WHAT'S IN A NAME? CHALLENGING THE CITIZEN-INFORMANT DOCTRINE

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Over the last fifty years, courts and scholars have debated the utility and reliability of informants—individuals who alert law enforcement to the occurrence of crime, point law enforcement in the direction of potential perpetrators, and help law enforcement prosecute those eventually charged. There are three primary types of criminal justice informants: (1) criminal and confidential informants, (2) anonymous tipsters, and (3) citizen-informants. Judicial examinations and scholarly critiques of informants have focused almost exclusively on the first two categories. These informants are deemed suspect, either because they are so enmeshed in the justice system that they have questionable motives, or because they inculpate others under a veil of anonymity. Meanwhile, the third category of informant—the citizen-informant—has evaded rigorous scrutiny because of the "citizen-informant doctrine," a premise embraced by the federal courts and many state courts. The citizen-informant doctrine reasons that individuals who witness or fall victim to crime and willingly identify themselves to law enforcement officers are presumptively reliable. This presumption enables law enforcement officers to conduct searches and seizures that would otherwise be unlawful based on uncorroborated reports from untested civilians. The citizen-informant doctrine has major consequences for the robustness of the Fourth Amendment's protection against unjustified government intrusions, and it has an enormous impact on the integrity of police investigations and criminal prosecutions. Yet this doctrine rests on shaky foundations that have heretofore been insufficiently probed. This Note proposes that courts require law enforcement officers to conduct more exacting inquiries before relying on the word of a so-called citizen-informant.

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Introduction

Consider the following hypothetical: Police officers on routine patrol are flagged down by a woman who reports that a man around the corner named Joe Smith, wearing a red shirt, is carrying cocaine and a gun. The officers do not want to seek a magistrate and obtain a warrant because they fear losing track of their new suspect. If, therefore, the officers spot a red-shirted man, they must judge for themselves whether they have probable cause to arrest or, at least, reasonable suspicion to stop and frisk him.

The answer to that question depends largely on their source. If the woman disappeared without providing her name or contact information, the police would lack reasonable suspicion to conduct even an investigative stop based solely on her tip.[1] If she told the police that she was an associate of Smith's—someone who helped him deal drugs—and would testify against him in exchange for immunity, the police would be required to consider her veracity and the basis of her knowledge about Smith before slapping on the cuffs.[2]

But what if she told them that her name was Jane Miller? In that case, police in many jurisdictions would be empowered to stop a

[1] *See infra* notes 84–100 and accompanying text (discussing the law on anonymous tipsters).

[2] These considerations would factor into the officer's analysis of whether probable cause existed to justify an arrest. *See infra* Part I.C.1 (discussing criminal and confidential informants).

person meeting her description of Smith, frisk him, and arrest him for any contraband found on his person during that frisk, even if that contraband were a small bag of marijuana instead of the anticipated cocaine and gun.[3] Miller's tip would be treated as reliable information requiring no additional corroboration to justify police action. The stop, frisk, and consequent arrest would be valid. Evidence obtained from that search and seizure would be admissible in court.

The variance among these scenarios is the product of the "citizen-informant doctrine," a premise applied in the federal courts and many state courts that reasons that a person who provides law enforcement officers with her name and information about a crime is presumptively reliable.[4] Pursuant to this doctrine, a citizen-informant's word alone—without additional investigation or corroboration—may serve as the basis for a stop, frisk, arrest, or search.[5]

By conferring upon citizen-informants a presumption of reliability, courts require significantly less of law enforcement officers acting on reports from these informants than of officers acting on information obtained from other sources, such as confidential or criminal informants and anonymous tipsters. When police receive information from a confidential[6] or criminal informant,[7] they must at least

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[3] *See infra* Part I.B (describing the citizen-informant doctrine). *But see* Minnesota v. Dickerson, 508 U.S. 366, 378 (1993) (holding that, during a protective frisk, police cannot continue to search once they conclude weapons are not present).

[4] *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.4(a), at 271–72 (5th ed. 2012) (noting that when "average citizen[s]" claim to have witnessed or fallen victim to crime, their reliability generally does not need to be demonstrated through corroboration); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 236–37 (1984) ("A 'citizen-informant' is a citizen who purports to be the victim of or to have been the witness [of] a crime who is motivated by good citizenship and acts openly in aid of law enforcement. It is reasonable for police officers to act upon the reports of such an observer of criminal activity." (quoting People v. Schulle, 124 Cal. Rptr. 585, 588 (Ct. App. 1975))); James R. Thompson & Gary L. Starkman, *The Citizen Informant Doctrine*, 64 J. CRIM. L. & CRIMINOLOGY 163, 163 (1973) (introducing and labeling the "citizen informant doctrine").

[5] *See, e.g.*, *Schulle*, 124 Cal. Rptr. at 587–88 (noting that corroboration of a citizen-informant's report is unnecessary for search-warrant purposes); Castella v. State, 959 So.2d 1285, 1290 (Fla. Dist. Ct. App. 2007) (explaining that, because "the veracity and reliability of a citizen informant are presumed, . . . further investigation and corroboration by law enforcement is not required" to justify an investigatory stop based on a citizen-informant's report); People v. Beto, 408 N.E.2d 293, 297 (Ill. App. Ct. 1980) ("It is well accepted law in Illinois that the requirement of prior reliability or independent corroboration which must be shown when the arresting officer acts upon information from police informers does not apply to information supplied by citizen-informers.").

[6] Confidential informants are persons whose identities are known to one or some officers but kept hidden from other officers, prosecutors, or magistrates evaluating warrant applications. *Infra* note 29; *see also* Corey Fleming Hirokawa, Comment, *Making the "Law of the Land" the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295, 312 n.76 (2000) (describing confidential informants).

consider that person's veracity and the basis of that person's knowledge and be able to explain those considerations to a magistrate evaluating a warrant application or to a judge considering a motion to suppress.[8] When police receive an anonymous tip from a nameless 911 caller, they must find corroborating evidence before intruding on a suspect's liberty interest unless that tip contains significant "indicia of reliability."[9] Yet in most jurisdictions, citizen-informants—people who state their names and claim to have witnessed or fallen victim to a crime—are presumed to be reliable and are trusted in their assertions about a crime or criminal.[10]

This presumption has been widely accepted, but its foundations have been insufficiently probed.[11] In light of a proliferating body of research about the dangers of unreliable informants and faulty eyewitnesses,[12] the citizen-informant cannot be excused from inspection.

This Note examines the citizen-informant doctrine, concluding that it rests on speculations, exaggerations, and misconceptions. It begins in Part I by introducing the concept of the citizen-informant,

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[7] Criminal informants include cooperators, accomplices, and other informants with criminal records or histories of involvement in the justice system. *See* Mary Nicol Bowman, *Truth or Consequences: Self-Incriminating Statements and Informant Veracity*, 40 N.M. L. REV. 225, 227–28 (2010) (describing criminal informants); Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. 1493, 1508–12 (2012) (discussing accomplice-informants and cooperators); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 4 (2003) (explaining how cooperators turn against "accomplices in a shared criminal enterprise"); *infra* notes 30–31 (identifying sources that define criminal informants).

[8] 2 LAFAVE, *supra* note 4, § 3.4(a), at 265 (noting that, in typical informant cases, "it might be said that veracity is assumed to be lacking until the contrary is established," so that informants must be shown to be credible or informants' reports must be shown to be reliable via corroboration).

[9] Alabama v. White, 496 U.S. 325, 326–27 (1990).

[10] 2 LAFAVE, *supra* note 4, § 3.4(a), at 265 (explaining that there is general agreement that a showing of reliability or credibility is unnecessary "when the information comes from an average citizen who is in a position to supply information by virtue of having been a crime victim or witness").

[11] To date, the most significant examination of the citizen-informant ever published is a 1973 article by two federal prosecutors arguing for the creation of a citizen-informant doctrine. Thompson & Starkman, *supra* note 4; *see also infra* note 51 (describing their article). A search for further analysis of the citizen-informant, or a rebuttal to Thompson and Starkman, yields only a few cursory discussions. In a 1984 article, Albert Alschuler used the citizen-informant doctrine as an example of how strict reliance on bright-line rules can produce unreasonable outcomes. Alschuler, *supra* note 4, at 237. Alschuler recognized the shortcomings of an inflexible rule defining citizen-informant reliability but did not probe the foundations of that rule or observe its ubiquitous application. *Id.* In 1982, a student at the Armed Forces Staff College named Lieutenant Colonel Herbert Green offered a more in-depth analysis of the citizen-informant, but he focused on military and federal criminal law only and, like Alschuler, did not probe the doctrine's foundational assumptions. Herbert Green, *The Citizen Informant*, ARMY LAW., Jan. 1982, at 1.

[12] *Infra* notes 31–43 and accompanying text.

discussing the legal contours of the citizen-informant doctrine, and briefly describing how the Supreme Court's treatment of other categories of informants gave rise to the presumption of reliability for citizen-informants. Part I also explains the central role of informants in the justice system and the dangers associated with uncritical dependence on such individuals.

Part II highlights tenuous assumptions and unanswered questions in judicial opinions addressing citizen-informants.[13] For example, courts assume that people who provide their names when reporting crimes have pure motives, as compared to self-serving criminal informants; indeed, judges seem to believe that these informant categories are comprised of entirely different types of people. Courts also assume that people understand the consequences of falsely reporting crimes and that those consequences provide a sufficient deterrent to false reporting. Finally, judges claim that greater scrutiny of citizen-informants would unacceptably hamper law enforcement efforts to investigate crimes and apprehend perpetrators. Assumptions like these lay the intellectual foundations of the citizen-informant doctrine but lack evidentiary support.

Part III suggests three possible avenues through which state courts could provide more robust Fourth Amendment protections and engage in more coherent analysis of citizen-informants: by rejecting the citizen-informant doctrine altogether; by requiring that citizen-informant status be established rather than automatically presumed; or, at the very least, by dispensing with the speculative logic used to justify the presumption of reliability. Because the citizen-informant concept seems entrenched in the federal courts,[14] and because the present Supreme Court is unlikely to consider imposing a stricter standard,[15] the proposals in Part III advocate "new federalism," the

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[13] Ideally, a comprehensive challenge to the citizen-informant doctrine would rest on empirical data, the gathering of which is beyond the scope of this Note. Most notably, the presumption of reliability could be buttressed or challenged with evidence actually demonstrating whether citizen-informants' reports typically prove to be accurate. *See, e.g.*, Max Minzer, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 942 (2009) (observing that requiring law enforcement to collect and report "success rates" would give scholars the opportunity to test the notion that citizen-informants are reliable, which is founded on "little or no empirical support"). But other data would be valuable too. It would be useful to have a concrete sense of who reports crimes; whether those people are, or have been, involved with the justice system as defendants or witnesses in other cases; whether they have relationships with, or vendettas against, those whom they identify; and whether they are later proven to share culpability for the actions that they reported to the police.

[14] *See infra* note 77 and accompanying text (describing federal citizen-informant jurisprudence).

[15] In the Court's most recent pronouncement on informants, *Navarette v. California*, a five-Justice majority seemed to lower the bar for assessments of anonymous tipsters, a

phenomenon of state high courts determining that their state constitutions compel greater protection than the Supreme Court has interpreted the federal constitution to guarantee.[16] Additionally, reform is particularly pressing at the state and local level, where routine police work and interaction with citizen-witnesses related to commonplace crimes are most likely to prompt searches and seizures based on bare-bones, uncorroborated reports from strangers.[17] The Fourth Amendment exists to protect civilians from police intrusion based on unsubstantiated hunches; the citizen-informant doctrine significantly weakens its protections.

I
WHO IS THE CITIZEN-INFORMANT?

A citizen-informant is an "average citizen who by happenstance finds himself in the position of a victim of or a witness to criminal conduct and thereafter relates to the police what he knows."[18] Although informants have long been utilized in our criminal justice system,[19] courts constructed the citizen-informant doctrine challenged here only during the last fifty years. The doctrine developed in juxtaposition to legal rules that were fashioned to govern the use of criminal and confidential informants. All types of informants have the power to catalyze government intrusions into the lives of others. But citizen-informants are sui generis in their exemption from the safeguards and scrutiny that should accompany this tremendous influence.

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category of informants closely related to citizen-informants. 134 S. Ct. 1683 (2014). In two prior cases, *Alabama v. White* and *Florida v. J.L.*, the Court had sketched an anonymous-tipster jurisprudence in which "bare-bones" tips alone cannot provide reasonable suspicion for a stop, but tips containing "sufficient indicia of reliability" may furnish reasonable suspicion, even without any corroborating investigation by police officers. *Id.* at 1688 (citing Alabama v. White, 496 U.S. 325, 327, 332 (1990); Florida v. J.L., 529 U.S. 266, 268 (2000)). In *Navarette*, the Court diluted the meaning of "sufficient indicia of reliability." Justice Scalia summed up the Court's new rule in a vigorous dissent: "So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop." *Id.* at 1692 (Scalia, J., dissenting).

16 *See infra* notes 171–74 and accompanying text (describing new federalism).

17 *See The Justice System*, BUREAU JUST. STAT., http://www.bjs.gov/content/justsys.cfm (last visited Nov. 17, 2014) (noting the role citizens play as witnesses to crimes and stating that "[t]he responsibility to respond to most crime rests with State and local governments").

18 2 LAFAVE, *supra* note 4, § 3.3, at 122.

19 *See* Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1091 (1951) ("From early times law enforcement authorities have utilized informers.").

A. The Dangerous Power of Informants

The Fourth Amendment guarantees the right to be free from "unreasonable searches and seizures" and commands that "no [w]arrants shall issue, but upon probable cause."[20] Consequently, law enforcement officers cannot detain or search people without legitimate, public-safety reasons for doing so.[21] To make an arrest, officers must have "probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."[22] To conduct an investigative stop,[23] officers must have "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'"[24] To conduct a search, officers need a warrant backed by probable cause or

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[20] U.S. CONST. amend. IV.

[21] What these requirements entail has been the subject of much dispute. Although the Supreme Court has repeatedly declared a preference for searches and seizures carried out pursuant to a warrant issued by a neutral and detached magistrate, today warrants are "more the exception than the rule." 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION § 18.01, at 311 (4th ed. 2006); *see also* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 32 (9th ed. 2010) (noting the Court's presumption that warrantless searches are unreasonable). The Court has carved out numerous exceptions to the warrant requirement—situations in which government action must satisfy only the reasonableness requirement. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) (exigent circumstances); South Dakota v. Opperman, 428 U.S. 364, 366, 375–76 (1976) (inventory search of an automobile); United States v. Robinson, 414 U.S. 218, 235 (1973) (search incident to a lawful arrest); Draper v. United States, 358 U.S. 307, 310–11, 314 (1959) (warrantless arrest backed by probable cause); Carroll v. United States, 267 U.S. 132, 155–56 (1925) (warrantless search of a vehicle). Along with this array of warrant exceptions, the Court has further diluted the Fourth Amendment's protections by condoning limited searches and seizures upon less than probable cause. During an investigative "stop," police may "detain [a person] briefly for questioning upon suspicion that he may be connected with criminal activity." Terry v. Ohio, 392 U.S. 1, 10, 31 (1968). If, in the course of a stop, police suspect that a person is armed and dangerous, they may conduct a "frisk" for weapons. *Id.* If the frisk yields any evidence of criminality, reasonable suspicion may ripen into probable cause, and the police may make a full arrest and conduct a search incident to arrest. *Id*.; *see also Robinson*, 414 U.S. at 235 (describing police authority to conduct a search incident to a lawful arrest).

[22] Gerstein v. Pugh, 420 U.S. 103, 111 (1975) (alteration in original) (internal quotation marks omitted). The determination of whether probable cause exists is essentially the same whether or not a warrant is present. *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 91 (1964) (applying the probable cause standard to warrantless arrests). *But see* Aguilar v. Texas, 378 U.S. 108, 110–11 (1964) (stating that less persuasive evidence is necessary to uphold a magistrate-issued warrant than a warrantless search).

[23] Because a "stop" is a less invasive seizure than an arrest, police can conduct a stop based on a lesser "quantum of suspicion" than probable cause. United States v. Sokolow, 490 U.S. 1, 7 (1989) ("[T]he level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause.").

[24] *Id.* (quoting *Terry*, 392 U.S. at 30).

must satisfy one of several Warrant Clause exceptions grounded in the notion of "reasonableness."[25]

Officers have many investigative tools to aid them in developing probable cause or reasonable suspicion.[26] Chief among these, informants play a key role in generating evidence needed to justify stops, arrests, and searches.[27]

Broadly, an informant is anyone who provides information to the police,[28] but this umbrella term is divisible into three major categories: (1) criminal or confidential informants, (2) anonymous tipsters, and (3) citizen-informants. A confidential informant is one whose identity is known by certain law enforcement officers but may be concealed from other actors, such as the magistrate evaluating a warrant application.[29] A criminal informant—whose identity may or may not be kept confidential—is a source who is personally involved in the justice system or who has criminal contacts. Casually referred to as

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[25] *See supra* note 21 (describing several Warrant Clause exceptions); *see also, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (describing "reasonableness" and the process of balancing the need to search against the invasion which the search entails).

[26] These include, among other methods, routine patrol and observation, community and problem-oriented policing, and forensic evidence. *See, e.g.*, Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013) (describing the use of forensic science); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 569 n.74 (1997) (listing sources that criticize routine patrol as a crime-control method); Michael D. Reisig, *Community and Problem-Oriented Policing*, 39 CRIME & JUST. 1, 2 (2010) (defining community policing); Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH L. REV. 299, 319–20 (2010) (discussing the effect of increased patrolling).

[27] *See* ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 158 (2002) (quoting former FBI Director William Webster as calling the informant "the single most important tool in law enforcement"); Bowman, *supra* note 7, at 225 ("Law enforcement today relies heavily on the flourishing industry of informants for prosecution of virtually all types of crimes."); Jeff Rojek et al., *Addressing Police Misconduct: The Role of Citizen Complaints*, *in* CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 258, 258 (Roger G. Dunham & Geoffrey P. Alpert eds., 5th ed. 2005) ("[P]olice are dependent upon citizen cooperation to fulfill their crime control mandate."); *see also* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 83 (1994) ("Informants are undoubtedly important in policing 'invisible crimes' where there is no victim, or the victim is reluctant to come forward and complain."); Sarah Stillman, *The Throwaways*, NEW YORKER, Sept. 3, 2012, at 38, 38 (noting that, "[b]y some estimates, up to eighty per cent of all drug cases" in the United States involve confidential informants).

[28] *E.g.*, 2 LAFAVE, *supra* note 4, § 3.3, at 122 ("Everyone who gives information to the police might be called an 'informant' in the broad sense of that word.").

[29] *See* Amanda J. Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 303 (2001) (describing confidential informants as people who "provide information to authorities on an ongoing basis" but whose "identities may never become known to anyone except the agents to whom they provide information").

"snitches,"[30] such informants often are rewarded with monetary payments or leniency in their own cases.[31] Citizen-informants are civilians who claim to have randomly witnessed or fallen victim to crime.[32] Officers can use statements from informants in each category to establish probable cause for an arrest warrant, search warrant, warrantless arrest, or warrantless search, or to form reasonable suspicion for an investigative stop or frisk.[33] Officers also use informant tips to gain leads for further investigation.

In spite of—and because of—their utility for law enforcement, informants can be extremely problematic. Numerous courts and scholars have recognized the fundamental risk associated with reliance on informants.[34] Whenever officers act on information obtained from civilians,[35] they should question the credibility and accuracy of

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[30] Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107 & n.1 (2006) (using the term "snitches" as a synonym for "criminal informants").

[31] *See* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 645 n.1 (2004) (defining a "criminal informant" as a person who trades information to obtain leniency); Thompson & Starkman, *supra* note 4, at 167 (observing that police informants usually "receive something in exchange for the information they supply, be it money or favorable consideration in connection with a charge pending against them").

[32] *See* 2 LAFAVE, *supra* note 4, § 3.4(a), at 266–69 (describing citizen-informants).

[33] *See, e.g.*, Alabama v. White, 496 U.S. 325, 331 (1990) (holding that a properly corroborated anonymous tip can provide reasonable suspicion for an investigative stop); Illinois v. Gates, 462 U.S. 213, 238, 246 (1983) (developing criteria for evaluating hearsay in a search warrant application and applying it to uphold a search warrant based on probable cause derived from an anonymous tip); Jones v. United States, 362 U.S. 257, 271 (1960) (holding that hearsay information may be sufficient, on its own, to establish probable cause in an arrest warrant application); Draper v. United States, 358 U.S. 307, 312–13 (1959) (holding hearsay to be a legitimate consideration in determining probable cause for a warrantless arrest); Brinegar v. United States, 338 U.S. 160, 170 (1949) (deeming hearsay a legitimate factor in assessing whether a police officer had probable cause for a warrantless search of an automobile).

[34] *See, e.g.*, Florida v. J.L., 529 U.S. 266, 272–73 (2000) (recognizing the potential unreliability of anonymous tipsters); Spinelli v. United States, 393 U.S. 410, 416 (1969) (recognizing the potential unreliability of confidential informants), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983); Aguilar v. Texas, 378 U.S. 108, 113–14 (1964) (same), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983); Bowman, *supra* note 7, at 229 (observing problems with systemic overreliance on criminal informants); Natapoff, *supra* note 30, at 107 ("Criminal informants, or 'snitches,' play a prominent role in [the] wrongful conviction phenomenon."); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329 (2012) (calling for pretrial hearings to assess the reliability of lay witnesses).

[35] Much has been written about law enforcement dishonesty, too, but that hugely important topic lies beyond the scope of this Note. *See, e.g.*, David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455 (1999) (discussing police credibility); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 914–15 (1991) (discussing police perjury); Melanie D. Wilson, *Improbable Cause: A*

that information, because people lie and people make mistakes.[36] The Supreme Court repeatedly has acknowledged that third parties whose statements are used to justify police action must be examined for their reliability.[37] Significantly, "reliability" in this context does not mean empirical truthfulness. Rather, a "reliable" informant is one who tells the police what he *thinks* he saw or experienced without *intentionally* fabricating information.

It is crucial, however, to recognize that informants often provide wrongful information *unintentionally* as well, due to problems related to memory, perception, bias, and suggestibility.[38] These problems do not exist in a separate sphere from the problem of lying or "unreliable" informants. Instead, intentional and unintentional inaccuracies

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Case for Judging Police by a More Majestic Standard, 15 BERKELEY J. CRIM. L. 259 (2010) (presenting a study on police perjury).

[36] *Cf.* Natapoff, *supra* note 30, at 108 ("[Criminal] informants do not generate wrongful convictions merely because they lie. After all, lying hardly distinguishes informants from other sorts of witnesses.").

[37] *See, e.g.*, *J.L.*, 529 U.S. at 272–73 (recognizing the potential unreliability of anonymous tipsters); *Spinelli*, 393 U.S. at 416 (recognizing the potential unreliability of confidential informants); *Aguilar*, 378 U.S. at 113–14 (same).

[38] Researchers have demonstrated the ease with which witnesses can wrongly identify people and the difficulty witnesses can have recalling faces and events. Problems such as memory failure, faulty eyewitness accounts, inaccurate cross-racial identifications, and police suggestiveness and misconduct impact the accuracy and utility of witness reports. *See, e.g.*, Ralph Norman Haber & Lyn Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCHOL. PUB. POL'Y & L. 1057, 1057 (2000) (noting that scientifically proven memory errors are "systematic" and "especially likely to occur for the kinds of events that are reported in courtroom testimony: reports of strangers performing brief, violent or unexpected acts that are frightening to the observer/witness"); Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 294–95 (2004) ("Eyewitnesses . . . see little, remember less, and often believe they remember what they never saw."). Theoretically, these issues are addressed through the adversarial process of suppression hearings and trials: Attorneys have the ability to cross-examine witnesses, and factfinders may assess witness credibility while weighing evidence of guilt. But if a defendant never goes to trial because she decides to plead guilty, these witnesses are not confronted. Today, more than ninety percent of criminal cases never go to trial. Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at SR5. Pursuant to a guilty plea, defendants waive many of their constitutional rights. *See Guilty Pleas*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 424, 453–55 (2011) (explaining that "[a] guilty plea waives most nonjurisdictional constitutional rights," including "the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination," as well as "the right to challenge nonjurisdictional defects brought about by government conduct prior to entry of the plea," such as an "illegal search and seizure"). Moreover, issues of reliability may be untouchable in court because of evidentiary rules, or may never come to light because of *Brady* or *Giglio* violations and other informational imbalances. *See* Thompson & Starkman, *supra* note 4, at 167 (describing how evidentiary rules impact the admissibility of informant testimony); *see generally* Giglio v. United States, 405 U.S. 150, 153–54 (1972) (requiring disclosure of witnesses' prior statements); Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring disclosure of exculpatory evidence).

may be inextricably layered in a single informant's interactions with the criminal justice system.

In addition to the paramount matters of accuracy and reliability, the system's dependence on informants carries other significant risks. For example, relationships between informants and law enforcement perpetuate an image of arbitrary justice.[39] In the case of criminal informants, there is arbitrariness in the government's decision to make bargains with certain individuals to facilitate the prosecutions of others.[40] And with regard to citizen-informants, the very process of conferring labels may be arbitrary.[41] Additionally, government cultivation of informants foments interpersonal distrust and violence.[42] This is the case not only for criminal informants urged to gather intelligence on associates or cell mates, but also for citizen-informants.[43]

Finally, and most importantly, an informant—through words alone—can bring the weight of the justice system to bear on another individual's freedom. Street encounters with the police are invasive in

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[39] These concerns are particularly acute with regard to criminal informants who, in exchange for their testimony, receive less severe sentences, better accommodations in confinement, or dropped charges. As Alexandra Natapoff describes, "[f]or high-crime communities, informant use sends problematic messages about the exercise of state power" because it "involves the official tolerance of crime," "sends the message that criminal liability is negotiable and rife with loopholes for those willing to betray others," and "institutionalizes secretive official decision-making and an arbitrary rewards system in which similarly situated individuals are treated differently depending on their personal relationships with and usefulness to law enforcement actors." Natapoff, *supra* note 31, at 694.

[40] *See* Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1086–87 (2011) (reviewing ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009)) (noting that the "general principle of criminal liability" that "the worse the crime, the worse the punishment" is "routinely flouted in the world of snitching," and providing examples (quoting NATAPOFF, *supra*, at 33)).

[41] *See infra* Part II.A (describing the mistaken assumption that crimes always involve readily identifiable victims and witnesses, whereas, in reality, the "victim" may be whoever first thinks to call 911).

[42] The use of informants contributes to a culture of distrust in jails, prisons, and the communities from which most people caught in the criminal justice system are pulled—poor communities and communities of color. *See* Natapoff, *supra* note 31, at 690–94 (describing the harm to interpersonal and community trust caused by heavy use of informants); Taslitz, *supra* note 40, at 1089 ("Snitching . . . creates pressure to distort or destroy intimate relationships, forcing mothers to testify against sons, wives against husbands, friends against friends—sometimes truthfully, sometimes not. This can fray the bonds of social trust." (citation omitted)).

[43] *See* Rich, *supra* note 7, at 1514 (noting that civilian witnesses may "suffer violent retaliation" in the "high-crime neighborhoods where the Stop Snitching movement has taken root"); *cf.* Taslitz, *supra* note 40, at 1086 ("Widespread snitching—even when reliable—has broader ill social effects, particularly because snitching is concentrated in neighborhoods heavily populated by vulnerable populations.").

and of themselves.[44] The Fourth Amendment protects American persons' fundamental right to be free from unjustified government intrusion—unlawful searches or seizures—even when that intrusion does not result in criminal charges. When someone *is* actually charged with a crime, the consequences are much more severe, even if no conviction results.[45] And of course there is greatest cause for concern where police encounters yield convictions and sentences, which may include death, incarceration, parole, or probation and lead to countless "enmeshed penalties" such as deportation, lost benefits and housing, or voter disenfranchisement.[46]

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[44] *See* Jeremy Chase Branning, State v. Reesman*: Examining Information Provided by an Anonymous Informant*, 24 AM. J. TRIAL ADVOC. 671, 671 (2001) ("The requirement of probable cause serves to protect the public from unwarranted government intrusion."); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1259 (1990) (observing that the Court's Fourth Amendment jurisprudence presents a danger to our "freedom of locomotion," the "long enjoyed . . . liberty to walk the streets and move about the country free from arbitrary government intrusion").

[45] Even pending or dismissed criminal charges can present enormous barriers and have major consequences. Pending charges can be cause to revoke someone's parole or probation, even if the new charges do not lead to any conviction. *See, e.g.*, Ellen Liberman, *Guilty, Even While Innocent*, R.I. MONTHLY, Dec. 2008, at 31, 31–32, *available at* http://www.rimonthly.com/Rhode-Island-Monthly/December-2008/Guilty-Even-While-Innocent/ (explaining how in Rhode Island and other states, a new arrest can have major ramifications even when it results in no conviction). Pending charges may show up on background checks and job applications, presenting serious obstacles to individuals seeking employment. For those already employed, time away from work while detained or battling a case may be grounds for termination. Pending charges also have serious ramifications for child custody matters and government benefits. For children, time spent in court or jail pending the outcome of a case means time away from school and academic disadvantage, as well as potential stigma in one's peer group.

[46] John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 55 (2013) (noting that in today's criminal justice system, "criminal convictions carry with them enmeshed penalties which are often of greater concern to defendants than actual incarceration"). Some would argue that, where there is sufficient evidence for a conviction, the system has functioned as intended. Yet this argument falls short in an era of draconian sentences, mass incarceration, and laws that unjustly target the poor and people of color. Protections against unjustified police intrusion are indispensable safeguards against ill-conceived laws that legislators lack the political will to change. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2, 180 (2010) (arguing that today's criminal justice system is a system of racial oppression); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 3–4, 23–24, 28–43 (1997) (explaining the political context for America's tough-on-crime movement and the existence of political barriers to reform); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 9–21 (2003) (discussing the characteristics of the "prison industrial complex"); HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT at xxxvii–lii (2011) (explaining the proliferation of actions that constitute federal crimes). In light of the deep flaws of our system, it is particularly problematic that the majority of criminal defendants plead guilty instead of contesting their charges because the system makes it foolish or impossible for

Despite all these concerns, however, informants play an indispensable role in public safety. Criminal informant cooperators are a vital tool for law enforcement officers and prosecutors,[47] and clearly police must respond to calls from informants, citizens or otherwise, about serious crimes that callers personally witness or experience. Accordingly, this Note does not suggest that actual victims and witnesses should not call the police. Rather, it aims to debunk the presumption that every person who self-identifies and reports a crime can automatically be presumed reliable. Informants are necessary tools for law enforcement, but uncritical dependence on informants jeopardizes law enforcement's accuracy and integrity. This tension demands consideration and raises a crucial question: How can the risks associated with informants be mitigated without unduly stymieing law enforcement officers in their efforts to prevent and prosecute serious crimes?

B. Defining the Citizen-Informant Doctrine

It is difficult to pinpoint the birth date of the citizen-informant doctrine. In California, for example, courts have endorsed the citizen-informant concept as black letter law at least since 1966.[48] The United States Supreme Court made its first significant pronouncement on the citizen-informant a year earlier, in the 1965 case *Jaben v. United States*, in which the justices compared narcotics informants "whose credibility may often be suspect" to civilian sources in a tax evasion case who were "much less likely to produce false or untrustworthy information."[49] Many courts discussing the doctrine cite language from Justice Harlan's 1971 dissent in *United States v. Harris*: "[T]he ordinary citizen who has never before reported a crime to the police may . . . be more reliable than one who supplies information on a regular basis. The latter is likely to be . . . himself involved in criminal activity or is, at least, someone who enjoys the confidence of

them to choose otherwise. *See* Alexander, *supra* note 38 (noting the significant portion of cases that result in plea agreements before trial).

47 *See supra* note 27 and accompanying text.

48 *See, e.g.*, People v. Schulle, 124 Cal. Rptr. 585, 588 (Ct. App. 1975) ("A 'citizen-informant' is a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. It is reasonable for police officers to act upon the reports of such an observer of criminal activity." (citations omitted)); Thompson & Starkman, *supra* note 4, at 170 (noting the doctrine's early emergence in California).

49 381 U.S. 214, 224 (1965); *see also* 2 LAFAVE, *supra* note 4, § 3.4(a), at 266 (noting that while the *Jaben* Court "did not go so far as to say that [supporting information concerning the informants' credibility] was unnecessary" in the case of citizen-informants, since *Jaben*, the Court has in fact "proceeded as if veracity may be assumed when information comes from the victim of or a witness to criminal activity").

criminals."[50] Although Justice Harlan offered this description of the citizen-informant as a hypothesis rather than a rigid doctrine, it has been widely embraced.[51]

Courts adopting the citizen-informant doctrine rest their analyses on certain assumptions. Most notably, almost every court that has considered the citizen-informant has claimed that citizen-informants lack any motive to falsify.[52] Unlike criminal informants whose reports are "self-serving" and must be "considered suspect," the argument goes, there is no reason to question citizen-informants' intentions.[53] Moreover, beyond asserting that citizen-informants have no ill motives, many courts have touted citizen-informants' *positive* motives: They report crimes because they are responsible and dutiful citizens.[54]

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[50] 403 U.S. 573, 599 (1971) (Harlan, J., dissenting) (internal quotation marks omitted).

[51] In 1973, James R. Thompson and Gary L. Starkman—at the time, the U.S. Attorney for the Northern District of Illinois and an Assistant U.S. Attorney in the Special Investigations Division of that same office, respectively—wrote an article for the *Journal of Criminal Law and Criminology* arguing for a special "citizen-informant doctrine." Thompson & Starkman, *supra* note 4. The doctrine they touted would allow search warrants to issue based on information provided by "ordinary citizen" witnesses "without regard to particularized considerations of reliability." *Id.* at 163. In practice, the citizen-informant doctrine has been used to uphold probable-cause determinations for warranted and warrantless arrests and searches and to uphold investigative stops. *See, e.g.*, United States v. Garrett, 940 F.2d 653, 1991 WL 138487, at *2 (4th Cir. 1991) (unpublished table decision) (per curiam) (upholding an arrest warrant based on the word of a citizen-informant and noting the "prevailing view" that "corroboration for citizen reports of criminal acts is unnecessary"); Burke v. Superior Court, 113 Cal. Rptr. 801, 804 (Ct. App. 1974) ("It has repeatedly been held that [a citizen informer] may furnish probable cause for a warrantless search or arrest."); State v. Maynard, 783 So.2d 226 (Fla. 2001) (upholding an investigative stop based on a tip from a citizen-informant); State v. Duff, 412 N.W.2d 843, 847 (Neb. 1987) (upholding a search warrant based on an affidavit that "permit[ted] an inference that all four witnesses were citizen informants" and contained nothing to suggest that they were "anything but eyewitnesses").

[52] *See, e.g.*, Panetta v. Crowley, 460 F.3d 388, 395 (2d Cir. 2006) ("[I]nformation provided by an identified bystander with no apparent motive to falsify has a peculiar likelihood of accuracy." (internal quotation marks omitted)); United States v. Angulo-Lopez, 791 F.2d 1394, 1397 (9th Cir. 1986) ("A citizen informant's veracity may be established by the absence of an apparent motive to falsify . . . ."); United States v. Ross, 713 F.2d 389, 393 (8th Cir. 1983) (comparing a citizen-informant "with no motive to falsify" to "a professional informant, with attendant credibility concerns"); United States v. Gagnon, 635 F.2d 766, 768 (10th Cir. 1980) (stating that there is no need to probe the reliability of a "citizen/neighbor eyewitness" with "no apparent ulterior motive for providing false information"); Brown v. United States, 365 F.2d 976, 979 (D.C. Cir. 1966) (observing that a victim-informant's report is "less likely to be colored by self-interest" than that of a criminal informant).

[53] Thompson & Starkman, *supra* note 4, at 167.

[54] *See, e.g.*, People v. Hicks, 341 N.E.2d 227, 230 (N.Y. 1975) (assuming that the "average citizen who provides the authorities with information . . . does so with no expectation of private gain" but rather "to promote the safety and order of the society as a whole"); State v. Paszek, 184 N.W.2d 836, 843 (Wis. 1971) ("[An ordinary citizen who reports a crime] is a witness to criminal activity who acts with an intent to aid the police in

Some courts also maintain that citizen-informants do not require exacting scrutiny because the officers who see them face-to-face have an opportunity to assess their demeanor and credibility.[55] Additionally, courts speculate that citizen-informants would be sufficiently deterred from lying by liability for false crime reports.[56] Finally, courts contend that the citizen-informant doctrine is necessary for expediency and public safety.

Based largely on these assertions, courts across the country have embraced the citizen-informant doctrine.[57] In these jurisdictions, "the reliability of the individual supplying information to the police need not be buttressed by supporting facts where it appears that he is a citizen outside the criminal environment."[58] Their word alone legitimates police intrusion.

C. The Development of the Citizen-Informant Doctrine

A brief examination of this doctrine's advent helps illustrate the extraordinary treatment afforded to citizen-informants and demonstrates alternative standards of scrutiny to which citizen-informants *could* be subject. Rather than developing on its own, the citizen-informant doctrine emerged from the shadow of legal rules designed

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law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession in exchange for his information.").

[55] *See, e.g.*, United States v. DeQuasie, 373 F.3d 509, 523 (4th Cir. 2004) ("[A]n informant who meets face-to-face with an officer provides the officer with an opportunity to assess his credibility and demeanor . . . ."). Of course, the idea that officers can make instant determinations of individual reliability based on brief encounters raises the troubling possibility that officers make these snap determinations based at least in part on implicit biases and stereotypes. This is problematic when some individuals reporting crimes are immediately presumed honest because of certain characteristics, but equally problematic when other individuals are presumed suspect based on their distinguishing features and presentation. For a discussion of implicit bias, see L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011), and Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

[56] *See DeQuasie*, 373 F.3d at 523 (observing that the citizen-informant "exposes himself to accountability for making a false statement"); *Hicks*, 341 N.E.2d at 230–31 (explaining why citizen-informants are deterred from fabricating information); *see also* Thompson & Starkman, *supra* note 4, at 169 (describing as a "common sense notion" the idea that "a responsible citizen . . . will not disregard the consequences of supplying inaccurate information to police").

[57] *See, e.g.*, United States v. Elmore, 482 F.3d 172, 180 (2d Cir. 2007) ("The veracity of identified private citizen informants . . . is generally presumed in the absence of special circumstances suggesting that they should not be trusted."); United States v. Blount, 123 F.3d 831, 835 (5th Cir. 1997) ("[A]bsent specific reasons for police to doubt his or her truthfulness, an ordinary citizen, who provides information to police . . . may be presumed credible without subsequent corroboration."); *see also infra* Part II (collecting cases).

[58] Thompson & Starkman, *supra* note 4, at 170.

to address informants typically viewed as more problematic: criminal and confidential informants, and anonymous tipsters.

The standards for police action in response to *any* informant statement stem from an initial innovation: the existence of probable cause and reasonable suspicion based entirely on nonpolice hearsay statements.[59] The Supreme Court first condoned the issuance of warrants based on hearsay and then, over several decades, crafted and refined rules to govern its use. Together, these rules establish an overarching principle: When there is reason to question the source of hearsay purported to establish reasonable suspicion or probable cause—because the source was confidential, criminal, or anonymous—police must satisfy themselves of the source's veracity or the basis of the source's knowledge. Otherwise, they must corroborate the source's tips with independent investigation. Citizen-informants have been excused from this assessment based on the premise that they are not questionable sources and are instead inherently reliable.

1. Aguilar-Spinelli*,* Gates*, and the Rules Governing Confidential and Criminal Informants*

To explain the dearth of any meaningful framework for assessing citizen-informant reliability, it is necessary to outline the hotly contested metric designed to evaluate confidential and criminal informants.[60] These actors are regarded with a skeptical eye and treated as necessary evils that can present major problems but remain indispensable to law enforcement.[61] Because these informants are regarded

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[59] *See* Adams v. Williams, 407 U.S. 143, 147 (1972) (rejecting the argument "that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person"); McCray v. Illinois, 386 U.S. 300, 312 (1967) (holding that the government is not required to disclose the identity of confidential informants whose reports are used to form probable cause); Jones v. United States, 362 U.S. 257, 270–71 (1960) (permitting the issuance of warrants based on hearsay information); Draper v. United States, 358 U.S. 307, 312–13 (1959) (permitting arrests based on probable cause developed through hearsay).

[60] *See, e.g.*, Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 284 (2010) (describing the Court's ruling on probable cause and informants in *Illinois v. Gates*, 462 U.S. 213 (1983), as "grounded in anti-intellectualism"); Arnold H. Loewy, *Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C. L. REV. 329, 339–40 (1984) (criticizing the *Gates* ruling for including "amorphous" terms, leaving magistrates "unguided," and running "counter to its own precedent as well as linguistics"); *infra* notes 71–75 (describing the diversity of state court approaches to assessing reports from criminal and confidential informants).

[61] For example, Justice Jackson wrote in 1952, "Society can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law." On Lee v. United States, 343 U.S. 747, 756 (1952); *see also* People v. Rodriguez, 420 N.E.2d 946, 949 (N.Y. 1981) ("The courts have long recognized that many police informants are not pillars of the community and many co-operate with the police

suspiciously, the Supreme Court implemented a framework to assess their reliability.

For years this framework consisted of a two-pronged test, developed in *Aguilar v. Texas*[62] and *Spinelli v. United States*,[63] which required a showing of an informant's trustworthiness and of the underlying circumstances from which the informant drew his conclusions. More specifically, *Aguilar-Spinelli*, as the test came to be known, demanded that police relying on criminal and confidential informants to develop probable cause demonstrate (1) the basis of an informant's knowledge and (2) the informant's veracity, such as details about the informant's credibility in general or about the reliability of the information specifically provided.[64] Under *Aguilar-Spinelli*, officers needed to present magistrates with solid evidentiary detail in order to obtain a constitutionally valid warrant based on an informant's report.[65] In later cases, the Court applied this same rule to assessments of probable cause for warrantless searches and arrests.[66]

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only to curry favor with the authorities at a time when their own right to continued liberty is in peril.").

[62] 378 U.S. 108 (1964), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983). In *Aguilar*, the Court reviewed a search warrant based on an affidavit that said, "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Id.* at 109. The Court found the affidavit insufficient without details to establish the informant's credibility. *Id.* at 115. Such details were necessary, the Court explained, to allow a magistrate to understand "some of the underlying circumstances" from which the informant made a conclusion and "from which the officer concluded that the informant, whose identity need not be disclosed, was 'credible' or his information 'reliable.'" *Id.* at 114 (citation omitted). "Otherwise, the inferences from the facts which lead to the complaint [would] be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime . . . ." *Id.* at 114–15 (internal quotation marks omitted).

[63] 393 U.S. 410 (1969), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983). In *Spinelli*, the Court "elevate[d] the evidentiary standards necessary to satisfy *Aguilar*'s dual criteria." Thompson & Starkman, *supra* note 4, at 165. The Court held that an unidentified informant's tip could be used to establish probable cause when corroborated by independent sources of information so that the corroborated tip was sufficiently reliable under the two-pronged test in *Aguilar*. *Spinelli*, 393 U.S. at 415.

[64] *See* Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 31 (1989) (reciting what is "commonly known as the '*Aguilar-Spinelli* test'").

[65] *See* Thompson & Starkman, *supra* note 4, at 165 (asserting that *Spinelli* greatly expanded the amount of detail that must be presented to a magistrate in order to obtain a warrant); *see also, e.g.*, People v. Montoya, 538 P.2d 1332, 1333–34 (Colo. 1975) (en banc) (finding that an affidavit was insufficiently detailed under *Aguilar-Spinelli*); State v. Nollsch, 273 N.W.2d 732, 734–35 (S.D. 1978) (same).

[66] *See, e.g.*, McCray v. Illinois, 386 U.S. 300, 304 (1967) (upholding a warrantless arrest and search based on information from an informant alleged to be trustworthy and reliable).

But in the 1983 case *Illinois v. Gates*, the Court abandoned the two-pronged test, erecting in its place a "totality-of-the-circumstances" framework.[67] The Court explained that, while an informant's veracity, reliability, and basis of knowledge were all "highly relevant in determining the value of his report," the elements should be understood as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause,'" rather than as "entirely separate and independent requirements to be rigidly exacted in every case."[68] *Gates* eliminated the need to independently identify and explain an informant's veracity and basis of knowledge. The two prongs are still factors to be considered, but neither is a prerequisite to police action. Although *Gates*, like *Aguilar* and *Spinelli*, addressed officer affidavits backing warrant applications,[69] the Court later extended its totality-of-the-circumstances test to warrantless arrests, searches, and stops.[70]

After *Gates*, many states followed suit and found that their state constitutions, like the Federal Constitution, did not require strict adherence to *Aguilar-Spinelli*.[71] In these states, courts determine whether probable cause exists based on the totality of the facts and circumstances.[72] Other state high courts, however, hold that it is still

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[67] Illinois v. Gates, 462 U.S. 213, 230 (1983). Even before *Gates*, the Court held that a confidential informant's "unverified tip," while perhaps insufficient for an arrest or search warrant under the *Aguilar-Spinelli* test, could provide reasonable suspicion to justify a "forcible stop" if the informant's tip "carried enough indicia of reliability." Adams v. Williams, 407 U.S. 143, 147 (1972).

[68] *Gates*, 462 U.S. at 230.

[69] *See id.* at 217 (contemplating the sufficiency of a search warrant application); Spinelli v. United States, 393 U.S. 410, 411 (1969) (same); Aguilar v. Texas, 378 U.S. 108, 109 (1964) (same).

[70] *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 370 (2003) (applying *Gates* to a warrantless arrest); Ornelas v. United States, 517 U.S. 690, 691, 695 (1996) (applying *Gates* to a warrantless search); Alabama v. White, 496 U.S. 325, 328–29 (1990) (applying *Gates* to a stop).

[71] *See* Jodi Levine Avergun, Note, *The Impact of* Illinois v. Gates*: The States Consider the Totality of the Circumstances Test*, 52 BROOK. L. REV. 1127, 1130, 1155 (1987) (noting that many states followed the Supreme Court in applying *Gates* and that "[v]irtually every state that has applied that test has found probable cause to exist, despite marked factual differences from case to case"). State constitutional protections are not necessarily coextensive with federal constitutional protections; even where a state constitution has a provision that is identical to a provision of the U.S. Constitution, a state may interpret its constitution differently from the Supreme Court's pronouncements on federal constitutional law. *See infra* notes 171–74 and accompanying text (discussing new federalism).

[72] *E.g.*, Jackson v. State, 675 S.W.2d 820, 821 (Ark. 1984); People v. Pannebaker, 714 P.2d 904, 907 (Colo. 1986) (en banc); Tatman v. State, 494 A.2d 1249, 1252 (Del. 1985); State v. Stephens, 311 S.E.2d 823, 824 (Ga. 1984); People v. Jones, 475 N.E.2d 832, 839 (Ill. 1985); State v. Luter, 346 N.W.2d 802, 807 (Iowa 1984); Beemer v. Commonwealth, 665 S.W.2d 912, 914 (Ky. 1984); State v. Knowlton, 489 A.2d 529, 531 (Me. 1985); Potts v. State,

essential for officers to assess, as independent factors, an informant's veracity and basis of knowledge before using that individual's word to justify an arrest or search.[73] For example, in 1985, the New York Court of Appeals declared that state constitutional standards required continued application of *Aguilar-Spinelli* to promote "predictability and precision in judicial review of search and seizure cases," "the protection of . . . individual rights," and "bright line guidance to police personnel in performing their duties."[74] In other jurisdictions, *Gates* was irrelevant because the two-pronged test had been enshrined in statutes declaring each prong necessary to a finding of probable cause.[75]

Understanding *Aguilar-Spinelli*, *Gates*, and their differences is essential because—while the vast majority of jurisdictions exempt citizen-informants from assessment under either test—these frameworks are applied to citizen-informants in some jurisdictions and should be in many more. But most importantly for the argument here, under both tests officers must conduct *some* reliability assessment before acting on a criminal or confidential informant's tip, either through the two-pronged test or the totality-of-the-circumstances analysis. Uncorroborated tips from criminal or confidential infor-

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479 A.2d 1335, 1339 (Md. 1984); State v. Wiley, 366 N.W.2d 265, 268 (Minn. 1985); State v. Hendrickson, 701 P.2d 1368, 1371 (Mont. 1985); State v. Abraham, 356 N.W.2d 877, 879 (Neb. 1984); State v. Andrews, 480 A.2d 889, 893 (N.H. 1984); State v. Arrington, 319 S.E.2d 254, 259 (N.C. 1984); State v. Anderson, 701 P.2d 1099, 1102 (Utah 1985); State v. Maguire, 498 A.2d 1028, 1031 (Vt. 1985); Bonsness v. State, 672 P.2d 1291, 1293 (Wyo. 1983).

[73] *E.g.*, Commonwealth v. Upton, 476 N.E.2d 548, 556–57 (Mass. 1985) (deeming the *Gates* test "unacceptably shapeless and permissive" and holding that each prong of *Aguilar-Spinelli* must be considered independently and separately satisfied); People v. Hetrick, 604 N.E.2d 732, 734 (N.Y. 1992) ("Although the United States Supreme Court has abandoned the *Aguilar-Spinelli* test in favor of the more permissive totality-of-the-circumstances rule, New York has continued to afford the protection of *Aguilar-Spinelli* as a matter of State constitutional law." (citations omitted)); People v. Griminger, 524 N.E.2d 409, 411 (N.Y. 1988) (requiring fulfillment of the two-pronged *Aguilar-Spinelli* test for cases involving search warrants); People v. Johnson, 488 N.E.2d 439, 445 (N.Y. 1985) (holding that the *Aguilar-Spinelli* test is required when evaluating warrantless arrests); State v. Cauley, 863 S.W.2d 411, 417 (Tenn. 1993) (requiring independent consideration of an informant's basis of knowledge and a basis of either her credibility or the reliability of her information); State v. Jackson, 688 P.2d 136, 143 (Wash. 1984) (en banc) (holding that the *Gates* test lacked "sufficient specificity and analytical structure . . . to protect the right of privacy secured by" Washington's constitution); *see also* Avergun, *supra* note 71, at 1130 ("The states that have refused to adopt the *Gates* test have done so because that test fails to protect fourth amendment rights inherent in their respective constitutions.").

[74] *Johnson*, 488 N.E.2d at 445 (internal quotation marks omitted).

[75] *See* Avergun, *supra* note 71, at 1148–50 (discussing statutes requiring the application of *Aguilar-Spinelli*).

mants whose reliability is unknown can provide probable cause or reasonable suspicion only when so detailed as to be "self-verifying."[76]

2. *How* Aguilar-Spinelli *and* Gates *Shaped the Citizen-Informant Doctrine*

Following the pronouncement of rules governing the use of facts reported by civilians rather than personally witnessed by officers, courts had to determine which informants would be subject to these rules. In the federal system, the transition from *Aguilar-Spinelli* to *Gates* theoretically did not change much with respect to citizen-informants because citizen-informants were already exempted from the two-pronged test. In *Gates*, the Court explained that its prior rulings had made clear that when an "unquestionably honest citizen comes forward with a report of criminal activity . . . rigorous scrutiny of the basis of his knowledge [is] unnecessary."[77] How the Court envisioned this "unquestionably honest citizen" was unclear.

Beyond the federal system, though, whether a jurisdiction follows *Aguilar-Spinelli* or *Gates* may prove decisive for its treatment of citizen-informants. Some state courts, like their federal counterparts, had already exempted citizen-informants from *Aguilar-Spinelli* by the time of *Gates*: An officer who classified someone as a citizen-informant had no burden to establish that informant's basis of knowledge or veracity.[78] Others affirmed or adopted the citizen-informant

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[76] *See* Illinois v. Gates, 462 U.S. 213, 284 (1983) (Brennan, J., dissenting) (asserting that a "self-verifying detail" would fulfill the basis-of-knowledge prong of the *Aguilar-Spinelli* test); 2 LaFave, *supra* note 4, § 3.3(e), at 203 (discussing the concept of "self-verifying detail").

[77] *Gates*, 462 U.S. at 233–34 (citing Adams v. Williams, 407 U.S. 143 (1972)). Many federal courts had, by the time of *Gates*, explicitly held that citizen-informants were exempted from *Aguilar-Spinelli*. *See, e.g.*, United States v. Burke, 517 F.2d 377, 380 (2d Cir. 1975) (holding that *Aguilar-Spinelli* was "addressed to the particular problem of professional informers and should not be applied in a wooden fashion to cases where the information comes from an alleged victim of or witness to a crime"); United States v. Unger, 469 F.2d 1283, 1287 n.4 (7th Cir. 1972) (noting that various state and federal courts had distinguished the informants considered in *Aguilar-Spinelli* from citizen-informants, "dispens[ing] with specific allegations of reliability" and "inferr[ing] that reliability may be deduced from the content of the complaint" in the case of the latter); United States v. Bell, 457 F.2d 1231, 1239 (5th Cir. 1972) (holding that *Aguilar-Spinelli* was "limited to the [confidential] informant situation only").

[78] *See, e.g.*, People v. Glaubman, 485 P.2d 711, 717 (Colo. 1971) (en banc) (observing that a citizen-informant's information "should not be subjected to the same tests as are applied to the information of an ordinary informer"); State v. Northness, 582 P.2d 546, 549 (Wash. Ct. App. 1978) ("When the informant is an ordinary citizen . . . and his identity is revealed to the issuing magistrate, intrinsic indicia of the informant's reliability may be found in his detailed description of the underlying circumstances of the crime observed or about which he had knowledge.").

rule after *Gates*.[79] In some states that follow *Gates*, it is still necessary to consider citizen-informants' reliability in the totality-of-the-circumstances analysis, but the reliability analysis is far less exacting than that required for criminal or confidential informants.[80] Finally, in some states that still apply *Aguilar-Spinelli*, citizen-informants,[81] like criminal and confidential informants, are subjected to a form of the two-pronged test when their observations are used to establish probable cause.[82]

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[79] In some states, like Florida, the high court has not reached this issue, but lower courts have accepted a complete presumption of reliability. *E.g.*, State v. Rewis, 722 So. 2d 863, 865 (Fla. Dist. Ct. App. 1998); Williams v. State, 721 So. 2d 1192, 1193 (Fla. Dist. Ct. App. 1998); State v. Evans, 692 So. 2d 216, 219 (Fla. Dist. Ct. App. 1997).

[80] In Illinois, for example, citizen-informants are considered to have greater indicia of reliability than criminal informants but no complete presumption of reliability in a totality-of-the-circumstances probable-cause evaluation. *See, e.g.*, Village of Mundelein v. Minx, 815 N.E.2d 965, 970–71 (Ill. App. Ct. 2004) (noting that the state no longer adheres to a strict citizen-informant doctrine but that citizen-informants have "greater indicia of reliability than the typical criminal informant"); People v. Gomez, 399 N.E.2d 1030, 1033 (Ill. App. Ct. 1980) (declaring that the court would not "state the rule so broadly as to say that the citizen-informer is simply presumed reliable" and requiring that a warrant affidavit "clearly demonstrate [the citizen-informant's] *present* reliability"). In Montana, if an informant is motivated by "good citizenship" and his information "demonstrates a sufficient degree of the nature of the circumstances under which the incriminating information became known," his reports are "deemed a reliable basis for determining probable cause." State v. Reesman, 10 P.3d 83, 90 (Mont. 2000). The Colorado Supreme Court has observed that "placing one's anonymity at risk is a factor to be considered in weighing reliability." People v. Polander, 41 P.3d 698, 704 (Colo. 2001) (en banc). In Tennessee, courts apply the citizen-informant doctrine but require some semblance of case-by-case justification for the presumption of reliability. *See* State v. Stevens, 989 S.W.2d 290, 293 (Tenn. 1999) (noting the difference in treatment for citizen-informants and stating that informants known to the police officer are presumed reliable but the reliability of other witnesses should be judged based on all the circumstances and the contents of the affidavit); State v. Yeomans, 10 S.W.3d 293, 296 (Tenn. Crim. App. 1999) (requiring more than "conclusionary allegations that the informant was a concerned citizen source, acted on civic duty, and asked for no payment for their information" (internal quotation marks omitted)).

[81] *See* Joseph G. Cook, *The Use of Informants—Reliability*, Const. Rts. Accused 3d (CRA) § 4:25, at 4-208 to -211 (Sept. 1996) (explaining that while most courts question reliability only when information comes from a source "presumed to be inherently suspect by virtue of an association with the criminal milieu," and not from victims or witnesses, "[s]ome courts . . . have been reluctant to totally ignore the question of reliability in such cases").

[82] In some of these jurisdictions, like New York, citizen-informants are presumed *personally* reliable, meaning that the veracity prong is satisfied, but police still must assess the basis of their knowledge. *See* People v. Parris, 632 N.E.2d 870, 874–75 (N.Y. 1994) (granting a defendant's motion to suppress because, while the citizen-informant was presumed personally reliable, the People failed to provide sufficient evidence of the informant's basis of knowledge); People v. Hetrick, 604 N.E.2d 732, 734 (N.Y. 1992) ("[B]ecause [the informant] was an identified citizen-informant, . . . there was a 'built-in' basis for crediting her reliability."). However, some lower courts in New York apply a watered-down version of *Aguilar-Spinelli* where citizen-informants are concerned. *See* People v. Burke, 690 N.Y.S.2d 897, 903 (Sup. Ct. 1999) (deeming a citizen-informant

3. The Anonymous-Tipster Wrinkle

Judges' trust in citizen-informants is further complicated by their treatment of anonymous tipsters, the final category of police informants. An anonymous tipster is someone who calls 911 or speaks to police in person to report a crime but leaves no identifying information. Information from anonymous tipsters, like that from citizen-informants, can vary in complexity and detail. As a category, citizen-informants are distinguishable from anonymous tipsters solely by their choice to provide some form of identifying information to law enforcement. Yet anonymous tipsters are treated much differently and do not benefit from any presumption of reliability.[83]

The Supreme Court prescribed the law on anonymous tipsters in two leading cases: *Alabama v. White*[84] and *Florida v. J.L.*[85] In *White*, the Court held that an anonymous tip could, alone, provide reasonable suspicion for an investigative stop only if supported by independent police corroboration.[86] In language that is applicable to citizen-informants as well as anonymous tipsters, the *White* Court, citing the *Gates* decision, explained that an anonymous tip alone "seldom demonstrates the informant's basis of knowledge or veracity" because "ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations" and because the veracity of an

presumptively reliable to satisfy the first prong of *Aguilar-Spinelli*, and finding that the second prong was satisfied because the informant was an eyewitness whose basis of knowledge was direct observation). Washington similarly requires application of *Aguilar-Spinelli* to citizen-informants but relaxes the veracity prong for named informants when exigency requires. *See* State v. Wible, 51 P.3d 830, 835 (Wash. Ct. App. 2002) ("The affidavit also satisfied the reliability prong because named citizen-informants . . . are presumed reliable."); State v. Tarter, 44 P.3d 899, 901 (Wash. Ct. App. 2002) (noting that the veracity prong of *Aguilar-Spinelli* is relaxed for citizen-informants); *Northness*, 582 P.2d at 548 (delineating four categories of "situations giving rise to questions of informant credibility").

[83] *See, e.g.*, United States v. Salazar, 945 F.2d 47, 50–51 (2d Cir. 1991) ("[A] face-to-face informant must, as a general matter, be thought more reliable than an anonymous tipster, for the former runs the greater risk that he may be held accountable if his information proves false."); State v. Brown, 366 S.E.2d 816, 818 (Ga. Ct. App. 1988) (comparing the status of anonymous tipsters with the "elevated" or "preferred status" of "concerned citizen[s]").

[84] 496 U.S. 325 (1990).

[85] 529 U.S. 266 (2000).

[86] 496 U.S. at 326–27. The case concerned a vehicle stop based on an anonymous phone call containing extensively detailed predictions about White's future behavior. *Id.* at 327. In fact, the caller's report was so detailed as to imply personal knowledge and suggest that the caller could not be an uninvolved bystander. The Court noted that "the caller's ability to predict respondent's *future behavior* . . . demonstrated inside information—a special familiarity with respondent's affairs." *Id.* at 332. After receiving the tip, officers conducted their own investigation and confirmed numerous aspects of the report before stopping White's car. *Id.* at 327. Because of the caller's extraordinary specificity and the officers' corroborating investigation, the Court upheld the stop of White's vehicle. *Id.* at 329–32.

anonymous tipster is "largely unknown, and unknowable."[87] A barebones tip, the Court explained, provides no grounds for concluding that a tipster is honest or his information is reliable, and no grounds for understanding the basis of the tipster's knowledge or predictions.[88] Consequently, the Court held that some corroboration was required before police could conduct an investigative stop based on a tip "completely lacking in indicia of reliability."[89]

A decade later, in *Florida v. J.L.*, the Court clarified its concept of a tip carrying "sufficient indicia of reliability."[90] *J.L.* concerned an anonymous call to the Miami-Dade police warning that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[91] There was no audio recording of the tip and nothing was known about the tipster, yet two police officers were instructed to respond.[92] When they arrived at the bus stop, they found three black males, one in a plaid shirt.[93] Based only on the caller's tip—the police had no other reason to suspect the men of illegal activity and saw no weapons or unusual movements—the police stopped, frisked, and recovered a gun from the fifteen-year-old J.L.[94]

The *J.L.* Court compared anonymous tipsters with "known" informants "whose reputation can be assessed and who can be held responsible if [their] allegations turn out to be fabricated."[95] While a "suitably corroborated" tip might occasionally demonstrate "sufficient indicia of reliability" to establish reasonable suspicion, the Court reasoned, an anonymous tip rarely illustrates the tipster's basis of knowledge or veracity.[96] The particular tip relied upon by the Miami-Dade police, they held, did not exhibit sufficient indicia of reliability to justify their stop and frisk.[97] Rather, the police had only "the bare report of an unknown, unaccountable informant," a caller who did not explain how he knew about the gun or about J.L.[98]

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87 *Id.* at 329 (citing Illinois v. Gates, 462 U.S. 213, 237 (1983)). This statement seems incongruous with the Court's pronouncement in *Gates* that when an "unquestionably honest citizen comes forward with a report of criminal activity . . . rigorous scrutiny on the basis of his knowledge [is] unnecessary." 462 U.S. at 233–34 (citing Adams v. Williams, 407 U.S. 143, 147 (1972)).

88 *White*, 496 U.S. at 329.

89 *Id.* (citing *Adams*, 407 U.S. at 147).

90 529 U.S. at 266.

91 *Id.* at 268.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* at 270.

96 *Id.* (quoting Alabama v. White, 496 U.S. 325, 327 (1990)).

97 *Id.* at 271.

98 *Id.*

Justice Kennedy's concurring opinion in *J.L.* demonstrates the murkiness of the line distinguishing anonymous tipsters from citizen-informants. He agreed that the tip in *J.L.* lacked sufficient indicia of reliability, but he observed:

> Instant caller identification is widely available to police, and, if anonymous tips are proving unreliable and distracting . . . , squad cars can be sent within seconds to the location of the telephone used by the informant. Voice recording of telephone tips might . . . be used . . . to locate the caller. It is unlawful to make false reports to the police, and the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips.[99]

His implication: A tip as uncorroborated as that in *J.L.* might still justify a stop and frisk if the caller's name, even if not provided, was discoverable, rendering the tipster a citizen-informant.[100]

It is unclear why a mere name would justify otherwise unlawful police action. Yet whether or not a tipster provides her name or is identifiable often controls the outcome of a court's Fourth Amendment analysis. Consider *State v. Maynard*,[101] in which the Florida Supreme Court revisited the distinction between anonymous tipsters and citizen-informants that it had emphasized in *J.L. v. State*[102] (affirmed by the Supreme Court in *Florida v. J.L.*) only three years prior. The court explained that the case's resolution would turn on "the classification" given to the caller.[103] If the caller was an anonymous informant, "the case would be controlled by . . . *J.L.*," and the tip alone would be insufficient to justify a stop.[104] But "if the caller

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[99] *Id.* at 276 (Kennedy, J., concurring) (citations omitted).

[100] *See* Edward W. Krippendorf, Florida v. J.L.*: To Frisk or Not to Frisk; The Supreme Court Sheds Light on the Use of Anonymous Tipsters as a Predicate for Reasonable Suspicion*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 161, 187 (2002) ("Justice Kennedy's concurring opinion points out that with caller identification and voice recordings, there exists a greater possibility to identify the caller. This avoids the truly anonymous situation where the caller 'has not placed his credibility at risk and can lie with impunity.'" (quoting *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring))). Justice Kennedy's argument about 911 calls gained traction in a recent majority opinion by Justice Thomas in *Navarette v. California*, 134 S. Ct. 1683 (2014). Upholding a vehicle stop based on an anonymous phone tip, the Court held that "the caller's use of the 911 emergency system" was an "indicator of veracity." *Id.* at 1689. Because 911 calls have "some features that allow for identifying and tracing callers," the Court reasoned that they provide "some safeguards against making false reports with immunity." *Id.* (citing *J.L.*, 529 U.S. at 276 (Kennedy, J., concurring)).

[101] 783 So. 2d 226 (Fla. 2001).

[102] 727 So. 2d 204 (Fla. 1998), *aff'd*, 529 U.S. 266 (2000).

[103] *Maynard*, 783 So. 2d at 228.

[104] *Id.* (citing J.L. v. State, 727 So. 2d 204).

qualifie[d] as a citizen-informant," her report "would be considered at the high end of the reliability scale, sufficient by itself to justify a *Terry* stop."[105] Ultimately, the *Maynard* court said it would be "difficult" to see how the caller at issue could be deemed "anonymous": "[S]he provided her name, location, and occupation to the police."[106]

II
Flawed Assertions Underlying the Citizen-Informant Doctrine

While much has been written about the psychology, utility, and credibility of criminal informants, confidential informants, and anonymous tipsters,[107] scholars have given short shrift to citizen-informants.[108] Critical analysis is long overdue. Courts tend to justify the citizen-informant doctrine with a few repeated premises: (A) citizen-informants have no reason to lie; (B) if citizen-informants *did* have any reason to lie, they would be adequately deterred by the potential sanctions for falsely reporting crime; and (C) the citizen-informant doctrine is necessitated by the urgency of police investigation. These premises reflect layered and overlapping assumptions, and courts considering the citizen-informant doctrine do not necessarily spell them out so explicitly. Nevertheless, this section examines these three premises as individual assertions, each of which courts use to defend the citizen-informant doctrine without backing from actual evidence or research, and posits potential flaws that underlie each.

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[105] *Id.*

[106] *Id.* at 229.

[107] *See, e.g.*, Arthur L. Burnett, Sr., *The Potential for Injustice in the Use of Informants in the Criminal Justice System*, 37 Sw. U. L. Rev. 1079, 1079 (2008) (explaining that wrongful convictions based on confidential informants wreak injustice on the accused and diminish public safety by leaving actual perpetrators at large); Aaron M. Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 Quinnipiac L. Rev. 151, 157, 211 (2004) (discussing the flawed use of "Drug War informers" and suggesting reforms); Peter Erlinder, Florida v. J.L.—*Withdrawing Permission to "Lie With Impunity": The Demise of "Truly Anonymous" Informants and the Resurrection of the* Aguilar/Spinelli *Test for Probable Cause*, 4 U. Pa. J. Const. L. 1, 62–75 (2001) (considering the state of the law on anonymous informants after *J.L.*); Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 Ariz. L. Rev. 563, 564–65 (1995) (discussing concerns related to the use of paid informants); Natapoff, *supra* note 30, at 108–09 (surveying data on "snitch-generated wrongful convictions," analyzing the "institutional relationships among snitches, police, and prosecutors," and suggesting a framework for judicial review); Stillman, *supra* note 27 (discussing problems with law enforcement reliance on criminal informants).

[108] *See supra* note 11 (describing the paucity of scholarship about citizen-informants).

A. The Unfounded Assumption that Citizen-Informants Have Pure Motives

The most common validation for the citizen-informant doctrine is that such actors have no incentive to provide false information and are, rather, inspired by a sense of civic duty.[109] Police informants generally get something in exchange for their reports: "money or favorable consideration" in a case in which they are a suspect or defendant.[110] Because criminal informants' cooperation is "self-serving," proponents of this argument claim, it must be considered suspect.[111] By comparison, when the informant is an "ordinary citizen," there is no reason to question his cooperation and a "substantial basis" for crediting his statements.[112]

Countless courts have leaned on this argument to justify a presumption of citizen-informant reliability and their adoption of the citizen-informant doctrine.[113] In 1974, for example, the Supreme Court of Iowa proclaimed, "[I]t is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime."[114] The Supreme Court of Wisconsin explained in 1976 that "the critical distinction" between different types of informants was "the expectation of some gain or concession in exchange for the information."[115]

But this argument—that merely because citizen-informants have no obvious skin in the game, they are trustworthy, and because criminal informants might have a self-serving purpose, they are unreliable—proves too much. On the one hand, certain reasons for

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109 *See supra* notes 52–54 and accompanying text.

110 Thompson & Starkman, *supra* note 4, at 167.

111 *Id.*

112 *Id.*

113 *See, e.g.*, Panetta v. Crowley, 460 F.3d 388, 395 (2d Cir. 2006) ("[I]nformation provided by an identified bystander with no apparent motive to falsify has a peculiar likelihood of accuracy, and we have endorsed the proposition that an identified citizen informant is presumed to be reliable." (citation omitted) (internal quotation marks omitted)); United States v. Ross, 713 F.2d 389, 393 (8th Cir. 1983) (comparing a citizen-informant "with no motive to falsify" to "a professional informant, with attendant credibility concerns"); United States v. Gagnon, 635 F.2d 766, 768 (10th Cir. 1980) ("[A]n affidavit need not set forth facts of a named person's prior history as a reliable informant when the informant is a citizen/neighbor eyewitness with no apparent ulterior motive . . . ."); Brown v. United States, 365 F.2d 976, 979 (D.C. Cir. 1966) (observing that a victim's report is "less likely to be colored by self-interest than is that of an informant"); People v. Hicks, 341 N.E.2d 227, 230 (N.Y. 1975) (assuming that "[t]he average citizen who provides the authorities with information . . . does so with no expectation of private gain" but rather "to promote the safety and order of the society as a whole").

114 State v. Drake, 224 N.W.2d 476, 478 (Iowa 1974).

115 Loveday v. State, 247 N.W.2d 116, 128 (Wis. 1976).

presumptively trusting citizen-informants are faulty, and on the other hand, certain reasons for inherently distrusting criminal informants might be unsound. Ultimately, since both categories of informants are imperfect, both demand scrutiny.

With regard to citizen-informants, just because no motive to falsify is immediately apparent does not mean that none exists. An initial encounter with a named informant might raise no impression of impure motives, but efforts to assess the reliability of a tip might prove that the informant is not the unbiased, responsible person that the citizen-informant doctrine presumes him to be.

One might claim to be a victim of a crime in order to seek revenge or to get someone else in trouble. One might claim to be a victim following a scuffle or accident so as to avoid criminal or civil liability or to explain away injuries and seek medical care without raising suspicions. One might claim that someone else committed an act that she actually committed in order to avoid detection.

While it is difficult to pinpoint the frequency of false police reports, it is clear that such reports are in fact filed[116]—hence the ubiquity of laws creating civil and criminal penalties for malicious prosecution and false reporting.[117] False reports may be of particular concern in the case of juvenile complainants, who—social science and legal literature have demonstrated—are more likely to exaggerate or to file fictitious reports and less likely to understand the full consequences of lying to the police.[118]

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[116] Even in Indiana, which has more or less embraced the citizen-informant doctrine, the high court explicitly acknowledged the possibility that these informants may lie: "Certainly, not all alleged victims are credible sources of information. The malicious or spiteful pointing out of another person as a criminal without basis in fact is not unknown to our society." Riddle v. State, 275 N.E.2d 788, 793 (Ind. 1971); *see also* Burke v. Superior Court, 113 Cal. Rptr. 801 (Ct. App. 1974) (discussing the validity of a warrantless search and arrest based on a citizen-informant's report which later proved to contain lies and embellishments about crucial details that he claimed to have observed).

[117] Fears about false reports are reflected in the very statutes addressing malicious prosecution and false police reports that are cited by defenders of the citizen-informant doctrine. *See, e.g.*, GA. CODE ANN. § 16-10-26 (West 2014) (making it a misdemeanor to "willfully and knowingly" make a false report to any law enforcement officer); MINN. STAT. ANN. § 609.505 (West 2014) (criminalizing the false reporting of a crime); N.C. GEN. STAT. ANN. § 14-225 (West 2014) (establishing misdemeanor and felony offenses for making "false, deliberately misleading, or unfounded" police reports).

[118] *See* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 260 (2007) (observing that "developmental differences between juveniles and adults (especially in the areas of judgment, maturity, assessing and weighing risks, vulnerability to peer pressure, and an inability to see the long-term consequences of their actions)" make juveniles less competent as defendants and witnesses); *id.* at 280 (discussing how different interview techniques can yield accurate statements or wild misinformation from child witnesses). Indeed, while young children are often prevented from testifying at trial, in many cases they *do* in fact testify. And even if

Understandably, courts are prone to crediting the motives of a subcategory of citizen-informants labeled "victims." For example, the Supreme Court of Colorado declared that it was "simply unreasonable to presume, in the absence of any contrary evidence, that the ordinary citizen who fortuitously becomes a victim of a crime is likely to offer false or untrustworthy information to the police."[119] The Sixth Circuit Court of Appeals similarly concluded that the report of a person who claims to be a victim is "entitled to greater weight" in probable-cause determinations and that a "victim's accusation standing alone can establish probable cause."[120] The notion of victimhood that pervades opinions like these rests on a vision of crimes involving discernable victims, witnesses, and perpetrators rather than overlapping categories and moral and legal ambiguities.

In reality, culpability often is shared within a single event, and such pronouncements overlook the possibility that individuals who share culpability or are embarrassed by their actions have incentives to lie. In tort law, it is well accepted that unfortunate events regularly occur because of the intentional, reckless, or negligent behavior of *multiple* actors. Tort law accounts for this through doctrinal accommodations such as joint and several liability, contributory negligence, and contribution.[121]

Criminal cases are no less plagued by ambiguity and uncertainty concerning fault. Yet the citizen-informant doctrine does not account for the possibility that, in situations involving multiple people with shared culpability, biased actors may have strong motives to claim to be a victim or bystander. Consider the fights and brawls that take

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they do not take the stand, children may provide the police with information to inspire invasive police inquiries that may lead to criminal prosecutions. *See* Lynn McLain, *"Sweet Childish Days": Using Developmental Psychology Research in Evaluating the Admissibility of Out-of-Court Statements by Young Children*, 64 ME. L. REV. 77, 80 (2011) (noting that "[y]oung children are frequently precluded from testifying at trial on the grounds of incompetency" and questioning whether a child's previous, out-of-court statements should be similarly inadmissible).

[119] People v. Fortune, 930 P.2d 1341, 1345 (Colo. 1997) (en banc) (quoting People v. Henry, 631 P.2d 1122, 1127 (Colo. 1981) (en banc)).

[120] Gardenhire v. Schubert, 205 F.3d 303, 322 (6th Cir. 2000).

[121] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 10 (2000) ("When, under applicable law, some persons are jointly and severally liable to an injured person, the injured person may sue for and recover the full amount of recoverable damages from any jointly and severally liable person."); *id.* § 23 ("When two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other . . . ."); RESTATEMENT (SECOND) OF TORTS § 463 (1965) ("Contributory negligence is conduct on the part of the plaintiff . . . which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.").

place daily in every jurisdiction: A crime is committed, and whichever participant first dials 911 is the "victim," a presumptively reliable citizen-informant.[122] Imagine a phone tip from a named informant reporting another motorist's aggressive driving: Aggressive driving may provide reasonable suspicion to stop a car based on fears of drunk driving,[123] but the tipster may share culpability in creating unsafe or tense conditions on the road. Still, in a jurisdiction that presumes victims are reliable, police can seize and search individuals based solely on the word of whoever claims the mantle of victimhood.

For victim and bystander witnesses alike, if an investigating officer does not immediately perceive questionable motives, there is no "apparent motive to falsify." But if that officer were required to dig deeper, she might uncover ulterior motives or causes for doubt before she initiated a search or seizure.[124] Yet it is of secondary importance to hypothesize about possible ulterior motives: What is evident is that we simply do not know *what* motivates a citizen-informant, whether good or bad, pure or self-serving. The many courts to assume that citizen-informants are always motivated by civic duty have no grounds for that assumption.

In one telling opinion, the Supreme Court of Utah imagined scenarios in which citizen-informants might have personal stakes in the outcome of a case and reasons to fabricate.[125] But because the court could identify other scenarios where courts considered such tips to be reliable, it elected to retain the citizen-informant doctrine.[126] The court held that "a personally involved informant is not presumed to have any lesser or greater reliability than any other identified

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[122] One can imagine many reasons why a person might lie in such a situation. For example, one might call 911 to seek medical attention; when the ambulance arrives, police come too, and the caller does not want to get in trouble. Fearing that another party will call the police, one might aim to preempt that person's ability to tell her side of the story first. One might call the police because he is genuinely afraid and wants to end an altercation, but he might also fear getting arrested and therefore downplay his own culpability or exaggerate another party's actions.

[123] *See* Navarette v. California, 134 S. Ct. 1683, 1690–92 (2014) (discussing the relationship between reckless driving and drunk driving, and upholding a stop based on a report of the former).

[124] Some might argue that this more substantial analysis comes later in the process, as prosecutors work with the police to determine what offenses to charge and whether to proceed with a given case. However, for many low-level crimes, arrestees are pushed to accept plea offers as early as arraignment, before additional investigation has probed an officer's initial determination of probable cause. *See* Alexander, *supra* note 38 (discussing the process of confronting witnesses during adversarial proceedings and trials).

[125] State v. Roybal, 232 P.3d 1016, 1022 (Utah 2010) (noting cases "where personal involvement between the informant and the suspect led to a possibility of bias and fabricated allegations").

[126] *Id.* at 1023.

informant," and that a "citizen-informant is presumed reliable, and personal involvement of the informant with the suspect neither weakens, nor strengthens, that presumption."[127] After recognizing numerous situations in which a citizen-informant's reliability might be compromised, the court declined to disrupt the presumption of reliability because it could point to specific situations in which citizen-informants had no obvious reason to lie.[128]

Meanwhile, though confidential or criminal informants do have incentives to tell stories that will please the government, they also have strong incentives to tell the truth. Indeed, the bargains and arrangements that officers and prosecutors strike with such individuals—exchanges of information for money[129] or leniency—depend on the accuracy of the information provided. For example, according to Department of Justice (DOJ) guidelines, confidential informants are paid commensurate with the value of the information they deliver and may be deactivated for providing false information or violating DOJ procedures.[130] Undoubtedly, there are occasions when criminal or confidential informants aim to benefit from the deals they strike by falsifying information when they have nothing helpful to provide. But the savvy informant would know that providing false information would lead to further headaches—or years in prison—rather than a shorter road to freedom or rewards.[131] Moreover, criminal or confidential informants, unlike citizen-informants, are supposed to be monitored by government agents and handlers.[132] Precisely because

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127 *Id.*

128 *Id.*

129 *See* Mauet, *supra* note 107, at 564 (observing that "[t]he amount of money federal agents paid to informants climbed from $25 million in 1985, to $97 million in 1993" and that "[m]any of today's paid informants operate on incentive plans").

130 *See* DEP'T OF JUSTICE, GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS para. (III)(B)(1) (2001), *available at* http://www.justice.gov/ag/readingroom/ciguidelines.htm ("Monies that a [DOJ Law Enforcement Agency] pays to a [confidential informant] in the form of fees and rewards shall be commensurate with the value . . . of the information he or she provided or the assistance he or she rendered . . . ."); *id.* para. (III)(B)(2) ("Under no circumstances shall any payments to a [confidential informant] be contingent upon the conviction or punishment of any individual."); *id.* para. (V) (outlining procedures for the deactivation of confidential informants).

131 A report found to be untrue would not serve a criminal informant's purpose of securing a shorter sentence or other favorable treatment. *See id.* para. (II)(C)(1)(a) (noting that the deals criminal informants make with law enforcement officers are premised on truthfulness). Additionally, a criminal or confidential informant who manufactured a report would be subject to false reporting statutes. *See infra* Part II.B (discussing the possibility that false reporting statutes deter civilians from lying to the police).

132 Many critiques of criminal and confidential informants have focused on the need for greater monitoring. *See* Taslitz, *supra* note 40, at 1077–79 (noting that while the FBI has adopted "relatively stringent rules on how police 'handlers' may treat their informant subjects," many local law enforcement agencies have not); Eric Lichtblau, *F.B.I. Found to*

their motives are considered suspect, they are watched. Citizen-informants, meanwhile, may act with unknown motives and then disappear.[133]

One potential explanation for courts' refusal to probe the motives of citizen-informants, in contrast with their readiness to vilify the character of criminal informants, is that judges imagine that these groups comprise different people from different segments of society. The analysis that pervades appellate court decisions discussing citizen-informants reflects a belief that people who report crimes to the police are not members of the same pool of citizens from which criminals emerge, but rather are in a different pool of law-abiding people who behave in accordance with an idealistic vision of citizenship. For example, in *People v. Hicks*, the New York Court of Appeals declared, "[W]e cannot hold that citizen informers are as inherently suspicious individuals as the underworld denizen upon whose oath, out of necessity, law enforcement officials must often rely. To do so would be to denigrate the character of public-spirited citizens. Instead, such civic-mindedness should be encouraged and applauded."[134]

It would be one thing if courts analyzed informants' incentives on a case-by-case basis. Instead, courts have issued broad proclamations about these separate informant categories. Criminal informants are not just individuals who are seeking a deal in a particular situation; they are "denizens of the underworld,"[135] "snitches,"[136] and inherently shady characters. Citizen-informants are not only credited

Violate Its Informant Rules, N.Y. TIMES, Sept. 13, 2005, at A14 (describing how FBI agents have departed from Bureau procedure for handling confidential informants); Stillman, *supra* note 27 (explaining the need for greater regulation of criminal informants). Such critiques demonstrate that while criminal and confidential informants must be monitored more closely, it is lucky that they are monitored at all.

133 *See* State v. Paszek, 184 N.W.2d 836, 843 (Wis. 1971) (conceding that, when police rely on a citizen-informant, the informant's "reliability has not theretofore been proved or tested" (quoting People v. Bevins, 85 Cal. Rptr. 876, 879 (Ct. App. 1970))); Charoletta J. Ransom, *Does the End Justify the Means? Use of Juveniles as Government Informants, Helpful to Society While Harmful to the Child*, 20 J. JUV. L. 108, 108–09 (1999) (noting that informants are often civilians with "no special training, who may be caught in the wrong place at the wrong time," and usually have "no training other than that gathered from experience").

134 341 N.E.2d 227, 230 (N.Y. 1975).

135 *E.g.*, On Lee v. United States, 343 U.S. 747, 756 (1952) (categorizing criminal informants as "denizens of the underworld"); Worthington v. United States, 166 F.2d 557, 566 (6th Cir. 1948) (same); State v. Morris, 444 So. 2d 1200, 1203 (La. 1984) ("[A] distinction may be drawn between an unnamed denizen of the criminal underworld . . . and the citizen who witnesses or is the victim of criminal conduct and reports to police as a matter of civic duty."); DeLuca v. State, 553 A.2d 730, 743 (Md. Ct. Spec. App. 1989) (describing a "gossip session" among "unnamed denizens of the 'underworld milieu' ").

136 *E.g.*, United States v. Quatermain, 613 F.2d 38, 46 (3d Cir. 1980) (Aldisert, J., dissenting) (describing an informant as a "snitch" and "denizen[ ] of the underworld").

momentarily but deemed "reliable,"[137] "trustworthy,"[138] "public-spirited,"[139] "civic-minded[ ],"[140] and "upstanding."[141]

The starkness of this contrast is incongruent with what is known about crime. Some neighborhoods or geographical areas are home to more crime than others.[142] Crime researchers have developed countless theories to explain why certain neighborhoods are more or less safe and have explored ways to monitor high-crime neighborhoods.[143] This research indicates that the same communities are both the location of most crime and the home of most offenders.[144] In terms of race, it is noteworthy that black and Latino Americans are disproportionately represented in the criminal justice system not only as suspects, defendants, and prisoners, but also as victims.[145] Given the

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137 *E.g.*, People v. Fortune, 930 P.2d 1341, 1345 (Colo. 1997) (en banc) (describing citizen-informants as "reliable"); State v. Detweiler, 544 N.W.2d 83, 89 (Neb. 1996) (same); State v. Roybal, 232 P.3d 1016, 1021 (Utah 2010) (same); Crackenberger v. State, 149 P.3d 465, 470 (Wyo. 2006) (same).

138 *E.g.*, Commonwealth v. Torres, 764 A.2d 532, 546 (Pa. 2001) ("[T]he citizen witness who reports a crime is *presumptively* trustworthy.").

139 *E.g.*, State v. Drake, 224 N.W.2d 476, 478 (Iowa 1974) (categorizing citizen-informants as "public-spirited"); State v. Ybanez, 313 N.W.2d 30, 32 (Neb. 1981) (same).

140 *E.g.*, People v. Hicks, 341 N.E.2d 227, 230 (N.Y. 1975) (distinguishing between confidential informants and "public-spirited citizens" who report crime because of their "civic-mindedness").

141 *E.g.*, State v. Leistiko, 578 P.2d 1161, 1164 (Mont. 1978) (distinguishing a regular informant from an "upstanding or believable" citizen-informant); State v. Franklin, 741 P.2d 83, 84–85 (Wash. Ct. App. 1987) (crediting an officer's assessment that an informant was an "upstanding citizen" with no criminal record or self-interested motive).

142 *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (holding that presence in a "high crime area" is relevant to the reasonable suspicion analysis); Adams v. Williams, 407 U.S. 143, 147–48 (1972) (same).

143 *See, e.g.*, Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas,"* 63 HASTINGS L.J. 179, 185–90 (2011) (discussing different schools of crime mapping); Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259, 271–72, 274–75 (2012) (describing "community policing," "broken windows" theory, "intelligence-led policing," and other place-based or environmental theories and tactics aimed at targeting high crime rates in particular hotspots).

144 *See* David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction*," 83 GEO. L.J. 2547, 2547, 2559–60 (1995) ("Especially in the inner city, where poverty, crime, and drugs are most prevalent, many families are likely to have friends and relatives who have been victimized by crime and friends and relatives who have been subject to the criminal justice system." (emphasis omitted)).

145 *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 43 (2012) (observing that African Americans are disproportionately represented in the justice system as both prisoners and victims); Robert Garcia, *Latinos and Criminal Justice*, 14 CHICANO LATINO L. REV. 6, 12 (1994) (explaining that Hispanics are disproportionately the victims of violent crime, theft, and household crimes); MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007) (noting that African Americans are incarcerated at nearly six times the rate of whites and Hispanics are incarcerated at nearly double the rate of whites).

concentration of crime in particular communities, repeat players may find themselves involved in different criminal cases at different times as witnesses, victims, and perpetrators.[146]

Ultimately, although citizen-informants are not as reliable as courts purport them to be, courts credit their motives when juxtaposed against criminal informants. Because there are compelling reasons to question the motives of criminal informants, there are also safeguards—ranging from the *Aguilar-Spinelli* and *Gates* tests to formal law enforcement guidelines and oversight—in place to check criminal informants' reliability. Only citizen-informants are so esteemed that their motives are trusted and their uncorroborated claims can give law enforcement free rein to conduct searches and seizures.

B. The Flawed Claim that Citizens Are Sufficiently Deterred by False-Reporting Laws

The second principal justification for the citizen-informant doctrine is the claim that, even if a citizen-informant did have a motive to falsify, she would be sufficiently deterred by criminal penalties for falsely reporting crime and civil penalties for malicious prosecution.[147] To start, the very acknowledgment that such deterrents are necessary demonstrates a recognition that citizen-informants might sometimes be motivated to lie. More importantly, though, the argument that these deterrents are sufficient lacks support.

In 1975, the New York Court of Appeals spelled out the idea of "sufficient deterrence" in *People v. Hicks*.[148] The court offered several arguments to mitigate concerns about false reporting: (1) the affidavits signed by citizen-informants contained warnings about the illegality of false reporting; (2) the "averments" of the citizen-informant, as a result of that illegality, would constitute declarations against penal interest; (3) the threat of prosecution was "not an empty gesture" because the police knew the informant's name and address and could track the informant down; and (4) the informant could face civil

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[146] The rules of evidence reflect this reality: Witnesses may be impeached with prior bad acts, crimes, character flaws, and lies. *See* FED. R. EVID. 601–15 (discussing witness competency and impeachment). Yet these acts, traits, and statements, which prosecutors must identify before trial to comply with discovery obligations, generally are not known to the police at the time of street encounters based on witness reports about particular incidents.

[147] Thompson & Starkman, *supra* note 4, at 169, 172 (describing "the common sense notion that a responsible citizen, as opposed to a paid informant, will not disregard the consequences of supplying inaccurate information" and will be deterred from the "vindictive tender of misinformation" by false-reporting mechanisms).

[148] 341 N.E.2d 227 (N.Y. 1975).

liability for malicious prosecution for providing false information that resulted in an unlawful search of someone's person or premises.[149] The court concluded that these amounted to "adequate safeguards against the rendition of false information."[150]

This analysis is flawed. First, witnesses generally do not sign affidavits until a suspect has become a defendant and a prosecution is underway, meaning that police action based on a citizen-informant's statement has already resulted in a search or seizure.[151] Furthermore, the court's arguments fail to address several possibilities: People may report crimes using fake or untraceable names;[152] people may report crimes and then disappear;[153] and people may not take seriously the threat of punishment for false reporting given the infrequency with which such prosecutions occur and the high burden faced by litigants in civil suits for malicious prosecution.[154]

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149 *Id.* at 230–31.

150 *Id.* at 230.

151 *See, e.g.*, *Criminal Justice System: How It Works*, N.Y. COUNTY DISTRICT ATT'Y'S OFF., http://manhattanda.org/criminal-justice-system-how-it-works?s=37 (last visited Nov. 17, 2014) (describing how, in most cases, after someone is arrested, an Assistant District Attorney will "review the facts with the arresting officer and sometimes with the complainant or other witnesses," and only then "determine the sufficiency of the evidence to support the charges originally brought by the police, determine the final charges, and draft the complaint upon which the defendant will be prosecuted").

152 Witnesses may have many reasons to withhold their names. Particularly if someone has nefarious motives for reporting a crime—for example, to get someone else in trouble or to avoid culpability—she would have a strong incentive to provide a fake name. Only by requesting proof of identification from every bystander witness could police prevent such occurrences.

153 In reality, every police officer and criminal attorney—prosecutor or defender—knows how difficult it can be to locate witnesses, even those who have provided names or addresses. *See, e.g.*, 2 AM. JUR. *Trials* § 4, at 229, 235 (1964) (describing missing witnesses who "unintentional[ly] skip" or move without leaving forwarding addresses and those who "intentional[ly] skip" to avoid bad situations or escape their pasts); *id.* § 6, at 236 ("[I]t is not unusual for [people] to give slight misinformation in order to avoid becoming involved in a complex matter at a later date."); Tammy S. Korgie, *Court-Appointed Attorneys Face Legal and Financial Challenges*, 73 N.Y. ST. B.J. 5, 9 (2001) (recounting one court-appointed defense attorney's experience of "knocking on doors looking for witnesses" and encountering difficulty when witnesses refuse to come forward because they are afraid of the repercussions of testifying). The high likelihood that witnesses disappear is evidenced clearly by the existence of "missing witness" rules, which permit the fact finder to draw an inference from the absence of a witness whose testimony is highly material to a party's case. *See* Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice From the Empty Chair*, 44 MD. L. REV. 137, 137 (1985) (describing the "missing witness" or "empty chair" doctrine, which "holds that a litigant's failure to produce an available witness who might be expected to testify in support of the litigant's case, permits the factfinder to draw the inference that had the witness chair been occupied, the witness would have testified adversely to the litigant" (internal quotation marks omitted)).

154 *See* Willis v. Brassell, 469 S.E.2d 733, 737 (Ga. Ct. App. 1996) ("[A]n aggrieved party has an especially heavy burden in [malicious prosecution] cases since his interest is weighed against the public's interest in encouraging citizens to report violations of

In order for the threat of prosecution for false reporting to have force as a deterrent, citizens must be aware of the possibility that they could face such prosecution, police officers must arrest individuals for such offenses, and prosecutors must actually forge ahead with cases against false reporters. However, these preconditions are not necessarily met.[155] Prosecutors may decline to file false-reporting charges because such cases are difficult to prove,[156] because false reporters may suffer from mental illness,[157] or because prosecutors do not want to dissuade citizens from reporting crime.[158] Finally, to the extent that witnesses are threatened with false-reporting charges, it is possible that such threats may lead witnesses to correct earlier inaccuracies relayed to the police, but it is also possible that such threats may pressure witnesses to stand behind an initial false report. Having been warned that a statement *already made* to the police, if untrue, might constitute a criminal act, an informant may choose to repeat that story many times rather than admit it was false.[159]

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law . . . ."); 52 AM. JUR. 2D *Malicious Prosecution* § 5 (2011) (explaining that "[a]ctions for malicious prosecution are not favored by the courts," "[p]ublic policy disfavors actions that burden or discourage persons from pursuing and resolving their disputes in court," and malicious-prosecution actions are subject to more stringent limitations than other tort actions); *infra* notes 155–58 and accompanying text (discussing the rarity of false-reporting prosecutions).

155 *See, e.g.*, Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593, 612 (1996) (observing that false-reporting laws are rarely used to punish those who file false cross-racial reports); Holly Abrams, *Fake Crimes Rarely Prosecuted*, J. GAZETTE (Fort Wayne, Ind.), Apr. 11, 2010, at C1, *available at* http://www.journalgazette.net/article/20100411/LOCAL07/304119860/ (quoting a prosecutor who said that, during her eight years on the job, she could recall only two or three cases in which police requested that someone who filed a false report be prosecuted for that offense).

156 Abrams, *supra* note 155 (quoting the same prosecutor who said that "[s]o many crimes are committed without any witness except the person that reports the crime," and "[j]ust because Person A says one thing and Person B says another thing, doesn't mean it's a false report").

157 *Id.*

158 *Cf.* 52 AM. JUR. 2D *Malicious Prosecution* § 5 (2011) (discussing the fear of "chilling" police reports).

159 After making a police report and signing an affidavit, if an individual is informed that the falsity of the report or lying on the stand could subject her to prosecution, that person would face a decision: admit that she lied previously, or stick to her story. Admitting that she lied would mean confessing to a crime that she has just been informed exists. Lying on the stand, meanwhile, may be more difficult to prove depending on the situation. Witnesses regularly testify mistakenly, and their testimony—if impeached or later refuted—could be viewed as just another example of mistaken identification, false memory, or misunderstanding.

C. The Exaggerated Notion that a Low Burden Is Necessary for Expediency

Perhaps courts' failure to probe the previous two assertions results from their third major assumption: that a stricter standard would be untenable, have too great an impact on routine law enforcement practice, take too much time, or set too high a bar.[160] The Supreme Judicial Court of Massachusetts articulated this argument: "In addition to citizen-informers' first-hand basis of knowledge and presumed credibility, their reports usually arise in urgent situations requiring a prompt response, so that a leisurely investigation of the report is seldom feasible."[161] The Supreme Court of Iowa similarly explained that "[a]ny other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause."[162]

Like the claims that citizen-informants have pure motives and are sufficiently deterred from lying by the threat of punishment for falsely reporting crimes, the claim that the citizen-informant doctrine is necessary to meet the pace and demands of police work is exaggerated. When courts reason that requiring greater front-end investigation would hamper officers' ability to respond to reports with sufficient rapidity, they tacitly accept that officers presently do not take the time to ask questions that are fundamental to a person's categorization as an unbiased citizen-informant. Moreover, it would not be too burdensome to demand slightly more of officers.[163]

Indeed, courts *do* require more in the case of the nameless citizen-informant: the anonymous tipster. In the case of anonymous tipsters, unless a report is so detailed as to be "self-verifying,"[164] officers must conduct an independent, corroborating investigation before searching or seizing a suspect based on an informant's tip. Furthermore, the feasibility of a corroborating investigation is evidenced

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[160] *See* 2 LaFave, *supra* note 4, § 3.4(a), at 272 ("[V]ictim-witness cases usually require a very prompt police response in an effort to find the perpetrator, so that a leisurely investigation of the report is seldom feasible.").

[161] Commonwealth v. Carey, 554 N.E.2d 1199, 1203 n.4 (Mass. 1990) (internal quotation marks omitted).

[162] State v. Drake, 224 N.W.2d 476, 478 (Iowa 1974).

[163] This is clear since courts do require additional questioning in a variety of situations. For example, Montana and Nebraska require that when a citizen-informant's report is based on another person's statements or knowledge, officers must inquire further about the "underlying facts and circumstances" on which the report is based to reduce the possibility of error and satisfy the requirements of probable cause. State v. Williamson, 965 P.2d 231, 237 (Mont. 1998), *abrogated on other grounds by* State v. Updegraff, 267 P.3d 28, 41–42 (Mont. 2011); State v. Marcus, 660 N.W.2d 837, 843 (Neb. 2003).

[164] 2 LaFave, *supra* note 4, § 3.3(e), at 203.

by those rare citizen-informant cases where police and courts saw the importance of "additional steps to ensure reliability" because a possible motive to falsify was immediately apparent from the circumstances of the report.[165]

It would be far more efficient for officers to question witnesses about possible biases and the grounds of their knowledge concerning an event or person at the front end of a criminal case—before a stop, seizure, or search—than to ask such questions after time, money, and energy have already been expended during further stages of an interaction, investigation, or prosecution. When police act on insufficient information, they may chase bad leads while actual perpetrators go free. Instead, police could significantly enhance the reliability of a citizen-informant's report by asking a series of quick, basic questions: Do you know the person you are identifying? Are you in any way involved in or implicated by the actions you are reporting? How did you learn the information you are sharing? These questions could be outlined for officers on a standardized form, similar to the UF-250 forms that New York City Police Department (NYPD) officers fill out after conducting a stop and frisk[166] or the "*Miranda* cards" that many officers carry to ensure that they correctly advise arrestees of their rights under the Fifth Amendment and secure valid waivers of those rights in the event that a suspect chooses to make a statement.[167] Such forms, and the information they collect, would provide invaluable evidence for judges presiding over probable-cause and suppression hearings. But even without standardized forms, officers could document witness statements in their notes and reports. One might argue that asking these questions would not stop an unreliable informant from

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165 *Id.* § 3.4(a), at 276 & n.50 (citing cases—particularly those where the victim and accused had a prior relationship—in which corroborating investigation was necessary despite the report's origins with a citizen-informant). *But see id.* § 3.4(a), at 277–78 & nn.54–56 (citing examples where courts did not require corroboration despite the existence of bias or a motive to falsify).

166 *See* Floyd v. City of New York, 861 F. Supp. 2d 274, 280 (S.D.N.Y. 2012) (explaining that, after conducting a stop, NYPD officers must fill out a "Stop, Question and Frisk Report Worksheet," known as UF-250, and that 2.8 million of these forms were completed between 2004 and 2009).

167 *See* United States v. Noti, 731 F.2d 610, 615 (9th Cir. 1984) (encouraging police to ensure compliance with *Miranda* by reading defendants their rights from prepared cards); Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 807 n.101 (2006) ("Most law enforcement agencies have preprinted cards containing the *Miranda* warnings. When a suspect is Mirandized, an officer reads the warnings on the card to her . . . ."); Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1561 (2008) (noting that a *Miranda* card has been used in California for over ten years); *see generally* Miranda v. Arizona, 384 U.S. 436 (1966) (requiring police to advise defendants under custodial interrogation of their rights to remain silent and to consult an attorney).

lying. However, if an informant falsely answered questions posed by police officers, those answers would provide useful impeachment material in later proceedings.[168] Such questioning might also curb false statements by conveying the seriousness of reporting a crime.

Finally, if courts are concerned that requiring greater scrutiny of citizen-informants would hinder the ability of police to respond swiftly to urgent situations, that concern could be addressed by the exigency exception cemented in other areas of Fourth Amendment jurisprudence.[169] Indeed, permitting officers to respond rapidly and uncritically to the bare-bones report of a named citizen might be necessary at times to prevent imminent danger. But courts could set a higher standard for how police investigate reports when time is *not* of the essence, with an allowance for those limited situations that require action first and analysis later. Rather than deterring witnesses from reporting crime, this higher standard might enhance public confidence in the system. Individuals who otherwise might hesitate to speak with police because they are reluctant to set the criminal justice machine into motion against another person might come forward if they know the police will conduct additional investigation before executing a search or seizure based on their word alone.

III
Proposals to Reform the Citizen-Informant Doctrine

In *Gates*, the Supreme Court observed, "Informants' tips doubtless come in many shapes and sizes from many different types of persons. . . . Informants' tips, like all other clues and evidence . . . , may vary greatly in their value and reliability. Rigid legal rules are ill-

168 *See* Moore v. United States, 657 A.2d 1148, 1152 (D.C. 1995) (recognizing the "well established" rule that "any notes taken by the police during their investigation" are potential witness statements that must be turned over to the defense and may be used for impeachment); *Discovery and Access to Evidence*, 40 Geo. L.J. Ann. Rev. Crim. Proc. 363, 364 (2011) (observing that impeachment evidence falls within a prosecutor's disclosure obligations pursuant to *Brady*). Impeachment material is "evidence having the potential to alter the [fact finder's] assessment of the credibility of a significant prosecution witness." R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 Vand. L. Rev. 1429, 1437 (2011). Impeachment material encompasses prior statements that are inconsistent with a witness's anticipated testimony, "acts of dishonesty" that might be used to question a witness's truthfulness, evidence revealing "a bias, motive, or interest against the accused," or evidence of rewards or promises by the government. *Id.* at 1437–38.

169 *See* Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) (observing that officers may conduct warrantless searches when presented with exigent circumstances); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (holding that "exigent circumstances" will justify a warrantless search of a stopped automobile where probable cause exists, because the vehicle can be moved and its contents lost).

suited to an area of such diversity."[170] The *Gates* Court relied on this logic to abandon *Aguilar-Spinelli*, but the same logic supports the contention of this Note: The simple rule of presuming citizen-informants to be reliable and the practice of allowing their tips alone to support reasonable suspicion or probable cause do not make sense in every situation. The citizen-informant doctrine is particularly troubling as a rigid legal rule in light of the unsupported assertions used to justify its application. Absent empirical grounds for treating citizen-informants so differently from other sources of information about crime, this doctrine demands reconsideration, or at least more principled application.

Given that the Supreme Court is unlikely to revisit the issue, state courts tasked with assessing law enforcement action based on citizen reports should apply "new federalism" to reject the citizen-informant doctrine. New federalism is the phenomenon of "state courts[ ] examining their own constitutions to determine individual civil liberties."[171] In 1977, Justice Brennan wrote an article in the *Harvard Law Review* urging state courts to examine their own constitutions, serve as "font[s] of individual liberties," and extend the protections of their state constitutions "beyond those required by the Supreme Court's interpretation of federal law."[172] Since then, there has been a resurgence of new federalism,[173] and many states have used its principles to interpret provisions of their state constitutions more expansively than similar provisions of the United States Constitution.[174]

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170 Illinois v. Gates, 462 U.S. 213, 232 (1983) (internal quotation marks omitted).

171 Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339, 345 (2004).

172 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 500 (1977) (encouraging state courts to interpret their own constitutions and decline to follow federal precedent that they find "unconvincing, even where the state and federal constitutions are similarly or identically phrased").

173 *See* State v. Knapp, 700 N.W.2d 899, 922 (Wis. 2005) (Crooks, J., concurring) ("Over the past three decades, 'new federalism' has gained increasing strength across the nation.").

174 For example, eleven states have rejected the third-party doctrine—the idea that individuals have no reasonable expectation of privacy in information they share with third parties, such as banks or phone companies, and therefore no Fourth Amendment protection for that information—despite the Supreme Court's contrary holdings in *United States v. Miller*, 425 U.S. 435, 436–37 (1976), and *Smith v. Maryland*, 442 U.S. 735, 735, 745 (1979). *See* Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1577–78 (2004) (discussing competing interpretations of the reasonable-expectations test for warrantless searches and seizures in the context of electronic communications); *see also, e.g.*, State v. Cardenas-Alvarez, 25 P.3d 225, 229–30, 234 (N.M. 2001) (holding that while a prolonged checkpoint stop did not violate federal border-search law, it did violate the state constitution); People v. P.J. Video, Inc., 501 N.E.2d 556, 558 (N.Y. 1986) (holding that the New York Constitution imposes "more exacting standard[s]" for the issuance of search warrants authorizing the seizure of allegedly

In the context of the citizen-informant doctrine, new federalism could be applied in several different ways. First, state courts could explicitly reject the citizen-informant doctrine and subject citizen-informants to the same examination applied to other informant categories: the two-pronged *Aguilar-Spinelli* test or the *Gates* totality-of-the-circumstances analysis. Second, states could maintain the citizen-informant doctrine but require officers to make formal, documented showings of proof to qualify witnesses as "citizen-informants." Finally, even in states that are reluctant to require more of law enforcement officers, courts should dispense with the speculative logic commonly used to justify the doctrine and instead offer coherent, evidence-based explanations for the deference afforded to so-called citizen-informants.

A. Reject the Citizen-Informant Doctrine

State courts could easily interpret their constitutions to require greater scrutiny of citizen-informants. If a state applies *Aguilar-Spinelli* to assess its criminal and confidential informants, it should apply that same two-pronged test to citizen-informants. If a state has followed the Supreme Court in adopting a totality-of-the-circumstances analysis for criminal and confidential informants, that same evaluation should be conducted for an arrest or search based on the word of a citizen-informant, and citizen-informants should not be treated as inherently reliable in the course of that evaluation. At the very least, states should require of citizen-informants what is required of anonymous tipsters—individuals who are distinguished from citizen-informants solely because they declined to provide a name. As with anonymous tipsters, courts should explicitly require that citizen-informant reports be so detailed as to be self-verifying where an individual's reliability cannot actually be known.

B. Require Proof of Citizen-Informant Status

Some jurisdictions accept the citizen-informant doctrine but do not apply it robotically. In these jurisdictions, while law enforcement

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obscene materials than the Fourth Amendment to the United States Constitution); People v. Johnson, 488 N.E.2d 439, 445 (N.Y. 1985) ("Certainly, when the Supreme Court has not addressed a specific issue or provided guidance for such an analysis in its 4th Amendment rulings, we may, as we have in the past, choose to judge the lawfulness of the police conduct by the standards of our State Constitution."); State v. Randolph, 74 S.W.3d 330, 334–35, 338 (Tenn. 2002) (using the state constitution to reject the Supreme Court's standard for determining when a person has been seized); Davenport v. Garcia, 834 S.W.2d 4, 12 (Tex. 1992) ("When a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.").

officers need not demonstrate the reliability of a citizen-informant, searches and seizures are subject to suppression on the grounds that a witness should not actually *qualify* as a citizen-informant. Where an officer makes an arrest based on the word of a witness later found not to qualify as a citizen-informant, that arrest and its fruits are subject to suppression. By so applying the exclusionary rule, courts deter officers from conducting searches and seizures based on unreliable or uncorroborated reports and motivate officers to ensure that citizen-witnesses are not harboring secret motives or connections to the reported incident.

In Washington, for example, "[t]o establish the reliability of a citizen-informant, the police must interview the informant and ascertain such background facts as would support a reasonable inference that he is prudent or credible, and without motive to falsify."[175] Although Washington does not require police to demonstrate evidence of a citizen-informant's "past reliability" under its formulation of the *Aguilar-Spinelli* test, police still must conduct sufficient investigation to guard against malicious reports by biased parties.[176] In Alaska, similarly, the citizen-informant doctrine is not applied woodenly: Only "[w]hen information concerning the informant's identity and motives identifies the informant as the kind of person who is likely to speak the truth" can the informant "be treated as a citizen-informant whose report is presumptively credible and requires only minimal corroboration."[177] The conferral of "citizen-informant status" requires "some circumstantial showing of intrinsically trustworthy motivation," and "[c]redibility is not presumed by default."[178]

Qualification as a citizen-informant could depend on a series of factors, such as the informant's responses to questions about any bad motives, the contemporaneity of the informant's report,[179] the informant's demeanor, the informant's willingness to provide various pieces of identifying information, and the level of detail in a given report.[180] Measuring reliability by the level of detail provided would

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175 State v. Bauer, 991 P.2d 668, 671 (Wash. Ct. App. 2000) (internal quotation marks omitted).

176 *Id.* at 671–72.

177 Lloyd v. State, 914 P.2d 1282, 1287 (Alaska Ct. App. 1996).

178 *Id.*

179 The Federal Rules of Evidence treat contemporaneous reports as particularly reliable because they are less likely to result from "deliberate or conscious misrepresentation." Navarette v. California, 134 S. Ct. 1683, 1689 (2014) (quoting FED. R. EVID. 803 advisory committee's note).

180 For example, in New York—which applies *Aguilar-Spinelli* to citizen and criminal informants—a warrantless search or arrest based on the report of "an informant who did not indicate the basis for his knowledge" can be upheld only if police observe corroborating conduct or if the information provided about the criminal activity is "so

subject citizen-informants to a test similar to the one applied to anonymous tipsters. This is fitting given the Supreme Court's declaration in *White* that "ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations," and that a tipster's veracity is "largely unknown, and unknowable."[181] Despite the uncertainty of informants' motives, the *Navarette* Court held that "under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion'" for a stop.[182] The same could be said of citizen-informants: While their motives are unknowable, detailed reports might be found reliable.

Using the aforementioned factors to determine whether citizen-informant status should attach could be telling. Take the example of a parent who reports that someone else with a stake in a child-custody battle has abused a child. In a jurisdiction with a liberal citizen-informant doctrine, this report alone could justify an arrest. But an officer might think twice before making that arrest if the report of alleged abuse came long after its occurrence and did not describe the abuse with any detail. Conversely, if that same parent came forward as soon as possible with photographs, medical records, or specific information about when and how the abuse occurred, the informant would seem far more reliable, and it would be more appropriate for the police to intrude upon the suspect's liberty and privacy.

The process of qualifying a witness as a citizen-informant could be formalized and documented or conducted on an informal case-by-case basis. A formalized qualification process could entail using forms that ask a series of routine questions aimed at discovering any connection to the case, motive to lie, or absence of personal knowledge that would be needed for police to trust an informant's report.[183] A more ad-hoc qualification process would depend on officers asking sufficient follow-up questions to adequately categorize a particular witness as a citizen-informant.

C. Reject Speculative Assertions and Adopt Honest Reasoning

Finally, those courts that maintain the citizen-informant doctrine and decline to require proof of citizen-informant status should at least

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detailed as to make clear that it must have been based on personal observation." People v. Elwell, 406 N.E.2d 471, 477 (N.Y. 1980).

[181] Alabama v. White, 496 U.S. 325, 329 (1990) (quoting Illinois v. Gates, 462 U.S. 213, 237 (1983)).

[182] 134 S. Ct. at 1688 (quoting *White*, 496 U.S. at 327).

[183] A formalized process could resemble the processes used to document stops and frisks in New York and regulate *Miranda* waivers in many jurisdictions. *See supra* notes 166–67 and accompanying text (discussing New York's UF-250 stop-question-and-frisk forms and *Miranda* cards carried by officers in many jurisdictions).

do so based on principled arguments rather than the speculative assertions that have bolstered the doctrine thus far.

The problem is the presumption: When nothing is known about a person, how can the justice system assume her reliability? In some instances, the amount and nature of information provided by a named informant "demonstrates sufficient reliability of the person."[184] But the category of named citizen-informants is broad, and courts are merely speculating when they claim to know such informants' motives. The integrity of our justice system is diminished when rules with sweeping consequences rest on groundless assumptions. If empirical research were to demonstrate the reliability of citizen-informants, the doctrine would make sense. As currently described by the courts, however, the citizen-informant doctrine is rooted in pure conjecture.

Conclusion

On countless television shows like *CSI* and *Law & Order*, officers solve crimes using an array of tools and technologies ranging from ballistics and DNA to forensic anthropology and crime-scene video reconstruction.[185] These shows make crime solving seem like a precise science that always yields a definitive answer. Yet many investigations and prosecutions still depend on one nonscientific tool: human informants.[186]

In certain cases—for example, those carrying serious charges or penalties, cases that proceed to suppression hearings or trials, and those that garner press attention—defense attorneys may have the opportunity to demonstrate that witnesses are actually biased or unreliable.[187] But, as the Supreme Court itself has acknowledged, "criminal justice today is for the most part a system of pleas, not a system of trials."[188] In a system that holds 7.1 million people under its supervi-

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184 Cundiff v. United States, 501 F.2d 188, 190 (8th Cir. 1974).

185 *See, e.g.*, Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 New Eng. L. Rev. 435, 436 (2007) (discussing crime television's effect on the administration of criminal justice); Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 Fordham Intell. Prop. Media & Ent. L.J. 429, 431 (2006) (describing the "CSI effect" and questioning whether it shapes the course of juror deliberations).

186 *See supra* note 27 and accompanying text (discussing the paramount importance of informants).

187 Even in these cases, a defense attorney's ability to check a witness's reliability depends upon prosecutorial compliance with *Brady*, *Giglio*, and other discovery obligations. *See supra* note 38 (discussing *Brady* and *Giglio*).

188 Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (noting that ninety-seven percent of federal convictions and ninety-four percent of state convictions stem from guilty pleas rather than trials).

sion[189] and forces most cases to pretrial resolution based on insufficient investigation, disclosure, or evidence,[190] lying witnesses and informants often go unchecked. Every day, in every jurisdiction in the United States, individuals plead guilty to crimes they may not have committed or charges they could have fought successfully with the time, resources, and resolve to go to trial.[191] The citizen-informant doctrine exacerbates this problem: Based on the word of a random civilian, individuals are searched or arrested, and the weight of the justice system comes crashing down on their lives.

As two proponents of the citizen-informant doctrine—both federal prosecutors—observed in 1973, "[T]he question of whether citizen-informants must be shown to be reliable in the same way and to the same extent as a police informant is of more than academic significance."[192] This widely accepted doctrine enables law enforcement officers to conduct searches and seizures based on an amount of information that would be held insufficient to justify action if it were gathered from other sources. In many cases, this doctrine permits invasions of individual privacy based on unsubstantiated tips.

Scholars, courts, and law enforcement officers have given considerable thought to the importance of reforming the government's use of criminal and confidential informants. No such critical consideration has been given to the government's reliance on citizen-informants. Although courts reason that citizen-informants have strong incentives to be truthful, that they are sufficiently deterred from providing false information, and that this doctrine is necessary for efficient police

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[189] LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 1 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cpus10.pdf (citing the number of Americans under correctional supervision at the end of 2010).

[190] Ellen Yaroshefsky describes the course of a typical misdemeanor or less serious felony case in state court: "The prosecution makes an offer; the defense lawyer after minimal or no investigation discusses the plea with the client who decides to take the offer to ensure a lesser sentence; the court questions the client to meet constitutional requirements of the voluntariness of the guilty plea; the plea is accepted, and the client is sentenced." Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do with It?*, CRIM. JUST., Fall 2008, at 28, 28; *see also id.* at 29 ("A significant cause of . . . wrongful convictions in the pretrial stage is the failure to disclose exculpatory information or a one-sided investigative process where exculpatory proof is simply ignored."); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 196 (2002) (observing that prosecutors can use evidence that would be inadmissible at trial as "leverage over the defendant in plea bargaining by bluffing that the evidence is actually admissible").

[191] *See* Alexander, *supra* note 38 (explaining how prosecutorial power, an outsized justice system, and severe sentences have led our system to become a factory for plea agreements); Yaroshefsky, *supra* note 190, at 29–30 (describing how and why innocent people are prompted to plead guilty).

[192] Thompson & Starkman, *supra* note 4, at 166.

work, these assumptions lack support. It is time for courts to think more carefully about this flimsy doctrine and subject citizen-informants to greater scrutiny.