Journal of Criminal Law and Criminology

Volume 61 | Issue 2 Article 5

1970

Police Infiltration of Dissident Groups

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 61, No. 2
Printed in U.S.A.

COMMENTS

POLICE INFILTRATION OF DISSIDENT GROUPS

> 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 their 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 gaiety, restrains their wit, casts a shadow upon their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency.[1]

Police infiltration may serve as a source of information which is impossible to obtain in any other way. Such investigative tactics have been traditionally used by American law enforcement agencies to obtain information about covert criminal activity such as drug traffic and organized crime. In recent years, the scope of activity subject to undercover surveillance has grown ever wider.[2] Dissident factions of American society now engage in vocal and aggressive conduct demonstrating their dissent. In response, police authorities have adopted the practice of infiltrating dissident groups[3] by employing planted informers[4]—police agents who use disguise and deception to become accepted members of the group[5]—in an effort to obtain information regarding group motivations, goals, and membership. Infiltration tactics become particularly useful to the police when group ranks are closed to the general public and the identity of group members is not common knowledge.

[1] 2 E. MAY, CONSTITUTIONAL HISTORY OF ENGLAND 275 (1863).

[2] O. W. WILSON, POLICE ADMINISTRATION 68 (1963). For obvious reasons, it was difficult to obtain accurate data from law enforcement agencies disclosing the frequency with which police subject dissident groups to undercover surveillance. It was indicated, however, by reliable confidential sources that police infiltration is much more commonplace than the public generally assumes.

For the purposes of this comment, surveillance means the observation of group members and activities either from within or without the group. Infiltration of a closed dissident group is the type of surveillance to which this comment is particularly directed.

[3] For purposes of this comment a dissident group is defined as a voluntary association which espouses a view differing from an established view held or accepted by a majority within the community.

Dissident groups may be divided into two categories. The first category consists of open groups—groups with negligible control or concern over the source and background of their membership. Such groups characteristically hold meetings open to the public and make no effort to maintain the security of a limited audience at group meetings. A street corner rally might be classified as an open group meeting.

The second category of dissident groups consists of closed groups which attempt to control the make-up of their membership through screening. Closed group meetings are open to only a limited group of screened members. The scope of this comment is specifically limited to the constitutional issues arising from police infiltration of closed groups.

It is quite possible for a closed group to exist within an open group. For example, the leadership of the Youth International Party anti-war demonstration at the Chicago Democratic Convention of 1968 was a closed group existing within the open group structure of general anti-war dissent.

[4] It is assumed in this comment that the leadership of law enforcement agencies decide which groups warrant undercover investigation. The factors which guide the outcome of this decision are critical when and if the legality of such investigative police activity should later be questioned in court. *See* text at 193 *infra*.

[5] Infiltrators are often trained professionals, who suffer replacement or discharge from their assignment if they fail to supply police with the information they desire. Since the purpose of any police investigation should be to acquire accurate information, possible problems inherent in the use of infiltration tactics should be recognized. Specifically, because a secret agent's success depends upon his ability to produce information useful in attaining arrests or gaining insights into group activities, an agent may be tempted to fabricate needed information or to exaggerate facts. Because of the nature of any infiltration assignment, there may be little opportunity for group members to challenge the veracity of an agent's allegations. Furthermore, the flexibility of a group's programs and plans may become an easy rationale for explaining away any group activity inconsistent with the agent's predictions and allegations. Because there is no absolute means by which to measure the accuracy of an agent's accounts of otherwise secret group activity, what appears to the police and public to be apparent reliability in past investigations is dubious assurance of an agent's credi-

There are basically three groups of cases which seem to relate to undercover infiltration of closed dissident groups. The first group consists of cases which limit the investigatory power of legislative bodies[6] and which suggest that surveillance or the threat of surveillance imposes a chilling effect on the exercise of free speech and assembly and therefore represents an unconstitutional infringement of these First Amendment rights.[7] These cases restrict legislative investigation of groups and group membership to those situations where the government can show a compelling state interest to justify its restrictive actions.[8]

The second group of cases apply the Fourth Amendment to evidence obtained by means of electronic eavesdropping apparatus.[9] These cases indicate that evidence obtained in such a manner without complying with the Fourth Amendment represents the fruit of an unreasonable search and seizure.

The third group of decisions assert the existence of a right to privacy protected by the Bill of Rights from governmental interference.[10] These cases hold that a legitimate governmental objective to control or prohibit activities subject to official regulation may not be achieved by means which sweep too broadly and thereby invade the area of freedoms protected by the Bill of Rights.

It is the purpose of this comment to consider the application of these cases to police infiltration and

---

bility in fact. D. PRITT, SPIES AND INFORMERS IN THE WITNESS-BOX 14 (London 1958).

A particularly successful agent may even infiltrate a group's hierarchy and be called upon to participate in substantive decision making. The functioning of a planted informer on this level within the group gives rise to related questions regarding the defense of entrapment. *See e.g.* Sherman v. United States, 356 U.S. 369 (1958). For the purposes of this paper, however, consideration is restricted to circumstances where the infiltrator limits himself to mere surveillance and passive participation in group activity, thereby avoiding the role of group provocateur, and, consequently, the issue of entrapment is beyond the scope of this comment. Cowen, *The Entrapment Defense in the Federal Courts and Some State Court Comparisons*, 49 J. CRIM. L.C. & P.S. 447 (1959).

[6] DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966) (state committee's investigation into defendant's prior affiliation with Communist Party held to be a violation of First Amendment right to associational privacy because state showed no nexus between defendant's conduct and the compelling state interest of self-preservation); Gibson v. Florida Leg. Investigatory Comm., 372 U.S. 539 (1963) (legislative investigation into group membership must yield to First Amendment right to freedom of association where no subversive or illegal activity is shown); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (because state failed to show nexus between Progressive Party and a compelling state interest in self-preservation, investigation by state committee into membership of Progressive Party held to be in violation of First Amendment right to political privacy); Watkins v. United States, 354 U.S. 178 (1957) (questioning union officer about members known to be former Communists held beyond House Committee on UnAmerican Activities' power to investigate Communism in labor).

[7] Local 309, U.F.W. v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) (police attendance at union meetings enjoined as a hinderance to members' First Amendment right to speak privately and hold private meetings); Anderson v. Sills, No. C-215-68 (Sup. Ct. of N.J., Chancery Div.) (unreported opinion) (maintenance of police intelligence files on participants in political demonstrations held to be unconstitutional inasmuch as existence of files served to deter citizens from exercising First Amendment rights of free speech and assembly). *See also* cases cited in note 6 *supra*.

[8] Although the majority of the Court has ruled that First Amendment rights are subject to a balancing test against compelling state interests, Justice Black and Justice Douglas hold that application of a balancing test is inappropriate in cases when governmental action directly infringes upon First Amendment rights. *See e.g.* Scales v. United States, 367 U.S. 203, 262, 271 (1961) (Douglas & Black, JJ., dissenting). Since surveillance or the threat of surveillance is best classified an indirect infringement on First Amendment rights, the balancing test is indeed appropriate to any determination of the constitutionality of dissident group surveillance.

[9] Katz v. United States, 389 U.S. 347 (1967) (electronic eavesdropping held to constitute a violation of defendant's justifiable reliance on privacy of his surroundings and therefore held to be an unreasonable search and seizure prohibited by the Fourth Amendment); Silverman v. United States, 365 U.S. 505 (1961) (use of electronic device to listen to defendant's conversations within the privacy of his home without a valid warrant held to constitute an unreasonable search and seizure); Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (use of evidence obtained by wiretapping is in violation of the constitutional right to be let alone protected by the Fourth Amendment from governmental intrusion). *See generally* Comment, *Federal Procedures for Court Ordered Electronic Surveillance: Does It Meet the Standards of Berger and Katz?*, 60 J. CRIM. L.C. & P.S. 203 (1969).

[10] Griswold v. Connecticut, 381 U.S. 479 (1965) (overbroad state statute aimed at restricting illicit sexual relations by prohibiting use of contraceptives by married couples held to be a violation of citizens' right to privacy and therefore unconstitutional); N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964) (state regulatory statute requiring submission of N.A.A.C.P. membership lists to state authorities held to be overbroad and a deprivation without due process of members' right to associational privacy because state failed to show a compelling state interest to justify disclosure of membership lists); Bates v. City of Little Rock, 361 U.S. 516 (1960) (statute requiring divulgence of N.A.A.C.P. membership lists held to be a deprivation without due process of members' right to freely associate); Louisiana v. N.A.A.C.P., 181 F. Supp. 37 (E.D. La. 1960) (state statute requiring submission of membership lists to state authorities held to be a deprivation without due process of citizens' right to associational privacy).

surveillance of closed dissident groups. In addition, the remedies available for limiting infiltration tactics when applied to a closed dissident group will be examined.

First Amendment

The First Amendment[11] guarantee of the right to speak and assemble free from intrusion or interference by federal or state[12] governments is jeopardized by the infiltration or threat of infiltration by police of dissident groups.[13]

In *Gibson v. Florida Legislative Investigation Committee*,[14] defendant was cited for contempt for refusing to submit N.A.A.C.P. membership lists to a state committee authorized to determine whether specific individuals, otherwise identified as, or suspected of being Communists, were N.A.A.C.P. members. In reversing the ruling, the Court stated that the

> compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . . restraint on freedom of association . . . [and] . . . [i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[15]

Although the Court in this case has shown solicitude for one's right not to disclose his associates because of the inhibitory effect which the threat of disclosure has upon the exercise of free speech and assembly, it has consistently held that these rights can be restricted under certain circumstances.[16] If the state can demonstrate a compelling state interest and a sufficient relationship or nexus between the group being investigated and the interest being asserted, the Court will generally permit the encroachment.[17]

In *Sweezy v. New Hampshire*,[18] the defendant refused to submit to a state legislative committee's inquiry into his knowledge of the Progressive Party and its adherents on grounds that the inquiry infringed upon his protected First Amendment rights. In reversing the petitioner's conviction for contempt, the Supreme Court of the United States stated that, although a countervailing state interest may have justified restricting petitioner's exercise of free expression, there was no evidence to connect the questioning of petitioner with the state interest in protecting itself from Communist subversion.[19] The Court held that the petitioner's right to political privacy could not be abridged under such circumstances.[20]

---

[11] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.
U.S. Const. amend. I.

[12] Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Gitlow v. New York, 268 U.S. 652 (1925).

[13] Dennis v. United States, 341 U.S. 494 (1951), demonstrates how the Supreme Court in the past twenty years has dealt with the argument that unauthorized surveillance threatens the free exercise of First Amendment rights. In the court of appeals, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), defendant objected to governmental use of undercover agents against alleged political activity. Judge Learned Hand dismissed the argument without referring to the First Amendment. In granting certiorari, the Supreme Court limited its consideration to the constitutionality of the statute under which the defendant had been convicted and did not discuss the propriety of the undercover investigative methods used to obtain the convicting evidence. Comment, *Police Undercover Agents*, 37 Geo. Wash. L. Rev. 634, 660 (1969).

Consistent with its treatment of the *Dennis* case, the Court has thus far evaded direct confrontation with the issue of admissibility of undercover agents' testimony in criminal proceedings. *See* Osborn v. United States, 385 U.S. 323 (1966) and Hoffa v. United States, 385 U.S. 293 (1966). As the practice of police surveillance of dissident groups becomes more commonplace, the admissibility of evidence so acquired is challenged more frequently. Consequently, the issue becomes ever more difficult for the Court to circumvent.

[14] 372 U.S. 539 (1963).

[15] *Id.* at 544.

[16] *See e.g.*, Cox v. Louisiana, 379 U.S. 559 (1965); Bates v. City of Little Rock, 361 U.S. 516 (1960); Uphaus v. Wyman, 360 U.S. 72 (1959); Barenblatt v. United States, 360 U.S. 109 (1959).

[17] Gibson v. Florida Leg. Investigatory Comm., 372 U.S. 539 (1963).

The state's interest in adequate crowd and traffic control is insufficient to justify the use of undercover surveillance and infiltration. Authorities might try to justify infiltration of certain groups on grounds that community interest requires constant reassurance that group activities will remain passive. This argument is incongruous with a society which espouses a system of laws under which a man is innocent until proven guilty, and in a society which preserves the right to free speech and assembly over all but the most compelling state interest. If such an argument is accepted as valid, police are effectively given the absolute discretion to determine which groups constitute an overt threat to society, which groups constitute a vague, potential threat to society, and which groups present absolutely no threat to society. Moreover, such an argument gives the police absolute license to deal with any given group according to the classification under which the group is arbitrarily deemed by the police to fall.

[18] 354 U.S. 234 (1957).

[19] *Id.* at 251.

[20] *Id.*

Those cases which limit the right of a legislative body to compel the disclosure by a group member of the group's membership list offer support for the proposition that the threat of disclosure of one's associates and associations resulting from the subjection of a group to secret police infiltration imposes a chilling effect on the free exercise of private assembly.[21] The fact that legislative inquiries are directed at the enactment of new laws rather than the enforcement of existing laws is not a meaningful distinction. Both practices are aimed at procuring information. One seeks compulsory disclosure; the other seeks information through deception. In either situation, the divulgence of information is involuntary. Moreover information which is privileged from compulsory divulgence to legislative investigators should also be privileged from discovery by police infiltrators.

The principle that police surveillance infringes First Amendment rights was recognized by a federal district court in *Local 309, U.F.W. v. Gates*.[22] There, plaintiffs sought to enjoin local uniformed police officials from sitting in on union meetings. Plaintiffs alleged that the presence of uniformed state police officers at union meetings prevented union members from discussing freely matters which related to the purpose of meeting. The police contended that such observation was necessitated by the union's recent participation in violent activities. The court noted that

> [t]he freedom and liberty to express ourselves privately and to hold private assemblies for lawful purposes and in a lawful manner without governmental interference or hindrance is protected as much by the First Amendment as the right to do so publicly.[23]

And then, citing *Thomas v. Collins*,[24] the court stated that

> [a]ny attempt to restrict those liberties [secured by the First Amendment] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.... Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.[25]

The *Gates* decision was an easy case because it involved obvious police presence within the group; however the principles underlying *Gates* are equally applicable to cases where police surveillance is less patent. It should not be necessary that members possess actual knowledge of the identity or the presence of an agent within the group. Even without such knowledge the chilling effect is the same. The situation is analogous to that found in cases dealing with the legality of employers' hiring industrial spies to infiltrate trade unions for the purpose of acquiring information concerning union activities.[26] Such activity has been held to constitute a restraint on employees' right to form unions and engage in concerted union activity, regardless of whether the employees actually realize that they are being surveyed.[27] The frequency with which

[21] The members of several groups feel that public disclosure of statements of a political nature made during the course of meetings might result in harassment by police officials, even though the statements themselves are not criminal. Suspicion that certain members of the group might be working for the local police or the FBI may prevent such statements from ever being aired. Furthermore, this dampening effect extends beyond the realm of political action groups; many citizens are willing to relate certain semi-private matters to friends, relatives, or business associates, but would feel that their privacy had been infringed if they knew that these matters were open to police investigation. Comment, *Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 U. COLORADO L. REV. 261, 279 (1969).

[22] 75 F. Supp. 620 (N.D. Ind. 1948).

[23] *Id.* at 624.

[24] 323 U.S. 516 (1945).

[25] *Id.* at 530, *cited in* 75 F. Supp. at 624–25.

[26] National Labor Relations Board v. Grower-Shipper Veg. Assoc. of Central Calif., 122 F.2d 368 (9th Cir. 1941) and Bethlehem Steel Co. v. National Labor Relations Board, 120 F.2d 641 (D.C. Cir. 1941) (use of undercover agents by employers to spy on employees' union activity held to be a restraint on employees' right to freely form and join union groups).

[27] 122 F.2d at 376; 120 F.2d at 647. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations,... and to engage in other concerted activities for the purpose of collective bargaining....

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a), states:

> (a) It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;...

The employment of undercover agents to spy on employees engaged in union activities has been held a violation of Section 8(a)(1) of the National Labor Relations Act, even though the employees failed to realize that they were being surveyed.

infiltration tactics are employed by police today creates a threat of surveillance which may itself constitute sufficient basis for group members to complain of a chilling effect on their exercise of free speech and assembly.

The actual knowledge of the members that one of their group is a police infiltrator presents no problem of relief. The group can simply expel the intruder, or get a section 1983 injunction if a constitutional violation is established.[28] In the case, however, where speech and association is affected only by the reasonable fear of intrusion, the most effective relief would appear to be a change in the policy of the governmental entity engaging in the unconstitutional conduct. In addition, it is submitted that any information obtained by police through conduct that demonstrably infringes First Amendment rights should be excluded in any subsequent criminal proceeding involving the investigated parties. This approach, termed the exclusionary rule,[29] has been adopted by the Supreme Court to deter police conduct which violates the Fourth and Fifth Amendments.[30] Its application to police conduct which erodes the freedoms of speech and assembly may be helpful.

Fourth Amendment

The protection of personal security provided by the Fourth Amendment[31] may be infringed by undercover police surveillance. However, the Court has thus far declined to make a definite and unqualified determination of the admissibility, under the Fourth Amendment, of information acquired by means of infiltration and undercover surveillance of closed dissident groups without a warrant. Judicial attention in the past has been restricted to cases involving the observation of actual criminal activity.[32] In such cases the Court has ruled that a secret government informer is subject to "all [the] relevant constitutional restrictions . . . [imposed upon] any other government agent. . . ." [33] Undercover agents have seldom been called by the state to testify to the nature of group activities as witnesses in trial proceedings. However, the frequency with which such testimony is used as evidence is increasing, and as the use of undercover infiltration of dissident groups becomes more common there is an ever greater probability of a clear-cut judicial determination of the admissibility of agent's testimony as evidence. The issues confronting the Court at such a time will compel it to define more precisely what "relevant constitutional restrictions" are applicable when undercover tactics are particularly directed against closed groups engaged in active dissent.[34]

Two cases decided in the 1966 term demonstrate the Court's most recent approach to the Fourth Amendment issues raised by infiltration tactics:

---

[28] 42 U.S.C. §1983(1964). *See* text at 192–193 *infra*.

[29] *See generally The Exclusionary Rule Regarding Illegally Seized Evidence: An International Symposium*, 52 J. Crim. L. C. & P. S. 245 (1961).

[30] *See* Mapp v. Ohio, 367 U.S. 643 (1961); Miranda v. Arizona, 384 U.S. 436 (1966).

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

[32] Hoffa v. United States, 385 U.S. 293 (1966) and Lewis v. United States, 385 U.S. 206 (1966) are recent cases in which testimony of an undercover agent was used to obtain a criminal conviction.
. . . "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. . . ."
385 U.S. at 311.

[33] 385 U.S. at 311.

[34] Defense attorneys for the eight men accused of crossing state lines to incite the Chicago riots during the 1968 Democratic Convention recently confronted Judge Julius J. Hoffman of the federal district court with precisely this issue. The attorneys made a motion to suppress the testimony of police secret agents assigned to survey several of the defendants during the Chicago disturbance. The defense contended that such a twenty-four hour, unprivileged and unlimited surveillance without a warrant constituted an unreasonable search and seizure, and, therefore, the information so obtained was inadmissable under the exclusionary rule of the Fourth Amendment. The motion was denied by the district court, and the issue has yet to be raised on appeal. United States v. Dellinger, No. 69 CR 180 (N.D. Ill., Feb. 20, 1970); *appeal docketed*, No. 18295, 7th Cir., Feb. 28, 1970.
Similar factual situations confronted the Court in Osborn v. United States, 385 U.S. 323 (1966) and Hoffa v. United States, 385 U.S. 293 (1966). However in both these cases the Court successfully avoided the clear-cut issue of admissibility as evidence of knowledge obtained through undercover surveillance of the defendants. In *Hoffa*, the Court avoided confronting the exclusionary rule by imposing the doctrine of waiver on the defendant. *See* text at 186–187 *infra*. In *Osborn*, the Court ignored the issue of the admissibility of an agent's testimony regarding a conversation which the agent had tape-recorded. The state sought to admit the tape solely as corroborating evidence to the agent's testimony. Following precedent set in Lopez v. United States, 373 U.S. 427 (1963), the Court held that the taped conversation was admissible as corroborating evidence, but the Court failed to address itself to the issue of the admissibility of the agent's testimony itself.

Lewis v. United States[35] and *Hoffa v. United States*.[36] The *Lewis* case raised the issue of whether the defendant's Fourth Amendment rights were violated by the admission into evidence of testimony from a federal narcotics agent. After misrepresenting his identity and expressing to the defendant an interest in buying marihuana, the agent was invited to the defendant's home and was sold quantities of the contraband.

Appealing his conviction for sale of narcotics, the defendant contended that, in the absence of a warrant, the agent's intrusion upon the privacy of his home constituted an unreasonable search and seizure; and, therefore, the agent's testimony was inadmissible under the Fourth Amendment. Furthermore, it was contended that the defendant's invitation to the agent should not constitute a waiver of defendant's Fourth Amendment rights when the invitation to enter and observe is induced by fraud and deception.[37]

The Court dismissed defendant's argument and stated that "the particular circumstances of each case govern the admissibility of evidence obtained by stratagem and deception," [38] and that, in this case, the defendant's rights were not violated because defendant waived his right to security from governmental intrusion into his business transactions when he invited the agent to his home for the specific purpose of executing a felonious sale of narcotics with him. Because the agent did not see, hear, or take anything not contemplated, and in fact intended, by the defendant as a necessary part of executing that felonious sale, the Court felt that the defendant could not claim that the information so acquired by the agent was within the realm of privacy protected from unreasonable governmental intrusion by the Fourth Amendment.[39] Essentially, the Court ruled that petitioner could not reasonably claim Fourth Amendment immunity from governmental intrusion into his apartment when, in the course of executing illegal business transactions, petitioner freely opened his apartment to the public in general.

The Court in *Lewis* stated that "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purpose contemplated by the occupant . . .",[40] and if, during the course of accomplishing that purpose, the government agent acquires incriminating information, such information is admissible as evidence in a criminal proceeding. This indicates that the government may infiltrate some groups and gain admissible evidence provided its agent's activity remains within the scope of general group conduct and does not exceed the purpose for which the agent was originally "invited" to join.

For the purposes of our analysis, however, the *Lewis* case and others like it can be factually distinguished from cases involving the undercover surveillance of dissident groups. The Court in *Lewis* was dealing with a defendant suspected of criminal conduct; and, in such a context, the Court found it reasonable to impose the risk of "faulty character judgment" on persons engaged in narcotics traffic. But prior to subjecting Lewis to undercover observation, the Court noted that the police had probable cause to believe that Lewis was engaged in criminal activity.[41] Thus the search was in accordance with Fourth Amendment standards on that ground also.

A concept of waiver similar to that employed in the *Lewis* decision was also used by the Court to justify the decision in *Hoffa v. United States*.[42] In

[35] 385 U.S. 206 (1966).
[36] 385 U.S. 293 (1966).
[37] 385 U.S. at 208.
[38] *Id.*
[39] 385 U.S. at 210.

[40] *Id.* at 211. The Court went on to state,

> [o]f course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials. . . .

See Gouled v. United States, 255 U.S. 298 (1921) (evidence seized by a business friend of defendant after friend, who was invited into defendant's office on a social call, searched defendant's drawers; evidence held inadmissible under Fourth Amendment). The Court in *Lewis* distinguished the *Gouled* decision on the grounds that, in *Gouled*, the agent had been invited into defendant's office on a social basis and the evidence had not been voluntarily submitted to the agent in the course of the social call.

[41] 385 U.S. at 208–09 n.4.

[42] In order to justify the holding that the defendant "waived" his right to privacy and freedom from self-incrimination, both the *Lewis* and the *Hoffa* decision make use of the fact that the defendant "voluntarily" made incriminating statements around the agent. The Supreme Court's willingness to classify the defendants' incriminating statements to undisclosed and unsuspected undercover agents as voluntary waivers of their right to privacy and freedom from self-incrimination is surprising, if not incongruous, in light of the strict criteria by which the authenticity and voluntariness of a "waiver" is judged in recent Supreme Court cases dealing with the issue of waiver. *Cf.* Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. United States, 378 U.S. 478 (1964).

that case an acquaintance of Hoffa was instructed by police authorities to infiltrate the defendant's circle of associates, "hang around" the defendant's hotel room, and report back to government authorities any suspicious activities which he observed. Because he was a friend of the defendant, the agent initially gained entrance into the defendant's hotel room by invitation and was allowed to hear confidential conversations which took place between Hoffa and several other persons within the privacy of Hoffa's hotel room. When the agent's testimony resulted in Hoffa's conviction for jury tampering, it was contended on appeal[43] that the prior consent which defendant gave to the agent's presence in the room was vitiated by the agent's failure to disclose his identity as a government informer. By listening to the defendant's incriminating statements with the intention of relaying acquired information to police authorities, it was claimed that the agent had overstepped the purpose for which he had been invited to enter the room. Therefore, in essence, the defense claimed the agent had violated Hoffa's reasonable expectation of privacy and had conducted an unprivileged and illegal search of the premises, the fruits of which are inadmissible as evidence against the defendant by the Fourth Amendment. The Court dismissed this argument and affirmed the conviction[44] stating that the Fourth Amendment protects only

> the security [which] a man relies upon when he places himself or his property within a constitutionally protected area....[45] ...In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is

---

Certainly, the Court cannot maintain that a defendant or a dissident group makes a "knowing waiver" of its rights when the defendant or dissident group "voluntarily" divulges information to a person who is an undisclosed and unsuspected government agent.

One might argue, however, that the *Miranda* ruling was prompted by considerations unique to "in custody" interrogation procedure and, as such, the *Miranda* doctrine of waiver should not be extended to apply to infiltration cases. For example, *Miranda* was principally aimed at prohibiting physical coercion of legally unsophisticated indigent suspects within the secretive confines of the station house. Therefore, it might be contended that its doctrine should not be extended to protect the sophisticated criminal whose illegal activity can be detected in absolutely no other manner than through undercover surveillance.

On the other hand, deceit and fraud can be the implements of coercion as well as can physical force, and, therefore, the secretive nature of undercover activity warrants *Miranda* protection just as much as do the impenetrable confines of the station house. Furthermore, the rights delineated in the *Miranda* decision are based on the provisions in the Fourth and Fifth Amendments. The protection of the Constitution is not limited to merely indigent or legally unsophisticated citizens, but, rather, extends to every citizen of the United States—even the most criminally sophisticated racketeer—and, particularly, it extends to protect the member of a dissident group.

A disclosure of information which a dissident group is tricked into making to a clever infiltrator is no more a voluntary disclosure than is a confession which a suspect is coerced into making to a clever police interrogator. Therefore, employing the philosophy of *Miranda*, the information divulged to the agent should be inadmissible as evidence for the same reasons that the confession of a coerced suspect is inadmissible as evidence in a criminal proceeding.

[43] In addition to arguing on the grounds of Fourth Amendment provisions, Hoffa also contended that use of the agent's testimony as evidence was in violation of his Fifth and Sixth Amendment rights, and the constitutional guarantee of due process.

Hoffa contended that the use of the agent's testimony violated the Fifth Amendment protection against compulsory self-incrimination. In answer to this argument, the Court ruled that a necessary element of compulsory self-incrimination is some kind of compulsion, and, since Hoffa's conversations with and around the agent were wholly voluntary, no right protected by the Fifth Amendment had been violated.

Hoffa's allegation that his Sixth Amendment right to counsel had been violated was based on the agent's presence during certain confidential conversations which petitioner had with the attorney handling the trial in which Hoffa was convicted of jury tampering. Hoffa claimed the agent's presence violated the attorney-client privilege secured by the Sixth Amendment. On this point, the Court ruled that, even if Hoffa's right to counsel had been violated, that fact could only affect the validity of his conviction under the original charge in which his attorney was involved when the privilege was breached, but would not involve Hoffa's later conviction for jury tampering.

Lastly, Hoffa's contention that due process had been denied was based on the broad grounds that "the 'totality' of the Government's conduct... operated ... to offend those canons of decency and fairness which express the notions of justice...." The Court summarily dismissed this last contention, stating that the use of informers under certain circumstances had been justifiably countenanced by the courts from time immemorial, and that the Court chose not to rule the use of informers unconstitutional per se. By dismissing Hoffa's due process argument, the Court in this case chose, in fact, to overlook the dubious character of the government informer involved, and the consequent possibility that his testimony might be shaded or unreliable. 385 U.S. at 304, 305, 310–11.

[44] 385 U.S. at 300.

[45] As discussed *infra* at p. 188–90, such reliance on privacy must be objectively evidenced and, also, recognized by society as reasonable. In this case, the Court decided that the defendant's reliance on the faithfulness of his friend was not reasonable and therefore did not place the defendant within the scope of Fourth Amendment protection.

involved.... [T]he petitioner, in a word, was not relying on the security of the hotel room; he was relying upon [the] misplaced confidence [that his friend] would not reveal his wrong-doing.[46]

The Court concluded that no right protected by the Fourth Amendment was violated by the use in this case of agent's testimony as evidence.[47] The Court, however, failed to consider that Hoffa's willingness to talk freely might not have been merely a consequence of his "misplaced confidence" in his friend; rather, his willingness to talk freely might have been a consequence of his reasonable assumption that the government would not attempt to spy on him in the privacy of his hotel room.[48] Therefore, even though the Court was ready to hold that the risk that a friend might deceive him was not an unreasonable burden to impose upon the defendant, it does not follow that, in light of sophisticated undercover techniques now employed by law enforcement agencies, the average citizen of a free society should be asked to assume the risk that his government will spy on him and use his friends to infiltrate and survey his most confidential dealings conducted within the relied upon privacy of closed quarters. Similarly, dissident groups which demonstrate an objective and reasonable reliance on the security of their group alliance should not be compelled to bear the risk that trusted group members may in fact be police agents.

Precedent for determining the status of undercover infiltration and surveillance under the Fourth Amendment might be found in recent decisions dealing with wiretapping. In *Katz v. United States*,[49] the Court ruled that eavesdropping on conversations without a warrant by means of an electronic device is a violation of privacy upon which a citizen justifiably relies and is an unreasonable search and seizure forbidden by the Fourth Amendment.[50] Consequently, the information so acquired was deemed inadmissible as evidence in a criminal proceeding.[51]

[46] 385 U.S. at 301–02.

[47] 385 U.S. at 303.

[48] Comment, *Judicial Control of Secret Agents*, 76 YALE L. J. 994, 1012 (1967).

[49] 389 U.S. 347 (1967).

[50] [T]he premise that property interests control the right of the government to search and seize has been discredited.... [T]he Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures.... [T]he reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

Id. at 353. *See generally* comment, *supra* note 9.

[51] 389 U.S. at 359.

A close parallel can be drawn between wiretapping and undercover surveillance because many factors which prompted the strict control and limitation of wiretapping are also inherent in the practice of undercover surveillance. Both methods of investigation are covert in nature and serve the purpose of acquiring information used by the police which cannot readily be acquired by alternate means. While the strict control of wiretapping is based upon a general reluctance to leave the scope of such tactics purely to the discretion of the police,[52] the use of police infiltration of dissident groups is presently subject to no control other than that of police discretion. The secretive nature of both undercover surveillance and wiretapping activity affords ample opportunity for conduct in violation of that personal security protected generally by the Fourth Amendment. Most important, both wiretapping and undercover surveillance invade aspects of privacy related to the spoken word: the privacy of a confidential conversation is violated by an electronic eavesdropping device in the next room just as much as by a human eavesdropper in the very area in which the conversation occurs. The only distinction between the two types of investigation is that one is accomplished by means of a sophisticated electronic device, while the other is accomplished by means of human ingenuity and infiltration skill. The Court's concern that the citizen of a free society should not be subjected to the unrestricted threat of sophisticated electronic eavesdropping apparatus suggests that the citizen also should not be subject to the unrestricted threat of sophisticated infiltration and surveillance techniques presently employed by police. The frequency with which police employ

[52] It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. ... This rule rests on the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed on such activities.

Trupiano v. United States, 334 U.S. 699, 705 (1948). ... [T]he right to search and seizure should not be left to the mere discretion of the police, but should, as a matter of principle, be subjected to the requirement of previous judicial sanction wherever possible.

Id. at 709–10. If police were given absolute discretionary control over the scope of wiretapping and search and seizure investigation, it was predicted that police incentive to acquire information might frequently override their reluctance to invade areas protected by the Fourth Amendment.

undercover infiltration as a means of investigation[53] indicates that the magnitude of the threat to privacy represented by this means of investigation is no less than that threat to privacy which prompted the Court's ruling on wiretapping.[54]

If one accepts the analogy suggested by the similar function and motivation common to such investigative techniques as wiretapping and undercover surveillance, it follows that both such investigative techniques should be subject to the sanctions of the Fourth Amendment.[55] Case law provides extensive guidelines limiting the use of investigative search and seizure or wiretrapping to circumstances where a search warrant has been issued upon a proper showing of probable cause to believe a crime has been or is being committed.[56] In light of the correlation between undercover surveillance and such investigative tactics as wiretapping, it is reasonable to assert that the use of undercover surveillance and infiltration should also be subject to the showing of sufficient probable cause to merit issuance of a search warrant.

Right to Privacy

The Supreme Court has interpreted provisions within the Bill of Rights to include a constitutionally protected right to privacy.[57] Although *Griswold v. Connecticut*,[58] the major decision asserting a right to privacy, centers around a factual situation far removed from that of undercover surveillance, the principles underlying that case are broad enough to encompass the practice of dissident group infiltration. In *Griswold* a majority of the Court declared that a right to maintain confidential relationships falls within the penumbra of the Bill of Rights.[59] This right to private associations might be deemed violated when police use the trust relation of a citizen's friendship in order to monitor that citizen's words and activities.

It is suggested however that, if such a right to maintain confidential relationships is to be recognized, it should be qualified to a certain extent. Specifically, any person or group asserting such a

[53] *Cf.* N. Y. Times, Feb. 26, 1970, at 35 col., 1 (city ed.).

[54] [The framers of the Constitution] conferred, as against the government, the right to be left alone.... To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Olmstead v. United States, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting).

[55] One might also contend that the principles underlying the Court's recent decisions placing limits on police interrogative practices should be applied also to police infiltration practices. *Cf.* 384 U.S. 436 (1966) and 378 U.S. 478 (1964). *See generally* Comment, *supra* note 44.

[56] The exclusionary rule is so applied in Katz v. United States, 389 U.S. at 357. Even though the police in *Katz* had probable cause to believe that the defendant's telephone was being used to conduct illegal betting, and even though the police restricted the electronic surveillance strictly to defendant's conversations only, the evidence so obtained was deemed inadmissible because the police had failed to obtain judicial authorization for the tapping. The Court emphasized that

... the mandate of the [Fourth] Amendment requires adherence to judicial processes ... and ... searches conducted outside the judicial process ... are *per se* unreasonable under the Fourth Amendment....

Id. at 357; *accord*, Silverman v. United States, 365 U.S. 505 (1961).

[57] Various [Constitutional] guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

... The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness .... They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred as against the Government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized man.

Id. at 494 (Goldberg, J., concurring).

Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. at 462; 372 U.S. at 544. *See also* Stanley V. Georgia, 394 U.S. 557 (1969).

[58] 381 U.S. 479 (1965).

[59] The majority decision in *Griswold* was split upon the issue of whether the scope of rights protected by the Fourteenth Amendment should include not only rights explicitly guaranteed to the people in the Bill of Rights but also those rights which are inferred to fall within the "penumbra" of constitutional protection. Nevertheless, the majority did agree that the right to privacy was within the scope of rights generally guaranteed by the Constitution. Justice Black and Justice Stewart dissented from the majority.

right should be required to show evidence of an actual expectation of privacy,[60] and, furthermore, the expectation of privacy must be one which society is prepared to recognize as reasonable.[61]

For example, in judging whether the First Amendment protects the privacy of a dissident group's activities, a court should consider whether the activity was held in closed sessions or in sessions open to the public (though not necessarily open to police officers). A meeting held in closed session would demonstrate an actual expectation of privacy, while a meeting held in open session might not. A court should also examine the extensiveness of the group's efforts to security screen its members and restrict its membership. The more elaborate a screening procedure the group employs, the more reasonable is the group's expectation of privacy.[62]

Because the right to privacy falls within the scope of the Bill of Rights' protection, it is subject to yet a third qualification; the Constitution prohibits only violations of citizens' privacy by state or federal officials.[63] Therefore, while police infiltration might qualify as an unconstitutional violation of an individual's right to privacy, the commonplace situation where police receive information from a conscientious citizen or a self-appointed informer does not constitute a violation of the right to privacy as it is protected in the Bill of Rights.[64]

[60] For example, divulging a secret to a supposed friend within the confines of a hotel room would constitute an exhibition of an actual expectation of privacy.

[61] 389 U.S. at 361 (Harlan, J., concurring).

[62] Using these suggested criteria, an open dissident group does not demonstrate an actual and reasonable expectation of privacy, and, therefore, does not qualify for the Bill of Rights' protection of that privacy. On the other hand, the closed group's justifiable reliance on security measures and membership screening does demonstrate an actual and reasonable expectation of privacy. Therefore, if the privacy of closed dissident groups is protected by the Bill of Rights, violation of that privacy by police infiltrators constitutes illegal activity by the state.

[63] One who invites or admits an old "friend" takes, I think, the risk that the "friend" will . . . disclose confidences or that the Government will wheedle them out of him. The case for me is different when the government plays the 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 part of our choicest tradition. . . . In the one case, the Government has merely been the willing recipient of information supplied by a fickle friend. In the other, the Government has actively encouraged and participated in a breach of privacy by sending in an undercover agent. 385 U.S. at 347 (Douglas, J., dissenting).

[64] Therefore, under the First and Fourteenth Amendments, law enforcement officials are not prohibited from passively availing themselves of private sources of information but are prohibited from conduct which constitutes active instigation of surveillance or planting of informants.

> Neither the ordinary citizen nor the confessed criminal should be discouraged from reporting what he knows to the authorities and from lending his aid to secure evidence of crime.

377 U.S. at 212 (White, J., dissenting).

Remedies

Cases arising under the First and Fourth Amendment commonly question the constitutionality of the application of a statute or other regulative governmental action to individual citizens[65] or members of a group.[66] The courts seek to determine if a statute or state action deprives the party in question of a constitutional right protected by these amendments. Before a group has standing to challenge the legality of undercover tactics under the First, Fourth, and Fourteenth Amendments, it must first establish that such police observation does in fact deprive its members of rights within the scope of constitutional protection.

If police infiltration and surveillance of dissident groups does infringe upon the group's freedom of speech and right to associational privacy, there are several federal remedies available. These remedies are found in the enforcement acts passed to implement the Civil War Amendments, particularly the Fourteenth.[67] Section 241,[68]

[65] *E.g.*, Feiner v. New York, 340 U.S. 315 (1951) (conviction for disorderly conduct); Whitney v. California, 274 U.S. 357 (1927) (conviction under the California Criminal Syndicalism Act); Gitlow v. New York, 268 U.S. 652 (1925) (conviction under a New York criminal anarchy statute); Schenk v. United States, 249 U.S. 47 (1919) (violation of the 1917 Espionage Act).

[66] *E.g.*, Cox v. Louisiana, 379 U.S. 536 (1965) (conviction for criminal conspiracy, disturbing the peace, obstructing public passages, and picketing before a courthouse); Scales v. United States, 367 U.S. 203 (1961) (violation of the membership clause of the Smith Act); Yates v. United States, 354 U.S. 298 (1957) (violation of the Smith Act); Dennis v. United States, 341 U.S. 494 (1951) (violation of the conspiracy provisions of the Smith Act).

[67] *See generally* R. Carr, Federal Protection of Civil Rights (1947); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952); and Putzel, *Federal Civil Rights Enforcement: A Current Appraisal*, 99 U. Pa. L. Rev. 439 (1951).

[68] 18 U.S.C. § 241 (1964). This section originated in the Enforcement Act of May 31, 1870, Section 6, and appeared in the Criminal Code of 1909 as Section 19.

"Conspiracy against Rights of Citizens," provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same... they shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

Two questions immediately arise as to the application of this section. First, do the terms of the statute apply to a conspiracy among state officers; and, second, what rights are "secured by the Constitution or laws of the United States." Section 19 of the Criminal Code of 1909, predecessor of the present Section 241, was first used for a prosecution of county election board officers in 1915, in *United States v. Mosley*.[69] The Supreme Court held that an indictment which charged two members of a state election board with failing to count ballots in a federal election was valid. Although this was the first time this section had been applied to state officers, Justice Holmes, writing the opinion, made no effort to justify the application. Rather, the opinion focuses on the right to have one's ballots counted fairly in a federal election as a right within the section's coverage. It was not until 1966 in *United States v. Price*[70] that the Supreme Court clearly determined that Section 241 applied to public officials. The Court in *Price* stated that Section 241 must be read to include the rights and privileges protected by the Fourteenth Amendment,[71] and, therefore, Section 241 could be invoked against state police officers.

A second possible sanction against police infringement of constitutional rights is found in Section 242 of Title 18.[72] This section provides that:

> Whoever under the color of law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States... shall be fined not more than $1000 or imprisoned not more than one year, or both....

Several differences between Section 241 and 242 are notable. Although Section 241 applies to conspiracies between "two or more persons", Section 242 covers the conduct of individuals acting "under color of law". Moreover, Section 241 requires only that persons "conspire to injure", but Section 242 requires that the alleged violator actually subject a person to certain deprivations. Finally, Section 241 covers "citizens", whereas Section 242 protects "inhabitants of any State, Territory or District".

With regard to the requirement that the activity sanctioned by Section 242 be "under color of law," the Court has held it immaterial whether or not the accused is an officer of the state. Rather, the defendant acts "under color of law" if he is a willful participant in joint activity with the state or with its agents.[73] Therefore, state officials can be indicted under Section 242 just as under Section 241.

A common problem in invoking either Section 241 or 242 is that of determining when the deprivation of a Constitutional right has been willful.[74] The Court construes "willful" to mean the intent to deprive a person of rights made specific by the express terms of the Constitution.[75]

In the 1926 Code it was changed to Section 51. The 1948 revision established this section as 241. In 1968, Congress increased the fine and imprisonment penalties.

[69] 238 U.S. 383 (1915).

[70] 383 U.S. 787 (1966).

[71] We cannot doubt that the purpose and effect of §241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth, and Fifteenth Amendments, and not merely under part of it.
Id. at 805.

[72] 18 U.S.C. § 242 (1964).

[73] 383 U.S. at 794 (numerous defendants, including both police officials and private citizens, convicted under § 242 for killing an arrested man after releasing him from jail); Screws v. United States, 325 U.S. 91 (1945) (police officer is convicted under § 242 for beating a convicted man to death).

[74] Although § 241 does not specifically use the term "willful," this requirement is implied by the essence of the offense it sanctions, i.e., the nature of conspiracy implies the intent on the part of the conspirators to commit the offense.

[75] 325 U.S. at 104. Note that the Court in *Screws* places the responsibility on courts, as well as on legislatures, to interpret the Constitution so as to effectively define to the general populace the scope of their constitutional rights, as well as the standards by which the seriousness of any infringement on those rights is to be judged. This duty of the courts was re-asserted in Bowens v. Knazze, 237 F. Supp. 826, 829 (N.D. Ill.

Although Section 241 and Section 242 theoretically provide significant protection for dissident groups subjected to indiscriminate use of undercover surveillance by police officials, a consideration of the practical application of Section 241 and Section 242 indicates otherwise. Section 241 and Section 242 are both criminal statutes which require law enforcement agencies to prosecute their own members who engage in unlawful surveillance. It is doubtful that these laws will be enforced with sufficient zeal to protect the rights of dissident groups. Furthermore, Section 241 and Section 242 do not provide a means for dissident groups to prevent surveillance before it has actually occurred. Even if Sections 241 and 242 could in fact be enforced against police officers they provide only a means of discouraging the practice of indiscriminate and unjustified surveillance after the fact.

Under the Civil Rights Act dissident group members also have civil remedies against violators of their constitutional rights. Section 1983 of Title 42[76] provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The language of this section affords an action against appropriate defendants for damages, injunction, or other equitable relief from deprivation of rights secured by the Constitution or federal laws. Unlike Section 241 and Section 242, Section 1983 can be used to obtain injunctive relief before actual police surveillance is initiated, providing a dissident group can demonstrate that the threat of surveillance has an inhibitory effect on the exercise of its Constitutional rights.

In *Monroe v. Pape*,[77] a case where plaintiff sued thirteen police officers for damages arising from an alleged illegal search, arrest, and detention, the Court applied the same meaning to the phrase "under color of law" as they had for 18 U.S.C. Section 242, and held that police officers could be sued under Section 1983. Furthermore, *Monroe* established that it was not necessary to allege that the defendant acted with the specific purpose and intent of depriving the plaintiff of one of his federal civil rights; rather, it is sufficient if the plaintiff shows that defendant knew or as a reasonable man should have known that his action would deprive plaintiff of a civil right.[78]

According to the Court in *Bowens v. Knazze*,[79] a suit involving action under Section 1983 to recover damages for an illegal search of the plaintiff by an officer of the Chicago Police Department, the applicability of Section 1983 to the facts of a case must be determined

> with reference to the standards of constitutional protection current at the time that the defendant acted. . . , [and] [s]o long as the defendant's conduct stems from his reasonable belief as to the requirements of the law and is not unreasonable in any other way, he cannot be held responsible—under the [reasonable man] standard of liability set forth in *Monroe v. Pape*—for the deprivation of plaintiff's rights.[80]

In a suit brought by members of a dissident group against police infiltrators under Section 1983, the defendants, as members of law enforcement agencies, should be chargeable with a high degree of knowledge regarding the "standard of constitutional protection current at the time". A law enforcement agency can be held liable for any damages arising from its failure to conform its conduct to that standard.[81]

1965), when the court stated, "The measure of a citizen's constitutional rights is not left to the community at large; it is determined by the courts."

[76] 42 U.S.C. §1983 (1964). This section stems from Section 1 of the Enforcement Act of April 20, 1871, and is the civil counterpart of Section 242 of the Criminal Code. Unlike Section 242, however, it is limited to acts done under color of laws of "any State or Territory," and does not apply to acts done under color of federal law.

[77] 365 U.S. 167 (1961). *See also* Downie v. Powers, 193 F.2d 760 (10th Cir. 1951); Robeson v. Fanelli, 94 F. Supp. 62 (S.D.N.Y. 1950).

[78] 237 F. Supp. at 826.

> The Civil Rights Act created a new type of tort: the invasion, under color of law, of a citizen's constitutional rights. The test of tortious conduct in an ordinary tort case is, as a general rule, whether at the time of the incident the defendant was negligent, whether he failed to act as a reasonably prudent man.

Id. at 828.

[79] 237 F.Supp. 826 (N.D. Ill. 1965).

[80] *Id.* at 829.

[81] The court in *Bowens* makes clear the importance of

The possibility of collecting damages for the tortious invasion of constitutional rights is of little practical use to an infiltrated dissident group since the group would have great difficulty proving monetary damages resulting from surveillance. Moreover, a tort recovery would become available to the group only after they had in fact already suffered surveillance. However, an injunctive remedy is also available under Section 1983. Unlike the previous remedies discussed, an injunction under Section 1983 would not operate to merely punish police misconduct after the fact, but, rather, it could be used to prevent surveillance, or, at least, to prevent the continuance or recurrence of surveillance which is shown to violate the plaintiff's civil rights.

Local 309, U.F.W. v. Gates[82] demonstrates the possible use of the injunctive relief available under Section 1983 to protect dissident groups from unwanted police surveillance. In *Gates*, union members succeeded in enjoining uniformed members of the police department from attending union meetings on the grounds that the presence of the police invaded the members' rights of speech and assembly. Even though the police did not actively interfere with the meetings, it was found that the known presence of police officers effectively restrained union members from freely discussing union affairs. The court's approach in *Gates* is particularly interesting because the court chose to treat the issues of police surveillance in the same manner as legislative inquiry was treated in *Sweezy* and *Gibson*. Although there had been violence during a recent union strike and although some of the union members had criminal records, the court found that police failed to show a sufficiently clear public interest to justify such inhibitory surveillance. The group's activities did not present a clear and present danger to the public interest.

The court in *Gates* considered the relevant questions of fact to be: (1) whether the assembly being surveyed is lawful, (2) whether the group's meeting presents a clear and present danger to a public interest, and (3) whether police surveillance restrains or interferes with the assembly in any manner. If a dissident group can demonstrate all three questions answerable in its favor, relief under the injunction provision of Section 1983 should be available. Furthermore, theoretically a group need not wait until actual inhibitory surveillance has occurred before asking for an injunction against such surveillance, since a group can claim that the very threat of imminent and probable secret surveillance, in itself, inhibits the group's exercise of free speech, assembly and association.[83]

Conclusion

> Insofar as the [courts] are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice. . . .[84]

In recent decisions, the judiciary has repeatedly "set its face against enforcement of the law by lawless means." Cases which limit the scope of legislative inquiry, search and seizure, and wiretapping represent just such exercises of the judicial conscience. Courts have permitted subordination of the rights of free speech and association only upon an exacted demonstration by the state of a compelling public interest to be served by such a restriction.

In cited cases dealing with legislative inquiry, courts have endorsed the assertion that unre-

---

adequate delineation by the judiciary of "standards of constitutional protection" when it says:

> If that standard has not yet been enunciated by a court in a manner which makes its application to the incident at hand clear [to the police officer], the potential defendant cannot be expected to conform his conduct to . . . [that standard].

Id.

[82] 75 F.Supp. 620 (N.D. Ind. 1948).

[83] This right to speak freely and to assemble peaceably for any lawful purpose without interference by either state or federal government officials ordinarily is thought of in connection with speaking and assembling in a public forum. However, there is nothing in the Constitution or in the cases decided under the First Amendment which limit these rights to such circumstances. The freedom and liberty to express ourselves privately and to hold private assemblies for lawful purposes and in a lawful manner without governmental interference or hindrance is protected as much by the First Amendment as the right to do so publicly. Limitation in this regard would be such a serious encroachment upon our liberties and freedoms as to render the pre-eminent rights guaranteed by the First Amendment nugatory in large areas of legitimate action.

Id. at 624.

[84] 318 U.S. 332, 341 (1943); Sherman v. United States, 356 U.S. 369, 380 (1958).

stricted disclosure of associational privacies and membership lists imposes a chilling effect upon the exercise of members' First Amendment rights. When sufficient nexus between state interest and the investigated group is not demonstrable, cases such as *Gibson*[85] establish the immunity of associational privacy from state interests as compelling as the threat of Communist subversion. In cases restricting the use of search and seizure, the courts consistently require a showing of probable cause to suspect criminal activity before evidence obtained by means of search and seizure is admissible in criminal proceedings. Furthermore, any search and seizure unsupported by such probable cause is an infringement of the Fourth Amendment right to personal security. The safeguards of the Bill of Rights and such recent rulings reflect the judicial sentiment that control over the range of investigative license is best elevated from the level of police discretion to that of considered judicial review.

The courts should not be willing to permit the state to employ techniques of stealth and deception to obtain information which it is prohibited from obtaining by means of unrestricted wiretapping, legislative inquiry, or search and seizure. The state's license to secretly survey and eavesdrop should be subject to more than only the unfettered discretion of police officials. The courts appear to take a position which is not only inconsistent with the rationale behind their restriction of other means of investigation, such as electronic eavesdropping, but also unresponsive to the threat which indiscriminate police surveillance of dissident groups presents to a free society. A system in which dissident groups must fear surveillance does not encourage the free interchange of ideas essential to a democracy.[86]

Statutory tools for a conscientious judicial response to the threat of surveillance are available. Section 1983 of Title 42 should be of particular use, since it represents a theoretically workable means of enjoining threatened and imminent surveillance prior to its actual occurrence. Section 241 and Section 242 of the Civil Rights Act constitute adequate framework for providing relief to groups whose activities have already been subjected to unprivileged surveillance.

The efficacy of statutory relief depends on the degree of implementation which the courts grant to the statutes involved. Judicial conscience is of extreme importance. In the last analysis, however, the free exercise of speech and assembly will only be ensured when governmental agencies decide to restrict this type of investigation to those situations clearly non-political in nature, involving a compelling danger to community security.

[85] 372 U.S. 539 (1963).

[86] [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.... That, at any rate, is the theory of our Constitution.
Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting).

The freedom of speech and association advocated in this article is largely private in nature. Yet the importance of this type of freedom in the dissident group situation is significant. These private meetings often discuss the most effective manner in which to present the group's views to the public, and a chilling effect in these circumstances has an ultimate effect on the public presentation of the group's ideas.