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# Justice Brennan, Dissenting

William J. Brennan
*US Supreme Court Justice*

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rejects 2-Part v. G-S

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

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**1st DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 81–430

ILLINOIS, PETITIONER *v.* LANCE GATES ET UX.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

[May ——, 1983]

JUSTICE BRENNAN, dissenting.

Although I join JUSTICE STEVENS' dissenting opinion and agree with him that the warrant is invalid even under the Court's newly announced "totality of the circumstances" test, see *post*, at 4–5, and n. 8, I write separately to dissent from the Court's unjustified and ill-advised rejection of the two-prong test for evaluating the validity of a warrant based on hearsay announced in *Aguilar* v. *Texas*, 378 U. S. 108 (1964), and refined in *Spinelli* v. *United States*, 393 U. S. 410 (1969).

I

The Court's current Fourth Amendment jurisprudence, as reflected by today's unfortunate decision, patently disregards Justice Jackson's admonition in *Brinegar* v. *United States*, 338 U. S. 160 (1949):

> "[Fourth Amendment rights] . . . 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. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . .
>
> "But the right to be secure against searches and sei-

> zures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court." *Id.*, at 180–181 (Jackson, J., dissenting).

In recognition of the judiciary's role as the only effective guardian of Fourth Amendment rights, this Court has developed over the last half century a set of coherent rules governing a magistrate's consideration of a warrant application and the showings that are necessary to support a finding of probable cause. We start with the proposition that a neutral and detached magistrate, and not the police, should determine whether there is probable cause to support the issuance of a warrant. In *Johnson* v. *United States*, 333 U. S. 10 (1948), the Court stated:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.*, at 13–14 (footnote omitted).

See also *Whiteley* v. *Warden*, 401 U. S. 560, 564 (1971); *Spinelli* v. *United States*, *supra*, at 415; *United States* v. *Ventresca*, 380 U. S. 102, 109 (1965); *Aguilar* v. *Texas*, *supra*, at 111; *Jones* v. *United States*, 362 U. S. 257, 270–271 (1960); *Giordenello* v. *United States*, 357 U. S. 480, 486 (1958); *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932).

In order to emphasize the magistrate's role as an independent arbiter of probable cause and to insure that searches or

seizures are not effected on less than probable cause, the Court has insisted that police officers provide magistrates with the underlying facts and circumstances that support the officers' conclusions. In *Nathanson* v. *United States*, 290 U. S. 41 (1933), the Court held invalid a search warrant that was based on a customs agent's "mere affirmation of suspicion and belief without any statement of adequate supporting facts." *Id.*, at 46. The Court stated that "[u]nder the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Id.*, at 47.

In *Giordenello* v. *United States*, *supra*, the Court reviewed an arrest warrant issued under the Federal Rules of Criminal Procedure based on a complaint sworn to by a Federal Bureau of Narcotics agent. *Id.*, at 481.[1] Based on the agent's testimony at the suppression hearing, the Court noted that "until the warrant was issued . . . [the agent's] suspicions of petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, none of whom either appeared before the Commissioner or submitted affidavits." *Id.*, at 485. The Court found it unnecessary to decide whether a warrant could be based solely on hearsay information, for the complaint was "defective in not providing a sufficient basis upon which a finding of probable cause could be made." *Ibid.* In particular, the complaint contained no affirmative allegation that the agent spoke with personal knowledge nor did it indicate

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[1] Although the warrant was issued under the Federal Rules of Criminal Procedure, the Court stated that "[t]he provisions of these Rules must be read in light of the constitutional requirements they implement." *Giordenello* v. *United States*, 357 U. S. 480, 485 (1958). See *Aguilar* v. *Texas*, 378 U. S. 108, 112, n. 3 (1964) ("The principles announced in *Giordenello* derived . . . from the Fourth Amendment, and not from our supervisory power").

any sources for the agent's conclusion. *Id.*, at 486. The Court expressly rejected the argument that these deficiencies could be cured by "the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer." *Ibid.*

As noted, the Court did not decide the hearsay question lurking in *Giordenello*. The use of hearsay to support the issuance of a warrant presents special problems because informants, unlike police officers, are not regarded as presumptively reliable or honest. Moreover, the basis for an informant's conclusions ~~are~~ not always clear from an affidavit that merely reports those conclusions. If the conclusory allegations of a police officer are insufficient to support a finding of probable cause, surely the conclusory allegations of an informant should *a fortiori* be insufficient.

In *Jones* v. *United States*, *supra*, the Court considered "whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another." 362 U. S., at 269. The Court held that hearsay information can support the issuance of a warrant "so long as a substantial basis for crediting the hearsay is presented." *Ibid.* The Court found that there was a substantial basis for crediting the hearsay involved in *Jones*. The informant's report was based on the informant's personal knowledge, and the informant previously had provided accurate information. Moreover, the informant's story was corroborated by other sources. Finally, the defendant was known to the police to be a narcotics user. *Id.*, at 271.

*Aguilar* v. *Texas*, 378 U. S. 108 (1964), merely made explicit what was implicit in *Jones*. In considering a search warrant based on hearsay, the Court reviewed *Nathanson* and *Giordenello* and noted the requirement established by those cases that an officer provide the magistrate with the underlying facts or circumstances that support the officer's

conclusion that there is probable cause to justify the issuance of a warrant. The Court stated:

> "The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello*. Here, the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'" *Id.*, at 113–114 (footnote omitted).[2]

While recognizing that a warrant may be based on hearsay, the Court established the following standard:

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose

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[2] The Court noted that approval of the affidavit before it "would open the door to easy circumvention of the rule announced in *Nathanson* and *Giordenello*." *Aguilar* v. *Texas*, *supra*, at 114, n. 4. The Court stated:

> "A police officer who arrived at the 'suspicion,' 'belief' or 'mere conclusion' that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had 'received reliable information from a credible person' that the narcotics were in someone's possession." *Ibid.*

> identity need not be disclosed . . . was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime' . . . or, as in this case, by an unidentified informant." *Id.*, at 114–115 (footnote omitted).

The *Aguilar* standard was refined in *Spinelli* v. *United States*, 393 U. S. 410 (1969). In *Spinelli*, the Court reviewed a search warrant based on an affidavit that was "more ample," *id.*, at 413, than the one in *Aguilar*. The affidavit in *Spinelli* contained not only a tip from an informant, but also a report of an independent police investigation that allegedly corroborated the informant's tip. *Ibid.* Under these circumstances, the Court stated that it was "required to delineate the manner in which *Aguilar*'s two-pronged test should be applied. . . ." *Ibid.*

The Court held that the *Aguilar* test should be applied to the tip, and approved two additional ways of satisfying that test. First, the Court suggested that if the tip contained sufficient detail describing the accused's criminal activity it might satisfy *Aguilar*'s basis of knowledge prong. *Id.*, at 416. Such detail might assure the magistrate that he is "relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Ibid.* Although the tip in the case before it did not meet this standard, "[t]he detail provided by the informant in *Draper* v. *United States*, 358 U. S. 307 (1959), provide[d] a suitable benchmark," *ibid.*, because "[a] magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." *Id.*, at 417 (footnote omitted).[3]

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[3] There is some tension between *Draper* v. *United States*, 358 U. S. 307 (1959), and *Aguilar*. In *Draper*, the Court considered the validity of a

Second, the Court stated that police corroboration of the details of a tip could provide a basis for satisfying *Aguilar*. *Id.*, at 417. The Court's opinion is not a model of clarity on this issue since it appears to suggest that corroboration can satisfy both the basis of knowledge and veracity prongs of

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warrantless arrest based on an informant's tip and police corroboration of certain details of the tip. The informant, who in the past had always given accurate and reliable information, told the police that Draper was peddling narcotics. The informant later told the police that Draper had left for Chicago by train to pick up some heroin and would return by train on the morning of one of two days. The informant gave the police a detailed physical description of Draper and of the clothing he was wearing. The informant also said that Draper would be carrying a tan zipper bag and that he walked very fast. 358 U. S., at 309.

On the second morning specified by the informant, the police saw a man "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." *Id.*, at 309–310. The man was carrying a tan zipper bag. The police arrested him and searched him incident to the arrest. *Ibid.*

The Court found that the arrest had been based on probable cause. Having verified every detail of the tip "except whether [Draper] had accomplished his mission and had the three ounces of heroin on his person or in his bag," *id.*, at 313, the police "had 'reasonable grounds' to believe that the remaining unverified bit of [the informant's] information . . . was likewise true." *Ibid.*

There is no doubt that the tip satisfied *Aguilar*'s veracity prong. The informant had given accurate information in the past. Moreover, under *Spinelli*, the police corroborated most of the details of the informant's tip. See *Spinelli* v. *United States*, 393 U. S., at 417; *id.*, at 426–427 (WHITE, J., concurring); *infra*, at ——, and n. 4. There is some question, however, about whether the tip satisfied *Aguilar*'s basis of knowledge prong. The fact that an informant is right about most things may suggest that he is credible, but it does not establish that he has acquired his information in a reliable way. See *Spinelli* v. *United States*, *supra*, at 426–427 (WHITE, J., concurring). *Spinelli*'s "self-verifying detail" element resolves this tension. As one commentator has suggested, "under *Spinelli*, the *Draper* decision is sound as applied to its facts." Note, The Informer's Tip As Probable Cause for Search or Arrest, 54 Cornell L. Rev. 958, 964, n. 34 (1969).

*Aguilar*. *Id.*, at 417–418.[4] JUSTICE WHITE's concurring opinion, however, points the way to a proper reading of the Court's opinion. After reviewing the Court's decision in *Draper* v. *United States*, *supra*, JUSTICE WHITE concluded that "[t]he thrust of *Draper* is not that the verified facts have independent significance with respect to proof of [another unverified fact]." *Id.*, at 427. In his view, "[t]he argument instead relates to the reliability of the source: because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts." *Ibid.* JUSTICE WHITE then pointed out that prior cases had rejected "the notion that the past reliability of an officer is sufficient reason for believing his current assertions." *Ibid.* JUSTICE WHITE went on to state:

"Nor would it suffice, I suppose, if a reliable informant

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4The Court stated that the FBI's independent investigative efforts could not "support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way." *Spinelli* v. *United States*, *supra*, at 417. The Court suggested that *Draper* again provided "a relevant comparison." *Ibid.* Once the police had corroborated most of the details of the tip in *Draper* "[i]t was . . . apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established." *Id.*, at 417–418.

It is the Court's citation of *Draper* which creates most of the confusion. The informant's credibility was not at issue in *Draper* irrespective of the corroboration of the details of his tip. See n. 3, *supra*. The Court's opinion, therefore, might be read as suggesting that corroboration also could satisfy *Aguilar*'s basis of knowledge test. I think it is more likely, however, especially in view of the discussion *infra*, at ——, that the Court simply was discussing an alternative means of satisfying *Aguilar*'s veracity prong, using the facts of *Draper* as an example, and relying on its earlier determination that the detail of the tip in *Draper* was self-verifying. See 393 U. S., at 416–417. It is noteworthy that although the affiant in *Spinelli* had sworn that the informer was reliable, "he [had] offered the magistrate no reason in support of this conclusion." *Id.*, at 416. *Aguilar*'s veracity prong, therefore, was not satisfied. *Ibid.*

states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for the warrant. He was right about 201, but that hardly makes him more believable about the equipment in 607. But what if he states that there are narcotics locked in a safe in Apartment 300, which is described in detail, and the apartment manager verifies everything but the contents of the safe? I doubt that the report about the narcotics is made appreciably more believable by the verification. The informant could still have gotten his information concerning the safe from others about whom nothing is known or could have inferred the presence of narcotics from circumstances which a magistrate would find unacceptable." *Id.*, at 427.

I find this reasoning persuasive. Properly understood, therefore, *Spinelli* stands for the proposition that corroboration of certain details in a tip may be sufficient to satisfy the veracity, but not the basis of knowledge, prong of *Aguilar*. As noted, *Spinelli* also suggests that in some limited circumstances considerable detail in an informant's tip may be adequate to satisfy the basis of knowledge prong of *Aguilar*.[5]

Although the rules drawn from the cases discussed above are cast in procedural terms, they advance an important underlying substantive value: Findings of probable cause, and

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[5] After concluding that the tip was not sufficient to support a finding of probable cause, the Court stated:

"This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to the other parts of the application, however, we 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." *Spinelli* v. *United States*, 393 U. S., at 418.

The Court went on to suggest that corroboration of incriminating facts would be needed. See *ibid.*

attendant intrusions, should not be authorized unless there is some assurance that the information on which they are based has been obtained in a reliable way by an honest or credible person. As applied to police officers, the rules focus on the way in which the information was acquired. As applied to informants, the rules focus both on the honesty or credibility of the informant and on the reliability of the way in which the information was acquired. Insofar as it is more complicated, an evaluation of affidavits based on hearsay involves a more difficult inquiry. This suggests a need to structure the inquiry in an effort to insure greater accuracy. The standards announced in *Aguilar*, as refined by *Spinelli*, fulfill that need. The standards inform the police of what information they have to provide and magistrates of what information they should demand. The standards also inform magistrates of the subsidiary findings they must make in order to arrive at an ultimate finding of probable cause. *Spinelli*, properly understood, directs the magistrate's attention to the possibility that the presence of self-verifying detail might satisfy *Aguilar*'s basis of knowledge prong and that corroboration of the details of a tip might satisfy *Aguilar*'s veracity prong. By requiring police to provide certain crucial information to magistrates and by structuring magistrates' probable cause inquiries, *Aguilar* and *Spinelli* assure the magistrate's role as an independent arbiter of probable cause, insure greater accuracy in probable cause determinations, and advance the substantive value identified above.

Until today the Court has never squarely addressed the application of the *Aguilar* and *Spinelli* standards to tips from anonymous informants. Both *Aguilar* and *Spinelli* dealt with tips from informants known at least to the police. See also, *e. g.*, *Adams* v. *Williams*, 407 U. S. 143, 146 (1972); *United States* v. *Harris*, 403 U. S. 573, 575 (1971); *Whiteley* v. *Warden*, 401 U. S. 560, 565 (1971); *McCray* v. *Illinois*, 386 U. S. 300, 302 (1967); *Jones* v. *United States*, 362 U. S. 257, 268–269 (1960). And surely there is even more reason to

subject anonymous informants' tips to the tests established by *Aguilar* and *Spinelli*. By definition nothing is known about an anonymous informant's identity, honesty, or reliability. One commentator has suggested that anonymous informants should be treated as presumptively unreliable. See Comment, Anonymous Tips, Corroboration, and Probable Cause: Reconciling The *Spinelli/Draper* Dichotomy in *Illinois* v. *Gates*, 20 Am. Crim. L. Rev. 99, 107 (1982). See also *Adams* v. *Williams*, *supra*, at 146 (suggesting that an anonymous telephone tip provides a weaker case for a *Terry* stop than a tip from an informant known to the police who had provided information in the past); *United States* v. *Harris*, *supra*, at 599 (Harlan, J., dissenting) ("We cannot assume that the ordinary law-abiding citizen has qualms about [appearing before a magistrate]"). In any event, there certainly is no basis for treating anonymous informants as presumptively reliable. Nor is there any basis for assuming that the information provided by an anonymous informant has been obtained in a reliable way. If we are unwilling to accept conclusory allegations from the police, who are presumptively reliable, or from informants who are known, at least to the police, there cannot possibly be any rational basis for accepting conclusory allegations from anonymous informants.

To suggest that anonymous informants' tips are subject to the tests established by *Aguilar* and *Spinelli* is not to suggest that they can never provide a basis for a finding of probable cause. It is conceivable that police corroboration of the details of the tip might establish the reliability of the informant under *Aguilar*'s veracity prong, as refined in *Spinelli*, and that the details in the tip might be sufficient to qualify under the "self-verifying detail" test established by *Spinelli* as a means of satisfying *Aguilar*'s basis of knowledge prong. The *Aguilar* and *Spinelli* tests must be applied to anonymous informants' tips, however, if we are to continue to insure that findings of probable cause, and attendant intrusions, are

based on information provided by an honest or credible person who has acquired the information in a reliable way.[6]

In light of the important purposes served by *Aguilar* and *Spinelli*, I would not reject the standards they establish. If anything, I simply would make more clear that *Spinelli*, properly understood, does not depart in any fundamental way from the test established by *Aguilar*. For reasons I shall next state, I do not find persuasive the Court's justifications for rejecting the test established by *Aguilar* and refined by *Spinelli*.

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[6] As noted, *supra*, at ———, *Aguilar* and *Spinelli* inform the police of what information they have to provide and magistrates of what information they should demand. This advances the important process value, which is intimately related to substantive Fourth Amendment concerns, of having magistrates, rather than police, or informants, determine whether there is probable cause to support the issuance of a warrant. We want the police to provide magistrates with the information on which they base their conclusions so that magistrates can perform their important function. When the police rely on facts about which they have personal knowledge, requiring them to disclose those facts to magistrates imposes no significant burden on the police. When the police rely on information obtained from confidential informants, requiring the police to disclose the facts on which the informants based their conclusions imposes a more substantial burden on the police, but it is one that they can meet because they presumably have access to their confidential informants.

In cases in which the police rely on information obtained from an anonymous informant, the police, by hypothesis, cannot obtain further information from the informant regarding the facts and circumstances on which the informant based his conclusion. When the police seek a warrant based solely on an anonymous informant's tip, therefore, they are providing the magistrate with all the information on which they have based their conclusion. In this respect, the command of *Aguilar* and *Spinelli* has been met and the process value identified above has been served. But *Aguilar* and *Spinelli* advance other values which argue for their application even to anonymous informant's tips. They structure the magistrate's probable cause inquiry and, more importantly, they guard against findings of probable cause, and attendant intrusions, based on anything other than information which magistrates reasonably can conclude has been obtained in a reliable way by an honest or credible person.

## II

In rejecting the *Aguilar-Spinelli* standards, the Court suggests that a "totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." *Ante*, at 15–16 (footnote omitted). In support of this proposition the Court relies on several cases that purportedly reflect this approach, *ante*, at 15, n. 6, 17, n. 7, and on the "practical, nontechnical," *ante*, at 16, nature of probable cause.

Only one of the cases cited by the Court in support of its "totality of the circumstances" approach, *Jaben* v. *United States*, 381 U. S. 214 (1965), was decided subsequent to *Aguilar*. It is by no means inconsistent with *Aguilar*.[7] The other three cases[8] cited by the Court as supporting its

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[7] In *Jaben* v. *United States*, 381 U. S. 214 (1965), the Court considered whether there was probable cause to support a complaint charging petitioner with willfully filing a false tax return. *Id.*, at 221. After reviewing the extensive detail contained in the complaint, *id.*, at 223, the Court expressly distinguished tax offenses from other types of offenses:

"Some offenses are subject to putative establishment by blunt and concise factual allegations, *e. g.*, '*A* saw narcotics in *B*'s possession,' whereas '*A* saw *B* file a false tax return' does not mean very much in a tax evasion case. Establishment of grounds for belief that the offense of tax evasion has been committed often requires a reconstruction of the taxpayer's income from many individually unrevealing facts which are not susceptible of a concise statement in a complaint. Furthermore, unlike narcotics informants, for example, whose credibility may often be suspect, the sources in this tax evasion case are much less likely to produce false or untrustworthy information. Thus, whereas some supporting information concerning the credibility of informants in narcotics cases or other common garden varieties of crime may be required, such information is not so necessary in the context of the case before us." *Id.*, at 223–224.

Obviously, *Jaben* is not inconsistent with *Aguilar* and involved no general rejection of the *Aguilar* standards.

[8] *Rugendorf* v. *United States*, 376 U. S. 528 (1964); *Ker* v. *California*, 374 U. S. 23 (1963); *Jones* v. *United States*, 362 U. S. 257 (1960).

totality of the circumstances approach were decided before *Aguilar*. In any event, it is apparent from the Court's discussion of them, see *ante*, at 17–18, n. 7, that they are not inconsistent with *Aguilar*.

In addition, one can concede that probable cause is a "practical, nontechnical" concept without betraying the values that *Aguilar* and *Spinelli* reflect. As noted, see *supra*, at ——, *Aguilar* and *Spinelli* require the police to provide magistrates with certain crucial information. They also provide structure for magistrates' probable cause inquiries. In so doing, *Aguilar* and *Spinelli* preserve the role of magistrates as independent arbiters of probable cause, insure greater accuracy in probable cause determinations, and advance the substantive value of precluding findings of probable cause, and attendant intrusions, based on anything less than information from an honest or credible person who has acquired his information in a reliable way. Neither the standards nor their effects are inconsistent with a "practical, nontechnical" conception of probable cause. Once a magistrate has determined that he has information before him that he can reasonably say has been obtained in a reliable way by a credible person, he has ample room to use his common sense and to apply a practical, nontechnical conception of probable cause.

It also should be emphasized that cases such as *Nathanson* v. *United States*, 290 U. S. 41 (1933), and *Giordenello* v. *United States*, 357 U. S. 480 (1958), discussed *supra*, at ——–——, directly contradict the Court's suggestion, *ante*, at 18, that a strong showing on one prong of the *Aguilar* test should compensate for a deficient showing on the other. If the conclusory allegations of a presumptively reliable police officer are insufficient to establish probable cause, there is no conceivable reason why the conclusory allegations of an anonymous informant should not be insufficient as well. Moreover, contrary to the Court's implicit suggestion, *Aguilar* and *Spinelli* do not stand as an insuperable barrier to the use

of even anonymous informants' tips to establish probable cause. See *supra*, at ——. It is no justification for rejecting them outright that some courts may have employed an overly technical version of the *Aguilar-Spinelli* standards, see *ante*, at 19, and n. 9.

The Court also insists that the *Aguilar-Spinelli* standards must be abandoned because they are inconsistent with the fact that non-lawyers frequently serve as magistrates. *Ante*, at 20. To the contrary, the standards help to structure probable cause inquiries and, properly interpreted, may actually help a non-lawyer magistrate in making a probable cause determination. Moreover, the *Aguilar* and *Spinelli* tests are not inconsistent with deference to magistrates' determinations of probable cause. *Aguilar* expressly acknowledged that reviewing courts "will pay substantial deference to judicial determinations of probable cause. . . ." 378 U. S., at 111. In *Spinelli*, the Court noted that it was not retreating from the proposition that magistrates' determinations of probable cause "should be paid great deference by reviewing courts. . . ." 393 U. S., at 419. It is also noteworthy that the language from *United States* v. *Ventresca*, 380 U. S. 102, 108–109 (1965), which the Court repeatedly quotes, see *ante*, at 20, 21, and n. 10, brackets the following passage, which the Court does not quote:

> "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. See *Aguilar* v. *Texas*, *supra*. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magis-

trate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." 380 U. S., at 108–109.[9]

At the heart of the Court's decision to abandon *Aguilar* and *Spinelli* appears to be its belief that "the direction taken by decisions following *Spinelli* poorly serves 'the most basic function of any government: to provide for the security of the individual and of his property.'" *Ante*, at 22. This conclusion rests on the judgment that *Aguilar* and *Spinelli* "seriously imped[e] the task of law enforcement," *ibid.*, and render anonymous tips valueless in police work. *Ibid.* Surely, the Court overstates its case. See *supra*, at ——. But of particular concern to all Americans must be that the Court gives virtually no consideration to the value of insuring that

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[9] The Court also argues that "[i]f the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search." *Ante*, at 21. If the Court is suggesting, as it appears to be, that the police will intentionally disregard the law, it need only be noted in response that the courts are not helpless to deal with such conduct. Moreover, as was noted in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971):

"[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'" *Id.*, at 454–455 (plurality opinion) (footnotes omitted).

It therefore would appear to be not only inadvisable, but also unavailing, for the police to conduct warrantless searches in "the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search." *Ante*, at 21.

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. I share JUSTICE WHITE's fear that the Court's rejection of *Aguilar* and *Spinelli* and its adoption of a new totality of the circumstances test, *ante*, at 23, "may foretell an evisceration of the probable cause standard. . . ." *Ante*, at 26 (WHITE, J., concurring in the judgment).

III

The Court'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 Fourth Amendment. Words 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 Fourth Amendment. Everyone shares the Court's concern over the horrors of drug trafficking, but under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil. We must be ever mindful of Justice Stewart's admonition in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), that "[i]n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts." *Id.*, at 455 (plurality opinion). In the same vein, *Glasser* v. *United States*, 315 U. S. 60 (1942), warned that "[s]teps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties." *Id.*, at 86.

Rights secured by the Fourth Amendment are particularly difficult to protect because their "advocates are usually criminals." *Draper* v. *United States*, 358 U. S. 307, 314 (1959)

(Douglas, J., dissenting). But the rules "we fashion [are] for the innocent and guilty alike." *Ibid.* See also *Kolender* v. *Lawson*, —— U. S. ——, —— (1983) (BRENNAN, J., concurring); *Brinegar* v. *United States*, 338 U. S. 160, 181 (1949) (Jackson, J., dissenting). By replacing *Aguilar* and *Spinelli* with a test that provides no assurance that magistrates, rather than the police, or informants, will make determinations of probable cause; imposes no structure on magistrates' probable cause inquiries; and invites the possibility that intrusions may be justified on less than reliable information from an honest or credible person, today's decision 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." *Johnson* v. *United States*, 333 U. S. 10, 17 (1948).