THE *DRAPER-SPINELLI* PROBLEM

Joseph M. Livermore*

Aguilar v. Texas[1] held that when a search warrant for narcotics is issued on a report from an informer, "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable,' "[2] or else the warrant will fail for want of probable cause.[3] This test is applicable in all circumstances where probable cause is sought to be established by an informer's report and it has spawned numerous cases and two excellent law review articles.[4] These articles have contended that ambiguities in *Aguilar* and subsequent Supreme Court opinions[5] have caused the workings of Murphy's law—what can go wrong will go wrong—to be evident in the handling of this issue by lower federal and state courts.[6] Looking at those lower court opinions, however, might well lead one to conclude that those courts have been more attuned to factual probabilities than either the Supreme Court or the scholarly community. This Article is an effort to provide a rationale to support the work of the lower courts and to relieve them of the charge of deviationism which has been lodged against them.

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* Professor of Law, University of Arizona, College of Law; A.B., Dartmouth College, 1958; L.L.B., Stanford University, 1961.

1. 378 U.S. 108 (1964).
2. *Id.* at 114.
3. *Id.* at 115.
4. *See* LaFave, *Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L. F. 1; Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974). Professor LaFave's article is substantially reproduced in his superb new treatise on the fourth amendment. 1 W. LAFAVE, SEARCH AND SEIZURE § 3.3, at 499-570 (1979).
5. *See, e.g.*, United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Draper v. United States, 358 U.S. 307 (1959).
6. *See* LaFave, *supra* note 4, at 2.

INFORMER CREDIBILITY

While it is generally held that an informer's information, even if purportedly firsthand knowledge, will not establish probable cause[7] unless there is some evidence of his veracity, no real explanation has shown why informers are presumptively untruthful or what factors make an individual an informer.[8] Courts and commentators have been content to echo the phrases used by Mr. Justice Douglas in his dissent in *Draper v. United States*[9] that we ought not rely on "the mere word of an informer"[10] or "risk making the role of the informer—odious in our history—once more supreme."[11]

In determining whether one furnishing information is odious or his word mere, some definition of the concept "informer" is necessary. Four possibilities exist: (1) Anyone furnishing information to authorities; (2) anyone furnishing information by betraying a trust; (3) anyone furnishing information who is an associate of criminals; or (4) anyone furnishing information for money or other consideration. Each definition is seriously defective as respects the issue it should address: the probable truthfulness of the person furnishing information.

The facts of *United States v. Diggs*[12] illustrate the defects of the first three possible definitions of informer. The Reverend Andrew Bradley was visited by his niece and her common-law husband.[13] They left a metal box with Bradley for safekeeping " 'so they wouldn't be

7. Throughout this article, I will assume that probable cause means more probable than not. *See generally* 1 W. LAFAVE, *supra* note 4, § 3.2, at 476-93. For a holding that evidence short of probable cause will suffice, see United States v. Melvin, 596 F.2d 492, 495 (1st Cir. 1979). Although it could be argued that a more stringent standard ought to be required because important privacy rights of individuals are involved, the Supreme Court has never suggested such a higher standard. *See* Spinelli v. United States, 393 U.S. 410, 419 (1969).

8. While LaFave states that anyone furnishing information to police might be called an informant, 1 W. LAFAVE, *supra* note 4, § 3.3, at 499, he uses a narrower definition, quoting in part the following passage from M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT 40 (2d ed. 1968):

> He is likely to be a person in the underworld or a person on its periphery; in its confidence, or so much 'a part of the scenery' to the criminal that this person is in a particularly good position to know the story of a crime committed, the story of criminal business done, being transacted or proposed for the future; or at least he gets significant bits of information which, when placed in context by the investigator, will demonstrate an accurate picture of crime . . . On this basis, then, our informer is likely to be himself a criminal. If not, he might be at least an associate of criminals. Or if he is merely in touch with criminals by reason of association, location or occupation, he might, nevertheless, be considered to be a person whose usual sympathies would lie with criminals; he would be a person who would identify himself with these people rather than with the forces of the law. It would, therefore, be reasonable to assume that this person would require a considerable degree of motivation before he would find himself willing to assist in the prosecutive endeavors of law enforcement.

9. 358 U.S. 307, 314 (1959).

10. *Id.* at 324.

11. *Id.*

12. 544 F.2d 116 (3d Cir. 1976), *aff'd*, 569 F.2d 1264 (3d Cir. 1977). Informer credibility was not an issue in the case.

13. *Id.* at 117.

tempted to spend it' and represented that it contained silver notes and bonds for their children."[14] Shortly after they returned to their home in Philadelphia, Bradley learned from his niece that her husband had been arrested for bank robbery. She told Bradley that the FBI might interrogate him and asked him to deny to the agents that she and her husband had left anything with him. Bradley became convinced that he had the proceeds of the bank robbery. He turned the box over to the FBI, providing a full explanation of his suspicions.[15] When the box was opened, bait money from the robbery was recovered.

If anyone furnishing information to authorities is an informer and presumptively untruthful, then Bradley was an informer and his information would not have supported a finding of probable cause. Such a holding seems unthinkable given Bradley's adherence to what is commonly said to be the general obligation of all citizens—to report to proper authorities evidence of crime[16]—but it would be a logical consequence of this first definition of informer and the application of *Aguilar* to it.

Reverend Bradley meets, as well, the definition of informer as one betraying a trust. This definition more nearly fits the characterization odious used by Justice Douglas. From Benedict Arnold to members of the Irish Rebellion, those persons betraying a cause have been held in opprobrium. The trouble with this analysis is that the odiousness of the informer turns on the perceived goodness of the cause or, more commonly, on an assessment of the obligations of trust in friendship as against other social ends. Intuitively, most criminality should not be viewed as deserving protection from revelation, nor should the expectation of privacy be seen as outweighing the social interest in prevention or solution of criminal behavior.

The obligation to reveal improper behavior is evidenced in countless ways. Lawyers are obligated to reveal unethical behavior by other lawyers,[17] although the reluctance to be labelled a snitch makes this an obligation rarely carried out.[18] Concealing evidence of criminality is itself a crime.[19] And, for those persons participating in inchoate criminality such as conspiracy, facilitation, or solicitation, a defense is provided where timely warning, given to law enforcement officials,

14. *Id.*
15. *Id.* at 118.
16. Miranda v. Arizona, 384 U.S. 436, 481 (1966); Marbury v. Brooks, 20 U.S. (7 Wheat.) 556, 575 (1822); G. WILLIAMS, CRIMINAL LAW § 141 (2d ed. 1961).
17. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-103(B) (1978).
18. *See* ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 167-72 (1970); Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509, 509-13 (1978).
19. *See* 18 U.S.C. §§ 3, 4 (1976); MODEL PENAL CODE § 242.3 (Proposed Official Draft 1962).

prevents the criminal result.[20] It seems anomalous to say that a betrayal of trust, either legally encouraged or required, is presumptively untruthful. Reverend Bradley not only revealed criminality by a close relative, but did so in violation of her express wish for privacy. His niece obviously felt betrayed. As a societal matter, however, it is doubtful that such expectations should be protected. And, a rule of probable untruthfulness is a form of protection.

Apart from the opprobrium attaching to betrayal of a trust, one must inquire whether such betrayal has anything to do with truthfulness. What made the main character in *The Informer*[21] odious was that he told the truth. Praise was reserved for those who lied to the authorities to protect their colleagues. Indeed, the pain betrayal must bring, and the risk of retaliation that often exists, would offer an indicia of probable truthfulness.[22]

The defect in defining informer as one who associates with criminals, and thus likely to be untruthful, is that such a definition is incredibly class biased.[23] Most crime is committed by those who are poor.[24] Since those who are poor generally associate with others who are poor, those having information about crime will be poor. To say that such persons, when revealing criminality, are probably lying is to say something that simply must not be said. There is nothing to support the proposition that those who are, by circumstance, associated with criminals are less likely to tell the truth. It is doubtful whether a court would find a businessman informing on price fixing, land or securities fraud, bribery, or tax evasion to be presumptively untruthful.[25] Yet the businessman is as much the associate of criminals as is the more conventional informer. By chance, Reverend Bradley had a nephew-in-law who was a bank robber. If that circumstance renders him unreliable absent corroboration, then the unreliability is the prod-

20. *See* MODEL PENAL CODE §§ 5.01-.03 (Proposed Official Draft 1962); NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, FINAL REPORT § 1005 (1971); ARIZ. REV. STAT. ANN. § 13-1005 (1978).

21. L. O'FLAHERTY, THE INFORMER (1925).

22. *See* United States v. Jackson, 544 F.2d 407, 411 (9th Cir. 1976); United States v. Wong, 470 F.2d 129, 131 (9th Cir. 1972) ("The informant in this case was acquainted with persons involved in violent crimes. She placed herself in danger when she gave the information she did give to the police. A baseless accusation in these circumstances is not likely."). *See also* T. CAPOTE, IN COLD BLOOD 159-63 (1965).

23. One might add that class bias could also be termed racial or ethnic bias.

24. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 43-49 (1967).

25. Justice Harlan made what seems to be the unforgiveable assertion in Jaben v. United States, 381 U.S. 214 (1965), that informers in tax cases are more likely to be credible than informers in narcotics and other lower class criminal cases. *Id.* at 224. *See* United States v. Harris, 403 U.S. 573, 600 (1971) (Harlan, J., dissenting); note 28 *infra*. Moylan, relying on federal cases, also suggests that one's status is related to one's credibility. *See* Moylan, *supra* note 4, at 772.

uct of a legal happenstance that is marginally, if at all, related to credibility.

The final definition of informer involves the individual who provides information in return for money or other consideration. This is the individual generally thought to be the most sleazy, willing to sell out his friends for money or to reveal other's criminality in return for exoneration from punishment for his own.[26] His is the call not of higher social duty, but of expedience.[27] However one might naturally feel about such a person, it is still necessary to tie perceived odiousness to credibility.[28] And, strangely, of the four types of informers, this kind has the greatest indication of truthfulness in conventional evidentiary terms. Because the consideration, monetary or otherwise, sought by this kind of informer is given only for truthful information, the motive to fabricate is substantially reduced. Analogous to one justification for the business records exception to the hearsay rule, reliability is insured by the employee's duty, on pain of loss of employment, to accurately report or record.[29] So here, a false story will forfeit the expected compensation, be it money or a reduction or dismissal of criminal charges.

Courts, while not clearly explicating the cause, have been uneasy with the rule of presumptive untruthfulness and have developed a vari-

26. Reverend Bradley also could fit this category if his conduct is viewed uncharitably as an effort to insure that no suspicion attached to him.

27. The objection to informers of this sort sometimes seems to be mainly aesthetic. "The spectacle of government secretly mated with the underworld and using underworld characters to gain its ends is not an ennobling one." Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1094 (1951). For good accounts of the use of informers, see J. SKOLNICK, JUSTICE WITHOUT TRIAL 112-38 (1966); J. WILSON, THE INVESTIGATORS 61-88 (1978).

28. It is frequently said that such informers are unreliable. *See The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 63 (1971). It is not clear what is meant by this other than a natural denigration of snitches. If it means that informers often provide false incriminating information, it is not empirically supported. Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 712 (1972), found no significant difference in success between warrant affidavits clearly good and those questionable under *Aguilar*. Of course, the fact that a search fails to uncover the evidence sought does not mean that the informer lied. *See* United States v. Martin, 511 F.2d 148, 151-52 (8th Cir. 1975). If the assertion is that informers are often unwilling to furnish all the incriminating information they possess, that assertion seems likely. But it is, at best, marginally relevant to how truthful they are when they do furnish incriminating facts.

29. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 310, at 726 (2d ed. 1972); 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 803(6) (Supp. 1978); 5 J. WIGMORE, EVIDENCE § 1522 (Chadbourn rev. 1974). It is this employment duty rationale, of course, that provides the presumptive credibility of police officers when furnishing information to other officers. *See* United States v. Harris, 403 U.S. 573, 587 (1971) (Harlan, J., dissenting); United States v. Ventresca, 380 U.S. 102, 110-11 (1965); United States v. Beusch, 596 F.2d 871, 874 (9th Cir. 1979); 1 W. LAFAVE, *supra* note 4, § 3.5, at 620-21.

Both Justice Harlan and Professor LaFave have made reference to this rationale without recognizing its general application to the consideration-motivated informer. *See* United States v. Harris, 403 U.S. at 593 (Harlan, J., dissenting); LaFave, *supra* note 4, at 29. As LaFave notes, "[O]ne who knows the police can charge him with a serious crime will not lightly undertake to direct the police down blind alleys." *Id.*

ety of indicia of probable truthfulness. A "restatement" of these holdings might read:

> Information given a police officer is presumptively untruthful unless:
>
> (1) It is given by a victim of or witness to the crime who is identified and unpaid;[30]
>
> (2) the person giving the information has spoken truthfully to officers in the past;[31]
>
> (3) part of the information given has been established as true by independent police corroboration;[32]

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30. *E.g.*, United States v. Melvin, 596 F.2d 492, 496-97 (1st Cir. 1979); United States v. McCrea, 583 F.2d 1083, 1085 (9th Cir. 1978); United States v. Baker, 577 F.2d 1147, 1151 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978); United States v. Campbell, 575 F.2d 505 (5th Cir. 1978); United States v. Swihart, 554 F.2d 264 (6th Cir. 1977); United States v. Banks, 539 F.2d 14 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); United States v. Rollins, 522 F.2d 160 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); United States v. Darensbourg, 520 F.2d 985 (5th Cir. 1975); United States v. Spach, 518 F.2d 866 (7th Cir. 1975); United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. McCoy, 478 F.2d 176 (10th Cir.), *cert. denied*, 414 U.S. 828 (1973); United States v. Unger, 469 F.2d 1283 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); United States v. Bell, 457 F.2d 1231 (5th Cir. 1972); United States v. Mahler, 442 F.2d 1172 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971); McCreary v. Sigler, 406 F.2d 1264 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969); United States v. Simmons, 444 F. Supp. 5 (E.D. Pa. 1978); State v. Houlf, 27 Ariz. App. 633, 557 P.2d 565 (1976), *cert. denied*, 429 U.S. 1106 (1977); People v. Smith, 17 Cal. 3d 845, 553 P.2d 557, 132 Cal. Rptr 397 (1976) (dictum). *See also* 1 W. LAFAVE, *supra* note 4, § 3.4, at 587-602.

31. *E.g.*, United States v. Garner, 581 F.2d 481, 484 (5th Cir. 1978); United States v. Marcello, 570 F.2d 324, 325 (10th Cir. 1978); United States v. Watts, 540 F.2d 1093, 1098 (D.C. Cir. 1976). LaFave argues that past truthfulness demonstrates probable present truthfulness only if it involves incriminating information. LaFave, *supra* note 4, at 14. It is not logical, however, to suggest that truthfulness about one particular subject is more probative of truthfulness generally than truthfulness about any other particular subject.

32. *E.g.*, United States v. Baker, 577 F.2d 1147, 1150 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978); United States v. Ashley, 569 F.2d 975, 982 (5th Cir.), *cert. denied*, 439 U.S. 853 (1978); United States v. Young, 567 F.2d 799, 802 (8th Cir. 1977), *cert. denied*, 434 U.S. 1079 (1978); United States v. Branch, 565 F.2d 274 (4th Cir. 1977); United States v. Gonzalez, 555 F.2d 308 (2d Cir. 1977); United States v. Rueda, 549 F.2d 865 (2d Cir. 1977); United States v. Jackson, 544 F.2d 407 (9th Cir. 1976); United States v. Dauphinee, 538 F.2d 1 (1st Cir. 1976); United States v. Spach, 518 F.2d 866 (7th Cir. 1975); United States v. Cummings, 507 F.2d 324 (8th Cir. 1974).

At least three commentators have argued that corroboration must extend to the incriminating portions of the informer's report. LaFave, *supra* note 4, at 58 ("Certainly corroboration of a few innocent and easily predictable events should not suffice."); Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958, 967 (1969) ("[A] skillful liar would always allege some true innocent facts to make his story appear credible."); Note, *Probable Cause and the First-Time Informer*, 43 U. COLO. L. REV. 357, 362 (1972) ("Corroboration of the innocent detail does not negate the possibility that the informer is lying about other incriminating facts, for a clever informer wishing to harass an innocent person by a police search might lace his report with detail about the other's activities to give the report an appearance of credibility."). Two circuits have adopted this view. *See* United States v. Mayes, 552 F.2d 729, 732 (6th Cir. 1977); United States v. Larkin, 510 F.2d 13, 15 (9th Cir. 1974). *See also* People v. Fein, 4 Cal. 3d 747, 752-53, 484 P.2d 583, 587, 94 Cal. Rptr 607, 611, (1971). As put by the court in *Ashley*, "What this argument misperceives is that the corrobative details do not create probable cause by themselves, but they do corroborate that . . . [the informer] is a truth teller under the second prong of *Aguilar*." 569 F.2d at 982. Or, as Moylan says:

> When independent police observations have verified part of the story told by an informant, that corroboration lends credence to the remaining unverified portion of the story by demonstrating that the informant has, to the extent tested, spoken truly. The verification helps to demonstrate his "credibility." Present good performance shows him to be probably "credible" just as surely as does past good performance.

(4) the information given constitutes a declaration against penal interest by the giver;[33]
(5) the information is given under oath;[34]
(6) the person furnishing the information is under the immediate control of the police;[35]
(7) the person furnishing the information is a businessman, never having been arrested, and with a good reputation in the community;[36]
(8) there is no apparent motive to falsify;[37] or
(9) the information is given by one who is an accomplice to the criminal activity to which the information relates.[38]

Given the inventive ways in which probable truthfulness has been established, one might inquire whether any requirement really exists. If a court is so disposed, it can, by emphasizing one factor or another, establish informer credibility. Whether or not it chooses to do so seems now to partake more of a shell game than reasoned reliance on existing rules. Each indication of credibility can as easily be explained away with the risk of falsity remaining present.

Moylan, *supra* note 4, at 779. Finally, it is folly to create a test of probable truthfulness based on notions of how a clever informer or a skillful liar might evade the test. By definition such a person can evade any test.

33. *E.g.*, United States v. Harris, 403 U.S. 573, 583-84 (1971); United States v. Boyce, 594 F.2d 1246, 1249 (9th Cir. 1979); United States v. Holmes, 594 F.2d 1167, 1170-71 (8th Cir. 1979); United States v. Ashley, 569 F.2d 975 (5th Cir.), *cert. denied*, 439 U.S. 853 (1978); United States v. Graham, 548 F.2d 1302 (8th Cir. 1977); United States v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); United States v. Golay, 502 F.2d 182 (8th Cir. 1974).

34. *See* United States v. Hunley, 567 F.2d 822, 825 (8th Cir. 1977); United States v. Copeland, 538 F.2d 639, 641-42 (5th Cir. 1976). The statement by the informer in United States v. Harris, 403 U.S. 573, 575 (1971) was sworn but the opinion did not refer to that fact. Administering an oath not only calls attention to the importance of the informer's act but also creates the fear of prosecution should the information prove false. *See* 6 J. WIGMORE, *supra* note 29, §§ 1816, 1831.

35. *See* United States v. Harrick, 582 F.2d 329, 332 (4th Cir. 1978); United States v. Watts, 540 F.2d 1093, 1098 (D.C. Cir. 1976).

36. *See* United States v. Robertson, 560 F.2d 647, 648 (5th Cir. 1977). *See also* United States v. Campbell, 575 F.2d 505, 506 (5th Cir. 1978) (informer was "a graduate of Annapolis, a professional boat operator and president of a boat company"); United States v. Moore, 552 F.2d 1068, 1072 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976); United States v. Spach, 518 F.2d 866, 871-72 (7th Cir. 1975).

37. *E.g.*, United States v. Rollins 522 F.2d 160, 164, (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); United States v. Spach, 518 F.2d 866, 870 (7th Cir. 1975); United States v. Wong, 470 F.2d 129, 131-32 (9th Cir. 1972). Both Professor LaFave and Judge Moylan suggest that in a casual encounter between a drug dealer and an informant, the dealer has no motive to lie. LaFave, *supra* note 4, at 31-34; Moylan, *supra* note 4, at 762-65. This notion seems to embrace the incongruous proposition that a criminal when talking to another criminal, is presumptively truthful, but when talking to the police is presumptively untruthful. *See* United States v. Smith, 462 F.2d 456, 460 (8th Cir. 1972).

38. *E.g.*, United States v. Dunloy, 584 F.2d 6, 10 (2d Cir. 1978); United States v. Rueda, 549 F.2d 865, 869-70 (2d Cir. 1977); United States v. Miley, 513 F.2d 1191, 1204 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); United States v. Golay, 502 F.2d 182 (8th Cir. 1974); United States v. Long, 449 F.2d 288 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972); Musgrove v. Eyman, 435 F.2d 1235 (9th Cir. 1971).

This search for factors indicating truthfulness is not unlike the effort to identify such factors in the law of hearsay exceptions under the rubric of declarant sincerity. Absent a strong motive of the declarant to lie, sincerity is demonstrated either by his participating in, or by his instigating, an official investigation. In such circumstances, whether or not any official penalty attaches for furnishing false information, the common perception is that it is either wrong or dangerous to mislead the police by furnishing misinformation. Because the question addressed is one of probable cause, the issue is not whether the information given by an informer may possibly be false. Rather, it is whether such information is more probably true than false. Generally speaking, this test will always be met, because the converse—that the information is more probably false than true—is so plainly wrong. To the extent that some indication of sincerity is necessary, however, invoking the aid of police provides it, given the common perception that one does not want to court disaster by fooling the police.[39]

If one were to approach informer credibility as an original matter unencumbered by the history related above, it would seem more profitable to focus on potential discrediting factors rather than to try to construct a group of accrediting factors. Thus, using the common impeachment rules, one might be presumed untruthful if he had been convicted of a crime, had a bad reputation for truthfulness, had engaged in misconduct probative of untruthfulness, had a bias against the object of the information, or had an interest in the furnishing of the information.[40] Rigorous application of these rules regretably would, also lead to incongruous results. Both victims and police could fall afoul of the bias and interest disqualifications. Even those guilty of past criminality or of generally suspect credibility ought not always be disregarded. Having won the battle against witness incompetency in favor of allowing impeachment, presumed incompetency should not be reinstituted at the probable cause stage of criminal proceedings.

The problem in either accrediting or discrediting an informer is that the factors pointing one way or another are, when subjected to

39. In Adams v. Williams, 407 U.S. 143 (1972), the Court suggested that if the furnishing of false information is criminal (as it is under 18 U.S.C. § 1001 (1976)), it provides an indicia of reliability. 407 U.S. at 146-47. This is analogous to furnishing information under oath where false information risks a perjury prosecution. Since credibility turns not on actual but on perceived risk, the risk can be some sort of unpleasantness short of criminal prosecution. Thus, for example, lawyers are told that a reputation for honesty and candor is valuable in their professional careers, and that for reasons of expedience, as well as professional duty, they ought not misrepresent matters of fact or of law to the court on pain of losing that professionally valued trust. *See* Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 IOWA L. REV. 807, 810-11 (1966). Of course, a counter argument can be made that this threatened loss of trust has not prevented many lawyers from making misrepresentations. *See* Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 6 HOFSTRA L. REV. 729, 737-38 (1978).

40. *See generally* C. MCCORMICK, *supra* note 29, §§ 33-45.

analysis, almost evanescent. Factors such as shifty eyes, sweaty palms, general immorality, or a past criminal conviction are not terribly persuasive bases on which to judge untruthfulness. Similarly, the factors in the restatement above do not easily lead to a conclusion of truthfulness. If one were to ask an ordinary person why he believed someone else to be telling the truth, he would probably reply, "I don't know why he would want to lie to me." This is an entirely sensible way to approach the question, one that the law might well emulate. Reasons to lie on this occasion are surely stronger indicia of present credibility than any of the more general factors we ordinarily rely upon.

State v. *Paszek*[41] identified three reasons that might motivate an informer to lie—payment, concession, or revenge.[42] One who is paid for furnishing information believing, based on rumor, that X had narcotics at his house, might lie saying that he had seen narcotics there, in the hope of payment should they happen to be there, but with no real fear of penalty if they are not. Similarly, one facing charges might seek to buy his freedom by untruthfully implicating others, with the hope of reward if lucky, but with no greater peril if unlucky. Finally, one might desire to upset an enemy by causing that enemy to be arrested or searched, the revenge coming from the police action whether or not it culminated in criminal conviction. The trouble with motives like these is that they are terribly improbable. One must first assume that the lying informer is sufficiently familiar with the *Aguilar* requirements to lie to having personally perceived the facts that would show a basis of knowledge. Beyond that, one must posit an extraordinarily manipulative individual. Such a possibility, of course, exists. But if a bare possibility of untruthfulness is enough, all information must be disregarded because one can never eliminate that possibility with any informer. If a probability of a motive to lie is necessary, then only rarely would it be present and for all practical purposes informers could be presumed to be telling the truth.[43]

While any attempt to define a class of people as being of suspect credibility is wrong, it is, for the reasons already suggested, understandable that courts are wary of the potential fabrication of facts generating probable cause. To the extent possible, the lying informer ought to be identified and his information rejected. But once one posits a liar, driven perhaps by a desire to harass an enemy, legal rules are of little utility. Whatever the legal test, the liar can lie to meet it. If the liar is

41. 50 Wis. 2d 619, 184 N.W.2d 836 (1971).
42. *Id.* at 630, 184 N.W.2d at 842.
43. *See generally* Harman, *The Inference to the Best Explanation*, 74 PHILOSOPHICAL REV. 88 (1965).

to be stopped, it must be by an analysis of factors more pointedly relevant to his credibility that render his information suspect.

Under existing law, specific information relevant to untruthfulness is likely to be overlooked by judicial insistence on information showing probable truthfulness. Those preparing affidavits in support of an application for a warrant are asked to allege at least one of the facts contained in the above restatement. With attention so focused, inquiry into grounds suggesting possible untruthfulness is not made.

It seems to be more profitable, I think, to try to identify matters that would suggest a substantial risk of lying on the particular occasion and then to require the officer preparing the affidavit to state those facts in order for the magistrate to assess whether the informer can be believed. Such matters might include the informer's past untruthfulness and his particular desire to injure the person to be arrested or searched.[44] Other indications of potential probable lying undoubtedly exist. What is important is to direct attention to matters that are more plainly probative of individual credibility than those presently addressed which create invidious subclasses of mankind distinguished only by tenuous notions of probable truthfulness.

BASIS OF KNOWLEDGE

Assuming that the informer is credible, *Aguilar* also requires that the information he possesses be laid out in the affidavit with enough specificity that the magistrate can arrive independently at the conclusion that the facts alleged constitute probable cause to believe that the person to be arrested has committed an offense or that the place to be searched does contain an item permissibly seized.[45] This aspect of *Aguilar*, in short, looks to what Moylan calls "conclusionary validity"[46]—do the facts within the possession of the honest informant, when viewed by a neutral and detached magistrate not "engaged in the often competitive enterprise of ferreting out crime,"[47] permit a conclusion of probable cause.

Justice White concisely illustrated the problem:

44. Judge Moylan would require that the affiant tell the magistrate of instances in which the informer has given false or unverified information. Moylan, *supra* note 4, at 759. In United States v. Lefkowitz, 464 F. Supp. 227 (C.D. Cal. 1979), the court held that it was erroneous not to state in the affidavit that the informant was the estranged wife of the target of the search "because of the critical effect it would have had, under the circumstances of this case, in the determination of the informant's credibility." *Id.* at 233. *See also* United States v. Cortese, 448 F. Supp. 845, 850-51 (E.D. Pa. 1978). In United States v. Copeland, 538 F.2d 639 (5th Cir. 1976), however, a stated bias that explained the informer's motivation did "not necessarily lessen his credibility." *Id.* at 642. *See also* Boyd, *The Indispensable Informer*, 226 NATION 495 *passim* (1979).

45. 378 U.S. at 113-15.

46. Moylan, *supra* note 4, at 773.

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

> If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2), the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the officer, who is to judge the existence of probable cause. . . . With respect to (3), where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hearsay.[48]

What is true of the officer is true, as well, of the informer—what he has personally sensed must be specified in the affidavit.[49]

Because, informers, like most people, do not talk in the language of personal perception,[50] the Court has held that if an informer's report is sufficiently factually detailed, a magistrate may reasonably infer that it rests on firsthand observation.[51] Thus, in *Draper v. United States*,[52] the informer told agents that Draper had gone to Chicago to obtain heroin, that he would return to Denver on the morning train on a particular day, and that he would be wearing specified clothing at that time.[53] As put by Justice Harlan, "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way."[54] *Spinelli v. United States*[55] provides a counterillustration. There the informer reported that Spinelli was making book from two specific telephone numbers.[56] The Court said, "[T]his meager report could easily have been obtained from an offhand remark heard at a neighborhood bar"[57] or could have been "a casual rumor circulating in the underworld."[58]

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48. Spinelli v. United States, 393 U.S. 410, 423-24 (1969) (White, J., concurring).
49. *Id.* at 425.
50. The preferred course of action is for the officer-affiant to require his informer to state what he has personally sensed. LaFave, *supra* note 4, at 43-44.
51. *See* Draper v. United States, 358 U.S. 307, 313 (1959).
52. 358 U.S. 307 (1959).
53. *Id.* at 309.
54. Spinelli v. United States, 393 U.S. 410, 417 (1969). Justice White, in his concurring opinion, expanded on this point:

> Detail like this, if true at all, must rest on personal observation either of the informant or of someone else. If the latter, we know nothing of the third person's honesty or sources; he may be making a wholly false report. But it is arguable that on these facts it was the informant himself who has perceived the facts, for the information reported is not usually the subject of casual, day-to-day conversation.

Id. at 425-26. Of course, if some of the detail were corroborated, it would not matter that it was hearsay to the informer. The detail would show firsthand knowledge of the ultimate source, while the police verification would establish the honesty of the source and all other agents of transmission on this occasion. See note 32 *supra*.
55. 393 U.S. 410 (1969).
56. *Id.* at 414.
57. *Id.* at 417.
58. *Id.* at 416. I do not know what neighborhood bars the justices have frequented nor what casual rumors they have heard in the underworld. Nevertheless, I would be prepared to nominate the statement "Bill Spinelli is making book at WY4-0029 and WY4-0136" for *New Yorker* depart-

While this dichotomy between "such detail" and "meager report" states the test by contrasting poles, the courts have had difficulty in determining the kind of detail that permits an inference of firsthand knowledge of the incriminating fact alleged. Commentators have suggested, however, that unless the detail relates to the incriminating fact, a risk is created that personal observation of nonincriminating facts, coupled with an impermissible conclusion, will be treated as firsthand knowledge.[59] *Draper* illustrates their concern. Assuming that the informer knew of Draper's travel plans and had heard street rumor that Draper was a pusher, he might have concluded that the purpose of the trip was to acquire heroin. Had these facts known to the informer been presented to a magistrate, that conclusion could not have been drawn constitutionally. Why then, the critics argue, should we allow indirectly what is plainly impermissible if done openly.

The criticism suffers from the same defect as that in the rule of presumptive untruthfulness—that of elevating a slight risk into a probability. No one doubts that such a risk is present. But to say that such a risk is so substantial as to defeat probable cause is to posit a very strange informer willing to speak in exquisite detail on most subjects but who retreats to a masked conclusion when that is all he has. Also, the commentators' request for incriminating detail runs against the fact that much that is incriminating cannot be broken into particularly informative detail. How could one describe an illegal firearm, or heroin, or money in detail.[60]

What the detail must do is to permit an inference that the incriminating fact was personally observed, which can be accomplished by requiring that the detail suggest access to the incriminating fact.[61] Thus,

ments headed either "Offhand Remarks We Doubt Were Ever Heard in a Neighborhood Bar" or "Casual Rumors We Doubt Ever Circulated in the Underworld." That Spinelli was making book could well be a casual rumor or an offhand remark; in my experience, probably as limited as the justices, two business phone numbers eliminate the possibility that the remark is either casual or offhand. Justice Harlan's characterization of the tip is illustrative of a recurrent problem in affidavit construction—the extent to which the suspicious nature of data turns on the reader's own life experience. Another illustration in the same opinion is the statement that two separate telephone numbers are frequently in use in the same apartment. *Id.* at 417-18. I would feel a good deal more comfortable with Justice Harlan's factual conclusions if he had been in fact familiar with neighborhood bars and the telephone habits of those living in middle class apartments. *See id.* at 430, 434 (Black, J., dissenting).

59. *See* LaFave, *supra* note 4, at 47-49; Note, *supra* note 32, at 965-66.

60. Reasonably precise descriptions could be made of these items, of course. But it is not clear whether these descriptions would more surely imply firsthand knowledge than would a reasonably precise description of the room where those items were kept.

61. This proposition is neatly made by Justice White's concurrence in *Spinelli*, although he seemed to be addressing a different point: "Nor would it suffice, I suppose, if a reliable informant states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for the warrant." Spinelli v. United States, 393 U.S. at 427 (White, J., concurring). The reason this would not suffice is that the specified detail respecting Apartment 201 does not permit an inference of access to firsthand knowledge of the contents of Apartment 607.

in *Draper* where the informer knew relatively intimate facts about the train by which Draper would return from Chicago and the clothing he would be wearing when he arrived,[62] it is easy to conclude that he learned that information from Draper himself. Having discussed Draper's travel plans, it is not improbable that the informer would have learned the incriminating fact, as well, the purpose of the trip. In short, the detailed facts implied access to the incriminating fact.

United States v. Larkin,[63] however, comes to the opposite conclusion:

> The key factor in the tip was that the vehicle was carrying contraband. A statement that a vehicle of a described make with an identified license number will be proceeding toward Los Angeles from El Centro at a certain time is information that could be readily obtained by any bystander observing the vehicle on the road from El Centro to Los Angeles. . . . Nothing about the described features of the car or its direction points to anything suspicious, let alone criminal. That a vehicle matching the description was spotted along a highway from El Centro in the general direction of Los Angeles corroborates nothing except, possibly, the ability of the informant accurately to relay what he has seen or what he has overheard. No hint is given thereby that the informant was truthful in reporting that the vehicle contained contraband. Nor does the observation supply any information about how the informant knew that contraband was being transported. The fact that these few innocuous details tallied with the officers' observations cannot "be said to support both the inference that the informer was generally trustworthy and that he had made his charge against [Larkin] on the basis of information obtained in a reliable way."[64]

It is, of course, possible, as the court suggests, that the informer saw a car on that road, made up a story about it, and transmitted that story to authorities. To suggest that this explanation is the more probable one, or even a substantial possibility, seems plainly wrong. The more appropriate analysis is that knowledge of the route taken by the car implies access to knowledge about the car's contents. Much the same argument could be advanced on the *Spinelli* facts. Knowledge that Spinelli used two telephones listed to Grace P. Hagen, in an apartment where he did not live,[65] suggests access to knowledge about what those phones were used for.[66]

62. 358 U.S. at 309.
63. 510 F.2d 13 (9th Cir. 1974).
64. *Id.* at 15.
65. 393 U.S. at 410.
66. While rarely addressed in these terms, many of the cases can be explained by the notion that the detail supplied permitted an inference of access to firsthand knowledge of the incriminating fact. *See, e.g.*, United States v. Beusch, 596 F.2d 871, 875 (9th Cir. 1979); United States v. Trejo-Zambrano, 582 F.2d 460, 463 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978); United States v.

CONCLUSION

When one talks of probable cause, by definition, what is invoked is one's view of how the world operates. My view of what the facts in the cases reasonably suggest is, of course, my view. It is appropriate to argue that this view is mistaken in its assessment of probabilities. But the argument that has dominated scholarly analysis of the *Draper-Spinelli* problem—that the ability to conceive an innocent or venal possibility defeats probable cause—seems plainly inappropriate.

Young, 567 F.2d 799, 802 (8th Cir. 1977), *cert. denied*, 434 U.S. 1079 (1978); United States v. Branch, 565 F.2d 274 (4th Cir. 1977); United States v. Gill, 555 F.2d 597 (6th Cir. 1977); Weeks v. Estelle, 531 F.2d 780 (5th Cir. 1976); United States v. Nieto, 510 F.2d 1118 (5th Cir.), *cert. denied*, 423 U.S. 854 (1975); United States v. Cummings, 507 F.2d 324 (8th Cir. 1974); United States v. Smith, 503 F.2d 1037, 1039 (9th Cir. 1974) ("the reasonableness of his access to accurate knowledge"), *cert. denied*, 419 U.S. 1124 (1975); United States v. Horton, 488 F.2d 374 (5th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); United States v. Acosta, 411 F.2d 627 (5th Cir. 1969).