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THE DEMISE OF THE *AGUILAR-SPINELLI* RULE: A CASE OF FAULTY RECEPTION

EUGENE CERRUTI*

INTRODUCTION

In *Illinois v. Gates*[1] the Supreme Court discarded a major fourth amendment doctrine of the Warren Court era. The *Gates* decision overruled the so-called *Aguilar-Spinelli* rule which governed the use of informers' tips to establish probable cause for a search and seizure.[2] The *Aguilar-Spinelli* rule had become one of the touchstone fourth amendment doctrines of the Warren Court era. It had also been the basis for more appellate litigation[3] and more controversy[4] than any other rule of fourth amendment law.

The Burger Court resorted to a drastic juridic device in overruling this major and recent precedent and completely discarded the Warren Court approach to the confidential informant issue.[5] The Burger Court majority had never before gone so far as to overrule any of the major precedents of the Warren Court.[6] Previously the Court had been satisfied to revise and restrict the earlier rulings.[7] Thus *Gates* represents a major breakthrough for

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

2. This rule derives from the Warren Court decisions in Aguilar v. Texas, 378 U.S. 108 (1964), and United States v. Spinelli, 393 U.S. 410 (1969). Together the decisions required that an informant's tip offered to establish probable cause for a search and seizure warrant satisfy a two-part test of minimum reliability. Under this test, police must show (1) that the informant himself had personal knowledge of the information conveyed to the police (the just or "basis of knowledge" prong); and (2) that there was reason to credit the veracity of the informant who would otherwise be presumed to be of insufficient reliability to support a finding of probable cause (the second or "veracity" prong).

3. LaFave, *Probable Cause From Informants*, 1977 U. ILL. L.F. 1, 2 ("[N]o other fourth amendment issue has received such constant and repeated attention from the appellate courts.") This article has since been largely incorporated into the text of 2 W. LAFAVE, SEARCH AND SEIZURE § 3.3 (1978).

4. "The United States Supreme Court has not dealt with the informant cases in a consistent or clear fashion and, as a consequence a significant degree of ambiguity and outright conflict is to be found in the lower court decisions." 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.3 at 500 (1978). *See also* LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, 255.

5. The issue is what guidelines, if any, must be followed by police to establish the reliability of an undisclosed confidential informant when the informant's tip is to be used to justify the invasion of a suspect's fourth amendment rights.

6. Rakas v. Illinois, 439 U.S. 128 (1978), is arguably a major overruling. However, the holding was limited to the procedural issue of standing and the court itself described the result as one limiting, rather than directly overruling, prior law.

7. A decision to overrule a constitutional precedent is extraordinary, even for the modern Supreme Court. "For despite its widespread reputation as a Court most ready to 'disregard precedent and overrule its own earlier decisions,' the Supreme Court in fact has directly overruled prior decisions on no more than a hundred occasions in over a century and a half of judicial review. And only about half of these instances involved cases . . . in which the Court was dealing with a constitutional question." J. Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 213-14 (footnotes omitted).

the emerging conservative majority of the Burger Court.[8]

This article explores the underlying doctrinal problems of the *Aguilar-Spinelli* rule. The argument presented here is that the technical failures of the rule were the product of hasty and faulty design in the rulemaking process, not of any fault in fourth amendment policy or principle. The rule needed to be reconstructed, not abandoned. In overruling the *Aguilar-Spinelli* rule, the court has effectively turned its back on the attempt to regulate one of the most controversial areas of search and seizure practice, without providing a reasonable alternative. It must be conceded at the outset, however, that the conclusions drawn here with respect to the rule are undeniably harsh and therefore are in marked contrast to the leading scholarship on the rule.[9]

The first section of the article analyzes the development of the *Aguilar-Spinelli* doctrine. It traces the careless creation and reluctant evolution of the rule during its nearly two decades of existence. The initial policy objective of the Warren Court majority which engendered the rule was to impose some regulation on the increasingly controversial use by the police of criminal informants as investigative tools. The misuse of such confidential informers had become notorious, but there was no extant fourth amendment handle with which courts could grasp the problem. The Warren Court majority never managed to develop a coherent set of policies and rules to resolve the overall dilemma of confidential informants in the criminal justice system, but it did act in piecemeal fashion to fill the most troublesome voids in this area of search and seizure law. It did so, in the *Aguilar-Spinelli* rule, by borrowing the already established hearsay rule from the law of evidence and incorporating it into the developing law of probable cause review. It is the premise of this article that the incorporation, or "reception," of the hearsay rule was a failure. The hearsay format represented a structural defect in the rule which surfaced repeatedly in the cases. Thus the continuous refinement and adjustment of the rule which was attempted in the case law became notorious for its technical avidity and failure. It became a situation of bad law making bad cases, rather than the other way around.

The final section analyzes the broader, more fundamental problems of fourth amendment jurisprudence which are exhibited in *Gates*. The argument presented is that the faulty reception of the hearsay format in the *Aguilar-Spinelli* rule is symptomatic of the accelerated, experimental and nonsystematic development of constitutional criminal procedure laws during the formative era of the 1960's. To undertake this argument, the section relies upon the analytic format of "reception theory" as it has been developed in the comparative law literature. From this perspective, it is possible to identify in a more general and profound manner the essential and irresolvable defects of the *Aguilar-Spinelli* rule. It will be demonstrated that the

8. *See generally* Fiss and Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC, March 10, 1982, at 14.

9. The two seminal articles on the rule are LaFave, *supra* note 4, and Moylan, *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer*, 25 MERCER L. REV. 741 (1974). The former is more documentative and the latter more analytical, but both conclude that the rule is essentially sound and that its failings are attributable to faulty interpretation or application.

objectives and conditions of the hearsay format were fundamentally incompatible with those of probable cause determination and review. Furthermore, this broader theoretical framework provides the basis for a series of affirmative suggestions on how the rule might be reconstructed to fulfill the original, and still valid, policy objectives of the rule. The ultimate conclusion of the article is therefore highly critical of the court's decision simply to abandon rather than to reconstruct a troubled rule which is pivotal to the development and efficacy of search and seizure law.

I. *AGUILAR-SPINELLI*: THE HEARSAY RECEPTION

A dilemma existed for the reform-minded Warren Court with respect to the widespread and rising use by law enforcement personnel of confidential informants. The modern trend in law enforcement, reflective of the new emphasis in penal policy on regulatory crimes at that time, was toward ever greater use of, and reliance upon such informers. Yet, at the same time, there was a growing recognition that such informers presented a unique and growing threat to the integrity of the criminal justice system. The Warren Court's initial response to this dilemma was the *Aguilar-Spinelli* rule. Essentially it was a fourth amendment rule of probable cause determination which incorporated a hearsay test[10] for those situations where probable cause was based upon the declarations of a confidential informer. This hearsay test was contrary to firmly estblished Supreme Court precedent which was never adequately acknowledged or reconciled by the Warren Court. The incorporation of the hearsay test was fundamentally inappropriate to the structural setting of probable cause determinations. Therefore *Aguilar-Spinelli* became a formative rule of first impression whose technical failings have been profound and persistent.

A. *The Informant Dilemma*

The use of private informers[11] as agents of the police has always been a difficult problem. Warnings regarding the unrestrained use of informers have abounded since earliest times.[12] In more contemporary times the informant remains "generally regarded with aversion and nauseous disdain."[13] Perhaps the ultimate irony of the informant dilemma is that nowhere is the informant despised more than within the very body that promotes his existence: the police department.[14]

10. *E.g.*, a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. FED. R. EVID. 801(c).

11. The term "informer" should be clarified. The term may be used to cover a variety of types of suppliers of information. *See generally* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1092 (1951) (classification of "informer" into four separate types). As used here, the term is meant to convey a lay person who provides law enforcement with information in order to gain or benefit.

12. The Bible contains its own warning: ". . . meddle not with him that revealeth secrets, and walketh deceitfully, and openeth wide his lips." *Proverbs* 20:19.

13. Donnelly, *supra* note 11, at 1093.

14. The fraternal code of silence within most police departments, and the outrage typically inspired by the department's use of internal informants, is mute testimony that no amount of professional rationalization or experience can overcome the deep-rooted mistrust and animosity

It comes then as no surprise that when the courts began to overturn the rocks of our criminal procedure landscape, they quickly encountered, and recoiled at, this ageless nemesis. Justice Douglas sounded an early alarm in one of his recurring dissents from the Supreme Court's generally conciliatory approach to the informer in law enforcement: "[t]his is an age where faceless informers have been reintroduced into our society in alarming ways."[15] And a far more poignant and provocative plea for reconsideration was only recently issued by Chief Judge Weinstein of the federal district court in New York who was prompted by a case tried before him to ruminate on the legal and ethical ambiguities of our widespread, and increasing, reliance upon confidential informers:

> . . . a large part of our antidrug and antigun enforcement activities are based on purchases by government law enforcement agencies. In a sense the government is, together with its host of criminal informers, the single largest entity engaged in such criminal activities. . . . Such methods evoke the dark and gloomy realization that in a sense we, the judges, prosecutors and defense attorneys, have all been co-opted into the criminal system.[16]

Although never quite welcome, the police informant has nonetheless always been given consideration in our laws. The history of such recognition is typically traced to the medieval practice of "approvement."[17] This system provided that once convicted of a crime, you could elect to inform, or "approve," on others. If they were found guilty, you were set free; if not, you were hanged. As crude as this practice appears, it has not really been altered. It is still essentially a bounty system. For today we continue to provide official encouragement and reward for the informant in a variety of ways. Congress has appropriated funds for the informant industry.[18] Various statutes provide financial rewards for tips on specified criminal activities.[19] Government records pertaining to the use of confidential informants are exempted from the Freedom of Information Act.[20] Although informants perform their works for a variety of motives[21] and rewards, the principal currency of the information market remains the time-honored deal with law enforcement. "A major motive—most investigators believe *the* major motive—of an informant is to obtain leniency on a criminal charge in exchange for information about accomplices involved in that charge or persons involved in other criminal offenses."[22] Most informants today are moved by

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reserved for informants. Indeed, it would appear that those who know best the informant business loathe and fear it the most. *See*, M. HARNEY AND J. CROSS, THE INFORMER IN LAW ENFORCEMENT (2d ed. 1968).

15. Jones v. United States, 362 U.S. 257, 273 (Douglas, J., dissenting).

16. Weinstein, *The Informer: Hero or Villain?—Ethical and Legal Problems*, N.Y.L.J., Nov. 8, 1982, at 1, col. 2.

17. *See generally* 4 W. BLACKSTONE, COMMENTARIES 324.

18. 28 U.S.C. § 524 (1982).

19. *See, e.g.*, 18 U.S.C. § 3059 (1982).

20. 5 U.S.C. § 552(b)(7)(D) (1982). *See generally*, Dennett, *Protecting the FBI's Informants*, 19 HARV. J. ON LEGIS. 393 (1982).

21. *See generally* Harney and Cross, *supra* note 14 at 65; J. SKOLNICK, JUSTICE WITHOUT TRIAL 125 (1966).

22. J. WILSON, THE INVESTIGATORS 65 (1978).

the same consideration as the medieval approvers: a pound of another's flesh will spare one's own.

Given that the informant is not so much accepted as he is tolerated on some "necessary evil" theory, it would appear to follow that the informant's role in modern law enforcement would be one of extremely low profile. "Inasmuch as the motivations of the informant are often questionable, and his information and operation require extensive verification, it would seem logical that his role should be diminished. Instead, many arrests are made as a direct result of the informant's word."[23] The reason for this is that the peculiar growth and direction of our substantive penal law into the areas of sumptuary and regulatory crimes has encouraged an increasing dependence on informers.[24] Law enforcement officials, led by the late J. Edgar Hoover, have therefore begun a public relations campaign to launder the informant's tawdry image. They have proposed that the very word "informer" be discontinued[25] and replaced by such euphemisms as "special employee" or "confidential source."[26] This law enforcement campaign has been remarkably successful. Thus the proposition that informers are a necessary evil in modern law enforcement is today generally taken for granted, especially by the courts.[27] But we should note here two points which have not been adequately explored with respect to this presumed need. The first is that the empirical basis for this belief is not found in any controlled studies of law enforcement practices and alternatives, but rather in the simple fact that the police do use informers extensively.[28] And, secondly, the alleged need for an expanding informer apparatus itself follows from a choice, namely the decision to utilize the penal justice system as the chosen instrument to enforce an ever-widening variety of regulatory controls.

The dilemma for search and seizure law posed by the confidential informer was that at the same time that recognition of the abuses of the informant system were mounting, law enforcement rationale for further institutionalizing the practice was also gathering support.[29] Both use and abuse were escalating unchecked, without a governing rule of law. The suspect motives and practices of the informer led readily to the same inquiry concerning the questionable incentives of the police officer. The apparent marriage of interests between the informer who was looking for a "free pass"

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23. Katz, *The Paradoxical Role of Informers Within the Criminal Justice System: A Unique Perspective*, 7 U. DAYTON L.R. 51, 54 (1981).

24. *See generally* Donnelly, *supra* note 13, at 1093, and Skolnick, *supra* note 23 at 116. ("Since the vice control squad deals with crimes for which there are no complaining witnesses, vice control men must, as it were, drum up their own business."). *Id.* at 116.

25. Harney and Cross, *supra* note 14 at 65.

26. This is the term of preference popularized by the FBI.

27. "Rather we accept the premise that the informer is a vital part of society's defensive arsenal." State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964), *quoted in* McCray v. Illinois, 386 U.S. 300, 307 (1967).

28. *See generally* Wilson, *supra* note 22 Chap. 3.

29. *E.g.*, J. Edgar Hoover, Law Enforcement Bulletin, Federal Bureau of Investigation (June, 1955). "Experience demonstrates that the cooperation of individuals who can readily furnish accurate information is essential if law enforcement is to discharge its obligations. . . . There can be no doubt that the use of informants in law enforcement is justified." *Id.*, *quoted in* Harney and Cross, *supra* note 14, at 9.

for his own criminal activity and the police officer who could issue such passes to advance his own career was not missed.[30]

Just how the members of the Warren Court viewed these developments is less than clear.[31] Their overall handling of the informer dilemma was evasive and inconsistent. But we do know that at least Justice Douglas based his own policy arguments on the open recognition of the above real world factors. In another of his informer dissents, Douglas stated pointedly: "[i]t is not unknown for the arresting officer to misrepresent his connection with the informer, his knowledge of the informer's reliability, or the information allegedly obtained from the informer."[32] We also know that the Warren Court was being pressured by the lower courts to take up the informer issue. In *Williamson v. United States*, in which the Supreme Court denied certiorari, the Fifth Circuit opened a major challenge to the informant enterprise when it reversed a conviction based upon information provided by a confidential informant who was working on a contingency fee basis with the police.[33] The informant was paid on a per capita basis for information on individuals preselected by the police.[34] The Fifth Circuit came down heavily on the practice and did not at all attempt to limit its opinion to the particular facts of the case. The court found that "[t]he opportunities for abuse are too obvious to require elaboration," and that the contingency fee arrangement was "a form of employment of an informer which this Court cannot approve or sanction."[35]

Yet at the same time other courts were marching in a different direction with respect to the formulation of a judicial policy approach to the growing use of informants. In the same year as *Williamson*, the Warren Court denied certiorari on another informer case, this one decided by the Fourth Circuit. In *United States v. Irby*[36] the police had relied heavily upon an informer's tip which had been partially corroborated by the police before they arrested and searched the defendant at an airport. It was then demonstrated that the particular informant the police had employed and relied upon in this case was a narcotics addict, had a long history of mental illness, had been discharged from the Army as unfit and had in fact been diagnosed as a pathological liar. The Fourth Circuit found no real cause for concern on these facts. "It is of little moment," said the court, "that [the informant] was shown to be a man of unstable character and credibility."[37] Yet even here

30. Skolnick, *supra* note 21, at 138.

31. Chief Justice Warren, in his dissent in Hoffa v. United States, 385 U.S. 293, 313 (1966), did go forcefully on record with his own reservations about the use of confidential informers. He favored close judicial regulation of such activities, but he would have had the Court do so pursuant to its supervisory powers (which would not have reached state police activity) rather than the fourth amendment.

32. McCray v. Illinois, 386 U.S. 300, 316 n.2 (Douglas, J., dissenting).

33. 311 F.2d 441 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965).

34. "Q: Yes, sir, how were you to be paid, what was the agreement? A: I was to be paid $200.00 for Big Boy, $200.00 for James McBride, $100.00 for Hogie, he's Big Boy's half-brother." From the trial record, cited at 311 F.2d at 442.

35. 311 F.2d at 444. *Williamson* has since been limited very strictly to its facts. *See* United States v. Garcia, 528 F.2d 580 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976).

36. 304 F.2d 280 (4th Cir.), *cert. denied* 371 U.S. 830 (1962).

37. 304 F.2d at 283.

the real issue had clearly come to the surface. The appearance of abuse, prompted by police opportunities and cynicism, was compelling.

B. *The Response:* Aguilar *and* Spinelli

The Warren Court had no established precedent from which to formulate a policy approach to the informer dilemma. No Supreme Court case prior to the Warren Court era had confronted the issue directly, and the Warren Court itself continued to deny certiorari until the mid-1960's on cases that raised the central issues. Therefore, when the Court did take up the informer issue, it was a strictly formative undertaking.

The aspect of the overall informer issue which the Court carved out for treatment with its holdings in *Aguilar v. Texas*[38] and *Spinelli v. United States*[39] was a narrow one. It dealt only with the matter of police use of confidential informants to satisfy the fourth amendment requirement of probable cause. It did not deal with the related issues of the refusal to disclose the identity of the informer either at the probable cause stage[40] or at trial.[41] These matters were treated separately, and inconsistently.[42] This attempt to segregate the probable cause aspect of the informer dilemma and to formulate a rule for it independent of the other aspects of the overall issue was indicative of the court's initial failure to identify a coherent set of policy objectives for its rulemaking exercise.

In the *Aguilar* and *Spinelli* cases the Court created a standard of judicial review which was unique to those cases in which probable cause to search was based upon information supplied by a police informant. In all other circumstances, if probable cause was based upon information supplied by a third party, the issuing magistrate or the reviewing court did not conduct a factual inquiry into the credibility of the third party source. In the non-informant situation, the reviewing court or magistrate reviewed, as a prima facie matter, only the "sufficiency" of the information supplied to establish probable cause. But information supplied by an informant was to be treated differently. Indeed, it was to be treated as hearsay, even though the informant communicated the information directly to the police officer in the first instance. Therefore the *Aguilar-Spinelli* rule, to be applied only in informant cases, was a "two-prong" test which incorporated not only the traditional rule of review for measuring facial sufficiency, but also a new hearsay rule for determining the credibility of the informant.

That *Aguilar* was a formative invention of law can be seen through a review of the case law upon which the court relied in *Aguilar*. Quite simply, there was no case doctrine, save for dictum in one case which the *Aguilar* court entirely ignored, which treated the probable cause-informant issue as a hearsay problem. The one case which did adopt a hearsay format to analyze

38. 378 U.S. 108 (1964).
39. 393 U.S. 410 (1969).
40. *See* McCray v. Illinois, 386 U.S. 300 (1967).
41. *See* Roviaro v. United States, 353 U.S. 53 (1957).
42. *See infra* text accompanying note 157.

a probable cause issue was *Grau v. United States*.[43] In *Grau* the real issue was the sufficiency of the allegations adduced in the warrant affidavit to establish probable cause to believe that the sale of moonshine was being conducted at particular premises. The court held that the affidavit clearly made out probable cause to believe that both the manufacture and possession of illicit liquor was taking place at the premises, but that the affidavit failed to allege sufficient facts to establish probable cause to believe that any *sales* were taking place there.[44] The particular prohibition statute under which the police were proceeding specifically required the allegations of sales. The actual holding was therefore quite narrow. It was tied to the specific statute in the case and it held the affidavit insufficient according to that statutory standard. The Court, however, included the broad dictum that: "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury."[45] Whatever the court meant by this statement, it was subsequently ignored by the Supreme Court and only a few lower court cases followed it. It was, in any event, the only Supreme Court case to so state and the *Aguilar* Court made no reference to it.

Now of course the *Grau* dictum could never be taken literally. The police have always made arrests, conducted searches, and obtained warrants on the basis of hearsay information.[46] No one, presumably including the *Grau* Court, has ever contended that the police may act only on the basis of personal observation. In the 1948 case of *Brinegar v. United States*,[47] the Supreme Court made note of the *Grau* dictum and was quick to dismiss it: "For this proposition there was no authority in the decisions of this Court . . . The statement has not been repeated by this Court."[48] The *Brinegar* Court was confronted with a trial court record in which the judge excluded certain hearsay testimony at trial but had previously admitted that very same evidence at a hearing held to determine probable cause to search. The issue of the applicability of the rules of evidence to the determination of probable cause was thus sharply drawn. The Supreme Court found the trial evidentiary standards inappropriate to the determination of probable cause.[49]

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43. 287 U.S. 124 (1932).

44. *Id.* at 125.

45. *Id.* at 128.

46. In United States v. Heitner, 149 F.2d 105, 106 (2d Cir. 1945), Judge L. Hand stated: "It is well settled that an arrest may be made upon hearsay evidence; and indeed, the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties."

47. 338 U.S. 160 (1949).

48. *Id.* at 174-75, n.13.

49. [I]f those standards were to be made applicable in determining probable cause for an arrest or for search and seizure, more especially in cases such as this involving moving vehicles used in the commission of crime, few indeed would be situations in which an officer, charged with protecting the public interest by enforcing the law, could take effective action toward that end.

338 U.S. at 174.

The inappropriateness of applying the rules of evidence as a criterion to determine probable cause is apparent in the case of an application for a warrant before a magistrate, the context in which the issue of probable cause most frequently arises. The ordinary rules of evidence are generally not applied in *ex parte* proceedings, "partly because there is no opponent to invoke them, partly because the judge's determination

Had the Warren Court understood the simple profundity of the *Brinegar* analysis, they may never have adopted the *Aguilar* prong of the test. For what the *Brinegar* opinion did was to reject a "residuum rule"[50] approach to judicial review of searches and seizures. And the court did so on the basis of procedural and institutional empirical factors. *Brinegar* made more explicit what had been the traditional approach to judicial review of probable cause findings. It recognized the issue to be one of "sufficiency" rather than "admissibility." The question for the reviewing court was whether the police had sufficient information to meet the legal standard of probable cause, not whether the information was technically competent to be considered on that issue at all. Indeed, the courts of the prohibition era had found the more straightforward sufficiency issue troublesome enough.[51]

The *Aguilar* majority, however, made no reference to *Brinegar*.[52] But it did cite two other cases, *Nathanson v. United States*[53] and *Giordenello v. United States*,[54] to support its novel use of a hearsay format to analyze probable cause-informant issues. Neither of these cases, however, had in fact broken the mold for treating the issue as one of sufficiency. To be sure, *Nathanson*, a case decided one year after *Grau* and on which the defendant-petitioner placed great reliance, reversed the probable cause finding without even mentioning *Grau*. In *Nathanson* there was no informer. The customs police obtained a search warrant on the basis of a customs agent's affidavit which alleged merely that the agent "has cause to suspect and does believe"[55] that untaxed liquors were located at the Nathanson premises. The court reversed the probable cause finding but clearly not on the basis of an evidentiary analysis: "The challenged warrant is said to constitute adequate authority [for the search and seizure]. The legality of the seizure depends upon its sufficiency."[56] The trouble the court had with the affidavit in *Nathanson* was that it alleged virtually no facts to support a finding; it merely alleged the officer's finding. If this involved evidentiary analysis at all, it was more in the nature of an exclusion of opinion evidence than of hearsay evidence. But in support of its finding of insufficiency, the court made the following statement:

> Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable

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is usually discretionary, partly because it is seldom final, but mainly because the system of Evidence rules was devised for the special control of trials by jury."

338 U.S. at 175, n. 12. (quoting 1 WIGMORE, EVIDENCE 19 (3d ed., 1940)).

50. The "residuum rule", now obsolete, dates from the formative era of administrative law between the two world wars. It was a judge-made rule which stated that no administrative order could be based entirely upon evidence which would be inadmissible in a court of law, but rather such an order was required to be founded upon at least a residuum of legally competent evidence. In effect, the residuum rule incorporated the exclusionary rules of evidence law into the administrative law of judicial review. The rise and fall of the residuum rule presents a remarkable parallel to that of the *Aguilar-Spinelli* rule. *See generally* K.C. DAVIS, ADMINISTRATIVE LAW TEXT 256-62 (3d ed. 1972).

51. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925).

52. But the dissenters certainly did. *See* 378 U.S. at 119 (Clark, J., dissenting).

53. 290 U.S. 41 (1933).

54. 357 U.S. 480 (1958).

55. 290 U.S. at 44.

56. *Id.* at 46.

> cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.[57]

It was from these words that *Aguilar* was later to draw the inference that the court was here imposing restrictions on the *type*, as opposed to the *amount*, of information required to establish probable cause.

Giordenello also was a case decided entirely on sufficiency grounds. Once again, there was no informer in the case. A federal narcotics agent obtained a warrant for Giordenello's arrest based upon his accusatory complaint charging Giordenello with the crime of an unlawful purchase of heroin.[58] The allegations in the complaint were conclusory in nature. They alleged that the defendant did, at an approximate time and place, purchase heroin. It was later discovered at the suppression hearing that the complaint was not based upon personal knowledge, but rested instead on information provided by other law enforcement officers and unidentified other persons. The defendant raised,[59] and primarily relied upon,[60] the *Grau* hearsay issue. He alleged that the complaint was deficient because it was based upon hearsay and not personal knowledge. The court found that it did not have to examine the hearsay issue because the complaint failed on sufficiency grounds: "we need not decide whether a warrant may be issued solely on hearsay information, for in any event we find this complaint defective in not providing a sufficient basis upon which a finding of probable cause could be made."[61] Once again the court had recognized the distinction between the separate issues of sufficiency and admissibility and had refused either to give credence to the hearsay issue or to merge it within the sufficiency test.

The next case of critical significance in the line leading to *Aguilar* was *Draper v. United States*.[62] In this case the hearsay issue was once again raised and rejected, but this time there was an informer in the case. This latter fact makes it all the more revealing that *Draper* was another of the in-line cases which the *Aguilar* court failed even to mention. In *Draper* the defendant was arrested without a warrant by federal narcotics police as he got off a train.[63] The police had received a tip from a "special employee" who informed them that Draper was selling drugs to several addicts and that Draper had left town and would be returning by train with a supply of drugs. The informer provided details of Draper's description, his clothing, his fast gait and his estimated time of arrival. The police staked out the train station and arrested Draper, who matched all the particulars of the tip. He was searched at the scene and two envelopes of heroin were found in his possession.[64] Only Justice Douglas dissented from the court's holding that the information adduced was sufficient to establish probable cause.[65] With respect to the

57. *Id.* at 47.
58. 357 U.S. at 481.
59. 357 U.S. at 484.
60. *Id.* at 484, n.2.
61. *Id.* at 485.
62. 358 U.S. 307 (1959).
63. *Id.* at 309.
64. *Id.* at 310.
65. *Id.* at 314 (Douglas, J., dissenting).

hearsay issue raised by the defendant-petitioner, the court was summarily dismissive: ". . . we find petitioner entirely in error. *Brinegar v. United States* . . . has settled the question the other way."[66]

The last of the significant pre-*Aguilar* cases was *Jones v. United States*.[67] Although known primarily for its contribution to the law of standing, *Jones* is actually a pivotal case in the transition from a strict sufficiency model to a strict hearsay format for reviewing the issue of probable cause based upon an informer's tip. In *Jones* the police had considerably more information than they had in any of the previously discussed cases and it was all laid out in the police officer's search warrant affidavit. The police had obtained their information from sources who had previously provided reliable information. The informants told the police they had purchased heroin from Jones on many occasions at a specified apartment. The informants described the particular hiding places in the apartment used by Jones to secrete the drugs.[68] The Court had little difficulty reaching the conclusion that this information was sufficient to establish probable cause.[69] Only Justice Douglas dissented, but on the related ground that the informer's identity had not been disclosed to the magistrate.[70] Once again the hearsay issue was raised in *Jones* and once again the Court rejected it, but this time it added what appeared at the time to be an innocuous qualification to the rejection of the hearsay approach.

> The question here is 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. An affidavit is not to be deemed insufficient on that score, *so long as a substantial basis for crediting the hearsay is presented*.[71]

With this simple, and perhaps gratuitous qualification, the court suggested for the first time that the sufficiency test may incorporate a hearsay test of sorts. That is, although sufficiency remained the issue, there may be occasions when the type or source of the information may influence the "weight" of that evidence when measuring its sufficiency. This was certainly a novel dictum in *Jones*.

The first segment of the *Aguilar-Spinelli* rule then came into being with the court's 1964 opinion in *Aguilar v. Texas*. Notably, this was the first probable cause-informer case to be decided by the Supreme Court which involved a *state* prosecution. *Mapp v. Ohio*[72] was only four terms old at the time and *Ker v. California*,[73] which held that the state police would be required to follow the same fourth amendment standards as the federal police, had been decided only the previous year. The opinion in *Aguilar* opened with the words: "This case presents questions concerning the constitutional

66. 358 U.S. at 311.
67. 362 U.S. 257 (1960).
68. *Id.* at 268.
69. *Id.* at 271.
70. *Id.* at 273 (Douglas, J., dissenting).
71. *Id.* at 269 (emphasis added).
72. 367 U.S. 643 (1961).
73. 374 U.S. 23 (1963).

requirements for obtaining a state search warrant."[74] The court then proceeded to a direct discussion of *Ker* and the policy reasons for not deferring to the findings of a state magistrate any more than to those of a federal magistrate.[75] There is every reason to believe, therefore, that the Warren Court viewed *Aguilar* as significant primarily for its role in consolidating the "single standard" approach to state cases. Indeed, this may be the only way to account for the court's otherwise cursory and uninformed treatment of the probable cause-informant issue in *Aguilar*.

In *Aguilar* the Houston police had obtained a search warrant for Aquilar's home. The affidavit filed in support of the warrant was patently deficient according to the sufficiency standards then well established in the pre-*Mapp* federal cases.[76] The affidavit merely alleged in conclusory fashion that the police "have received reliable information from a credible person and do believe" that the defendant was in possession of narcotics at his home.[77] It was an easy case on the facts and the Court treated it as such. The Court did not get involved in a discussion of the hearsay issue and, as noted above, did not even mention *Grau*, *Brinegar* or *Draper*. It noted *Jones* only in passing. Instead the Court relied almost entirely on *Nathanson* and *Giordenello*, the two sufficiency cases which did not involve an informer.[78] Nevertheless, the Court appeared fairly oblivious to the informer aspects of the case. The Court announced its ruling in the following passage which launched the confidential informant brigade of cases.

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, the 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 identity need not be disclosed, see *Rugendorf v. United States*, 376 U.S. 528, was "credible" or his information "reliable."[79]

It is from this passage that we get the so-called "two-pronged test"[80] for reviewing probable cause based upon an informer's tip. The first prong, now commonly referred to as the "basis of knowledge" prong,[81] required that a warrant affidavit contain "some of the underlying circumstances from which the informant concluded that narcotics were where he claimed they were."[82] This was simply a restatement of existing law as applied to informers. It stated that just as a police officer's mere conclusory allegations were insuffi-

74. 378 U.S. at 109.
75. *Id.* at 110.
76. *Id.*
77. *Id.* at 109.
78. *Id.* at 112-16.
79. *Id.* at 114.
80. This phrase entered the Supreme Court lexicon in Spinelli v. United States, 393 U.S. at 413.
81. This appellation first appeared in Moylan, *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer*, 25 MERCER L. REV. 741, 747 (1974).
82. 378 U.S. at 114.

cient, as per *Nathanson* and *Giordenello*, the allegations of an informant certainly must be factual in nature. This prong of the rule required nothing more, in kind or degree, than had been traditionally required by the sufficiency test.

But the second prong, since coined the "veracity" prong,[83] was entirely new. It required that the warrant affidavit also contain "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' "[84] There was no authority for this requirement and the opinion cited none. The opinion merely dropped a footnote at this point to cite the warrant affidavit in *Jones* as a model for allegations of the preferred sort.[85] What the Court was requiring was a function never before contemplated for the issuing court by the sufficiency test: a look behind the facial sufficiency of the evidence, as a matter of law, to determine the actual probative value or credibility of the evidence, as a matter of fact. Of course, a strict division between matters of law and fact is a theoretical premise impossible to maintain in practical affairs. But the distinction is operative up to a point and it certainly had been a universally operative characteristic of magistrates at the ex parte warrant proceeding not to make findings of fact as to the credibility of the information provided. Indeed, even today a magistrate is to presume the credibility of a police affiant.[86]

Thus, although the rule was then well settled that probable cause may be based upon hearsay information, the new rule appeared to require that some hearsay—that provided by a confidential informant—was to be treated differently, indeed, was to be treated as mere hearsay. Therefore, the second prong of the *Aguilar* test required that the magistrate treat information supplied by an informer as unreliable, and hence "inadmissible" on the issue of probable cause, absent some showing of factual circumstances that would except it from the exclusionary operation of the hearsay rule. It is not at all clear that the *Aguilar* opinion intended or contemplated this result. It is certainly possible that this dictum was added simply to express favor for the extended allegations in the *Jones* affidavit. Nevertheless, the more activist lower courts and the scholars read the rule as a strict requirement for a new type of review which applied only to confidential informers. The *Aguilar* Court meanwhile had given no indication, other than its reference to the *Jones* affidavit, of what would satisfy the new requirement. Nor did it give any expression to the policy behind the new rule which would at least have provided the lower courts with an analytical starting point. The opinion was narrow, cryptic and unhelpful. The case law that followed *Aguilar* in the lower courts almost immediately went aground.

Although the lower courts soon began to clamor for more explicit guidance with the new rule, the Warren Court uncharacteristically refused the initiative and left the formative work to the lower courts. The Supreme

83. This appellation also first appeared in Moylan, *supra* note 75 at 747.

84. 378 U.S. at 114.

85. *Id.* at 114-15 n.5.

86. Franks v. Delaware, 438 U.S. 154, 171 (1978).

Court did not return to the *Aguilar* issues until five years later,[87] in *Spinelli v. United States*.[88] This in itself was further evidence that the court had set off in *Aguilar* something which it had not fully anticipated and which it was unprepared to resolve.

In *Spinelli*, the Supreme Court was confronted with what had become, by 1969, an all too typical lower court record. The informant issue had been considered and resolved in three different ways by three different courts: the district court, an Eighth Circuit panel and ultimately the Eighth Circuit en banc. The en banc court ruled six-two upholding the search warrant issued to the FBI. The discursive opinion of the Eighth Circuit contained considerable grumblings about the vacuous "hypertechnicality" and "ritualistic recitation" that had crept into the rule.[89] The Eighth Circuit therefore had adopted the view that the new "second prong" rule of *Aguilar* did not have to be applied strictly to require specific information to support the credibility of the hearsay informant.[90] The Eighth Circuit, in other words, read *Aguilar* as not substantially altering the traditional sufficiency approach to probable cause review.[91]

Spinelli, in contrast to *Aguilar*, was by no means an easy case on its facts. In *Spinelli*, the police had received a tip from a "confidential reliable informant" that Spinelli was conducting an illegal bookmaking operation that made use of two specified telephone numbers.[92] The police investigated the location of these two numbers and meanwhile tailed Spinelli's movements. Spinelli was observed by the FBI on five separate occasions to arrive and remain at the location of the specified phone numbers for approximately one hour in mid-afternoon. Furthermore, the FBI on its own account knew Spinelli to be a bookmaker. All of this information was contained in a very detailed warrant affidavit which covered three pages of an appendix to the Supreme Court decision. Yet the court was clearly troubled by the obfuscatory approach of the Eighth Circuit:

> We believe . . . that the "totality of the circumstances" approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a

87. The intervening cases of Beck v. Ohio, 379 U.S. 89 (1964), United States v. Ventresca, 380 U.S. 102 (1965), and McCray v. Illinois, 386 U.S. 300 (1967) made no significant elaboration of or contribution to the *Aguilar* rule.

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

89. Spinelli v. United States, 382 F.2d 871, 884 (8th Cir. 1967).

90. *Id.*

91. *Aguilar* is only a caveat to the general principles governing probable cause and is not a replacement of those principles. *Aguilar* was directed to the specific situation in which a warrant was based solely upon the hearsay conclusion of a third party informant, and the majority found that without elaboration of "underlying circumstances" this bare conclusion could not provide a magistrate with the substantial basis necessary for a finding of probable cause. However, there is nothing in *Aguilar* which holds that a hearsay conclusion has no probative value, and when coupled with other pieces of information that tend to substantiate the reliability of that conclusion, a valid warrant may not be issued.

Id. at 883.

92. 393 U.S. at 414.

more precise analysis.[93]

Spinelli therefore set out to confirm what had not been clear among the lower courts: *Aguilar* had in fact created a new and distinct rule for evaluating the hearsay provided by informers and the Supreme Court was prepared to require strict enforcement of that rule. Until *Spinelli*, only Justice Douglas had clearly stated his preference for a rule that discriminated sharply against informer hearsay. Douglas, in fact, would have excluded it entirely.[94] And although Justice Harlan in his majority opinion did not go so far, he certainly did go uncharacteristically far in promulgating a narrow and exacting standard of review. But at the same time that he reaffirmed the new rule, Justice Harlan also elaborated upon the manner in which the new test might be satisfied.

The *Spinelli* opinion first demonstrated that the warrant affidavit, however detailed, did not explicitly state the basis for the informant's opinion nor the basis for crediting the informant's hearsay. Justice Harlan made it clear that there were indeed two prongs to the new test, each independent of the other. The opinion then suggested two methods by which such a technically deficient affidavit may otherwise satisfy the test. The first method was to infer from the circumstances of the informer's tip that the basis for the informer's conclusion was reliable first-hand knowledge of the facts. The Court referred to the facts of *Draper* as a "suitable benchmark" for this approach.[95] The unique and specific details of the tip provided in *Draper* would permit a reviewing court to "infer that the informant had gained his information in a reliable way."[96] In the lexicon of the rule, this has come to be referred to as the "self-verifying detail" test for satisfying the first prong of the rule.

The second method to rehabilitate a technically deficient hearsay report was "independent investigative efforts."[97] The notion here was that if the police were able independently to confirm the truth of at least part of the hearsay tip, it would then be "apparent that the informant had not been fabricating his report out of whole cloth,"[98] and thereby the entire hearsay report would be accredited. This method was also illustrated by reference to *Draper* wherein the independent police observations had confirmed the appearance, gait and travels of the defendant. This method is now commonly referred to as the "corroboration" test of the *Aguilar-Spinelli* rule.[99]

Spinelli therefore underscored both the technical requirements of the *Aguilar* rule and facilitated its application consistent with the Court's pre-*Aguilar* cases. It succeeded only in the former of the two objectives. It clearly demonstrated the fact that *Aguilar* involved a "two pronged test"

93. *Id.* at 415.
94. 380 U.S. 102, 121-23 (1965) (Douglas, J. dissenting).
95. 393 U.S. at 416.
96. *Id.* at 417.
97. *Id.*
98. *Id.*
99. Enormous confusion and inconsistency has arisen in the case law over whether the corroboration test can rehabilitate a facial defect in the first, or "basis of knowledge," prong as well as the second, or "veracity" prong. See the discussion in LAFAVE, SEARCH AND SEIZURE *supra* note 4, at 561-70.

and, moreover, that the two prongs were independent of one another. Thus the hearsay test of the second prong had to be satisfied regardless of how many personally-observed and particular details were provided by the hearsay informant. The lower courts, however, quickly entered upon a new round of confusion as they confronted the practical and analytical weaknesses of the opinion. To be sure, Justice White in his concurring opinion in *Spinelli* had already identified some of the problems the lower courts were soon to find irresolvable. With respect to the self-verifying detail notion, Justice White suggested[100] that instead of second-guessing whether the informant had personal knowledge, the rule could simply require that the police must determine and allege the factual basis for the informant's belief in the first instance. As to the corroboration test, Justice White noticed that the Court's opinion, particularly so in its reliance upon the *Draper* illustration, suggested that corroboration of the non-inculpatory details of a given tip could permit an inference of reliability as to the uncorroborated inculpatory details of the tip. This, suggested Justice White,[101] would convert the rule into one in which a presumption of reliability would follow if the police could confirm *anything* that the informer said, no matter how tenuously it was connected to the facts which directly established probable cause. Yet, however broadly formative and unsatisfactory the Supreme Court's rulemaking attempt in *Spinelli*, the Warren Court did not again return to the probable cause-informant issue. Thus, at the close of the Warren Court era, the Court had initiated (or, perhaps, backed into) a strict and controversial new hearsay format for the confidential informer situation but had made no real attempt to resolve the major doctrinal splits and confusion that had developed almost immediately in the lower courts.

The Burger Court made only one real attempt, in *United States v. Harris*,[102] to influence the substantive development of the *Aguilar-Spinelli* rule.[103] The attempt was only half successful, however, since the new majority which voted to affirm a finding of probable cause by the trial court could not itself agree upon a single reason for doing so.

Harris was a five-four case in which Chief Justice Burger wrote the opinion for the court. It was a plurality opinion in three parts. Three other Justices joined the first part, a different three joined the third part and only two joined the second part. The facts of *Harris* presented one of the problems which had been plaguing the lower courts. How may the prosecution demonstrate the veracity of an informer who has never before provided the police with information? One approach, of course, was through the corroboration technique. The extent of corroboration in *Harris* was weak, however, and only three members of the Court affirmed this approach. The other method suggested by the plurality opinion was novel to the Supreme

100. 393 U.S. at 426.

101. *Id.* at 426-27.

102. 403 U.S. 573 (1971).

103. The Court did, however, in Adams v. Williams, 407 U.S. 143 (1972), hold that an informant's tip which fails to establish "probable cause" because it does not meet the *Aguilar-Spinelli* standards may nevertheless be sufficient to establish "reasonable suspicion" to stop and frisk pursuant to Terry v. Ohio, 392 U.S. 1 (1968).

Court and involved, ironically, an *extension* of the hearsay format. This approach was to credit an informant's hearsay if it fit one of the established evidentiary exceptions to the hearsay rule. In *Harris*, the Burger opinion analyzed the informer's tip as a declaration against penal interest, despite the fact that this particular exception to the hearsay rule had not yet been recognized by the Supreme Court.[104] Only four members of the Court voted to affirm the finding of probable cause on this view. In the end, *Harris* reflected for the Supreme Court the same doctrinal fragmentation and uncertainty that had come to characterize the laborings of the lower courts with the *Aguilar-Spinelli* rule. The Burger Court also became shy of the issue. It did not again agree to review an *Aguilar-Spinelli* issue until more than a decade later in *Illinois v. Gates*.

C. *The Deficiencies of* Aguilar-Spinelli

In its nearly two decades of existence the *Aguilar-Spinelli* rule has produced now-legendary inconsistencies in legal outcomes. Both the federal and state courts have toiled endlessly with the rule but have failed to arrive at a uniform or workable rendition. The nature and existence of the lower court's agonies reveal the defective formulation of the rule. As early as Justice White's concurring opinion in *Spinelli*,[105] it was clear that the results of the rule did not readily or reliably accord with common sense. Weak probable cause facts such as those in *Draper* were affirmed, while seemingly much stronger facts like those in *Spinelli* were denied. The lower courts experienced the same arbitrary and inconsistent results with the rule.[106] When applied correctly, the rule did not seem to work. It did not produce credible outcomes. This in itself suggested fundamental design defects in the rule.

The high formalism of the rule is also revealing.[107] As it has come to be generally understood, the rule may be satisfied by very minimal, although highly formalized, allegations by the police. In other words, there is little question that a warrant affidavit by a police officer would pass muster under the rule if it alleged only the following: "The affiant is informed by a confidential source, who has previously supplied this department with information leading to an arrest and conviction, that he has today personally observed the defendant in possession of narcotics at the above place of residence." The second clause, an allegation of prior reliability, or what is now commonly referred to as an informer's "track record," satisfies the second,

104. Justice Burger in his opinion acknowledged this but found it to be not a controlling limitation, 403 U.S. at 584. *But see* FED. R. EVID. 804(b)(3) which now recognizes a limited exception for such statements.

105. 393 U.S. at 423.

106. In one recent case, the New York Court of Appeals reviewed its own cases decided under the rule and concluded humbly but honestly: "To be noted from the foregoing review of the case law is the difficulty, if not impossibility, of reconciling the results of the decisions. . . ." People v. Elwell, 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477 (1980).

107. Hovenkamp has noted the critical influence of legal formalism on the formative development of American laws: "Legal formalism was an intense concern for language, rules and consistency, often at the expense of legislative or popular feelings about the best public policy. Although legal formalism strongly influenced every aspect of the law, its biggest influence was quite naturally felt in those areas that were in relatively early stages of development." Hovenkamp, *Pragmatic Realism and Proximate Cause in America*, 3 J. LEGAL HIST. 3, 9-10 (1982).

hearsay prong of the rule. The third cause, an explicit allegation of personal observation by the informant, is all that is required to satisfy the first basis of knowledge prong. It is not immediately clear why an affidavit of this sort is necessarily superior to the three page affidavit rejected by the court in *Spinelli*. Yet this is the strict mandate of the rule. If the purpose of all search and seizure law is to protect individual privacy by limiting the power to search to those circumstances where there is a reasonable and reliable basis for permitting an invasion of privacy, it is not obvious that permitting a search on the basis of our hypothetical affidavit but denying it on the basis of the *Spinelli* affidavit furthers that cause. "Basically, this procedure deems probable cause to be a question of warrant documentation. It does not seem to safeguard adequately against situations where the informer either lied to the police or obtained his information illegally."[108]

It is in this very formalism of the rule that we can most readily identify its inherent defects, for the rule has created a formalized test to determine the reliability of hearsay which does not in fact measure reliability. As one circuit court noted in the days prior to the formulations of *Aguilar*.

> The reliability of such [informers] is obviously suspect. The fact that their information may have produced convictions in the past does not justify taking their reports on faith . . . it is to be expected that the informer will not infrequently reach for shadowy leads, or even seek to incriminate the innocent.[109]

Under the present rule, however, "even the giving of information on a single past occasion has been deemed sufficient when that information brought about an arrest and a conviction of the individual arrested."[110] The strict formalism creates the appearance of strict protection of privacy. Yet the reality is otherwise.

Another negative aspect of the rigid formalism of the rule is the extent to which it actually promotes mendacity, and therefore unreliability, on the part of the police. This occurs for two reasons. In the first instance the technical formalism of the rule discredits the rule with the police officer who tends to view it as alien and unreasonable.[111] And, secondly, the testimonial formula required by such a rule makes perjury very simple; the officer need only repeat the minimal required litany.[112] Such a negative and ironic result, in which a new and highly formalized rule produces poorer outcomes than had existed previously, is not unknown to our law of criminal procedure. Grano has performed a limited study of the "tailored testimony" problems of the *Aguilar-Spinelli* rule and has found them to be considerable.[113] "In any event, there is no denying the fact that *if* a particular policeman were willing to perjure himself, it would be very easy to do so in a

108. Katz, *supra* note 75, at 65.

109. Jones v. United States, 266 F.2d 924, 928 (D.C. Cir. 1959).

110. LAFAVE, SEARCH AND SEIZURE *supra* note 4, at 509.

111. *See, e.g.*, Younger, *The Perjury Routine*, 204 NATION 596 (1967).

112. *See, e.g.*, People v. Mitchell, 45 Ill. 2d 148, 258 N.E.2d 345, *cert. denied*, 400 U.S. 882 (1970), discussed in Grano, *A Dilemma for Defense Counsel:* Spinelli-Harris *Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405, 418.

113. Grano, *supra* note 101.

manner giving the appearance that the probable cause test of *Aguilar v. Texas* has been satisfied."[114]

Another problem with the hearsay format adopted by the rule relates to the inherent limitations this approach imposed upon the rule. That is, the hearsay format unduly restricted what was considered pertinent to the formulation of a comprehensive rule to govern the probable cause-informant situation. Tips from an informer present an objective problem for criminal justice, but not because the tips are hearsay. The essential problem resides in the institutionalized personage of the police informant. In other words, information supplied by informants is objectively problematic even when *not* hearsay. Most jurisdictions, in fact, recognize this through special rules directed at the problem of informer testimony when rendered at a trial.[115] By defining the informer's tip as essentially a hearsay problem, the court closed its eyes to broader problems which could not be excluded from the overall question of reliability.

This broader dimension primarily concerns the related issue of the so-called "informer's privilege."[116] This is a separate rule which permits the prosecution under most circumstances to refuse to disclose the identity of the confidential informant, either to the defense or to the court. The privilege applies both in trial[117] and probable cause[118] settings. The impact of the privilege on the *Aguilar-Spinelli* rule is this: the reliability of the informer will almost always have to be determined under circumstances in which neither the court nor the defense is permitted any information concerning the very identity or personal make-up of the informer. The clash between the *Aguilar-Spinelli* rule and the informer's privilege is not unlike a "double-think," or "Catch-22," proposition. Indeed, in a related context the Warren Court said as much. In *Smith v. Illinois*,[119] the defendant was convicted of a sale of narcotics to a confidential informer. At trial, the informer and the defendant were the only ones who provided direct testimony on the question of whether a sale had in fact taken place.[120] The credibility of the informer, who gave on direct the name "James Jordan," was paramount to the resolution of guilt. On cross-examination the informer admitted that James Jordan was not his real name. The judge thereupon prevented the defense from obtaining from the witness his real name and present address. The Supreme Court held this invocation of the privilege to be a denial of the defendant's right of confrontation. The Court's analysis of the reliability issue is apt:

> [W]hen the credibility of a witness is in issue, the very starting

114. LAFAVE, SEARCH AND SEIZURE, *supra* note 4, at 577.

115. One common rule requires that the testimony of an accomplice must be corroborated. *See, e.g.*, N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1981). Another rule, typical of the federal approach, requires a cautionary instruction to the jury on the credibility of an informer. *See, e.g.*, United States v. Gonzalez, 491 F.2d 1202 (5th Cir. 1974); United States v. Lee, 506 F.2d 111 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1002 (1975). "The rationale behind this requirement is to insure no verdict based solely on the uncorroborated testimony of a witness who may have good reason to lie is too lightly reached." United States v. Garcia, *supra* note 35, at 588.

116. *See generally* LAFAVE, SEARCH AND SEIZURE, *supra* note 4 at 570-86.

117. *See* Roviaro v. United States, 353 U.S. 53 (1957).

118. *See* McCray v. Illinois, 386 U.S. 300 (1967).

119. 390 U.S. 129 (1968).

120. *Id.* at 130.

> point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.[121]

Granted that there are necessary and meaningful distinctions to be made between the probable cause setting and the trial setting of *Smith*, the Court's observation that the starting point of any credibility inquiry is the identity of the declarant remains valid. Indeed, it must appear anomolous, if not incredulous, to have a system in which there are two operative rules: one which designates a certain class of declarants as people whose reliability is uniquely and inherently suspect, and another which specifically shields that very same class from the "most rudimentary inquiry" into their credibility.

McCray v. Illinois[122] is the Warren Court case which upheld the informer's privilege in the probable cause setting. The confusion and questionable logic engendered by the hearsay approach to the probable cause-reliability issue is evident in the Court's analysis. The *McCray* Court quoted extensively, and approvingly, from an opinion by the New Jersey Supreme Court which stated in part:

> Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an *ex parte* proceeding. As we have said, the magistrate is concerned, *not with whether the informant lied*, but with whether the affiant is truthful in his recitation of what he was told.[123]

It is exceedingly difficult to reconcile this analysis with the *Aguilar-Spinelli* rule. For the *McCray* Court has here written the informer's reliability issue out of the problem.[124] And it has done so with a curious inversion of hearsay analysis. The basic premise of the hearsay evidentiary rule is that reliability of factfinding is enhanced by having evidentiary declarations made personally before the factfinder. We exclude hearsay declarations precisely because the factfinder has no direct access to the declarant and cannot gain such access through any examination of the witness who merely repeats the declaration as hearsay. The *McCray* Court appears to have taken this analysis full circle. It reasoned that because the informer's hearsay is made an exception to the hearsay prohibition when it meets the formal requirements of the *Aguilar-Spinelli* rule, the *only* credibility issue that remained for the magistrate to consider was that of the police officer affiant. It "followed" therefore that disclosure of the identity of the informant was generally irrelevant to *that* credibility issue.[125]

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121. *Id.* at 131.

122. 386 U.S. 300 (1967).

123. State v. Burnett, 42 N.J. 377, 201 A.2d 39, 45 (1964), *quoted in* McCray v. Illinois, 386 U.S. at 307 (emphasis added).

124. Allen views *McCray* as one of several key cases of the "waning years" of the Warren Court which indicate that the Court had lost some of its impetus for reform. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 538 n.103.

125. There is, moreover, the so to speak "Catch-23" rule of Franks v. Delaware, 438 U.S.

D. *Hearsay ad Absurdum*

The foregoing review of the case law developments which culminated in the *Aguilar-Spinelli* rule suggests that the Warren Court was less than fully cognizant of the true import of its own formulation.[126] Therefore we have argued here that the Supreme Court did incorporate a hearsay test into the rule of probable cause review, even though the Court itself never clearly articulated the rule in these terms. The point, of course, is that the Court never clearly articulated the rule in any terms. Yet if the foregoing analysis of the high Court's cases is not dispositive of the question of whether a strictly hearsay format as such was introduced into the governing law, a brief glimpse at several of the subsidiary case law developments under the rule does confirm the view that in this instance of careless borrowing the captured law did indeed turn out to be the hearsay rule.

1. Declarations Against Penal Interest

Evidence law has increasingly recognized an exception to the hearsay exclusionary rule for statements which are, at the time of their making, against the penal interest of the declarant.[127] Thus, any statement which knowingly inculpates the declarant is considered sufficiently reliable to be admissible at trial.[128] The theory behind the rule is simplistic: mendacity generally is motivated by and consistent with self-interest, so where the statement in question is against the self-interest of the declarant, it is presumed not to have been prompted by mendacity.

Virtually all tips provided by confidential informants are personally compromising to the penal innocence of the informant. Almost every tip by every such informant involves, as is virtually required by the basis of knowledge prong, a declaration by the informant that he has personally been complicit in some manner in the commission of a crime.[129] Indeed, sources who have not been personally involved in the criminality upon which they provide information will either: 1) have no reason to become "informants" in the first instance or 2) fail the basis of knowledge prong. Therefore, as Chief Justice Burger recognized in his plurality opinion in *Harris*,[130] an informant's tip can almost always be categorized as a declaration to some degree against the penal interests of the declarant. This has in fact been the ap-

154 (1978) which requires the magistrate and reviewing court to presume the credibility of the police officer affiant and places the burden of persuasion on the defendant to overcome the presumption.

126. That a strictly formulated two-prong test was not clearly intended by the *Aguilar* court in all situations is evidenced in the Court's opinion one year later in Jaben v. United States, 381 U.S. 214 (1965), where the Court did not apply such a test in a criminal tax evasion prosecution.

127. *See, e.g.*, FED. R. EVID. 804(b)(3). *See generally* MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 278 (E. Cleary ed. 2d ed. 1972).

128. This exception is, however, often subject to a corroboration requirement. *See, e.g.*, FED. R. EVID. 804(b)(3) (requiring corroboration for any declaration against penal interest offered to exculpate the accused.)

129. Wilson quotes one experienced Drug Enforcement Agency officer who summed up the common police attitude as follows: "The civic-minded guys are useless—being law-abiding, they don't know anything about the drug traffic." WILSON, *supra* note 22, at 66.

130. United States v. Harris, 403 U.S. 573, 583 (1971).

proach followed by a number of lower courts, with the result that admissions against penal interest by an informant are regularly relied upon as a means of showing that his information is reliable.[131] This is surely not what the *Aguilar* court had in mind as the acid test of an informant's reliability. Yet the rule had become a reception of the hearsay rule, complete with its exceptions.

This development, of course, is absurd. At the point of recognizing the penal interest exception, the rule has come full circle upon itself. For now the very same reasons that led to a presumption of *unreliability* at the inception of the rule—the criminal duplicity of the confidential informant—are now treated as the basis for a presumption of *reliability*. Indeed, if the logical implications of the penal interest exception theory are correct—that is, the typical declarations by informants concerning their personal knowledge of the criminality of others are to be presumed to be inherently reliable—then obviously it was totally unnecessary to formulate the *Aguilar-Spinelli* rule in the first place. For the hearsay exception theory would hold that the typical informant's tip is more, not less, reliable than the hearsay provided by, for instance, the victim of a crime whose declaration does not fit one of the established exceptions.

The recognition of the penal interest exception demonstrates a complete loss of sense and purpose by the courts. The reason an informant's hearsay was singled out for special distrust by the Warren Court is precisely because of the recognition that informant's have *affirmative*, not negative, penal interests in providing the police with information. That is, as discussed earlier, the typical informant is providing information because he knows that he will escape, not incur, culpability by doing so. It blinks reality and logic to pretend that the informant who is providing information to further his penal interest is simultaneously making declarations against those interests. The interests of the informant in implicating his confederates cannot lead both to a presumption of unreliability (the *Aguilar-Spinelli* rule) and of reliability (the declaration against penal interest exception). Yet this is precisely the extended logic of the overly formalized hearsay reception within the rule.

2. Multiple Hearsay Exceptions

The *Aguilar-Spinelli* rule was an attempt to resolve the informer dilemma. The Warren majority did not absolutely prohibit probable cause from being based upon an informant's hearsay, as Justice Douglas would have preferred,[132] but it did attempt to limit the circumstances in which such information could satisfy the fourth amendment. The compromise was meant to permit law enforcement personnel to avail themselves of such first-hand information, provided the police exercised proper professional caution in screening the informant and his information. The expectations of the two-pronged test were that the police would be able to attest personally to their professional determination both that the particular informant was reliable and that his information was first-hand. But these expectations cannot

131. LAFAVE, SEARCH AND SEIZURE, *supra* note 4, at 523.
132. *See supra* note 77.

be met when what the informant provides is not first-hand, but rather second-hand, information. Under these circumstances, it might be assumed, the basis for deferring to the professional needs and judgment of the police officer in selecting his sources becomes somewhat attenuated, if not lost entirely. For when the police informant does not commit himself personally to the information he provides, but instead merely reports what he has heard from sources not personally known to the police, the police officer of course is in no position to "vouch" for the remote source. Furthermore, the potential for dissembling by the informant hustling a deal with the police is obviously greater where not even the informant himself vouches for the reliability of his information but merely passes it along as something asserted by yet another criminal source.

One might expect such second-hand accounts of probable cause to fall short, both in fact and as a matter of policy, of the standard of reasonableness and reliability required to justify an invasion of privacy. Again, however, the application of a strict hearsay analysis obviates the real nature of the problem. For according to hearsay analysis, the only requirement for a finding of reliability as to remote sources of information is that the source's declaration itself fit a hearsay exception.[133] "In the hearsay-upon-hearsay situation, as where an informant of established reliability tells police what someone else has told him, there is a need to establish veracity with respect to each person in the hearsay chain."[134] As might be expected, under this analysis an alleged declaration against penal interest by an unknown criminal source, passed along to the police by another criminal source seeking a deal, has been held repeatedly to satisfy both prongs of the *Aguilar-Spinelli* rule.[135] Surely here also the considered judgment must be that the hearsay reception has taken over the rule to the extent of denying the rule its original sense and purpose.

3. The Myth of the Magistrate

Contemporary fourth amendment law purports to be grounded in the policy preference that probable cause should be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[136] The notion here is that the magistrate will act as a protective screen over the citizen to prohibit unwarranted invasions of privacy. The magistrate is presumed to be a competent and independent fact-finder[137] who will shield the privacy interests of the citizens against the acquisitive interests of the state. In this sense, then, the magistrate is presumed to safeguard the privacy interests of the people in the same manner that the grand jury safeguards their penal interests. Yet the reality is otherwise. For just as the modern grand jury is more

133. *See, e.g.*, FED. R. EVID. 805.

134. LAFAVE, SEARCH AND SEIZURE, *supra* note 4, at 530.

135. *See, e.g.*, the cases cited at *id.* 543 n.180.

136. Johnson v. United States, 333 U.S. 10, 14 (1948).

137. *But see* Shadwick v. City of Tampa, 407 U.S. 345 (1972) (held, with respect to arrest warrants only, that the issuing officer may be a civil service clerk with no law training).

sword than shield,[138] so too is the magistrate of the real world little more than a rubber stamp for law enforcement. The irony is that the hearsay reception of the *Aguilar-Spinelli* rule was designed with this mythical fact-finder in mind. The two-pronged test of the rule is meant to require a de novo review of the probable cause information supplied to the police. But an informant's tip is not hearsay when presented to the police officer in the first instance; it only becomes hearsay when the police officer repeats it to the magistrate. Therefore the premise of the hearsay format of the rule is that the critical tribunal with respect to the probable cause determination is the magistrate, not the police officer.

Consider the facts: first, only an extraordinarily small percentage of searches and seizures at the state level are conducted pursuant to a warrant. "[T]he few figures that do exist show that the ratio of searches with warrants to searches without them is tiny. . . . When experts are pressed to estimate how many police searches are made without warrants, they say about 90 percent, and they could probably make a case for 95 percent."[139] What then of the remaining five to ten percent of the cases in which a search is preceded by a warrant application before a "neutral and detached magistrate"? Does the hearsay format lead to a more exacting review by this judicial officer? Grano provides the common answer:

> Although magistrates give more attention to search warrants than to arrest warrants—the former are at least usually read—the review is unlike that assumed in appellate opinions. The magistrate does not cross-examine, or even examine, the officer concerning the warrant's factual basis. Invariably, the magistrate simply issues the warrant if it seems sufficient on its face, with nothing but the officer's uniform and oath attesting to the credibility of its facts.[140]

One of the very few empirical studies to gather actual statistics on this process was conducted by faculty and students at Yale Law School.[141] The results of the study confirm the common belief. In their study of the police department in a "medium-sized city in Connecticut," researchers extrapolated that less than 2% of the search warrant applications presented to a magistrate were denied,[142] despite the fact that researchers found 16-18% of the warrant affidavits "doubtful" according to the *Aguilar-Spinelli* standards.[143] Furthermore, the study revealed that in 36% of the cases where a search warrant was executed, nothing was recovered.[144]

It is not difficult to see how the hearsay format of the rule has contributed to this lack of meaningful screening by the magistrate. Trial judges are trained and obligated to rule on questions of admissibility according to a

138. *See generally* Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972).

139. F. GRAHAM, THE SELF-INFLICTED WOUND 204 (1970).

140. Gran, *supra* note 91, at 415.

141. The study is reported at Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L. J. 703 (1972).

142. *Id.* at 710.

143. *Id.* at 711.

144. *Id.* at 712.

prima facie standard.[145] Judges habitually rule on whether or not an item of hearsay is admissible, not on the basis of a factual finding of reliability, but rather on the technical legal standard of whether the item, on its face, conforms to one of the hearsay exceptions. Judges, in other words, are not meant to evaluate the credibility of evidence, only its legal "competence." The introduction of evidence at trial is ritualistic and talismanic, and the judge is priestly, not worldly, in his behavior. To the extent that the probable cause-informant standard has incorporated a hearsay test, and thereby has become talismanic in its operative features, judges are thereby encouraged to perform the same perfunctory and non-evaluative review at the ex parte warrant proceeding or at the suppression hearing as they do at an adversarial trial proceeding.

The conclusion that judges apply the *Aguilar-Spinelli* test in a mechanical, if not mindless fashion is difficult to avoid the more one studies the operation of the rule. The *Aguilar* Court contemplated the magistrate performing a close scrutiny of both the sufficiency and reliability of the information offered on the issue of probable cause. Yet the real test has universally become one of requiring only the minimal litany. Thus, because the reliability test of the second prong is satisfied if the informant has previously demonstrated his reliability, the judge's scrutiny typically will begin and end with the police officer's mere assertion that the informant has previously (and perhaps only once) provided information that was determined to be reliable. The demonstrable inadequacies and failures of such word-watching are now legendary. *United States v. Irby*,[146] is but one example of an informant found "reliable" by the magistrate who was subsequently demonstrated to be a virtual credibility basket case, and a notorious one at that.

4. Hearsay, The Final Bite

A final class of cases in which the hearsay reception can be seen being taken to the extreme is exemplified by the Michigan Court of Appeals case of *People v. Coleman*.[147] In that case an informant by the name of Prince had provided information upon which the police obtained a search warrant to enter certain premises in which the defendant was subsequently arrested and searched. The defendant challenged the warrant on the ground that the affidavit failed to allege sufficient facts to establish the prior reliability of the informant. The court analyzed and applied the *Aguilar-Spinelli* test and concluded as follows: "This Court . . . finds that the information establishing Prince's credibility in the present case, though sketchy, was more substantial than the affidavit information regarding the informant's credibility in *Aguilar*."[148] What is remarkable about this case is not the conclusion, but rather the very application of the informant hearsay test in the first instance. For Prince, the reliable informant, was a dog.

The use of the *Aguilar-Spinelli* test to measure the reliability of a confi-

145. *See, e.g.*, FED. R. EVID. 104(a) and (b).
146. 304 F.2d 280 (4th Cir. 1962).
147. 100 Mich. App. 587, 300 N.W.2d 329 (1980).
148. *Id.* at 332.

dential canine[149] represents a symptomatic regression in the law of probable cause review prompted by the hearsay reception. In an earlier era, the developing law of evidence confronted the same issue: should information supplied by animals be treated as an out-of-court hearsay "declaration"?[150] These earlier cases were primarily concerned with the fact that the "declaration" by the animal could not be cross-examined.[151] Eventually the courts came to realize that the hearsay rule was analytically inapplicable to such evidence and abandoned the hearsay approach.[152] Yet within the confines of the *Aguilar-Spinelli* rule, we find the history of hearsay repeating itself. And we see once again how the hearsay reception was responsible for a belabored technicalism that could only appear spurious.

II. RECEPTION THEORY ANALYSIS

The formative problems of our search and seizure laws are not limited to the *Aguilar-Spinelli* rule. The fourth amendment is everywhere in a state of crisis and *Gates* may only signal that the worst is still to come. Traditional nomocentric legal analysis, however, as illustrated in the foregoing sections, is limited in its ability to step beyond the individual rule to develop a programatic basis for a major reconstruction of our search and seizure laws. The need is therefore pressing to develop a broader theoretical framework which will enable us more effectively to analyze and pursue the formative work of the Warren Court. This section will attempt to broaden our analysis of the *Aguilar-Spinelli* doctrine through an application of the comparative law methodology of reception theory. We will demonstrate how we can apply this theoretical format to deepen our understanding of the essential defects of the rule and then use it to develop a constructive alternative to the regressive approach to fourth amendment privacy expressed in *Gates*.

A. *Nature of Reception Theory*

Virtually all sciences include a theory of development, or ontology, which is comprised of a series of generalizations about the nature of growth and change pertinent to a given science. Such a developmental theory provides the scientist with an invaluable tool for any critical study. It provides insight into the true nature of the very subject matter of the science, it generates objective standards to measure and evaluate any observed or planned growth or development, and, perhaps most significantly, it provides the programmatic basis for corrective or constructive intervention in the developmental process. The legal scientist is less fortunate than most in this respect, since legal scholars have not yet fully accepted the intellectual

149. *See, e.g.*, United States v. Klein, 626 F.2d 22 (7th Cir. 1980); United States v. Venema, 563 F.2d 1003 (10th Cir. 1977); United States v. Meyer, 536 F.2d 963 (1st Cir. 1976).

150. *See generally* Annot. 18 A.L.R.3d 1221.

151. *See, e.g.*, State v. Davis, 154 La. 295, 97 So. 449 (1923).

152. Such evidence is now typically treated as a matter of expert opinion rendered by a human and based upon the instrumentality of the tracking dog. The question of admissibility therefore centers about the adequacy of the foundation evidence proferred to establish the relevance and reliability of the data generated by the instrumentality. See cases collected at Annot., *supra* note 150, at 1230.

propriety or possibility of such a sociological theory of law.[153]

Nonetheless, legal studies of the nature of growth of the law are certainly available and do provide us with an analytic format for probing more scientifically into the phenomena of constitutional criminal procedure law. By far the most useful of these studies, for our purposes, have been in the field of comparative law. Comparative law has traditionally been the area of legal scholarship most open to the theoretical findings and methods of the other social sciences. The various methodologies developed within comparative law scholarship, although used primarily in the field of international law, are readily adaptable to the study of individual bodies of law located within a single national system.[154]

Reception theory[155] is one such comparative law methodology.[156] The purpose of this theory is to describe and analyze one particular process of growth in the law: the process whereby a relatively undeveloped body of law borrows some aspect of law from a more developed body of law. Essentially a given body of law "short-circuits" the sequential path of growth and "leaps" to a more advanced state. This is, of course, precisely what was attempted during the Warren Court era with the law of constitutional criminal procedure.[157] Reception theory is designed to throw critical light on this process which is utterly fundamental to legal reform.

Reception theory attempts to identify the essential properties of this ubiquitous process of legal growth and reform and to explicate it in terms of its primary objectives. The underdeveloped body of law which seeks to borrow law from a more advanced body is referred to as the "host" system. The more advanced body of law is termed the "donor" system. When legal bor-

153. "The new socio-legal approach is regarded as subversive by some law teachers, and others believe it represents the indulgence of those who do not understand what is truly entailed in the study of law." Campbell & Wiles, *The Study of Law in Society in Britain*, 10 L. AND SOC. REV. 547, 550 (1976).

154. "The fundamental characteristic of comparative law, viewed as a method, lies in the fact that it is applicable to any form of legal research." H. GUTTERIDGE, COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH 10 (1946).

155. The term "reception theory" will be favored here although other terminology, such as "borrowing," "incorporation" and "legal transplants," appears in the literature and is used virtually interchangeably. Reception theory appears to have gained the greatest currency and invites the least confusion with other theories or doctrine.

156. Methodology is at present all that comparative law has to offer those concerned with the legal engineering of the criminal justice system. "Comparative research of criminal justice systems is still in its infancy. It is not surprising then, that when questions are asked transcending the concerns of a single system very little is actually known, and answers tend to be mostly in the nature of impressionistic beliefs and vague hypotheses." Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 507 (1973).

157. The history of the Warren Court may be taken as a case study of a court that for a season determined to employ its judicial resources in an effort to alter significantly the nature of American criminal justice in the interest of a larger realization of the constitutional ideal of liberty under law . . . To those, both on and off the Court, who were eager for a more profound judicial influence on the quality of American criminal justice, a significant change in the assumptions and tactics of the Supreme Court seemed clearly required. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 525-26.

rowing takes place, the host system is said to "receive" law from the donor system.

The basic premise of reception theory is that when a rule of law is transferred from one system to another, an organic interaction takes place between the two systems. Therefore, to understand the inherent dynamics of the rule in its new setting, several focal points of research and analysis must be undertaken simultaneously. For one thing, the rule itself must be carefully understood in its original form in the donor system. Also, the rule must be viewed in systemic terms as a component part of that system. The operation and objectives of the rule in the donor system reveal much of the rule's inherent limitations, both in terms of its theoretical root structure and the range of factual constructs and determinations to which it is demonstrably applicable.

The experience of the law in the donor system must be understood because it will not only explain the rule's viability in the donor system but will also serve to reveal its adaptability for transfer to other systems. The conditions and objectives of the host system must also be understood. What type of rule is needed? What function is the rule to perform in that system? Are the operative factors in the host system—the objectives and conditions of the rule's implementation—similar to those of the donor? "The process of adaptation happens in many different conditions. Depending on the nature of these conditions, the new law can integrate itself into the new legal system more or less successfully; or can be an alien body within it; or again it can be the departure point of a new system."[158] Perhaps the most basic lesson to be learned from reception theory is this: to understand the operation and development of a rule of law which has been received from another system, it is never sufficient to analyze the rule solely in terms of its experience within the new system. This would be similar to attempting to diagnose the receptivity problems of a transplanted organ with little or no knowledge of the body from which it came.

B. *Application of Reception Theory*

The application of reception theory to a given instance of borrowing involves a comparative analysis of the host and donor systems to gauge the "receptivity" of the transplanted law in the new system. The two prinicpal points of this comparison are the *objectives* assigned for the rule and the *conditions* of implementation of the rule in each system. The notion here is that to the degree that the two systems of law are not compatible on these two scores, a transfer of law between them will be less likely to succeed. Rather, given such incompatibility, one would expect to find indications of a spontaneous rejection taking place in the host system. This may manifest itself in a variety of ways. The host system may simply ignore the new rule, or it may attempt to accommodate the new law by revising either the rule itself or,

158. G. EORSI, COMPARATIVE CIVIL (PRIVATE) LAW: LAW TYPES, LAW GROUPS, THE ROADS OF LEGAL DEVELOPMENT 423 (1979).

more radically, the objectives and conditions of the host system. Or it may completely abort the new law, as was done in *Gates*.

Even our cursory review of the case law developments under the *Aguilar-Spinelli* rule has revealed sufficient evidence of a protracted rejection syndrome in which the lower courts struggled unsuccessfully to revise the rule to the point where they could live with the results it produced. We would like now to use the methodology of reception theory to sharpen and enlarge our understanding of why this well-intended rule, so plausible on its face, failed so badly. To do so, we must compare the respective objectives and conditions of the host (the law of probable cause review) and the donor (the law of evidence) systems of law.

There are three categories of *objectives* of the respective bodies of law which we may identify and compare. The first category is composed of the independent objectives which are common to each. The second is the category of mutually inconsistent objectives. And the third class is one of unrelated objectives, that is, objectives for one body of law which have no counterpart in the other.

The sole objective which is truly common to both the law of evidence and the law of probable cause review is that of providing a formalized standard of review. Evidence scholars have long advocated the abolition of the formal categories of admissible hearsay, to be replaced by a rule vesting largely unformalized discretion in the hands of the trial judge.[159] But the law of hearsay has nonetheless endured in its highly formalized state, with only minor concessions towards informality.[160] The Warren Court held the same objective for the probable-cause informant rule. In rejecting a looser, "totality of the circumstances", standard of review, the *Spinelli* Court stated emphatically: "Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis."[161] This emphasis on formality, which imposes strict centralized control of legal reforms, is symptomatic of law in its formative era.[162] The emerging law of probable cause review found in the hearsay rule a ready and credible source for such a standard of review. To underscore the irony, then, it appears likely that the now notorious technicality of the *Aguilar-Spinelli* rule was in fact a conscious objective of its authors.

The category of mutually *inconsistent* objectives, however, is far more replete:

(1) The hearsay rule is one of the exclusionary rules of the law of evidence designed to protect the presumably unsophisticated lay jury from being misled by various types of evidence whose reliability they cannot properly assess. By contrast, the probable cause rule has no such objective. At no point in time, either prior to a search or subsequently upon a motion

159. *See, e.g.*, McCormick, *Law and the Future: Evidence*, 51 NW. U.L. REV. 218, 219 (1956).

160. Federal Rules of Evidence Sections 803 (24) and 804(b)(5) now permit a step beyond the formalized list of hearsay exceptions, but there has been little development thus far under these sections. *See generally* 4 J. WEINSTEIN AND M. BERGER EVIDENCE ¶¶ 803(24)[01], 804(G)(5)[01] (1981).

161. Spinelli v. United States, 393 U.S. 410, 415 (1969).

162. See *supra* note 89.

to suppress, is the issue of probable cause presented to a jury. On the contrary, the law of probable cause review governs the appropriate *use* of information already in the possession of the factfinder.

(2) Another objective of the hearsay rule is to promote the presentation of first-hand evidence before the factfinder. "A distinctive and cherished ideal of our trial tradition is that evidence in the main should be limited to the statements in court of witnesses who have observed the facts and are produced for cross-examination."[163] The probable cause rule does not share this objective. The law here is *not* encouraging informants to appear in person before the magistrate. The objective of the probable cause rule is to facilitate a warrant process conducted on paper only, or even upon oral testimony communicated by telephone,[164] and to avoid the need for even a minimal evidentiary proceeding.

(3) The hearsay rule is designed to regulate only the admissibility of evidence. It is not constructed so as to pass any more precise or particularized judgment on the reliability or probative value of admissible hearsay. The objective of the probable cause rule, on the other hand, is certainly to provide a standard to measure the sufficiency of the evidence. Therefore, the objectives of the probable cause rule in this respect are a critical step beyond those of the hearsay rule. To attempt to measure sufficiency according to an evidentiary standard of admissibility is to attempt to accomplish an objective for which the hearsay rule has never been considered adequate.

(4) Another objective of the hearsay rule is to bifurcate the functions of judge and jury according to an objective *legal* standard. The concern here is to prohibit the judge, through his evidentiary rulings, from invading the fact-finding province of the jury. The objective, in other words, is to require the judge to rule on the admissibility of hearsay according to the formalized rule and to rule it admissible regardless of how unreliable, incredible or absurd *in fact* the judge views the evidence to be. Of course, judges as magistrates are expected to do precisely the opposite in evaluating the sufficiency of evidence proferred on the issue of probable cause. In the probable cause setting, the bicameral objectives of the hearsay rule are inconsistent with the tasks expected of the singular judicial or police factfinder.

(5) Finally, the inconsistency of the objectives of the host and donor systems of law may be compared with respect to the standard of reliability promoted by each. The hearsay rule is essentially a procedural rule designed to govern the *general* reliability of an institutionalized litigation ritual. It is freely acknowledged that the hearsay rule will, on numerous specific occasions, exclude good evidence and admit bad. The justification for the rule is that it is said to promote and effect generally a more reliable litigation process. The objective of the probable cause rule, however, is to better guarantee the *specific* reliability of each determination to invade a constitutionally protected sphere of privacy. The fourth amendment is determined to be more specifically reliable, and therefore less general and arbitrary, than are

163. McCormick, *supra* note 148 at 218.

164. *See* FED. R. CRIM. P. 41(c)(2).

the rules of evidence.[165]

The third category of objectives, those that are unrelated between the two systems of law, also provides a revealing comparison. There are two regulatory objectives of the probable cause rule which have no analogous counterpart in the hearsay rule. The first is that the rule governing probable cause based upon informants' tips involves an attempt to raise the standard of review for searches based upon an informant's tip and thereby to discourage or minimize the influence of such people in the criminal justice process. But certainly the hearsay rule, which is directed only at the nature of the declaration and not at all at that of the declarant, does not share this objective. Consequently, the *Aguilar-Spinelli* rule has backfired in terms of this objective, for by effectively limiting informant's tips *only* to a hearsay review, information supplied by an informant is in practice subject to *less* scrutiny than the first-hand information of the police officer. For instance, most jurisdictions have developed fact-specific standards for street searches based upon observations of "narcotics related activity" by the police. If a police officer conducts a typically warrantless search based upon such alleged observations, he will subsequently be scrutinized through cross-examination at a hearing held pursuant to a motion to suppress. If the officer can state that an informant provided him with the probable cause information, at the hearing the officer cannot be cross-examined as to the specific observations since he has no personal knowledge of them and the informant cannot be cross-examined since he is privileged by *McCray* not even to appear. This is clearly ironic.[166] There is an obvious import to this situation, and one which has not been missed by urban police forces across the country. The police are much better off if they use informants to provide probable cause than if they were to pursue and investigate the facts independently.

A second unrelated objective of the probable cause rule is to instill a self-governing professional respect on the part of the police for the privacy of all citizens. The hearsay rule of course does not, and cannot, promote such an objective. To the contrary, the hearsay reception does affirmative damage to the pursuit of that regulatory goal. For by encouraging the use of investigative surrogates in the form of confidential informants, the law is encouraging the use of less trained, less visible, less responsible, less answerable, and less professional agents who have a keen interest in invading the privacy of others.[167]

The comparison of the *conditions* of the practical implementation of a hearsay test in the two different systems of law is reasonably straightforward,

165. The history of the fourth amendment is commonly related to a reaction to the arbitrariness of the infamous "general warrants" of the colonial era. *See generally* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19-48 (1966).

166. "[C]ourts—including the United States Supreme Court—seem to think it is enough that an informant says he "saw" a sale of narcotics, even without any explanation as to how it was known that a sale was occurring or that the object being sold was in fact narcotics." LAFAVE, SEARCH AND SEIZURE, *supra* note 4, at 539.

167. "In this manner, the FBI's own guidelines may provide members of the Bureau with the means by which to circumvent explicit Supreme Court rulings which serve to suppress illegally obtained evidence, as these unlawful actions of the informant may never be discovered." Katz, *supra* note 23 at 58.

yet equally revealing of the inevitable failure of the hearsay reception in the *Aguilar-Spinelli* rule:

(1) The hearsay rule has been tailored to fit the circumstances of a trial. This is a highly predictable and drawn-out ritual of retrospective fact-finding in which the opportunity exists to repair or reform an initially inadequate foundation for admitting an item of hearsay. But the probable cause determination is made prospectively, either by the magistrate or, more commonly, by the police as the facts are still unfolding. The conditions and opportunity for technical conformity to the rule are certainly more adverse.

(2) The trial proceeding is adversarial. Opposing counsel provide notice, by objecting, of any hearsay defects in the evidence being presented. The probable cause setting is *ex parte*. Any notice of any technical defects will not be provided until it is too late to bring the information into technical compliance.

(3) At trial, law-trained judges and lawyers invoke and apply the rules of hearsay. In the probable cause setting, particularly in the warrantless situation, the lay police officer is required to assume the role of both lawyer and judge.

(4) The factfinder at trial is the jury which is presumed to have no expertise in the subject matter of their fact-finding. The police, of course, are presumed to have particular professional expertise in weighing the reliability of information relevant to criminal activity.

(5) Finally, the fixed rule of hearsay applies where the objective predictability of the rule's application is required and relied upon by the opposing parties to litigation. Such predictability is thought to promote fairness and equality between the litigants. In the *ex parte* probable cause setting, however, the need for a fixed rule of reliance is far less, if at all, critical to insure the fundamental fairness of the fact-finding process.

This comparison of the objectives and conditions of the two systems of rules should demonstrate that the frustration and all-thumbs feelings of the judges who have had to work with the *Aguilar-Spinelli* rule are well-founded. The hearsay rule was designed to meet a set of objectives within a context of conditions which are inconsistent with the mandate and practice of the issuing or reviewing judicial officer. The *Aguilar-Spinelli* rule was never designed appropriately to meet the indigenous needs of the criminal justice system for a legal response to the informant dilemma. The dilemma persists, and now worsens. With a clear view of the objectives and conditions of a probable cause-informer rule, however, it is possible to identify the structural outlines of a rule that could be made to work.

III. TOWARDS A RECONSTRUCTED RULE

How then may we move now towards a better rule to resolve the informant dilemma? It is certainly possible to do so, if for no other reason than that the existing rule of *Gates* is essentially a non-rule. But before listing the elements of such an improved rule, it is perhaps best to begin by making our rejection of the hearsay reception emphatic. The rule governing the de-

termination of probable cause based upon informants' tips must be tailored to the realities of search and seizure practice. The principal point here is that even if magistrates were to perform a meaningful function in reviewing applications for warrants, the overwhelming majority of searches are conducted without a warrant. Therefore the rule must be effective within the context of police, not judicial, decision-making. In this respect, it is almost whimsical that the final word on the hearsay reception of the *Aguilar-Spinelli* rule was written nearly 100 years before the rule itself. In 1873, in analyzing the appropriateness of a reception of the common law system of evidentiary rules into the foreign system of Indian Law, Sir Henry Sumner Maine made the following poignant observation:

> The system of technical rules, which this procedure carries with it, fails then, in the first place, whenever the arbiter of facts—the person who has to draw inferences from or about them—has special qualifications for deciding on them, supplied to him by experience, study, or the peculiarities of his own character, which are of more value to him than could be any general direction from book or person. For this reason, a policeman guiding himself by the strict rules of Evidence would be chargeable with incapacity; and a general would be guilty of a military crime.[168]

Given the foregoing, we may identify at least five elements that would better meet the objectives and conditions of a probable cause-informer rule:

(1) The first point of an improved rule would be to establish informers, as a matter of policy, as a disfavored investigative tool. If one objective of the rule is to limit and control police exploitation of informers, a simple rule of necessity could be incorporated. This would require that the police rely upon informants to establish probable cause only where no other, or more preferable, method of investigation is reasonably available. This would not prohibit the use of informants, but it would require the "necessary evil" theorists to document their case in each instance. It would, however, certainly cut down on the increasingly casual use of informants by urban police departments to perform routine surveillance functions previously performed by the police themselves. In the law enforcement lexicon, informants are said to be the "eyes and ears" of the police. This is, up to a point, certainly necessary. Informers, however, should not be used to the point of permitting the police themselves to become blind and deaf. Police work is better done by the police, and the rule should so state.

Congress has incorporated such a rule of necessity in the law governing probable cause determinations for wiretapping. Title III of the Omnibus Crime Control and Safe Streets Act of 1968[169] requires that before a wiretapping warrant may issue, the applicant must demonstrate that "normal investigative procedures have been tried and have failed or reasonably ap-

168. H. S. MAINE, VILLAGE COMMUNITIES IN THE EAST AND WEST 321-22 (3d ed. 1876). *See also* Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981), (argues that legal analysis should identify the most appropriate decision maker to fulfill a given legal policy or objective and then structure the substantive rules accordingly).

169. 18 U.S.C. §§ 2510-2520 (1982).

pear to be unlikely to succeed if tried or to be too dangerous."[170] Given that the fear of abuse by informants should at least equal the fear of wiretapping abuse, there is no reason not to adopt a similar approach.[171] Thus far, however, the courts have been reluctant to adopt such an explicitly regulatory approach to influence police search and seizure choices.[172]

(2) One of the most common suggestions in the literature[173] for an improved rule is to require a minimal level of independent police corroboration of the information contained in an informant's tip. The reason this suggestion is so obvious and prevalent is that under the *Aguilar-Spinelli* rule, once the tip itself conforms to the requirements of both prongs of the rule, *no* corroboration by the police is required. This obviously works towards the wrong end. Perhaps the best way to encourage professionalism and to discourage opportunism on the part of the police is through a rule of necessity, as indicated above. But it also makes sense to require the police, even in circumstances where use of an informant is found to be necessary, to perform as much independent investigative work as is reasonable to corroborate the informant's tip.

In most jurisdictions, prosecutors are presently required at trial to do as much. The majority rule in America is that the testimony of a criminal accomplice is admissible against a defendant at trial, but it must be corroborated by other proof.[174] The policy behind the rule is manifest:

> The reasons which have led to this distrust of an accomplice's testimony are not far to seek. He may expect to save himself from punishment by procuring the conviction of others. It is true that he is also charging himself, and in that respect he has burned his ships. But he can escape the consequences of this acknowledgment, if the prosecuting authorities choose to release him provided he helps them to secure the conviction of his partner in crime.[175]

The policy objectives of the accomplice rule and the informer rule are identical in this respect: to prevent findings of fact based upon the tips of criminal informants who have a strong incentive towards mendacity.

It may be argued that the societal objective of avoiding mistaken convictions is stronger than that of avoiding mistaken searches. Undoubtedly this is so. Yet the rule may take this into account. First of all, even if we are less concerned about findings of probable cause based upon inaccurate information, we are, one must assume, nonetheless sufficiently concerned to require a greater degree of protection against fact-finding error than is typically required in an *ex parte* proceeding. Secondly, the corroboration

170. 18 U.S.C. § 2518(3)(c) (1982).

171. "Simplistically stated, this . . . recognizes that a government infringement upon individual privacy may be deemed unreasonable because a less intrusive alternative procedure existed which could have accomplished the same end at less cost to individual privacy." Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. F. 763, 799.

172. *Id.* at 799-803.

173. *See, e.g.*, Rebell, *supra* note 141.

174. *See generally*, 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2056 (Chadbourn rev. 1978). But corroboration is not required in the federal courts. *See* United States v. Lee, 506 F.2d 111, 118-19 (D.C. Cir. 1974).

175. WIGMORE, *supra* note 163, at 322.

rule for the probable cause-informant does not have to be an absolute requirement, as is the accomplice rule. The rule could simply require corroboration according to a standard of reasonableness. Finally, to the objection that such a requirement would place an undue burden on law enforcement, Rebell has answered with the finding that in more than 90% of the cases in the Yale study the police did perform at least some follow-up investigation upon receiving an informant's tip.[176] The practical effect of a corroboration requirement may therefore be to simply require that the police perform better follow-up investigations.[177]

(3) The rule should also permit evidentiary hearings on the issue of probable cause where the search has been conducted pursuant to a warrant issued on the basis of an informant's tip. The point here is simply to recognize that where the reasonableness of the police officer's reliance upon an informant's tip is at issue, there is no adequate substitute (and certainly not the hearsay test) for adversarial cross-examination to develop *all* the relevant facts. The myth of the neutral magistrate[178] must be at least partially forsaken. The rule of *Franks v. Delaware*,[179] which essentially restricts a "subfacial" inquiry into the reasonableness of the police officer-affiant, would have to be modified in the informant situation to permit such an inquiry.[180] Such a modification would not unreasonably compromise the policy objective of encouraging warrants. The police would still be required, under existing law, to obtain warrants wherever there is no recognized exception for not doing so. Certainly it is not sound policy to encourage warrants to the extent of making a warrant a shield for abuse.

(4) The rule should require that, where the police choose to use a confidential informant as an investigative agent, the police must be prepared to document and disclose *all* of the available information on the informant himself. This would be something in the nature of a certification requirement. The *Aguilar-Spinelli* rule requires only that the police be able to allege that the informant has on one or more prior occasions provided the police with accurate information to satisfy the veracity prong. It does not require the police to document those occasions, nor does it require the police to disclose the number of times the informant has provided *unreliable* information. Therefore, under the rule and practice of *Aguilar-Spinelli*, an informant who has provided tips to the police on 100 prior occasions, 99 of which turned out to be demonstrably false, would nonetheless satisfy the second prong of the rule. Indeed, when one reads the informant cases, it appears that no inform-

176. Rebell, *supra* note 141 at 719.

177. The defendant-respondent's brief at 26 n.10A, Illinois v. Gates, 103 S. Ct. 2317 (1983) offered the following quote from a newspaper interview with Detective Mader, the police officer who conducted the search in Gates: "Says Mader, 'I am not an attorney. I felt we reacted as well as we could. I felt we had done everything proper.' But in retrospect, he said, if he had understood the exclusionary rule as well then as he does now, he would have conducted a surveillance to better corroborate the [anonymous informant's] letter before seeking the warrant." THE CHICAGO LAWYER, Jan. 1983, at 7, col. 4.

178. *See supra* text accompanying note 126.

179. 438 U.S. 154 (1978).

180. See the argument developed by Grano, *supra* note 102 at 411.

ant has ever previously supplied the police with a false tip.[181] Because the rule employed the formal mechanism of a hearsay test, such evidence of prior unreliability was, incredibly, irrelevant to the issue of reliability. This fact explains the prevalent cynicism and opportunism that accompanied the rule.

To require the police to keep files on the informants they would like to have certified as reliable investigative agents would not be unreasonable. The federal police, to greater and lesser degrees, already do so.[182] The FBI keeps extensive and centralized files on its informants. These files catalog the record of performance of the informant with the agency. The Drug Enforcement Agency maintains comparable records on its informants. Indeed, it would appear that the self-interest of the professional investigator would require such records, wholly apart from any requirements of the rule. A valid objection to such documentation and disclosure would be that it would compromise the anonymity of the informant. The consideration is addressed in the following suggestion.

(5) The rule should also require disclosure of the identity of the informant whenever the information supplied by the informant is necessary to establish probable cause. Once again, the myth of the magistrate and the policy of encouraging warrants should not exempt the prosecution from a disclosure requirement where a warrant is issued.[183] And the *McCray*[184] rule should be recognized for what it is: an overstatement of the factual need for a probable cause-informant privilege and a serious misstatement of the legal predicates for such a rule.[185]

In 1958, prior to any of the Warren Court's attempts to resolve the informant dilemma, Justice Traynor of the California Supreme Court cogently expressed the rationale for a rule of disclosure:

> If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's action depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a

181. Not only does the data concerning instances of unreliability not surface in the cases, but there is also little information provided by any outside studies. One notable instance of statistical backtracking discovered that one "reliable informant" of the 1930s who provided tips leading to 150 prostitution arrests, provided inaccurate information in 40 of them. J. HOPKINS, OUR LAWLESS POLICE 105 (1931).

182. *See* Wilson *supra* note 22 at 74-76.

183. *But see* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.3 (1972) which distinguishes between searches made with and without a warrant.

184. McCray v. Illinois, 386 U.S. 300 (1967).

185. "*McCray* is based primarily on a wrong reading of two centuries of precedent, precedent which read properly requires disclosure whenever necessary to detect false testimony and to investigate the issue before the court. Grano, *supra* note 102, at 440.

> holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue. . . . If the prosecution refuses to disclose the identity of the informer, the court should not order disclosure, but on proper motion of the defendant should strike the testimony as to communications from the informer.[186]

More recently, Judge Friendly has argued that disclosure should also be required even in the less intrusive stop and frisk situation:

> There is no . . . guarantee of a patrolling officer's veracity when he testifies to a 'tip' from an unnamed informer saying no more than that the officer will find a gun and narcotics on a man across the street, as he later does. If the state wishes to rely on a tip of that nature to validate a stop and frisk, revelation of the name of the informer or demonstration that his name is unknown and could not reasonably have been ascertained should be the price.[187]

The compromise position is of course that disclosure be made, in the first instance, not to the defense but to the trial court in camera.[188] The wisdom of such a compromise is unclear, in part because it appears to invoke some of the same false premises as the mythology surrounding the ability or likelihood of the magistrate to perform a satisfactory *ex parte* scrutiny of the adverse interests of the defendant. Yet even the existence of such an alternative to full disclosure underscores the lack of validity to the present rule which ignores the disclosure dilemma entirely.

The net effect of incorporating the foregoing proposals into the rule would be to abandon the hearsay format almost entirely. In its stead would be created a comprehensive legal response to the informant dilemma which is both consistent with the policy objectives of the rule and operable within the typical conditions in which the rule is invoked. It would represent a step beyond the technical formalism of the formative era of criminal procedure law and into a secondary stage of experience-based legal engineering. It would also renew faith in the creation of rules of search and seizure law which have doctrinal integrity and which may in practice help to safeguard individual privacy.

CONCLUSION

There is much cause to lament the court's opinion in *Illinois v. Gates*. At its heart, the opinion represents a radical reaction to the core concept of fourth amendment privacy—the need for close judicial regulation of police investigative activity. The deeper logic of this reaction does not end with the

186. Priestly v. Superior Court, 50 Cal.2d 812, 819, 330 P.2d 39, 43 (1958). However, *Priestly* has since been legislatively abrogated by section 1042(c) of the California Evidence Code, the constitutionality of which has been upheld in Martin v. Superior Court, 66 Cal.2d 257, 424 P.2d 935, 57 Cal. Rptr. 351 (1967).

187. Williams v. Adams, 436 F.2d 30, 38 (2d Cir. 1970) (Friendly J., dissenting).

188. See the discussion in Grano, *supra* note 91, at 440-47.

overruling of *Aguilar-Spinelli*. It extends ominously to all search and seizure laws which may be seen to compromise the local autonomy of the foot-soldiers in the criminal justice system, the very police officers and lower court officials who are most closely caught up in "the often competitive enterprise of ferreting out crime."[189]

There is, on the other hand, no cause to lament the passing of the *Aguilar-Spinelli* rule itself. The ultimate judgment on this rule must be that while it served initially to advance the concept of strict judicial regulation, it became, over time, an impediment to the development of search and seizure law. The present impulse of fourth amendment advocates is too much to defend against any encroachment on this beleagured body of law. The more candid and more profitable approach would be to concede the undeniable defects in many of these early rules, to support only those aspects of the formative law which can survive their own "strict scrutiny," and then to demonstrate how a satisfactory reconstruction may be made which furthers the valid objectives of fourth amendment privacy. For, as we have seen here, it is the very shortcomings of the early law which provide the necessary intelligence for the law's next step.

189. Johnson v. United States, 333 U.S. 10, 14 (1948).