in the home, thus displacing the reasons for the parental immunity, as it did in *Mosier* and *Brinks*.

By finding premises in other areas of the law and converging them to one point, the Iowa supreme court may find authority, reason and logic to circumvent the public policy upon which the doctrine of absolute parental immunity was first based.

A principle of primary importance is that the doctrine of parental immunity is a court-made rule.[28] As such, it is the duty of the judiciary to examine it and determine its application. In recent years, economic, social and legislative changes, modern business methods, and the significant influence of automobile and liability insurance have placed the parties in different positions. Therefore, the effect of the earlier decisions must be considered in relationship to the occasion, facts and laws upon which they were based. *Stare decisis* must give way to the rule of reason. The law is not static, it is a progressive science, and when reason and logic cannot support a particular area of the law, it must change or fall.[29] This is particularly true when the specific law is founded on public policy alone. It must sway and move with the public breeze. Granted, parents should enjoy some type of immunity, but only to the extent when the reasons for such immunity exist. However, where the circumstances are similar to the instant case, no such shield of protection is necessary.

RICHARD L. MCCOY

Search and Seizure—PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT DOES NOT EXIST UNLESS THE MAGISTRATE IS APPRISED OF THE UNDERLYING FACTS AND CIRCUMSTANCES THAT LEAD THE OFFICER TO HIS CONCLUSIONS THAT THE UNDISCLOSED INFORMANT IS RELIABLE, AND SOME OF THE CIRCUMSTANCES FROM WHICH THE INFORMANT DREW HIS CONCLUSIONS.—*State v. Spier* (Iowa 1970).

Defendant's automobile was searched pursuant to a warrant issued by a magistrate who was neither aware of the source of the information, an undisclosed informant, nor the grounds upon which the undisclosed informant founded his beliefs. A narcotics agent came to the home of the magistrate, named the defendant, and asked for a warrant to search his auto for narcotics.

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[28] Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

[29] Recently New York has abolished the doctrine of intrafamily immunity, stating that the public policy reasons no longer exist. Howell v. Perry, 60 Misc. 2d 871, 304 N.Y.S.2d 156 (Sup. Ct. 1969); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

The agent obtained his information from his superior, who, in turn, had learned about the narcotics through a "tip" from an undisclosed informant. At the hearing on the motion to suppress, there was a discrepancy between the testimony of the agent and that of the magistrate regarding whether the magistrate was told that another agent had received the information and passed it on to the affiant for the purpose of obtaining the warrant. The motion to suppress was denied, and Spier was convicted of possession of narcotics, and he appealed. *Held*, reversed and remanded, three justices dissenting. The magistrate was not informed sufficiently as to the underlying circumstances from which the informant reached his conclusions, and upon which the agent concluded that the informant was reliable, and thereby a finding of probable cause for the issuance of a search warrant was not supportable. *State v. Spier*, 173 N.W.2d 854 (Iowa 1970).

The abuse of search warrants in England and in the American colonies[1] led to the requirements of the fourth amendment to the United States Constitution[2] which prohibit *unreasonable* searches and seizures, and limit the issuance of search warrants to when there has been a finding of *probable cause*.

The mechanics involved in the issuance of search warrants is a matter of local law, as long as the federal standards of due process[3] are not abridged. Most states have restrictions in their constitutions[4] similar to those of the fourth amendment.

The fourth amendment and its State counterpart do not require that a *magistrate* issue the warrant,[5] but the use of the terms "Oath or affirmation" indicates that someone in authority must issue or administer the warrant. As yet, any variance from the use of a magistrate has not been brought before the Supreme Court of the United States, so the question of the result of a deviation from the use of a magistrate remains untested. The spirit of the constitutional guaranty appears to indicate that a judicial "cross-check" on the police power is the desired effect.

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[1] Sgro v. United States, 287 U.S. 206 (1932).

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

[3] In Mapp v. Ohio, 367 U.S. 643, 655 (1961), the Court said:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then . . . the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.' "

[4] *See, e.g.*, IOWA CONST. art. I, § 8.

[5] For example, the Attorney General of New Hampshire can issue a search warrant although he is also actively engaged in prosecution. State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965).

In *State v. Spier*, the magistrate issuing the warrant was a justice of the peace.[6] The Iowa supreme court held that this justice was required, in effect, to apply a probable cause standard, the existence of which he had no knowledge. It may be harsh to require that a magistrate without a technical background in law apply a procedural standard that appellate courts in many states are having difficulty interpreting.

In interpreting the fourth amendment, the criteria to be used in determining the existence of probable cause have long been debated.[7] In *State v. Spier*, the information which led the narcotics agent to ask for the issuance of the warrant came from an undisclosed informant.

It is well settled that hearsay testimony can be considered by the magistrate in his finding of probable cause,[8] and that he may find probable cause on less evidence than would be necessary for condemnation,[9] indeed, it need not even be admissible in a court of law.[10] It has also been held that the name of the informant does not have to be disclosed to the magistrate,[11] probably to both encourage citizens to cooperate in anonymity with police officers and to protect the informant from possible retribution by the accused or others involved. Thus, the officer-affiant does not have the burden of proving the guilt of the suspect, but only needs to persuade the magistrate that there is justification for the proposed search.[12]

In *Ker v. California*,[13] the principles governing the application of the *Mapp v. Ohio*[14] exclusionary rule[15] against the states were set up by the Supreme Court. The *Mapp* decision did not establish federal supervisory authority over the state courts and did not obliterate state law relating to search and seizure in favor of federal law. But the Court held that the states have an obligation to respect the *same fundamental criteria* as are used in the federal system. There is no fixed formula for compliance with the fourth amendment guaranties. Reasonableness is the standard for the court to use in its inde-

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[6] IOWA CODE § 39.21 (1966) reads: "In all townships, except such as are included in the territorial limits of municipal courts, there shall be elected, biennially, two justices of the peace . . . who shall hold office two years and be county officers." There are no other requirements except residence in the county and the holding of no incompatible office, for example, city attorney. Many justices of the peace have little or no legal training.

[7] *See* State v. Oliveri, 261 Iowa 1140, 156 N.W.2d 688 (1968), *cert. denied*, 393 U.S. 1030 (1969); State v. Lampson, 260 Iowa 806, 149 N.W.2d 116 (1967); State v. Hall, 259 Iowa 147, 143 N.W.2d 318 (1966).

[8] Jones v. United States, 362 U.S. 257 (1960).

[9] Locke v. United States, 11 U.S. (7 Cranch) 339 (1813).

[10] The Court noted that the terms "probable cause" and "reasonable grounds" are substantially equivalent. Draper v. United States, 358 U.S. 307, 311 (1959).

[11] *See* McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957).

[12] Giordenello v. United States, 357 U.S. 480 (1958).

[13] 374 U.S. 23 (1963).

[14] 367 U.S. 643 (1961).

[15] "A search is good or bad when it starts and does not change character from its success." State v. Hagen, 258 Iowa 196, 205, 137 N.W.2d 895, 900 (1965). *See also* Weeks v. United States, 232 U.S. 383 (1914), wherein the Court established the exclusionary rule in the United States.

pendent examination of the circumstances surrounding the issuance of the search warrant, applying state law as long as it is not repugnant to the federal standards.

A comprehensive definition of what constitutes probable cause to support a warrant has never been given by the Supreme Court, but the Court has said that the reasonableness in any particular case must be determined by the facts and circumstances.[16] A reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that a crime is being committed, has been held to constitute probable cause.[17]

In *Aguilar v. Texas*,[18] the Supreme Court held that if the only information that the officer possesses, upon which to base his belief that a crime has been, or is being, committed, comes from an informant whose name is to be withheld, a two point probable cause standard is to be applied. The Court stated that the magistrate must be informed of some of the detailed underlying facts and circumstances both (1) from which the informant reached his conclusions, and (2) from which the affiant concluded the informant was reliable.[19] Subsequent to the *Aguilar* decision, some courts erroneously failed to apply both parts of the standard in cases where information came from an undisclosed informant or sources outside the officer-affiant's personal knowledge.[20]

In *Spinelli v. United States*,[21] the Supreme Court of the United States in an attempt to further explicate the *Aguilar* decision strictly applied the two-point probable cause standard. Information from an undisclosed informant was corroborated by F.B.I. surveillance which uncovered evidence of activity which was suspicious in light of the "tip." The Court held that the "totality of circumstances" approach "paints with too broad a brush."[22] It was held that the informant's report must be examined and fulfill both points of the *Aguilar* standard unless the corroborating evidence is enough, by itself, to justify the issuance of the search warrant. The Court said: "A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes *Aguilar's* requirements when standing alone."[23]

The right to privacy is a basic concept in an ordered society such as ours. It is common knowledge that police engaged in the often competitive enterprise of ferreting out crime may become overzealous, and would be tempted to encroach upon the individual's right to privacy, were it not for the fourth amendment guaranties.[24] The Supreme Court of the United States has held that

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16 Johnson v. United States, 333 U.S. 10 (1948).
17 Henry v. United States, 361 U.S. 98 (1959).
18 378 U.S. 108 (1964).
19 *Id.* at 111.
20 State v. Oliveri, 261 Iowa 1140, 156 N.W.2d 688 (1968), *cert. denied*, 393 U.S. 1030 (1969).
21 393 U.S. 410 (1969).
22 *Id.* at 415.
23 *Id.* at 415-16.
24 Johnson v. United States, 333 U.S. 10 (1948).

warrants must not be issued simply on the basis of a rumor circulating in the underworld,[25] or upon mere conclusions or "hunches."[26] The magistrate must be persuaded by the factual and practical considerations of everyday life upon which reasonable and prudent men act[27] that probable cause exists.

Search warrants should be issued in such a manner and tested in such a way that law enforcement officers will not be discouraged from submitting their evidence to a judicial official before invading the privacy of an individual.[28] Though a magistrate should be neutral and detached in his determination of probable cause, not simply serving as a "rubber stamp" for the police,[29] he is not to be denied the same inferences that a man of reasonable caution would make.[30]

Before the Acts of the 63rd General Assembly, the statutory duties of the Iowa magistrate required for the issuance of a search warrant were set forth in Chapter 751 of the Iowa Code of 1966. It provided:

> Any credible resident of this state may make application for the issuance of a search warrant by filing before any magistrate, except a judge of the supreme court, a written information, supported by his oath or affirmation, and alleging therein the existence of any ground or grounds specified in this chapter as ground for the issuance of a search warrant and that he believes and has substantial reason to believe that said ground or grounds exist in fact. Said information shall describe with reasonable certainty the person or premises, or both, to be searched, the property to be seized, and the person, if known, in possession of said premises and property.[31]

While the amendment to this section passed in 1969 was not binding in *State v. Spier* because the search took place before it was passed, its language is of interest as it further clarifies the duties of the magistrate in his finding of probable cause, particularly with regard to situations where the information came from an undisclosed informant. The amendment added the following:

> If the magistrate thereafter issues the search warrant, he shall endorse on the application the name and address of all persons upon whose sworn testimony he relied to issue such warrant together with an abstract of such witness' testimony. However, if the grounds for issuance is supplied by an informant, the magistrate shall only identify the peace officer to whom the information was given and that he finds that such informant had previously given reliable information.[32]

Had this amendment been in effect at the time the warrant to search Spier's automobile was issued, the fruits of that search would be clearly inadmissible, for the magistrate was never told about the informant. This amendment should operate in such a way that the magistrate will have knowledge of

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25 Spinelli v. United States, 393 U.S. 410 (1969).
26 Beck v. Ohio, 379 U.S. 89 (1964).
27 *Id.* at 91. *See also* Brinegar v. United States, 338 U.S. 160 (1949).
28 United States v. Ventresca, 380 U.S. 102 (1965).
29 Aguilar v. Texas, 378 U.S. 108 (1964).
30 United States v. Lefkowitz, 285 U.S. 452 (1932).
31 IOWA CODE § 751.4 (1966).
32 Ch. 306, § 2, [1969] Iowa Acts 481, *amending* IOWA CODE § 751.4 (1966).

the necessary standard to apply in cases similar to *Spier*.

In *State v. Salazar*,[33] a case decided by the Iowa supreme court subsequent to the *Spier* decision, the fact situation was similar to that in *Spier*, except that the justice of the peace was informed by the affiant that the information which led to the application for the warrant came from an informant whose name the affiant did not wish to disclose. The magistrate failed to require the affiant to comply with the *Aguilar* standard before issuing the warrant. Salazar's conviction was reversed and remanded, the primary authority being the *Spier* decision. The court stated:

> Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has *reasonably trustworthy information* are sufficient in themselves to warrant a reasonable belief that an offense is being committed. . . . In this case, the "trustworthiness" of affiant's informant is not referred to in the written Information, and is referred to only in passing in the testimony of the affiant at the hearing on the motion to suppress.[34]

In dealing with determinations regarding the existence of probable cause, only *probability*, as implied, can be examined in deciding whether a search is reasonable,[35] and it is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the *magistrate's* attention.[36]

The decision in *Spier* was predictable and it is now clear that the two-point probable cause standard set forth in *Aguilar* must be applied in any situation where the information which brought about the application for the search warrant was not within the personal knowledge of the officer-affiant, but came from an informant whose name the officer did not care to reveal.

The effect of the *Spier* decision could be more extensive than may have been intended. The stringent requirement of strict application of the two-point probable cause standard will foreclose law enforcement officers from obtaining a search warrant when their information comes from an anonymous source or from a source whose reliability cannot be accredited, for example, a child or a felon. Police officers will then be required to corroborate the "tip" with information that will be sufficient in itself to justify the issuance of a search warrant. This procedural safeguard of the fourth amendment guaranties may jeopardize the attempt of law enforcement officials to protect our society, which has experienced a rapid growth in the crime rate.[37]

PETER J. KLAUER

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[33] 174 N.W.2d 453 (Iowa 1970).
[34] *Id.* at 455 (emphasis the Court's).
[35] Brinegar v. United States, 338 U.S. 160 (1949).
[36] Aguilar v. Texas, 378 U.S. 108 (1964).
[37] *See* REPORT OF THE PRESIDENT'S COMM'N ON CRIME IN THE DISTRICT OF COLUMBIA 20-29 (1966).