved upon by clarifying the effect of corroborating information on the basis-of-knowledge test. In fact, Justice White, in his *Gates* concurrence, proposed just such a clarification.[323] Instead, however, the Court saw fit to repudiate *Aguilar-Spinelli*. In so doing, the *Gates* Court struck at the integrity and independence of the judiciary in the warrant process. It did this by downgrading the magistrate's central role in making determinations of probable cause, and by encouraging the magistrate to abdicate his responsibility in the probable cause process by deferring to the judgment of police officers in the name of effective law enforcement and common sense.

As this article has attempted to show, the centerpieces of the warrant machinery under the fourth amendment are an independent judiciary and the standard of probable cause.[324] The *Aguilar-Spinelli* rules implemented the Supreme Court's commitment to these principles, and were not at all inconsistent with any notions of

323. 103 S. Ct. at 2350-51 (White, J., concurring in the judgment).

324. *See supra* text accompanying notes 7-57.

effective law enforcement and common sense. Although application of the rules created some problems, they were not of such a serious or fundamental nature as to warrant outright repudiation. Yet, this is exactly the drastic remedy upon which the *Gates* majority seized. In so doing, the majority replaced the *Aguilar-Spinelli* analysis with a totality-of-the-circumstances approach that lacks sufficient specificity and analytical structure to adequately inform magistrates as to what standard is required to protect the right of privacy secured by the fourth amendment. The reader must ask himself, "Why?" Why was it so necessary, so imperative, to reject and overrule *Aguilar-Spinelli*? Why wasn't clarification or modification invoked? Were these alternatives even considered? If not, why not?

The answers to these questions lie not in the facts in *Gates*, nor in the need to combat the "horrors" of the drug trade. The answers are to be found in the basic legal philosophy of a current majority of the Supreme Court. More particularly, the answers lie in an understanding of the majority's perception of the relationship between government and citizen. This is the critical key to a true understanding of *Gates*, one that strips the majority opinion of its graceful style and pretentious adherence to effective law enforcement consistent with constitutional principles. For underneath the Court's nostrum, lies a message of narrow vision that is at odds with the fundamental constitutional ideals upon which this country was established. The warrant machinery designed by the fourth amendment is central to these ideals, for it interposes an independent judiciary between the state and the individual. The key components of this machinery are a neutral magistrate and a standard of probable cause that reasonably protects the security and privacy interests of the individual without unduly hindering effective law enforcement. It is precisely in these areas that the implications of *Gates* are most disturbing, and where the clues to its true meaning, and portent of the future, are to be found.

A. *Deficiencies in the Basis-of-Knowledge Prong*

The first clue to *Gates'* true meaning appeared when Justice Rehnquist offered an example of how the two-pronged analysis, which had been directed into largely independent channels under *Aguilar-Spinelli*, would be applied under the new totality-of-the-circumstances approach. He cited *United States v. Sellers*[325] in support of the principle that a deficiency in the basis-of-knowledge prong of

325. 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

a tip from an unusually reliable informant would not be fatal to a showing of probable cause. As Justice Rehnquist phrased the proposition:

> If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to *thoroughly* set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip.[326]

Although the Fifth Circuit, in *Sellers*, had acknowledged that "the quantum of underlying circumstances which reveal the source of the informer's knowledge necessary to sustain the affidavit is clearly less than in cases where the indicia of informer reliability is less dramatic," the court actually upheld the affidavit at issue primarily on the basis of the "wealth of detail" supplied by the informant—a "wealth" that "outline[d] the administrative hierarchy of the [defendants'] bookmaking operation"—from which the magistrate "could have reasonably inferred" that the information was either the product of the informant's personal knowledge or that the informer had direct access to the defendants' gambling operation.[327] This analysis in *Sellers* is thoroughly consistent with the *Draper* analysis as well as with the *Spinelli* majority where Justice Harlan reasoned that, in the absence of a statement detailing the circumstances in which the information had been gathered, a description of a defendant's criminal activity in sufficient detail would permit the reviewing magistrate to reasonably infer that the informant had obtained his information or knowledge in a reliable way.[328] Thus, *Sellers*, rather than being at odds with *Spinelli*, remained loyal to its principles.

Moreover, how can "an informant's . . . 'basis of knowledge' [be] . . . highly relevant in determining the value of his report," as Justice Rehnquist acknowledged in *Gates*,[329] and yet remain sufficiently irrelevant that a "failure . . . to thoroughly set [it] forth [will] . . . not serve as an absolute bar to a finding of probable cause . . . [?]"[330] Unfortunately, the Court offers no meaningful guidance to magistrates beyond some general appeal to their common sense and practical good judgment. Apparently, "bare bones" affidavits based

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326. 103 S. Ct. at 2329 (emphasis added).

327. 483 F.2d at 41.

328. 393 U.S. at 416-17; *accord*, *Gates*, 103 S. Ct. at 2347 n.20 (White, J., concurring in the judgment).

329. 103 S. Ct. at 2327.

330. *Id.* at 2329.

upon nothing more than mere conclusory allegations of criminal wrongdoing will not be sufficient.[331] And, when an affidavit contains "anything more," then "it appears that the question whether the probable cause standard is to be diluted is left to the common-sense judgments of issuing magistrates."[332]

The net result, however, is to reduce the central importance of the role of an independent judiciary in probable cause inquiries, and to correspondingly enhance the role of the police and their informants. This is readily apparent from the majority's emphasis upon the past reliability of an informant, which, under the Court's new equation, may be resorted to to compensate for a deficiency in the basis of knowledge for a tip. Furthermore, this interpretation is reinforced by the majority's belief that the *Aguilar-Spinelli* rules are inconsistent with the significant role played by laymen in the warrant process, where "many warrants are — quite properly . . . — issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings."[333] Similarly, the majority believed that the rules "seriously imped[ed] the task of law enforcement," and "greatly diminished [the] value [of anonymous tips] in police work."[334] While Justice Rehnquist denied that this was so,[335] one is left with the impression, as correctly perceived by Justice Brennan, that the majority employed words, "such as 'practical,' 'nontechnical,' and 'commonsense,' as . . . but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the [f]ourth [a]mendment."[336] Practicality and common sense have their place in the law, but we should not pay homage to them at the expense of basic constitutional rights. The message from *Gates*, therefore, comes through loud and clear that magistrates should pay more respect to the claims of law enforcement officers, who know far more about the ways of criminals and what is needed to combat their antisocial practices, and less attention to analytical assessments of probable cause. Any standard that does not expressly require, as a prerequisite to the issuance of a warrant, a substantial showing of facts from which an inference may be reasonably drawn that the informer is a credible person and that his information was obtained or

331. *Id.* at 2332.
332. *Id.* at 2350 (White, J., concurring in the judgment).
333. *Id.* at 2330-31.
334. *Id.* at 2331; *see id.* at 2332.
335. *See id.* at 2333-34.
336. *Id.* at 2359 (Brennan, J., dissenting).

gathered in a reliable way, will result in an evisceration of the probable cause standard and an impairment of the rights secured by the fourth amendment.[337]

Finally, this analysis also applies to Justice Rehnquist's belief that an honest citizen's basis of knowledge need not be subjected to a searching inquiry.[338] Simply because a citizen is honest does not mean that he is credible or that his information has been gathered in a reliable way. In short, one may be honest and still remain naive and gullible, easily swayed by the views or opinions of others, or by items of gossip circulated by them.

B. *Suspicion and the Standard of Probable Cause*

The second, and more disturbing, implication emanating from *Gates* is the introduction of the concept of suspicion into probable cause analysis. This attempt to dilute the standard of probable cause touches roots that run deep in the constitutional history of this country, and requires extended discussion.

Justice Rehnquist, writing for the majority, had just presented "persuasive arguments" against according an informant's veracity or reliability and his basis of knowledge "independent status,"[339] and followed this by citing illustrative examples of the new totality-of-the-circumstances analysis, when suddenly, and quite unexpectedly, he introduced a discussion of the *meaning* of probable cause. Here, his choice of definitions was not simply intriguing; it bordered on the Byzantine.

Justice Rehnquist looked back to *Locke v. United States*,[340] decided by the Supreme Court in 1813, to find a definition of probable cause that would be appropriate for the 1983 totality-of-the-circumstances analysis that was superseding the *Aguilar-Spinelli* rules.[341] Further, he insisted that the definition proposed by Chief Justice Marshall, the author of *Locke*, had been made "in a *closely related*

337. *See id.* at 2350 (White, J., concurring in the judgment). In a *Draper*-type situation, the wealth of detail supplied by an informant, coupled with a substantial degree of corroboration developed by independent police work, will permit a magistrate to reasonably infer that the information has been obtained in a reliable way, either as the product of the informer's personal knowledge or by means of direct access to, or participation in, the defendant's criminal activities. *See Spinelli*, 393 U.S. at 417-18; *id.* at 426 (White, J., concurring); *Sellers*, 483 F.2d at 41.

338. 103 S. Ct. at 2329.

339. *Id.*

340. 11 U.S. (7 Cranch) 339 (1813).

341. 103 S. Ct. at 2330.

context," presumably closely related to the *Gates* context.[342] Justice Rehnquist then proceeded to quote Chief Justice Marshall's definition: "[T]he term 'probable cause', according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant *suspicion*."[343]

Justice Rehnquist did not let matters lie here however, as he seized upon a second opportunity to interject the concept of suspicion into probable cause analysis. The opportunity presented itself within the following context.

Toward the end of the *Gates* opinion, Justice Rehnquist proceeded to apply the totality-of-the-circumstances standard to Detective Mader's affidavit. During his discussion, he took the Illinois Supreme Court to task for downplaying the significance of the police corroboration of innocent activity on the part of the Gates'. After noting that seemingly innocent activity can become suspicious in the light of the informant's tip, and that "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity," he observed: "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the *degree of suspicion* that attaches to particular types of non-criminal acts."[344]

Again, the reader of *Gates* is confronted with a seemingly puzzling turn of events. A close examination will reveal, however, that Justice Rehnquist's choice of words was neither puzzling nor inexplicable; that, in fact, his choice was quite deliberate, and made with an eye to the future.

At this point, it is important to take stock of what was, and what was not, at issue in *Gates*. The *Aguilar-Spinelli* rules were not created in a vacuum; they were not established to satisfy themselves, or some hypothetical concept of probable cause, but rather to assist magistrates in seeing that affidavits containing hearsay reports from informants satisfied the constitutional requirement of probable cause. The standard for this requirement has remained relatively constant, at least since 1878, when it was explicated in *Stacey v. Emery*,[345] and certainly since 1925, when it was refined in *Carroll v. United States*.[346] Thus, the issue before the Court in *Gates* was not

342. *Id.* (emphasis added).
343. *Id.* (quoting *Locke*, 11 U.S. (7 Cranch) at 348) (emphasis added).
344. 103 S. Ct. at 2335 n.13 (emphasis added).
345. 97 U.S. 642, 645 (1878).
346. 267 U.S. 132, 161-62 (1925).

the standard for probable cause, but whether Detective Mader's affidavit had in fact satisfied this standard. In short, the controversy surrounding *Aguilar-Spinelli*, and culminating in *Gates*, had been one of application to the standard of probable cause, and not one of conceptualization of that cause. Therefore, the rejection of the *Aguilar-Spinelli* analysis did not necessitate a reassessment, or a refinement, of the probable cause standard.

Since, however, the *Gates* majority saw fit to interject the standard of probable cause into the controversy surrounding *Aguilar-Spinelli*, a review of its historical development and meaning is in order.

1. Historical Development of the Probable Cause Standard

Although the practice of arresting a felon on probable suspicion was known at English common law,[347] the American experience has generally rejected any standard governing search-and-seizure procedures that does not satisfy the standard of probable cause.[348] The

347. *See* Mure v. Kaye, 128 Eng. Rep. 239, 242-43 (C.P. 1811) (Mansfield, C.J.); *id.* at 243 (Heath, J.); *id.* at 243 (Chambre, J.); 4 W. BLACKSTONE, COMMENTARIES *290; 1 J. CHITTY, CRIMINAL LAW 13-15, 21, 22, 24, 31, 33-34 (1816); 1 M. HALE, PLEAS OF THE CROWN 579-80 (1778); 2 M. HALE, *supra*, at 108-10; 2 W. HAWKINS, PLEAS OF THE CROWN 84-85 (1721); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 602 (1923) (practice was regarded "as perfectly legal at the end of the seventeenth century"); 5 W. HOLDSWORTH, *supra* at 191; *see also* United States v. Watson, 423 U.S. 411, 429 (1976) (Powell, J., concurring). Holdsworth traced this development to a new application of the rules governing the hue and cry. 3 W. HOLDSWORTH, *supra*, at 603-04.

It must be noted, however, that the common law tended to employ the terms "probable cause," "supsicion," and "suspect" interchangeably. *See* J. LANDYNSKI, *supra* note 33, at 27 n.34. For examples of this, see 1 J. CHITTY, *supra*, at 34 (reasonable suspicion of guilt, or reasonable ground to suspect, defined as "such a probable cause as might induce a discreet and impartial man to suspect the party to be guilty"); 1 M. HALE, *supra*, at 579-80 ("probable caufe of fufpicion").

348. The Supreme Court has sanctioned a reduced standard of an articulable and objectively reasonable suspicion in only limited situations; and then, only where the law enforcement need is special, and the intrusion is less invasive both as to scope and duration than either a full-blown search or a full-scale arrest. *See* Michigan v. Long, 103 S. Ct. 3469, 3480-82 (1983) (warrantless area search of passenger compartment for weapons during an investigative stop of a motor vehicle); Michigan v. Summers, 452 U.S. 692, 703-05 (1981) (temporary detention on less than probable cause of owner or occupant of residence while the police are executing a search warrant for the premises); United States v. Cortez, 449 U.S. 411, 417-18, 421-22 (1981) (border patrol search involving a brief investigative stop of a motor vehicle on a particularized suspicion of being involved in criminal activity); United States v. Brignoni-Ponce, 422 U.S. 873, 878-82, 884 (1975) (roving border patrols briefly stopping motor vehicles on reasonable suspicion for illegal immigrants, where intrusion is modest, there is no search of vehicle or its occupants, and visual inspection is limited to those parts of vehicle which can be viewed by anyone standing alongside of it); Pennsylvania v. Mimms, 434 U.S. 106, 110-12 (1977) (per curiam) (limited search of driver of motor vehicle for weapons on basis of reasonable

standard, in short, is the rule, not the exception, of fourth amendment jurisprudence. Consistent with this philosophy is the Supreme Court's commitment to the requirement of probable cause, a "requirement. . .[which] has roots that are deep in our history."[349] Thus, the Court has acknowledged that "[h]ostility to seizures based on mere *suspicion* was a *prime motivation* for the adoption of the [f]ourth [a]mendment. . . ."[350]

This hostility was reflected in early American cases, decided shortly after the adoption of the fourth amendment, condemning the practice of issuing warrants on suspicion.[351] It was further reinforced by Coke's concern for the security and privacy of the individual in his home, if he were subjected to intrusions supported only by suspicion,[352] a fact that could not have been lost upon the framers of the fourth amendment.[353] In a similar vein, Lord Camden, in *Wilkes v. Wood*,[354] condemned the issuance of general warrants authorizing the arrest of unnamed persons, connected with an alleged seditious libel, and the seizure of their papers on suspicion. He stated:

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belief that detainee is armed and dangerous); Adams v. Williams, 407 U.S. 143, 147-48 (1972) (same as *Mimms*); Terry v. Ohio, 392 U.S. 1, 24, 27, 29-31 (1968) (protective frisk of detainee for weapons).

Although the Court has sanctioned investigative detentions on less than probable cause, it has cautioned that they must be of limited duration, and last "no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 103 S. Ct. 1319, 1325 (1983) (plurality opinion). Similarly, a further limitation requires that the investigative methods employed by a law enforcement officer should be the "least intrusive means reasonably available" to verify or dispel his suspicion in "a short period of time." *Id.* The burden is on the prosecution to demonstrate that the detention was sufficiently limited in duration and scope to satisfy the requirements of an investigative seizure on reasonable suspicion. *Id.* at 1326.

What these cases point up is that the greater the intrusion into the individual's freedom of movement, the stronger the justification for the restraint must be. United States v. Vasquez, 638 F.2d 507, 520 (2d Cir. 1980), *cert. denied*, 454 U.S. 975 (1981). Thus, if the suspect's liberty of movement is sufficiently curtailed to constitute an arrest under the fourth amendment, then it must be supported by probable cause. Dunaway v. New York, 442 U.S. 200, 212-16 (1979).

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

350. Dunaway v. New York, 442 U.S. 200, 213 (1979)(emphasis added).

351. *See, e.g.*, Conner v. Commonwealth, 3 Binn. 38, 44 (Pa. 1810); *cf.* Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 334-36 (1841) (upholding a warrant issued on the basis of probable cause, and favorably comparing such a warrant to one issued on mere suspicion).

352. E. COKE, FOURTH INSTITUTE 178 (1644); *accord* Entick v. Carrington, 19 Howell's St. Tr. 1029, 1073-74 (C.P. 1765).

353. Lord Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" Payton v. New York, 445 U.S. 573, 594 (1980) (quoting A. HOWARD, THE ROAD FROM RUNNYMEDE; MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 119 (1968)).

354. 98 Eng. Rep. 489 (C.P. 1763).

> [These warrants amount to] a discretionary power given to messengers to search wherever *their suspicions may chance to fall*. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.[355]

Finally, the hostility to the issuance of warrants on suspicion received approbation in the "celebrated judgment"[356] of *Entick v. Carrington*,[357] where, in the process of condemning general warrants to search on suspicion any home for evidence of seditious libel, Lord Camden inquired that "if suspicion at large should be a ground of search, . . . *whose house would be safe?*"[358]

Lord Camden's disapproving inquiry is not without significance. In *Boyd v. United States*,[359] which has been described by the Supreme Court as "[t]he leading case on the subject of search and seizure,"[360] and by Justice Brandeis as "a case that will be remembered as long as civil liberty lives in the United States,"[361] the Court described the impact of *Entick* on the framers of the fourth amendment in these terms:

> It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. . .
>
> As every American statesmen [sic], during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the [f]ourth [a]mendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. . . .
>
> Can we doubt that when the [f]ourth. . .[a]mendment[] to the Constitution of the United States [was] penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and "unreasonable" character of

355. *Id.* at 498 (emphasis added); *see* Marcus v. Search Warrant, 367 U.S. 717, 728-29 (1961).

356. Boyd v. United States, 116 U.S. 616, 627 (1886).

357. 19 Howell's St. Tr. 1029 (C.P. 1765).

358. *Id.* at 1073-74 (emphasis added); *see id.* at 1063-72.

359. 116 U.S. 616 (1886).

360. *Carroll*, 267 U.S. at 147; *accord*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965).

361. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

[searches and seizures under the fourth amendment]?[362]

In England, as *Wilkes* and *Entick* demonstrated, the fear was of the dreaded general warrant, which permitted the indiscriminate search of private residences on mere suspicion. In the American colonies, a similar fear existed of writs of assistance, which also permitted intrusions into the home on less than probable cause.[363] Thus it was search on mere suspicion that facilitated the indiscriminate execution of these feared processes, and created what amounted to little more than roving commissions authorizing search and seizure on the discretionary suspicion of petty officers. As history teaches, it was in reaction to these practices, which encouraged arbitrary governmental intrusions upon "the sanctity of a man's home and privacies of life,"[364] that the fourth amendment was enacted.[365]

As this review has indicated, the choice of probable cause as the standard by which privacy is reasonably invaded under the aegis of the fourth amendment was no accident of history. It reflected the American distaste for the excesses of the English crown in pursuing a harsh policy of collecting taxes from the colonists. While the main vice of the Crown's processes was the virtually unlimited authority that they conferred upon the officers who were entrusted with their execution, that very execution was facilitated by the reduced standard of suspicion. Hence, the framers of the fourth amendment settled upon the higher standard of probable cause that would reasonably accommodate the legitimate concerns of society for effective law enforcement without jeopardizing the security and privacy interests of the individual. The requirement of probable cause was specifically mandated by the warrant clause of the fourth amendment, which established "the root principle of *judicial superinten-*

362. 116 U.S. at 626-30.

363. For discussion of opposition by the American colonists to general writs of assistance, issued on mere suspicion, see J. Frese, *supra* note 7, at 178-300.

364. Boyd v. United States, 116 U.S. 616, 630 (1886).

365. *See* Steagald v. United States, 451 U.S. 204, 220 (1981); Payton v. New York, 445 U.S. 573, 583 & n.21 (1980); Warden v. Hayden, 387 U.S. 294, 301 (1967); Stanford v. Texas, 379 U.S. 476, 481-82 (1965); Lopez v. United States, 373 U.S. 427, 454 (1963) (Brennan, J., dissenting); Frank v. Maryland, 359 U.S. 360, 363-66 (1959), *overruled on other grounds*, Camara v. Municipal Court, 387 U.S. 523 (1967); Weeks v. United States, 232 U.S. 383, 389-90 (1914); Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 334-36 (1841); B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 196 (1977); J. Frese, *supra* note 7, at 300; *see also* Harris v. United States, 331 U.S. 145, 157-63 (1947) (Frankfurter, J., dissenting) (because of historical abuses, search warrants require great specificity, and may be issued only on adequate grounds).

dence of searches and seizures."[366]

2. Conceptualization of the Respective Terms

Probable cause is a flexible concept which does not lend itself to rigid analysis or precise definition.[367] Its meaning, therefore, must be found in the particular facts and circumstances of each case - in short, within the context peculiar to each situation.[368] Within this framework, the courts have striven for a definition that, while not precise, does convey a discernible concept capable of reasonably consistent application.

Under the fourth amendment, as its warrant clause commands, probable cause is a prerequisite for the issuance of a valid warrant.[369] Probable cause is established for a search warrant when the facts and circumstances within an affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution and prudence to believe that[370] items subject to seizure are presently upon a particular person or situated within a specified place or thing;[371] or, for an arrest warrant, a criminal offense has been, or is being, committed by a particular individual.[372] The standard thus required for the existence of probable cause is *nothing less* than a reasonable *belief*.[373]

It is clear that neither proof beyond a reasonable doubt[374] nor a

366. Lopez v. United States, 373 U.S. 427, 454 n.6 (1963) (Brennan, J., dissenting) (emphasis added).

367. *See Gates*, 103 S. Ct. at 2328-29; United States v. Sorrells, 714 F.2d 1522, 1528 (11th Cir. 1983); J. LANDYNSKI, *supra* note 33, at 46.

368. *See Gates*, 103 S. Ct. at 2328; N. LASSON, *supra* note 18, at 120.

369. *See* authorities cited *supra* note 18.

370. Texas v. Brown, 103 S. Ct. 1535, 1543 (1983) (plurality opinion); Berger v. New York, 388 U.S. 41, 55 (1967); Brinegar v. United States, 338 U.S. 160, 175-76 (1949); *Carroll*, 267 U.S. at 162; Stacey v. Emery, 97 U.S. 642, 645 (1878); United States v. Wylie, 705 F.2d 1388, 1392 (4th Cir. 1983); *see* Henry v. United States, 361 U.S. 98, 102 (1959).

371. J. LANDYNSKI, *supra* note 33, at 46; N. LASSON, *supra* note 18, at 129.

372. Berger v. New York, 388 U.S. 41, 55 (1967); Beck v. Ohio, 379 U.S. 89, 91 (1964); Brinegar v. United States, 338 U.S. 160, 175-76 (1949); United States v. Wallraff, 705 F.2d 980, 990 (8th Cir. 1983); Commonwealth v. Perez, 357 Mass. 290, 300, 258 N.E. 2d 1, 7 (1970); *see* United States v. Pepple, 707 F.2d 261, 263 (6th Cir. 1983); J. LANDYNSKI, *supra* note 33, at 46; N. LASSON, *supra* note 18, at 129.

373. *See* Berger v. New York, 388 U.S. 41, 55 (1967); Beck v. Ohio, 379 U.S. 89, 91 (1964); *Draper*, 358 U.S. at 313; Brinegar v. United States, 338 U.S. 160, 175-76 (1949); *Carroll*, 267 U.S. at 161-62; Stacey v. Emery, 97 U.S. 642, 645 (1878); United States v. Kolodziej, 706 F.2d 590, 598 (5th Cir. 1983); United States v. Dill, 693 F.2d 1012, 1014 (10th Cir. 1982); Commonwealth v. Perez, 357 Mass. 290, 301, 258 N.E.2d 1, 7 (1970).

374. Brinegar v. United States, 338 U.S. 160, 174-75 (1949); Commonwealth v. Pe-

prima facie showing is required.[375] More than "bare" suspicion, since Chief Justice Marshall's time,[376] or " 'reasonable cause to suspect,' "[377] or even " 'strong reason to suspect,' "[378] is required. Anything less than a reasonable belief, or any "relaxation of the fundamental requirements of probable cause," would leave innocent persons at the discretionary mercy of law enforcement officials.[379] Hence, a requirement of mere suspicion would severely undermine the fundamental human right of freedom.[380] This position is confirmed by an analysis of the meaning (and import) of suspicion.

"Suspicion," which requires no real foundation for its existence, is weaker than "belief,"[381] which, of necessity, is based on at least assumed facts.[382] Suspicion involves the act of imagining or apprehending that something is so, without supporting proof or on only slight evidence.[383] It is a concept that is well-known to the English-speaking countries, having been in existence at least since the fourteenth century, and is aroused to a substantial degree by conjecture.[384] Thus, suspicion is not synonymous with knowledge,[385]

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rez, 357 Mass. 290, 301, 258 N.E.2d 1, 7 (1970); *see* United States v. Harris, 403 U.S. 573, 584 (1971) (plurality opinion); Wong Sun v. United States, 371 U.S. 471, 479 (1963).

375. *Spinelli*, 393 U.S. at 419; United States v. Wallraff, 705 F.2d 980, 990 (8th Cir. 1983).

A finding of probable cause may rest on evidence that is not legally competent in criminal trial proceedings. *Draper*, 358 U.S. at 311-12; Brinegar v. United States, 338 U.S. 160, 172-76 (1949); *see Ventresca*, 380 U.S. at 107-08; Jones v. United States, 362 U.S. 257, 269-72 (1960) (hearsay may be the basis for the issuance of a warrant, so long as there is a "substantial basis" for crediting the hearsay).

376. Brinegar v. United States, 338 U.S. 160, 175 (1949)(footnote omitted);*see* Florida v. Royer, 103 S. Ct. 1319, 1325 (1983) (plurality opinion); *Spinelli*, 393 U.S. at 418-19.

377. United States v. Ramsey, 431 U.S. 606, 612-13 (1977) (such cause to suspect "imposes a less stringent requirement than that of 'probable cause'" to search or arrest under the fourth amendment).

378. Henry v. United States, 361 U.S. 98, 101 (1959)(quoting Conner v. Commonwealth, 3 Binn. 38, 43 (Pa. 1810)).

379. Wong Sun v. United States, 371 U.S. 471, 479 (1963); Brinegar v. United States, 338 U.S. 160, 176 (1949)("[t]o allow less [than probable cause] would be to leave law-abiding citizens at the mercy of the officers' whim or caprice").

380. *See* Henry v. United States, 361 U.S. 98, 101 (1959); Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue*, 47GEO. L.J. 1, 22 (1958).

381. *See* Cook v. Singer Sewing Mach. Co., 138 Cal. App. 418, 421, 32 P.2d 430, 431 (1934); Giddens v. Mirk, 4 Ga. 364, 370 (1848); Gosser v. Gosser, 183 Pa. 499, 503, 38 A. 1014, 1015 (1898).

382. Cook v. Singer Sewing Mach. Co., 138 Cal. App. 418, 421, 32 P.2d 430, 431 (1934).

383. *See* People v. Superior Court, 85 Cal. App. 3d 1020, 1025, 149 Cal. Rptr. 349, 352 (1978); State v. Barick, 143 Mont. 273, 283, 389 P.2d 170, 175 (1964); 9 THE OXFORD DICTIONARY (Part 2) 260 (1919).

384. *See* 9 THE OXFORD DICTIONARY, *supra* note 383, at 260.

385. Guarantee Co. of N. Am. v. Mechanics' Sav. Bank & Trust Co., 80 F. 766, 784

which may consist of credible information on material facts and circumstances sufficient in content and quality to generate a reasonable *belief*[386] that, in turn, will justify search-and-seizure activity by law enforcement officers.[387] Accordingly, suspicion can never satisfy the criterion for belief, namely, a conclusion or condition of mind which results from a consideration of relevant facts and circumstances by an individual of reasonable prudence and caution.[388]

The major distinguishing feature, therefore, between suspicion and belief lies in the respective foundations justifying each state of mind or mental process. In the case of suspicion, little if any supporting basis is required. In the case of belief, the cornerstone of probable cause analysis,[389] a stronger foundation is required, one that is secured by a factual predicate that warrants the requisite mental conviction or conclusion. Any attempt to sanction search-and-seizure procedures governing the issuance of warrants on the basis of suspicion absent a factual foundation would severely threaten the continued vitality of the individual's right to personal privacy and security free from arbitrary intrusion by government agents. The relevant inquiry, in making determinations of probable cause, should be the degree of factual *belief*, as distinguished from *conjecture*, that is justified by particular types of innocent acts.

Justice Rehnquist cannot read the requirement of probable cause out of the fourth amendment, but he can do the next best thing: *change* its meaning. This, it is submitted, is what he has at-

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(6th Cir. 1896), *rev'd on other grounds*, 173 U.S. 582 (1899); American Sur. Co. v. Pauly, 72 F. 470, 477 (2d Cir. 1896), *aff'd*, 170 U.S. 133 (1898); *see* Tracerlab, Inc. v. Industrial Nucleonics Corp., 313 F.2d 97, 102 (1st Cir. 1963)(suspicion and knowledge are "poles apart on a continuum of understanding").

386. *See* Sackett v. Farmers State Bank, 209 Iowa 487, 495, 228 N.W. 51, 54 (1929); State v. Smith, 22 N.J. 59, 64-65, 123 A.2d 369, 372 (1956).

387. *See* State v. Godette, 188 N.C. 497, 503-04, 125 S.E. 24, 28 (1924).

388. Cook v. Singer Sewing Mach. Co., 138 Cal. App. 418, 421, 32 P.2d 430, 431 (1934). Stated differently, a belief consists of the mental acceptance of the existence of a fact on the basis of evidence of which one is conscious. *See* Reed v. Fish Eng'g Corp., 76 N.M. 760, 769, 418 P.2d 537, 544 (1966)(Oman, J., dissenting); 1 THE OXFORD DICTIONARY (Part 2), at 782 (1888).

In Smith v. Bouchier, 93 Eng. Rep. 989 (C.P. 1734), the court held that an arrest warrant, issued on the basis of an oath of suspicion by the plaintiff that he suspected that the defendant would run away, could not be justified under a custom which sanctioned the issuance of an arrest warrant on the basis of an oath of belief that the defendant would flee. *Id.* at 989. The court reasoned that to suspect something was not the same as to believe it. Hence, a suspicion would not induce a belief and, therefore, was not a sufficient basis for invoking the custom. *Id.*

389. *See* cases cited *supra* note 373.

tempted to do in *Gates*.[390]

It bears repeating, as well as emphasis, that the issue in *Gates*, as it was also in both *Aguilar* and *Spinelli*, was not the standard of probable cause, but, rather, whether the affidavit in question had satisfied that standard. Not surprisingly, therefore, neither party to the controversy questioned the efficacy of the probable cause standard. Rather, they joined issue on whether the information contained in

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390. This attempt may already be bearing fruition. *See* United States v. Mendoza, 722 F.2d 96, 101-02 (5th Cir. 1983)(in assessing and finding probable cause, court appears to have applied standard of reasonable suspicion espoused by Justice Rehnquist in *Gates*, 103 S. Ct. at 2335 n.13).

Gates does not represent Justice Rehnquist's initial flirtation with the principles of suspicion while seeking an appropriate meaning for probable cause. In Texas v. Brown, 103 S. Ct. 1535 (1983)(plurality opinion), Justice Rehnquist, while stating that the standard of probable cause is " a flexible, common-sense standard. . .[that] merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief'. . .that certain items may be [subject to seizure; in short, a] 'practical, nontechnical' probability," analogized the process of assessing probable cause to the analysis of " 'particularized suspicion.' " *Id.* at 1543 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925); and Brinegar v. United States, 338 U.S. 160, 176 (1949)). He quoted the following passage from United States v. Cortez, 449 U.S. 411, 418 (1981):

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, *practical* people formulated certain *common-sense* conclusions about human behavior; jurors as factfinders are permitted to do the same - and so are law enforcement officers. Finally, the evidence thus collected *must be seen and weighed* not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

103 S. Ct. at 1543 (emphasis added).

Again, one is struck by the use of words such as "practical" and "common-sense" as but code words for an overly-deferential attitude toward law enforcement practices in derogation of the rights secured by the fourth amendment. It is also revealing, and quite symptomatic of his insensitivity to fourth amendment values, that Justice Rehnquist chose *Cortez* as an appropriate vehicle for favorable comparison with probable cause analysis.

In *Cortez*, the Supreme Court was called upon to articulate a standard governing the reasonableness of warrantless investigative stops by the Border Patrol of motor vehicles on a particularized suspicion of being involved in criminal activity. In formulating the appropriate standard, the Court noted "the enormous difficulties of patrolling a 2,000-mile open border," and that, "[o]f critical importance, [was the fact that] the officers knew that the area [where the stop under review was made] was a crossing point for illegal aliens." 449 U.S. at 418-19.

These factors, while relevant to the reasonableness of an investigative stop of a motor vehicle at a border crossing, are singularly inappropriate for a critical assessment of the factors relevant to a proper determination of the existence of probable cause. This is especially true where warrants authorize forcible intrusions into the sanctity of the home, an area of heightened privacy interests under the fourth amendment. *See* Payton v. New York, 445 U.S. 573, 585-90 (1980); United States v. Martinez-Fuerte, 428 U.S. 543, 561, 565 (1976)(dictum); Dorman v. United States, 435 F. 2d 385, 389 (D.C. Cir. 1970)(en banc)("[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the [f]ourth [a]mendment").

Detective Mader's affidavit had imparted sufficient information to the magistrate to satisfy that standard. Although the state had asked the Court to repudiate the *Aguilar-Spinelli* rules, at no time did it invite a reassessment of the meaning of probable cause.

Rather than accepting the issues as framed by the parties, Justice Rehnquist seized upon the opportunity presented in *Gates* to call into question the very concept of probable cause. By so doing, he struck at the heart of the warrant machinery established by the fourth amendment. If the concept of probable cause — the standard by which privacy is reasonably invaded — is undercut, the very privacy interests it was aimed at securing will be diminished and proportionately weakened. Probable cause defines the criteria for reasonable intrusions upon the individual's security and privacy. When those criteria have been met, permission to breach the individual's privacy will be forthcoming. If those criteria have not been satisfied, permission will be withheld. That is precisely what Justice Rehnquist is attempting to alter through his *Gates* analysis. He is tipping the scales against the individual and in favor of the police by reducing the criteria for authorizing intrusions into the sanctity of the home and the security of the individual.

C. *Customs and Maritime Searches and the Concept of Reasonable Suspicion*

As previously noted,[391] Justice Rehnquist, in *Gates*, had informed the reader that Chief Justice Marshall's conception of probable cause in *Locke* had been made "in a *closely related* context," presumably closely related to the *Gates* context.[392] A close examination will reveal, however, that the *Locke* context was anything but closely related to *Gates*, or, for that matter, to the warrant clause of the fourth amendment which governed *Gates*.

As background, the reader will recall that Marshall, in his *Locke* opinion, had conceptualized probable cause in terms of "a *seizure* made under circumstances which warrant *suspicion*."[393] Two aspects of this concept are noteworthy. First, Marshall was defining probable cause solely in terms of a seizure, rather than with reference to both searches and seizures. Why, one may ask, did he consider it appropriate to limit his discussion to seizures, thereby

391. *See supra* text accompanying note 342.

392. 103 S. Ct. at 2330 (emphasis added).

393. 11 U.S. (7 Cranch) at 348 (emphasis added); *see supra* text accompanying notes 340-43.

excluding searches?[394] Second, Marshall introduced the concept of suspicion into his analysis of probable cause. The question arises, why did the premier Chief Justice of the Supreme Court conceptualize probable cause in terms of suspicion only a short time after the adoption of the fourth amendment if, as the Court has reminded us, "[h]ostility to seizures based on mere *suspicion* was a *prime motivation* for the adoption of the [f]ourth [a]mendment[?]"[395] The answers to these questions lie in the factual setting of *Locke*, which will reveal that Marshall's choice of terms was not surprising.

Locke was a libel proceeding to forfeit a cargo of imported goods seized for violation of the revenue laws. "It presented," as the Supreme Court has noted, "*no* question concerning the validity of a *warrant*."[396] More fundamentally, however, the practice of sanctioning searches on suspicion for goods smuggled into the country in violation of the revenue or tariff laws has "been sustained from the earliest times," and was authorized as early as 1789.[397] Similarly, in 1790, the First Congress enacted a comprehensive statute authorizing customs officers to board and search, without even articulable suspicion, any vessel found within the nation's domestic waters.[398] These practices were affirmed in the revenue act of March 2, 1799, which formed the statutory basis for the libel of condemnation filed

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394. Although the standard of probable cause is the same for searches and seizures, *see Giordenello*, 357 U.S. at 485-86, it remains *factually* noteworthy that Marshall referred only to seizures.

395. Dunaway v. New York, 442 U.S. 200, 213 (1979)(emphasis added); *see supra* text accompanying notes 347-66.

396. *Nathanson*, 290 U.S. at 47 (emphasis added).

397. *Id. See, e.g.*, Act of July 31, 1789, ch. 5, §23, 1 Stat. 29, 43 (1789)(current version at 19 U.S.C. §§ 482, 1461, 1462, 1467, 1496, 1499, 1582 (1982))(authorizing the opening and examination, "on suspicion of fraud," of packages of goods imported into the country);*id.* § 24, 1 Stat. at 43 (current version at 19 U.S.C. §§ 482, 1595(a)(1982))(authorizing searches of ships or vessels on "reason to suspect" that goods subject to duty are concealed therein, and sanctioning the issuance of search warrants for daytime searches of residences, stores, buildings, "or other place[s]" on "cause to suspect" the concealment therein of imported goods "subject to duty"). Under present law, section 1595(a) requires the officer making a search of any dwellings, store or building to "have cause to suspect the presence. . .of any merchandise upon which the duties have not been paid. . . ." 19 U.S.C. § 1595(a)(1982); *see* United States v. Ramsey, 431 U.S. 606, 616-17 & n. 12 (1977); *Nathanson*, 290 U.S. at 47; *Carroll*, 267 U.S. at 149-51; Boyd v. United States, 116 U.S. 616, 623 (1886); United States v. Williams, 617 F.2d 1063, 1079-81 (5th Cir. 1980) (en banc). The Massachusetts colony had conferred similar powers on its local customs collector in the mid-seventeenth century. J. Frese, *supra* note 7, at 127-28.

398. Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164-65 (1790) (current version at 19 U.S.C. § 1581(a) (1982)); *see* United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2577-78 (1983).

in *Locke*.[399]

It is apparent, therefore, that Marshall was addressing the meaning of probable cause within the context of the seizure of smuggled goods or contraband. This is highlighted by the nature of the proceeding before the *Locke* Court: a libel for the condemnation of goods illegally imported into the country. It was confirmed by Marshall's use of the word "condemnation," when he observed that probable cause "means less than evidence which would justify *condemnation*."[400] Hence, Marshall was correct when he observed that "in all cases of seizure [of smuggled goods]," the term probable cause "has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."[401]

An examination of the principal issue raised by the defendant in *Locke* further reinforces this interpretation. The defendant claimed that "just cause to suspect" that the goods seized had offended against the law was not enough to require him to produce exculpatory evidence. "Guilt," he argued, "must be proved before the pre-

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399. Act of March 2, 1799, ch. 22, §§ 67, 68, 1 Stat. 627, 677-78 (1799) (current version at 19 U.S.C. § 1581 (1982)); *see Carroll*, 267 U.S. at 151.

The authority to conduct customs searches on less than probable cause has continued to the present time. *See* United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2579-82 (1983); United States v. Herrera, 711 F.2d 1546, 1550, 1552-56 (11th Cir. 1983); United States v. Sandler, 644 F.2d 1163, 1165-66 (5th Cir. 1981) (en banc); United States v. Kenney, 601 F.2d 211, 212-13 (5th Cir. 1979) (per curiam); United States v. Doe, 472 F.2d 982, 984 (2d Cir.), *cert. denied*, 411 U.S. 969 (1973); United States v. Glaziou, 402 F.2d 8, 12-14 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); United States v. Burke, 540 F. Supp. 1282, 1286-87 (D.P.R. 1982), *aff'd*, 716 F.2d 935 (1st Cir. 1983); United States v. Whitmore, 536 F. Supp. 1284, 1290-91 (D. Me. 1982), *aff'd*, 701 F.2d 6 (1st Cir. 1983) (per curiam); 14 U.S.C. § 89(a) (1982); 19 U.S.C. §§ 482, 1581(a) (1982). In addition, border searches may be conducted by customs officials without a warrant or probable cause, or even mere suspicion. *See* United States v. Ramsey, 431 U.S. 606, 616-19 (1977); *Carroll*, 267 U.S. at 153-54; *Herrera*, 711 F.2d at 1552 (dictum); *see generally Villamonte-Marquez*, 103 S. Ct. at 2579-82 (boarding by customs officials of vessel in domestic waters providing ready access to open sea, without articulable suspicion of wrongdoing, to conduct an examination of vessel's documents, does not offend the fourth amendment). Such authority extends to documentary and safety inspection searches of vessels on the high seas without any antecedent or particularized suspicion of wrongdoing. *Burke*, 716 F.2d at 937; United States v. Thompson, 710 F.2d 1500, 1504-06 (11th Cir. 1983); United States v. Hilton, 619 F.2d 127, 131 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980); *see* United States v. Williams, 617 F.2d 1063, 1081-82, 1086 (5th Cir. 1980) (en banc). The authority further extends to searches of vessels on the high seas on reasonable and articulable grounds for suspecting that they are engaged in criminal activity. United States v. Green, 671 F.2d 46, 53 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *Burke*, 540 F. Supp. at 1287; *see Herrera*, 711 F.2d at 1550, 1552-56 (applying same standard to customs searches of non-private areas of vessels conducted in customs, as distinguished from international, waters); *Williams*, 617 F.2d at 1086-88.

400. 11 U.S. (7 Cranch) at 348 (emphasis added).

401. *Id.*

sumption of innocence could be removed" from the case.[402] With this, the Court disagreed.[403]

Chief Justice Marshall noted that the statute governing these proceedings required that the burden of proof would be on anyone claiming the property previously seized for violation of the revenue laws, provided probable cause had been established " 'for such prosecution."[404] The previous reference to burden of proof ("the *onus probandi*") was contained in a statutory clause which stated that "in actions, suits or informations to be brought, where any seizure shall be made pursuant to this act," if the property seized was "claimed by any person, in every such case [the burden of proof would be on] such claimant."[405] The subsequent reference to burden of proof, again being placed on "the claimant," came at the end of section 71 of the Act of March 2, 1799, and contained a provision that qualified the previous general applicability of "the *onus probandi*" to all "such claimant[s]."[406] This provision must have referred to "the *onus probandi*" applicable to "actions, suits or informations to be brought, where any seizure shall be made *pursuant to this act*."[407] These are the only references to "the *onus probandi*" contained in section 71, and in each instance it has specific applicability to a "claimant" of the property previously *seized* "pursuant to this act."[408] Therefore, the provision, in limiting the applicability of "the *onus probandi*," or burden of proof, to the claimant "only where probable cause is shown for such prosecution," can mean "only where probable cause is shown for such ['actions, suits or informations to be brought, where any seizure shall be made pursuant to this act']."[409]

In sum, when Marshall characterized probable cause as having "a fixed and well known meaning[, which] imports a seizure made under circumstances which warrant suspicion,"[410] he clearly had in mind its "meaning" in the law governing searches for goods smuggled into the country in violation of the revenue or tariff laws. It is only in this limited area of the law that probable cause has come to mean "circumstances which warrant suspicion."[411]

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402. *Id.*
403. *Id.*
404. *Id.* (quoting Act of March 2, 1799, ch. 22 § 71, 1 Stat. 627, 678 (1799)).
405. Act of March 2, 1799, ch. 22, § 71, 1 Stat. 627, 678 (1799) (repealed).
406. *Id.*
407. *Id.* (emphasis added).
408. *Id.*
409. *Id.*
410. *See* 11 U.S. (7 Cranch) at 348.
411. The defendant-claimant in *Locke* had argued that "[g]uilt. . .must be proved

The justification for customs and border searches or seizures on less than probable cause is based on the inherent authority of the sovereign "to protect its territorial integrity,"[412] and to prevent smuggling, as well as to prevent prohibited articles from entering the country.[413] Similarly, the need for a warrant, or for probable cause, prior to the boarding of a ship by government agents, is excused by the circumstances and exigencies of the maritime setting, which afford individuals on a vessel a reduced expectation of privacy.[414] Thus, factual and circumstantial distinctions between maritime and land searches[415] determine their respective reasonableness.[416] This, of course, is but a corollary of the precept that the reasonableness of a particular search or seizure depends upon the peculiar facts and circumstances giving rise to its occurrence — the "total atmosphere of the case."[417]

It is submitted, however, that the reduced, and even, in some instances, nonexistent standard of cause that is appropriate for customs and border searches is singularly inappropriate for land searches, and, in particular, for those searches conducted in the home,[418] where privacy interests (and concerns) are most pronounced,[419] or on other fixed premises.[420] While any search or

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before the presumption of innocence [could] be removed" from the case. 11 U.S. (7 Cranch) at 348. Marshall rejected this claim by noting that the issue of burden of proof was governed by the applicable statute, and implicitly determining that probable cause had to be assessed within the context of the nature of the prosecution. *See id.* Thus, he rejected the defendant's argument that the standard required was that of prima facie evidence, and applied the "fixed and well known meaning," in the law governing contraband seized for violation of the revenue or tariff statutes, of "circumstances which warrant suspicion." *Id.*

412. Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979); *see* United States v. Ramsey, 431 U.S. 606, 616-20 (1977); Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725, 731-32 (1980).

413. United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973).

414. United States v. Herrera, 711 F.2d 1546, 1552 (11th Cir. 1983) (probable cause not required); United States v. Green, 671 F.2d 46, 53 (1st Cir. 1982) (warrant not required); *see* United States v. Williams, 617 F.2d 1063, 1087-88 (5th Cir. 1980) (en banc).

415. "Land searches" means those searches conducted in the interior of the country, away from the border or its functional equivalent.

416. *See* United States v. Herrera, 711 F.2d 1546, 1551 (11th Cir. 1983).

417. United States v. Rabinowitz, 339 U.S. 56, 66 (1950); *accord*, Chimel v. California, 395 U.S. 752, 765 (1969).

418. Part of the search activity in *Gates* consisted of a search of the defendant's residence. 103 S. Ct. at 2326.

419. *See* Michigan v. Clifford, 104 S. Ct. 641, 648 (1984) (plurality opinion); Payton v. New York, 445 U.S. 573, 585-90 (1980); United States v. Martinez-Fuerte, 428 U.S. 543, 561, 565 (1976) (dictum); Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970) (en banc).

420. *Cf.* United States v. Ross, 456 U.S. 798, 805-07 (1982) (searches of vessels or

seizure activity necessarily involves some degree of intrusiveness and disruption, not to mention its traumatic impact upon one's state of mind, the degree of intrusion upon privacy that may be occasioned by a customs or border search is hardly comparable to, and is, in fact, significantly different from, the severe interference with privacy resulting from a search of a home or other fixed premises.[421] In the latter setting, the sharply defined privacy and security interests of the

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motor boats are not comparable to searches of residences or other fixed premises); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973) (import restrictions and searches at the nation's borders rest on different considerations and different rules of constitutional law "from domestic regulations"); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971) (plurality opinion) (port-of-entry is not a traveler's home; individual's right to be let alone does not exempt his luggage from customs search, which is "an old practice. . .intimately associated with excluding illegal articles from the country"); *Nathanson*, 290 U.S. at 45-47 (customs agents seeking warrants for private residences must satisfy probable cause requirements of fourth amendment, mere affirmance of suspicion or belief, without disclosure of supporting allegations of fact, not sufficient; Court implicitly rejected cause-to-suspect standard for issuance of warrants under fourth amendment); *Carroll*, 267 U.S. at 149-53 (same as *Ross*); Boyd v. United States, 116 U.S. 616, 623-24 (1885) (same as *Ross*); United States v. Green, 671 F.2d 46, 53 (lst Cir. 1982) (circumstances and exigencies of maritime setting afford people on a vessel a lesser expectation of privacy than in their homes); United States v. Williams, 617 F.2d 1063, 1084, 1087-88 (5th Cir. 1980) (en banc) (there are substantial differences between maritime searches and searches of buildings and vehicles on land); United States v. Steinkoenig, 487 F.2d 225, 229 (5th Cir. 1973) (statute authorizing border searches will not sanction warrantless searches of a residence); United States v. Burke, 540 F. Supp. 1282, 1286 (D.P.R. 1982) (same as *Ross* and *Green*), *aff'd*, 716 F.2d 935 (1st Cir. 1983).

In *Nathanson*, the Third Circuit acknowledged that had the warrant in question been issued under authority of the prohibition laws (warrant had been issued for the seizure of liquor smuggled into the country), it would have been invalid, "since the affidavit was merely based upon cause to suspect and suspicion." Nathanson v. United States, 63 F.2d 937, 938 (3d Cir.), *rev'd*, 290 U.S. 41 (1933). The court sustained the warrant, however, under the tariff and customs laws, arguing that the government's pecuniary interest in the smuggled goods was sufficient to justify the issuance of the warrant, and that the search warrant, based on a sworn complaint phrased almost in the language of section 595 of the Tariff Act of 1930 did not violate the defendant's constitutional rights. *Id.* at 939; *see* Tariff Act of 1930, ch. 497, § 595(a), 46 Stat. 752 (current version at 19 U.S.C. § 1595(a) (1982)).

To the Supreme Court, the Third Circuit had "acted upon an *erroneous* view." 290 U.S. at 46 (emphasis added). The Court perceived the issue to be whether the warrant was supported by *probable cause*, and concluded that it was not. 290 U.S. at 46-47. It would appear, therefore, that the Court implicitly rejected the cause-to-suspect standard for probable cause. For further discussion of *Nathanson*, *see supra* text accompanying notes 39-45.

421. *Cf.* United States v. District Court, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the [f]ourth [a]mendment is directed"); United States v. Kramer, 711 F.2d 789, 793 (7th Cir. 1983) (dictum) (fourth amendment protects individual's interest in peace and quiet by prohibiting searches that result in the physical disruption or ransacking of people's households).

individual require, as does the fourth amendment, the higher standard of probable cause.

By contrast, customs and border searches protect an important national interest— the prevention of smuggling. Without the authority to conduct such searches on less than probable cause, the government would be virtually powerless to effectively police the nation's frontiers and prevent smuggling activities, in particular, the difficulties posed by combating widespread drug smuggling operations would increase. Moreover, people crossing into the nation's territorial waters know that they are likely to be searched, due to the extensive governmental regulation of maritime and boating operations, thereby significantly reducing their reasonable expectations of privacy. Similarly, vessels are searched solely because they belong to a morally neutral class. These factors combine to suggest that customs searches on less than probable cause satisfy the requirement of reasonableness under the fourth amendment.[422]

The abuses attendant upon searches on suspicion were uppermost in the minds of the framers of the fourth amendment when they insisted upon the requirement of probable cause. This choice was not by accident. It was made with the knowledge and foresight, and with the intent that the integrity of the individual would better be served and preserved by this higher standard.[423] The selection of the Constitution as the repository for this standard was also without accident. In this way did the framers seek to preserve individual rights from the vicissitudes and pressures of political and judicial change.[424] Thus, any attempt to analogize the search of a person, his home, his papers, and his effects, conducted in the interior of the nation, to customs, maritime, or border searches is devoid of historical and analytical merit and misconceives the very purpose of the fourth amendment.

The amendment was designed to protect the individual from arbitrary and unwarranted intrusions upon his legitimate expectations of privacy, and thereby sought to secure *him* in his "person[], house[], papers, and effects, against unreasonable searches and

422. *See* United States v. Williams, 617 F.2d 1063, 1085-88 (5th Cir. 1980) (en banc); *see also id.* at 1087-88.

423. *See supra* text accompanying notes 347-66.

424. *Cf.* THE FEDERALIST No. 78, at 491-92 (A. Hamilton) (B. Wright ed. 1961) (constitutional requirement of lifetime tenure for judicial officers will secure the independence of the judiciary against legislative encroachments, and protect the rights of the individual from majoritarian excesses).

seizures."[425] It was designed, in short, to protect people, not places, or papers, or effects.[426] Note the very language of the amendment: "The right of the *people* to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."[427]

Under the constitutional command, it was the people, and only the people, who were endowed with the right to be secure against unreasonable searches and seizures. A search or seizure is reasonable or unreasonable, generally not because of the nature of what it seeks, but because of its fidelity or lack of fidelity to the requirements of the fourth amendment. Therefore, the attempt by Justice Rehnquist to characterize the *Locke* setting as "a closely related context"[428] to the factual setting of *Gates* was both factually and jurisprudentially inaccurate.[429] The only relation between the two cases was that the quarry in each was contraband. But, as fourth amendment jurisprudence teaches, it is not the nature of the quest but rather an assessment of both the invasion of the individual's privacy interests and the "promotion of legitimate governmental interests" through effective law enforcement that determines the standard of reasonableness applicable to search-and-seizure practices.[430] Thus, a particular search or seizure may be permissible in one factual setting while impermissible in another setting, even though what is sought is the same in each instance.[431] In delineating the constitutional safeguards applicable in particular contexts, a court should weigh the public interest against the privacy and security interests of the individual under the fourth amendment.[432]

Although the public interest in effective law enforcement is always a weighty consideration in formulating a standard of reasonableness applicable in particular contexts, there are certain settings where the fourth amendment interests of the individual are pre-eminent. For example, a warrantless search or seizure within the home is

425. U.S. CONST. amend. IV.

426. *See* Katz v. United States, 389 U.S. 347, 351, 353 (1967).

427. U.S. CONST. amend. IV (emphasis added).

428. *Gates*, 103 S. Ct. at 2330.

429. *Cf.* United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973) (import restrictions and searches at the nation's borders rest on different considerations and different rules of constitutuional law "from domestic regulations").

430. Delaware v. Prouse, 440 U.S. 648, 654 (1979) (footnote omitted); *see* United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976).

431. *See* cases cited *supra* note 420.

432. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976).

"presumptively unreasonable."[433] Conversely, objects subject to seizure, such as weapons or contraband, that are found in a public place may be lawfully seized by government agents without a warrant.[434] And, the justifications for customs and border searches on less than probable cause are the compelling need and the inherent authority of the sovereign to protect its territorial integrity, and to prevent smuggling, as well as to prevent prohibited articles from entering the country.[435] Similarly, the circumstances and exigencies of the maritime setting, which afford individuals on a vessel a reduced expectation of privacy, will excuse the need for a warrant, or for probable cause, prior to the boarding of a ship by agents of the government.[436] In sum, then, the scope of a constitutional safeguard will be defined by its purpose within a particular context.

Finally, Justice Rehnquist ignored "traditional doctrine"[437] by quoting *Locke* as implicit precedent for searches conducted in the interior of the country, and, in particular, for residential searches, such as took place in *Gates*.[438] That doctrine requires that the precedential value of a decision should be limited to the immediate confines of the decision's factual setting. This means that language appearing in a particular decision is to be read in light of the decision's factual setting[439] and should not be interpreted as a decision upon, or precedent for, an issue which the facts of the case do not present.[440] Therefore, it is submitted that *Locke* had no precedential value for *Gates*, and should not have been accorded any such treatment by Justice Rehnquist.

D. *The Impact of* Gates *on State Prosecutions*

1. Federalism and the Standard of Protection Under State Law

One of the great strengths of the American constitutional scheme is its diversity, which has permitted the development of a

433. Payton v. New York, 445 U.S. 573, 586 (1980) (footnote omitted).
434. *Id.* at 586-87 (dictum).
435. *See* authorities cited *supra* notes 412-13.
436. *See* cases cited *supra* note 414.
437. Satty v. Nashville Gas Co., 522 F.2d 850, 853 (6th Cir. 1975).
438. 103 S. Ct. at 2330.
439. Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944); Satty v. Nashville Gas Co., 522 F.2d 850, 853 (6th Cir. 1975); *accord*, Communications Workers of Am. v. American Tel. & Tel. Co., 513 F.2d 1024, 1028 (2d Cir. 1975), *vacated on other grounds*, 429 U.S. 1033 (1977); *see* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).
440. United States v. Neifert-White Co., 390 U.S. 228, 231 (1968); *accord*, United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 404 (1965).

system of shared responsibility between the national government and the several states. Not only does it provide for a series of checks and balances, but also it permits independent state sovereigns to exist within a federal framework of government. Under the balances of federalism, the separate states of the Union possess all of the powers of sovereignty that are not in conflict with the powers delegated by the United States Constitution to the federal government or prohibited by that charter to the states.[441]

This concept of federalism envisions a constitutional system providing for the exercise of both concurrent and exclusive powers by the federal government and by the states. Thus, pursuant to the principle of dual sovereignty, the national government remains supreme within the federal sphere, while each state retains its independent sovereignty and remains supreme within its own territory,[442] subject to limited federal jurisdiction. In the criminal sphere, for example, the state, while pursuing and vindicating its separate governmental interests, may not interpret rights guaranteed by the United States Constitution more restrictively than the Supreme Court has interpreted them.[443]

Prior to *Mapp v. Ohio*,[444] a majority of the states had not developed a substantial body of law governing search-and-seizure practices by law enforcement officers. With the advent of *Mapp*, and its insistence upon extending the federal exclusionary rule, announced in *Weeks v. United States*,[445] to state prosecutions,[446] the state courts were confronted with the prospect of having to decide large numbers of complaints about the search-and-seizure practices of their police officers without a well-developed body of independent jurisprudence defining and governing the requirements of reasonableness under their own constitutions. The result was, as might be expected, an

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441. *See* Parker v. Brown, 317 U.S. 341, 359-60 (1943); 2 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 10.1, at 4-5 (1969 & Supp. 1983).

442. *See* 2 C. ANTIEAU, *supra* note 441, § 10.1, at 4-5; R. TRESOLINI, AMERICAN CONSTITUTIONAL LAW 90-92 (1959). The principle of dual sovereignty is "inherent in our federal system." Rinaldi v. United States, 434 U.S. 22, 29 (1977) (per curiam).

443. *See* Oregon v. Hass, 420 U.S. 714, 719 n.4 (1975); Ker v. California, 374 U.S. 23, 34 (1963).

A further restriction upon the power of the states arises where there exists an actual conflict between federal and state law, or where the federal government has preempted or occupied the field. In these situations, federal law is supreme. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-23 through 6-30 (1978).

444. 367 U.S. 643 (1961).

445. 232 U.S. 383 (1914). The Court in *Weeks* was careful to exclude the states and their officials from its precept. *Id.* at 398.

446. 367 U.S. at 655-56.

inordinate reliance by state courts upon federal precedents, in particular the decisions of the Supreme Court.[447]

These Court pronouncements, however, and in particular those of the Warren Court, were far more expansive of fourth amendment protections than what most state tribunals, with their tradition of admitting all relevant evidence no matter how obtained, were prepared to adopt on their own initiative. In seeking guidance from the nation's highest court, some state tribunals may well have been confused as to the duty of the Supreme Court in interpreting the commands of the federal Constitution. That duty, quite simply, requires the Court to seek out and define only minimum standards of protection for individual rights.[448] Consequently, the federal Constitution, as interpreted by the Supreme Court, establishes minimum standards, and reserves to the states the right to impose higher standards on law enforcement practices pursuant to their own constitutions.

While pronouncements of the Supreme Court are entitled to respectful consideration, state courts retain their freedom of choice as to whether, under their respective constitutions, they should comport their decisions with federal law. In short, while this decision remains one of choice, it may not be compelled.[449] Thus, the states are not precluded from imposing, as a matter of state law, higher standards on searches and seizures than are required by the fourth amendment.[450] And, a number of states have elected to do so.[451]

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447. *Cf. Developments in the Law-The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1370 (1982) (state courts usually interpret state constitutional protections exactly as the Supreme Court has interpreted corresponding federal guarantees).

448. Mills v. Rogers, 457 U.S. 291, 299, 300 (1982); People v. Brisendine, 13 Cal. 3d 528, 545, 531 P.2d 1099, 1110, 119 Cal. Rptr. 315, 326 (1975) (en banc); State v. Benoit, 417 A.2d 895, 899 (R.I. 1980); J. HALL, *supra* note 28, § 23:6, at 655-56.

449. *See* People v. Brisendine, 13 Cal. 3d 528, 548, 552, 531 P.2d 1099, 1112, 1114-15, 119 Cal. Rptr. 315, 328, 330-31 (1975) (en banc).

450. Cooper v. California, 386 U.S. 58, 62 (1967) (dictum); *see* Oregon v. Hass, 420 U.S. 714, 719 & n.4 (1975); Alderman v. United States, 394 U.S. 165, 175 (1969) (dictum); Sibron v. New York, 392 U.S. 40, 60-61 (1968); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498-504 (1977); *see also* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

451. Illustrative of this approach are: Waring v. State, 670 P.2d 357, 362-63 (Alaska 1983) (refusing to follow restrictions on standing to assert the violation of a co-defendant's fourth amendment rights imposed in Alderman v. United States, 394 U.S. 165 (1969)); People v. Brisendine, 13 Cal. 3d 528, 545-52, 531 P.2d 1099, 1110-15, 119 Cal. Rptr. 315, 326-31 (1975) (en banc) (rejecting the standard governing the right to search incident to custodial arrest announced in United States v. Robinson, 414 U.S. 218 (1973)); People v. Sporleder, 666 P.2d 135, 140-44 (Colo. 1983) (en banc) (disavowing the analysis in Smith v. Maryland, 442 U.S. 735 (1979), that the installation and use of a pen

This result is not surprising. Not only were state constitutions intended to be documents of independent force and vitality, but also their historic roots reveal that the Bill of Rights was itself drafted on the basis of the corresponding provisions of the first state constitutions.[452] Thus, for example, protection against unreasonable searches and seizures, which later ripened into the fourth amendment, had been embodied in all of those state constitutions adopted prior to 1789 that contained a separate bill of rights.[453]

Although the United States Constitution was designed to secure the sovereign integrity and independence of states against the potential abuses of a centralized government, the state charters were conceived as the first line of protection of individual rights against the excesses of local authorities. This dual sovereignty reflects a basic principle of federalism: that this nation as a whole is composed of

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register, on telephone company property, does not constitute a search within the meaning of the fourth amendment); People v. Beavers, 393 Mich. 554, 564-66, 227 N.W.2d 511, 514-15 (en banc), *cert. denied*, 423 U.S. 878 (1975) (declining to follow United States v. White, 401 U.S. 745 (1971) (plurality opinion), which upheld the right of one party to a telephone conversation to consent to eavesdropping on the conversation); State v. Ball, 34 CRIM. L. REP. (BNA) 2272, 2273 (N.H. Dec. 12, 1983) (adopting a stricter standard governing the application of the plain view doctrine than that articulated in Texas v. Brown, 103 S. Ct. 1535 (1983) (plurality opinion)); State v. Johnson, 68 N.J. 349, 353-54, 346 A.2d 66, 67-68 (1975) (refusing to follow Schneckloth v. Bustamonte, 412 U.S. 218 (1973), regarding consent searches); People v. Gokey, 60 N.Y.2d 309, 312, 313-14, 457 N.E.2d 723, 724-25, 469 N.Y.S.2d 618, 619, 620 (1983) (employing a stricter standard for searches incident to arrest than explicated in New York v. Belton, 453 U.S. 454 (1981)); Commonwealth v. Sell, 470 A.2d 457, 466-69 (Pa. 1983) (declining to adopt the analysis in United States v. Salvucci, 448 U.S. 83 (1980), abolishing automatic standing to suppress in possessory-offense cases); State v. Benoit, 417 A.2d 895, 899-901 (R.I. 1980) (rejecting the logic of Chambers v. Maroney, 399 U.S. 42 (1970), regarding the warrantless investigatory search of a motor vecicle stopped and seized on the highway and removed to a police station); State v. Opperman, 247 N.W.2d 673, 674-75 (S.D. 1976) (declining to follow South Dakota v. Opperman, 428 U.S. 364 (1976), regarding inventory searches of impounded motor vehicles); State v. Ringer, 674 P.2d 1240, 1242-43, 1247-48 (Wash. 1983) (en banc) (rejecting the automobile exception to the warrant requirement as refined in United States v. Ross, 456 U.S. 798 (1982), and the search-incident-to-arrest rule developed in New York v. Belton, 453 U.S. 454 (1981)); *see* State v. Caraher, 293 Or. 741, 653 P.2d 942, 947, 950-52 (1982) (en banc) (endorsing right to impose stricter standards on searches and seizures under state constitution than are required by federal Constitution, and creating such standards for searches incident to valid arrests).

452. People v. Brisendine, 13 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975) (en banc); State v. Caraher, 293 Or. 741, — n.13, 653 P.2d 942, 950 n.13 (1982) (en banc); *see* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (1973); B. SCHWARTZ, *supra* note 365, at 86-90; *see also* A. HOWARD, *supra* note 353, at 182-83, 205-15, 231-40 (incorporation by state constitutions of many of the "rights of Englishmen" led to adoption of Bill of Rights; American constitutional law, as reflected in the state constitutions and the Bill of Rights, owes its origin to Magna Carta).

453. People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975) (en banc); *see* B. SCHWARTZ, *supra* note 365, at 86-90.

distinct political and geographic entities, bound together by a fundamental federal law, but remaining, nevertheless, independently responsible for safeguarding the rights of their respective citizens.[454]

2. A Call to the States to Reject the Implications of *Gates* and its Lower Standard

After reading the majority opinion in *Gates*, one is left with the uneasy (one might even say, disturbing) impression that the real culprit, in Justice Rehnquist's cast of characters, is not *Aguilar-Spinelli* or the standard for probable cause, or even the exclusionary rule, but rather, the fourth amendment itself; that to him, it is "a kind of nuisance, a serious impediment in the war against crime,"[455] and functions as a refuge for the guilty and the wrongdoers of American society. If this impression is accurate, then Justice Rehnquist misconstrues the amendment's purpose and has seriously misread its history.

In a sense, the fourth amendment does operate to protect the guilty; for when a criminal accused moves to suppress competent and relevant evidence, obtained in violation of his rights under the amendment, he is implicitly acknowledging that the evidence he is seeking to exclude from his trial is in fact inculpatory to him.[456] But the fourth amendment protects more than just the guilty. It protects all persons — the innocent and the guilty — who have been subjected to intrusions by means of unreasonable searches and seizures upon their security and legitimate expectations of privacy. Toward that end, it must be construed liberally to safeguard these precious rights.[457] Justice Butler put the proposition in these terms: "The Amendment is to be liberally construed and *all owe the duty of*

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454. People v. Brisendine, 13 Cal. 3d 528, 550-51, 531 P.2d 1099, 1113-14, 119 Cal. Rptr. 315, 329-30 (1975) (en banc); *see* State v. Benoit, 417 A.2d 895, 899 (R.I. 1980).

For further discussion of this issue, see Brennan, *supra* note 450; Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1 (1981); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); *Developments in the Law*, *supra* note 447; Note, *Stepping into the Breach: Basing Defendants' Rights on State Rather than Federal Law*, 15 AM. CRIM. L. REV. 339 (1978).

455. Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

456. It would be a rare defendant, indeed, who would move to exclude exculpatory evidence.

457. United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); *see* Weeks v. United States, 232 U.S. 383, 391-92 (1914); Boyd v. United States, 116 U.S. 616, 635 (1886). *See generally* Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

vigilence for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."[458]

There is good reason for this broad protection. As history teaches, arbitrary governments frequently resort to oppressive search-and-seizure practices to further the ends of tyranny at the expense of fundamental principles of liberty.[459] Moreover, such practices are not unfamiliar to this country, and have been described in stark terms by Justice Jackson:

> [T]he right to be secure against searches and seizures is one of the most difficult to protect. Since the [law enforcement] officers are themselves the chief invaders, there is no enforcement outside of court.
>
> *Only occasional* and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of *innocent* people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
>
> Courts can protect the *innocent* against such invasions only indirectly and through the medium of excluding evidence obtained against those *who frequently are guilty*.[460]

As this passage demonstrates, the fourth amendment is not self-executing and of necessity must rely upon the collective good judgment of the courts to secure, for the overwhelming majority of innocent citizens of this country, protection from arbitrary invasions of their peace and security by government agents. Thus, the courts must remain faithful to the great and enduring principles embodied in the fundamental law of the Land by insisting that the police comply with the commands of the amendment.[461] The vehicle adopted for securing this compliance is the exclusion of evidence obtained in

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458. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) (emphasis added).

459. *See* Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

460. *Id.* at 181 (emphasis added); *see* Loewy, *supra* note 457, at 1269 (since primary purpose of fourth amendment ought to be protection of the innocent, the Supreme Court's principal focus should be on deterrent value of the exclusionary rule).

461. *See* Weeks v. United States, 232 U.S. 383, 391-93 (1914).

violation of the constitutional mandate,[462] even if on occasion it results, as Justice Jackson acknowledged, in the acquittal of guilty persons.[463]

Who is to say that this is too high a price to pay, when one considers the genesis of the fourth amendment? Men, such as John Adams, William Henry Drayton, Thomas Jefferson, James Madison, George Mason, James Otis, and Oxenbridge Thacher, were not acting as criminals and wrongdoers when they cried out against the abuses of the English crown. It was the outcry against these abuses that led to the Declaration of Independence and to the Constitution and the Bill of Rights. These men were all too familiar with the excesses employed by the monarchy, through the the dreaded and despised writs of assistance, not to know that the security and privacy of innocent persons were frequently invaded without just cause. Their knowledge was reflected in the fourth amendment, in its command against unreasonable searches and seizures, and in its insistence that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[464] By means of these protections, the innocent would be secure from indiscriminate general searches based only on suspicion, which, "[s]ince before the creation of our government,. . . have been deemed obnoxious to fundamental principles of liberty."[465] It is not surprising, therefore, that Justice Jackson protested that fourth amendment protections "are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart."[466]

Justice Rehnquist's vision of the fourth amendment is both narrow and insensitive to the great principles of individual liberty upon which the Bill of Rights is founded. There is, however, another vision of the fourth amendment, one that rejects Justice Rehnquist's interpretation. This view teaches that there is a spiritual underpin-

462. United States v. Calandra, 414 U.S. 338, 347-48 (1974); *Mapp*, 367 U.S. at 655-57 (exclusionary rule assures that "no man is to be convicted on unconstitutional evidence"; without the rule, the fourth amendment would be reduced to "'a form of words'"); Elkins v. United States, 364 U.S. 206, 217-18, 222-24 (1960).

463. *See Mapp*, 367 U.S. at 659 (while the rule of exclusion may result in the freeing of a criminal, "it is the law that sets him free. Nothing can destroy a government more quickly than. . .its disregard of the charter of its own existence").

464. U.S. CONST. amend. IV.

465. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

466. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

ning to the fourth amendment - the belief that equates the value of the privacy and sanctity of person and home, supplemented by constitutional protection against overreaching government, with the very value of human dignity itself. This belief, in sum, views the amendment as a fundamental restraint upon police conduct so as to preserve individual privacy and security except in cases of compelling necessity, and then only under strict procedural safeguards.[467] Justice Brandeis stated this philosophy most cogently as "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."[468] Thus, the principle function of the fourth amendment is to preserve "the privacy of a free people living free lives"[469] from indiscriminate search-and-seizure practices by law enforcement officers.

This clash of philosophies was most evident in *Gates*. The particular setting for this disagreement was the facial sufficiency of a supporting affidavit for a warrant based on hearsay evidence contained in an anonymous informant's tip. The issue raised, however, far transcended the significance of its factual context, for what ultimately was implicated in *Gates* was the continued vitality of the warrant machinery erected by the fourth amendment.

The great, and enduring, purpose of the warrant requirement is to interpose a neutral and detached magistrate between the citizen and the police, so that an objective mind might assess the need of government agents to invade the individual's privacy in order to enforce the law. In this way, the founders of our constitutional system of government believed that the individual's right to privacy and society's interest in reasonable security and freedom from official surveillance could best be preserved and accomodated. Obviously, therefore, the role of the magistrate is central to this constitutional scheme, for he acts as a brake on the arbitrary practices of unscrupulous law enforcement officers, thereby severely limiting the right of an officer to thrust himself into a home.[470] At the core of this role is the magistrate's independence, for without this structural and mental integrity, all semblance of objectivity would quickly vanish, and the magistrate would become a deferential and pliable agent of the police. It is submitted that this is exactly the role that Justice Rehn-

467. J. LANDYNSKI, *supra* note 33, at 47.

468. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

469. Amsterdam, *supra* note 11, at 407.

470. *See* McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 13-14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); United States v. Bonfiglio, 713 F.2d 932, 935 (2d Cir. 1983).

quist's opinion in *Gates* envisions for the magistrate— one of subservience to law enforcement officers and their informants, one of deference to their superior knowledge and expertise in combating and rooting out crime. And, it is further submitted, it is precisely this ideology that the founders of this nation most abhorred and feared and sought to neutralize, not only by a system of checks and balances but also by means of the Bill of Rights, which was conceived as a collective limitation upon the exercise of power by government. The framers of the fourth amendment were not ignorant men. They did not bring second-class minds to the task of erecting an enduring charter of this nation's existence. Surely they must have been aware of the temptation to use the awesome power of government in furtherance of some "noble" cause, passionately perceived and warmly embraced by a current majority of the community. But just as surely, they saw the dangers of such a result, for once government is free of constitutional restraints and let loose on society, that society will be quickly cowed and crushed in spirit. Its members will become terrorized, their human personality diminished, and their dignity and self-reliance destroyed. It is little wonder, therefore, that unrestricted search-and-seizure practices have become, in the words of Justice Jackson, "one of the first and most effective weapons in the arsenal of every arbitrary government."[471]

Gates struck at the integrity and independence of the magistrate. It did this by downgrading the magistrate's central role in making determinations of probable cause and by encouraging the magistrate to abdicate his responsibility in the probable-cause process by deferring to the judgments of police officers and their informants in the name of efficient law enforcement and common sense.

A clue to Justice Rehnquist's thinking appeared when he implicitly admonished magistrates not to insist upon a thorough detailing of the basis of knowledge of an informant known for his "unusual reliability."[472] The magistrate, under the new totality-of-the-circumstances approach touted in *Gates*, is asked to trust to the informer's current reliability primarily, if not exclusively, on the basis of his past reliability. But, as Justice White was quick to point out, the past reliability of an informant is no more a barometer of current probable cause than is the previous trustworthiness of an ex-

471. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).
472. 103 S. Ct. at 2329.

perienced and honest law enforcement officer.[473]

Justice Rehnquist's approach differs from that of Justice White and of *Aguilar-Spinelli* by asking the magistrate to place undue emphasis upon the prior reliability of an informer in determining current probable cause. Put another way, he is asking the magistrate to trust the source of the information, primarily on the basis of proven reliability, and if it satisfies the affiant-police officer, it will be sufficient for the magistrate to find probable cause. The argument appears to be that the collective knowledge and expertise of law enforcement officers and their informants in combating crime are far superior and more trustworthy than that of mere magistrates. In this way, the integrity of the role of an independent judiciary in probable cause determinations and the warrant process will have been compromised, and the objective analysis required of a truly independent judicial officer will have been effectively subverted.

Justice Brennan caught the drift of Justice Rehnquist's argument when he observed, with perception, that "[w]ords such as 'practical,' 'nontechnical,' and 'commonsense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the [f]ourth [a]mendment."[474] It was never the intent of the framers of the amendment, or of the Supreme Court itself, as reflected in its prior decisions, that practicality, common sense, and effective law enforcement were to take precedence *per se* over rights secured by the fourth amendment.[475] The states should emphatically reject any such approach under their respective constitutions. They should insist, at a minimum, that, as a prerequisite to the issuance of a warrant, a *substantial* showing of facts must be made from which an inference may be reasonably drawn that the informer is a credible person and that his information was obtained or gathered in a reliable way. Any standard that does not require such a showing will result in an impairment of the rights secured by the fourth amend-

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473. *Id.* at 2350 (White, J., concurring); *Spinelli*, 393 U.S. at 424-25 (White, J., concurring).

474. 103 S. Ct. at 2359 (Brennan, J., dissenting).

For an example of *Gates'* implicit endorsement of the substantial, if not, in fact, primary role of law enforcement expertise in assessments of probable cause, *and* its *impact* upon an evaluation of innocent-appearing activity, see United States v. Mendoza, 722 F.2d 96, 101-02 (5th Cir. 1983).

475. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 393 (1978) ("mere fact that law enforcement may be made more efficient can never by itself justify disregard of the [f]ourth [a]mendment").

ment.[476] Making it easier to obtain a warrant may simplify and expedite the investigation of crime, but it is not the way for constitutional government to go, and Justice Stewart has told us why: "[T]he [f]ourth [a]mendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity [and expediency] in enforcement of the criminal law."[477]

Ultimately, the focus of judicial inquiry should not be on such subjective factors as the expertise and wisdom of law enforcement officers and their informers, common sense, practicality, and efficient and simplified law enforcement, but rather on an objective analysis of the information contained in the supporting affidavit so as to make a proper determination of probable cause. In this way, the magistrate will be effectively discharging his duty of determining whether the constitutional rights of the individual who is subject to the warrant will be violated if the warrant is issued. Justice Rehnquist was correct when he implied that there is no magic formula for accomplishing this.[478] Certainly, as he suggested, there is an interrelationship between the *Aguilar-Spinelli* basis-of-knowledge and veracity prongs.[479] Therefore, there is merit to the argument that the *Aguilar-Spinelli* rules were not the last word on the troublesome subject of properly assessing the probable cause sufficiency of informants' tips, and that a rigid application of this analysis could seriously hamper effective law enforcement without materially increasing constitutional protections.[480] But after this much is acknowledged, the fact remains that the magistrate must still be

476. *See Gates*, 103 S. Ct. at 2350 (White, J., concurring in the judgment). This may be done, for example, by means of the informant's personal observation of the information imparted in his report, or a showing that the informer's hearsay came from one of the actors in the crime in the nature of an admission against penal interest, or self-verifying detail in the tip sufficient to infer an adequate basis of knowledge, or substantial corroboration or verification of the report's contents.

One court has attempted to put a limiting construction on *Gates*: Commonwealth v. Upton, 390 Mass. 562, 568-74, 458 N.E.2d 717, 720-24 (1983). The problem with any such assessment, however, is that the Supreme Court is the final arbiter of its own pronouncements. Moreover, one may assume that the Court chooses the language contained in its rulings with care. Thus, interpreting a Supreme Court decision by choosing to ignore part of the language contained in that decision, as the *Upton* court did, could prove to be of dubious, as well as of limited, precedential value. The better approach, it is submitted, is for a state court to recognize and appreciate the full implications of *Gates*, and to reject it under the authority of the applicable state constitution.

477. Mincey v. Arizona, 437 U.S. 385, 393 (1978).

478. *See Gates*, 103 S. Ct. at 2328-29.

479. *See id.* at 2329.

480. *See id.* at 2330-32; *id.* at 2350-51 (White, J., concurring in the judgment).

presented with a showing of facts that is sufficient for him to reasonably infer that the informer is a credible person who gathered his information in a reliable way. Otherwise, warrants will issue "on loose, vague or doubtful bases of fact,"[481] and will expose the individual and his home to search on mere suspicion.

Similarly, the states should emphatically reject any suggestion of Justice Rehnquist's that probable cause should be conceptualized in terms of suspicion, reasonable or otherwise. While retaining its label, Justice Rehnquist has attempted to change the meaning of probable cause. By so doing, he has embarked on a path that runs counter to the legal traditions of this country, and has struck at the very concept of the fourth amendment. For if the amendment stands for anything, it is that government must act with prudence and restraint in moving against the individual, and then only upon just cause.

The history of the fourth amendment demonstrates that the standard of suspicion has never been considered an adequate or just cause for government to intrude upon the individual's zone of privacy by means of a warrant. Probable cause has always been the standard under the warrant clause of the amendment by which privacy is reasonably invaded. This command is central to the warrant requirement, and represents the historical genesis of the fourth amendment. To equate probable cause with suspicion is to stand history on its head and to expose the individual and the privacies of his life to the discretionary mercy of law enforcement officers.

The fact that this is being proposed in the name of effective law enforcement and common sense is of no moment. The message coming from *Gates* may have been sugarcoated and served up under the least obnoxious banner of efficient law enforcement and practicality. But once Justice Rehnquist's opinion is stripped of its graceful style and palatable call for a more effective war on crime, what is revealed is a message of bitter antagonism toward the warrant requirement, the standard of probable cause, and, above all else, the fourth amendment itself. It is the duty of the states, as it befell them once before prior to the establishment of the federal Constitution, to resist this message of hate, and to preserve to their citizens what this country fought in revolution to achieve: the dignity and privacy of the individual, secure from arbitrary government.

As *Henry v. United States*[482] taught, and as *Dunaway v. New*

481. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).
482. 361 U.S. 98 (1959).

York[483] confirmed, the requirement of probable cause "has roots that are deep in our history."[484] Those roots, however, have always rejected any attempt to equate suspicion with probable cause. Thus, history has revealed that "[h]ostility to [searches or] seizures based on mere suspicion was a prime motivation for the adoption of the [f]ourth [a]mendment,"[485] and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest [or to search]. And that principle has survived to this day."[486]

The core principles of fourth amendment jurisprudence reveal a deep-rooted commitment of this nation to a standard of probable cause that is superior to the concept of suspicion. We, as a people, had paid too high a price to rid ourselves of arbitrary government and its inevitable excesses only to have then turned around and adopted for ourselves a standard governing search-and-seizure practices that would have effectively undercut the very principles that gave birth to freedom in this country, and would have left the security and privacy of the individual at the mercy of petty officers of the state.[487]

Justice Rehnquist, as a member of the Supreme Court, had to be familiar with this history, and was certainly charged with knowledge of the Court's pronouncements on this subject. Both *Henry* and *Dunaway* have been and remain good law, and, he must have known this when he authored the majority opinion in *Gates*. The conclusion is inescapable that he intentionally introduced the concept of suspicion into probable cause analysis for the purpose of laying the foundation for the eventual lowering of the standard of probable cause. If he is successful in this, he will have effectively diminished the right of the people to be secure in their persons and homes against unreasonable searches and seizures. The net result will be to reduce the fourth amendment to a "form of words,"[488] and to render its protections as "secondary rights, to be relegated to a deferred position."[489]

The states should be no party to such an insidious attempt to

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483. 442 U.S. 200 (1979).

484. *Henry*, 361 U.S. at 100; *accord, Dunaway*, 442 U.S. at 213.

485. *Dunaway*, 442 U.S. at 213.

486. *Henry*, 361 U.S. at 101 (footnote omitted).

487. *Weeks*, 232 U.S. at 389-92.

488. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.) (citing *Weeks*, 232 U.S. at 393); *see* Terry v. Ohio, 392 U.S. 1, 12 (1968); *Mapp*, 367 U.S. at 655.

489. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

undercut the principles that gave birth to this nation. The standard of probable cause is no formality. It serves a high function and defines the criteria for the reasonable invasion of privacy. The standard was selected not to shield criminals but to protect the innocent from arbitrary intrusions by agents of the government. The right of privacy was deemed too precious to be subject to the dangers inherent in a standard governed by the principles of suspicion. Power has a heady effect; and history has shown that the police, acting pursuant to a standard of suspicion, cannot be trusted. Against such a pernicious doctrine, a state court "should resolutely set its face."[490]

VI. CONCLUSION

This article ends where, in a very real sense, it began: with *Boyd v. United States*,[491] "[t]he leading case on the subject of search and seizure,"[492] and which "will be remembered as long as civil liberty lives in the United States."[493] Writing nearly one hundred years ago, Justice Bradley placed the courts of this nation under a charge to protect fundamental rights in terms that proved to be prophetic:

> It may be that it is the obnoxious thing in its *mildest* and *least repulsive* form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by *silent* approaches and *slight* deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be *liberally* construed. A close and literal construction deprives them of half their efficacy, and leads to *gradual* depreciation of the right, as if it consisted *more in sound than in substance*. It is the *duty* of courts to be *watchful* for the constitutional rights of the citizen, and against any *stealthy* encroachments thereon.[494]

It is submitted, in conclusion, that the state courts remain under this charge, and should take up the call of *Boyd* "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," by rejecting the message emanating from *Gates*. Suspicion must never be the standard of probable cause, and no warrant should issue on the basis of hearsay evidence contained in an informant's tip without a substantial factual basis to support a

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490. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

491. 116 U.S. 616 (1886).

492. *Carroll*, 267 U.S. at 147; *accord*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965).

493. *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting).

494. 116 U.S. at 635 (emphasis added).

reasonable inference that the informer is a credible person who has obtained his information in a reliable way. To permit suspicion to be the standard by which privacy may be invaded, or to sanction the issuance of a warrant on less than a substantial factual basis to support a reasonable inference that an informant is a credible person who has gathered his information in a trustworthy manner, will result in an evisceration of the probable cause standard and an impairment of the rights secured by the fourth amendment.