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Closing the Gates: A Nebraska Constitutional Standard for Search and Seizure: *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983)

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Note

Closing the Gates: A Nebraska Constitutional Standard for Search and Seizure

State v. Arnold, 214 Neb. 769, 336 N.W.2d 97 (1983).

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*There is no war between the Constitution and common sense.**

*Uno absurdo dato, infinita sequuntur.***

I. INTRODUCTION

Seven years ago, Associate Justice William J. Brennan, Jr. argued for a calculated shift in perspective by those concerned with the protection of individual rights and liberties.[1] Noting that "[u]nder the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated and systematic violations of civil liberties,"[2] Justice Brennan suggested that state courts and state constitutions might prove more hospitable for those seeking the types of protections that were once routinely secured under the federal Bill of Rights.[3]

In the intervening years the frequency with which the Court has issued rulings similar to those that provoked Justice Brennan's original criticisms has, if anything, increased, and scrutiny of the Court's decisions in certain volatile areas has intensified.[4] This has been particularly true when the Court has been called upon to refine and reshape the parameters of the fourth amendment's guarantees against "unreasonable searches and seizures."[5]

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* Mapp v. Ohio, 367 U.S. 643, 657 (1961).

** "One absurdity being allowed, an infinity follows." 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 102 (1628), *quoted in*, Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 603 (1982).

1. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).
2. *Id.* at 502 (citations omitted).
3. Justice Brennan advocated presentation of both federal and state claims: "I suggest to the bar that, although in the past it may have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions." *Id.* This may prove unworkable in light of Michigan v. Long, 103 S. Ct. 3469 (1983), within which the Court indicated that it would decline review on the basis of an "adequate and independent state ground" *only* if that ground was, on its face, the exclusive basis for the lower court's holding. *Id.* at 3476. *See infra* notes 208-15 and accompanying text.
4. For example, because of pervasive national concerns about the widespread distribution and use of controlled substances, Court criminal procedure rulings involving drugs have been subjected to intense scrutiny. Various members of the Court have argued that fourth amendment guarantees must be reexamined in light of the drug problem. In Florida v. Royer, 103 S. Ct. 1319 (1983), Justice Blackmun argued that police conduct in an airport drug profile detention "should not be subjected to a requirement of probable cause." *Id.* at 1332 (Blackmun, J., dissenting). As Justice Douglas observed, however, it is important to recall that fourth amendment rules must protect both "the innocent and the guilty alike." Draper v. United States, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting).
5. The fourth amendment states:

Two themes have permeated the majority of the Court's recent fourth amendment rulings. The first has been a willingness to restrict the scope and application of the amendment's guarantees.[6] During its most recent Term, for example, the Court utilized *Illinois v. Gates*[7] as a vehicle for substantially reshaping the affidavit requirements for issuance of search warrants.[8] In *Gates*, the Court

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

U.S. CONST. amend. IV.

The Court has frequently emphasized the importance of fourth amendment guarantees within our democratic system of government. Justice Jackson's statement in his dissenting opinion in Brinegar v. United States, 338 U.S. 160 (1949), has become a frequently cited benchmark:

> [Fourth amendment rights] are not mere second class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Id. at 180 (Jackson, J., dissenting).

It appears that this perspective is not shared by a majority of the current Court, particularly in light of the perception that far too many criminals are being set free on "technicalities" that bear no relation to ultimate guilt. *See infra* notes 245-51 and accompanying text.

6. *See, e.g.*, New York v. Belton, 453 U.S. 454, 462-63 (1981) (warrantless search of container within passenger area of automobile permissible if arrestee lawfully arrested while in automobile); Rawlings v. Kentucky, 448 U.S. 98, 108 (1980) (individual challenging search must prove legitimate expectation of privacy in area searched or article seized); Rakas v. Illinois, 439 U.S. 128, 148 (1978) (no standing to challenge search of third person's residence or property); Adams v. Williams, 407 U.S. 143, 146 (1972) (reasonable suspicion, rather than probable cause, as standard for investigatory detention). *See generally* Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335 (1978).
7. 103 S. Ct. 2317, *reh'g denied*, 104 S. Ct. 33 (1983). Justice Rehnquist wrote the majority opinion and was joined by Chief Justice Burger and Justices Blackmun, Powell, and O'Connor. Justice White issued a concurring opinion. Justice Brennan, joined by Justice Marshall, dissented, as did Justice Stevens, joined by Justice Brennan, on different grounds.
8. The narrow issue before the Court was "the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip." *Id.* at 2321. The Court's holding, however, arguably sets a standard for assessment of probable cause for all warrant applications. *See infra* notes 87-89 and accompanying text.

   It should be noted that a limited number of state courts initially argued that the revised *Gates* standard did *not* expressly repudiate the *Aguilar-Spinelli* standard. *See, e.g.,* Commonwealth v. Upton, 390 Mass. 562, 458 N.E.2d 717 (1983), *rev'd sub nom.* Massachusetts v. Upton, 104 S. Ct. 2085 (1984). As the Court made clear in its *per curiam* reversal, however, *Gates* "did not merely refine or qualify the 'two-pronged test' [but] rejected it as

adopted a "totality of circumstances" approach in the evaluation of warrant affidavits,[9] expressly overruling the standards that had prevailed under the "two-pronged" test articulated in *Aguilar v. Texas*[10] and refined in *Spinelli v. United States*.[11]

A second, and potentially more troubling trend has been the Court's failure to achieve a working consensus in some of its most important fourth amendment cases.[12] Recently, in what many had

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hypertechnical and divorced from 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Massachusetts v. Upton, 104 S. Ct. 2085, 2087 (1984) (quoting Brinegar v. United States, 338 U.S. 160 (1949)). In doing so, the Court stressed the clear language of *Gates* indicating that it "is wiser to *abandon*" *Aguilar* and *Spinelli*. Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983).

9. The revised standard states that:

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

Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983).

10. 378 U.S. 108 (1964).

11. 393 U.S. 410 (1969). Under the *Aguilar-Spinelli* approach, information secured from an informant was deemed reliable only if "the magistrate [was] informed of some of the underlying circumstances from which the informant [reached his conclusions] and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable.'" Aguilar v. Texas, 378 U.S. 108, 114 (1964) (citations omitted). However, where "allegations . . . contain no suggestion of criminal conduct when taken by themselves . . . they are not endowed with an aura of suspicion by virtue of the informer's tip." Spinelli v. United States, 393 U.S. 410, 418 (1969). Accordingly:

> [i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's *criminal* activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

Id. at 416 (emphasis added). By adopting a "totality of circumstances" standard, the Court has removed any *requirement* that the affidavit meet minimum objective standards. *See infra* notes 175-80 and accompanying text.

12. During the October, 1983 Term the Court issued full opinions in nine search and seizure cases, none of which produced a unanimous judgment. All nine cases involved prosecutions for possession or distribution of drugs or narcotics, and in each the government had appealed an adverse judgment below.

In two, Texas v. Brown, 103 S. Ct. 1535 (1983) (plain view doctrine), and Florida v. Royer, 103 S. Ct. 1319 (1983) (illegal airport detention invalidated subsequent luggage search), the Court was unable to fashion a majority opinion. Four produced sharply worded dissents that vividly illustrated the profound disagreements regarding the scope of fourth amendment protections that have split the Court: Michigan v. Long, 103 S. Ct. 3469 (1983) (sustains protective detention and attendant automobile search); Illinois v. Andreas, 103 S. Ct. 3319 (1983) (sustains initial container search and con-

hoped would be an important ruling dealing with drug courier profiles, airport stops and detentions, and warrantless searches of airline passenger's luggage, the Court failed to reach a consensus on anything other than the result.[13] And, while the Court has retreated temporarily from its avowed intent to reshape the controversial "exclusionary rule,"[14] its docket for the current Term leaves little doubt that those Justices who have sought the opportunity to restrict the scope of that rule will have ample opportunity to do so.[15]

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trolled delivery); United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983) (search of vessel permitted incident to documents inspection); Illinois v. Gates, 103 S. Ct. 2317 (1983) (affidavit requirements for issuance of search warrant). In three, United States v. Place, 103 S. Ct. 2637 (1983) (airport detention of luggage and "sniff test" for drugs sustained; length of detention exceeded permissible limits); Illinois v. LaFayette, 103 S. Ct. 2605 (1983) (inventory search of personal effects incidental to arrest sustained); and United States v. Knotts, 103 S. Ct. 1081 (1983) (electronic beepers do not invade fourth amendment privacy expectations), the Court issued a total of six concurring opinions.

This pattern of fragmented decisionmaking is illustrative of the tendencies that have, on occasion, led the Court itself to admit that "it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony." Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971). Moreover, the Court's inability to fashion a binding consensus is not confined to fourth amendment jurisprudence. *See generally* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981).

13. Florida v. Royer, 103 S. Ct. 1319 (1983).
14. The rule, formulated in Weeks v. United States, 232 U.S. 383 (1914), and made applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961), requires the exclusion in a criminal trial of evidence gathered in violation of the fourth amendment. It has generated considerable controversy during recent years, and various Justices have indicated their desire to abolish the rule or to considerably restrict its scope and application. *See, e.g.*, Illinois v. Gates, 103 S. Ct. 2317, 2340-47 (1983) (White, J., concurring); Robbins v. California, 453 U.S. 420, 437, 443-44 (1981) (Rehnquist, J., dissenting); Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring); Bivens v. Six Unnamed Narcotics Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (1978 & Supp. 1983); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).
15. The focal point in much of the current debate about the rule is the belief that there should be a "good faith" exception, allowing the introduction of evidence that police have obtained when operating under a sincere belief that their conduct was consistent with fourth amendment guarantees. After asking the parties in *Gates* to brief this issue, 103 S. Ct. 436 (1982), and a reargument focusing upon it, the Court refused to rule on the point, stating that "[t]he State never, however, raised or addressed the question whether the

The Nebraska Supreme Court has consistently demonstrated its willingness to follow the lead of its federal counterpart when assessing claims that the procedural and substantive rights of criminal defendants have been violated.[16] This tendency to accept doctrines that have substantially reshaped criminal procedure was most recently demonstrated in *State v. Arnold*,[17] where the court incorporated, without having been requested to do so,[18] and with

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federal exclusionary rule should be modified in any respect, and none of the opinions of the Illinois courts give any indication that the question was considered." Illinois v. Gates, 103 S. Ct. 2317, 2323 (1983).

In his concurring opinion in *Gates*, Justice White took exception with the Court's refusal to reach the question and set out a detailed justification for adopting the good faith exception. Illinois v. Gates, 103 S. Ct. 2317, 2336-47 (1983) (White, J., concurring). Certiorari has been granted in two cases that directly raise the question, United States v. Leon, 701 F.2d 187 (9th Cir.) (warrant issued, but information from informants found not to be credible or reliable), *cert. granted*, 103 S. Ct. 3535 (1983), and Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982) (warrant failed to describe objects to be seized), *cert. granted*, 103 U.S. 3534 (1983). Certiorari was granted in a third case, Coloradc v. Quintero, 657 P.2d 948 (warrantless police action), *cert. granted*, 103 S. Ct. 3535 (1983). The writ has, however, been dismissed, "it appearing that the respondent died on November 27, 1983." 104 S. Ct. 543 (1983). The dismissal was apparently issued over the objections of the State of Colorado, which sought to have the case argued and decided in spite of Quintero's death. This tenacity reflects the eagerness with which opponents of the exclusionary rule have sought opportunities to modify or eliminate it. At the same time, *Quintero* was perhaps the most significant of the three good faith cases to be argued. Those wishing to see the Court finally come directly to grips with the "good faith" exception have good cause to be disappointed by the dismissal, particularly since the Court has held that it will hear cases arguably moot where the constitutional issues posed are important, Roe v. Wade, 410 U.S. 113, 125 (1973), or capable of repetition but evading review. So. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911).

The pairing of the *Gates* "totality of circumstances" test for probable cause determinations and a "good faith" exception to the exclusionary rule would almost certainly radically alter the balance in criminal investigations in favor of the police.

16. *See, e.g.*, State v. Roth, 213 Neb. 900, 331 N.W.2d 819 (1983) (adopting New York v. Belton, 453 U.S. 454 (1981)); State v. Vicars, 207 Neb. 325, 299 N.W.2d 421 (1980) (adopting Rakas v. Illinois, 439 U.S. 128 (1978)); State v. Smith, 207 Neb. 263, 298 N.W.2d 162 (1980) (adopting Rawlings v. Kentucky, 448 U.S. 98 (1980)); State v. Brewer, 190 Neb. 667, 212 N.W.2d 90 (1973) (adopting Adams v. Williams, 407 U.S. 143 (1972)). One commentator has observed that "[a]mong the fifty states, there is today an unhealthy kind of attention given to the decisions rendered by the United States Supreme Court." Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 16-17 (1981).
17. 214 Neb. 769, 336 N.W.2d 97 (1983).
18. *Gates* was decided on June 9, 1983; *Arnold* on July 1, 1983. The Brief for Appellant in Arnold was filed with the court on October 7, 1982, and that of the Appellee on February 3, 1983. Both parties confined their analysis of the case to an application of previous tests, and neither urged that the court in any

little real comment, the "totality of circumstances" test enunciated in *Gates*.[19] In this particular instance, however, the absorption into Nebraska law of the revised federal standard provoked sharp criticism from two members of the court, who suggested that "rather than blindly allowing the 'continuing evisceration of Fourth Amendment protection against unreasonable searches and seizures,' . . . we adopt a standard based on the Nebraska Constitution and offer such protection as we may in the courts of Nebraska."[20]

It is upon this aspect of the *Arnold* decision, the availability and desirability of a specific Nebraska standard, that this Article will focus. In particular, the Article will examine carefully the facts and holdings in both *Arnold* and *Gates*, contrasting the manner in which the respective courts treated the facts and their analysis of applicable legal doctrines. It will then explore the validity of Judge White's[21] criticisms in *Arnold*, demonstrating both that the general tenants of his concurring opinion are well founded, and that serious flaws exist in the *Gates* Court's analysis and its holding. Finally, the Article will argue for the adoption of an alternate standard governing searches and seizures in Nebraska that is based solely upon the guarantees of the Nebraska Constitution.[22]

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way alter the approach that had prevailed under the *Aguilar/Spinelli* formulation, as adopted by the Nebraska court in State v. LeDent, 185 Neb. 380, 384, 176 N.W.2d 21, 23 (1970). *See generally* Brief for Appellant and Brief for Appellee, State v. Arnold, 214 Neb. 769, 336 N.W.2d 97 (1983).

19. The majority found that "[the affidavit's] sufficiency is even more obvious under the totality of the circumstances test established by *Illinois v. Gates*, [103 S. Ct. 2317 (1983)]." State v. Arnold, 214 Neb. 769, 774, 336 N.W.2d 97, 100 (1983). It should be noted that, one week prior to *Arnold*, Judge Caporale discussed *Gates* in a one-judge opinion issued pursuant to the provisions of NEB. REV. STAT. § 29-824 (Cum. Supp. 1982). State v. Brennan, 214 Neb. 734, 738-40, 336 N.W.2d 79, 82-85 (1983). Section 29-824 permits the State to appeal from an order suppressing evidence, and provides for a summary review by one judge of the court. One judge opinions are, however, dispositive only of the factual question before the judge and have no precedental value.

The court has since utilized the revised standard adopted in *Arnold* on at least two occasions. *See* State v. Gilreath, 215 Neb. 466, 468-69, 339 N.W.2d 288, 291 (1983); State v. Williams, 214 Neb. 923, 928, 336 N.W.2d 605, 608 (1983).

20. State v. Arnold, 214 Neb. 769, 775-76, 336 N.W.2d 97, 101 (1983) (White, J., concurring) (citations omitted). Judge Shanahan joined Judge White in this opinion.

21. Opinions issued by both Judge C. Thomas White of the Nebraska Supreme Court and Associate Justice Byron R. White of the United States Supreme Court are discussed extensively in this Article. Every effort has been made to indicate which individual authored the opinion being examined. Where not otherwise clear from the context, however, it should be understood that references to *Judge* White refer to Judge C. Thomas White, and those to *Justice* White refer to Justice Byron White.

22. The applicable provision of the Nebraska Constitution provides that:

Much of the analysis will focus upon the question of what requirements should govern the issuance of a warrant where the affidavit relies, at least in part, upon information secured from informants.[23] Nevertheless, the basic premises and analytic meth-

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

NEB. CONST. art. I, § 7.

The language of art. I., § 7, of the Nebraska Constitution mirrors that of the fourth amendment. The Nebraska court has held, however, that decisions of the Supreme Court of the United States construing the fourth amendment are neither controlling nor necessarily binding in the construction of art. I, § 7. Billings v. State, 109 Neb. 596, 603, 191 N.W. 721, 723 (1923). In *Billings* the court refused to adopt the exclusionary rule as formulated in *Weeks*, a position to which it adhered until *Mapp* forced a reversal. State v. O'Kelly, 175 Neb. 798, 804, 124 N.W.2d 211, 215 (1963); State v. Goff, 174 Neb. 548, 553, 118 N.W.2d 625, 629 (1962); State v. Easter, 174 Neb. 412, 421-22, 118 N.W.2d 515, 521 (1962). These rulings, however, did not alter the *Billings* premise that art. I, § 7, has independent force.

23. The court's initial analysis in *Arnold* appears to have focused upon the sufficiency of the information secured from an informant who has engaged in a controlled purchase of drugs. *See infra* note 46. This poses a more narrow issue than would have been present had the affidavit detailed only the information provided by the initial informants.

At least three "types" of informants can be distinguished for the purposes of probable cause determinations. The first is the "concerned citizen." The Nebraska Supreme Court has held that information secured from concerned citizens is presumptively reliable. State v. Ybanez, 210 Neb. 42, 44, 313 N.W.2d 30, 31 (1981); State v. Butler, 207 Neb. 760, 763-64, 301 N.W.2d 332, 334-35 (1981); State v. King, 207 Neb. 270, 275, 298 N.W.2d 168, 171 (1980) (one judge opinion).

The second type of informant is the "confidential" informant, whose information may be deemed reliable if it meets the requirements outlined in *Aguilar* and *Spinelli*. *See supra* note 11.

Finally, there is the "anonymous" informant, whose identity is unknown. It has been argued that the anonymous informant is presumptively unreliable, Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the Spinelli/Draper Dichotomy in Illinois v. Gates*, 20 AM. CRIM. L. REV. 99, 107 (1982), and that information from such a source should be subjected to a more rigorous evaluation. There is some support for this position in Adams v. Williams, 407 U.S. 143, 146 (1972) ("This is a stronger case than obtains in the case of an anonymous telephone tip."). Prior to its ruling in *Gates*, however, the Court had not directly addressed the questions posed when information in a warrant had been secured from an anonymous source. *See infra* notes 84-85 and accompanying text.

Professor LaFave has examined in considerable detail the traditional rationales for requiring that informant tips meet rigorous probable cause standards. 1 W. LAFAVE, *supra* note 14, at § 3.3. Professor Livermore has, however, argued that "no real explanation has shown why informers are presumptively untruthful or what factors make an individual an informer," and that "the argument that has dominated scholarly analysis of the *Draper-Spinelli* problem—that the ability to conceive an innocent or venal possibil-

ods will have general applicability, and the standard advanced will carry implications for the majority of instances where Nebraska courts must examine claims that the admission of evidence in a criminal proceeding should be barred as a result of the protections embodied in the Nebraska Constitution.[24]

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ity defeats probable cause—seems plainly inappropriate." Livermore, *The Draper-Spinelli Problem*, 21 ARIZ. L. REV. 945, 946, 958 (1979).

24. The debate about the application of state constitutional guarantees in criminal proceedings is not limited to fourth amendment situations. Similar questions have been raised in fifth and sixth amendment cases. In Nebraska, for example, Judge White has argued that "[i]t may well be necessary, in view of the decisions of the U. S. Supreme Court which have considerably weakened the once absolute strictures of *Miranda*, for this court . . . to formulate, as have a number of the states, a state constitutional basis to deal with police conduct violative of *Miranda*." State v. Favero, 213 Neb. 718, 724, 331 N.W.2d 259, 263 (1983) (one judge opinion).

Many commentators have argued that the rulings of the Burger Court have created a need for stricter criminal procedure standards based upon state constitutions. *See, e.g.*, Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 202 (1983); Howard, *State Courts and Constitutional Rights in the Days of the Burger Court*, 62 VA. L. REV. 873 (1976); Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1 (1981); Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976) [hereinafter cited as Wilkes, *The New Federalism Revisited*]; Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421 (1974) [hereinafter cited as Wilkes, *The New Federalism*]; *Project Report, Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

But see Grano, *Perplexing Questions about Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425 (1978); Israel, *Criminal Procedure, The Burger Court, And the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977). Professor Grano argues, for example, that the characterization of the Burger Court as "an uncompromising champion of law enforcement interests is incorrect." Grano, *supra*, at 425.

Professor Kamisar, by way of contrast, has asserted that there are "two" Burger Courts, one that initially dealt "heavy blows to the Fourth Amendment," and a second that has been far less disposed to dismantle the legacy of the Warren Court. Kamisar, *The Warren Court (Was It Really So Defense-Minded ?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983). Professor Kamisar's conclusion that "the Burger Court's hostility to its predecessor's police practices rulings seems to have subsided," *id.* at 91, is debatable, and in the specific instance of the warrant requirement, was reached without the benefit of having the *Gates* ruling before him.

Regardless of how one interprets the rulings of the Burger Court, it is important to emphasize that state courts must respond to such rulings in a principled fashion. Professor Collins, for example, has argued convincingly that "a reactionary approach [that] uses the state charter in a piecemeal fashion

II. THE *ARNOLD* DECISION

A. The *Arnold* Facts

On January 26, 1982, Officer Joseph Nepodal of the Omaha police requested a warrant to search two Omaha addresses and certain vehicles for "marijuana, and records, money, or other items used in the distribution of controlled substances."[25] Some of the information in the affidavit had been secured from informants;[26] other elements were obtained from an independent police investigation.[27]

Specifically, in March, 1981, a group of "concerned citizens" met with Omaha police[28] and brought to their attention various pieces of information about alleged narcotics activities in the area of Thirty-fourth and Decatur Streets in Omaha.[29] This initial information was supplemented in January, 1982, by a telephone call from an unidentified informant who stated that a particular individual, one "Ross," was selling marijuana in that same area.[30]

Acting upon these pieces of information, Officer Nepodal initi-

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. . . for the purposes of philosophical disagreement or in order to insulate a controversial decision from Supreme Court review . . . [treats] the sovereign law of state constitution[s] [as] little more than a plaything." Collins, *supra* note 16, at 13-14. Professor Collins makes this point while criticizing those courts that have sought to evade Burger Court decisions. This same perspective should, however, apply in those instances where state courts have displayed excessive deference to Supreme Court rulings.

25. State v. Arnold, 214 Neb. 769, 772, 336 N.W.2d 97, 99 (1983).
26. Information secured from informants presents certain dangers distinct from the normal problems associated with hearsay testimony. *See infra* note 220 and accompanying text. Courts have distinguished at least three types of informants, and the legal tests applicable to information from each were, prior to *Gates*, distinguishable. *See supra* note 23.
27. The principle that police may utilize information from an informant as the starting point for an investigation is well established.
28. Brief for Appellee at 5.
29. State v. Arnold, 214 Neb. 769, 770, 336 N.W.2d 97, 98 (1983). The information included two addresses, one of which was subsequently identified as the Robert Ross residence, and a license plate number that was also registered to Ross. Brief for Appellee at 5. While incorrect in some ways, the information received from the "concerned citizens" was, in large part, verified by subsequent police investigations. *Id.* Unlike the situation in *Gates*, the details obtained from informants and presented to the court in the affidavit requesting the warrant detailed expressly criminal activities. *See infra* notes 96-123 and accompanying text.
30. State v. Arnold, 214 Neb. 769, 770-71, 336 N.W.2d 97, 98 (1983). The identity of this informant was not revealed, and there is nothing in the record to indicate that this information would, standing alone, have met the requirements set forth in *Aguilar* and *Spinelli*. *See supra* note 11. This tip would not have provided sufficient basis for issuing a warrant. However, it constituted only a small portion of the information relayed in the affidavit, and was corroborated by the ensuing investigation.

ated in January, 1982, a "controlled purchase"[31] of marijuana by an unidentified informant at the North 34th Street address.[32] During the purchase, the informant learned that larger quantities of marijuana might be purchased from "Cisco," and was given a telephone number that proved to be listed to a Sheryl Ross residing at the same address.[33] The informant was also told that purchases of larger quantities of marijuana would require "Cisco" to leave the North 34th Street residence and secure the marijuana elsewhere.[34]

A second controlled purchase at the North 34th Street address followed, during which an individual, subsequently identified as Robert Ross, left that house.[35] Ross was followed to 6915 North 24th Street, which he entered, and from which he returned to his residence. Shortly afterwards, the informant emerged, gave the police a quantity of marijuana, and indicated that Ross had had to leave the original house to secure it.[36] Further investigation revealed that the defendant, Marcia C. Arnold, about whom Nepodal had received past information indicating involvement in the distribution of controlled substances, resided at the second address.[37]

On January 26, 1982, an affidavit and application for a search

31. The Nebraska Supreme Court has recognized the validity of a "controlled purchase" as an investigative tool and has defined that term as "a purchase of controlled substances by a cooperating individual from a specific designated person or at a specific designated place, made under the personal supervision and control of an officer or officers." State v. Payne, 201 Neb. 665, 669, 271 N.W.2d 350, 352 (1978). Judge White dissented in *Payne*, arguing that the definition of a "controlled buy" had been established only at the suppression hearing and had not been before the magistrate when the warrant was issued. *Id.* at 674, 271 N.W.2d at 355 (White, J. dissenting). Judge White noted with apparent approval the procedure outlined in Jones v. United States, 336 A.2d 535 (D.C. Ct. App. 1975), which involved a careful search of the informant prior to the purchase to insure that he was not already carrying the contraband. This procedure was apparently not followed by the police in *Arnold*, a fact noted by the Appellant. Brief for Appellant at 4. However, neither the court in its decision nor Judge White in his concurring opinion addressed this issue.

32. State v. Arnold, 214 Neb. 669, 771, 336 N.W.2d 97, 98 (1983).

33. *Id.* It was subsequently determined that "Cisco" was, in fact, Robert Ross. *Id.* at 772, 336 N.W.2d at 99.

34. *Id.* at 771, 336 N.W.2d at 98.

35. *Id.* at 771, 336 N.W.2d at 99.

36. *Id.* at 771-72, 336 N.W.2d at 98-99.

37. *Id.* at 771-72, 336 N.W.2d at 99. Appellant argued that Nepodal's previous information regarding Arnold was a "bald assertion not corroborated by any reliable information and similar to the statement made [and rejected] in Spinelli wherein the suspect was purportedly a 'known gambler'." Brief for Appellant at 12. Even had the court explicitly accepted this contention, however, it is likely that it would have found sufficient other detail to sustain the issuance the issuance of the warrant. *See infra* notes 76-80 & 93-95 and accompanying text.

warrant were filed in the Omaha Municipal Court.[38] A warrant authorizing a search of both residences was issued and served the same day.[39] During the search of the Arnold residence the officers found eighty-two tablets of a substance later identified as LSD,[40] and thirty dollars that were determined to be part of the money from the earlier controlled purchases at the North 34th Street residence.[41] Arnold subsequently admitted that the LSD belonged to her and that Ross had given her $800 to purchase two pounds of marijuana.[42]

On May 13, 1982, after trial to the court without a jury, Arnold was convicted of possession of a controlled substance, LSD.[43] Arnold appealed her conviction, assigning as error the District Court's denial of her request that certain evidence obtained from the execution of a search warrant be suppressed.[44]

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38. State v. Arnold, 214 Neb. 769, 770, 336 N.W.2d 97, 98 (1983).
39. *Id.* at 772-73, 336 N.W.2d at 99.
40. *Id.* at 773, 336 N.W.2d at 99. There appears to have been some dispute regarding the contraband that the officers discovered in the Arnold residence. In her brief, Appellant declared that the police "found no marijuana, nor any instruments or records of manufacture of marijuana, but only a limited quantity of LSD which had never been mentioned previously." Brief for Appellant at 5. The state, on the other hand, contended that "[t]he officers found a few dime bags of marijuana at the residence." Brief for Appellee at 3. Arnold was arrested and charged only for possession of the LSD. State v. Arnold, 214 Neb. 769, 773, 336 N.W.2d 97, 99 (1983). Assuming that the warrant was valid, both the evidence and the charge were proper:

> When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.

State v. Waits, 185 Neb. 780, 787, 178 N.W.2d 774, 779 (1970) (quoting Skelton v. Superior Court, 1 Cal. 3d 144, 460 P.2d 485, 81 Cal. Rptr. 609 (1969)). *See also* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971); State v. King, 207 Neb. 270, 277-78, 298 N.W.2d 168, 172 (1980) (one judge opinion).
41. The presence of these funds in Arnold's purse was noted by the court, State v. Arnold, 214 Neb. 769, 773, 336 N.W.2d 97, 99 (1983), and does not appear to have been contested by the Appellant, who made no mention of this fact in her brief.
42. *Id.* at 772-73, 336 N.W.2d at 99. The court does not appear to key its holding upon these admissions, and it is likely that Arnold's conviction would have been sustained even had these statements not been made.
43. *Id.* at 770, 336 N.W.2d at 98.
44. *Id.* at 773, 336 N.W.2d at 99. The court's decision does not indicate the exact basis for the appeal, noting only that "[t]he contention is that the affidavit for the search warrant was insufficient." *Id.* at 770, 336 N.W.2d at 98.

Appellant argued that probable cause had not been established within the parameters of *Aguilar* and *Spinelli*: "[The affidavit] neither informed the magistrate of how the informant arrived at his conclusion that drugs were being kept at the premises for sale, nor did it say why the officer gave the informer credence." Brief for Appellant at 7. This focus upon the role of the

B. The *Arnold* Decision

The Nebraska Supreme Court affirmed Arnold's conviction.[45] In doing so, the court emphasized that "[a]n informant selected by the police, who makes a purchase of controlled substances under the personal direction, supervision, and control of a police officer . . . is presumptively reliable."[46] The court observed that "[t]he rule is well established that in evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity" need be established.[47] The court then articulated a two part state law test, noting that "[w]here some of the underlying circumstances are detailed," and "reason for crediting the source of the information is given,"[48] probable cause is established. Characterizing this process as a "commonsense, realistic" examination of the warrant,

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informant ignored much of the evidence presented in the request for the warrant, and in particular the fact that funds from the controlled purchase were found in Arnold's purse. *See supra* note 41 and accompanying text.

One indication of the extent to which criminal procedure practice in Nebraska has been dominated by federal rulings can be found in the posture taken by appellant in her brief. Appellant expressly limited her appeal to the question of whether the affidavit "satisfie[d] federal standards of reliability," Brief for Appellant at 6, and cited no Nebraska authorities in support of her contention that probable cause standards had not been met.

45. State v. Arnold, 214 Neb. 769, 336 N.W.2d 97 (1983). Judge McCown wrote for the court and was joined by Chief Justice Krivosha and Judges Hastings, Boslaugh, and Caporale. Judge White, joined by Judge Shanahan, wrote a concurring opinion.

46. *Id.* at 773, 336 N.W.2d at 99-100 (citation omitted). This principle was established in State v. Payne, 201 Neb. 665, 669, 271 N.W.2d 350, 352 (1978). *See supra* note 31.

By emphasizing this aspect of the case, it appears that the court focused its inquiry upon the narrow question of the reliability of the information secured during the controlled purchases. This presented a different issue than would been the case if the affidavit relied solely on the complaints from the "concerned citizens" or the telephone tip.

This distinction is critical given the court's subsequent application of the *Gates* analysis. In *Gates*, the informant was anonymous. *See infra* note 96 and accompanying text. Certain aspects of the information contained in the letter regarding the Gates' activities proved to be incorrect, see *infra* note 101, and the activities that the Illinois police observed were at least colorably "innocent." *See infra* notes 96-123 and accompanying text. In *Arnold*, however, the activities detailed in the affidavit involved clear criminal conduct, and all relevant elements of the information secured from both the informant and the citizens were fully corroborated by a thorough police investigation. *See infra* notes 76-80 and accompanying text.

47. State v. Arnold, 214 Neb. 769, 773, 336 N.W.2d 97, 99 (1983).

48. *Id.* This standard was first adopted by the court in State v. LeDent, 185 Neb. 380, 384, 176 N.W.2d 21, 23-24 (1970), and is patterned after the test established in *Aguilar/Spinelli*. *See supra* note 11.

the court concluded that the it met applicable state law tests.[49]

The Nebraska court then referred to both *Aguilar v. Texas*[50] and *Spinelli v. United States*,[51] primarily as vehicles for its acceptance of the revised standards articulated by the United States Supreme Court in *Illinois v. Gates*.[52] The court noted that *Gates* recast the previous emphasis upon the need to establish an "informant's veracity, reliability, and basis of knowledge"[53] into "simply . . . closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is probable cause to believe that contraband or evidence is located in a particular place."[54] The court then set as its duty upon review a simple inquiry as to whether "the magistrate had a substantial basis for concluding that probable cause existed."[55]

C. The *Arnold* Concurrence

In an eloquent concurring opinion, Judge White, joined by Judge Shanahan, took issue with the court's willingness to "blindly" adopt a search and seizure standard that, in his estimation, "present[ed] the disturbing vision that the bedrock of our federal constitutional rights may only be a mass of shifting sand."[56] In Judge White's estimation, the standard developed in *Aguilar* and *Spinelli*, as affirmed by the Nebraska court in *State v.*

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49. *See infra* notes 69-80 and accompanying text.
50. 378 U.S. 108 (1964).
51. 393 U.S. 410 (1969).
52. 103 S. Ct. 2317 (1983). The *Arnold* majority stated that "[t]he affidavit in the present case was adequate to support the issuance of a search warrant under the former standards of Aguilar v. Texas . . . and Spinelli v. United States. . . . Its sufficiency is even more obvious under the totality of the circumstances test established by [*Gates*] . . . ." State v. Arnold, 214 Neb. 769, 774, 336 N.W.2d 97, 100 (1983).
53. State v. Arnold, 214 Neb. 769, 774, 336 N.W.2d 97, 100 (1983).
54. *Id.* The exact standard adopted in *Arnold* provides that:

    > The task of the issuing magistrate is simply to make a practical, commensense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

    Id. This test mirrors the language utilized by the *Gates* Court. *See supra* note 9.
55. *Id.* The court has since cited the revised test with approval in State v. Gilreath, 215 Neb. 466, 468-69, 339 N.W.2d 288, 291 (1983), and State v. Williams, 214 Neb. 923, 928, 336 N.W.2d 605, 608 (1983). In *Gilreath*, the court described *Gates* and *Arnold* as having "relaxed somewhat" the warrant standards. This characterization of the revised standard is, at best, suspect. *See infra* notes 173-80 and accompanying text.
56. State v. Arnold, 214 Neb. 769, 775, 336 N.W.2d 97, 100 (1983) (White, J., concurring).

LeDent,[57] presented a sufficient basis for affirming Arnold's conviction.[58] This rendered any discussion, much less acceptance, of *Gates* unnecessary.[59]

In addition, Judge White saw within the United States Supreme Court's recent fourth amendment decisions a tendency to believe that "the necessities of law enforcement require a more flexible view of the fourth amendment."[60] This, in his estimation,

57. 185 Neb. 380, 384, 176 N.W.2d 21, 23 (1970). *See supra* note 11 & *infra* notes 72-75 and accompanying text.

58. Judge White stated: "I agree that the affidavit met the test of *Aguilar* . . . and *Spinelli* . . . ." State v. Arnold, 214 Neb. 769, 774, 336 N.W.2d 97, 100 (1983) (White, J., concurring).

59. *Id.* at 774-75, 336 N.W.2d at 100. In *Gates*, Justice White expressed a simlar belief that the facts before the Court were sufficient to find probable cause for issuance of a warrant under *Aguilar* and *Spinelli*, Illinois v. Gates, 103 S. Ct. 2317, 2347 (1983) (White, J., concurring). A number of state appellate courts have refused to adopt *Gates* when the warrant met the requirements of *Aguilar* and *Spinelli*. *See, e.g.,* State v. Summerlin, 675 P.2d 686, 691 n.1 (Ariz. 1983) (affidavit met *Aguilar-Spinelli* test; will not consider *Gates*); People v. Wares, 129 Mich. App. 136, 140, 341 N.W.2d 256, 258 (1983) ("[W]e need not decide whether the *Aguilar-Spinelli* view or the *Gates* view should be followed as the law for the future [as] the affidavit here satisfies the more restrictive *Aguilar-Spinelli* test and thus would also satisfy *Gates*.") (footnote omitted); State v. Randa, 342 N.W.2d 341, 342 n.2 (Minn. 1983) (affidavit meets the *Aguilar-Spinelli* standard); State v. Myers, 35 Wash. App. 543, __ n.6, 667 P.2d 1142, 1146 n.6 (1983) ("We need not consider the application of *Gates* in this case, inasmuch as the supporting affidavit met the more rigorous standards of the Aguilar-Spinelli test."). The Arizona court has since adopted *Gates* and found it to be retroactive, State v. Espinosa-Gamez, 678 P.2d 1379, 1384 (Ariz. 1984), and at least one lower appellate court in Minnesota has also accepted *Gates*. Hanson v. State, 344 N.W.2d 420, 423 (Minn. App. 1984).

60. State v. Arnold, 214 Neb. 769, 775, 336 N.W.2d 97, 100 (1983). The Court in *Gates* made it clear that one of its primary motivations in promulgating a "totality of circumstances" standard was to ease those "strictures that inevitably accmpany the 'two-pronged test' [which] cannot avoid seriously impeding the task of law enforcement . . . ." Illinois v. Gates, 103 S. Ct. 2317, 2331 (1983) (citations omitted).

This concern for accommodating the police has surfaced with increasing frequency in the Court's recent search and seizure rulings. *See, e.g.*, United States v. Ross, 456 U.S. 798, 820 (1982) (arguing that "practical consequences . . . would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers and packages found inside the vehicle"). Professor Gardner has noted that "the impact of *Ross* may ultimately extend beyond the automobile into the fourth amendment world in general." Gardner, *Searches and Seizures Of Automobiles And Their Contents: Fourth Amendment Considerations In A Post-Ross World*, 62 NEB. L. REV. 1, 34 (1983). The Court's subsequent rulings in *Gates* and *Villamonte-Marquez*, see *supra* note 12, provide evidence that this fear is not misplaced.

Perhaps even more alarming are the dangers posed when state courts misapply these Burger Court rulings. For example, in State v. Smith, 344 N.W.2d 505 (S.D. 1984), the court utilized *Ross* as the basis for sustaining a warrant to search both apartments in a two-family dwelling when tracks in the snow

presented the spectre of "a more orderly society" that would, inevitably, "be a less free society."[61] Given his belief that the court's decision left the people of this state with "one less tree to shield us from the devil,"[62] Judge White declared that "[i]n my view, it is now past time to consider search and seizure cases in light of Neb. Const. art. I, § 7,"[63] with the court "adopt[ing] a standard based on the Nebraska Constitution and offer[ing] such protection as we may in the courts of Nebraska."[64]

III. ANALYSIS

A careful comparison of *Arnold* and *Gates* provides an opportunity to both examine an important area of criminal procedure, and to explore the reasoning that the United States Supreme Court has employed in its recent efforts to reshape search and seizure law.

In *Arnold*, the Nebraska Court elected to adopt the *Gates* standard in a case where the affidavit met the test set forth in *Aguilar*

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from a robbery scene led to the common entrance. *Id.* at 508. As one judge noted in dissent:

> The majority's reliance on *United States v. Ross* . . . is misplaced. *Ross* . . . dealt with the search of an automobile trunk. This case deals with the search of an apartment house. The law applicable to constitutional protection against unreasonable searches and seizures which extends to searches of automobiles, cannot carte blanche, be engrafted upon the home of a citizen.

Id. at 510 (Henderson, J., dissenting) (citations omitted).

61. State v. Arnold, 214 Neb. 769, 775, 336 N.W.2d 97, 100 (1983) (White, J., concurring).
62. *Id.* at 769, 336 N.W.2d at 100-101. The allusion is to a statement attributed to Sir Thomas More in *A Man For All Seasons*.
63. State v. Arnold, 214 Neb. 769, 775, 336 N.W.2d 97, 100 (1983) (White, J., concurring). See *supra* note 22 for the text of Art. I, § 7.
64. State v. Arnold, 214 Neb. 769, 775-76, 336 N.W.2d 97, 101 (1983) (White, J., concurring).

Judge White has consistently argued that the courts must resist any and all pressures to condone police misconduct, even in the face of strong evidence that the suspect was guilty:

> The evidence is probably conclusive that the defendant was a large dealer in dangerous drugs and that suppression of the evidence would result in his freedom. As it was put by Mr. Justice (then judge) Cardozo: "the criminal is to go free because the constable has blundered." . . . I am as reluctant as the majority to bring about this result, but as Mr. Justice Clark responded in Mapp v. Ohio . . . ". . . 'there is another consideration—the imperative of judicial integrity.' . . . The criminal goes free . . . but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

State v. Payne, 201 Neb. 665, 675, 271 N.W.2d 350, 355 (1978) (White, J., dissenting) (citations omitted).

and *Spinelli*.[65] This was, of course, the court's prerogative.[66] Nevertheless, a careful examination of the *Gates* decision[67] leads to the conclusion that the United States Supreme Court engaged in a legal *tour de force* that ignored the facts of the case, misread previous case law, and arguably promulgated a probable cause standard that lends itself to confusion and abuse.[68] Viewed in this light, the precipitous acceptance of *Gates* by the *Arnold* majority was unwise, as is the continuing advisability of following the lead of the United States Supreme Court in search and seizure cases in Nebraska. Accordingly, the desirability of promulgating a Nebraska standard keyed to the guarantees of Article I, section 7, of the Nebraska Constitution becomes both evident and compelling.

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65. As indicated, while the *Gates* ruling was available to the court, neither party in *Arnold* indicated in any way that the previous tests were inappropriate. *See supra* note 18.

66. The court's willingness to do so is, however, at odds with its settled rule that "the court will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." First Trust Co. v. Smith, 134 Neb. 84, 92, 277 N.W. 762, 767 (1938); *accord*, State v. Austin, 209 Neb. 174, 306 N.W.2d 861 (1981); State *ex rel.* Casselman v. Macken, 194 Neb. 806, 235 N.W.2d 867 (1975).

In a slightly different context, Chief Justice Krivosha has pointed out the problems inherent within a precipitous application of United States Supreme Court rulings to search and seizure issues in Nebraska: "[t]he recent U.S. Supreme Court decisions of Rawlings v. Kentucky . . . and United States v. Salvucci . . . at least raise some serious question about when a person has a legitimate expectation of privacy so that a claim based upon a fourth amendment violation can be raised or entertained." State v. Vicars, 207 Neb. 325, 336, 299 N.W.2d 421, 428 (1980) (Krivosha, C.J., concurring) (citations omitted). That being the case, he would have "awaited answering the question . . . [until] a case which requires us to answer that question after the parties have fully and adequately briefed and argued the question to us. The answer to that question may not be quite as clear as we have indicated in our majority opinion today." *Id.* at 336-37, 299 N.W.2d at 428.

In People v. McFall, 672 P.2d 534 (Colo. 1983), the court adopted an approach in a post-*Gates* case that tracked closely the one suggested by Chief Justice Krivosha in *Vicars*: "The defendant did not have an opportunity to argue the *Gates* totality of the circumstances standard on appeal. Therefore, we rely solely upon the more stringent *Aguilar-Spinelli* test for our decision." *Id.* at 538 n.5.

67. It should, however, be emphasized that the court did not have the luxury of a protracted period within which to examine *Gates*. As indicated, any application of *Gates* in *Arnold* was necessarily limited by the short time between the dates upon which the respective decisions were announced. *See supra* note 18.

68. *See infra* notes 173-80 and accompanying text.

A. The *Arnold* Court's Treatment of Existing Case Law

In *Arnold* the court provided a concise summary of the legal principles that govern probable cause determinations in Nebraska:

> The rule is well established that in evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard for determining probable cause . . . .
>
> Affidavits for search warrants must be tested in a commonsense, realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason is given for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner.[69]

Under this standard, a magistrate must be given sufficient information to determine that there is a "probability" of *criminal* activity. In assessing that information, it is incumbent upon the magistrate to exercise independent judgment, and not to rely upon conclusions reached by police officers "engaged in the often competitive enterprise of ferreting out crime."[70] This is particularly important in those instances where the probable cause determination must, to any significant degree, rest upon information secured from informants.[71]

Prior to *Arnold*, the Nebraska court had declared that questions regarding "underlying circumstances" and "reason[s] . . . for crediting the source of the information"[72] provided by informants would be assessed within the contexts provided by the United States Supreme Court's holdings in *Aguilar* and *Spinelli*. The evolution of the Nebraska test was gradual. The court's initial references to both *Aguilar* and *Spinelli* were in cases that did not expressly adopt their holdings,[73] and it was not until *LeDent* that

69. State v. Arnold, 214 Neb. 769, 773, 336 N.W.2d 97, 99 (1983). As is the case with most criminal procedure standards in Nebraska, this standard is derived in large part from Supreme Court interpretations of fourth amendment guarantees. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 175 (1949) (probable cause as "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act"). The origins and development of modern search and seizure standards in Nebraska are traced in some detail in Comment, *Nebraska Standards on Search and Seizure*, 56 NEB. L. REV. 599 (1977).

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

71. *See supra* note 23 & *infra* note 220 and accompanying text.

72. State v. Arnold, 214 Neb. 769, 773, 336 N.W.2d 97, 99 (1983).

73. The court noted in State v. McCreary, 179 Neb. 589, 139 N.W.2d 362 (1966), that "[t]he defendant relies on Aguilar v. Texas . . . [but] [t]he case is controlled by United States v. Ventresca . . . ." *Id.* at 593, 139 N.W.2d at 365 (citations omitted). In much the same vein, the court in State v. Howard, 184 Neb. 274, 283-85, 167 N.W.2d 80, 87 (1969), referred to *Spinelli*, but did not articulate a specific standard that matched the "two-pronged" *Aguilar/Spinelli* test.

the court articulated a specific, albeit derivative, Nebraska test that appeared to encompass both the *Aguilar* and *Spinelli* holdings.[74] Some of the Nebraska cases dealing with these issues made passing reference to Article I, section 7, of the Nebraska Constitution.[75] Nevertheless, the clear trend on the part of the Nebraska court in cases dealing with informant's tips had been to adhere to the framework initiated in *Aguilar* and refined in *Spinelli*.

When examined within the framework provided by *Aguilar*, *Spinelli*, and *LeDent*, it becomes apparent that both the majority and Judge White were correct in their assessment that the warrant was sufficient under applicable Nebraska standards. The investigation in *Arnold* was initiated as a direct result of tips from "concerned citizens"[76] and strengthened after the receipt of information from the unidentified informant.[77] This information, however, constituted only a small portion of the facts presented to the Municipal Court in the affidavit; the tips themselves would not have led the police to Arnold, except through the most fortuitous of circumstances.[78] Rather, it was Arnold's apparent participation

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74. The rule that emerged provided:

> For the affidavit of a tip from an informant to be sufficient the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible.

State v. LeDent, 185 Neb. 380, 384, 176 N.W.2d 21, 23 (1970).

75. *See, e.g.*, State v. Howard, 184 Neb. 274, 167 N.W.2d 80 (1969):

> We will consider [the defendant's] argument . . . being mindful that both the Fourth Amendment to the United States Constitution and Article I, section 7, of the Nebraska Constitution, relate to the right of the people to be secure against *unreasonable* searches and seizures, and that search warrants shall issue only upon *probable cause* supported by oath or affirmation.

Id. at 278, 167 N.W.2d at 84 (emphasis in original).

76. State v. Arnold, 214 Neb. 769, 770, 336 N.W.2d 97, 98 (1983). As indicated, in Nebraska, citizen informants are presumptively reliable. *See supra* note 23.

77. State v. Arnold, 214 Neb. 769, 770-71, 336 N.W.2d 97, 98 (1983). There is nothing in the decision to indicate what weight the court attached to the information secured from the unidentified informant and the concerned citizens. However, by stressing the reliability of information received during a "controlled purchase" of drugs, the court appears to have determined that the magistrate relied in large part on the information obtained through the independent police investigations. *See supra* notes 46-49 and accompanying text.

78. The concerned citizens gave the police two addresses, 3416 Parker St. and 1714 N. 34th St., and a license plate number. Officer Nepodal's investigation revealed that the original N. 34th St. address was incorrect but that the Ross residence at 1722 N. 34th St. fit the description given in the anonymous telephone call received by Sergeant Sieh of the Vice/Narcotics Unit in January, 1982. Brief for Appellee at 5-6. Neither of the addresses was Ms. Arnold's, and the license plate number would not have linked Arnold to Ross absent her involvement in the sale of the marijuana. In fact, the offense for which

in the sale of the marijuana to the controlled informant that implicated her.[79] Viewed objectively, the information that led the police to Arnold was secured through a carefully controlled investigation that met applicable legal tests.[80]

As a result, police conduct in *Arnold* avoided, in large part, those "pitfalls" that many courts and commentators have detected in the development and application of the rules that have evolved from the core holdings of *Aguilar* and *Spinelli*.[81] The affidavit set

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Ms. Arnold was ultimately convicted had nothing to do with the marijuana purchases.

79. The affidavit and warrant were directed toward a suspicion of criminal activities engendered when Ross led the police to the Arnold residence. Probable cause for the search of the Arnold residence was present, and the LSD was properly seized during the execution of a valid warrant. *See supra* note 40.

80. The situation in *Arnold* thus stands in sharp contrast to that present in *Aguilar*. In *Aguilar*, the police in their affidavit averred that they had received "reliable information from a credible person and [did] believe," that narcotics were being kept at the defendant's residence. Aguilar v. Texas, 378 U.S. 108, 109 (1964). A warrant was issued based solely upon this information. No mention was made in the affidavit of any corroborating investigation, although the police had apparently kept the house under surveillance for a period of time prior to their request for a warrant. Noting that this information had not been presented to the magistrate, the Court emphasized that: "If the fact and results of such surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case." *Id.* at 108 n.1.

Justice Clark dissented in *Aguilar*, arguing that the majority had "substituted a rigid, academic formula for the unrigid standards of reasonableness and 'probable cause' . . . a substitution of technicality for practicality," *id.* at 122 (Clark, J. dissenting), and that "[t]he totality of the circumstances upon which the officer relied is certainly pertinent to the validity of the warrant." *Id.* at 120. This analysis foreshadowed much of the reasoning employed by the Court when it abandoned *Aguilar* and *Spinelli* in *Gates*.

By way of contrast, the majority in *Spinelli* stated that "[w]e believe, however, that the 'totality of circumstances' approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis." Spinelli v. United States, 393 U.S. 410, 415 (1969). Justice Blackmun was a member of the 8th Circuit majority whose decision was overruled in *Spinelli*.

One commentator provided an interesting side-note to *Spinelli* when he observed that "[t]here is a heavy hint in the concurring opinion by Justice Byron R. White that the Court believed that the F.B.I.'s 'confidential reliable informant' might well have been a tap on those two suspicious telephone lines (a belief that was widely shared by officials within the Justice Department itself)." F. GRAHAM, THE SELF-INFLICTED WOUND 210 (1970).

81. Both *Aguilar* and *Spinelli* were adopted in the face of sharply worded dissents, and various members of the Court have criticized the "two-pronged" test, and in particular the standard set forth in *Spinelli*. For example, in United State v. Harris, 403 U.S. 573 (1971), a badly splintered Court was unable to generate an opinion that would command the support of a majority of the Justices, apparently because of the hostility of some Justices to the *Agui-*

forth in considerable detail the "underlying circumstances" from which both the controlled informant and the police concluded that narcotics were probably located at both the Ross and the Arnold residences.[82] Standing alone, neither the information from "concerned citizens" nor that secured from the telephone call to the narcotics unit would have been sufficient. When coupled with the police's extensive investigative activities, however, any difficulties that might have arisen as a result of the use of informant information were overcome.

B. The *Arnold* Court's Adoption of *Gates*

The true significance of the *Arnold* decision lies in its unquestioning adoption of the standard promulgated by the United States Supreme Court in *Illinois v. Gates*.[83] In *Gates*, the Court addressed for the first time the "application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated *anonymous* informant's tip."[84] This focus upon the relative weight of information secured from an anonymous informant is important,[85] and stands in sharp contrast to the

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lar/Spinelli test: "I would go further and overrule [*Aguilar* and *Spinelli*] and wipe their holdings from the books . . . ." United States v. Harris, 403 U.S. 573, 585 (1971) (Black, J., concurring); "I continue to feel today that Spinelli at this level was wrongly decided and, like Mr. Justice Black, I would overrule it." *Id.* at 586 (Blackmun, J., concurring).

Numerous commentators have also criticized the *Aguilar/Spinelli* test on a variety of grounds. *See, e.g.*, LaFave, *Probable Cause from Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1; Livermore, *The Draper-Spinelli Problem*, 21 ARIZ. L. REV. 945 (1979); Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974); Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703 (1972); Comment, *Anonymous Tips*, *supra* note 23; Note, *Probable Cause and the First-Time Informer*, 43 COLO. L. REV. 357 (1972); Note, *The Informer's Tip as Probable Cause for Search and Arrest*, 54 CORNELL L. REV. 958 (1969).

82. The transactions occurred at the Ross residence, and Ross had apparently secured the marijuana involved in the second controlled purchase from the Arnold residence, all under the surveillance of the police.

83. 103 S. Ct. 2317, *reh'g denied*, 104 S. Ct. 33 (1983).

84. *Id.* at 2321 (emphasis added). The Court had previously denied certiorari in at least two cases that presented similar questions. *See* Anderson v. United States, 648 F.2d 29 (D.C. Cir.) and White v. United States, 648 F.2d 29 (D.C. Cir.), *cert. denied*, 454 U.S. 924 (1981); Jernigan v. Louisiana, 377 So. 2d 1222 (La. 1979), *cert. denied*, 446 U.S. 958 (1980). In each case, Justice White, joined by Justices Brennan and Marshall, dissented from the denial of the writ, arguing, for example, that it "left the state and lower federal courts in conflict and confusion over whether an anonymous tip may furnish reasonable suspicion for an investigatory detention." White v. United States, 454 U.S. 924, 924 (1981) (White, J., dissenting).

85. Neither *Aguilar* nor *Spinelli* involved information from an anonymous source. In *Aguilar*, "[a]ffiants . . . received reliable information from a credi-

situation in *Arnold*, where the initial tip was provided by presumptively reliable "concerned citizens," and the information secured during the telephone call from the "unidentified informant" was subsequently corroborated in full.[86]

Unfortunately, the *Gates* Court did not confine its holding to the narrow issue that it framed in the first part of its decision.[87] Rather, it used *Gates* as a vehicle for the formulation of a new standard for the evaluation of affidavits, not simply in situations presenting the particular problems posed by anonymous tips,[88] but for all warrant applications.[89]

The revised standard represented a significant departure from previous tests, and careful consideration of its implications would have been warranted prior to its adoption by a state court.[90] This does not, however, appear to have been the case in *Arnold*. Certain factual elements were common to the two cases.[91] Nevertheless, a careful comparison of them reveals that the resemblances

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ble person . . ." Aguilar v. Texas, 378 U.S. 108, 109 (1964). In *Spinelli*, the magistrate was told that "the FBI has been informed by a confidential reliable informant . . . ." Spinelli v. United states, 393 U.S. 410, 414 (1968). The informant in Draper v. United States, 358 U.S. 307 (1959), the case whose fact pattern was utilized by the *Spinelli* Court as a "suitable benchmark," Spinelli v. United States, 393 U.S. 410, 416 (1968), was "a 'special employee' of the Bureau of Narcotics . . . [whose information] had always [been] found . . . to be accurate and reliable." Draper v. United States, 358 U.S. 307, 309 (1959). The importance of this fact in *Draper* has generally been overlooked, and the Court's subsequent treatment of *Draper* has been a source of confusion. *See infra* notes 110-19 and accompanying text.

86. The telephone informant indicated only that "a person named Ross was selling marijuana in the 34th and Decatur Streets area." State v. Arnold, 214 Neb. 769, 771, 336 N.W.2d 97, 98 (1983). The subsequent controlled purchases were made from Robert Ross.

87. *See supra* note 84 and accompanying text.

88. *See infra* note 220 and accompanying text.

89. While the majority initiated its discussion with a statement that the issue presented involved questions arising from an anonymous tip, *see supra* note 84 and accompanying text, the rule that it formulated its *not* expressly limited to probable cause inquiries involving informants. *See supra* note 11. Rather, the Court fashioned a broad rule that will, presumably, be applied to all warrant determinations. The Texas Court of Criminal Appeals did precisely this in Bellah v. State, 653 S.W.2d 795, 796 n.2 (Tex. Crim. App. 1983) ("*Gates* involved a search warrant, but the rationale is equally applicable to the arrest warrant in this case. . . .") (citation omitted). *See also* Commonwealth v. Moore, __ Pa. Super. __, __ n.3, 467 A.2d 862, 865 n.3 (1983) (*Gates* standard applies to arrest warrants).

90. This would be particularly true when that court has consistently held that constitutional rulings should be narrowly tailored to fit the specific facts before the court. *See supra* note 66.

91. Each investigation was initiated after the police had received a tip, and in each the police supplemented the informant's information through an investigation designed to amplify and verify the data that the informants had provided.

between the cases are, at best, superficial,[92] making the wisdom of the Nebraska court's precipitous adoption of the *Gates* standard questionable.

1. Arnold *and* Gates*: The Respective Courts' Treatment of the Facts*

In *Arnold* the police investigation centered upon a carefully orchestrated sequence of events that documented explicit criminal activities.[93] No innocent gloss could be placed upon Ms. Arnold's conduct. Leaving aside her subsequent admissions,[94] the web of facts detailed in the police affidavit more than met the probable cause requirements envisioned under even the strictest interpretation of the applicable tests.[95]

The situation in *Gates* was categorically different. The investigation that led to the conviction of Lance and Susan Gates began when the Bloomingdale, Illinois police received an anonymous letter that claimed that the Gates were selling drugs and predicted a specific pattern of future criminal conduct.[96] Certain aspects of the anonymous letter and its predictions about future actions by

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92. Factual parallels are neither necessary nor likely, and the sole concern of the court should be the careful application of the proper legal standard. Nevertheless, a careful examination of the two cases reveals substantial discrepancies that become all the more noteworthy given the Nebraska court's explicit statement that prior tests were met. *See supra* notes 52 & 58-59 and accompanying text.

93. This is not to imply that the police in *Gates* did not engage in a structured investigation. Rather, the focus here is upon the *nature* of the activities that the police observed and reported in their affidavit.

94. It does not appear that the court placed any great weight upon Arnold's admission that she had received funds from Ross to purchase the marijuana. State v. Arnold, 214 Neb. 769, 773, 336 N.W.2d 97, 99 (1983). The court's decision may, then, be read fairly as relying *solely* upon its assessment of the contents of the affidavit. This does not appear to have been the case in *Gates*. *See infra* notes 96-123 and accompanying text.

95. For example, none of the reasons traditionally given for discrediting informant information would apply in *Arnold*. *See* 1 W. LAFAVE, *supra* note 23, at § 3.3. *See also infra* note 220 and accompanying text. In addition, the affidavit would have been sustained under the applicable alternate formulations for probable cause determinations outlined in Comment, *supra* note 23, at 124 n.233.

96. The entire letter read:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, when Lance flys down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over

the Gates were borne out: Lance Gates did fly to Florida,[97] did meet his wife at a motel,[98] and did return to Bloomingdale[99] in a

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> $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.
>
> Lance & Susan Gates
> Greenway
> in Condominiums.

Illinois v. Gates, 103 S. Ct. 2317, 2325 (1983).

One aspect of the anonymous letter, its reference to the frequent visits of "some big drug dealers," appears to have been lost on the Bloomingdale police. Rather than placing the Gates residence under surveillance, and possibly identifying and arresting numerous pushers, the police elected to serve the warrant immediately. This lack of professionalism stands in sharp contrast to the conduct of the Omaha police in *Arnold*, who engaged in an extensive investigation that drew within its web parties, and in particular Ms. Arnold, who were not mentioned in the initial tips. More importantly, by sanctioning this conduct, the *Gates* majority does implicit violence to the need to detect "sophisticated criminal syndicates" that certain of its members have stressed when arguing for a different standard of review in drug cases. *See, e.g.*, Florida v. Royer, 103 S. Ct. 1319, 1332 (1983) (Blackmun, J., dissenting) (police conduct in airport drug profile detention "should not be subjected to a requirement of probable cause"); United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) (Powell, J., concurring) (obstacles to detection of drug traffic are immense and should be accounted for). *See also infra* notes 185 & 250 and accompanying text.

97. However, unlike suspects in other drug cases that have come before the Court, *see, e.g.*, Florida v. Royer, 103 S. Ct. 1319 (1983), Lance Gates's conduct did not fit any of the patterns of behavior outlined in drug courier profiles:

> Lance does not appear to have behaved suspiciously in flying down to Florida. He made a reservation in his own name and gave an accurate home phone number to the airlines. . . . [The] affidavit does not report that he did any of the other things drug couriers are notorious for doing, such as paying for the ticket in cash, . . . dressing casually, . . . looking pale and nervous, . . . improperly filling out baggage tags, . . . carrying American Tourister luggage, . . . not carrying any luggage . . . or changing airline en route . . . .

Illinois v. Gates, 103 S. Ct. 2317, 2360 n.2 (Stevens, J., dissenting) (citations omitted).

Nor, as the Court has found, would a simple match to such a profile *necessarily* justify the conclusion that criminal activity was afoot: "We cannot agree with the State, if this is its position, that every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge." Florida v. Royer, 103 S. Ct. 1319, 1329 (1983) (plurality opinion).

98. The affidavit stated, however, only that "a female" had left West Palm Beach with Lance. People v. Gates, 82 Ill. App. 3d 749, 757, 403 N.E.2d 77, 82 (1980). The identity of the woman was not established until the Gates had arrived in Bloomingdale.

vehicle that subsequently was found to contain marijuana.[100] Other statements in the letter, however, proved to be inaccurate.[101]

As Justice Stevens observed in his dissenting opinion,[102] the critical link in forging the probable cause chain was that the Gates returned immediately to Bloomingdale.[103] The Illinois magistrate did not, however, know this at the time that the request for the warrant was made.[104] All that he knew was that Lance Gates had met a woman in Florida and had left West Palm Beach on an interstate highway that, in the words of both the majority and Justice

99. At the time that the warrant was issued the magistrate knew only that the Gates had left West Palm Beach; he did not know their destination.

100. Illinois v. Gates, 103 U.S. 2317, 2325-26 (1983). It should be noted that in his dissenting opinion Justice Stevens argued that the searches of the house and car might arguably be treated differently in light of the Court's decision in United States v. Ross, 456 U.S. 798 (1982). Illinois v. Gates, 103 S. Ct. 2317, 2361-62 (Stevens, J., dissenting). Accordingly, Justice Stevens would have found that the search of the house was not valid, *id.* at 2361, and that the search of the car should be reexamined by the Illinois court in light of *Ross*. *Id.* at 2362.

101. Susan Gates had remained in Florida to meet Lance, while the anonymous letter had predicted that she would fly back. Justice Stevens found this significant: "The informant had predicted an itinerary that always kept one spouse in Bloomingdale, suggesting that the Gates did not want to leave their home unguarded because something valuable was hidden within. That inference obviously could not be drawn when it was known that the pair was actually together over a thousand miles from home." *Id.* at 2360 (1983) (Stevens, J., dissenting). The majority, in turn, argued that this discrepancy should be discounted because "[w]e have never required that informants used by the police be infallible, and can see no reason to impose such a requirement in this case." *Id.* at 2335, n.14. This debate is largely irrelevant. It seems to assume that criminals have both the insight and capacity to always act in their own best interest. Even if such a belief were warranted, however, it does not account for the fact that those activities known at the time that the warrant was found were innocent on their face.

102. As indicated, Justice Stevens in dissent argued that the warrant should be treated differently as to the house and the car. *See supra* note 100.

103. The majority stressed that "only 36 hours after [Lance] had flown out of Chicago [the Gates] returned to their home in Bloomingdale, driving the car in which they had left West Palm Beach some 22 hours earlier." Illinois v. Gates, 103 S. Ct. 2317, 2326 (1983). As Justice Stevens pointed out, however:

> The fact that Lance and Sue Gates made a 22-hour nonstop drive from West Palm Beach, Florida, to Bloomingdale, Illinois, only a few hours after Lance had flown to Florida provided persuasive evidence that they were engaged in illict activity. That fact, however, was not known to the magistrate when he issued the warrant to search their home.

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

104. It has long been settled that magistrates may consider only that information that is before them in the affidavit. Giordenello v. United States, 357 U.S. 480, 486 (1958).

White, indicated only an "*apparent* immediate return North."[105] But, as Justice Stevens observed, it is far from obvious that travelers on that highway are in fact destined for the Chicago area.[106] Indeed, it was likely "that each year dozens of perfectly innocent people fly to Florida, meet a waiting spouse, and drive off together in the family car."[107]

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105. Illinois v. Gates, 103 S. Ct. 2317, 2334 (1983); *id.* at 2348 (White, J., concurring) (emphasis added).

106. In fact, "the same highway is also commonly used by travelers to Disney World, Sea World, and Ringling Brothers and Barnum and Bailey Circus World. It is also the road to Cocoa Beach, Cape Canaveral, and Washington, D.C." *Id.* at 2360 n.3 (Stevens, J dissenting).

107. *Id.* Justice White conceded this point, *id.* at 2349 n.24 (White, J., concurring), but preferred to "agree with the Court . . . that Lance Gates' flight to Palm Beach, an area known to be a source of narcotics, the brief overnight stay in a motel, and apparent immediate return North, suggest a pattern that trained law enforcement officers have recognized as indicative of illicit drug-dealing activity." *Id.* at 2348 (footnote omitted). Both Justice White and the majority appear to have attached considerable weight to the area's reputation: "[i]n addition to being a popular vacation site, Florida is well-known as a source of narcotics and other illegal drugs." *Id.* at 2334.

It appears that a majority of the Court in *Gates* argued that a magistrate may determine that probable cause exists through "guilt by association." Probable cause determinations are subject to a somewhat lower evidentiary threshold than proof of criminal guilt. *See supra* note 69 and accompanying text. Nevertheless, the potential for abuse within such a standard is immense. Moreover, a careful examination of other recent decisions of the Court indicates that certain justices are, at best, inconsistent in their application of this principle. In *Royer*, for example, Justice Blackmun in dissent argued that "[t]he character of the police room did not transform the encounter into the functional equivalent of an arrest." Florida v. Royer, 103 S. Ct. 1319, 1334 n.2 (1983) (Blackmun, J., dissenting). In a similar vein, Justice Rehnquist, joined by the Chief Justice and Justice O'Connor, took exception with the plurality opinion's characterization of the room where Royer was detained. *Id.* at 1342 n.10 (Rehnquist, J. dissenting). In *Royer*, then, the nature of a given place was unimportant if it served to free the defendant; in *Gates*, where it would allow conviction, this same characteristic suddenly became significant.

State courts have begun to rely upon the *Gates* characterization of Florida in their probable cause determinations. For example, in State v. Lang, 105 Idaho 683, 672 P.2d 561 (1983), the court cited *Gates* as authority for the proposition that "[t]he destination of the suspect further bolstered the finding of probable cause. In addition to being a popular vacation site, Florida is well known as a source of narcotics and other drugs. . . ." *Id.* at 685, 672 P.2d at 563 (citations omitted). *Lang* produced a sharply worded dissent, within which the dissenting judge took issue with the Idaho court's willingness to follow *Gates* and "stigmatize . . . the whole state of Florida . . . heaping carelessness upon carelessness." *Id.* at 691, 672 P.2d at 569 (Bistline, J., dissenting).

The Nebraska court has, however, on at least one occasion soundly rejected similar assertions:

> Next is the claim of the officer that vans and campers are used more than other vehicles for transportation of controlled substances.

The majority in *Gates* refused to accept this possible explanation of the Gates conduct, preferring instead to focus upon what it characterized as the "suspicious" nature of their activities.[108] Viewed dispassionately, however, the conduct of both Lance and Susan Gates was at least arguably innocent, and it was upon this reading of the facts that the Illinois courts focused in reaching their determinations that the requirements of *Aguilar* and *Spinelli* had not been met.

Both Illinois courts found that the "corroborated" activities of the Gates were innocent on their face.[109] The majority in *Gates* acknowledged the Illinois Supreme Court's characterization of the activities detailed in the warrant as innocent. Nevertheless, it stated that "[w]e are inclined to agree, however, with the observation of [Illinois] Justice Moran in his dissenting opinion that '[i]n this case, just as in *Draper*, seemingly innocent activity became suspicious in light of the initial tip.' "[110]

Unfortunately, this characterization misreads the result in *Draper v. United States*,[111] and perpetuates the confusion generated when the *Spinelli* Court referred to the fact pattern in *Draper* as "detail . . . [that] provides a suitable benchmark" for an adequate informant tip.[112] In *Draper* an *identified* informant[113] pre-

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> This may be true, but it is also true that there are tens of thousands of such vehicles that are not used for such purposes. We can hardly say that each and every camper van may be searched. There is no way we can remove the owners and operators of all such vehicles from the protection of the Fourth Amendment. The nature of the vehicle alone surely is not enough, if, in fact, it is at all significant.

State v. Aden, 196 Neb. 149, 158, 241 N.W.2d 669, 673 (1976).

108. The travel pattern was "as suggestive of a pre-arranged drug run, as it [was] of an ordinary vacation trip." Illinois v. Gates, 103 S Ct. 2317, 2334 (1983).

109. The Illinois Supreme Court concluded that "[t]he corroboration of innocent activity is insufficient to support a finding of probable cause." People v. Gates, 85 Ill. 2d 376, 390, 423 N.E.2d 887, 893 (1981). The initial appellate court noted: "Were we to accept the State's argument, we would permit government invasion of the privacy of persons solely on the basis of anonymous tips, made perhaps out of spite or based upon unsubstantiated rumor, merely because innocent details have been verified by the observations of a police officer." People v. Gates, 82 Ill. App. 3d 749, 755, 403 N.E.2d 77, 81 (1980).

110. Illinois v. Gates, 103 S. Ct. 2317, 2335 n.13 (1983). In his dissent, Judge Moran declared: "In this case, as in *Draper*, *every* detail of the informant's information was corroborated by the police investigation." People v. Gates, 85 Ill. 2d 376, 394, 423 N.E.2d 887, 895 (1981) (Moran, J., dissenting) (emphasis added). This was simply not true. *See supra* note 101.

111. 358 U.S. 307 (1959).

112. Spinelli v. United States, 393 U.S. 410, 416 (1969). This use of *Draper* by the Court in Spinelli has, quite properly, been cited as a source of great confusion for the courts in their attempts to apply the *Aguilar* and *Spinelli* holdings. *See generally supra* note 81 and authorities cited therein. In New York, the Court of Appeals cited this confusion as one of the major factors in its decision to reject the *Aguilar-Spinelli-Draper* morass and fashion its own stan-

dicted that Draper would return to Denver from Chicago with heroin in his possession,[114] and described in detail Draper's physical attributes, attire, and demeanor.[115] The predictions proved accurate.

As the majority in *Gates* correctly noted, "*all* of the corroborating detail established in *Draper* . . . was of entirely innocent activity."[116] The Court's attempt to square the facts in *Draper* with those in *Gates* is, however, unconvincing. The informant in *Draper* was known and his reliability previously established.[117] The *Gates* majority argued that, in *Draper*, independent police investigation had corroborated the informant information.[118] How-

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dard based upon the New York Constitution. *See* People v. Elwell, 50 N.Y.2d 231, 241-42, 406 N.E.2d 471, 477-78, 428 N.Y.S.2d 655, 662 (1980) (state constitution requires that magistrate be provided "noncriminal detail received from the informant . . . so explicit and extensive and so well confirmed by police observation as to warrant the inference that the informant or his source was speaking from personal observation"). In People v. Landy, 59 N.Y.2d 369, 452 N.E.2d 1185, 465 N.Y.S.2d 857 (1983), the court refused to consider the *Gates* standard, arguing that *Elwell* provided the applicable test. *Id.* at 375 n.*, 452 N.E.2d at 1188 n.*, 465 N.Y.S.2d at 860 n.*.

113. The informant's name was Hereford. The Court noted that he "had been engaged as a 'special employee' of the Bureau of Narcotics at Denver for about six months, and from time to time gave information . . . regarding violations of the narcotics laws, for which [he] was paid small sums of money, and . . . the information [had always been] accurate and reliable." Draper v. United States, 358 U.S. 307, 309 (1959). Unfortunately, "Hereford died four days after the arrest and therefore did not testify at the hearing on the motion [to suppress]." *Id.* at 310.

114. Specifically, Hereford alleged that Draper was " 'peddling narcotics to several addicts' in [Denver]." *Id.* at 309.

115. Hereford provided specific details as to the date, time, and mode of transportation that Draper would employ, his clothing, a bag he would be carrying, and his habits. *Id.* The only detail left to verify was that Draper did in fact have the heroin in his possession.

116. Illinois v. Gates, 103 S. Ct. 2317, 2335 n.13 (1983).

117. *See supra* note 113. This situation was not present in either *Aguilar* or *Spinelli*, and was by definition impossible given the *anonymous* informant in *Gates*. *See supra* note 85.

118. The majority in *Gates* asserted that:

> The Supreme Court of Illinois reasoned that *Draper* involved an informant who had given reliable information on previous occasions, while the honesty and reliability of the anonymous informant in this case were unknown to the Bloomingdale police. While this distinction might be an apt one at the time the police department received the anonymous letter, it became far less significant after . . . independent investigative work occurred.

Illinois v. Gates, 103 S. Ct. 2317, 2335 (1983). The difficulty with this contention lies in the extent to which one needs to color the activities documented by the independent investigation with the assertions of criminality secured from a totally anonymous source. In this regard it is interesting to note that the State of Illinois made the following assertion in its appeal of *Gates*:

> The informer in this case was a citizen informer rather than a paid

ever, this rather cursory treatment seriously misrepresents the process by which the *Draper* Court arrived at its determination that the tip should be credited. In *Draper*, the majority employed an analytic sequence within which it expressly stated:

> [t]he information given to narcotic agent Marsh by 'special employee' Hereford may have been hearsay to Marsh, *but coming from one employed for that purpose and whose information had always been found accurate and reliable*, it is clear that Marsh would have been derelict in his duties had he not pursued it.[119]

The informant in *Gates* was, however, anonymous. As the Court conceded:

> We are inclined to agree—that, standing alone, the anonymous letter sent to the Bloomingdale Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe that contraband would be found in the Gates' car and home. The letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gates' criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found . . . .[120]

> police informant. The informer volunteered his information. He received no reward. He had no apparent financial reason to lie. In this respect, the informer in this case resesmbles the unnamed "third persons having knowledge of the said taxpayer's financial condition" whose information was credited in Jaben v. United States . . . or the eyewitnesses whose information was credited in Chambers v. Maroney . . . .

Brief for Petitioner at 19-20 (citations omitted). It is difficult to see how this statement could have been made with a straight face, *absent* the subsequent documentation of criminal activities after the warrant had actually been served. Even then, the verification of the details established only that the informant's information was generally correct; it tells one nothing of his character.

119. Draper v. United States, 358 U.S. 307, 312-13 (1959) (emphasis added). In his concurring opinion in *Spinelli*, Justice White noted that:

> The thrust of Draper is not that the [nine] verified facts have independent significance with respect to proof of the tenth [fact]. The argument instead relates to the reliability of the source: because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts.

Spinelli v. United States, 393 U.S. 410, 427 (1969) (White, J., concurring).

Justices White and Brennan debated the meaning of this statement in their respective opinions in *Gates*. Illinois v. Gates, 103 S. Ct. 2317, 2348-49 (1983) (White, J., concurring); *id.* at 2354-55 (Brennan, J., dissenting) (emphasizing technical consideration of the "veracity" and "reliability" prongs of *Aguilar/Spinelli*). Such inquiries may or may not be illuminating. The central, and essentially ignored, point in *Draper* was that the informant was known and had been previously shown to be reliable. It was on this basis that the *Draper* Court determined that Hereford had provided "inside information" which, while innocent on its face, could be safely connected with criminal activities.

120. Illinois v. Gates, 103 S. Ct. 2317, 2326 (1983). It does appear that the Court did

Prior to the point at which the warrant was served, nothing that the Gates did presented evidence of *overt* criminal activities.[121] As Justice Stevens noted, "[g]iven that the note's predictions were faulty in one significant respect, and were corroborated by nothing except ordinary innocent activity, I must surmise that the Court's evaluation of the warrant's validity has been colored by subsequent events."[122] Viewed in this context, the Court's holding falls squarely within the now apparently discredited warning in *Spinelli* that courts must avoid affirming warrants based upon "allegations [that] contain no suggestion of criminal conduct when taken by themselves . . . and . . . are . . . endowed with an aura of suspicion [solely] by virtue of the informer's tip."[123]

Regardless of whether the Court's holding in *Gates* was "correct," a strong case can be made for distinguishing the fact patterns in *Gates* and *Arnold*. As the *Gates* Court readily admitted, the affidavit in that case failed to meet the requirements of *Aguilar* and *Spinelli*.[124] Accordingly, the Court needed to reach out and embrace a new, less stringent standard in order to sustain the search and seizure. In *Arnold*, however, there was no need to fashion a new doctrine. The affidavit met applicable tests, and police conduct was meticulous and correct.[125] Given the significant impact that the adoption of the *Gates* standard will have upon search

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reject the State of Illinois' attempt to characterize the informant as an "pure" citizen informant. *See supra* note 118. In his dissent from the denial of *certiorari* in Jernigan v. Louisiana, 446 U.S. 958 (1980), Justice White observed that "[t]he informers in *Adams* and *Draper* were known to the officers and were known to have provided reliable information in the past. The same cannot be said to an anonymous tipster." *Id.* at 959 (White, J., dissenting).

121. Courts do not, of course, require "proof beyond a reasonable doubt" in order to sustain a probable cause determination for the issuance of a search warrant: probable cause is a "practical, nontechnical conception." Brinegar v. United States, 338 U.S. 160, 176 (1949). *See* State v. Arnold, 214 Neb. 769, 773, 336 N.W.2d 97, 99 (1983). Nevertheless, it is at least arguable that the facts of *Gates*, *absent* the knowledge that drugs and other illegal materials were discovered when the warrants were served, would establish a *probability* of criminal activity.

More importantly, as the conduct of the Omaha police in setting up their controlled purchases in the Arnold case clearly demonstrates, the police have ample means at their command to extend a criminal investigation and secure undeniable evidence of overt criminal activity. As Justice Brennan has observed: "[i]t is unseemly at best for the Government to refrain from implementing a simple, effective and unintrusive law enforcement device, and then to argue to this Court that the absence of such a device justifies an unprecedented invasion of constitutionally guaranteed liberties." United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2590 (1983) (Brennan, J., dissenting).

122. Illinois v. Gates, 103 S. Ct. 2317, 2361 (1983) (Stevens, J., dissenting).

123. Spinelli v. United States, 393 U.S. 410, 418 (1969).

124. *See supra* note 120 and accompanying text.

125. *See supra* notes 76-80 & 93-95 and accompanying text.

and seizure law in Nebraska, it becomes at least arguable that it was a mistake for the Nebraska court to apply the *Gates* standard to the facts before it in *Arnold*, even as an afterthought. This is particularly true given the Nebraska court's prior insistence that constitutional rules be closely tied to the facts presented within a given case.[126]

The general principles that govern the issuance of warrants have evolved over an extended period of time and have been fashioned in a manner that will allow them to be applied to a variety of situations.[127] Indeed, in many instances criticisms of *Aguilar* and *Spinelli* reflect difficulties that have arisen because of the tensions inherent within the application of general principles to particular factual situations.[128] In *Gates*, the conclusion is inescapable that the facts before the magistrate, unlike those in *Arnold*, could be characterized as indicia of criminal activities *only* if the anonymous informant is endowed with a presumption of credibility. The *Gates* Court's determination that this was appropriate cannot be reasonably divorced, however, from its after-the-fact knowledge that the couple returned immediately to Bloomingdale and that contraband was then found in their car and home.

In defending its holding, the *Gates* Court argued that the positions adopted by both the dissenting Justices and the Illinois courts would "[leave] virtually no place for anonymous citizen informants" within the law enforcement spectrum.[129]

As an initial matter, it is difficult to see how the majority could justify such a conclusion. Neither the Illinois courts nor the dis-

126. *See supra* note 66.

127. Much of the current debate about the fourth amendment centers upon competing perceptions of the value of "rigid" versus "flexible" tests. Proponents of a "flexible" approach generally premise their argument upon the need to avoid "strictures that . . . seriously [impede] the task of law enforcement . . . ." Illinois v. Gates, 103 S. Ct. 2317, 2331 (1983). Those who would retain a more structured series of tests believe that a failure to do so "leaves no workable guidelines either for the police or for those who seek legal redress after their rights have been violated." Countryman, *Search and Seizure in a Shambles? Recasting Fourth Amendment Law in the Mold of Justice Douglas*, 64 IOWA L. REV. 435, 459 (1979).

128. Justice White appears to make this point in his opinions dissenting from the denial of petitions for writs of certiorari in the companion cases of White v. United States and Anderson v. United States, 454 U.S. 924 (1981): "While the determination of reasonable suspicion is heavily dependent on the specificity of the information, the amount of verification, and the urgency of a particular situation, the conflicting results cannot be explained as accounting for different factual patterns." *Id.* at 926 n.2 (White, J., dissenting). The question that Justice White wished to address was "whether an anonymous tip may furnish reasonable suspicion for an investigatory detention." *Id.* at 924. Justice White was joined in these opinions by Justices Brennan and Marshall.

129. Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983).

senting Justices asserted that anonymous tips have *no* value or should be preemptorily rejected. Rather, they insisted that such information be subjected to a higher level of scrutiny than would be appropriate when the record demonstrated the informant's reliability and basis of knowledge. Certainly, given the traditional distrust of hearsay evidence, which provided the analytic foundations for the Court's pre-*Aguilar* rulings, the requirement that an *anonymous* tip be rigorously evaluated is not unreasonable. As one commentator has noted:

> [a] tip from an anonymous informant is presumptively unreliable because the police and the magistrate cannot know the motives of the anonymous informant—he may be motivated by a sense of civic duty, revenge, or a desire to eliminate criminal competition. . . . The motives of anonymous informants may include harassment of a neighbor or a racial minority.[130]

In addition, the assertion that a revised standard is required to preserve a place for anonymous informants fails to accommodate in any meaningful fashion the serious reservations expressed by Justices White and Brennan. While concurring with the result reached by the Court, Justice White expressed a fear that the revised standard provides magistrates and police with no meaningful guidance.[131] And in dissent, Justice Brennan argued that there is "a need to structure the inquiry in an effort to insure greater accuracy."[132]

The majority's willingness to vest broad discretion in the authorities is perhaps a commendable exercise in good faith. The dangers implicit within the *Gates* holding are, however, aptly illustrated by the gloss placed upon a "totality of the circumstances" standard by the State of Illinois when it argued in *Gates* that:

> As applied to the instant case the proposed standard yields a fairly simple and straightforward question for decision: Whether, based on the totality of the circumstances and judged by the factual and practical considerations of everyday life, could [the magistrate] *reasonably* conclude that Lance Gates was *probably* bringing drugs back from Florida, just as the letter predicted. Put somewhat differently the question is: Based on the totality of the circumstances in this particular case, could *any* reasonable person think that Lance Gates was probably transporting drugs?[133]

That is, when assessed within the confines of this revised standard, the "reasonable" determination of *any* individual that probable cause existed should be accepted. Such a framework reduces legal

130. Comment, *supra* note 23, at 107 (footnotes omitted).
131. Illinois v. Gates, 103 S. Ct. 2317, 2350-51 (1983) (White, J., concurring). Justice White has expressed similar concerns in the past. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 168 (1978) (White, J., dissenting) (revised approach to issue of standing "will not provide law enforcement officers with a bright line between the protected and the unprotected").
132. *Id.* at 2355 (1983) (Brennan, J., dissenting).
133. Petitioner's Reply Brief on Reargument at 2 (emphasis in original).

determinations of the utmost importance to what amounts to a "lowest common denominator" jurisprudence.

Moreover, the three hypothetical situations posed by the Court to illustrate the value of its holding do not support its analysis. In *Gates* there was neither a "particular informant . . . known for the unusual reliability of his predictions of certain types of criminal activities"[134] nor an "unquestionably honest citizen."[135] Nor did the anonymous informant whose credibility and reliability were questioned provide "a statement that the event was observed first-hand, entitl[ing] his tip to greater weight than might otherwise be the case."[136] Rather, the Court sustained a determination of probable cause based upon information received from a totally anonymous source, corroborated only by the facially innocent travels of Lance Gates.

Viewed in this context, the *Gates* majority's argument that lower courts will continue to require that affidavits present indications of informant "veracity" and "basis of knowledge" is unconvincing. That was simply not the case in *Gates*. Accordingly, it is difficult, if not impossible, to believe that lower courts will hold themselves to a more stringent analytic standard than that employed by the Court itself when it promulgated the revised test.[137]

2. Arnold *and* Gates: *The Respective Courts' Treatment of Prior Case Law*

In *Arnold*, the Nebraska Supreme Court examined carefully the applicable legal tests and reached a reasoned conclusion that the affidavit fell within their parameters. No alteration of the prior tests was required to sustain Ms. Arnold's conviction—a fact that the court acknowledged.[138] This was not possible in *Gates*. The affidavit would not pass muster under the *Aguilar/Spinelli* formulation, and it was necessary for the Court to abandon these holdings in order to justify its reversal of the Illinois courts.

In arguing for its result in *Gates*, the United States Supreme Court advanced a second rationale, the need to escape "[t]he strictures that inevitably accompany the 'two-pronged' test [which] cannot avoid seriously impeding the task of law enforcement."[139] The *Gates* majority argued that lower courts have become overly technical in their interpretation and application of *Aguilar* and

134. Illinois v. Gates, 103 S. Ct. 2317, 2329 (1983).
135. *Id.*
136. *Id.* at 2330.
137. One might, in this context, be tempted to argue that what was sauce for the Supreme Goose will almost certainly be so for the deferential State Ganders.
138. State v. Arnold, 214 Neb. 769, 774, 336 N.W.2d 97, 100 (1983).
139. Illinois v. Gates, 103 S. Ct. 2317, 2331 (1983) (citation omitted).

Spinelli,[140] and cited as proof of this point three cases "brought to [the Court's] attention by the State [that] reflect a rigid application of such rules."[141]

As both Justice White and Justice Brennan properly noted, the fact that *some* lower courts *might* have misapplied the *Aguilar* and *Spinelli* standards does not in itself provide a compelling rationale for rejecting them.[142] More importantly, close scrutiny of the cited cases does not verify the Court's analysis of them.[143]

In *People v. Palanza*,[144] for example, the Court noted correctly that the warrant was invalidated because "[t]here is no indication as to how the informant or for that matter any other person could tell whether a white substance was cocaine and not some other white substance such as sugar or salt."[145] The majority in *Gates* apparently believed that the Illinois court had engaged in an ex-

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140. The majority stated that:

> Unlike a totality of circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending the informant's tip, the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate.

Illinois v. Gates, 103 S. Ct. 2317, 2330 (1983) (footnote omitted).

141. *Id.* at 2330 n.9.

142. Justice Brennan, for example, observed that "[i]t is no justification for rejecting them outright that some courts may have employed an overly technical version of the *Aguilar-Spinelli* standards . . . ." Illinois v. Gates, 103 S. Ct. 2317, 2358 (1983) (Brennan, J., dissenting). Justice White argued only that he was cognizant of ". . . the fact that *some* lower courts have been applying *Aguilar* and *Spinelli* in an unduly restrictive manner." *Id.* at 2350-51 (White, J., concurring) (emphasis added). However, Justice White's assertion that "[t]he holdings in these cases could easily be disapproved without reliance on a 'totality of the circumstances' analysis," *id.* at 2350 n.26, is incorrect. *See infra* notes 144-64 and accompanying text.

143. This is not to say that there are not cases that might be cited as excellent examples of an overly technical application of *Aguilar* and *Spinelli*. There undoubtedly are. The question is whether they justify wholesale rejection of the requirement in *Aguilar* and *Spinelli* that the magistrate be given certain basic information about the informant and the presumptively *criminal* activities that the informant or police have, in theory, verified. With regard to "technical" applications of the prior test, the Court emphasized, correctly, that only "some" of the information bearing upon each aspect of the *Augilar/Spinelli* test need be presented to the magistrate. Illinois v. Gates, 103 S. Ct. 2317, 2328 n.6 (1983). This observation ignored the fact that, in *Gates*, *no* information regarding the reliability or credibility of the informant was available, and that the activities that the police could document at the time that the warrant was sought were innocent on their face. *See supra* notes 96-123 and accompanying text.

144. 55 Ill. App. 3d 1028, 371 N.E.2d 687 (1978).

145. *Id.* at 1030, 371 N.E.2d at 689. The affidavit specified that the informant "has observed cocaine on numerous occasions in the past and is thoroughly famil-

cessively technical application of *Aguilar* and *Spinelli* because it gave no credence to the visual identification of cocaine by an individual "familiar" with its appearance. The Illinois court did find the affidavit deficient under the *Aguilar* and *Spinelli* tests.[146] However, it went on to observe that:

> Another facet of the case should be mentioned. When the motion to suppress the evidence was heard, the defendants called an Illinois Bureau of Identification Criminalist who was familiar with narcotics prosecutions and had often testified in behalf of the prosecution. This witness testified that it was impossible to ascertain that a white substance was cocaine merely from its appearance.[147]

In *Palanza*, then, the critical factor in the state's inability to meet the requirements of *Aguilar* and *Spinelli* was its failure to overcome testimony that undermined the reliability of the informant's observations. This was a *factual* failure, rather than a barrier to conviction erected by an overly stringent probable cause standard.

In *People v. Brethauer*[148] an informant "known to be reliable" provided detailed information, based upon personal observation, regarding the location and nature of certain drugs.[149] Once again, the state court found the affidavit defective, and the Supreme Court in *Gates* took exception with the court's conclusion.[150]

The point of emphasis for the Colorado Supreme Court was not, however, the sort of mechanistic application of the principles of *Aguilar* and *Spinelli* that the *Gates* Court sought to criticize.

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iar with its appearance," and "also included facts relating to the informant's credibility and reliability." *Id.* at 1029, 371 N.W.2d at 688.

146. Specifically, the court found that:

> Where, as in this case, the complaint not only refers to hearsay of an informant, but also hearsay of a more remote informant unsubstantiated and untested, it is difficult to conclude other than that the initial facts of the informant demonstrate unreliability on the face of the complaint. Accordingly, for these reasons alone we believe the action of the trial court [to suppress] was proper.

Id. at 1032, 371 N.E.2d at 690.

147. *Id.* As Professor LaFave has noted:

> [C]ourts, including the United States Supreme Court, seem to believe that if an informant says he "saw" a sale of narcotics, he has demonstrated adequately his basis of knowledge even without any explanation of how he knew that a sale was occurring or that the object being sold was narcotic. Because even trained police sometimes jump to the unwarranted conclusion that they have witnessed a drug transaction, it is strange that such allegations by informants, which are conclusory as to the most critical facts, should be so readily accepted.

LaFave, *supra* note 81, at 39 (footnotes omitted).

148. 174 Colo. 29, 482 P.2d 369 (1971).

149. The affidavit alleged that the informant had purchased materials subsequently proven to be LSD and STP, had seen other drugs, and was told of future drug transactions. *Id.* at 34, 482 P.2d at 371.

150. Illinois v. Gates, 103 S. Ct. 2317, 2330 n.9 (1983).

Rather, the Colorado court emphasized that its prior holding in *Hernandez v. People*[151] had made it clear that "[t]he Colorado Constitution, Article II, Sec. 7 is even more restrictive and provides that probable cause must be supported by oath or affirmation *reduced to writing*."[152] The Colorado court listed six specific deficiencies[153] in the affidavit in light of its pre-*Aguilar/Spinelli* requirement that the "judge must look within the four corners of the affidavit to determine whether there are grounds for the issuance of a search warrant."[154] While closely tied to the basic requirements of *Aguilar* and *Spinelli*, then, the critical element in the court's determination that the evidence should have been suppressed was the higher standard of proof grafted onto these tests by the Colorado Constitution.[155]

Finally, the Court criticized the standards used by the Texas Court of Criminal Appeals when it affirmed the suppression of certain information secured from one of two suspects in an armed robbery.[156] The Texas court found that the affidavit "liberally construed shows no more than a suspicion on the part of the informer that these implements were kept where the appellant resided."[157] Accordingly, the court believed that the affidavit failed the first requirement of *Aguilar*: that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [evidence was] where he claimed . . . ."[158]

The admissions of a co-felon should, in the abstract, be accorded a certain weight, and a rule that indiscriminately excludes

151. 153 Colo. 316, 385 P.2d 996 (1963).

152. *Id.* at 321, 385 P.2d at 999 (emphasis in original).

153. People v. Brethauer, 174 Colo. 29, 34-35, 482 P.2d 369, 371 (1971).

154. *Id.* at 39, 482 P.2d at 373-74 (citations omitted).

155. *Id.* at 37, 482 P.2d at 372.

156. Bridger v. State, 503 S.W.2d 801 (Tex. Crim. App. 1974). The affidavit detailed information "voluntarily" provided by Bridger's accomplice in the robbery of a federal savings and loan. *Id.* at 803. The court found that the evidence should not have been admitted, but sustained the conviction when it found that this was "harmless error beyond a reasonable doubt." *Id.* at 805.

157. *Id.* at 803. The court first noted that the statement of the accomplice "was not attached and incorporated into the affidavit" and that "[i]f it had been it might have supplied the deficiencies which we find in the affidavit." *Id.* This paralleled, in many respects, the defect noted by the Court in *Aguilar*. *See supra* note 80. The Texas court then determined that "[t]he magistrate issuing the warrant was not informed of the underlying circumstances from which the informant concluded that the named implements" were hidden in the appellant's apartment, Bridger v. State, 503 S.W.2d 801, 803 (Tex. Crim. App. 1974), and that at least one piece of evidence introduced at the trial "was actually found on other premises after the appellant's apartment had been searched." *Id.* at 803 n.2.

158. *Id.* at 803 (*quoting* Aguilar v. Texas, 378 U.S. 108, 114 (1964)).

such information would be suspect.[159] The Texas court believed that the *Bridger* affidavit provided no indication of the basis for the informant's belief and therefore failed to meet one of the basic requirements of *Aguilar*.[160] However, in reaching this holding, the court prefaced its analysis by declaring that:

> We do not intend to be overly strict or technical in our interpretation of affidavits supporting search warrants, recognizing that they must be written by working officers having limited time. We adhere to the common sense interpretation of such affidavits, but in doing so we must stay within the boundaries of constitutional requirements.[161]

This application by the Texas court of a "non-technical, common sense" approach to the evaluation of warrant affidavits appears to fall squarely within the parameters of the test formulated by the Court in *Gates*.[162] The Texas court would, presumably, have reached the same result in *Bridger* had the *Gates* ruling been before it.[163] Viewed in this light, it is difficult to see what the *Gates* Court accomplished.[164]

The majority's reasoning regarding "overly technical" lower court readings of *Aguilar* and *Spinelli* was, therefore, suspect. As indicated,[165] there is reason to believe that courts will occasionally employ excessively technical standards in assessing probable cause. This *possibility* does not, however, establish a firm *doctri-*

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159. The *Gates* Court's summary of *Bridger* stressed that the case dealt with "a confession of armed robbery from one of two suspects in the robbery" and receipt by the police of "$800 in cash stolen during the robbery." Illinois v. Gates, 103 S. Ct. 2317, 2330 n.9 (1983).

160. *See supra* note 11.

161. Bridger v. State, 503 S.W.2d 801, 803 (Tex. Crim. App. 1974).

162. That is, assuming that the Court was serious when it included a "basis of knowledge" element within its test, *see* Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983), the Texas court could have concluded that this index of reliablity had not been met.

163. The Texas court believed that it was utilizing a "non-technical, commonsense standard." While there is room to quibble, the assertion in *Gates* that the *Bridger* holding is "overly technical," would, presumably, be disputed by the Texas court.

164. The Texas Court of Criminal Appeals did adopt the *Gates* standard in Bellah v. State, 653 S.W.2d 795 (Tex. Crim. App. 1983). In a sharply worded dissent, Judge Teague argued that the court had incorrectly refused to address the appellant's claim of an independent state constitutional ground. *Id.* at 797-99 (Teague, J., dissenting). Accordingly, he believed that:

> [T]he cause should be remanded to the Court of Appeals for it to reconsider . . . in light of *Gates and* Texas law as it existed prior to *Aguilar v. Texas* . . . whether Texas law mandates that this Court should adopt, as a matter of Texas Constitutional law, the principles stated by the Supreme Court in *Aguilar* and *Spinelli* . . . .

Id. at 797 (citations omitted) (emphasis in original).

165. *See supra* note 143.

nal basis for rejecting the previous test.[166] Indeed, a careful examination of the cases cited by the *Gates* majority does not substantiate the Court's contention that these cases document deficiencies in the application of *Aguilar* and *Spinelli*. More importantly, the logic employed by the *Bridger* court belies the assumption that an application of the *Gates* standard would have altered the result in that case. Stripped of this justification, the result in *Gates* may more clearly be seen for what it was: a judicial *tour de force*, within which the end sought justified the means employed.

IV. A NEW NEBRASKA STANDARD?

A. The Rationales Advanced in the *Arnold* Concurrence

In *Arnold*, Judge White took issue with the majority on two counts. First, he argued that the facts presented in the case fell within the established tests. Consideration of the totality of circumstances formulation articulated in *Gates* was, accordingly, unnecessary.[167] This position is reasonable, given both the factual distinctions between the two cases,[168] and the extent to which the *Arnold* affidavit relied upon the independent investigative activities of the police.[169] Clearly, the *Arnold* court was not *required* to go beyond its prior holdings and accept the *Gates* holding.[170]

166. This position is, presumably, one shared by both Justices White and Brennan. *See supra* notes 142-43 and accompanying text.

167. State v. Arnold, 214 Neb. 769, 774-75, 336 N.W.2d 97, 100 (1983) (White, J., concurring).

168. *See supra* notes 93-137 and accompanying text.

169. *See supra* notes 28-42 and accompanying text.

170. The *Aguilar/Spinelli* standard sets a higher threshold than that adopted in *Gates*, and the Court has ruled that "a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis in original). Both the Nebraska court, see *supra* note 22, and a number of other state supreme courts have indicated that they do not feel bound by the rulings of the United States Supreme Court when assessing the independent meaning of their own constitutional guarantees. *See, e.g.*, Reeves v. State, 599 P.2d 727, 733-34 (Alaska 1979) (rejecting the federal constitutional standard adopted in United States v. Robinson, 414 U.S. 218, 235 (1973), for pre-incarceration inventory searches and fashioning an independent state constitutional standard); People v. Brisendine, 13 Cal. 3d 528, 550-52, 531 P.2d 1099, 1113-15, 119 Cal. Rptr. 315, 329-31 (1975) (California Constitution poses higher standard than *Robinson*); State v. Kaluna, 55 Hawaii 361, 371-72, 520 P.2d 51, 58-60 (1974) (rejecting the federal constitutional standard of Gustafson v. Florida, 414 U.S. 260 (1973) and United States v. Robinson, 414 U.S. 218 (1973), and using a state constitutional basis to limit the scope of custodial searches); State v. Cutotta, 343 So. 2d 977, 981 (La. 1976) (acknowledging the express guarantee of third party standing granted by the Louisiana Constitution); State v. Benoit, 417 A.2d 895, 899-901

Whether it was *wise* for the Nebraska Court take this step is less clear. Individual reactions to *Arnold* and *Gates* will depend in large part upon the perspective that each person brings to the question. The majority in *Gates* clearly favored the development of a standard in fourth amendment inquiries that would give greater latitude to police in their investigations.[171] There are potentially persuasive arguments in favor of such an approach, particularly if one brings to the analysis a sense that "technicalities" should not stand in the way of the successful prosecution of "obviously" guilty individuals.[172]

Nevertheless, a careful examination of traditional fourth amendment values tends to bear out Judge White's position in *Arnold*. Initially, there is little doubt that the *Gates* "totality of circumstances" standard will provide less protection for the criminal suspect than was previously available.[173] However, even if that

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(R.I. 1980) (rejecting the rationales of Texas v. White, 423 U.S. 67 (1975), and Chambers v. Maroney, 399 U.S. 42 (1970), regarding warrantless, delayed searches); State v. Badger, 141 Vt. 430, 447-55, 450 A.2d 336, 346-50 (1982) (fashioning a state constitutional basis for purging a tainted custodial interrogation).

171. By arguing that "[t]he strictures that inevitably accompany the 'two-pronged test' cannot avoid seriously impeding the task of law enforcement . . .", Illinois v. Gates, 103 S. Ct. 2317, 2331 (1983) (citations omitted), the Court appears to believe that the end sought must be allowed to sustain the means employed. Indeed, it argued that *unless* the standard is lowered police might well be tempted to "resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search." *Id.* As the Court noted on another occasion, however, it is precisely the "predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all." Brewer v. Williams, 430 U.S. 387, 406 (1977).

172. The public outcry against the use of "mere technicalities" to free those who are "obviously guilty" often ignores the fact that the same prohibited police conduct might be applied against "suspicious," but ultimately *innocent*, individuals. As Justice Douglas' observed in *Draper*:

> [W]herever a culprit is caught redhanded, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike.

Draper v. United States, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting).

173. As Justice White noted, the "standard . . . does not expressly require . . . some showing of facts from which an inference may be drawn that the informant is credible and that his information was obtained in a reliable way." Illinois v. Gates, 103 S. Ct. 2317, 2350 (1983) (White, J., concurring).

The lack of clear guidance on this point in the majority opinion is reflected in the differing interpretations adopted by various state appellate courts. *Compare* Lee v. State, 435 So. 2d 674, 676 n.1 (Miss. 1983) ("The *Gates* decision now provides that these factors should be considered, but that their existence is not a necessary condition to establish probable cause.") *with* Blue v. State, 441 So. 2d 165, 167 (Fla. Dist. Ct. App. 1983) ("Although with

was not the avowed purpose of the Court, the holding on its face substituted a standard that arguably provides magistrates with *less* guidance when they are presented with those facts that the authorities have assembled.

Justice White's concurring opinion in *Gates* is instructive on this point. As he properly noted, the analytic focus for the *Gates* Court shifted in large part to the accuracy, or lack thereof, of the information supplied by the informant:

> The critical issue is not whether the activities observed by the police are innocent or suspicious. Instead, the proper focus should be on whether the actions of the suspects, whatever their nature, give rise to an inference that the informant is credible and that he obtained his information in a reliable manner.[174]

The dangers implicit within this standard can be illustrated by a hypothetical reconstruction of the *Gates* case. Angry or jealous neighbors, hoping to rid the area of two individuals deemed, for whatever reasons, "undesirable," send the anonymous letter to the Bloomingdale police. These same neighbors have been given the details of Lance's travel plans and have been asked by the unsuspecting couple, who have given them the keys, to watch their home. Lance is put under surveillance. He departs, as predicted, and meets his wife, who has been in Florida visiting relatives, perhaps even Disney World. In the interim, contraband is planted within the home by the neighbors, and is subsequently uncovered by the police when the warrant is served.

Nothing within the revised standard would preclude such a sequence of events. The Gates, who have been effectively framed, would have behaved in precisely the same way that they did under the actual fact pattern. For, while the Court's opinion eliminates the "rigid demand that specific 'tests' be satisfied by every informant's tip,"[175] it provides no clear guidance for lower courts in determining precisely what sorts of information or informants will satisfy its new, "nontechnical" standard:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[176]

The language utilized in this test is, at best, imprecise, a fact high-

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Gates's abandonment of the two-pronged test of *Aguilar* and *Spinelli* 'veracity' and 'basis of knowledge' are now merely circumstances, among others, to be considered, they nonetheless must be considered.").

174. *Id.* 2348 (White, J., concurring).

175. *Id.* at 2328.

176. *Id.* at 2332.

lighted by both Justices White[177] and Brennan[178] when they observed that the standard would provide little, if any, meaningful guidance for police,[179] magistrates,[180] and reviewing courts.

In the best of worlds, the *Gates* standard poses serious problems. The "best of worlds" is, however, often not the one within which criminal defendants find themselves, particularly if they are involved in the sale or distribution of drugs.[181] As Justice Brennan noted in his *Gates* dissent, "[w]ords such as 'practical,' 'nontechnical,' and 'commonsense,' as used in the Court's opinion [have become] but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment."[182]

The majority responded that "[t]he task of this Court . . . is to 'hold the balance [between individual rights and government authority] true,' and we think we have done that in this case."[183] The flaws in the majority's treatment of the facts in *Gates*, however, indicate otherwise.[184] As applied by the Court, the revised test tips the balance in probable cause determinations decidedly in favor of the government. This was undeniably the Court's intention: statements found in *Gates* and other cases seem to indicate that the Court is becoming much less vigilant when asked to protect the rights of individuals accused of narcotics violations.[185]

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177. *See supra* note 131 and accompanying text.
178. *See supra* note 132 and accompanying text.
179. As Professor Yackle has noted, however: "Studies have shown that in practice judicial supervision is ineffective in any event. Generally, the police do not seek warrants but act without them and request judicial approval only after the fact." Yackle, *supra* note 6, at 414 (footnote omitted). To the extent that these studies remain valid, the majority's argument in *Gates* that a continuation of the *Aguilar/Spinelli* standard will encourage warrantless searches, *see supra* note 171, loses much of its force.
180. The ultimate value of having a clear and consistent standard for magistrates will, of course, depend upon whether the magistrates treat seriously their responsibility to objectively assess the affidavits being presented to them. At least one commentator has, however, observed that "[i]n the few cases in which warrants are sought, they are usually issued perfunctorily by magistrates who see their task as merely rubber-stamping the judgments of law enforcement officers. Indeed, in many cases the affidavits filed by police officers are note even read." Yackle, *supra* note 6, at 414.
181. *See infra* notes 185 & 250 and accompanying text.
182. Illinois v. Gates, 103 S. Ct. 2317, 2359 (1983) (Brennan, J., dissenting).
183. *Id.* at 2333-34.
184. *See generally supra* notes 96-137 and accompanying text.
185. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980):

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophis-

A standard such as that employed in *Gates* might prove workable for a magistrate who *insists* that the affidavit provide certain minimal indicia of the informant's "reliability" and "basis of knowledge." Such information is not, however, *required* by the standard.[186] Absent some minimal objective requirements to guide the assessment of the initial character of the informant's tip, the dangers are immense that this evaluation process will be "endowed with an aura of suspicion by virtue of [an] informer's tip."[187]

More importantly, under the test formulated in *Gates*, a court reviewing the magistrate's initial determination could justifiably base its analysis on one simple question: was the informant right? The answer to this question, which is asked only *after* incriminating evidence has been discovered, is to be found within the "totality of the circumstances." The *Gates* majority stressed that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing] that probable cause existed.' "[188] Unfortunately, the Court's revised standard provides no guidance as to the point at which the balance is tipped in favor of the issuance of the warrant. Rather, lower courts are left with a subjective standard that focuses, not upon the character of informants, but solely upon the accuracy of their tips. For all except the magistrate who originally issued the warrant, this will be information that the reviewing court will already *know* has proven to be true.

Previous experiences with broad "totality of the circumstances"

> ticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

Id. at 561-62 (Powell, J., concurring). Justice Blackmun cited this argument in support of his contention that "[g]iven the strength of society's interest in overcoming the extraordinary obstacles to the detection of drug traffickers, such conduct should not be subjected to a requirement of probable cause." Florida v. Royer, 103 S. Ct. 1319, 1332 (1983) (Blackmun, J., dissenting).

Prosecutors have apparently responded to this invitation. Each of the search and seizure cases in which the Court issued a ruling during its October, 1983, Term were drug related, and each involved an appeal by the state of an adverse judgment below. *See supra* note 12.

This phenomenon is not confined to the U.S. Supreme Court. Professor Snowden has, for example, documented a similar antipathy to the rights of defendants in "dope" cases in Nebraska. Snowden, *A Holistic Jurisprudential View of the Drug Victim*, 54 NEB. L. REV. 350, 361-76 (1975).

186. *See supra* note 173 and accompanying text. As indicated, there is in addition no real assurance that the authorities will be guided by the applicable test, whatever it might be. *See supra* notes 179-80 and accompanying text.

187. Spinelli v. United States, 393 U.S. 410, 418 (1969).

188. Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983) (quoting Jones v. United States, 362 U.S. 257, 271 (1960)).

standards in criminal procedure cases indicate that such standards seldom work. For example, prior to the Court's landmark ruling in *Miranda v. Arizona*,[189] reviewing courts were to determine if there was "a totality of circumstances evidencing an involuntary . . . admission of guilt."[190] Various factors were to be taken into account, including: the individual's state of mind and capacity for effective choice;[191] individual weaknesses or incapacities;[192] threats or imminent danger;[193] repeated or extended interrogation;[194] limits on access to counsel or friends;[195] and the length and illegality of the detention under state law.[196]

This impressive array of specific touchstones was, in theory, to be assessed within the "totality of the circumstances."[197] However, reviewing courts "did not take these factors into account very much, nor were they *required* to."[198] The *Miranda* ruling followed.[199] Since magistrates have in the past displayed a lack of

189. 384 U.S. 436 (1966).
190. Haynes v. Washington, 373 U.S. 503, 514 (1963). The totality of the circumstances test has been characterized as "an I know it when I see it' school of jurisprudence." Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 793 (footnote omitted). The Court has utilized a totality of the circumstances approach in a number of other cases. *See, e.g.,* Fare v. Michael C., 442 U.S. 707, 728 (1979) (question of whether juvenile who asked to see probation officer, but not an attorney, has waived *Miranda* rights to be "resolved on the totality of the circumstances surrounding the investigation"); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (consent to search voluntary or product of duress or coercion "a question of fact to be determined from the totality of the circumstances"). The *Schneckloth* standard has been criticized as "likely to [produce] still another series of fourth amendment cases in which the courts provide a lengthy factual description followed by a conclusion (most likely, in the current climate, that consent was voluntarily given), without anything to connect the two." Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 57 (1974).
191. Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962).
192. Lynumn v. Illinois, 372 U.S. 528, 534 (1963).
193. Payne v. Arkansas, 356 U.S. 560, 567 (1958).
194. Chambers v. Florida, 309 U.S. 227, 239-40 (1940).
195. Lynumn v. Illinois, 372 U.S. 528, 534 (1963).
196. Haynes v. Washington, 373 U.S. 503, 514 (1963).
197. These touchstones offered a degree of specificity that is not, it should be emphasized, present in the *Gates* standard.
198. *Supreme Court Review and Constitutional Law Symposium*, 52 U.S.L.W. 2228, 2230 (Oct. 25, 1983) (remarks of Prof. Kamisar) (emphasis added). In a similar vein, Professor LaFave, commenting upon the *Gates* test, noted that "if one reflects on the experience under the other 'totality of the circumstances' test long used in confession cases, which both left the police without needed guidance and impaired the effectiveness of judicial review, there is certainly cause for concern." LaFave, *Supreme Court Report: Nine key decisions expand authority to search and seize*, 69 A.B.A. J. 1740, 1744 (1983).
199. In their dissenting opinions in *Miranda*, Justices Harlan and White objected to the new standard in terms strikingly similar to those employed by individ-

diligence when assessing warrant affidavits,[200] the likelihood that law enforcement officials will prove more conscientious under the relaxed *Gates* standard is not great.[201] Viewed in this light, Judge White's observation in *Arnold* that "the bedrock of our federal constitutional rights may only be a mass of shifting sand"[202] merits attention, and his proposal that Nebraska consider the development of its own standard assumes a greater urgency.

B. A New Nebraska Standard

Article I, section 7, of the Nebraska Constitution[203] provides a firm state basis for a Nebraska search and seizure standard. Aside from its attempt to evade the mandates of *Weeks*,[204] the Nebraska Supreme Court has not distinguished the guarantees of Article I, section 7, from those of the fourth amendment. Nevertheless, the court has made it clear that this section of the Nebraska Constitution carries independent force,[205] and that the Nebraska court will, as a general rule, reserve the right to construe its own constitution in the manner in which it sees fit.[206]

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uals seeking to lower current search and seizure guidelines. Justice Harlan, for example, argued that "the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation." Miranda v. Arizona, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting). Justice White stated that "[t]he rule announced today will measurably weaken the ability of the criminal law to perform [its] tasks." *Id.* at 541 (White, J., dissenting). These fears have, in large part, proven to be groundless. *See also* Y. KAMISAR, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980); Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869-72 (1981) (summarizing Professor Kamisar's analysis of the flaws in the approach of the *Miranda* dissents).

200. *See supra* notes 179-80.

201. The Court in *Gates* argued that "[t]he diversity of informants' tips, as well as the usefulness of the totality of the circumstances approach to probable cause is reflected in our prior decisions on the subject." Illinois v. Gates, 103 S. Ct. 2317, 2329 n.7 (1983). As Justice Brennan observed: "Only one of the cases cited by the Court . . . was decided subsequent to *Aguilar* . . . [T]hey are not inconsistent with *Aguilar*." *Id.* at 2357 (Brennan, J., dissenting). In many respects, the fact that informant tips are so diverse would argue for the imposition of a framework to guide the magistrate's inquiry and to insure that all parties proceed from with a common, objective set of assumptions the extent to which such tips are to be accepted.

202. State v. Arnold, 214 Neb. 769, 775, 336 N.W.2d 97, 100 (1983) (White, J., concurring).

203. For the text of Art. I, § 7, see *supra* note 22.

204. *Id.*

205. *Id.*

206. Other state supreme courts have reached similar conclusions. *See supra* note 170. In some instances this result has been dictated by the terms of the

The Supreme Court has repeatedly emphasized that "a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."[207] The Court's recent holding in *Michigan v. Long*[208] indicates, however, that states electing to do so must proceed with great care. In *Long*, the petitioner argued that "the Michigan courts have provided greater protection from searches and seizures under the state constitution than is afforded under the Fourth Amendment, and the references to the state constitution therefore establish an adequate and independent ground for the decision below."[209]

The *Long* Court rejected petitioner's claim.[210] The majority reasoned that:

> when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[211]

The Court then indicated that it would respect a state court's determination that its ruling did not "rest primarily on federal law" only when "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state] grounds . . . ."[212]

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state constitution itself. The California Constitution, for example, stipulates that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." CAL. CONST. art. I, § 24.

But cf. FLA. CONST. art. I, § 12. It should be noted that in Florida a constitutional amendment approved by popular vote incorporated into that provision the requirement that the Florida courts read art. I, § 12 "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." *Id.* Chief Justice Burger has noted this development with approval. *See infra* note 215.

207. Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis in original).
208. 103 S. Ct. 3469 (1983).
209. *Id.* at 3474.
210. Specifically, the Court found that "[a]part from its two citations to the state constitution, the court below relied *exclusively* on its understanding of [*Terry v. Ohio*, 392 U.S. 1 (1968)] and other federal cases." *Id.* at 3477 (emphasis in original).
211. *Id.* at 3476.
212. *Id.* The Court indicated that "[i]f a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that federal cases are being used only for the purpose of guidance." *Id.* Consistent with this doctrine, the Oregon Supreme Court recently stated that, "[l]est there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views expressed there persuasive, not because it considers itself bound to do so by its understanding of federal doctrines." State v. Kennedy, 295 Or. 260, __, 666

Some commentators have expressed the fear that this holding portends an "increased . . . penetration of federal review into state judicial systems."[213] Such a result would clearly be of concern, particularly for states such as South Dakota that have chosen to "evade" decisions of the Burger Court through a declaration that a previously "unacceptable" ruling might be justified on the basis of the state constitution.[214] Nevertheless, the language of the *Long* decision does not appear to support the contention that state court rulings will *inevitably* be subjected to substantive review by the Supreme Court, and the lesson of *Long* may well be confined to a simple requirement that state rulings claiming an independent state constitutional basis be carefully crafted.[215]

Given the flaws in *Gates*, careful consideration should be given to the development of a state constitutional standard for probable cause determinations in Nebraska. As an initial matter, such a standard should *require*, rather than simply *permit*, magistrates to have before them sufficient information to determine that a probability of *criminal* activity exists. In the majority of cases, this

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P.2d 1316, 1321 (1983). *See also* State v. Ball, __ N.H. __, 471 A.2d 347, 352 (1983) (court to rely on federal precedents "merely for guidance and do not consider our own results bound by these decisions").

213. Tribe, NAT. L.J., Aug. 1, 1983, at 5, col. 2.

214. *See, e.g.*, State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976), holding that "[w]e find that logic and a sound regard for the purposes of the protection afforded by the S.D. Const. Art. VI, § 11 warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary [in South Dakota v. Opperman, 428 U.S. 364 (1976)] under the Fourth Amendment." Professor Wilkes characterized such actions as a "new federalism" marked by "state court evasion," and has argued that "[w]hile it might be possible for the Burger Court to curtail some of the evasion by altering the adequate state ground doctrine, the Court does not appear likely to do so." Wilkes, *The New Federalism Revisited*, *supra* note 24, at 751. This no longer appears to be the case.

215. It should be noted, however, that the Chief Justice gave notice well before *Long* that decisions claiming an adequate and independent state ground would be subjected to more intense scrutiny. In Florida v. Casal, 103 S. Ct. 3100 (1983), the Court dismissed its writ of certiorari as improvidently granted, stating that "the judgment of the court below [apparently] rested on independent and adequate state grounds." *Id.* However, the Chief Justice felt compelled to issue a concurring opinion, within which he noted that "[t]he Florida Supreme Court did not expressly declare that its holding rested on state grounds, and the principle state case cited for the probable cause standard . . . is based entirely upon this Court's interpretation of the Fourth Amendment of the Federal Constitution." *Id.* at 3101 (Burger, C.J., concurring). And, in a not terribly subtle hint to states seeking to retain more restrictive search and seizure standards, the Chief Justice noted that "[t]he people of Florida have since shown acute awareness of the means to prevent . . . inconsistent interpretations of the two constitutional provisions," through their amendment of art. I, § 12 of the Florida Constitution. *Id.* *See supra* note 214.

threshold will be easily met. It will only be in those few instances where the magistrate is required to assess activities that are arguably innocent that problems will arise.[216] This will be particularly true when the affidavit is based, in any significant degree, on information supplied by informants.

As indicated, three different types of informants have been distinguished.[217] For the first of these, the concerned citizen, Nebraska has formulated a Nebraska specific standard of presumptive reliability.[218] In reaching this determination the court stressed that it was speaking of the "citizen informer, whose only motive is to help law officers in the suppression of crime . . ." and who "unlike the professional informant . . . is without motive to exaggerate, falsify or distort the facts to serve his own ends."[219] Where, as in *Arnold*, citizen informants have identified themselves to the police, a presumption of reliability of this sort is clearly warranted.

This would not be the case when dealing with either a "confidential" or "anonymous" informant. Generally, such an individual:

> 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 himself to be 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 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.[220]

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216. Strict adherence to a standard that permitted a reviewing court to have before it *only* that information that was available to the magistrate would eliminate most, if not all, of the difficulties. Unfortunately, the very act of requesting that evidence be suppressed carries with it the implication that criminal activities have, in fact, been uncovered.
217. *See supra* note 23.
218. *See, e.g.*, State v. Ybanez, 210 Neb. 42, 44, 313 N.W.2d 30, 31 (1981).
219. State v. King, 207 Neb. 270, 274, 298 N.W.2d 168, 171 (1980) (one judge opinion) (quoting State v. Drake, 224 N.W.2d 476, 478 (Iowa 1974)). As indicated, the full court subsequently adopted the rationale advanced in *King* in *Ybanez*, and in *Butler*. *See supra* note 23. In *King*, Chief Justice Krivosha began his analysis of applicable case law with a quotation from *Aguilar*, and cited a number of federal cases. The ultimate adoption by the full court of a presumption of reliability for citizen informants was, however, predicated upon its acceptance of the reasoning utilized by the Iowa Supreme Court. This approach would, presumably, pass muster under *Long* as an independent state restriction.
220. M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT 40 (2d ed. 1968).

As this definition indicates, there is a presumption that an informant is sufficiently close to criminal activities to witness or be aware of them. At the same time, an informant's intimate association with criminals makes it likely that this individual is, in turn, untrustworthy. This creates a dilemma for law enforcement officials: the information that they must utiliize in the pursuit of crime may itself be the product of criminal activities.

Given these realities, the wisdom of continuing to require that informants reveal a basis of knowledge and demonstrate their credibility and reliability is evident. This will be particularly true where, as was the case in *Gates*, the informant is anonymous.[221] This requirement assumes added force if, as is apparently the case, it remains the position of the Court that, by "expressly reaffirm[ing] . . . the validity of cases such as *Nathanson*,"[222] it continues to be the rule that "no matter how reliable the affiant-officer may be, a warrant should not be issued unless the affidavit discloses supporting facts and circumstances."[223] As Justice White noted in *Gates*, "[i]t would be 'quixotic' if a . . . statement from an honest informant, but not one from an honest officer, could furnish probable cause [while] we have repeatedly held that the unsupported assertion or belief of an officer does not satisfy the probable cause requirement."[224]

Prior to *Arnold*, the *LeDent* test[225] provided a framework within which magistrates in Nebraska could assess whether the affidavit met minimal objective standards. Admittedly, the ruling in *LeDent* evolved from the standards set in *Aguilar* and *Spinelli*. However, unlike many of its counterparts in other states, it does not appear that the Nebraska court became bogged down in elaborate explications of the nuances of various "prongs" of the test.

221. As indicated, the test adopted in *Gates* is not, however, applicable only to affidavits based on information secured from anonymous informants. *See supra* notes 87-89 and accompanying text.

222. The reference is to Nathanson v. United States, 290 U.S. 41 (1933), in which the Court held that "an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Id.* at 47.

223. Illinois v. Gates, 103 S. Ct. 2317, 2350 (1983) (White, J., concurring). *See also* Spinelli v. United States, 393 U.S. 410 (1969), where Justice White observed that "[t]he unsupported assertion or belief of the officer does not satisfy the requirement of probable cause." *Id.* at 423 (White, J., concurring). In making this point, Justice White cited Jones v. United States, 363 U.S. 257, 269 (1960), one of the cases utilized by the majority in Illinois v. Gates, 103 S Ct. 2317, 2329 n.7 (1983), to verify the "usefulness of the totality of the circumstances approach to probable cause . . . ." *Id.*

224. Illinois v. Gates, 103 S. Ct. 2317, 2350 (1983) (White, J., concurring) (citations omitted).

225. See *supra* note 74 for the text of the *LeDent* test.

Rather, the standard appears to have been treated in what one might characterize as a "commonsense, nontechnical" fashion. At the same time, it respected the need for magistrates and reviewing courts to have available the sort of structure that generated consistent standards and a common frame of reference.

A Nebraska specific standard for probable cause inquiries should, then, incorporate the following requirements:

1. a presumption of reliability when the informant is an identified, concerned citizen who comes forward voluntarily with information;
2. a requirement that, where the information is supplied by a "confidential" informant, the officer requesting the warrant document, in the affidavit, facts from which the magistrate may determine what the basis of knowledge is and that the informant is credible and reliable;
3. where the affidavit must rely upon anonymous tips, or where, for whatever reason, the officers cannot establish that the informant is credible and has an express basis of knowledge, a requirement that any corroborating information be of *incriminating* details from which the magistrate may conclude that there is a probability of expressly *criminal* activities.

In order to pass muster under *Long*, such a standard will need to be adopted with language that expressly states that it is based upon the independent guarantees of Article I, section 7, of the Nebraska Constitution. Admittedly, the standard draws, in large part, upon prior case law reflective of the tests that originated with the *Aguilar* ruling. Nevertheless, the elements of the test expand upon previous rulings, and, in particular, offer an escape from the confusion generated by the utilization of *Draper* in *Spinelli*, and the subsequent misinterpretations of *Draper* in cases such as *Gates*.[226]

The prospects for eventual acceptance of such a standard in Nebraska should be greatly enhanced as the legal community becomes more familiar with the details and implications of *Gates*. It is, for example, noteworthy that the Nebraska Supreme Court's acceptance of *Gates* in *Arnold* appears to have been predicated upon the assumption that *Gates* merely "relaxed somewhat" the "rules relating to affidavits used to obtain search warrants."[227] That was clearly not the case, and a careful examination of *Gates* and the difficulties inherent within the revised standard argue for a rejection of *Arnold* in favor of a more stringent standard predicated upon the guarantees of Article I, section 7.

Nor is it unlikely that the Nebraska court would adopt a revised,

226. *See supra* notes 110-19 and accompanying text.

227. State v. Gilreath, 215 Neb. 466, 468, 339 N.W.2d 288, 291 (1983). The court's acceptance of *Gates* may also be another indication of the problems that are imposed by its workload, the sheer volume of which may operate to occasionally preclude extended examination of the true implications of decisions by the U.S. Supreme Court.

state-specific standard if given the opportunity to do so. Judge White, joined by Judge Shanahan, argued in *Arnold* against precipitous acceptance of *Gates* and for a Nebraska standard. Chief Justice Krivosha has, on previous occasions, declared that the court should not decide questions of constitutional law that have not been fully briefed and argued.[228] Writing for the majority in *State v. Tweedy*,[229] Judge Hastings has noted that the court has on occasion been reluctant to follow completely the criminal procedure holdings of the United States Supreme Court.[230]

Moreover, a careful examination of previous opinions by Judge McCown,[231] who authored the majority opinion in *Arnold*, seems to indicate that the main impetus for acceptance of *Gates* was an unfortunate deference to the dictates of the Burger Court. Judge McCown's dissenting opinion in *State v. Bernth*[232] is noteworthy in this regard. *Bernth* involved a conviction for possession of marijuana and possession of marijuana with intent to distribute. In its decision, the court examined the sufficiency of an affidavit that relied upon the uncorroborated assertions of a "concededly reliable informant."[233] In arriving at its conclusion that the warrant should be sustained, the majority reasoned:

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228. State v. Vicars, 207 Neb. 325, 336, 299 N.W.2d 421, 428 (1980) (Krivosha, C.J., concurring). *See supra* note 66.
229. 209 Neb. 649, 309 N.W.2d 94 (1981).
230. The specific issue in question was the applicability to misdemeanors of the holding in Boykin v. Alabama, 395 U.S. 238 (1969) (record must disclose that guilty plea was knowingly and intelligently entered). Writing for the majority, Judge Hastings noted that "[t]his court has been reluctant to embrace unequivocally the specific holding of *Boykin*" but that it had adopted *Boykin* "in principle." State v. Tweedy, 209 Neb. 649, 652, 309 N.W.2d 94, 96 (1981).
231. Judge McCown has since retired and has been replaced by Judge Grant.
232. 196 Neb. 813, 246 N.W.2d 600 (1976), *cert. denied*, 430 U.S. 948 (1977). Judge Newton wrote the majority opinion and was joined by Chief Justice Paul W. White and Judges Spencer, Boslaugh, and Brodkey. Judges McCown and Clinton filed separate dissenting opinions. Of the seven, only Judge Boslaugh remains on the court.

The *Bernth* decision has been criticized. *See* Comment, *Nebraska Standards*, *supra* note 69, at 610-12; Note, *Use of Informant's Tips in Establishing Probable Cause*, 56 NEB. L. REV. 883 (1977).

233. State v. Bernth, 196 Neb. 813, 815, 246 N.W.2d 600, 601 (1976). The affidavit stated:

> That on the 2nd day of April, 1975, Affiant was advised by an informant in oral conversation of the following: That on the 29th day of March, 1975, said informant had a personal conversation with suspect and was advised by suspect that suspects had pounds of grass for sale.
>
> That on the 3rd day of April, 1975, Officer Brad Brush of the Grand Island Police Department advised Affiant that he had accompanied informant on said date in a motor vehicle during which time informant pointed out the above address as suspect's residence.

Brief of Appellant at 6. The Affiant then stipulated that, based solely upon

> a magistrate [should consider] known facts and common-sense probabilities. Controlled substances are of considerable value on the street, much sought after by users, and, unless kept in a safe place, subject to theft. Wide experience over the years has demonstrated that such items are usually kept in a dealer's place of residence and under constant surveillance or supervision. The defendant was obviously a dealer. He had pounds of marijuana. Such a quantity would not be carried on his person or left unprotected in an automobile. Where then does logic and common sense dictate that it would be kept? There is only one answer, his residence. A magistrate is not required to ignore the lessons of experience or to disregard logic and common sense.[234]

The majority opinion contained no direct references to the test established in *LeDent*, and relied in large part upon the holding in *United States v. Ventresca*[235] that warrants be evaluated in a "commonsense" rather than "hypertechnical" manner. Judge McCown criticized this failure to adhere to established standards, noting that "[t]here is no case cited in the majority opinion, nor have we found one anywhere, in which the affidavit for the search warrant contained nothing more than the bare report of an informer that a suspect had stated that he had contraband."[236]

In many respects, the *Bernth* holding depended upon, but did not expressly articulate, a "totality of the circumstances" approach.[237] It was perhaps for this reason that Judge McCown de-

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these facts, he "has reason to and does believe" that the marijuana would be found in Benth's residence. *Id.* at 14.

In his dissenting opinion, Judge McCown noted that "[t]he affidavit here recited a bare conclusion reflecting only suspicion" and "recited none of the underlying circumstances from which either the informer or the affiant concluded that the marijuana was located in the residence of the defendant." State v. Bernth, 196 Neb. 813, 820, 246 N.W.2d 600, 604 (1976) (McCown, J., dissenting). Judge Clinton's brief dissent also emphasized the failure of the affidavit to recite any "of the underlying circumstances . . . . " *Id.* at 821, 246 N.W.2d at 604 (Clinton, J., dissenting).

The affidavit in *Bernth* contained less detail than the anonymous letter in *Gates*, *see supra* note 92, although it does have the "virtue" of having been predicated upon information supplied by a "reliable informant" rather than an anonymous correspondent.

234. State v. Bernth, 196 Neb. 813, 817, 246 N.W.2d 600, 602-03 (1976). The majority's emphasis upon the security interests involved, and the concommitant assumption that the drugs would be found in the defendant's home, is particularly ironic in light of the debate in *Gates* regarding whether Susan Gates would have left the Gates residence unguarded if drugs were stored there, as the anonymous letter predicted. *See supra* note 101.

235. 380 U.S. 102 (1965).

236. State v. Bernth, 196 Neb. 813, 819, 246 N.W.2d 600, 603 (1976) (McCown, J., dissenting).

237. The *Bernth* ruling has not been cited in subsequent search and seizure cases as a basis for sustaining a warrant that did not fall within the tests articulated in *Aguilar*, *Spinelli*, and *LeDent*. See, *e.g.*, State v. Davis, 199 Neb. 165, 256 N.W.2d 678 (1977), in which *Bernth* is cited only for the proposition that warrants be assessed in a "commonsense" manner, *id.* at 169, 256 N.W.2d at 680,

clared that "[t]he majority opinion here goes far beyond any prior decisions of this court, or of any other court, in emasculating the Fourth Amendment protection against unreasonable searches and seizures,"[238] and argued forcefully that the clear and previously authoritative requirements of *Aguilar* and *LeDent* had not been met.[239] Viewed within the context of Judge McCown's dissent in *Bernth*, it would appear that the court's willingness to adopt the *Gates* standard in *Arnold* reflected a deference to the dictates of the Burger Court that was, given the realities of *Gates*, misplaced.[240]

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and *Aguilar* is cited as the source of the "tests for determining the validity of an affidavit . . . ." *Id.* at 168, 256 N.W.2d at 680.

Clearly, the court in *Arnold* did not believe that the long established tests had, at that point in time, been discarded.

238. State v. Bernth, 196 Neb. 813, 819, 246 N.W.2d 600, 603 (1976) (McCown, J., dissenting). In language strikingly similar to that employed by Judge White in his *Arnold* concurrence, Judge McCown concluded his dissent with these words:

> The decision of this court effectively destroys the protection afforded to every citizen under the specific terms of the Constitution of the United States and the Constitution of Nebraska. It also sets out a new and unique basis for determining what constitutes probable cause for the issuance of a search warrant. If the home of any citizen is open to police search whenever a reliable informer reports that the citizen made a statement implicating himself in the possession of illegal substances or things, the dread spectre of a police state is all too close and real. Constitutional freedoms should never be so easily discarded.

Id. at 821, 246 N.W.2d at 604 (McCown, J., dissenting).

239. *Id.* at 819-20, 246 N.W.2d at 603-04 (McCown, J., dissenting). Judge McCown also took issue with the majority's conclusion that the defendant was obviously a dealer," *id.* at 817, 246 N.W.2d at 602, stating that:

> If that be true, then the same conclusion would necessarily follow as to any citizen who was reliably reported to have made the same statement, even if the statement was made in jest. As the trial court said at the original suppression hearing: "Well, I guess I'd better not tell anyone that I have marijuana in my home, or I may be invaded by the police."

Id. at 820, 246 N.W.2d at 604 (McCown, J., dissenting).

240. The reaction to *Gates* in those other jurisdictions that have considered it has been mixed. Some state appellate courts have embraced the revised test with enthusiasm. *See, e.g.,* State v. Lang, 105 Idaho 683, 684, 672 P.2d 561, 562 (1983) ("unduly technical" standard of *Aguilar-Spinelli* abandoned in favor of *Gates*); State v. Erler, __ Mont. __, __, 672 P.2d 624, 627 (1983) ("The absurdly technical aspects of the previous test are thus abandoned."); Bonsness v. State, 672 P.2d 1291, 1293 (Wyo. 1983) (Wyoming had never expressly adopted *Aguilar-Spinelli*, and now rejects "technical and rigid" requirements in favor of Wyoming law and *Gates*). Other courts have adopted *Gates*, but expressed a need to approach the revised standard with caution. *See, e.g.,* State v. Stephens, 252 Ga. 181, __, 311 S.E.2d 823, 826 (1984) (*Gates* a "rule of subjectivity"; should be considered the "outer limit of probable cause," with "supporting affidavits [to] reflect the maximum indication of reliability, along the lines of *Aguilar-Spinelli*, wherever and whenever that shall be feasible");

The problems inherent in the standard promulgated in *Gates*, and accepted in *Arnold*, are such that serious consideration should be given to the development of an independent Nebraska standard for probable cause determinations. Obviously, certain elements of this Article's argument for such a change reflect a considered judg-

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State v. Arrington, __ N.C. App. __, __, 311 S.E.2d 33, 35 (1984) ("*Gates*, while strong medicine in the noble fight to discourage excessively technical dissections of informant's tips, is not a panacea."); State v. Ricci, 471 A.2d 291, 296 (R.I. 1984) (Rhode Island applications of *Aguilar-Spinelli* had not been "unduly technical," and "principles that have controlled our determinations remain valid in light of *Gates*"); State v. Bailey, 675 P.2d 1203, 1205 (Utah 1983) ("However, even under this standard, compliance with the *Aguilar-Spinelli* guidelines may be necessary to make a sufficient basis for probable cause.").

The majority of the courts that have addressed the question have adopted *Gates*. Only one state, New York, has expressly refused to follow *Gates* and has adhered to its own previously adopted state constitutional standard. People v. Landy, 59 N.Y.2d 369, 375 n.*, 452 N.E.2d 1185, 1188 n.*, 465 N.Y.S.2d 857, 860 n.* (1983). A number of state court judges have, however, argued for consideration of an independent state law standard as a substitute for the *Gates* test. *See, e.g.,* Thompson v. State, 280 Ark. 265, 273-74, 658 S.W.2d 350, 354 (1983) (Purtle, J., concurring) (independent standard under Arkansas Rules of Criminal Procedure not abrogated; consideration of *Gates* inappropriate); People v. Exline, 98 Ill. 2d 150, __, 456 N.E.2d 112, 116 (1983) (Goldenhersch, J., dissenting) ("We are not required to blindly follow the actions taken by the Supreme Court in determining the standards applicable to our own constitution . . . I would retain [*Aguilar* and *Spinelli*] as constitutional requirements in Illinois."); Commonwealth v. Gray, __ Pa. Super. __, __, 469 A.2d 169, 176 (1983) (Brosky, J., concurring) (while not expressing an opinion as to retaining *Aguilar-Spinelli*, "the people of this Commonwealth would have been better served by a consideration of this option"); Bellah v. State, 653 S.W.2d 795, 797 (Tex. Crim. App. 1983) (Teague, J., dissenting) (would remand to lower court "to decide whether Texas law mandates that this Court should adopt, as a matter of Texas Constitutional law, the principles stated by the Supreme Court in *Aguilar* and *Spinelli*").

One state court has expressly considered, and rejected, the issue of an independent state constitutional guarantee. Beemer v. Commonwealth, 665 S.W.2d 912, 915 (Ky. 1984) (fully in accord with *Gates*; do not retain *Aguilar-Spinelli* as matter of state constitutional interpretation). Most courts have simply adopted *Gates* as a matter of federal constitutional law. *See, e.g.*, State v. Espinosa-Gamez, 678 P.2d 1379, 1384 (Ariz. 1984) (*Gates* controlling, and is retroactive); State v. Luter, 346 N.W.2d 802, 807-08 (Iowa 1984) ("substantial change" of *Gates* now controlling); State v. Walter, 234 Kan. 78, 670 P.2d 1354 (1983) (*Gates* adopted, per discussion in State v. Rose, 8 Kan. App. 2d 659, 665 P.2d 1111 (1983)); State v. Lingle, 436 So. 2d 456, 460 (La. 1983) (adopt the "non-technical, commonsense" standard of *Gates*); Ramia v. State, 57 Md. App. 654, __, 471 A.2d 1064, 1064-65 (1984) (adopting *Gates*); State v. Gilmore, 665 S.W.2d 25, 28 (Mo. App. 1984) (totality of the circumstances as standard); Lee v. State, 435 So. 2d 674, 676 (Miss. 1983) (adopting *Gates*); State v. Anderton, 668 P.2d 1258, 1260-61 (Utah 1983) (abandon rigid two-prong test and reaffirm totality of the circumstances); State v. Doucette, 143 Vt. 573, 585, 470 A.2d 676, 684 (1983) (test announced in *Gates* applicable); State v. Boggess, 115 Wis. 443, 453-54, 340 N.W.2d 516, 522-23 (1983) (in assessing probable cause, totality of circumstances to be considered).

ment that the dangers posed by the *Gates* standard should not be tolerated by a citizenry that is sensitive to the guarantees set forth in the Nebraska and federal constitutions. Nevertheless, the aura of uncertainty that hovers over the *Gates* test is a cause for serious concern on the part of all citizens.

The inherently subjective nature of the *Gates* test makes it susceptible to manipulation by those at either end of the legal spectrum. Both "liberals" and "conservatives" can read into the test what they will. As a result, the law governing probable cause determinations runs the risk of being reduced to a potentially inconsistent sequence of individual judicial determinations.[241] The Nebraska court's adoption of *Gates* in *Arnold* was unfortunate, and a serious reconsideration of that ruling is both appropriate and necessary.[242]

V. CONCLUSION

One of the key premises in Judge White's concurring opinion is undoubtedly correct: recent decisions by the United States Supreme Court have cut back the protections once afforded by the fourth amendment.[243] The composition of the current Court, and its expressed intentions, make it likely that this trend will

241. One state court judge confronted by the *Gates* ruling emphasized the volatile nature of criminal procedure jurisprudence during the past two decades in support of his argument for consideration of a standard based upon the guarantees of the state constitution. *See* Bellah v. State, 653 S.W.2d 795, 798 (Tex. Crim. App. 1983) (Teague, J., dissenting).

242. The critical question, however, is not whether it was within the court's power to adopt the *Gates* standard. *See supra* notes 65-68 and accompanying text. Rather, the issue is whether it was wise to do so in such a precipitious manner.

243. *See supra* note 6. This trend has not been confined to fourth amendment situations. As Judge White has observed, the "Court [has] considerably weakened the once absolute strictures of Miranda . . . ." State v. Favero, 213 Neb. 718, 724, 331 N.W.2d 259, 263 (1983) (one judge opinion). *Compare*, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (broad protections in custodial interrogation) *with* Harris v. New York 401 U.S. 222 (1971) (otherwise reliable statements obtained in violation of *Miranda* admissible for impeachment purposes). *Compare* United States v. Wade, 388 U.S. 218 (1967) (right to counsel at *pretrial* lineup) *with* Kirby v. Illinois, 406 U.S. 682 (1972) (no right to counsel at *preindictment* lineup). One observer has noted:

> [i]t is assumed that the state supreme court judges, like the commentators, saw the apparent handwriting on the wall and anticipated a continuous chipping away at the *Miranda* principles by the Burger Court. It is hypothesized that these judges took the opportunity to erode the *Miranda* principles and, in fact, eroded them even more than the Burger Court had already done.

Gruhl, *State Supreme Courts and the U.S. Supreme Court's Post Miranda Rulings*, 72 J. CRIM. LAW & CRIMINOLOGY 886, 886-87 (1981) (footnote omitted).

continue.[244]

The manner in which one reacts to these developments tends, however, to be a philosophical rather than a strictly legal matter.[245] Few, if any, would argue that felons should be immune from the consequences of their actions.[246] Nevertheless, it has been a fundamental premise of our system of justice that one accused of a crime is considered innocent until proven guilty "beyond a reasonable doubt," and that the vast resources and pressures of our system of justice must not be brought to bear in an unfair or arbitrary manner. As Mr. Justice Brandeis once observed:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[247]

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244. It has been argued that the fourth amendment doctrines adopted by the Burger Court are actively hostile to the rights of a criminal suspect. *See generally supra* note 24 and the articles cited therein. After examining the Court's treatment of the exclusionary rule, one commentator observed:

> The foregoing analysis obviously raises serious questions about the Burger Court's apparent lack of candor regarding its underlying motivations in fourth amendment cases. It is no coincidence, it may be argued, that all fourth amendment doctrinal inconsistencies surveyed in this Article invariably result in applications of exclusionary doctrine beneficial to the state and detrimental to the accused.

Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 191 (1979).

245. For example, *compare* the statement that "[t]he unjustified acquittals of guilty defendants due to application of the exclusionary rule have resulted in a growing sense of concern by our citizens that our system of justice is lacking in sense and fairness," Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916, 929 (1982), *with* Professor Schlag's assertion that "good faith type tests are nothing more than epistomological artifice." Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damages Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 914 (1982).

246. This sentiment should not, however, be confused with a willingness to characterize fourth amendment standards as "procedural niceties" that should yield to "a hard-minded concern for guilt or innocence of the defendant in the dock." Yackle, *supra* note 6, at 430.

247. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). It was under the Warren Court that this doctrine found its first full expression. As Professor Yackle has observed:

> There was a time when the Supreme Court understood its task. It adopted a value-oriented model that permitted the fourth amendment to speak to new threats not foreseen by the original draftsmen,

Both the Nebraska Supreme Court and its federal counterpart have made it clear that Article I, section 7, and the fourth amendment provide protection only against *unreasonable* searches and seizures. Clearly, in warrant cases the determination that objective standards merit a finding of probable cause will meet this threshold. Unfortunately, determinations of what is "reasonable" are inherently subjective. *Aguilar*, *Spinelli*, and *LeDent* provided a framework within which such decisions might be channeled. *Gates* and *Arnold* have removed those guidelines. They have not, however, eliminated the human tendency in criminal procedure to color the discussion by the manner in which one reacts to the particular crime or criminal in question.

Rulings setting aside criminal convictions on the basis of official misconduct are inevitably controversial.[248] The public demand for criminal convictions, particularly in certain types of crimes, provides strong incentives for "overzealous officers" to violate the law. The Court's attempt in *Gates* to argue for a revised standard because "police might well [otherwise] resort to warrantless searches"[249] reflects this pressure. More importantly, the Court's apparent willingness to succumb to public insistence for convictions in drug-related cases may well signal a willingness to lower constitutional standards—not because it is appropriate, but because certain members of the Court have an aversion to a particular type of crime.[250] The Court has recently emphasized, however, that it is precisely the "predictability of those pressures that

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> developed the principle of judicial supervision in order to control police discretion, and embraced the exclusionary rule to build into the system a fundamental respect not only for the individual defendant's constitutional rights but for the vicarious interests of all Americans. Above all, the Court recognized that when it spoke in a search and seizure case it spoke not only for the litigants at bar but for the public at large.

Yackle, *supra* note 6, at 436-37.

248. Professor Kaplan, for example, has argued that "[i]t is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment." J. KAPLAN, CRIMINAL JUSTICE 208 (1973).

249. Illinois v. Gates, 103 S. Ct. 2317, 2331 (1983).

250. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) (Powell, J., concurring) (arguing that the obstacles to detection of drug traffic are immense and should be accounted for). Justice Powell's implicit call for heightened scrutiny in drug cases appears to indicate a willingness to reduce the level of constitutional scrutiny when such cases are before the Court. Prosecutors have apparently responded to this invitation. Each of the search and seizure cases in which the court issued a ruling during its last Term were drug related, and each involved an appeal of an adverse judgment below by the state. *See supra* notes 185 & 12. This phenomenon is not confined to the U.S. Supreme Court. Professor Snowden has, for example, documented a similar antipathy toward the rights of defendants in "dope" cases in Nebraska. Snowden, *supra* note 185, at 361-76.

makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all."[251]

This tension between two generally opposing camps will almost certainly persist whether the standard applied is that of a United States Supreme Court bent upon broadening the range of tolerated official conduct, or of a Nebraska Supreme Court seeking to strengthen the constitutional defenses available to the citizens of this State. It is doubtful that those on either side of the line, if indeed the line can even be clearly drawn, will ever be inclined to accede to the arguments of their opponents. Nevertheless, the spectre of a less tolerant system of justice should concern us all. This will be all the more so if the impetus for change is in large part responsive to the viscera of those opposed to "crime," rather than to a reasoned examination of the extent to which this society is willing to tolerate the occasional release of a felon in order to protect the liberties of all citizens.

Recent decisions by the Burger Court, and in particular *Gates*, make it apparent that the Court wishes to reassess and, in most instances, restrict both the substantive and procedural guarantees developed by its predecessor. This being the case, those whose responsibility it is to shape the law in Nebraska would be well advised to recall the details of the era that preceeded the development of modern criminal procedure standards. It was an era within which federal constitutional guarantees were unavailable to criminal defendants in state proceedings, and comparable state constitutional provisions carried little force.[252] During that time police could, for example, utilize physical and psychological intimidation as substitutes for "interrogation."[253] Many criminal defendants had little, if any hope of legal assistance.[254] The right to trial by an impartial jury was inconsistently afforded,[255] safeguards against compulsory self-incrimination were minimal,[256] protections against double jeopardy generally unavailable,[257] and the right to confront witnesses only sporadically guaranteed.[258]

It was, then, a period during which the devil that lurks within us was very close to the surface, and there were few, if any, trees

251. Brewer v. Williams, 430 U.S. 387, 406 (1977).
252. For example, *see supra* note 22, the State of Nebraska refused to adopt the exclusionary rule until forced to do so by *Mapp*. During this same time period, the independent and parallel guarantees of the Nebraska Constitution, *see*, *e.g.*, NEB. CONST. art. I, §§ 11, 12, & 13, provided no relief.
253. Miranda v. Arizona, 384 U.S. 436 (1966).
254. Gideon v. Wainright, 372 U.S. 335 (1963).
255. Parker v. Gladden, 385 U.S. 363 (1966).
256. Mallow v. Hogan, 378 U.S. 1 (1964).
257. Benton v. Maryland, 395 U.S. 784 (1969).
258. Painter v. Texas, 380 U.S. 400 (1965).

upon the Nebraska legal landscape within whose shade we could seek even a modicum of shelter. Dare we risk a return?

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