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Barry D. Green

POLICE ENCOURAGEMENT AND THE FOURTH AMENDMENT

BARRY D. GREEN*

In deterring and investigating crime, local police and federal officials have numerous tools at their disposal. They can, for example, patrol neighborhoods, obtain search warrants, use roadblocks, run undercover operations, and employ wiretaps. Constitutional, statutory, and judicial limits exist, however, to limit the power of the police to intrude into the lives of the American people. For example, the fourth amendment constrains the ability of the police to obtain search warrants,[1] and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 establishes a statutory mechanism to review applications for wiretaps.[2] Moreover, in *Sorrells v. United States*,[3] the Supreme Court established a subjective entrapment defense which prevents the convictions of defendants who are "entrapped"[4] by undercover operations.[5]

The Supreme Court has refused, however, to hold that under-

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* A.B., with distinction, Cornell University; J.D., Yale University; 1987-88 law clerk for the Honorable John Walker, Jr., United States District Judge for the Southern District of New York.

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1. The fourth amendment states that warrants must be based on probable cause. U.S. CONST. amend IV. The Supreme Court has held that the fourth amendment requires that police obtain a warrant to search, except under exigent circumstances. Stoner v. California, 376 U.S. 483 (1964); United States v. Jeffers, 342 U.S. 48 (1951). These exigent circumstances include the threat of removal or destruction of evidence or contraband, and the flight of a suspect. Johnson v. United States, 333 U.S. 1015 (1948).

2. 18 U.S.C. §§ 2510-2520 (1982).

3. 287 U.S. 435 (1932).

4. The *Sorrells* Court stated that entrapment occurs when "the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." 287 U.S. at 451. Entrapment is established by determining whether the defendant was predisposed to commit the crime, *id.*, or he was an "unwary innocent." Sherman v. United States, 356 U.S. 369, 372 (1958). The test thus depends on the subjective state of mind of the defendant prior to commission of the crime. *See* United States v. Russell, 411 U.S. 423 (1973), Lopez v. United States. 373 U.S. 427 (1963).

5. The use of the term "undercover operations" includes the use of secret agents, electronic surveillance, informants, and agent provocateurs. Mere surveillance of a suspect is, however, excluded.

cover operations are subject to the dictates of the warrant requirement of the fourth amendment.[6] A majority of the Court has consistently held that the fraudulent obtaining of statements or consents to search does not violate the fourth amendment. While there has been considerable academic debate concerning the choice of a subjective rather than an objective entrapment standard,[7] few have examined the continued vitality and logic of the Court's rationale that undercover operations are outside the purview of the fourth amendment.[8] Nevertheless, given the Court's flexibility in interpreting the amendment since its decisions holding that the fourth amendment does not control undercover operations,[9] a return to those cases and a comparison with the Court's more recent holdings are in order.

Currently, there are few constitutional limits imposed on the police in conducting undercover operations.[10] For example, the Court has allowed undercover agents to record conversations with their targets,[11] to testify to private conversations which they have overheard,[12] and to initiate contacts with a suspect to elicit incriminating statements.[13] In addition, the police do not need any antecedent justification to conduct an undercover operation,[14] the target

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6. *See, e.g.*, United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966). For a discussion of these cases see *infra* notes 71-84 and 122-44 and accompanying text.

7. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975); Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565 (1982); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871 (1963); Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 5 SUP. CT. REV. 111 (1981); Note, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193 (1985).

8. A few articles were written in the years immediately following the *Hoffa*, *Lewis*, and *Osborn* decisions. *See, e.g.*, Note, *Judicial Control of Secret Agents*, 76 YALE L.J. 994 (1967). There is a dearth of recent articles arguing that the fourth amendment does apply to undercover activities. Indeed, one author has concluded that "any reform in the entrapment area will have to come from Congress." Note, *supra* note 7, at 1221 n.168.

9. For a discussion of the Court's flexible approach in interpreting the fourth amendment see *infra* notes 95-121 and accompanying text.

10. Moreover, many academics have remarked that the subjective approach to entrapment is almost meaningless because predisposition can be proven so easily. Gershman, *supra* note 7, at 1580-85; Dix, *supra* note 7, at 254-58. Of course, once a person has been indicted or charged, the police may no longer obtain statements from an accused by using an undercover agent. United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964).

11. *E.g.*, United States v. White, 401 U.S. 745 (1971); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).

12. Hoffa v. United States, 385 U.S. 293 (1966).

13. Lewis v. United States, 385 U.S. 206 (1966).

14. *See, e.g.*, *Hoffa*, 385 U.S. 193 (search warrant not necessary when government agent planted in defendant's hotel to hear incriminating statements); *Lewis*, 385 U.S. 206 (neither search warrant nor probable cause needed when undercover agent entered defendant's home to purchase narcotics). Neither case discussed the

can be a person that the agent already knows,[15] and there is no apparent limit on the duration of the operation.[16] Indeed, the only constitutional limit on undercover operations is the prohibition against surreptitiously removing papers from a person's files.[17]

Because of the impact of these operations on personal privacy and the Court's flexible approach to fourth amendment issues in related areas,[18] some restraints need to be placed on the use of undercover activities. Specifically, a warrant requirement, based on a showing that there is reasonable suspicion to believe that crimes are being committed, is mandated by the fourth amendment and should be adopted by the Court.

This paper will focus on the applicability of the fourth amendment to undercover operations. The first section will examine the need for undercover operations as a police tool. In exploring the utility of these operations, the paper will highlight the differences between consensual and nonconsensual crimes. The paper will then discuss the various privacy interests that are affected by undercover operations. This section will conclude that fundamental privacy concerns are intruded upon by the use of this police mechanism. The third section will examine the Supreme Court's approach to undercover operations and the fourth amendment in general. This tracing of the Court's jurisprudence will highlight the need to rethink the Court's approach to undercover operations. The paper will conclude with a suggested Constitutional standard for undercover operations which balances the need for such operations against the privacy interests which they affect.

I. The Nature of Police Work: Consensual v. Nonconsensual Crimes

The usual model of police work is reactive: a crime is reported and the police investigate.[19] Once the investigation has reached an

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evidence supporting either probable cause or reasonable suspicion, yet the Court allowed both convictions to stand. Indeed, in *Hoffa* it is doubtful that the police could have found any justification for believing that Hoffa would bribe the jury. Of course, a juror did report to the judge that someone had attempted to bribe him, but that occurred after the undercover agent had been asked to begin his work. 385 U.S. at 296 n.3.

15. *Hoffa*, 385 U.S. 293.

16. *Id.* In *Hoffa* the undercover agent conducted his activities for more than two months.

17. Gouled v. United States, 255 U.S. 298 (1921).

18. These areas include administrative searches, Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967), and stops based on reasonable suspicion, Terry v. Ohio, 392 U.S. 1 (1968). See *infra* notes 95-121 and accompanying text for an analysis of this approach.

19. This discussion is largely based on materials in *Abscam Ethics: Moral Issues and Deception in Law Enforcement* (G. Caplan ed. 1983) [hereinafter Abscam

advanced stage, the police may apply for a search warrant. If that is granted and the police uncover enough evidence, an arrest may follow. The police intrude on individual privacy when they search or arrest, yet the fourth amendment limits the use of these tools by imposing a warrant requirement.[20] To deter crimes before they occur, police officers walk their beats and patrol in their cars. On the whole, however, the system is fairly unintrusive. No significant police activity is begun until a crime has been committed and reported, and only then do the police engage in significantly intrusive behavior.

This approach to crime is effective as long as a victim or witness is willing to come forward or the police observe the crime taking place. However, if a crime is planned carefully, there will be no witnesses. Indeed, most consensual crimes are planned and carried out in private.[21] Consequently, the crime will not be reported to the police, unless one of the parties changes his mind or becomes a state witness.

Although these consensual crimes may remain unreported and unnoticed by the police, their seriousness should not be underestimated. Narcotics, counterfeiting, corruption, prostitution, insider trading, and sales of stolen property have serious effects on the United States. For example, corruption and its effect on democracy have received significant attention in light of the corrupt behavior of certain New York City politicians.[22] Moreover, as this highlights, consensual crimes frequently involve an ongoing series of illegalities, not just one-time thefts or assaults.

The police cannot ignore these crimes. First, a reactive strategy is biased against those who commit their crimes in public. Those who are able to commit crimes in private, therefore, are spared the possibility of being caught if the police rely only on a reactive strategy.[23] Second, and more important, these crimes are too significant to ignore. One has only to read the daily newspaper to understand their magnitude.[24] Thus, the police must employ a "proactive" strategy to combat consensual crimes, while also continuing to "react" to

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ETHICS].

20. U.S. CONST. amend IV.

21. Thus, by definition, the investigation of consensual crimes involves an intrusion into privacy.

22. *See, e.g.*, N.Y. Times, Aug. 7, 1986, at B1, col. 3.

23. At least one author has concluded that such reliance will result in inequities based on wealth. Sherman, *From Whodunit to Who Does It: Fairness and Target Selection In Deceptive Investigations*, in ABSCAM ETHICS, *supra* note 19, at 120.

24. For example, newspapers frequently report on the drug problem and its effects on the nation. In addition, each day seems to bring new arrests for insider trading. Not surprisingly, some traders have recently been arrested for cocaine use, and the U.S. Attorney's Office suggested that there is a link between drug use and insider trading. New York Times, Apr. 17, 1986, at A1, col. 2.

nonconsensual offenses.

The police can employ several strategies to investigate consensual crimes. While many are relatively unintrusive, these tend not to be very effective. For example, the number of policemen walking beats or patrolling can be increased in the hope of catching criminals while committing crimes. This strategy, however, is likely to be ineffective given the nature of consensual crimes. More frequent tax audits can also be used, but such a response may only uncover certain types of consensual crimes. Another strategy is to create incentives for witnesses or partners-in-crime to come forward to the police. However, this alternative is also likely to be ineffective since the "witness" would normally be a co-conspirator and thus unlikely to respond to this strategy. In addition, false allegations may be generated.[25]

Given the shortcomings of the minimally intrusive strategies just discussed, other means are used to fight consensual crimes. The police, aware that real witnesses cannot be convinced to report consensual crimes, adopt methods which create witnesses. Undercover operations, by injecting the police into the illegal activity, provide them with essential information; the police are informed of the identity of those who commit consensual crimes. Consequently, the detection problem is solved. Indeed the success of this strategy is attested to by the increasing frequency with which federal officials engage in undercover operations. In 1977, the Federal Bureau of Investigation (FBI) received an appropriation of one million dollars for undercover work and carried out 53 operations, but five years later the appropriation had risen to 4.5 million dollars and the number of operations had grown to 463.[26] The importance of this crime-fighting technique has led one Senate Committee to conclude: "Undercover operations of the United States Department of Justice have substantially contributed to the detection, investigation, and prosecution of criminal activity, especially organized crime and consensual crimes such as narcotics . . . and political corruption . . . . Some use of the undercover technique is indispensable to the

25. For a further analysis of the various strategies the police may employ to fight consensual crimes short of deceptive techniques, see Moore, *Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement*, in ABSCAM ETHICS, *supra* note 19, at 31-35; Kerstetter, *Undercover Investigations: An Administrative Perspective*, in ABSCAM ETHICS, *supra* note 19, at 139-44, Sherman, *supra* note 23, at 120-21. Kerstetter also discusses the advantages which undercover operations offer in fighting invisible offenses.

26. SELECT COMM. TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE, FINAL REPORT TO THE U.S. SENATE, S. REP. NO. 682, 97TH CONG., 2D SESS. 42 (1982) [hereinafter FINAL REPORT]. The growth of undercover operations does not appear to have slowed in recent years; in 1984, the FBI received 12 million dollars for undercover work. Note, *supra* note 7, at 1196 n.6.

achievement of effective law enforcement."[27] Although the police use many different types of undercover operations in fighting consensual crimes, two basic strategies exist. Either the police adopt a strategy which investigates a group of possible criminals, or they target a particular individual who is suspected of criminal activity.[28]

The first category of undercover operations is not directed at convicting any particular person; rather, these operations are aimed at uncovering criminal activity within a targeted group.[29] They effectively enable the police to patrol for and deter[30] certain crimes. For example, in the typical sting operation, the police merely create a "criminal organization" and wait for customers to call. As the police are deterring and patrolling for offenses, however, they are also able to obtain evidence against those who take the bait. Indeed, the police would probably have enough evidence to arrest the putative criminal during or after the "controlled" offense has occurred. Thus, the neat line observed in nonconsensual offenses between patrolling/deterring and investigating becomes blurred when it is applied to consensual crimes.[31]

When the police engage in an undercover operation which is targeted at a specific individual, the goal is to obtain evidence against the person, ideally culminating in an arrest. Consequently, this type of operation closely resembles techniques the police use to gain information concerning a nonconsensual crime. While the police could have chosen to use more traditional methods, such as search warrants or wiretaps, instead they have employed an undercover operation.[32]

II. The Impact of Undercover Operations on Personal Privacy

A significant price is paid for the success of undercover opera-

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27. Final Report, *supra* note 26, at 11.

28. *Id.*

29. Such police activity is not dissimilar to the techniques sanctioned by the Court in Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) (building inspections); or United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (roadside stops for enforcement of immigration laws).

30. Once criminals know that the police engage in undercover operations, a deterrent effect will result since any willing criminal *could* be an undercover agent.

31. Moore, *supra* note 25, at 37, upon noticing this phenomenon wrote, "In effect, informants and undercover operations tend to blur the distinction between detecting and investigating offenses: They happen almost simultaneously."

32. At least two academics have argued that the police may have turned to undercover operations to avoid the constraints on other types of police work. Duke, *Entrapment Defense Languishes in Permanent State of Confusion*, Nat. L.J. Mar. 21, 1983, at 30, col. 1; Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, in Abscam Ethics, *supra* note 19, at 68. Both authors argue that an implicit swap has occurred; by limiting coercion, the Court has increased the use of deception.

tions in detecting and investigating consensual crimes. The use of informants, electronic surveillance, and deception, while solving the detection and investigation problems, seriously intrudes upon personal privacy. Thus, society is faced with a dilemma. If it wishes to fight consensual crimes effectively, it is forced to adopt intrusive practices. Since the United States, through its local and federal law enforcement agencies, has opted to attack the problem of victimless crimes, appropriate limits must be placed on the police to safeguard the privacy of the American people. Although many have turned to the entrapment defense[33] or Congress[34] to develop these checks, the constitutional limits on police activity should also be examined. The fourth amendment is designed to control and limit the intrusiveness of police practices on personal privacy. To understand the relationship between the fourth amendment and undercover operations, however, the privacy interests affected by undercover operations need first to be examined.[35]

Undercover operations are a direct assault on individual privacy. Indeed, they are useful because they allow the police to invade the private sphere of an individual's life.[36] Through undercover work, an undercover agent becomes privy to information that only a limited number of people know. For example, in *Hoffa v. United States*,[37] the police hired an undercover agent whom James Hoffa knew because the police expected that Hoffa would trust him with private information.[38] As a result, the agent spent two months listening to Hoffa and his entourage plan activities which they believed would remain private.[39] Of course, Hoffa took the chance that someone would later turn state's witness or inform the police of his illegal activities, but he never expected that an informant was in his midst who *from the beginning* was planning to divulge all he was to

33. *See, e.g.*, Note, *supra* note 7, at 1197 (evaluating the entrapment doctrine).

34. *See, e.g.*, FINAL REPORT, *supra* note 26, at 25-29. Senator Charles Mathias did introduce a bill during the 98th Congress based on the recommendations of the FINAL REPORT. S. 804, 98th Cong., 1st Sess., 129 CONG. REC. S2797-2801 (daily ed. Mar. 14, 1983). The proposed statute required that before an undercover operation was commenced or expanded, a finding of reasonable suspicion was required. No judicial officers were involved in this process. The statute also adopted the objective definition of entrapment for federal crimes. The bill was never enacted.

35. This paper focuses exclusively on the effects of undercover operations on privacy. The other significant costs of these operations, such as the resulting corruption of the police and the disrespect for a government whose officials violate the law, are beyond the scope of this article.

36. One author captured the essence of undercover operations when he wrote, "The very rationale for the use of undercover agents comes from a recognition of the utility of invading private space in order to get valuable information." Levinson, *Under Cover: The Hidden Costs of Infiltration* in ABSCAM ETHICS, *supra* note 19, at 51.

37. 385 U.S. 293 (1966).

38. *Id.* at 298-99.

39. *Id.*

hear.

The privacy of personal and professional relationships is violated when undercover operations are employed. Although the police would not be allowed to sit in on personal or business conversations if they asked, they are able to achieve the same result through an undercover operation. In *Lewis v. United States*,[40] an undercover agent telephoned Lewis claiming that he was recommended by a colleague of Lewis. Had he knocked on Lewis' door with his uniform on, asking for drugs, he most certainly would have been turned down. However, since he was undercover, the agent was successful in obtaining the incriminating evidence.[41]

The police investigating Lewis could have applied for a search warrant or a wiretap, but either alternative would have required a judicial determination of probable cause. Although an undercover operation does not require such antecedent justification, the same evidence is uncovered and the same intrusion into personal privacy is achieved.[42] Indeed, a Senate select committee which studied the use of undercover operations concluded that such operations "affect the same privacy interests as do physical searches and wiretaps."[43] The Court has allowed the police to achieve by indirection what cannot be achieved directly. The police may use chicanery and deceit to invade the privacy of individuals without probable cause or reasonable suspicion, yet they need to demonstrate probable cause when the invasion of privacy is admitted to be the goal.

Because undercover operations are based on deceit, suspects who are tested by them often feel betrayed and dehumanized.[44] Deceit also manipulates people and creates situations which may never have existed had the undercover operation not occurred. Like cogs in a machine to be used in the way most satisfactory to the government, American citizens, at the whim of the police, may become targets of undercover operations. For example, in *On Lee v. United States*,[45] the petitioner was approached by a friend who was cooperating with the police. While the conversation was being taped without the knowledge of Mr. On Lee, the government agent elicited many incriminating statements.[46]

Once people become aware that anyone could be an undercover

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40. 385 U.S. 206 (1966).
41. *Id.* at 207.
42. Of course, Lewis did "invite" the agent into his house, but that invitation was premised on Lewis' belief that the agent was whom he was purported to be. *Id.*
43. FINAL REPORT, *supra* note 26, at 381.
44. One commentator has concluded that privacy "clearly encompasses the interest in being aware of all relevant characteristics of persons with whom one deals." Dix, *supra* note 7, at 211.
45. 343 U.S. 747 (1952).
46. *Id.* at 749.

agent, the willingness of individuals to trust one another will be chilled. Moreover, because these operations are shrouded in secrecy, people will tend to exaggerate the threats they pose. Thus, undercover operations will deter the formation of confidential, personal and professional relationships. Justice Harlan recognized the significance of this result when he noted in *United States v. White* that undercover operations "undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society."[47] The United States takes pride in its respect for the private lives of its people, yet by sanctioning undercover operations without any constitutional controls, the Court has created a serious threat to this unique aspect of American life.[48]

The effect of undercover operations on individual privacy can be illustrated by the damage done to those individuals who are drawn into an operation but do not fall prey to its temptations.[49] Subjects of undercover work are likely to feel intimidated and threatened long after their names have been cleared. Like the city dweller whose apartment has been burglarized, an innocent subject will feel that her privacy has been illegally invaded. In Abscam, at least two Congressmen did not take the bait offered to them, yet they continued "to feel guilty, compromised, distrustful and uncertain long after their names had been cleared."[50]

III. The Fourth Amendment and Undercover Operations

Although the privacy interests which are infringed upon by undercover operations are substantial, the Supreme Court has consistently refused to subject such operations to the constraints of the fourth amendment.[51] This refusal is surprising, given the Court's conclusion that the purpose of the fourth amendment is "to safe-

47. 401 U.S. 745, 787 (Harlan, J., dissenting).

48. *See* United States v. Jannotti, 673 F.2d 578, 612-13 (3rd Cir. 1982) (Aldisert, J., dissenting) (comparing the tactics used in Abscam to those of the Gestapo), *cert. denied*, 457 U.S., 1106 (1982).

49. Although this is a result of any undercover work, there are now no procedural safeguards to reassure innocent subjects. For example, in Abscam there were no prior warnings to possible subjects, the methods used to select suspects were questionable, and the FBI never issued public statements clearing the reputations of innocent suspects. Note, *supra* note 7, at 1215. Each of these safeguards is recommended to limit the intrusion of undercover operations. *See infra* text accompanying notes 193-95.

50. Note, *supra* note 7, at 1215. Recognizing this effect, the Senate select committee which studied Abscam concluded that "the mere offer of a criminal temptation, even to a citizen who refused it, can . . . be very intrusive and harmful." Final Report, *supra* note 26, at 382.

51. *See* United States v. White, 401 U.S. 45 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966).

guard the privacy and security of individuals against arbitrary invasions by government officials."[52] This section of the paper will trace the Supreme Court's decisions which affect the relationship between undercover operations and the fourth amendment, and argue that the Court's refusal to apply the fourth amendment to undercover operations is misguided given the privacy interests at stake and the Court's general, flexible approach to the fourth amendment.

The Court's first foray into undercover operations held the challenged undercover operation unconstitutional and recognized that privacy could be intruded upon by such police tactics. In *Gouled v. United States*,[53] the Supreme Court decided that an undercover agent who gained entry to the petitioner's home by "stealth" and surreptitiously removed some documents had violated the fourth amendment. The Court spoke in broad language in holding this behavior unconstitutional: "These Amendments [the fourth and fifth] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous executive officers."[54] The Court took a legal realist approach to the practice at issue in *Gouled*. Since it reasoned that the police could not have forced their way into the petitioner's house and taken the papers with force, the Court held that the police could not achieve the same result by deceit.[55]

The applicability of *Gouled* was drastically limited in the next case that the Court decided concerning undercover techniques. In *On Lee v. United States*,[56] the Supreme Court upheld the surreptitious recording[57] of a conversation between the petitioner and an undercover agent, who was a friend of Mr. On Lee. The agent was able to obtain incriminating evidence because the petitioner mistakenly relied on the friendship between him and the agent.[58] The Court reasoned that since there was no trespass by the agent and no tort was committed, the fourth amendment was not violated.[59] The petitioner argued that *Gouled* prohibited the practice under review,

52. Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967).
53. 255 U.S. 298 (1921).
54. *Id.* at 304.
55. *Id.* at 305-06.
56. 343 U.S. 747 (1952).
57. Many operations involve the use of electronic surveillance. Although the use of such equipment arguably makes undercover work more intrusive, it is the argument of this paper that all undercover operations deceive, manipulate, and invade the privacy of individuals. See *supra* text accompanying notes 33-50. While some members of the Court perceive a constitutional difference in the intrusiveness of undercover operations based on the use of electronic surveillance, the privacy of an individual is still greatly infringed whether or not conversations are recorded.
58. *On Lee*, 343 U.S. at 749.
59. *Id.* at 750-53.

but the Court limited the holding of that case to the seizure of "tangible property."[60] Mr. Justice Frankfurter dissented to the Court's approach, reasoning that undercover work constituted intrusion by the police "into our daily lives against which the fourth amendment of the constitution was set on guard."[61]

The Court's approach in *On Lee* and its interpretation of *Gouled* are not surprising since the Court at that time was relying on property and tort notions to define the boundaries of the fourth amendment. The Court applied the same approach in its next case, *Lopez v. United States*.[62] Although Mr. Lopez argued that the deception induced him to behave illegally, the Court, relying on *On Lee*, held that there was no constitutional violation. "[The agent is] not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real."[63] Throughout its analysis of the facts and law in *Lopez*, the Court refused to acknowledge any intrusion into privacy.[64]

The *Lopez* Court did give special consideration to the use of the concealed tape recorder.[65] Although the opinion for the majority rejected all arguments that the recording was unconstitutional,[66] the Court's reasoning hinted that its approach to the fourth amendment was undergoing change. It held that "the risk that petitioner took in offering a bribe to [agent] Davis fairly included the risk the offer would be accurately produced in court, whether by faultless memory or mechanical recording."[67] This approach begs the question, however, since Davis was never prepared to accept a bribe; he was merely role-playing in order to obtain evidence against Lopez. If Lopez knew that Davis intended to reveal the illegal activity, he probably would not have acted as he did.[68] More important is the question of whether Lopez should be subjected to this risk, given its effect on his privacy, without any police obligation to prove probable cause or reasonable suspicion to a magistrate.[69]

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60. *Id.* at 753.

61. *Id.* at 759 (Frankfurter, J., dissenting).

62. 373 U.S. 427 (1963). Mr. Lopez was accused of attempted bribery of an IRS agent. The agent was not originally engaged in undercover work, but upon the offer of a bribe, he assumed that role pursuant to Government instruction. He was also concealing a machine to record his conversations with Lopez. *Id.* at 429.

63. *Id.* at 438.

64. *Id.*

65. *Id.* at 438-39.

66. *Id.* at 440.

67. *Id.* at 439.

68. For example, he might have demanded reassurances from Davis and searched him to guarantee that he was not bugged. The police relied on the fact that Lopez would not contemplate this risk; otherwise, Davis may never have been equipped with a recorder. *Id.* at 429.

69. Justice Brennan, joined by Justices Douglas and Goldberg, dissented and argued that the fourth amendment "must embrace a concept of the liberty of one's

The Supreme Court, on the same day in 1966, decided three cases concerning the relationship between undercover operations and the fourth amendment.[70] *Hoffa v. United States*[71] addressed the constitutionality of employing an undercover agent whom the petitioner knew before and believed was a friend. Undercover agent Partin manipulated his way into the hotel suite where Hoffa was staying during the pendency of a trial against him.[72] The police believed that Hoffa would attempt to bribe jurors during the pendency of that trial; therefore, they hired Partin to spy on Hoffa's activities.[73] The petitioner argued that this behavior violated his fourth amendment rights since it constituted an illegal search for verbal evidence.[74] Hoffa further contended that the consent to Partin's presence was based on Partin's presumed friendship, and the consent was vitiated since he was a government agent.[75]

The Court had little trouble finding this operation constitutional. Although the Court talked about protected areas, its holding appears to be based on Hoffa's mistaken belief that Partin was his friend.[76] The Court emphasized that there is no constitutional violation when the police rely upon a suspect's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[77] Throughout the decision the Court appeared preoccupied with its readily apparent desire not to control undercover operations with the fourth amendment.[78] The desire to avoid placing restric-

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communications, and historically it has." *Id.* at 438-39 (Brennan, J., dissenting). Although he thought the tape recording made a constitutional difference, this paper has rejected that distinction in its analysis in Part II and *supra* note 57. For further criticism, see Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause and The Warrant Requirement*, 69 J. CRIM. L. & C. 425, 435-38 (1978); Levinson, *supra* note 36, at 53-59. In relying on the electronic surveillance, Justice Brennan was concerned about the slippery slope of intrusion as technology improves the ability of the police to monitor individuals, yet he ignored the same problems with respect to deception as the police improve those techniques. *Lopez*, 373 U.S. at 439 (Brennan, J., dissenting).

70. Although the Supreme Court was still relying on the property approach, the reasoning behind its decisions was more complex than that in *On Lee* and *Lopez*. Realizing the inadequacy of its prior approach to the fourth amendment, the Court began to place more emphasis on "misplaced confidence" and the need for undercover operations to combat crime. Hoffa v. United States, 385 U.S. 293 (1966).

71. 385 U.S. 293 (1966).

72. *Id.* at 296.

73. *Id.* at 299.

74. *Id.* at 300.

75. *Id.*

76. The Court held, "The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing." *Id.* at 302.

77. *Id.*

78. For example, the majority opinion concluded that "the use of secret informers is not *per se* unconstitutional." *Id.* at 311. But this was hardly the issue. The issue was whether the requirements of the fourth amendment are applicable to undercover operations.

tions on undercover work became explicit in *Lewis v. United States*.[79] In this case, the agent did not know the petitioner before the undercover operation was launched.[80] Instead, he telephoned the petitioner claiming that he had been told Lewis could help him obtain drugs.[81] Lewis did eventually sell drugs to the agent; as a result, he was arrested and convicted.[82] After little discussion, the Court held that the deception practiced did not violate the fourth amendment.[83] Perhaps the most interesting part of this opinion, however, is the following:

> Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest.[84]

This contention is plainly wrong. Undercover operations would not be made unconstitutional; merely, such operations would become subject to the requirements of the fourth amendment. Whether such a result would hamper the government in law enforcement is irrelevant. The Constitution cannot be ignored simply because its commands are inconvenient.

The last case of this trilogy is perhaps the most interesting. In *Osborn v. United States*,[85] a private detective, Vick, was asked by the petitioner to bribe some jurors. When Vick informed the Department of Justice of this request, federal officials applied to two judges sitting together for permission to wire Vick so that his next encounter with the petitioner could be recorded.[86] After receiving permission from the judges, Vick recorded his conversations with Osborn on two occasions.[87] In holding that there was no constitutional violation in this case, the Court emphasized that it did not need to rely on *Lopez* or *On Lee*.[88] Rather, given the unique situation of prior judicial approval based on antecedent justification, the

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79. 385 U.S. 206 (1966).
80. *Id.* at 207.
81. *Id.*
82. *Id.* at 208.
83. The Court compared the facts here to those in *Gouled*. Finding the factual situations totally different, the Court held there was not a constitutional violation. *Id.* at 212.
84. *Id.* at 210.
85. 385 U.S. 323 (1966). The only issue in this case was the admissibility of the tape recording transcript. The petitioner did not challenge the testimony of Vick. *Id.* at 326.
86. *Id.* at 325.
87. *Id.* at 325-26. Permission was obtained separately for each encounter. The Court did not say what standard the authorizing judges applied to the request to record. *Id.*
88. *Id.* at 327.

Court relied on the "precise and discriminate" use of electronic surveillance.[89] The Court also emphasized that the surveillance was allowed "for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegation."[90]

The irony of *Osborn* is that the facts and the Court's holding directly contradict the Court's conclusion in *Lewis* that all undercover operations, if subjected to the requirements of the fourth amendment, would be unconstitutional. *Osborn* illustrates that undercover operations and the fourth amendment are not incompatible. The fourth amendment can be applied to control the infringement of undercover operations on personal privacy as it has been with search warrants.[91]

The *Hoffa* and *Lewis* decisions are troubling because they fail to recognize the privacy interests at stake: the importance of nondeceptive personal and business relationships, the intrusiveness of undercover operations, and the effects of manipulation and deceit. In his dissent, Justice Douglas recognized these consequences.[92] Foreshadowing the holding in *Katz*, he also criticized the "misplaced confidence" rationale since it ignored the different risks one takes in divulging personal information:

> A householder who admits a government agent, knowing that he is such, waives of course any right of privacy. One who invites or admits an old "friend" takes, I think, the risk that the "friend" will tattle . . . . The case for me, however, is different when government plays an ignoble role of "planting" an agent in one's living room or uses fraud and deception in getting him there. These practices are at war with the constitutional standards of privacy which are parts of our choicest tradition.[93]

Justice Douglas reasoned that the fraud and deceit practiced in *Hoffa* and *Lewis* were analogous to that of the agent in *Gouled*, and were thus unconstitutional since there was no antecedent justification.[94]

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89. *Id.* at 329.

90. *Id.* at 329-30.

91. Even the Court's language in *Osborn* directly contradicted the quoted language from *Lewis*. For example, the Court concluded that the facts "could hardly be a clearer example of 'the precedure of antecedent justification before a magistrate that is central to the Fourth Amendment.' " *Id.* at 330 (citations omitted).

92. He wrote, "These federal cases present various aspects of the constitutional right of privacy . . . [and] demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away." *Id.* at 341-43 (Douglas, J., dissenting).

93. *Id.* at 347.

94. He also suspected that the police had used undercover operations to avoid the requirements of the fourth amendment. He characterized the government's behavior as "lawless invasion[s] of privacy," arguing that "[w]here, as here, there is enough evidence to get a warrant to make a search I would not allow the fourth amendment to be short-circuited . . . . We downgrade the fourth amendment when we forgive noncompliance with its mandate and allow these easier methods of the

Not until 1971 was the Supreme Court faced with another case concerning the relationship between the fourth amendment and undercover operations. Between 1966 and 1971, however, the Court's approach to the fourth amendment experienced significant change. *Katz v. United States*,[95] *Terry v. Ohio*,[96] and *Camara v. Municipal Court of San Francisco*[97] radically altered the Court's fourth amendment jurisprudence with significant implications for its approach to undercover operations.

In *Katz*, the Court largely abandoned its property rationale for the fourth amendment. Instead, it embraced an analysis which emphasized the expectations of individuals.[98] Justice Harlan's concurring opinion, which has been the approach followed by the Court,[99] advocated a two-prong test to determine whether the fourth amendment was applicable: first, whether the individual had a subjective expectation of privacy; and second, whether society was willing to recognize that expectation as reasonable.[100] After holding the fourth amendment applicable in *Katz*,[101] the Court found the search unconstitutional since there had been no prior, independent review by a magistrate.[102] The Court held that the absence of the "detached scrutiny" of a magistrate and the lack of limits established in advance resulted in a violation of the fourth amendment.[103]

In the same year that *Katz* was decided, the Court created a new area of fourth amendment law: administrative searches. In *Camara v. Municipal Court of San Francisco*,[104] the Court examined the constitutionality of warrantless searches to ensure compliance with San Francisco's housing code[105] and held that these ad-

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police to thrive." *Id.* at 344-46.

95. 389 U.S. 347 (1967).

96. 392 U.S. 1 (1968).

97. 387 U.S. 523 (1967).

98. 389 U.S. at 359.

99. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968) (adopting Justice Harlan's analysis in *Katz*).

100. While easily stated, Justice Harlan's "reasonable expectations of privacy" approach moves the Court into murky waters. In deciding fourth amendment cases, the Court must now make value judgments about what expectations of privacy are appropriate for our society. *See infra* text accompanying notes 140-41.

101. For a discussion of the factors which led the Court to this conclusion, see *infra* text accompanying notes 150-51.

102. *Katz*, 389 U.S. at 359.

103. The Court concluded, "In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Id.* at 356-57.

104. 387 U.S. 523 (1967).

105. The Court framed the issue narrowly. It was not whether the public interest justified the search but "whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the government purpose behind the search." *Id.* at 533. Compare this language with the Court's conclusion in *Lewis*, *supra* text accompany-

ministrative searches were subject to the fourth amendment.[106] In reaching this decision, the Court noted that homeowners under the current system were subject to the unfettered discretion of government inspectors.[107] This result, the Court emphasized, "is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."[108] The majority opinion also rejected the respondent's argument that statutory safeguards were an adequate substitute for individualized review.[109]

While the Court agreed that the searches were subject to the commands of the fourth amendment, it did not adopt the typical probable cause requirement. Rather, it articulated a new test to determine what standard a search must satisfy before it will be deemed constitutional: "There can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[110] After balancing the governmental and personal interests at stake in *Camara*,[111] the Court held that these searches would be permissible if executed pursuant to "reasonable legislative or administrative standards for conducting an area inspection."[112] The Court recognized that administrative searches would not be based on the knowledge of defects in a specific building but on such neutral factors as the passage of time since the last search, the type of building being inspected, or general conditions in an area.[113]

The Court's decision in *Terry v. Ohio*[114] added further flexibility and complexity to fourth amendment jurisprudence. In this case, the Court held that a "stop and frisk"[115] by a police officer was sub-

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ing note 84.

106. In reaching this conclusion, the Court overruled Frank v. Maryland, 359 U.S. 360 (1959), which held that these searches were not affected by the Constitution. *Camara*, 387 U.S. at 539.

107. 387 U.S. at 531.

108. *Id.* at 533.

109. *Id.* at 532-33.

110. *Id.* at 536-37.

111. The Court found three factors supporting the government's need to conduct administrative searches: (1) a long history of acceptance; (2) a strong public need to search since that strategy was universally recognized as the only effective way to ensure compliance with housing codes; and (3) only a limited invasion of privacy since the inspections are not "personal in nature nor aimed at the discovery of evidence of crime." *Id.* at 537.

112. *Id.* at 538.

113. Notice that these factual predicates do not establish any reason to suspect that violations were occurring. The Court assumed that violations existed, but required that searches be based on neutral standards in an attempt to limit the discretion of government officials to search. *Id.* at 538.

114. 392 U.S. 1 (1968).

115. A "stop and frisk" is defined in *Terry* as "a carefully limited search of the outer clothing . . . in an attempt to discover weapons . . . ." 392 U.S. at 30.

ject to the fourth amendment because it was an invasion of privacy which "may inflict great indignity and arouse strong resentment."[116] Nevertheless, the Warrant Clause of the fourth amendment was held inapplicable.[117] Instead, the Court maintained that the practice must be tested against the fourth amendment's proscription against unreasonable searches and seizures.[118] In *Terry*, a majority of the Court concluded that a "stop and frisk" would satisfy constitutional requirements only if it passed a reasonable suspicion test with "specific reasonable inferences," not "inchoate and unparticularized" hunches.[119] Thus, as it did in *Camara*, the Court allowed an invasion of privacy only when antecedent justification existed.[120] As it did in its past decisions, the Court emphasized the importance of subjecting the officer's behavior "to the more detached, neutral scrutiny of a judge."[121]

In *United States v. White*,[122] the Supreme Court again faced the question of the constitutionality of undercover operations. In this case, an agent who had monitored conversations between the petitioner and a wired undercover agent testified in court about the content of those conversations.[123] The plurality opinion is rather confused and confusing. Although the Court applied the reasoning of *Katz* to the case, the opinion suggested that this approach was only dicta because in *Desist v. United States*[124] the Court had held that *Katz* only applied to electronic surveillance occurring after *Katz* was decided. Indeed, a majority of the Court agreed to the result in *White* based solely on the holding in *Desist*.[125]

The plurality opinion indicates, however, that at least four justices did not believe that *Katz* had any effect on the constitutionality of undercover operations. These justices continued to rely on the applicability of *Hoffa*, *Lewis*, *Lopez*, and *On Lee*, all of which, they

116. *Id.* at 17.

117. *Id.* at 20.

118. In making this determination, the Court applied the *Camara* balancing test. The Court characterized the invasion as follows: "A severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25. The search was justified, however, because of the importance of preventing crimes and avoiding the killing of police officers. *Id.*

119. *Id.* at 27.

120. The Court did not require that the police officer obtain judicial approval before the search due to the exigent circumstances, yet the justification of the stop and frisk was to be based only on what the officer observed before he invaded the privacy of the suspect. *Id.* at 20-22.

121. *Id.* at 21.

122. 401 U.S. 745 (1971).

123. *Id.* at 746. The conversations occurred before the Supreme Court had decided *Katz*.

124. 394 U.S. 244 (1969).

125. Justice Brennan, concurring in the result, based his opinion on *Desist*. Thus, when he is added to the four in the plurality, a majority emerges.

contended, were not disturbed by *Katz*.[126] The opinion concluded that the police activity was constitutional because "[i]nescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police."[127] The plurality based its holding on the reliability and relevance of the information being challenged.[128] Once again at least four justices wanted to avoid "erect[ing] constitutional barriers to relevant and probative evidence which is also accurate and reliable."[129]

There are numerous problems with the plurality's approach to the fourth amendment. The very wording of the *White* decision is problematic. The Constitution does not merely protect innocent citizens, it protects all citizens.[130] To state that those who contemplate illegal activities do not enjoy the same protection as do others is inaccurate.[131] Thus, the opinion, if accurate, means that no one, regardless of the activity contemplated, has any constitutional claim when her privacy is infringed upon by an undercover operation. Because undercover operations affect not only those guilty of crimes, these justices sanctioned enormous intrusions into privacy. If the opinion did not contemplate this result, then its conclusion is invalid, because the Constitution will not countenance one rule for the innocent and one for the guilty. Moreover, in reaching its conclusion, the plurality, as Justice Harlan indicated in dissent,[132] ignored the various privacy interests which are infringed upon by undercover operations and which, according to *Katz* and *Camara*, should be considered.

These justices also refused to frame the issue narrowly as the Court had done in *Camara*.[133] Instead, they assumed that any application of the fourth amendment would destroy the utility of undercover operations. This conclusion is particularly troubling after *Terry* and *Camara*, in which activities never before subject to the fourth amendment were brought within its confines.[134] There has never been any suggestion that either decision destroyed the ability of the police to "stop and frisk," or government inspectors to conduct administrative searches. Why should undercover operations be treated differently? Merely because an undercover operation creates

126. *White*, 394 U.S. at 749.
127. *Id.*
128. *Id.* at 753-54.
129. *Id.* at 753.
130. In his dissent, Justice Harlan recognized this flaw in the plurality's opinion: "Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society." *Id.* at 790 (Harlan, J., dissenting).
131. *But see* Dripps, *Living With Leon*, 95 YALE L.J. 906 (1986).
132. *See infra* text accompanying notes 135-44.
133. *See supra* note 105.
134. *White*, 401 U.S. at 761.

reliable evidence does not suggest that it should not be subject to the Constitution; indeed, this factor is entirely irrelevant. Searches and wiretaps also create reliable evidence. They are, however, regulated by the fourth amendment because they infringe on privacy. The same is true of undercover operations.[135]

Justice Harlan dissented to the plurality opinion, and his opinion is an eloquent defense of the right to privacy and the need to protect that right by regulating undercover operations.[136] He began his dissent by discussing the Court's new flexibility in fourth amendment jurisprudence as well as its broader scope.[137] According to Justice Harlan, by 1971, the fourth amendment protected not property, but privacy, including verbal communications.[138] The opinion also highlighted the continued importance to the Court of antecedent justification and the review of a detached magistrate.[139]

Justice Harlan recognized, however, that the Court's new expectations or risk analysis approach could "ultimately lead to the substitution of words for analysis."[140] The Court's job, therefore, was to determine what expectations and risks were entitled to the protection of the fourth amendment. By expanding upon the *Camara* test, Justice Harlan captured the difficulty of the Court's responsibility and ably summarized the Court's duty:

> The analysis must . . . transcend the search for subjective expectations or legal attribution of assumptions of risk . . . . [Thus], [t]his question must be answered by assessing the nature of a particular practice and the likely extent of its impact upon the individual's sense

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135. In dissent, Justice Douglas recognized that the evolution in the Court's fourth amendment jurisprudence since *On Lee* mandated a rethinking of the relationship between the Constitution and undercover operations. He argued that the decisions in *Terry*, *Katz*, and *Camara* "have moved [the Court] far away from the rationale of *On Lee* and *Lopez* and only a retrogressive step of large dimensions would bring us back to it." *White*, 401 U.S. at 761. (Douglas, J., dissenting).

136. The opinion is even more extraordinary since it marks a change in Justice Harlan's approach to the fourth amendment. He wrote the opinion in *Lopez*, yet in this dissent he implicitly recognizes that this decision was no longer good law given the Court's decisions in *Terry*, *Camara*, and *Katz*. *White*, 401 U.S. at 788 n.24 (Harlan, J., dissenting).

137. *Id.* at 769 (Harlan, J., dissenting).

138. *Id.* at 781 (Harlan, J., dissenting).

139. Justice Harlan noted that *Camara* reaffirmed the principle "that it was against the possible arbitrariness of invasion that the fourth amendment with its warrant machinery was meant to guard." *Id.* at 782. Given the Court's decision in Chimel v. California, 395 U.S. 752 (1969), Justice Harlan concluded that warrants can only be excused in extraordinary circumstances, none of which were present in *White*. *White*, 401 U.S. at 795 (Harlan, J., dissenting).

140. *White*, 401 U.S. at 786 (Harlan, J., dissenting). Justice Harlan continued, "Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present. Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society." *Id.* (Harlan, J., dissenting).

> of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of fourth amendment liberties, I am of the view that more than self-restraint by law enforcement officials is required and at the least warrants should be necessary.[141]

In applying this test to the undercover operation in *White*, Justice Harlan concluded that the fourth amendment was applicable.[142] He noted that the result of uncontrolled undercover operations would chill personal and business relationships which are basic to a free society.[143] A warrant requirement, therefore, was needed to protect the openness of American society and to ensure that privacy was invaded only in limited circumstances.[144]

IV. Towards a "Reasonable" Fourth Amendment Approach To Undercover Operations

A. *The Applicability of the Fourth Amendment to Undercover Operations*

Since 1971, the Court has not addressed the relevance of the fourth amendment to undercover operations. Given the lack of agreement in *White* and the Court's continued flexibility in interpreting the fourth amendment,[145] a constitutional challenge to undercover operations may be successful. The Court, however, refused to grant certiorari[146] in any of the Abscam cases,[147] and the lower courts dismissed any fourth amendment arguments by a quick citation to *White*.[148] In addition, the Court's recent unwillingness to rethink the entrapment defense certainly does not suggest it would be

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141. *Id.* at 786-87 (Harlan, J., dissenting).

142. *Id.* (Harlan, J., dissenting). Once again, electronic surveillance was the issue, but the privacy interests identified by Justice Harlan are equally applicable to undercover operations in general.

143. Much of Justice Harlan's argument on this point echoed the concerns raised in Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 477-79 (1928) (Brandeis, J., dissenting).

144. *White*, 401 U.S. at 781 (Harlan, J., dissenting).

145. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

146. Note, *supra* note 7, at 1193 n.5.

147. Abscam involved an extended undercover operation by the FBI into political corruption of United States Congressmen and Senators. The investigation began, however, as an operation to recover stolen property. For a detailed discussion of the operation, see Final Report, *supra* note 26, at 56-324; Nathan, *ABSCAM: A Fair and Effective Method for Fighting Public Corruption*, in Abscam Ethics, *supra* note 19, at 1-16.

148. *See, e.g.*, United States v. Williams, 705 F.2d 603, 620 (2nd Cir. 1983), *cert. denied*, 464 U.S. 1007 (1983).

receptive to a constitutional attack on undercover operations.[149]

Nevertheless, based on the privacy interests at stake and the Court's opinions in other fourth amendment contexts, the Court should decide that undercover operations must satisfy the requirements of the fourth amendment. American citizens should not be forced to measure their every word fearing that anyone could be an undercover agent. This is not a risk that people assume nor should have to assume. The costs of undercover operations on human dignity also mandate that the government prove that such tactics satisfy constitutional demands. As Justice Harlan advocated in his dissent in *White*, the effect on a democratic society in chilling personal and business relationships is significant.[150]

The Court would not be departing from the fourth amendment jurisprudence it developed since *Katz* by concluding that undercover operations are controlled by the fourth amendment. For example, in *Katz* the Court concluded that when one makes a telephone call he attempts to exclude eavesdroppers and assumes the phone is not wired, yet in the undercover context, one assumes that the undercover agent is really a friend or a business associate. The same privacy values and implications for democratic society are affected by either governmental tactic, but the Court, so far, has only given protection to the former. What the Court ignores in the latter are largely intangible values such as the assumption of good faith between people and the harmful effects of deception. Indeed, the misplaced confidence rationale of these decisions ignores the deliberate penetration of privacy by the government.

In *Terry*, the Court was concerned with the brief but serious intrusion into privacy of a "stop and frisk."[151] The Court measured the seriousness of this intrusion largely by examining the likely reaction of an individual who had been frisked.[152] A person who has been manipulated by an undercover operation, however, is also likely to feel resentment and anger that the police have intruded on her privacy. Indeed, we have already seen that the effect of Abscam upon innocent subjects was substantial.[153] There is no reason to doubt that all undercover operations will engender "strong resentment" and "arouse great indignity."[154] Moreover, the invasion in

149. *See, e.g., Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973). Of course, the two areas, entrapment and the warrant requirement, focus on different aspects of police practices. The former is concerned with the *mens rea* of the defendant, while the latter focuses on the justification required before the police may engage in certain activities.

150. *White*, 401 U.S. at 787 (Harlan, J., dissenting).

151. 392 U.S. 1 (1967).

152. *Id.* at 21-22.

153. See *supra* note 50.

154. *Terry*, 392 U.S. at 17.

Terry was brief, yet an undercover operation, as evidenced in *Hoffa*, may last for months. Thus, if the Court remains concerned with the same factors considered relevant in *Terry*, it should hold that undercover operations are controlled by the fourth amendment.

Like housing inspections before *Camara*, undercover operations may currently be launched without any antecedent justification or review by a neutral magistrate. This uncontrolled discretion to invade privacy greatly disturbed the Court in *Camara*, however, and led it to conclude that administrative searches must satisfy the fourth amendment warrant requirement.[155] There is no principled reason why the Court should not reach the same conclusion with respect to undercover operations. The invasion of privacy caused by undercover work is at least as significant, and arguably more so, than that caused by administrative searches. In addition, unlike administrative searches, undercover operations possess the "additional odious characteristic that the target does not even know that he is seized by the state, his reactions probed and his words marked."[156]

It is possible that the Court has not held the fourth amendment applicable to undercover operations because the testimony of friends or co-conspirators who turn against their peers is universally recognized as constitutionally valid. There is, however, a significant difference between a friend who, on her own, turns against a defendant and an undercover agent who is placed in a person's midst by the government. The risk and the effect on individuals are different when the government plays an active role in creating the situation. The Court recognized this difference in *Marshall v. Barlow's, Inc.*[157] That case involved the constitutionality of warrantless OSHA searches for safety hazards.[158] The government contended that since an employee can report OSHA violations, a government agent should also be allowed to enter without a warrant to inspect for such violations.[159] The Court rejected this argument because of the differences between employees and government agents.[160] While the Court recognized that an employee could report whatever he saw to the government, the opinion concluded that a government inspector "is not an employee."[161] The same analysis should be applied to un-

155. 387 U.S. at 528.
156. Note, *supra* note 8, at 1011.
157. 436 U.S. 307 (1978).
158. *Id.* at 309.
159. *Id.* at 311.
160. *Id.* at 322-23.
161. The Court concluded:

> The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. That an employee is free to report, and the government is free to use, any evidence of noncompliance with OSHA that the employee observes fur-

dercover agents. Although a friend or co-conspirator can betray another's confidences, an undercover agent is not a friend or a co-conspirator. The Court's decision in *Marshall* implicitly assumes that the government agent could not have pretended to be an employee and obtained the desired information in that fashion; if that were allowed, the opinion would make no sense because the same privacy interests would have been infringed.[162]

The academic literature on entrapment and undercover operations is in unanimous agreement that significant privacy interests are affected by the use of such tactics.[163] The Senate investigation into undercover techniques conducted after Abscam also concluded that it was "beyond dispute that undercover operations can and do invade legitimate privacy interests in significant ways."[164] The Senate committee further recognized that undercover tactics undermine the trust and goodwill which is essential to interpersonal dealings in a free society.[165] If Justice Harlan was correct that the *Katz* approach requires an analysis of what police tactics are appropriate in a democratic society,[166] the committee's findings should be strong evidence that our society does value the privacy interests affected by undercover operations.[167]

The Court may still be concerned that placing a warrant requirement on undercover operations would destroy their utility. However, this argument, as we have seen, is simply incorrect. A warrant requirement would only regulate undercover operations; it would not destroy them. Just as search warrants and wiretaps, which are controlled by the fourth amendment, remain widely used, there is no reason to believe that undercover work would not continue to be employed. Indeed, the use of that tactic would be fairer and less intrusive on privacy if controlled by the fourth amendment. Moreover, given current law, the police may attempt to circumvent the warrant requirement for searches and wiretaps by engaging in undercover operations. Thus, based on the significant privacy interests at stake and the Court's fourth amendment jurisprudence, undercover operations should be subject to the commands of the

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> nishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.

Id. at 315.

162. Of course, the government agent does not become an employee just by pretending to be one. *See* Grano, *supra* note 69, at 435.

163. *See supra* notes 7-8.

164. FINAL REPORT, *supra* note 26, at 381. Notice that the committee's language is very similar to that used in *Katz*, "reasonable expectations of privacy."

165. *Id.* at 382.

166. *See supra* text accompanying notes 140-41.

167. Certainly the representative branch of our government is better equipped than the Court to determine what expectations of privacy are "reasonable."

fourth amendment.

B. *A Constitutional Standard for Undercover Operations*

To develop the appropriate standard for determining the constitutionality of undercover operations, the *Camara* balancing test must be applied. There can be little doubt that both the governmental and personal interests are very strong. Like administrative searches, the government needs undercover tactics to fight consensual crimes effectively.[168] On the other hand, undercover tactics seriously intrude upon privacy. In the proper situation, however, there is little doubt that an undercover operation is reasonable. To determine what test the government must satisfy before an undercover operation should be held reasonable, the different types of undercover operations must be examined separately because each is used for different purposes and at different stages of the criminal investigatory process.

1. *Targeted Undercover Operations*

Similar in function to searches or wiretaps, targeted undercover operations are primarily used to obtain enough evidence against a suspect so that the police may arrest him. A probable cause standard for this type of undercover work would be logical given the analogy to searches; however, because of the nature of consensual crimes, a reasonable suspicion standard is more appropriate.[169] As previously discussed, it is very difficult to obtain evidence concerning consensual crimes.[170] Thus, a probable cause standard may very well destroy the utility of targeted undercover operations.[171] While the privacy interests affected by these operations are significant, they are not strong enough to overwhelm the utility of undercover operations.[172]

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168. *See supra* notes 21-28 and accompanying text.

169. Of course, the probable cause standard could be interpreted more leniently in cases involving undercover tactics. This could, however, have a deleterious effect on the integrity of the probable cause requirement. *But cf.* Illinois v. Gates, 462 U.S. 213 (1983) (two-pronged test for determining whether an informant's tip establishes probable cause for issuance of a warrant was abandoned in favor of the totality of the circumstances approach).

170. For a discussion of this issue, see *supra* notes 21-22 and accompanying text.

171. *See, e.g.*, Dix, *supra* note 7, at 220; Note, *supra* note 7, at 1216.

172. The choice of a standard to evaluate the constitutionality of an undercover operation is not an easy one. A strong argument could be made that a reasonable suspicion standard is inappropriate because the invasion of privacy resulting from undercover work is great in contrast to the brief and relatively insignificant intrusion of a "stop and frisk." Moreover, the safety of a police officer is not an issue here as it was in *Terry*. Nevertheless, this paper has argued that the very nature of consensual crimes is their secrecy and resistance to detection. Thus, a faithful application of the

There should be little concern that the reasonable suspicion standard is too stringent. Whenever the Court has been faced with an invasion of privacy which is targeted at specific individuals and based on the discretion of the officer in the field, it has required, at a minimum, that the police be able to point to articulable facts which support the inference that illegal activity is being conducted.[173] In addition to the frequent scholarly articles written advocating a reasonable suspicion standard, the Senate select committee concluded that a reasonable suspicion standard should be applied.[174]

The reasonable suspicion test would require the police to show that there is reasonable suspicion to believe that the suspect is engaged in, was engaged in, or is likely to engage in criminal activities.[175] To be an effective check against police misconduct, this standard must be applied before the undercover operation is launched and evaluated by a neutral magistrate.[176] Both requirements are consistent with the Court's protection of fourth amendment rights as evidenced in its decisions in *Camara* and its progeny.[177]

Although not free from ambiguity, the reasonable suspicion standard should be a workable standard which magistrates can supervise. The application for an undercover warrant would first need to state the basis for believing that reasonable suspicion exists. For example, reasonable suspicion certainly existed in *Osborn* once Vick informed the federal agents of Osborn's proposal. The same is true of *Hoffa* once one of the jurors had informed the judge that he had been offered a bribe. Less obvious cases can also be posited. For example, reasonable suspicion would exist to suspect that a putative member of a criminal organization was engaged in illegal activity based on the divergence between her reported income and her lifestyle, her association with known criminals, and the claims of informants. Depending on the crime involved and the substantiality of the evidence offered, any of the three factors or all three combined

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probable cause standard would practically preclude the use of undercover operations to detect victimless crimes. This police practice, however, has been the most effective means to combat consensual crimes. *See supra* text accompanying note 27. In actuality, the need to fight consensual crimes effectively is the crutch relied upon to lower the constitutional test to one of reasonable suspicion.

173. *Terry*, 392 U.S. at 27; Delaware v. Prouse, 440 U.S. 648, 661 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

174. FINAL REPORT, *supra* note 26, at 28.

175. *Id.*

176. Of course, the usual exceptions for exigent circumstances would apply.

177. Although the Court in *Martinez-Fuerte* determined that a warrant was not required, the reasoning of that decision is not applicable here. 428 U.S. at 565. *See infra* text accompanying note 190 for a discussion of the Court's conclusion in *Martinez- Fuerte* that a warrant was not required.

could show reasonable suspicion. For example, if the target is suspected of counterfeiting and the police can point to a divergence between reported and actual incomes, reasonable suspicion may exist. Moreover, the reliability of the evidence need not be as strong as is demanded for probable cause. Thus, if the police base the application on information from an informant, the standard requirements for reliability should be relaxed.

The fourth amendment also demands that the warrant satisfy the requirements of particularity with respect to the crime for which the target is suspected and the structure and strategy of the proposed undercover operation.[178] Both of these requirements are essential to guarantee the manageability of the warrant process; without them, a suspect has no basis for challenging the legality of the operation and the magistrate has little ability to evaluate the legitimacy of the alleged deficiencies. Of course, in reviewing challenges to the strategy employed, a magistrate must be mindful of the necessities of undercover operations and apply a flexible review. Significant changes in strategy or targets, however, should not be tolerated. Thus, if the warrant asked for permission to plan an encounter between the suspect and an undercover agent whom the suspect did not know, a magistrate should not allow that warrant to sanction the use of a friend or employee as the undercover agent. Because the intrusion on privacy is greater in the latter situation, the reasonable suspicion requirement would require a stronger factual predicate before authorizing that type of operation.[179] Nevertheless, just as in the Court's existing jurisprudence, undercover agents must be able to respond to exigent circumstances and the course of the operation.

The price for disobeying the commands of the warrant must be the exclusion of evidence. This result is consistent with the Court's jurisprudence and is supported by the same considerations which led to the adoption of the exclusionary rule.[180] Consequently, if a suspect alleges in a pretrial motion that the police have not complied with the warrant and he is successful, the evidence resulting from that operation must be excluded in any subsequent trial.[181]

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178. U.S. CONST. amend IV.

179. The same analysis would apply if stronger inducements than originally contemplated in the warrant were employed.

180. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984); Mapp v. United States, 425 U.S. 978 (1976).

181. Of course, the entire jurisprudence of the exclusionary rule must be adopted. Thus, *Leon* and *Gates* would apply, at least in federal court. Other remedies, such as an action based on 42 U.S.C. § 1983, may also be available, but the deterrence rationale of the exclusionary rule supports the adoption of the rule in this context. A discussion of the relative merits of the exclusionary rule, now a highly controversial subject, is beyond the scope of this article.

2. *Non-targeted Undercover Operations*

This type of undercover work is employed to patrol for, detect, and deter the commission of consensual crimes. While the intrusion involved is equivalent to that in targeted operations, the possible factual predicate which can reasonably be expected to justify the operation cannot be as substantial.[182] In a similar context, the Court in *Camara* did not require that there be *any* evidence that a housing code was being violated; it merely demanded that procedures be adopted to limit the discretion of the inspector.[183] In subsequent cases, the Court has even excused the warrant requirement in administrative searches when discretion is limited.[184] Nevertheless, a warrant requirement based on reasonable suspicion should be demanded before the police may begin a non-targeted undercover operation.[185]

Unlike the search for housing code violations in *Camara* or the fixed checkpoints aimed at discovering illegal aliens in *Martinez-Fuerte*, the privacy interests affected by non-targeted operations are significant. Moreover, the invasion of privacy is not lessened because the discretion of the field officer is limited. Of course, the ability of the officer to misuse his authority is checked, yet this element of control does not lessen the effect on privacy. The *Camara* balancing test mandates, therefore, that a reasonable suspicion test based on articulable facts suggesting that crimes are being committed be adopted. A plan limiting discretion of field officers and based on neutral factors will not be sufficient.[186]

The factual support for a non-targeted operation, given its objectives, will be less specific than that for a targeted operation. For example, a sting operation would be justified upon the showing that many robberies had been committed within a certain locality. The FBI's undercover operation entitled "Lobster" was based on this predicate.[187] The FBI and the Massachusetts state police, reacting to a spate of truck hijackings, successfully penetrated criminal

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182. If the police knew who were committing consensual crimes, a non-targeted operation would be unnecessary. This type of undercover operation is employed to determine who is breaking the law, not to ascertain whether a specific individual is a criminal.

183. *Camara*, 387 U.S. at 534-39.

184. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

185. Once again, this is the standard the FINAL REPORT advocated. *See supra* note 26, at 28.

186. This conclusion obviously is dependent upon the analysis in the preceding section of the paper concerning targeted undercover operations. Since there is no difference between the two with respect to the governmental or personal interests at stake, the same standard should be applied regardless of the nature of the operation. By necessity, of course, the facts which will satisfy the reasonable suspicion standard for the two categories will differ.

187. FINAL REPORT, *supra* note 26, at 339-44.

operations and uncovered significant criminal activity.[188] An operation like Abscam could be justified by a showing of recent convictions of politicians for corruption. For example, an undercover operation launched in New York City to root out corruption would satisfy the reasonable suspicion test by detailing the recent indictments and convictions of city officials. Such an operation could also be justified by suspicious tax returns by numerous members of Congress. If, for example, many Congressmen reported significant consulting incomes which went unexplained in their tax returns, the requirements of the reasonable suspicion standard would be fulfilled.[189] The same requirements of particularity with respect to scope and strategy as were demanded for targeted operations should be established for these operations as well.

Because of the privacy interests at stake, antecedent justification through a warrant procedure should be required. Although the Court in *Martinez-Fuerte* decided not to require a warrant,[190] none of the considerations which led to that conclusion are relevant here. The invasion of privacy by undercover operations is considerable, it is crucial "to prevent hindsight from coloring the evaluation of reasonableness," and the judgment of the magistrate is relevant.[191] Indeed, the Court's decision in *Martinez-Fuerte* was an aberration; in all other relevant contexts, the Court has uniformly demanded that a warrant issue before a search may occur.[192]

Other factors may dictate caution however. As with wiretapping, the warrant requirement may provide little more than an appearance of legitimacy to undercover operations. If a magistrate will be overwhelmed by the evidence generated and the complexity of the operation, meaningful review may not be possible. Although it will not be a simple task for a magistrate to review police activity which has been authorized by an undercover warrant, the responsibility should not be overwhelming. The police must confine their activities to those authorized in the warrant. While a reviewing magistrate may allow for some flexibility in the techniques actually employed, it should not be an impossible chore to determine what behavior is unacceptable after examining the warrant. In addition, the crime being investigated is limited to what is detailed in the warrant.

No contention is made, however, that the warrant procedure

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188. By all accounts, Lobster was a model undercover operation. *See* FINAL REPORT, *supra* note 26, at 339-44.

189. Many more examples could be posited; for more possibilities, see Note, *supra* note 7, at 1223.

190. *Martinez-Fuerte*, 428 U.S. at 565-66.

191. *Id.*

192. *See supra* note 1.

will be uniformly successful in constraining the police or that it will always provide for meaningful review by a magistrate. Nevertheless, the warrant requirement should enable a magistrate to review challenged undercover techniques frequently enough to merit its adoption. Moreover, a warrant requirement will require the police to prove reasonable suspicion before an undercover investigation is commenced.

There are at least two serious problems with sanctioning undercover operations on the basis of such a broad factual predicate. A non-targeted operation, by definition, will invade the reasonable expectations of privacy of individuals who are not suspected of criminal activity and who are probably law-abiding citizens. The reasonable suspicion standard somewhat tempers this result. If a subject does not respond to the inducement after a reasonable period of time, the operation must move on to the next member of the group. However, the innocent suspect will still be resentful and feel manipulated by the experience. Also, depending on the operation, additional harms could be inflicted.

These consequences can and should be mitigated by the adoption of several prophylactic procedures. For example, notice should be given, whenever feasible, to possible targets informing them that they may be chosen, based solely on their membership in a relevant group, as subjects in a future operation.[193] The notice should also be provided to the press so that the public will understand that individuals will not be selected because they are suspected of crimes. To avoid tipping their hat, the police should provide notice to as broad a group as possible. For example, in Abscam, the FBI would have notified not only all Congressmen but also all senior executive officials. These notices should also inform the possible suspects of the relevant law.

Another feature which would minimize the intrusiveness of these undercover operations is random selection of suspects. Abscam is particularly lacking in this regard since the FBI agents relied on underworld figures to bring them the Congressmen.[194] Once an undercover operation has concluded, the police should, as soon as possible, release the names of those group members who were investigated by the operation but proven to be law-abiding.

The second major failing of non-targeted operations is that they move quickly from being non-targeted to targeted. For example, once a randomly selected suspect responds to the bait, the police

193. Others have also advocated a notice requirement. *See, e.g.*, Sherman *supra* note 23, at 130-31.

194. Although random selection may not always be possible, it should be required whenever it is reasonable. *See* Sherman, *supra* note 23, at 130-31.

have at least reasonable suspicion to believe that that individual is crooked. The police may not always have enough evidence to arrest; therefore, further surreptitious activity directed at that individual may be necessary.[195] Must the police go back to the magistrate at this point or do the circumstances obviate that necessity?

The police should not be required to return to the magistrate for authorization to investigate the "crooked suspect." Rather, the police should continue to gather evidence within the already judicially approved undercover operation. This could involve, for example, offering the suspect additional bribes or buying additional stolen goods from her. Several factors lead to this conclusion. First, one of the goals of this type of undercover operation is to uncover criminal activity; thus, implicit within the initial warrant application is a request to pursue further those who appear guilty. Furthermore, it was noted earlier that the detection and investigative phases tend to merge in non-targeted operations.[196] Of course, if the police continually return to the magistrate there is also the possibility that he may become over-involved with the operation, a result which was condemned by the Court in *Lo-Ji Sales, Inc. v. New York*.[197]

Abscam, judged by the standards developed above, fails miserably to pass constitutional muster. First, there was no factual foundation to believe that political corruption was a problem serious enough to merit investigation. There may have been reasonable suspicion to suspect certain Congressmen of illegality based on allegations of informants and middlemen; however, there was not reasonable suspicion to support an operation to detect for other crooked officials. Second, the operation significantly changed its focus midcourse without obtaining permission from a judicial officer at FBI headquarters. Begun in early 1978 to uncover stolen artwork, the operation became within eighteen months an operation to uncover political corruption.[198] Third, of course, no warrant was obtained to conduct the operation and no exigent circumstances existed to excuse that shortcoming. Fourth, no prophylactic measures were adopted to minimize the effects of the invasion of privacy.

V. Conclusion

A large gap currently exists in the Supreme Court's fourth amendment jurisprudence. Undercover operations seriously invade

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195. In a majority of cases, however, the police should have probable cause to arrest. *See supra* text accompanying notes 29-31.

196. *See supra* text accompanying notes 29-31. *Cf.* United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

197. 442 U.S. 319 (1979).

198. Nathan, *supra* note 146, at 5.

reasonable expectations of privacy but remain outside the protection of the Constitution. The Court has yet to examine these police techniques according to the standards developed in *Katz* and *Camara*, but it is questionable whether the Court, given its decisions in the area, would decide that undercover operations are restricted by the fourth amendment. Nonetheless, based on the privacy interests affected and the Court's recent precedents, it should find that undercover operations are subject to the warrant clause of the fourth amendment.