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Notes and Comments

Judicial Control of Secret Agents

Society has never taken pride in its secret agents; informers, like hangmen, are despised in the worthiest of causes. And if an individual spy is unsavory, the threat of an informer state arouses deeper disquiet. Nevertheless, society tolerates the police spy. Necessity is held to require that "artifice and stratagem may be employed to catch those engaged in criminal enterprises." The detection of consensual crimes would be all but impossible without the use of traps, decoys and deception. But though the use of spies may sometimes be proper, such tactics should be controlled. Even in the most necessitous of cases the end has been used to justify the means, and the argument that "society is at war with the criminal classes" can clearly be abused.

Yet to date the law has limited the police spy only by the defense of entrapment. While widely recognized, this doctrine is ineffectual as a curb on the secret agent. It is available only to control government

1. The nineteenth-century English historian Sir Erskine May expressed the popular view:

   Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators—who shall say that they are free? Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency.

2. E. MAY, CONSTITUTIONAL HISTORY OF ENGLAND 275 (1863).

3. The classic statement of the caution with which slight inroads on the privacy of the individual must be viewed is that of Justice Bradley in Boyd v. United States, 116 U.S. 616, 635 (1886):

   It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure.

4. See Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). But cf. Gouled v. United States, 255 U.S. 295 (1921) (search by deception). The future effectiveness if not the past activities of informers is also reduced to the extent the police are compelled to disclose their identities. Compare Roviaro v. United States, 353 U.S. 53 (1957) with McCray v. Illinois, 35 U.S.L.W. 4261 (U.S. 1967). This note will examine only the activities of spies and informers as participants in the criminal law process; the problems presented by police eavesdropping by mechanical devices (and the ancillary problems created when secret agents use recording or transmitting devices) will not be considered.

solicitation of crimes and does not reach passive undercover activities such as spying or subverting friends. Moreover, the current entrapment doctrine allows the police complete freedom to choose targets for criminal solicitation, with or without reason for suspicion, since the secret agent's proposition can be justified post hoc by the "ready complaisance" of the target.

Because of the Supreme Court's recent enthusiasm for policing the police, many observers forecast a reevaluation of the traditional permissive approach when certiorari was granted last year on three petitions involving secret agents. Such, however, was not to be the case.

6. Moreover, the doctrine controls active solicitations but poorly. As formulated by the two leading Supreme Court cases, the defense suffers from a sorry ambivalence as to whether the doctrine functions to control police tactics or to protect defendants who in some inarticulate sense are not culpable for their crimes. Thus, in Sherman v. United States, 356 U.S. 369 (1958), the Court followed the test laid down in Sorrells v. United States, 287 U.S. 435 (1932), to conclude:

"[W]hen the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . . ," then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. 356 U.S. at 372, quoting from 287 U.S. at 442.

But since the majority test is balanced by an inquiry into "whether [the defendant] was already predisposed to commit the act," 356 U.S. at 371, police methods however improper cannot alone establish the defense of entrapment. Practically, the question whether the criminal design originated with the police or their target is usually an impossible conundrum, particularly since the parties' testimony is often poles apart. Logically, the relevance of the origin of intent to the guilt of the accused is puzzling, since he has voluntarily committed the offense. This is especially so because the defense is not available if the criminal design originated not with the police but with another private party. Henderson v. United States, 237 F.2d 169, 175 (5th Cir. 1956) (collecting cases). Strong concurring opinions in both Sherman and Sorrells argued that the Court should focus exclusively on police conduct. 356 U.S. at 378 (Frankfurter, J., with Douglas, Harlan and Brennan, JJ); 287 U.S. at 453-54 (Roberts, J., with Brandeis and Stone, JJ). Commentators have also advocated that the function of the defense as a device to control police activities should be clarified. See generally Donnelly, Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs, 60 Yale L.J. 1091 (1951); Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245 (1942); Rotenberg, The Police Detection Practice of Encouragement, 49 U. Va. L. Rev. 871 (1963); Comment, Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense, 31 U. Cin. L. Rev. 137 (1963); Note, Entrapment, 73 Harv. L. Rev. 1333 (1960). The authors of the ALI Model Penal Code have moved in the 1962 draft to a formulation of the defense embodying an objective test for the defendant which would allow the court to focus on police conduct, after proposing the conventional subjective test in 1959 with an alternative formulation based on an objective test. Compare Model Penal Code § 2.19(1) (Proposed Official Draft, 1962) with Model Penal Code § 2.10 (Tent. Draft No. 9, 1959).

7. See Sherman v. United States, 356 U.S. at 375. At least one author has argued for an expansion of the doctrine to include a requirement that "the police . . . have reasonable grounds for suspecting such [criminal] conduct . . . before they engage in solicitation." Note, The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense, 74 Yale L.J. 942, 952 (1964).


Hoffa, Osborn & Lewis

The decisions handed down last December in Hoffa v. United States, Osborn v. United States and Lewis v. United States imposed no limitations whatever on the use of police spies. The convictions were upheld in each case, and the Court employed such open-ended reasoning that almost any tactics could be justified under one or more of the opinions.

The Hoffa case arose out of the efforts by the Teamster president and his co-defendants to tamper with the jury during his 1962 trial in Nashville on charges related to misuse of union funds. The petitioners argued that their Fourth, Fifth and Sixth Amendment rights had been violated by the activities of one Edward Grady Partin, the chief government witness and the only witness linking Hoffa to the attempted bribes. They claimed the Government had deceptively placed Partin in their midst to collect evidence; the Government refused to concede that it had "'placed' the informer anywhere, much less that it did so 'deceptively.'" While Justices Clark and Douglas would have accepted the findings of the lower courts that Partin had not been placed in the defendants' camp, the majority led by Mr. Justice Stewart found a resolution of this "'verbal controversy' unnecessary to a decision of the constitutional issues.

The parties did not disagree except in detail concerning the chain of events which brought Partin to Nashville and his activities there. Partin met Hoffa in Nashville on the first day of the 1962 trial with the best wishes and admitted foreknowledge of the Government; whether he could be said to have been "'placed' there seems, as the Court felt, principally a question of semantics. Several weeks before he had been languishing in a Baton Rouge jail on a charge of kidnapping. At the time he was also under a 26-count Federal indictment for

13. Aside from the porous limitations of the conventional entrapment defense, the inadequacies of which have already been discussed. See note 6 supra.
14. This note will discuss only the issues in their relation to Hoffa; his co-defendants faced difficult problems of standing which were not discussed by the Court in view of its rejection of Hoffa's claims. Hoffa v. United States, 385 U.S. at 300.
17. Id. at 322. Clark and Douglas would accordingly have dismissed the writs of certiorari as improvidently granted.
18. Id. at 295.
19. The Court's description of the underlying facts appears at 385 U.S. at 296-99. The statements of the parties appear in the Brief for Petitioner at 3-23 and Brief for the United States at 3-60.
embezzling the funds of his Teamster local, and under state indict-
ments for manslaughter, perjury and assault. After recounting to his
turnkey an alleged plot by Hoffa to assassinate Robert F. Kennedy,
then Attorney General, he not only told the federal agents who rapidly
appeared the details of the conspiracy, but also volunteered, as a close
personal friend of Hoffa, to inform them of any illegal activities at
Hoffa’s forthcoming trial. Partin was subsequently released on bail
and the Government requested a continuance on the Federal indict-
ment; during the next days he made calls to Hoffa—recorded by the
state—and invited himself to meet his friend in Nashville to talk over
problems.

Once in Nashville, Partin reported his arrival as he had been in-
structed to Walter J. Sheridan, the non-lawyer “special consultant” to
the Attorney General who headed the organization popularly known as
the Get Hoffa Task Force. Partin thereafter became a court retainer
in the Hoffa entourage; by “constantly hanging around” in the Team-
ster suite where he “got people ashtrays, moved chairs and acted as
doorman,” he overheard incriminating conversations which he reported
daily to Sheridan.

Partin received no money directly for these services, although $1,200
in support payments were made to his wife from government funds.
More significantly, perhaps, the federal and state charges against him
were either dropped or not actively pursued—although the Govern-
ment argued there was no necessary connection between this and his
activities.

The Court found no hint of a denial of constitutional rights in these
activities. While the majority opinion by Stewart acknowledged that
“there have been sharply differing views within the Court as to the
ultimate reach of the Fifth Amendment right against compulsory
self-incrimination,” the Court curtly rejected Hoffa’s claims since
his incriminating statements were not “the product of any sort of coer-
cion, legal or factual.”

In dismissing Hoffa’s claim that Partin’s evidence had been obtained

20. Brief for Petitioner at 5.
21. Id. at 6-7.
22. Id. at 7-8.
23. See, e.g., Cook, Anything to Get Hoffa, 204 NATON 230 (1967); Suydam, Hoffa:
26. Id.; see also Brief for the United States at 55-58.
28. Id. at 504.
in violation of his Fourth Amendment rights, the Court agreed with the premises of his argument: a hotel room can be a constitutionally protected area;\textsuperscript{29} guileful as well as forcible intrusions may violate the amendment;\textsuperscript{30} and the protection of the amendment extends to oral statements.\textsuperscript{31} But, said Stewart, the petitioners misunderstood the "fundamental nature and scope" of the Fourth Amendment, which protects only "the security a man relies upon when he places himself or his property within a constitutionally protected area. . . ."\textsuperscript{32} Because Partin "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence," Hoffa was obviously "not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing."\textsuperscript{33}

Justices Fortas and White did not sit in the case. Chief Justice Warren, in dissent, argued that the Court should have exercised its supervisory powers over the federal courts to reverse the convictions because of the distastefulness and "serious potential for undermining the . . . truth-finding process" of the Government's undercover tactics.\textsuperscript{34}

In \textit{Osborn v. United States},\textsuperscript{35} an attorney of "impeccable reputation"\textsuperscript{36} stood convicted of jury tampering.\textsuperscript{37} The evidence consisted of the testimony and tape recordings of a man named Robert Vick who

\begin{itemize}
\item \textsuperscript{29} United States v. Jeffers, 342 U.S. 48 (1951).
\item \textsuperscript{30} Gouled v. United States, 255 U.S. 298 (1921).
\item \textsuperscript{31} Silverman v. United States, 365 U.S. 505 (1961).
\item \textsuperscript{32} Hoffa v. United States, 385 U.S. 293, 301.
\item \textsuperscript{33} \textit{Id.} at 302. The Court also denied two claims under the Sixth Amendment. The first was that Hoffa's right to the effective assistance of counsel was interfered with when Partin reported the conversations of the defense attorneys that he had overheard. The Court found that even upon the assumption that a "surreptitious invasion" by a government agent into the legal camp of the defense would have invalidated a conviction in the 1962 Nashville trial (which actually ended with a hung jury), the 1964 trial was unaffected since the "incriminating statements . . . in this case were totally unrelated in both time and subject matter to any assumed intrusion by Partin into the conferences of the petitioner's counsel in the [Nashville] trial." \textit{Id.} at 306-09. The second claim was based on the assertion that the Government had probable cause to justify Hoffa's arrest relatively early in its investigation. Hence, the petitioner argued, the failure of the police to arrest him and thereupon follow the rules laid down in \textit{Escobedo v. Illinois}, 378 U.S. 478 (1964), resulted in a denial of his right to counsel. The Court was stunned at the claim of a right to be arrested, 385 U.S. at 310. Hoffa also made a final plea that the police tactics employed against him, even if no specific constitutional rights were violated, constituted a denial of due process in offending the "canons of decency and fairness . . . of the English-speaking peoples," Rochin \textit{v. California}, 342 U.S. 165, 169 (1952), 385 U.S. at 310-11. The Court's canons, however, were not offended.
\item \textsuperscript{34} 385 U.S. at 320.
\item \textsuperscript{35} 385 U.S. 323 (1966).
\item \textsuperscript{37} The case arose out of a later Hoffa trial following the 1962 trial which ended in
had applied for and obtained a job investigating prospective jurors; unbeknownst to lawyer Osborn, Vick had already agreed to report to the government any "illegal activities." The two inevitably differed in their versions of who proposed what to whom for how long, but at length Vick was ready to swear to an affidavit that Osborne was a budding juror briber. The Government asked for and obtained from a district judge authorization to equip its agent with a Minifon recording device. The Minifon "did not operate properly" on Vick's next visit to the defendant's office, but ultimately did record several highly incriminating statements.

The Court, with Stewart again writing for the majority, upheld the district court authorization of the Minifon as a proper means to avoid "a testimonial contest," and rejected the claim that the entrapment defense was established as a matter of law.

In Lewis v. United States, a Government agent had telephoned the petitioner to ask to purchase narcotics. Lewis had invited the agent to his home and sold him, in two transactions, eleven bags of marijuana. After his conviction Lewis did not claim entrapment, "as he could not on the facts of [the] case." Moreover, his counsel conceded at oral argument that after the phone call, at least, the Government had probable cause to justify the issuance of a search warrant. The narrow claim presented was that "in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation and that the fact that the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception." The Court made short work of it. Chief Justice Warren concluded confidently for the majority that since the house had been converted to a "commercial center" by the two narcotics sales proven, it was no longer a "home" but had become a "business" entitled to no constitutional protection.

In short, having broached the subject anew in Hoffa, Osborn and
Lewis, the Supreme Court once again approved the virtually unrestrained use of secret agents:

(1) a spy or informer may be employed against a person although there is neither probable cause nor even reasonable suspicion that he has committed, is engaged in, or is about to engage in a criminal course of conduct; 47

(2) the agent may be a close personal friend of the target, a business associate or a stranger; 48

(3) the agent may carry on his clandestine activities without any limits of time or place. 49

The Court's carte blanche for police spying would have been surprising under any circumstances. But it came as an especially unexpected sequel to Miranda, where open and acknowledged police questioning was brought under rigid control. Unrestrained use of informers, no less than uncontrolled station-house interrogation and police searches, can place Fourth and Fifth Amendment rights in jeopardy. The practices are not, of course, identical. But even if the Fifth Amendment privilege should for practical reasons be limited to the police station, as this note will ultimately conclude, the similarities between deceptive interrogation and undercover tactics dictate some measure of judicial control over spying. The close relationship of certain undercover tactics to the searches and seizures regulated by the Fourth Amendment leads to both a rationale and an effective means for such control.

Secret Agents and Self-Incrimination

Hoffa and Osborn were both convicted by testimony "out of their own mouths." If admissions such as theirs have never been thought fit subjects for Fifth Amendment coverage, neither arguably were police station confessions before Miranda. As late as 1964, the Court felt obliged to obscure its ultimate plans for the Fifth Amendment with a narrow holding that the accused upon his request must be

47. The Government’s reasons to suspect Hoffa and Lewis are, at best, not clear; against Osborn there were no grounds for suspicion whatever.
49. As to time, Partin carried on his activities over a period of two months, reporting daily when he was in Nashville. As to place, Hoffa and Lewis together open the home to virtually all undercover agents: if the agent is a friend, he enters by "invitation"; if a stranger enters to engage in an unlawful business transaction, the home has become a "commercial center."
allowed to consult his lawyer.\textsuperscript{60} Two years later the Court acknowledged that the Escobedo requirement of counsel at interrogation was merely a protective device and set about straightforwardly “applying the privilege against self-incrimination to in-custody interrogation.”\textsuperscript{51}

The elaborate procedural safeguards fashioned by Miranda\textsuperscript{52} can partially be explained as simply an escalation of the Court’s long drive to end coercion in the station house.\textsuperscript{53} Although beatings are apparently a rarity today,\textsuperscript{54} long experience has taught that judges can never know what actually happened in the interrogation room.\textsuperscript{55} Moreover, the Court was plainly frustrated by the difficulties of its case-by-case search for psychological coercion. As the majority repeatedly stressed, the “compulsion inherent in custodial surroundings” is always present in some degree but never measurable on a cold record.\textsuperscript{56}

But, as Mr. Justice Harlan insisted in dissent,\textsuperscript{57} even the travails of case-by-case analysis could not justify the majority’s rigid curbs on the police—if the decision’s only target was coercion. High-pressure tactics could be stopped by clamping a time-limit on police questioning and making interrogation visible to outside observers, as was proposed in the American Law Institute’s Model Pre-Arraignment Code.\textsuperscript{58} But

52. The Court summarized its pre-arraignment code as follows:

[Un]less other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere facts that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

\textit{Id.} at 444-45.
54. The Court buttressed its Miranda opinion with citations—many dated, a few more recent—of actual police brutality, 384 U.S. at 446 nn.6 & 7, but stressed that “the modern practice of in-custody interrogation is psychologically rather than physically oriented,” \textit{Id.} at 448.
55. \textit{See id. at} 445, 448, 461.
56. \textit{Id. at} 458. \textit{See also id. at} 461, 465, 467.
57. \textit{Id. at} 505 (dissenting opinion of Harlan, J).
58. \textit{See ALI, A Model Code of Pre-Arraignment Procedure}, Articles 4, 5 (Tent. Draft No. 1, 1960). It could be argued that the Court could not itself enact such a code of
Miranda aimed at more than an end to compulsion; it sought to guarantee the defendant the right not to speak at all.

In establishing the affirmative right of an accused to stand silent in the police station, the Court joined two converging lines of cases. The state confession cases had found coercion with increasing frequency;60 by 1963, it was "coercive" for the police to refuse to allow the accused to call his wife until he confessed.60 Indeed, in extending the Fifth Amendment to the States in Malloy v. Hogan61 the Court relied on these due process precedents as evidence of "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . ."62

But endless rummaging for evidence of "coercion" in the state cases never produced a rationale for the right to stand silent the Court was slowly extending to suspects. The privilege against self-incrimination provided this rationale. Although the privilege historically was at best questionably related to the confession doctrine,63 the Court began to reason in Massiah v. United States64 that the right to remain mute in court is meaningless if the accused can be induced to incriminate himself before trial. In Massiah a co-defendant, collaborating with the police, placed a transmitting device under the seat of his car before engaging Massiah in an incriminating conversation. The Court avoided Massiah's Fourth Amendment claims by reversing for a denial of the Sixth Amendment right to counsel. Mr. Justice Stewart reasoned for the majority that since Massiah had already been indicted, the tactics of the Government in eliciting incriminating statements from him in the absence of his retained attorney had denied him "effective representation by counsel at the only stage when legal aid and advice would help him."65 Commentators had great difficulty imagining what "aid and advice" an equally unsuspecting attorney would have given Massiah,66 but the rationale of the Court began to criminal procedure, but in view of the "procedural safeguards" set forth in Miranda this point is debatable. The Court could certainly have adopted the essence of the ALI proposals without venturing significantly further.

59. See sources-cited note 53 supra.
62. Id. at 8.
63. See 8 J. WIGMORE, EVIDENCE § 2266 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].
64. 377 U.S. 201 (1964).
65. Id. at 204, quoting concurring opinion in Spano v. United States, 360 U.S. 315, 320 (1959).
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emerge in Escobedo. The majority there held that an interrogation was no less "critical" a stage of the process than the period after indictment, since allowing the state to elicit a confession from the suspect "would make the trial no more than an appeal from the interrogation." 67

Finally, in Miranda the merely instrumental role of counsel was conceded. 68 The majority's use of the "critical stage" analysis of Massiah and Escobedo to extend the Fifth Amendment to the police station makes vividly clear that the Miranda rules were not designed simply to protect the suspect from "compulsion" in even the most attenuated meaning of that word, but to provide concrete "assurance of real understanding and intelligent exercise of the privilege of silence." 69

Even a narrow reading of Miranda presents implications for the use of secret agents to secure incriminating statements. The Court stressed the inherently coercive atmosphere of the police station in Miranda, but while this may well be an important consideration in many confession cases, the "deceptive stratagems" and "psychological ploys" also condemned by the Court 70 depend little or not at all on bright lights and straight-backed chairs. Danny Escobedo, forewarned by his lawyer to keep silent, was cracked less than three hours after his arrest when the police presented him with a false accusation and tricked him into admitting his complicity by accusing his friend of the murder. 71 Escobedo, a seasoned veteran of the interrogation room, 72 may or may not have been intimidated by the "police-dominated atmosphere," but one cannot help suspecting that he would have blurted out the same damning rebuttal to a policeman on the street or an undercover agent on a bar stool. Even if the "coercive atmosphere" of the interrogation room contributes to the effectiveness of

67. Escobedo v. Illinois, 378 U.S. 478, 486-87 (1964). In the process the majority lost Mr. Justice Stewart, who had written the majority opinion in Massiah but who thought the time of indictment an eminently sensible place to draw the line. Id. at 493-95 (dissenting opinion of Stewart, J.).

68. The Court in Miranda made explicit the role of counsel as a "protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination]." Miranda v. Arizona, 384 U.S. 436, 465 (1966).

69. Id. at 469. The Court's opinion was in fact laced with talk of "the knowing and intelligent waiver required to relinquish constitutional rights." Id. at 492; see also id. at 460, 463, 475, 480. Cf. Tehan v. Shott, 382 U.S. 406, 414-16 (1965).

70. Miranda v. Arizona, 384 U.S. at 455, 457.


the ploys condemned by the Court in recent years, such stratagems should be found equally objectionable when they succeed by simple deception outside the police station.

Jimmy Hoffa may have had a weak claim of coercion since Partin had merely overheard rather than actively elicited the incriminating statements. But Hoffa was deceived: he had no knowledge that his friend was acting as an informer. The trickery was not so qualitatively different from the sort of deception found to constitute coercion in the confession cases as to justify the Supreme Court's glib conclusion that no "coercion, legal or factual" was involved. If the crucial difference was the quantum of deception or "coercion," or in the fact that Hoffa was tricked in his hotel room rather than in the police station, those distinctions should have been explained.

Distinguishing confessions from incriminating statements obtained by secret agents becomes even more difficult where the agent solicits the commission of the crime. In Osborn the government spy made at least an overture toward crime even if, as he claimed, he only mentioned that he knew personally some of the prospective jurors. The suggestion that this innocent statement represented anything but dangled bait would be naive. Moreover, and perhaps more importantly, Osborn claimed that Vick not only suggested the bribe attempt, but badgered and cajoled him into acquiescence. Under the entrapment doctrine the Court considered this a question of fact for resolution by the jury. But it was precisely such questions of fact that the Court in Miranda concluded were impossible of resolution by even the trial judge. If the privacy of the police station inevitably "results in a gap in our knowledge as to what in fact goes on in interrogation rooms," the privacy in which spies work certainly leaves a far wider gap. And if Miranda and Escobedo "reflect a deep-seated distrust of law enforcement officers," the Justices must certainly view with even more suspicion the typical undercover hireling. The question of self-incrimination was not considered in Osborn. But on almost any ver-

73. Partin had asked some questions, Hoffa v. United States, 385 U.S. 293, 296-97 n.3 (1966), but even on his version of the events they do not seem to have been significant or notably successful; see Brief for the United States at 14-20.
76. Id. at 331.
79. Partin's qualifications for government work have already been briefly mentioned; see text accompanying notes 19-22 supra. For a good summary of Vick's dubious credentials, see Brief for Petitioner at 6-7, 14-16, Osborn v. United States, 385 U.S. 323 (1966).
sion of the facts the Court would have had difficulty distinguishing the coercion found in appeals to friendship,80 psychological pressures81 or simple persistence in the confession cases.

Secret agents became especially apt targets for Fifth Amendment limitation under the court's "critical stage" analysis, which aims to preserve the defendant's rights at trial. For if the substantive right to stand mute in the courtroom is to be protected in the interrogation room, the same reasoning compels the protection of the right outside the police station. Mr. Justice Harlan pointed this out in his dissent,82 and the majority itself tacitly recognized that it had a headless monster running loose by constantly stressing that its decision was limited to in-custody interrogation. The significance of arrest for the right to silence, however, is as dubious as the formal indictment emphasized in Massiah and abandoned in Escobedo. Indeed Massiah, where the Court first used its "critical stage" analysis, did not involve the "policedominated atmosphere" of the interrogation room at all; the spy technique under review in that case was identical to the practices approved in Hoffa and Osborn.

Incriminating statements collected by a spy or informer can "affect the whole trial" as decisively as a confession made in the police station. If the privilege is to be preserved by demanding "the knowing and intelligent waiver required to relinquish constitutional rights," the requirement should logically encompass the entire investigatory process. And however one may measure the deception practiced in Hoffa and Osborn, none of the defendants could be considered to have made a "knowing and intelligent waiver" while unaware that he was talking to a secret agent.

The Supreme Court did not explore—or even mention—these issues in Hoffa. Instead it fled to "legal coercion" as a conclusory term of art. Had it faced the necessary task of showing why the Fifth Amendment should apply to custodial interrogation but not to secret agents, it would have found the going rough but not unmanageable. Differences do exist between the activities of police secret agents and interrogation. These differences show that the stationhouse door can be justified as a sensible if not ideal stopping point.

First, physical coercion has traditionally been considered an evil of

80. See Spano v. New York, 360 U.S. 315 (1959) (a police officer who was a boyhood friend told the defendant he might lose his job unless the defendant confessed).
81. See Culombe v. Connecticut, 367 U.S. 568 (1961) (the police persuaded the suspect's wife to exhort him to confess if he was guilty).
The police station is a more likely setting for such coercion than the outside world where spies and informers operate. While coercion was not the Court's sole concern in *Miranda*, the threat of coercion partly justifies its decision to place uniquely strict controls on stationhouse activities.

Necessity provides a second basis for distinguishing interrogation from spying. While interrogation may be important in a significant fraction of cases in every category of crime, it is not absolutely essential for any particular category. If the isolated cases made unsolvable by the *Miranda* rules are evenly spread among all categories of crime, the *Miranda* rules will not render law enforcement impossible in any single area.

The necessity for spies and informers, on the other hand, is heavily concentrated in specific categories of crime. Without secret agents, consensual offenses and organized crime would be virtually beyond the reach of enforcement officials. Since extending the Fifth Amendment to spies and informers would destroy their utility altogether, the result would be to make whole categories of crimes undeterrable.8

The Court's special interest in police questioning may also be due to the fact that its subjects are often the most easily intimidated members of society. *Miranda* and *Escobedo* reflect a pragmatic concern for the poor and uneducated members of minority groups. And if the Court considered Danny Escobedo and Ernesto Miranda representative visitors to the interrogation room, it may have thought Jimmy Hoffa and Tommy Osborn typical targets of the secret agent. Spies and informers may well be most frequently used against experienced criminals and relatively sophisticated suspects, who can most easily insulate themselves from ordinary investigatory tactics.

Each of these considerations may have affected the Court's decision to extend the Fifth Amendment no farther than arrest. Yet none provides a satisfying constitutional rationale. A more promising approach would begin with an examination of the relationship between the Fifth and Fourth Amendments.

Constitutional authorities long ago discovered84 that the ultimate

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83. An interesting aspect of the *Hoffa* and *Osborn* cases is that while many would argue that the enforcement of sumptuary legislation in such areas as narcotics and consensual sex offenses can and should be made impossible, few would suggest a similar abandonment of the effort to preserve the deterrent effect of laws against jury tampering. Whether even such laws are worth the cost of enforcement by undercover tactics is quite another question.

84. *Boyd v. United States*, 116 U.S. 616, 630 (1886); *see also* *Malloy v. Hogan*, 378 U.S. 1, 8-9 (1964).
objectives of both the Fourth and Fifth Amendments are intertwined if not identical. "Like the constitutional barrier to unreasonable searches," as Judge Jerome Frank observed, the privilege against self-incrimination functions "as a safeguard of the individual's 'substantive' right of privacy, a right to a private enclave where he may lead a private life." But this perception leaves unexplained the difference between the qualified privilege against unreasonable searches and the absolute privilege against self-incrimination.

Historically, the absolute right against self-incrimination arose perhaps as an ad hoc reaction to a particular evil of the seventeenth century, the Star Chamber with its oath ex officio, perhaps as the product of a more reasoned consideration of a particular institution, the trial. But the privilege was limited to formal judicial proceedings, and for good reason. By extending to the defendant the absolute right to remain silent, it imposes a heavy burden on the state to prove the guilt of the accused. But since the state can at the trial rest upon the fruits of its investigation of the crime, the burden has proved tolerable.

The Fourth Amendment has historically controlled the investigatory process. It too protects the privacy and dignity of the individual; but since the state to bear its burden at the trial must be able to collect evidence beforehand, the protection offered is more limited: the police

86. The analyses attempted by the Court, as in Schmerber v. California, 384 U.S. 757, 768-69 (1966), have wallowed, ultimately, in the ancient mind-body distinction. The difficulty of drawing the line, once the easy cases are left behind, suggests that the attempt itself is rooted in no clear purpose.
87. See generally 8 WIGMORE § 2250; Fortas, The Fifth Amendment, 25 CLEV. B. ASS'N J. 91 (1954); Morgan, The Privilege Against Self-Incrimination, 34 MINN. L. REV. 1 (1949). The leading proponent of the self-incrimination privilege as a mindless overreaction to the Star Chamber was, of course, Bentham:

In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishing mass of odium and abhorrence. . . .

J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), in 7 THE WORKS OF JEREMY BENTHAM 456 (Bowring ed. 1845). Whether the appearance, and acceptance by the courts, of the claim that no man was bound to incriminate himself in any court was a conscious and rational advance in the law or, as Bentham would have it, a product of confusion and aroused passions seems largely a function of the scholar's fondness for the privilege. Whichever the case—if indeed a choice between the two analyses can or need be made—the development of the rule during the political and religious upheavals of mid-seventeenth-century England is perhaps the best commentary on it. The proposition that the accused may stand mute and "put the state to its proof," or, as Mr. Justice Fortas wrote before his appointment to the bench, that "a man may be punished, even put to death by the state, but . . . he should not be made to prostrate himself before its majesty," 25 CLEV. B. ASS'N J. at 100, is expressive of an overriding concern for the dignity of the individual.
88. Indeed, not until 1848 was the accused in England assured protection of his right to remain silent even at a preliminary hearing. See Morgan, supra note 87, at 14.
may, when they have probable cause to suspect an individual, search him and his home.

In extending the absolute self-incrimination privilege to the police station the Court in effect adopted a functional conception of the difference between "trial" and "investigation." The interrogation chamber, like the court room, houses a highly institutionalized stage of law enforcement. By the time the suspect is brought there, the investigation has, as Escobedo put it, "focused" on him; it is as "the accused" that he confronts the state and its officials. Police station confessions are disfavored, therefore, not simply because they may decisively affect the trial. Their function so resembles a trial as to generate the same concerns which originally produced the privilege.8

Taken seriously, this functional approach leads to quite startling results. For example, considerations drawn from Escobedo's emphasis on "focus" underlay Jimmy Hoffa's claim that the Constitution confers a right to arrest.9 At an early stage in Partin's "investigation," he argued, the Government could present probable cause for his arrest, and therefore he had a constitutional right to be arrested and allowed the protection of counsel. The Court boggled at the novelty of this claim.10 But its surprise was unwarranted. Hoffa's lawyers had simply chosen inartistic phrasing for an argument substantially drawn from the Court's own opinions: when suspicion had focused on Hoffa the general investigation was functionally complete; at that point, he was the accused and thereby entitled to the absolute protection of the privilege against self-incrimination.

Even if Hoffa had made his point in a less startling fashion, however, his chance for success would have been slight. In Miranda the Court had already retired its functional terminology, and carefully emphasized that the line was to be drawn mechanically at the point when the suspect was taken into custody. It would be all but impossible to determine the point outside the police station at which suspicion has been focused on a single individual. The point at which an accused is taken into custody, however, can be judicially determined with reasonable certainty. Thus, the Court modified its functional extension of the Fifth Amendment in the interests of administrative convenience.

Practical considerations may thus ultimately justify the result reached in Hoffa on the Fifth Amendment issue. But the fact that a

90. See note 33 supra.
purely functional view would extend the privilege to many targets of the secret agent suggests the need for an alternative means of protecting their privacy.

Secret Agents and the Fourth Amendment

The Supreme Court rejected Hoffa's Fourth Amendment claim because he "was not relying on the security of the hotel room; he was relying on his misplaced confidence that Partin would not reveal his wrongdoing."92 The Court seems to have adopted the analysis advanced by the Government brief:93

(1) the incriminating statements overheard by Partin could have been made anywhere, and bore no logical relationship to the "fortuitous" fact that they were actually made in a constitutionally protected area;

(2) therefore the issue of a constitutionally protected area was an irrelevancy;

(3) and since the risk that statements made to others will be repeated "is probably inherent in the conditions of human society,"94 no constitutional issue remained.

The holding that Hoffa like everyone else took the chance his words would be repeated to the police is a novel application of an "assumption of the risk" notion which first appeared in Mr. Justice Brennan's dissent in *Lopez v. United States.*95 *Lopez* involved the admissibility of recordings made with a Minifon device carried in an Internal Revenue Agent's pocket during conversations with the defendant. The Court held the recordings admissible. Brennan chose the occasion for a philippic against the evils of electronic surveillance; he argued that a subject cannot "control" the risk of bugging and wiretapping, whereas with a little circumspection he can avoid—and therefore he held to assume—the risk of mere human informing and spying:

For there is a qualitative difference between electronic surveillance, whether the agents conceal the devices on their persons or in the walls or under beds, and conventional police stratagems such as eavesdropping and disguise. The latter do not so seriously

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92. *Id.* at 302.
93. *Compare id.* at 301-05 with *Brief for the United States* at 124-32.
95. 373 U.S. 427, 446 (1963) (dissenting opinion of Brennan, J., with Douglas and Goldberg, JJ.).
intrude upon the right of privacy. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy.  

Though rejected by the Court in *Lopez*, Brennan’s dichotomy between bugging and secret agents became in *Hoffa* the basis of the Court’s decision that secret agents do not threaten privacy enough to merit Fourth Amendment limitation. But it is difficult to accept, at least without explanation, the assertion that the chance a confidant may be reporting to the police “is not an undue risk to ask persons to assume.” Consider, for example, the likely reactions of the citizenry if asked to rank the offensiveness of three practices:

(1) the police will be allowed to search your home, without force during daylight hours;

(2) the police will be allowed to offer your friends very strong inducements to report to them any illegal activities on your part;

(3) the police will be allowed to employ agents, who may be strangers, business associates or friends, to invite or encourage you to take part in a criminal venture.

The clear state of the constitutional law after *Hoffa* and its companion cases is that (1) represents an invasion of privacy abhorrent to the American way of life, but (2) and (3) are quite proper. The average citizen would hardly agree. For the law-breaker, or even the average person who realistically considers himself subject to temptation, (2) or (3) would prove at least as inconvenient as (1). And the law, of course, claims to protect the guilty as well as the innocent. But even if only the God-fearing are considered, those who have never broken the law and are convinced they never will, there seem at best marginal differences among the three. The actual inconvenience of a police search, conducted politely at a reasonable hour, is relatively slight. The assault on the personality lies mainly in the fact that the

96. *Id.* at 465-66.

97. *Id.* at 450.

98. A qualification is the entrapment defense, which must be considered in conjunction with practice (3) but does not actually limit it: under the conventional doctrine, the police spy may not only invite the target to commit a crime, but may actually encourage him provided that a jury later decides that the intent to commit the offense in some sense originated with the defendant. *See* note 6 *supra.*
police have chosen the individual for testing and investigation, and that the individual must consider himself subject to such scrutiny at the whim of the police. But this is precisely the same sort of intrusion as that represented by undercover investigation and solicitation. The use of secret agents, indeed, has the additional odious characteristic that the target does not even know that he is ringed by the state, his reactions probed and his words marked.

The test, of course, cannot be simply the degree to which the individual feels "inconvenienced" by a given police practice. Many men, not otherwise corrupt, would find convenient a constitutional right to offer bribes to highway patrolmen without fear that their words could be turned upon them. But there are situations where a man should be allowed to speak freely; where he should be able to talk with the confidence that the state is not listening; in short, where his right to be left alone requires constitutional shelter.

In sorting out the situations in which the individual has good reason to take umbrage if the state has stationed an observer, the relevant variables are where the conversation is carried on; to whom the individual is speaking; and the circumstances leading to the conversation. Thus, in the Lewis case the incriminating statements and transactions occurred in the petitioner's home, but the location was fortuitous. The deception, such as it was, occurred when the secret agent called Lewis and passed himself off as a narcotics purchaser. The agent then entered the petitioner's home in this false role, but on the invitation of Lewis. The Court in Lewis perceived the significance of these factors, but inartistically dismissed the Fourth Amendment claim because the "home" had been converted to a "commercial center" when it was used for an unlawful "business transaction." The Court was led to this inapt phrasing when it focused not on evaluating the deception practiced, but simply on skirting the problem of a protected area.

In Hoffa, on the other hand, the majority not only expressed its conclusions poorly but also failed to perceive the quality of the deception under review. The Court concluded that since Hoffa "was relying upon his misplaced confidence that Partin would not reveal his wrongdoing," and since he might have mistakenly trusted Partin anywhere,


100. 385 U.S. at 211.

101. Mr. Justice Douglas, dissenting in Lewis, perceived the open-endedness of the Court's language but did not attempt to evaluate the quality of deception practiced on the facts of the case. See 385 U.S. at 346-47.

102. 385 U.S. at 302.
the fact that the deception occurred in a constitutionally protected area was an irrelevancy.

This analysis oversimplifies the nature of Hoffa's "misplaced confidence" and in doing so mistakenly rejects the privacy of the hotel room as a relevant factor. Partin did not just happen to be in Hoffa's hotel room, nor did the incriminating statements just happen to be made there. Partin made an effort to spend as much time as possible in the suite, and the government not only encouraged him to do so but made it possible for him to be in Nashville to do so. Partin and the government were so interested in his presence in the suite purely because both realized that Hoffa would there, if anywhere, discuss the jury with his cronies. The penetration was active and deliberate; Hoffa's willingness to talk freely there was not merely a consequence of his "misplaced confidence" in Partin, but also of his assumption that the government would not attempt to spy on him in the privacy of his hotel room.

The fragility of the "misplaced confidence" argument, with its implication that Hoffa should have perceived and avoided the risk that Partin had become an informer, emerges more clearly when the Gouled case, cited as good coin in both Hoffa and Lewis is considered. There a friend of the defendant entered his office on the pretense of a social call, and in his absence seized certain papers; the conviction was reversed. The Court distinguished Gouled in Hoffa on the ground that the defendant did not intend his visitor to see the documents, while Hoffa knew that Partin could overhear any incriminating statement. While true enough, this distinction does not show that Hoffa any more than Gouled was chargeable with "misplaced confidence," or that he had "assumed a risk" different from that assumed by Gouled. On the contrary, both men could have shielded their secrets by precisely the same device: by not trusting friends. Each man failed to consider the possibility that the police had enlisted a friend to collect evidence from a place where the state could not otherwise reach.

In effect, then, the Court has held that the state cannot without probable cause invade the privacy of the home—unless it tricks the individual into admitting a secret agent and allowing him to see or hear incriminating information.

103. See p. 997 supra.
105. 385 U.S. at 301.
106. 385 U.S. at 299-11.
More startling, however, is the Court’s total disregard for the value of friendship as an aspect of privacy. *Hoffa v. United States* did not even mention that this might be a value comparable to the freedom to shut one’s door on the world. Yet the interests built into the concept of privacy clearly include the freedom to maintain confidential personal relationships. The Constitution should give some recognition at least to that interest. The citizen should be able to rely not only on his home, but also on some other people, without fear that the police will use them to monitor his words and activities.

A third aspect of the activities of the secret agent, in addition to the locale of his work and his relationship to the target individual, is the active or passive nature of his tactics. Thus, if the individual talks to a stranger whom he has no reason to trust in a public area, it does not seem an “undue risk” for him to assume that the listener may be an informer. A different question is presented, however, if the same stranger, still in a public place, actively solicits the individual to commit a crime. This point, of course, is closely related to the entrapment defense, except that the conventional doctrine places no significant limitation on the freedom of the police to choose a target. Thus, the government had no reason to suspect that Osborn would rise to dangled bait. Yet such target selection by hunch or by hope is not improper under the entrapment doctrine if the defendant readily acquiesces in the invitation to crime.

But in ratifying the initial decision of the police to test the predisposition, will-power or financial need of the target, the courts have rejected the interest of the individual in being left alone by the state until some justification has arisen. The problem is analogous to that of a search, where the state has never been allowed to justify its invasion by the results.

The Supreme Court’s reluctance to scrutinize the tactics of spies and informers opens limitless vistas for governmental assaults on the private life of the individual. Its caution probably reflects conviction of the need for secret agents, and of the difficulty of limiting their activities without eliminating their role altogether. But administrative hardship does not require total abstention. Workable devices can be created for judicial control of secret agents.

107. See p. 994-95 & notes 4-7 supra.
108. See note 6 supra. And the determination of that question, on the inevitably conflicting testimony of solicitor and solicitee, is an issue for the jury. Cf. *Osborn v. United States*, 385 U.S. 206, 331-32.
Judicial Controls for the Secret Agent

In trying to place Fourth Amendment controls on the activities of the secret agent, courts will face a task immensely complicated by the variety of situations in which spies and informers appear. Moreover, no great degree of cynicism is needed to suspect that courts will encounter difficulty in learning all that goes on in the world of the secret agent.

But the frustrations to be expected are outweighed by the potential benefits. The interests of the individual to be protected are worthy of preservation. If close questions yield no crisp, satisfying answers, the clearcut cases can be solved. And experience may provide evidence useful in the solution of the questions which seem on first impression so difficult. Indeed, the mere accumulation of knowledge is an important goal in an area where so little is known of who actually does what how frequently to whom. Finally, even the cynic must presume at least a modicum of good-faith cooperation from law enforcement officers.

The Agency Relationship

The starting point for any system of judicial control of secret agents is determination of the circumstances in which an informer should be considered an agent of the police. A private individual may spy on his friends or enemies for a variety of motives, or evidence of criminal activity may simply fall into his hands and be reported to the authorities. In either case the evidence so acquired has not been tainted by the improper police conduct toward which the Fourth Amendment is directed. At the other extreme, the state must obviously be held responsible for the actions of an official employee or a special agent directed to collect evidence in a specific case.

Difficult problems arise only with individuals in a floating, ambivalent relationship to the police. These may include a host of informers who report useful tidbits of information to the police in exchange for money, tolerance of their own activities, or simply the satisfaction of serving justice. For such sometime-servants of the state fine distinctions could be constructed from the law of agency to determine their status in specific situations. The realities of the problem militate against a judicial willingness to allow the police to wash their hands of the on-and-off operative, however. First, and most important, the authorities can be expected to minimize their prior relationship with such semi-pro spies and informers, and the defendant will have great difficulty finding out, let alone proving in court the full story. Second,
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to the extent the police have encouraged an operative to collect evidence, theirs should be the responsibility for his actions. The goal is the control of such tactics, and only the police are in a position to control the activities of the stool pigeons reporting to them.

The test then should be whether the police had reason believe the operative was in general collecting whatever information he could, and not whether the police had authorized his actions in the specific case. In determining this, past service, past encouragement, and especially past payments—monetary or otherwise—will be relevant.

The Situations for Control of Secret Agents

The objective of constitutional control is to identify and protect those places, relationships and circumstances where the state should not officiously monitor an individual's life or test his will. While a case-by-case examination could be made to determine whether protection is warranted under all the circumstances, such an unstructured approach would lead only to confusion, as the Supreme Court discovered in the state confession cases. General rules are desirable; some can be suggested. The suggestions will parallel those interests found slighted in Hoffa and its companion cases.

First, the use of spies or informers actively to penetrate a constitutionally protected place should be judicially controlled. It should be possible to predict with fair certainty when the undercover activity will reach into such an area; certainly Partin and the government both knew that evidence against Hoffa had to be gathered primarily in his hotel room. If a living space is fortuitously invaded—as was true in Lewis—the burden should be upon the police to show that the penetration was unplanned.

Second, the use as a secret agent of a person enjoying a relationship of trust with the target individual should be controlled. The problem here, of course, is that interpersonal relationships stretch from mere passing acquaintance to marriage. The test should be whether the victim would have made the incriminating statement except for the personal relationship. Thus, Hoffa relied on his close friendship

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with Partin; he would not have let a stranger or a casual acquaintance lounge about his hotel suite. Osborn, on the other hand, had no reason to place trust in Vick: while he had hired Vick before for jury investigations, the employer-employee relationship between them had not ripened into the sort of mutual trust and confidence requiring constitutional protection.

The third situation where spying tactics should be controlled arises when an active solicitation to crime is to be made toward the target. This is the Osborn situation, of course, and here contests of credibility similar to those inevitably present in the entrapment cases can be expected. But the defendant by this test would not have to show that the "intent" to engage in criminal conduct was forced upon him, but merely that a solicitation was made to him without justification; his "ready complaisance" would not be admissible to justify an overture to crime made without prior cause.

**The Standard for Judicial Control**

Fourth Amendment standards should be applied to the first case for control—deliberate penetration into a protected place. The standard should be the probable cause required to justify a conventional search, to which this situation is closely analogous. The usual phrasing of this standard—"probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed"—would, of course, need to be extended to include a reasonable belief that an offense was about to be committed or that the target was engaged in a continuing course of criminal conduct.

A probable cause standard would also be proper for controlling the use of a spy or informer who occupies a relationship of trust with the target individual. While the analogy to an ordinary search is not so clear, these tactics clearly intrude upon the privacy of a close personal relationship. A standard of probable cause presents the further advantage of a well-developed judicial test with familiar precedents.

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Only in the case of active solicitation to crime is probable cause too exacting a standard. Since the only kind of solicitation not covered by the first two criteria is that made by a relative stranger in a public place, the invasion of the individual's privacy is more difficult to define and may seem almost ephemeral. A typical example would be the use of a spy to attempt to buy narcotics on a street corner or in a bar. The assault on the personality of the target lies in the fact that the state has selected him to be tested, has scrutinized his will and reactions without his knowledge or consent. In these limited circumstances, some such standard as "reasonable suspicion" might be proper.114

The Timing of Judicial Control

Control of police agents will be most effective if it is prior control. The Supreme Court has long expressed its preference that "those inferences [justifying intrusions upon the privacy of the individual] be drawn by a neutral and detached" officer of the court rather than by police officers pressured by their responsibilities to enforce the law.115

A system of prior control would be handicapped at its inception by the absence of any statutory provisions such as those governing the issuance of search warrants. The government used considerable ingenuity in obtaining prior judicial authorization for the use of the Minifon device in Osborn, however, and the judicial construction of a warrant system would not be impossible. A statutory framework would, of course, be desirable.

In exigent circumstances the situation may justify the use of a secret agent without prior judicial authorization. The Court has re-

113. Cf. Note, 74 YALE L.J. 942, 952 (1965). "Reasonable suspicion" is admittedly vague and may introduce another "unruly factor" into the law. The best, albeit inelegant, definition would probably be "almost but not quite probable cause." For a factual situation in which probable cause was lacking but reasonable suspicion would be present, see Henry v. United States, 361 U.S. 98 (1959). Even with full allowance made for definitional difficulties, a limited standard such as "reasonable suspicion" would still serve a valuable function in informing the police both that some discretion should be exercised in selecting targets for solicitation and that their decisions must either be authorized before execution or reviewed afterward.

114. If the solicitation were repeatedly made or accompanied by psychological pressures, a more serious situation would be presented. This, however, could be dealt with either by the precedents defining coercion in the confession cases or the criteria governing the intensity and duration of agent activity to be discussed below. See notes 118-20 infra and accompanying text.

115. Johnson v. United States, 333 U.S. 10, 14 (1948); see also Ventresca v. United States, 380 U.S. 102, 106 (1965); Chapman v. United States, 365 U.S. 610, 615 (1961). But see Rabinowitz v. United States, 339 U.S. 56, 65-66 (1950). The question whether magistrates in fact make "neutral and detached" decisions or merely rubberstamp the decisions of the police is beyond the scope of this note. Even if the warrant system is markedly imperfect in practice, whatever check it does place on unfettered police discretion would represent an improvement in the area of secret agents.
laxed its strong insistence on a search warrant when a suspect is fleeing or about to take flight, when a moving vehicle is involved, or when evidence is threatened with removal or destruction. Similar exceptions would be proper in the context of secret agents when, for example, the opportunity to employ an informer arose so abruptly and needed to be exploited so quickly that recourse to a court was not feasible. But when the police in marginal circumstances employ secret agents without prior authorization, the court should view post hoc justification with a jaundiced eye. To prevent evasion of the general requirement of prior authorization, the state should bear a heavier burden to show probable cause when spies are used without a warrant.

The Intensity and Duration of Undercover Tactics

The judicial control of spies and informers should extend not only to the decision to employ secret agents but also to their activities once authorized. This aspect of control corresponds to the Fourth Amendment requirement of specificity as to "the place to be searched, and the persons or things to be seized." The prohibition against general warrants and unreasonable searches—in the sense of the intensity of the search—acquires special importance in the context of spies and informers. A conventional search, even so intensive a one as that approved in *Harris v. United States*, is limited to a single time and...

117. This might occur when a private citizen who has not been acting as a secret agent reports evidence to the police; to perfect their case the police may wish the citizen to continue collecting evidence. In doing so by police request he will become a state agent, and if his subsequent activities are in a protected area or directed against a close personal friend, probable cause will be required. In some cases such justification may exist, but the tempo of events may preclude obtaining prior judicial authorization. The more difficult case is when probable cause does not yet exist. The argument can be made that the police should not be denied the information of a private citizen who came to them as soon as he came upon or collected a tidbit of information. Had he held off, he would not have become by contact with the police an agent of the state; as a private citizen he could have gathered further evidence from a friend or in a protected area without probable cause. The judicial response to this argument must be largely a function of the degree of confidence in the good faith of the police. If such confidence is present, an exception to the requirement of probable cause may be carved out when the private citizen initiates his agency relationship with the state. Absent such confidence—whether because of cynicism or simply from a frank realization of the temptation to which the police would be placed to claim the citizen-spy came to them—no allowance would be made. A possible middle road would be to place the burden on the police to show that the citizen initiated his relationship with them. Because of the great practical difficulty a defendant would face in meeting any such claim put forward by the police, however, this does not seem a promising approach.
118. *U.S. Const.* amend. IV.
120. 331 U.S. 145 (1947) (five federal officers searched a four-room apartment for five hours).
place. The collection of evidence by an undercover agent can span weeks or even months; Partin gathered information for two months in the Hoffa hotel suite. The obvious danger is that an undercover agent may engage not in the detection of a specific crime or course of criminal activity but in general fishing expeditions. Any such continuing scrutiny of the activities of the target individual would be an intolerable invasion of privacy.

Judicial warrants for the use of spies or informers should therefore describe with particularity the extent and intensity of activities authorized. The police should be required to state concretely the evidence they expect to obtain and within what period of surveillance. The permissible period should be limited by the conditions of the case; it seems unlikely that a general surveillance extending over months, as was present in Hoffa, would ever be justified. If continued use of spies or informers is required in an ongoing investigation, the police should be required to secure authorization periodically by showing that continuation of their tactics was justified.