Comment

The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards

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In *United States v. Harris*,¹ a recent explication of the demands of the Fourth Amendment,² the Supreme Court examined once again "the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an [unidentified] informant . . . who purports to relate his personal knowledge of criminal activity."³ On one level, the case of *United States v. Harris* can be seen as simply "another indication of the determination of the Supreme Court's changing membership to reverse the trend of the Warren Court's criminal procedure decisions."⁴ Upon analysis, however, the misfortunes of Roosevelt Harris, "a trafficker in nontaxpaid distilled spirits" exposed by "a person who fears for their life [*sic*] and property should their name be reported,"⁵ can also convey a more basic message. For the plurality

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1. 403 U.S. 573 (1971).

2. Since *Mapp v. Ohio*, 367 U.S. 643 (1961), federal law has come to dominate the search and seizure field. *Mapp* held that the Fourth Amendment, operating through the Fourteenth, barred the use of evidence secured through an illegal search and seizure from state trials.

3. 403 U.S. at 575. The question is not only "recurring," but also one of the most important in the field of search and seizure law. Most search warrants are probably granted on the basis of the hearsay testimony of unnamed informants. A study of search warrants in one California city revealed that eighty-one per cent of all warrants rested on informer data. More than eighty-five per cent of these informer-based warrants did not disclose the informants' identity. See S. BRODSKY, SEARCH WARRANTS, HEARSAY EVIDENCE AND THE FEDERAL CONSTITUTION: A CRITIQUE BASED ON CALIFORNIA EXPERIENCE 29 (1965). An unpublished study of the issuance of warrants in a medium-sized Connecticut city, in which the author participated, indicated that anonymous informants were the source of the information for seventy-three per cent of all search warrants issued in 1963 and sixty-three per cent in 1969. See Appendix, Table 2 *infra*. Reliance on hearsay testimony of informants is especially significant in narcotics cases. In the city studied, ninety per cent and eighty-three per cent of all warrants for narcotics searches were founded on informant reports in 1968 and 1969, respectively. The study is described in more detail at pp. 708-12 *infra*.

4. Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 46, 53 (1971).

5. 403 U.S. at 575.

opinion authored by Chief Justice Burger⁶ is fundamentally a continuation, rather than a repudiation, of past Supreme Court analyses of probable cause showings of search warrants based on informer testimony.⁷ The last decade of decisions in this area has consisted entirely of attempts to define standards which would prove the reliability of anonymous informants.⁸ Yet it is doubtful that those standards—whether applied strictly, as in the Warren era, or loosely, as presaged by *Harris*—can successfully distinguish reliable from unreliable informer affidavits.

This Comment will suggest a new probable cause model which promises to be more capable of assuring the credibility of incriminating information obtained from unidentified informants.

I. The Supreme Court's Search for Standards

Prior to *Harris*, the Supreme Court formulated, and later elaborated, a "substantial basis" test for undisclosed informer testimony. The Court first specifically analyzed the use of hearsay information provided by an unnamed informant to support a search warrant in *Jones v. United States*.⁹ Almost unanimously,¹⁰ it upheld a warrant based on a tip from a "reliable" informer who had given prior information "which was correct" and who asserted that he had personally purchased narcotics from the suspects.¹¹ Responding to an objection to the use of hearsay information from unidentified informants, the *Jones* Court declared that "an affidavit is not to be deemed insuffi-

6. A bare majority of the justices voted to uphold the warrant presented, and of these, only three could agree on any of the key points in the Chief Justice's opinion.

7. See pp. 706-08 *infra*.

8. See pp. 704-08 *infra*.

9. 362 U.S. 257 (1960). Adumbrations of *Jones* are apparent in *Draper v. United States*, 358 U.S. 307 (1959). In *Draper*, a "special employee" of the Bureau of Narcotics who had always given "accurate and reliable" information in the past notified the Bureau that James Draper "was peddling narcotics to several addicts" and supplied a detailed description of Draper's appearance and where and when he could be apprehended carrying heroin. The Court found the arrest and incident search of Draper's person valid, reasoning that since every other descriptive detail related by the informant had proved to be true, the arresting officer had reasonable grounds to believe that the one remaining unverified item—that the suspect was carrying heroin—was likewise correct. *Id.* at 313.

10. As in *Draper v. United States*, 358 U.S. 307 (1959), only Justice Douglas dissented, protesting against the use of "faceless informers."

11. This information was corroborated by "other sources" and, to some extent, by the fact that the persons implicated were known to be drug addicts. However, the officer who obtained the warrant—solely on the basis of an affidavit that he had signed—did not swear to the results of his own independent investigation of the claims made by the informants. L. HALL, Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 236 (3d ed. 1969).

cient on that score, so long as a substantial basis for crediting the hearsay is presented.”¹² The “substantial basis” test of *Jones* was soon refined and applied in *Aguilar v. Texas*¹³ to strike down a state search warrant issued on the basis of an affidavit which recited, in relevant part, that “[a]ffiants have received reliable information from a credible person and do believe that” narcotics were on the premises to be searched.¹⁴ Building on *Jones*, the Court held that to enable a magistrate to determine when the hearsay statements of informants establish probable cause for a search warrant:¹⁵ (1) the affidavit must, in order to preclude the possibility that the informant is relying on mere rumor, indicate the circumstances from which the informer concluded that evidence is present or that crimes are occurring;¹⁶ and (2) the affiant must present the basis for his belief that the informant is trustworthy, thus reducing the possibility that a tip meeting the first standard is no more than a well-embroidered fabrication.¹⁷

In *Spinelli v. United States*¹⁸ the Court restated the *Aguilar* criteria and confronted the question of whether a warrant affidavit found defective under the two-pronged reliability test of *Aguilar* might be “cured” by other averments contained in the affidavit. The entire Court agreed¹⁹ that supporting information could serve to establish probable cause by buttressing an otherwise unacceptable informant’s tip,²⁰ although the majority found the corroborative information in the *Spinelli* warrant insufficient.²¹

12. 362 U.S. at 269.

13. 378 U.S. 108 (1964).

14. 378 U.S. at 109.

15. See generally Note, *The Informer’s Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958 (1969); Comment, *Informer’s Word as the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840 (1965).

16. Note, *supra* note 4, at 55. See also *Spinelli v. United States*, 393 U.S. 410, 416 (1969); Comment, *supra* note 15, at 841. This “particular knowledge” test places a premium on personal observation. If the informant claims first-hand knowledge, a detailed description of the incriminating evidence observed may not be required. See *Spinelli*, *supra* at 428 (White, J., concurring); cf. *Rugendorf v. United States*, 376 U.S. 528 (1963). Moreover, by its very nature the standard as applied may differ from the Court’s formulation. The acceptable statement “x is selling liquor to me” and the unacceptable statement “x is selling liquor” may seem equivalent in the minds of the informant or the officers drafting the warrant application. Cf. Note, *The Outwardly Sufficient Search Warrant Affidavit: What If It’s False?*, 19 U.C.L.A.L. REV. 96, 136-37 (1971).

17. See Note, *supra* note 4, at 55; Comment, *supra* note 15, at 846-47. For a discussion of the problems in the operation of this rule, see Note, *The Outwardly Sufficient Search Warrant Affidavit*, *supra* note 16, at 134-36.

18. 393 U.S. 410 (1969).

19. Justice Marshall took no part in the case.

20. See 393 U.S. at 438 (Fortas, J., dissenting).

21. An F.B.I. investigation indicated that the suspect was spending considerable time at an apartment not his own which contained two telephones, whose numbers matched those the informant had asserted *Spinelli* was using for illegal gambling activities. In addition, *Spinelli* was known to federal authorities as a bookmaker. With respect to

*United States v. Harris*²² is significant principally because of its willingness to embrace dubious corroborative assertions in an affidavit in order to rescue an informer's tip which probably would have been held unacceptable by the Warren Court. The affidavit in *Harris* recited that a "prudent person" had told the affiant, a federal tax investigator, that he had recently seen Harris selling untaxed liquor and that no more than two weeks ago he had purchased some of the bootlegged whiskey himself. In addition to the allegations concerning the informant's report, mention was made of "a sizable stash of illicit whiskey" once found in an abandoned house under Harris' control and attention was drawn to Harris' reputation as a bootlegger.²³

A bare majority of the Court upheld the magistrate's finding of probable cause on the basis of this affidavit, though there was no consensus on *why* that finding should be upheld.²⁴ The difficulties with the warrant stemmed from the fact that no basis was given to support the affiant's belief that the informant was generally trustworthy.²⁵ Two of the majority Justices favored overcoming this obstacle by overruling *Spinelli* or *Aguilar*.²⁶ The Chief Justice's plurality

these independent investigative details, Justice Harlan's majority opinion noted that "at most, these allegations indicated that Spinelli could have used the telephones specified by the informant for some purpose," 393 U.S. at 417, and that the allegation that Spinelli was "known" to the police as a gambler was "but a bald and unilluminating assertion of suspicion that is entitled to no weight," *id.* at 414.

22. 403 U.S. 573 (1971).

23. The affidavit read, in part:

Roosevelt Harris has had a reputation with me for over four years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [*sic*] from all types of persons as to his activities. Constable Howard Johnson located a sizable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life [*sic*] and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal information of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past 2 days from the house, has personal knowledge that illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the "dance hall," and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

403 U.S. at 575-76.

24. The Chief Justice's opinion was joined by Justices Black and Blackmun who also wrote separate concurring opinions. Justice Stewart joined in only part I of the plurality opinion, and Justice White concurred only in part III of the Court's opinion.

25. No one denied that the affidavit met the first *Aguilar-Spinelli* test. An allegation of personal observation suffices to show that an informant has based his particular conclusions on reliable data. See 403 U.S. at 589 (dissenting opinion); cf. note 16 *supra*.

26. Justice Black desired to "wipe their holdings from the books," 403 U.S. at 585, and Justice Blackmun wrote "a personal comment" in favor of overruling *Spinelli*, *id.* at 585-86.

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opinion, however, contented itself with distinguishing the facts of these cases, and, like *Spinelli*, indicated that a bare assertion of an informer's general reliability can be a basis for a finding of probable cause only if it is corroborated by other factual data which supports the affiant's opinion that the informant is trustworthy.²⁷ Unlike *Spinelli*, however, sufficient corroborative data was found. Because the informant's statements were against his penal interest, they were said to have "carried their own indicia of credibility,"²⁸ and since police knowledge of reputation is often accurate, the affiant's declarations as to Harris' reputation as a bootlegger were considered "probative."²⁹

Thus, although *Harris*, in its generous view of what facts are corroborative, limits the significance of the *Aguilar-Spinelli* holdings, the framework that these two cases constructed for analyzing informer-

27. The Chief Justice's opinion is remarkably opaque, but this interpretation is strongly supported by the statement which concludes part I of that opinion and outlines the structure of the opinion as follows:

While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a *factual* basis for crediting the report of an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled with his own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant.

403 U.S. at 579-80.

28. 403 U.S. at 583. This inference is, at best, unconvincing. First, since an informant is often compensated with a promise of non-prosecution or favorable treatment, superficially incriminating statements may not be against penal interest at all. *See id.* at 595 (dissenting opinion). Indeed most informant testimony is probably putatively against penal interest. *See* p. 713 *infra*. Second, if the reasoning were valid, it would have the result of encouraging the state to prefer as informants participants in criminal enterprises rather than the ordinary citizen who from time to time may supply information to police. 403 U.S. at 595 (dissenting opinion).

The Court was evenly divided on this issue. Justices Black, Blackmun and White joined this portion of the Chief Justice's opinion, while the four dissenting Justices expressed their unwillingness "to embrace such a speculative theory." *Id.* at 596.

29. 403 U.S. at 583. This, presumably, is what the Chief Justice meant when he characterized a policeman's knowledge of a suspect's reputation as "something that policemen frequently know and a factor that impressed such a 'legal technician' as Mr. Justice Frankfurter." *Id.* Such treatment of reputation diverges sharply from *Spinelli* (*see* note 21 *supra*), and only Justices Black and Blackmun joined this portion of the Chief Justice's opinion. The cases are distinguishable in this regard only in that Harris' reputation was based, at least in part, on the prior seizure of illicit liquor on his property—a specific past event within the affiant's own knowledge. *But see* 403 U.S. at 596 (dissenting opinion); Note, *supra* note 4, at 58 n.28.

In dealing with reputation evidence, the Chief Justice looked to the language in *Jones v. United States*, 362 U.S. 257 (1960), and *Brinegar v. United States*, 338 U.S. 160 (1949). In neither of these cases, however, was reputation evidence a decisive factor. The warrant affidavit in *Jones* showed both general reliability and particular knowledge, and *Brinegar* was replete with corroborative details uncovered by police surveillance. Reliance on police allegations of the suspect's reputation is an inadequate substitute for a finding that the informer can be believed. *See* Note, *supra* note 4, at 58-59. And the fact that the suspect may have had previous encounters with the police may be the very reason that an unscrupulous informant thought he could incriminate the individual with impunity.

based warrants has by no means been dismantled.³⁰ Affidavits which relate the testimony of anonymous informants should set forth enough of the underlying circumstances to demonstrate that there is reason to believe both that the informer is a truthful person and that he has based his particular conclusions in the matter at hand on reliable data. Affidavits deficient in either of these respects can establish probable cause only if they provide adequate information to corroborate the informant's general reliability and/or particular knowledge.

II. The Existing Standards in Operation

In order to ascertain whether the *Aguilar-Spinelli* mode of evaluating informer-based warrants does, in fact, distinguish reliable from unreliable informant data, the author participated in a study of the issuance and effectiveness of search warrants in a medium-sized city in Connecticut.³¹ This study was designed to determine, first, the extent to which the *Aguilar-Spinelli* requirements were implemented at the local level and second, the degree to which the use of these tests succeeded in assuring the reliability of informant data.

30. Accordingly, lower courts are correct in employing the *Aguilar-Spinelli* tests in post-*Harris* litigation. See, e.g., *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971); *Chrisman v. Field*, 448 F.2d 175 (9th Cir. 1971); *Manning v. United States*, 448 F.2d 992 (2d Cir.), cert. denied, 92 S. Ct. 541 (1971).

31. The study was conducted by the author and Jeffrey N. Weisen, Esq., under the supervision of Dean Abraham S. Goldstein and Professor Stanton Wheeler from October 1969, through June 1970, as part of the 1970 Senior Studies Program at the Yale Law School.

Information on the warrant process was obtained by three main techniques: personal interviews, examination of records, and direct observations. Those interviewed included six judges, five police detectives, five prosecutors, two attorneys of the public defender's office, and two private attorneys. These interviews are the source of our impressions relating to the attitudes of the local participants toward compliance with Supreme Court standards described at pp. 709-11 *infra*.

The records examined were obtained from the files of granted search warrants maintained by the prosecutor's office. The search warrants are filed by year and divided into two classes, those in which evidence was found and those in which no evidence was uncovered. Each class is further divided by subject matter into four groups, gambling, narcotics, liquor, and "other." See Appendix, Table 1 *infra*. We sampled 100 per cent of the warrants for 1968 (a total of 145) and for 1969, we sampled fifty per cent of the gambling, liquor, and narcotics warrants and 100 per cent of the "other" warrants (for a total of ninety-three).

Finally, direct observation of police, prosecutorial and judicial activities was carried out twice a week for three months. We were permitted to enter judicial chambers on six different occasions when arrest warrants were being signed, but, because of a fear of "leaks," we were not allowed to observe the signing of search warrants.

The study also analyzed approximately 150 arrest warrants, most of which were based on citizen complaints of misdemeanor violations. Our findings concerning the arrest warrant process will be mentioned only insofar as they are suggestive of characteristics of the search warrant process as well.

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A. Compliance

Search warrants in the city studied are drafted by two branches of the police department. The vast majority of the warrants are produced by the Special Services Division, which investigates narcotics, liquor, and gambling offenses. The Detective Division, which investigates other crimes, processes a much smaller number of warrants, typically relating to stolen goods.³²

A deep ambivalence permeates the view the police take toward the warrants they draft. The Special Services Division displays great pride in drafting acceptable search warrants, and though the Detective Division generally approaches warrants with less enthusiasm,³³ its insistence in important cases on careful drafting matches that of the Special Services.³⁴ Yet the diligence of both divisions is directed mainly at the surface appearance of the warrants.³⁵ To minimize the discovery function of a warrant, the police tend to reveal the least amount of information necessary to meet judicial requirements. As a result, the allegations contained in the warrants are highly standardized, with identical paragraphs appearing in numerous warrants.³⁶

32. In 1968, a total of 145 search warrants were granted in the study area, and in 1969, the figure was 172. As Table 1 shows (*see Appendix infra*), the Special Services Division was responsible for more than nine tenths of all warrants in both years included in the study.

33. Some members of the Detective Bureau appeared more willing to cut corners to avoid burdensome search warrant requirements. This may be because, as one officer put it, not being specialists in warrant preparation like their colleagues in Special Services, "the patrolmen like to avoid paper work [and] are always asking if they really need a warrant in this situation." In addition, the nature of the searches (usually involving stolen goods) makes the Bureau emphasize expeditious return of the property over the painstaking investigation necessary to ensure conviction.

Although the Detective Division does not rely extensively on search warrants, it does conduct a substantial number of searches. To do so, it relies primarily on consent. One detective estimated that from seventy to eighty per cent of the suspects sign the Division's consent form because:

They know if they don't sign we'll station cops around the house and get a warrant.

He [*sic*] can stop the search anytime. Sometimes, if you're getting warm, they'll stop it. But most times not When they know they're going to be arrested, they're cooperative. If they don't consent, they know the judge will wonder why It's the same reason as why most murderers talk.

34. The captain of the Detective Division illustrated this attitude when he told us of a recent murder case in which the suspect admitted he had been with the victim the evening of the murder. Despite the fact that the suspect had offered to take the police to his room to prove his innocence, the captain required the investigators to obtain a warrant. In his words, "You know the state has to prove consent, and in an important case we don't want to risk it."

35. Supreme Court pronouncements have had an impact on at least the drafting of warrants by the police. Almost all warrants submitted by the police are approved, *see* p. 710 *infra*, and ninety-eight per cent of the approved warrants we studied contained assertions fulfilling at least one of the *Aguilar-Spinelli* reliability criteria.

36. The typical search warrant reviewed contains about ten paragraphs. For each type of crime there appears to be a standard form into which differing defendant names, addresses and other particulars are inserted. (In the detective bureau a prototype warrant is posted on the bulletin board of the office to aid the officers in their preparation.)

The Connecticut Circuit Court judges³⁷ interviewed stated that they carefully scrutinized each warrant application. Despite the fact that less than two per cent of search warrant applications are rejected,³⁸ the judges emphatically denied that they acted as mere "rubber-stamps."³⁹ Nevertheless, while the judges were knowledgeable about Supreme Court standards as to search and seizure,⁴⁰ the quality of their scrutiny is questionable.⁴¹ Applying the *Aguilar* test of informer

A typical narcotics warrant begins as follows:

Sgt. X is a regular member of the . . . Police Department and is presently assigned to the Special Services Division. He has a total of 19 years service, 6 of which are with Special Services. He has been in charge of numerous narcotic investigations and narcotic raids.

After several paragraphs stating the reliability of the informant, the dates upon which "known addicts" were seen entering the suspect's apartment, or the date upon which an informant "buy" was observed by the police, the warrant concludes with a paragraph reviewing the grounds for probable cause.

The usual affidavit also contains a statement of items to be seized. In narcotics cases this usually takes the following form:

Narcotics, dangerous drugs, misbranded drugs, narcotic paraphernalia, *i.e.*, eye drop-pers, syringes, bottle caps (cookers), needles (hypodermic), water pipes, scales, grinders, or other apparatus used for packing of narcotics.

In this fashion, the police may be given wide-ranging authority to seize a myriad of items even though the evidence presented in the affidavit often does not support the inference that they will all be present. For example, an affidavit may establish probable cause to believe that narcotic sales are occurring, but may not support a conclusion that narcotics are being used; hence, reference to narcotic paraphernalia, cookers, etc. would not be justified.

37. Since in Connecticut the prosecutor is not required to sign or attest the search warrant (CONN. GEN. STAT. REV. § 54-33a (1968)), he normally does not participate in the process. Prosecutors report that even when police request their judgment as to the adequacy of a warrant, the additional scrutiny is minimal. In addition to the lack of legal duty, one reason often given for the cursory character of the prosecutor's review was that the police are highly competent and draft "good" warrant applications. We were told: "You'll find they're all exactly the same. The same guys draw them up with the same key words."

38. This was the figure quoted to us by police, prosecutors, and judges alike. We were unable to verify its accuracy on the basis of the records at our disposal.

39. Although search warrant applications are presented to a judge in chambers whenever possible, the need for speed sometimes causes the police to approach the bench in open court or to seek the judge at home during non-court hours.

40. One judge, for instance, summarizes in notebook form all important probable cause decisions as they are handed down by the Court.

41. Because we were not permitted to view the initiation, presentation, and signing of the search warrants (*see* note 31 *supra*), we cannot substantiate by direct observation our belief that judges do not carefully analyze these documents. Our conclusion, however, is supported by two other aspects of our study and agrees with the findings of L. TIFFANY, D. MCINTYRE, JR. & D. ROTENBERG, *THE DETECTION OF CRIME* 119-20 (1967). First, as is indicated above, although only a fiftieth of the warrants are denied, approximately a sixth exhibit a questionable basis for probable cause even assuming the veracity of all the allegations contained therein. Second, support for our inference is provided by our study of arrest warrants. As with search warrants, every judge asserted that he did not rubber-stamp arrest warrants, but in the course of the same interviews, the following illustrative comments were also made:

If the prosecutor and the police think there's probable cause, I'll sign even if I have a little doubt They both review the warrants carefully.

They [the warrants] have been carefully reviewed by the prosecutors who know what to look for before they come to me.

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reliability supplemented by the standards for curative corroborative information suggested by *Spinelli*,⁴² we concluded that eighteen per cent of the warrants approved by the judges in 1968 and sixteen per cent of the 1969 warrants were of doubtful constitutional validity.⁴³

B. Success

The existence of this group of "questionable" warrants provided an opportunity for evaluating the empirical validity of the *Aguilar-Spinelli* requirements. We hypothesized that if the Supreme Court standards actually selected out the unreliable informant data, the group of questionable warrants would lead to a higher proportion of

Our findings suggest that these judicial assumptions are invalid. Connecticut law requires a prosecutor to countersign arrest warrants before submission to the magistrate, but the prosecutors we observed would, almost invariably, read through the documents for the first time before the judge in chambers. One prosecutor explained that arrest warrants are only skimmed because "if it doesn't work out, we can always nolle."

As with the arrest warrants, then, the judges may be disinclined to examine even the surface allegations of the search warrant applications very closely in view of their high regard for the competence of the police in drafting search warrants. Also, in some circumstances, the limited amount of time devoted to evaluating the warrant applications may preclude meaningful review. Cf. Barrett, *Criminal Justice: The Problem of Mass Production*, in *THE COURTS, THE POLICE, AND THE LAW EXPLOSION* 85, 117-18 (H.W. Jones ed. 1965).

42. See p. 705 *supra*. Since our evaluation of corroborative assertions which might "cure" a warrant which would otherwise be rejected under the two *Aguilar* tests was based on the *Spinelli* Court's strict treatment of such allegations, a portion of the warrants which we labeled "questionable" would probably be found acceptable under the generous approach of the *Harris* Court. See pp. 706-08 *supra*. Likewise, we used a demanding interpretation of the *Aguilar* reliability tests in classifying warrants. See note 43 *infra*. By doing so, we have shown that even a very strict application of the existing standards may not enhance reliability of informant data.

43. See Appendix, Table 4 *infra*. A warrant was regarded as "questionable" only if (1) it failed to meet the *Aguilar* requirements as to setting forth the basis for a belief that the informant is generally reliable (general reliability deficiency) and that the particular information he has supplied is based on reliable data (particular knowledge deficiency) and (2) it failed to meet the *Spinelli* standard for remedying *Aguilar* deficiencies by other assertions in the warrant affidavit (inadequate corroboration). In the warrants in our sample, an effort to establish general reliability always took the form of an allegation as to past information supplied by the informant. Cf. note 16 *supra*. A warrant which did not allude to prior correct information leading to conviction was considered deficient under the first criterion. Inadequate corroboration was more difficult to define with precision. We first determined whether the corroboration, if any, took the form of general surveillance or an informer "buy." General surveillances were then classified as "weak" if they uncovered information of only limited probative value, as in *Spinelli*. See Appendix, Table 4 *infra*. The following were typical of the "weak" surveillances we reviewed: reports that numerous persons entered and left, with no visible purchases, stores which were allegedly fronts for illegal gambling or narcotics sales; reports that an informer was observed to have walked in and out of a building in which he asserted he had placed an illegal wager; and reports that someone, identified by an informant as a policy runner who took slips from points A to B to C, in fact travelled from points A to B to C. The "buy" technique is discussed at note 78 *infra*. For the reasons given at note 82 *infra* and note 42 *supra*, "apartment house buys," like "weak" surveillances, were regarded as insufficient to cure a warrant found questionable under the first criterion.

fruitless searches than would the warrants that clearly met the *Aguilar-Spinelli* tests.⁴⁴

No such variation was found. In 1968, thirty-six per cent of all warrants produced no incriminating evidence whatsoever.⁴⁵ The failure rate differed slightly as between "questionable" and "acceptable" warrants, but the variation was not statistically significant.⁴⁶ Likewise, the extent to which the 1969 failure rate for "questionable" and "acceptable" warrants diverged from the overall failure rate for that year of thirty-one per cent⁴⁷ was well within the bounds of normal statistical fluctuations.⁴⁸ Accordingly, our data does not support the hypothesis that even a strict version of the Supreme Court standards provides a meaningful measure of the reliability of informer-based warrants.

If attention is directed to the character and motivations of the typical undisclosed informant, this result is readily explicable.⁴⁹ Frequently, informants are themselves criminals,⁵⁰ drug addicts,⁵¹ or even pathological liars.⁵² For instance, one prosecutor described the typical narcotics informant as "a guy who made a purchase a half-hour ago. He was stopped for possession, and the police make a deal with him, exchanging release for information."⁵³ Obviously, such

44. We do not mean to suggest that the existence of probable cause turns on the ultimate success of a search in uncovering evidence of criminality. On the contrary, the probability that a search will be successful is but one of many elements which are involved in the concept of probable cause. See note 64 *infra*. We focus on success only as a measure of the reliability of informant tips—a factor which the Supreme Court has regarded as of paramount importance in assessing probable cause in the case of informer-based warrants. See pp. 704-08 *supra*.

Nor do we maintain that unreliability of informant testimony is the only possible cause for a warrant's failure to lead to the seizure of the items specified. In some instances, especially in searches for narcotics and policy slips, the easy disposability of the evidence may have frustrated the searches. In addition, police were very concerned with "leaks" reaching the suspects. Factors such as these, however, can be expected to influence equally the success rates of "questionable" and "acceptable" warrants.

45. See Appendix, Table 5 *infra*.

46. See *id.*

47. See *id.*

48. See *id.*

49. An alternate explanation could be adduced. If police perjury were prevalent—that is, if police consistently fabricated the affidavits to meet the *Aguilar-Spinelli* test—then the failure rate of the "questionable" and the "acceptable" warrants might not be expected to display any significant disparity. Our data does not permit us to decide conclusively between these two hypotheses, but even if the absence of any correlation between success rates and apparent compliance with Supreme Court standards is the product of widespread police perjury, my policy recommendation is the same. See note 70 *infra*.

50. See, e.g., *Cratty v. United States*, 163 F.2d 844, 847 (D.C. Cir. 1947); Note, *The Outwardly Sufficient Search Warrant Affidavit*, *supra* note 16, at 134.

51. See, e.g., cases cited in Note, *The Outwardly Sufficient Search Warrant Affidavit*, *supra* note 16, at 134 n.138.

52. See, e.g., cases cited in *id.* at 134 n.139.

53. The prosecutor we interviewed went on to say:

[T]he informer is usually ignorant of his rights and admits possession. Having

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people give information for reasons other than the call of civic duty. The factors motivating undisclosed informants have been widely recognized by commentators and police alike.⁵⁴ These motives include offers of immunity or sentence reduction in exchange for cooperation,⁵⁵ promises of money payments, usually on a per tip basis,⁵⁶ and such perverse motives as revenge⁵⁷ or the hope of eliminating criminal competition.⁵⁸ In sum,

The reliability of such persons is obviously suspect. The fact that their information may have produced convictions in the past does not justify taking their reports on faith. . . . [I]t is to be expected that the informer will not infrequently reach for shadowy leads, or even seek to incriminate the innocent.⁵⁹

done so, he has no choice but to make a deal [T]o keep the informer's identity secret, pushers are arrested for possession instead of sale. For a criticism of these practices, see Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 562-73 (1960).

54. See, e.g., M. HARNEY & J. CROSS, *THE INFORMER IN LAW ENFORCEMENT* 32-49 (1960); BRODSKY, *supra* note 3, at 34-36; Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs*, 60 YALE L.J. 1091, 1094 (1951); Note, *The Outwardly Sufficient Search Warrant Affidavit*, *supra* note 16, at 133-34.

55. See, e.g., Goldstein, *supra* note 53, at 565-67. These offers may be especially attractive to narcotics informants since sentences for possession are often unusually long. In Connecticut, for example, a person arrested for possession who does not cooperate risks five years imprisonment for the first offense and fifteen for the second. See CONN. GEN. STAT. REV. § 19-481 (Supp. 1969).

56. Paying addicts for information is especially prevalent. For example, Brodsky found that the payment per tip in the California municipality he studied averaged ten dollars. This amount was generally used to finance the informant's drug habit. Brodsky, *supra* note 3, at 35. Police in Washington, D.C., reportedly supplied narcotics to informants who were unable to obtain them through the usual illicit channels. See *Jones v. United States*, 266 F.2d 924, 928 (D.C. Cir. 1959). In New York City regular informers are paid a "retainer" of forty dollars per month and are given narcotics in exchange for particular tips. See N.Y. Times, Oct. 28, 1971, at 45, col. 8. See also Note, *The Outwardly Sufficient Search Warrant Affidavit*, *supra* note 16, at 133 n.134; N.Y. Times, Mar. 11, 1972, at 14, col. 7 (1500 dollars paid to F.B.I. informant). Because police readily attribute the failure of a warrant to turn up evidence to causes other than the unreliability of informants, see note 44 *supra*, financial reimbursement does not assure consistently accurate information.

57. The desire for revenge "may come only from a feeling by a member of a criminal group that he is being discriminated against or is not given the preferment or opportunity to which he thinks his talents entitle him. Sometimes a desire for revenge arises from factors independent from criminal enterprise. Jealousies and quarrels over women may set at each other's throats, bosom companions who once were as thick as thieves." HARNEY & CROSS, *supra* note 54, at 35. In some cases, then, information supplied to police for the purpose of vengeance will be accurate, but in others, it will be incorrect. For example, rather than implicate a friend who sold him narcotics, an informant may seek to incriminate an enemy whom he suspects may be selling, although he may have no personal knowledge of the illegal activities. If the informant does report that he purchased contraband from an individual with whom he actually had no contact, police may truthfully prepare a warrant application which, on its face, complies with the *Aguilar-Spinelli* particular knowledge requirement. In these circumstances, the protective value of the Court's standard will be lost.

58. See HARNEY & CROSS, *supra* note 54, at 35-36.

59. *Jones v. United States*, 266 F.2d 924, 928 (D.C. Cir. 1959). The court also pointed out that "[t]he practice of paying fees to the informer for the cases he makes may also be expected, from time to time, to induce him to lure non-users into the drug habit and then entrap them into more violations." *Id.*

As a result, the *Aguilar-Spinelli* criteria do not ensure the reliability of tips from the overwhelming majority of police informants—the admitted criminals, addicts, and stool pigeons who volunteer information in order to promote their own special interests.⁶⁰ The general reliability criterion may establish that an upstanding citizen with whom the police have previously dealt does not exaggerate or assert imaginary happenings. But the fact that the typical informant, often operating from inherently suspect motives, may have given accurate information some unknown number of times in the past provides no assurance that he is not now seeking revenge on an enemy or implicating an innocent person.⁶¹ Similarly, the particular knowledge criterion is of little value when applied to the usual informant. To be sure, a magistrate may be in a better position to evaluate the reliability of the report of a presumably reliable police undercover agent if the officer states the underlying basis of his knowledge and the particular details of his relationship with the suspect. But an assertion of personal observation or involvement by the usual informant—one whose veracity is inherently suspect—can add little to the equation.⁶² That the use of such tests⁶³ does not enhance the success rates of informer-based warrants is therefore not surprising.

60. Mr. Justice Harlan was sensitive to this factor. In *Jaben v. United States*, 381 U.S. 214, 224 (1965), he noted that "unlike narcotics informants . . . whose credibility may often be suspect, the sources in this tax evasion case are much less likely to produce false or untrustworthy information." Similarly, in *United States v. Harris*, 403 U.S. 573, 600 (1971), he argued in dissent that:

[w]ithout violating the confidences of his source, the agent surely could describe for the magistrate such things as the informer's general background, employment, personal attributes that enable him to observe and relate accurately, position in the community, reputation with others . . . and the like.

See also *United States v. Ventresca*, 380 U.S. 102 (1965) (general reliability test easily met for local police officers and federal investigators).

61. In some cases, the police assertion that an informant has supplied correct information may be mistaken. See Note, *The Outwardly Sufficient Search Warrant Affidavit*, *supra* note 16, at 134-35. In the Connecticut city we studied, in order to protect the anonymity of informants, police kept no records of prior information supplied by specific individuals. Instead, the usual warrant statement that an informant has given information leading to arrest or conviction on a certain number of past occasions was based on the recollections of the officers involved.

The efficacy of altering the general construction of the *Aguilar-Spinelli* general reliability test to require a statement of the number of incorrect as well as correct tips supplied by an informant in the past is discussed at note 68 *infra*.

62. Cf. note 57 *supra*.

63. This conclusion is not altered by the inclusion of those warrants containing "curative" averments, a possibility left open by *Spinelli* and seized upon in *Harris*, *see* pp. 705-08 *supra*. Police verification of detailed descriptive facts supplied by an informant, as in *Draper* (*see* note 9 *supra*), logically can provide no basis for believing that the informant knew that the suspect was acting illegally. Knowledge of a person's dress or travel plans may merely indicate that the informant was acquainted with the suspect and knew his daily habits. See, e.g., Note, *supra* note 15. Other forms of police corroboration of informer tips are discussed in more detail at pp. 715-18 *infra*.

III. Toward A More Meaningful Test for Probable Cause

Alternatives to the existing standards for judging probable cause in informer-based warrants are not lacking. For example, since many informer-based warrants that do not meet the *Aguilar-Spinelli* criteria do result in successful searches, it might be argued that a warrant should be granted without any inquiry into whether or not a substantial basis exists for the police opinion that the informer's tip should be pursued.⁶⁴ At the other extreme, it has been suggested that no weight should ever be given to informer tips⁶⁵ or that *McCray v. Illinois*⁶⁶ should be overruled and an informant's identity be disclosed at a probable cause hearing.⁶⁷

Fortunately, however, the course between complete deference to police acumen and forbidding all reliance on undisclosed informants is navigable.⁶⁸ Information provided by the usual unidentified informer whose motives are prima facie suspect would nevertheless be acceptable if a test could be devised whereby a magistrate could assure

64. It is difficult to predict the frequency with which searches would be successful in such circumstances. If the Connecticut data is representative, informer-based searches are successful more than half the time, but it is impossible to know how many warrants are not even requested because the police know the issuing magistrate will inquire into the basis of their judgment.

But even if it could be conclusively demonstrated that the police seek a warrant only when they feel a suspect is guilty and that such police intuition is correct in most cases, the argument for unfettered police discretion would not stand. The probable cause requirement is more than a matter of probability. Rather, probable cause has been defined by a balancing of the privacy rights which the Fourth Amendment embraces against the police needs of the state. *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967); *State v. Kasabucki*, 52 N.J. 110, 116, 244 A.2d 101, 104 (1968). Thus, in *Chimel v. California*, 395 U.S. 752 (1969), generally accepted police practices were declared illegal without an inquiry into whether wide-ranging searches made concurrent to arrest usually turned up evidence. On the other hand, in *Camara, supra*, area-wide searches for health-code violations were permitted even though, as to any given household in the area, the probability of uncovering violations was obviously very small.

65. See generally BRODSKY, *supra* note 2.

66. 386 U.S. 300 (1967).

67. See, e.g., Fabrikant, *Probable Cause and the Confidential Informant*, 1 CRIM. L. BULL. 1 (1965); Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege*, 45 DENVER L.J. 399 (1968). It has also been contended that even if the informant's identity is kept secret, allowing the defendant to challenge by cross-examination of the police affiant the accuracy of the allegations in a warrant affidavit at a pre-trial hearing would be a significant advance. See, e.g., Kipperman, *Inaccurate Search Warrant Affidavits As a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971). While this procedure might be valuable in conjunction with the reform advocated below, little would be gained by such "piercing" under current standards since a policeman under cross-examination could in all honesty repeat assertions which had been fabricated by an undisclosed informant deemed reliable under the *Aguilar-Spinelli* tests.

68. Justice Douglas' view that the tips of anonymous informants should have no place in probable cause determinations, see note 10 *supra*, has never commanded a majority of the Court, and it appears that such arguments can expect little judicial sympathy at a time when it is generally thought that information from undisclosed informants is essential to effective law enforcement in areas such as narcotics violations. See, e.g., *United States v. Manning*, 448 F.2d 992, 996 (2d Cir. 1971) (Moore, J., dissenting), *cert. denied*, 92 S. Ct. 541 (1971); HARNEY & CROSS, *supra* note 54, at 18-19; Barrett, *Police Practices and the Law*, 50 CALIF. L. REV. 11 (1962).

himself in each case that the informant is supplying truthful and probative information. Further elaboration of the *Aguilar-Spinelli* criteria as to the general reliability and particular knowledge of the informant probably cannot accomplish this result,⁶⁹ but a requirement relating to police corroboration might. The proposal here is that to establish probable cause a showing should be made in *each* case involving undisclosed informant tips that *police investigation* has uncovered *probative indications of criminal activity* along the lines suggested by the informant.⁷⁰ This police investigation need not generate, in and of itself, enough evidence to establish probable cause.⁷¹ But it should indicate the presence of some suspicious activity of the

69. The general reliability requirement might be further refined by demanding a statement of the informant's overall "batting average," i.e., the ratio of prior correct tips to prior incorrect tips. Three basic difficulties are involved in this approach. First, where should the threshold for reliability be set? Would fifty-one per cent success in the past suffice? Or should ninety or even 100 per cent be required? If the acceptability level is low, the informer's past record does not justify much confidence in his present tip. But if the level were very high, there would be a strong incentive for police falsification. Second, to cope with the latter problem, effective enforcement of the procedure would require disclosure of the files to defense attorneys—a requirement which might jeopardize the anonymity of the informant. Third, even if a typical informant has given accurate information on, say, two out of two past occasions, he may be motivated to fabricate the information the third time. See p. 713 *supra*.

Further explication of the particular knowledge standard would also be pointless, for however detailed the requirement of personal observation or involvement may be, the assertions originate with the very person whose credibility is being questioned. Cf. p. 714 *supra*. But see *United States v. Harris*, 403 U.S. 573, 591 (1971) (dissenting opinion).

70. As the example presented in the text will show, this requirement is very different from the "curative" corroboration allowed under *Spinelli* and *Harris*. Under those cases, it is "always open to the officer to seek corroboration of the tip," *United States v. Harris*, 403 U.S. 573, 600 (1971) (dissenting opinion), but he need not do so unless the two-pronged *Aguilar* test has not been met. The proposed standard treats corroboration as mandatory rather than remedial. Furthermore, the class of adequate corroborative assertions is more limited under the proposed standard. Probative indications of criminal activities of the type suggested by the informant rather than, as under *Draper*, innocent behavioral patterns, would have to be verified.

It might be contended that requiring corroboration of *every* informer tip goes too far since the presumption of unreliability does not apply to the trained police undercover agent and to the upstanding member of the community who seeks anonymity out of fear of physical retaliation. Certainly the requirement might be altered to account for this observation by allowing the affiant to supply enough details as to the informant's background to permit the magistrate to conclude that the particular informant is an exception to the generalization of informer unreliability (cf. note 60 *supra*) in lieu of a corroborative investigation. On balance, however, it is probably wiser not to depart from a uniform rule of corroboration, for if the requirement could be avoided by merely alleging that the informant is an undercover agent, a strong inducement for police fabrication in drafting warrant affidavits would be present. Cf. P. CHEVIGNY, *POLICE POWER* (1969); J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 214-15 (1966). Falsifying elements relating to the reliability of an unnamed informer is considerably easier than detailing the existence and results of an independent, corroborative investigation, especially if "piercing" of the affidavit allegations is permitted, see note 67 *supra*.

71. Of course, it would be desirable if the investigation were to do so. For instance, questions as to informant reliability were not vital in *United States v. Ventresca*, 380 U.S. 102 (1965), an illegal distillery case, because police observation documented different occasions when a car was driven to the rear of the suspect's house with loads of sugar and five-gallon tins, when the odor of fermenting mash was detected near the house, and when the sounds of distillery machinery were heard in the vicinity of the house.

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character suggested by the informant's tip which, taken together with that tip and any other averments in the warrant affidavits, might reasonably be said to amount to a showing of probable cause.⁷²

The manner in which this approach would operate can be illustrated by resorting to a not too unrealistic hypothetical case. Suppose that a police affidavit is submitted in support of an application for a warrant to search the premises of 123 Stratton Road. The affidavit recounts the statements of a "reliable person" who has given "correct information leading to conviction on ten past occasions." The informant, whose name is not given, has told the police that every Tuesday evening at eight P.M. suspect *A* drives up to his girl friend's house at the address given above in a blue convertible bearing the license plate 6N4-8524, that *A* carries a brown attaché case which contains heroin into the house which he uses as a base for the sale of narcotics, and that he learned of *A*'s activities by buying narcotics from *A* at the indicated address several times in the recent past.

Should the magistrate, on the strength of this affidavit, grant the warrant? Since both general reliability ("prior correct information leading to conviction") and particular knowledge (personal involvement) are set forth, the answer under *Aguilar* is clearly in the affirmative. Indeed, even if the allegation of prior correct information were not made, issuance might conceivably be justified under *Harris*,⁷³ and even if the informant had not admitted to a personal purchase of narcotics, the warrant could validly be granted under *Draper* if the affidavit also indicated that the police saw *A* drive up to 123 Stratton Road last Tuesday in the blue convertible and carry the brown attaché case indoors.⁷⁴ Nevertheless, under the approach advocated here,

72. For example, in *Henry v. United States*, 361 U.S. 98 (1959), a warrant was invalidated which stated only that federal officers who were investigating the theft of whiskey twice observed large cartons being loaded into a car in a residential district. If this police observation were combined with a specific informant tip, it might have sufficed to establish probable cause, though this hypothetical lies at the borderline even under the proposed standard. Data relating to general trustworthiness of the informer might also be considered in the mix of factors pertinent to the probable cause determination. A general statement of what elements must be present in what degrees to establish probable cause is not possible, but this is a problem endemic to the field of search and seizure and arrest law. This Comment is concerned with the narrower question of when an informer's tip should be admissible as an element in the probable cause determination.

73. Under the Chief Justice's opinion, the fact that the information was against penal interest and that the police regarded the informer to be reliable could be adduced to uphold the issuance. See p. 707 *supra*. On the other hand, since there is no reputation evidence impeaching *A*, even if the plurality opinion in *Harris* is accepted at face value, it should not support granting the warrant under the circumstances sketched above.

74. See note 9 *supra*. See also *United States v. Manning*, 448 F.2d 992 (2d Cir. 1971) (*en banc*) (construing *Harris* to mean that police corroboration of innocent behavioral patterns would establish probable cause even in the absence of a showing of general reliability), *cert. denied*, 92 S. Ct. 541 (1971).

the warrant should not be granted, whether or not the informant admitted to purchasing narcotics and whether or not the police corroborated the fact that *A* visited his girl friend as predicted. The outcome would be otherwise, however, if police surveillance had uncovered truly suspicious activities along the lines suggested by the tip. For example, if the police observed known narcotics users entering and leaving the premises in question beginning soon after *A*'s arrival, the surveillance (which might not, in itself, establish probable cause)⁷⁵ would show sufficiently suspicious activity to justify crediting the informant's tip in the particular case.

As this illustration indicates, the approach suggested here would give more protection to the individual and lead to a more realistic assessment of probable cause than do existing standards, because it would require the magistrate to consider whether it is reasonable to believe that the unidentified informant is telling the truth *in this instance and vis-à-vis this subject*. Furthermore, when an informant knows that the report he gives will be tested by independent surveillance, he will be more likely to resist the temptation to fabricate reports of criminality in order to satisfy grudges, protect friends, or receive money payments.⁷⁶ Thus, implementation of a requirement of police corroboration should not only succeed in screening out unreliable tips⁷⁷ but should also improve the quality of informant tips in general.

75. Cf. *Sibron v. United States*, 392 U.S. 40, 62 (1968).

76. "Knowledge that there is such surveillance serves to prevent double-dealing by persons in an extra-official capacity and to get a fuller measure of assistance from these." M. HARNEY & J. CROSS, *NARCOTIC OFFICER'S HANDBOOK* 135 (1961).

77. We sought to verify the claim that a strict corroboration requirement would screen out unreliable tips by testing for a correlation between success rates and adequacy of police surveillance alleged in our sample of warrants. However, the number of warrants on which we had suitable information as to both success and the degree of surveillance was small and did not permit us to establish statistical significance at the usual significance levels. See Appendix, Table 6 *infra*. Nevertheless, comparison of Tables 5 and 6 is at least suggestive. Table 5 shows the surprising result that those warrants which passed a strict application of the *Aguilar-Spinelli* test were, on the average, *less* successful in terms of uncovering evidence than those which were questionable under the same criteria. On the other hand, the correlation in Table 6 is in the expected direction: informer warrants that were granted after adequate police surveillance were, on the average, *more* successful in producing evidence than those which entailed either no surveillance at all or insufficient surveillance.

In Table 6, in determining which instances of surveillance were adequate and which were not, we treated warrants which involved no surveillance as unacceptable. We also regarded as unacceptable those warrants for which the surveillance produced only information of very weak probative value, such as *Draper*-type facts. In most instances, our evaluation of the probative force of the items verified did not require great subtlety. For example, police investigations which established only that the informer gave an accurate statement of the suspect's automobile registration number were counted as unacceptable. Because of our uncertainty as to the proper treatment of "apartment house

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Despite these appealing characteristics, however, two objections can be made of the proposed corroboration requirement. First, it might be argued that there is a real possibility that judicial pressure for supplementary investigation of this sort would strain limited police resources. But this claim is easily exaggerated. In fact, there is reason to believe that further investigation is presently conducted in the preponderance of cases involving informer tips,⁷⁸ and that a substantial portion of these investigations are already of the type that would validate the informant's tip under the standard advocated here.⁷⁹ Moreover, some increased expenditure of police investigative resources, in light of the acknowledged unreliability of most informers,⁸⁰ seems a small price to pay for the promotion of Fourth Amendment interests.⁸¹

The second major objection to an across-the-board corroborative investigation requirement goes to the nature of what is to be corroborated. For it will not always be clear which observations along the lines suggested by the informant's tip are probative of illegal activity rather than merely representative of an innocent pattern of behavior known to the informant.⁸² In considering this objection,

buys," however, *see* note 82 *infra*, we excluded from the analysis warrants in which the police investigation took the form of an informant "buy." The "buy" technique is described at note 78 *infra*.

78. More than ninety per cent of the informer-based warrant cases in our survey involved some supplemental police investigation. *See* Appendix, Table 3 *infra*. The police investigation generally took one of two forms: surveillance or "buys." Typically, the place of the alleged criminal activity was observed, the comings and goings of unusual numbers of people or of known addicts or gamblers recorded, and, in a few cases, illegal transactions such as placing bets or passing policy slips were noted. Some surveillances were very brief, while others were quite extensive. Somewhat less frequently, the police would set up an informer buy in which the informer is taken to the locus of the alleged criminal activity and searched to ensure that he is not concealing contraband. He is then given a quantity of money and instructed to purchase contraband at the place under investigation. The extent to which buys and surveillance are employed varies significantly among localities. For example, although we found that the buy technique was used in seventeen per cent of the informer warrant cases in 1969, Brodsky reports that some variant of that procedure was employed in ninety-five per cent of the California cases. *See* BRODSKY, *supra* note 3, at 38.

79. Between thirty and sixty per cent of the informer warrants in our survey were granted after police surveillance which corroborated probative elements of the informant's tip. *See* Appendix, Table 3 *infra*.

80. *See* pp. 712-13 *supra*; Brief for Petitioner at 14, *United States v. Harris*, 403 U.S. 573 (1971).

81. *Cf.* Note, *supra* note 4, at 63 n.55.

82. In *Spinelli*, for instance, extensive police surveillance was conducted in an effort to verify the informer's tip, but the only arguably probative item uncovered was the fact that Spinelli, who was suspected of bookmaking, spent considerable time at an apartment which contained two telephones. The majority saw "nothing unusual about an apartment containing two separate telephones" since "[m]any a householder indulges himself in this petty luxury." 393 U.S. at 414. On the other hand, the dissent took a less cordial view of these facts, insisting that "[n]othing in the record indicates that the apartment was of that large and luxurious type which could only be occupied by a person to whom it would be a 'petty luxury' to have two separate phones, with different numbers, both listed under the name of a person who did not live there." *Id.* at 430.

it is important to observe that the need for judicial definition of the quantity and quality of police-obtained corroborative information which suffices to substantiate an unreliable informant's tip is a pressing problem under the existing standards as well.⁸³ Hence the recognition that it would remain a problem under the approach recommended here does not argue against pursuing that approach.⁸⁴ Probative indications of criminal activity obtained through police investigations can be defined only in the context of specific circumstances, and since the number of factual combinations is practically unlimited, an exhaustive listing of what investigatory discoveries are properly considered probative for the purpose of corroborating an informant's tip is virtually impossible. Nonetheless, certain patterns of activity characteristic of illegal gambling, bootlegging, and the like are discernible.⁸⁵ Judicial decisions as to what observations should support an informer's tip in these circumstances are entirely feasible and would provide predictable, dispositive standards for the great majority of cases.⁸⁶

In short, a general requirement of meaningful police corroboration of the accusations of undisclosed informants would be a workable and inherently more reliable means for bolstering the credibility of informer tips. The Fourth Amendment's command that "no warrant shall issue, but upon probable cause"⁸⁷ should mean no less.

A more frequent border-line situation arises from the use of the buy technique described at note 78 *supra*. In a large number of cases the premises which the informant is seen entering and leaving are apartment houses. In these circumstances there is normally no assurance that the informant has not purchased contraband in one apartment while alleging that the purchase took place in another. Lower federal courts are divided on the question of whether an observed apartment house buy can be validly considered by a magistrate in the probable cause determination. Compare *United States ex rel. Rogers v. Warden*, 381 F.2d 209, 219 (2d Cir. 1967), with *Jones v. United States*, 353 F.2d 908 (D.C. Cir. 1965).

83. See, e.g., Note, *Search and Seizure—Hearsay as Grounds for Probable Cause*, 21 CASE W. RES. L. REV. 135, 143 (1969); Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 180-81 (1969).

84. In fact, focusing attention on the probative force of investigations in particular should lead in the long run to a clearer set of judicial standards than seems possible under the present approach of directing investigatory requirements toward corroboration of the minimally useful informer reliability criteria.

85. See generally HARNEY & CROSS, *supra* note 76.

86. Typical results of police surveillance in the municipality we studied are mentioned at notes 43 and 77 *supra*. Adjudication to determine the validity of such observations in establishing probable cause when combined with informer tips does not appear to raise unduly difficult problems. For instance, the fact that an informant correctly reports the number of a suspect's license plate is not probative of any criminal activity. Similarly, verification of an anonymous informer's report that an individual, allegedly a policy runner, travels from points A to B to C should not be sufficient to show probable cause. On the other hand, when combined with independent evidence that points A, B and C are frequented predominantly by known gamblers, the informant's tip and the surveillance of the reputed messenger could reasonably be held to demonstrate probable cause.

87. U.S. CONST. amend. IV.

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Appendix

Table 1
Search Warrants Granted and Sampled, By Type of Crime

Type of Crime	1968				1969			
	# Granted	% ^a	# Sampled	% ^b	# Granted	% ^a	# Sampled	% ^b
Gambling	50	34	50	100	88	31	44	50
Liquor	27	18	27	100	24	14	12	50
Narcotics	60	40	60	100	46	27	23	50
Other	8	6	8	100	14	8	14	100
Total ^c	145	98	145	100	172	100	93	54

- Warrants relating to a type of crime as a percentage of total warrants.
- Warrants sampled as a percentage of warrants granted.
- In this and all other tables percentages may not total 100 due to errors in rounding off each figure to the nearest per cent.

Table 2
Informer-Based Search Warrants Sampled, By Type of Crime

Type of Crime	1968		1969	
	#	% ^a	#	% ^a
Gambling	26	52	31	70
Liquor	25	93	8	67
Narcotics	54	90	19	83
Other	1	13	1	7
Total	106	73	59	63

- Informer-based warrants relating to a type of crime as a percentage of all warrants (regardless of source of information) relating to that type of crime.

Table 3
Distribution of Informer Warrants According to Type of Corroboration Alleged

Type of Corroboration	1968		1969	
	#	%	#	%
None	7	7	4	7
"Weak" Surveillance ^a	18	17	8	14
"Strong" Surveillance ^b	34	30	37	63
"Buy" ^c	47	44	10	17

- Police surveillance, not involving the "buy" technique, was alleged but was judged by the study researchers to be insufficient under *Spinelli v. United States*, 393 U.S. 410 (1969). See note 43 *supra*.
- Police surveillance, not involving the "buy" technique, was alleged and judged by the study researchers to be sufficient under *Spinelli v. United States*, 393 U.S. 410 (1969). See note 43 *supra*.
- See note 78 *supra*.

Table 4
 "Questionable" Warrants^a

	1968		1969	
	#	%	#	%
<i>General Reliability Deficiency + Inadequate Corroboration</i>				
No Allegation of Prior Correct Information + No Corroboration	0	0	0	0
Allegation of "Prior Arrests" + No Corroboration	3	2	1	1
No Allegation of Prior Correct Information + "Weak" Surveillance	2	1	1	1
Allegation of "Prior Arrests" + "Weak" Surveillance	4	3	4	4
No Allegation of Prior Correct Information + Apartment House Buy	3	3	0	0
Allegation of "Prior Arrests" + Apartment House Buy	3	2	3	3
<i>Particular Knowledge Deficiency + Inadequate Corroboration</i>				
Source of Informer Knowledge Not Specified + No Corroboration	2	1	2	2
Source of Informer Knowledge Not Specified + "Weak" Corroboration	4	3	2	3
Source of Informer Knowledge Not Specified + Apartment House Buy	4	3	1	1
<i>Total</i>	25	18	14	16

a. For explanation of categories, see note 43 *supra*.

Table 5
Success of Searches Based on Informer Warrants, By Acceptability of Warrants Under *Aguilar-Spinelli* Standards

	1968					1969				
	Accept- able	Question- able	Total ^a	χ^2	p ^b	Accept- able	Question- able	Total ^a	χ^2	p ^b
Number of Warrants	75	25	100			38	14	52		
Number Successful ^c	47	17	64	.050	.8	25	11	36	.141	.7
Per Cent Successful ^c	63	68	64			66	79	70		

a. The number of informer warrants is less than the sample size given by Table 2. In examining success rates, we corrected for the fact that in several cases in each year more than one warrant was granted on the basis of the testimony contained in a single warrant application.

b. The differences in the success rates of acceptable and questionable warrants are not statistically significant. That is, the χ^2 test revealed that even if the true success rates for the two categories were identical, given the size of our samples, differences in the success rates no larger than those which we observed would arise as a matter of statistical variability approximately eight times out of ten for the 1968 data and seven times out of ten for the 1969 data. Therefore, we were unable to reject the hypothesis that apparent compliance with *Aguilar-Spinelli* standards is not correlated with success rates.

c. A warrant is regarded as "successful" if the search conducted pursuant to it led to the seizure of evidence, whether or not the items seized were described in the warrant.

Table 6
Success of Informer Searches Based on Informer Warrants, By Acceptability Under Proposed Standard

	1968					1969				
	Accept- able ^a	Unaccept- able ^a	Total ^b	χ^2	p ^c	Accept- able ^a	Unaccept- able ^a	Total ^b	χ^2	p ^c
Number of Warrants	23	30	53			29	13	42		
Number Successful ^d	21	18	39	1.05	.3	22	9	31	.025	.9
Per Cent Successful ^d	91	60	74			76	69	74		

- a. See note 77 *supra*.
- b. The number of informer warrants is less than the sample size given in Table 2 both because the correction described at Table 5, note a *supra* was used and because informer buys were excluded for the reason given at note 77 *supra*.
- c. The differences in the success rates of acceptable and unacceptable warrants are not statistically significant. Note, however, that the probability that the differences are attributable to random error is somewhat smaller under the proposed standard than was the case for the *Aguilar-Spinelli* standard. If the data for the two years studied are combined, then the differences in the success rates of unacceptable and acceptable warrants under the *Aguilar-Spinelli* standard yield a χ^2 of .101 (p=.8), whereas combining the data and applying the proposed standard gives a much higher χ^2 of .740 (p=.4).
- d. "Success" is defined as in Table 5.

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