

## ARTICLES

### INFORMANTS AND THE FOURTH AMENDMENT: A RECONSIDERATION

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In many ways, Decatur, Illinois, is a typical Midwestern community. With a population of 84,000, Decatur is located in central Illinois amid corn and soybean fields. In one respect, however, Decatur is not like most American towns; it is the home of Archer-Daniels-Midland ("Archer-Daniels"), one of the world's largest agricultural companies.<sup>1</sup> On July 10, 1995, both Archer-Daniels and the citizens of Decatur learned that a high-flying company executive, Mark E. Whitacre, had acted as an undercover spy for the Federal Bureau of Investigation ("FBI") and provided the FBI with valuable information about alleged price-fixing by executives of Archer-Daniels and other grain processors.<sup>2</sup>

The FBI initially asked Whitacre to tape conversations that occurred at company headquarters. To do this, Whitacre wore a small recorder placed inside his coat pocket.<sup>3</sup> The FBI later gave its informant a high-tech briefcase allowing Whitacre to record dialogues wherever he went. As an informant for the FBI, Whitacre obtained "secret tape recordings, including videotapes, of hundreds of conversations and meetings in hotel rooms in the U.S. and abroad with employees of other agribusiness concerns. The sessions occurred over several years and in such locations as Tokyo, Hawaii, and Los Angeles. . . ."<sup>4</sup> Whitacre also alerted federal agents about "certain meetings,

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1. Archer-Daniels-Midland is often described as "the nation's largest processor of agricultural commodities, a lean, swift, efficient enterprise. Revenues at this self-described 'supermarket to the world' have increased from \$7.9 billion to \$11.4 billion in the past five years as the company has expanded into new products and new regions." Ronald Henkoff, *So Who Is This Mark Whitacre, and Why Is He Saying These Things About ADM?*, FORTUNE, Sept. 4, 1995, at 64, 66.

2. *Id.* at 66-68.

3. Mark Whitacre, *My Life as a Corporate Mole for the FBI*, FORTUNE, Sept. 4, 1995, at 52, 60 (as told to Ronald Henkoff).

4. Scott Kilman et al., *An Executive Becomes Informant for the FBI, Stunning Giant ADM*,

which helped the government make arrangements to monitor conversations dealing with the pricing of some products made by Archer-Daniels."<sup>5</sup> Whitacre's double identity was exposed when several FBI agents, "armed with subpoenas" and search warrants, appeared at the homes and offices of Archer-Daniels executives.<sup>6</sup> Federal agents played for the curious company executives some of the tapes that Whitacre had recorded.<sup>7</sup>

While federal investigators are doubtlessly pleased with the assistance that Whitacre provided, some citizens of Decatur have taken a less benign view of his conduct. The Reverend Randy DeJaynes, pastor of Christ Lutheran Church, explained the reactions of people in his congregation this way:

The biggest feeling here right now is a sense of being violated. It's as though I became a good friend of your family, came over to your house all the time, then started rifling through your drawers. . . . It's not an intruder, though. It's someone who's trusted—by a company and by an entire community.<sup>8</sup>

One member of Reverend DeJaynes's church, frightened by the notion of a federal spy in the community, condemned the federal government for fostering such activities: "They're about as underhanded as anybody."<sup>9</sup> It seems that many in Decatur "would rather judge Mr. Whitacre a rat than contemplate that the company might be a price-fixer."<sup>10</sup>

This adverse reaction to the FBI's use of an informant to gather evidence of possible criminal activity by Archer-Daniels and other agribusinesses is both surprising and understandable. On the one hand, it is startling that law-abiding people would criticize the government for investigating allegations that multi-national corporations were colluding to fix prices on products that serve as staples for much of the world's diet. Few people would want the government to ignore such allegations. Moreover, without the assistance of Whitacre and his agreement to become an informant, investigators would have encountered numerous obstacles to obtaining the information that would shed light on whether criminal conduct had actually occurred. In fact, some information might never have been available but for Whitacre's secret

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WALL ST. J., July 10, 1995, at A1.

5. *Id.*

6. *Id.*

7. *Id.*

8. Carl Quintanilla & Anna D. Wilde, *You Dirty Rat, Says Decatur, Ill., of Mole at Archer-Daniels*, WALL ST. J., July 13, 1995, at A1.

9. *Id.*

10. *Id.*

surveillance.<sup>11</sup>

On the other hand, some Americans treasure their freedom and resist unsolicited government intrusion into their lives. Security and privacy interests are jeopardized when individuals learn that the government has recruited and planted informants into their lives to gather information. When we discover that the colleague, the neighbor, or the business partner is not what he appears to be, but instead is a covert police agent, our distrust of government is exacerbated. While many might concede that informants and spies are essential for effective law enforcement, few cherish the thought that a co-worker or girlfriend may actually be a police spy. In other words, covert operations are fine, but "not in my backyard" is a common view.<sup>12</sup>

When these strong and sometimes conflicting attitudes toward covert surveillance by government informants are combined with the well-documented history of government abuse, both at the federal and state levels, in spying on its citizens,<sup>13</sup> Americans may be surprised to learn that the Supreme Court has interpreted the Constitution to impose few, if any, restraints on the government's authority to plant or send covert informants and spies into our lives. The Court reads the Fourth Amendment's guarantee against unreasonable governmental searches and seizures<sup>14</sup> to place no

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11. See generally GARY S. KATZMANN, *INSIDE THE CRIMINAL PROCESS* 1-41 (1991) (noting the importance of informants and undercover operations to the ABSCAM investigation of former Sen. Harrison Williams). Based on the information provided by Whitacre, several parties sued Archer-Daniels for price-fixing. On July 19, 1996, a federal judge approved a \$45 million settlement claim against the company and its competitors. *Judge Clears Accord on Class-Action Suit Against Archer Daniels*, N.Y. TIMES, July 20, 1996, at 40. A criminal investigation of Archer-Daniels and its executives is ongoing.

12. The dubious character of some police informants is a dilemma that often confronts prosecutors and law enforcement officials. The government, however, is often forced to deal with individuals it would rather avoid. The due process and ethical concerns inherent in the government's use of crooked or questionable informants are beyond the scope of this Article. Also, I do not discuss situations where undercover informants are compelled to commit crimes to sustain their covert status.

Nor does this Article confront the question of whether private persons who act in response to government encouragement or incentives offered to the public at large are state actors under the Fourth Amendment. The informants and secret spies involved in all of the cases discussed in this Article are clearly state actors. But for the secret nature of their activities their conduct would ordinarily be subject to Fourth Amendment restraints.

13. See generally WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* (1990); FRANK J. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM* (1980); CURT GENTRY, *J. EDGAR HOOVER: THE MAN AND THE SECRETS* (1991); GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* (1988); KENNETH O'REILLY, "RACIAL MATTERS": *THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972* (1989); ANTHONY SUMMERS, *OFFICIAL AND CONFIDENTIAL: THE SECRET LIFE OF J. EDGAR HOOVER* (1993).

14. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against

limitations on the government's power to send informants to infiltrate our homes, businesses, religious organizations, or social groups.<sup>15</sup>

What is the upshot of this constitutional norm? It means secret police agents may surreptitiously gain entrance to any home or office and gather information, even though the government lacks reasonable grounds for believing that a crime has occurred. With no evidence of criminality, the government can videotape or audiotape actions and conversations that occur in the presence of covert spies.<sup>16</sup> When the federal government insists that the

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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.

15. The authority of the government to infiltrate is not diminished by the fact that the target of its spying is exercising First Amendment rights of free speech or religious freedom. *See United States v. Aguilar*, 883 F.2d 662, 699-705 (9th Cir. 1989) (permitting undercover agents to infiltrate an organization engaging in protected First Amendment activities due to the strong governmental interest in law enforcement). For a detailed discussion of the FBI's use of a secret informant and other intrusive surveillance methods to spy on the innocent political activities of American citizens, see DIARMAID JEFFREYS, *THE BUREAU: INSIDE THE MODERN FBI* 238-73 (1995) (detailing the FBI's investigation of the Committee in Support of the People of El Salvador). *See also* Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 *BUFF. L. REV.* 333 (1984); Michael F. McCarthy, Note, *Expanded Fourth Amendment Coverage: Protection from Government Infiltration of Churches*, 3 *GEO. IMMIGR. L.J.* 163 (1989).

16. The Supreme Court has not, however, addressed the issue of whether police officials have the same discretion to "wire" a criminal suspect's hotel room or other private residence as they do to "wire" a suspect's colleagues or friends.

For example, imagine that federal law enforcement agents know that a drug suspect plans to stay at a hotel in Puerto Rico. Before his arrival, the agents, without a warrant, place secret listening devices inside the suspect's hotel room. After the suspect's arrival, the agents record *only* those conversations between the suspect and covert informants regarding illegal drug transactions.

Or, imagine that a suspect asks a colleague who is actually a police informant to reserve a motel room for him. With the informant's knowledge and consent, police then, again without a warrant, install a hidden listening device in the room. As in the case above, the police only activate the surveillance equipment when both the suspect and informant are together in the room.

The lower courts are divided over the constitutional validity of these types of police surveillance. Regarding the second example, a majority of the lower courts have said that the police surveillance does not implicate the Fourth Amendment. *See, e.g., United States v. Yonn*, 702 F.2d 1341, 1346-47 (11th Cir.) (rejecting the defendant's argument that a recording device concealed in his room is constitutionally distinguishable from a recording device secretly worn on the body of the informant, because the location of the recording device does not change the conclusion that his conversation with the informant lacked constitutional protection), *cert. denied sub nom.*, *Weeks v. United States*, 464 U.S. 917 (1983). Indeed, one court has extended this reasoning to permit warrantless undercover video recordings as well. *See United States v. Laetividal-Gonzalez*, 939 F.2d 1455, 1460-61 (11th Cir. 1991), *cert. denied sub nom.*, *Ocampo v. United States*, 503 U.S. 912 (1992).

Regarding the first example, one federal court has ruled that this form of police surveillance does violate the Fourth Amendment. *See United States v. Padilla*, 520 F.2d 526, 527-28 (1st Cir. 1975) (rejecting the government's position that installation of a secret recording device in a hotel is no different from a device carried on an informant's person and noting that under the government's

target of its concern or curiosity may be connected with a foreign power, even greater intrusion is allowed.<sup>17</sup> This situation might trouble individuals who value their freedom.<sup>18</sup>

This Article argues that the Court's current interpretation of the Fourth Amendment, which sanctions the government's authority to insert secret spies and informants into our lives, is misguided. Part I highlights the historical background of the Fourth Amendment to show why its procedural safeguards are relevant when considering whether the government should be free of constitutional restraint when deploying informants and spies in our homes and offices. Part II will explain and critique the Court's cases on informants.

Part III contends that the Court's doctrine on informants rests on a

position, "a room—or an entire hotel—could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur"). For a review of the cases dealing with consensual video surveillance, see Kirsten M. Schimpff, *Consensual Video Surveillance: Has Someone Told Big Brother That He Can Watch You?* (unpublished student manuscript, on file with author).

17. In *United States v. United States Dist. Ct.*, 407 U.S. 297, 321-22 (1972), the Court left open the question of whether the President has the inherent authority to conduct warrantless wiretaps and other physical searches in cases involving foreign powers and their agents inside the United States. In response, Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1829 (1994)). But "[o]nly electronic surveillance was regulated under the new FISA law; physical searches of property in national security investigations still [could] be authorized either by the [P]resident or the [A]ttorney [G]eneral, with no requirement that a court authorize a warrant." JIM MCGEE & BRIAN DUFFY, *MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIBERTIES* 327 (1996); *id.* at 321 (describing the Attorney General's authorization of a search by FBI agents of the home of Aldrich Ames, a spy for the Soviet Union); *see also* Don Edwards, *Reordering the Priorities of the FBI in Light of the End of the Cold War*, 65 ST. JOHN'S L. REV. 59, 70 (1991) (pursuant to a Presidential Executive Order and foreign intelligence guidelines, the federal government conducts "surveillance of Americans not even suspected of breaking the law"). Another author has commented that:

[u]nlike other [FBI] squads in Dallas, [the foreign intelligence squad is] relatively unconstrained by rules and regulations in their use of wiretaps. They do not need a criminal predicate to monitor a telephone, only a "strong" suspicion that the target may be involved in intelligence gathering. They also, uniquely, have the ability to open a case on American citizens even if there is no evidence to suggest that they may have been involved in a crime—a loose connection with a national security investigation is enough. In other words, agents can eavesdrop on the private conversations of innocent people in the cause of some greater good.

JEFFREYS, *supra* note 15, at 205. In October 1994, Congress amended the FISA. *See* Pub. L. No. 103-359, 108 Stat. 3443 (codified at 50 U.S.C. §§ 1821-1829). Under the new law, "the President, acting through the Attorney General, may authorize physical searches without a court order . . . to acquire foreign intelligence information for periods of up to one year," provided the Attorney General satisfies specified certification and minimization requirements. 50 U.S.C. § 1822(a)(1) (1994). The new law also allows judges to authorize physical searches for foreign intelligence purposes. 50 U.S.C. § 1822(b) (1994).

18. One survey found that its respondents viewed certain forms of undercover police spying as comparable to the intrusion inherent in a police search of a car, yacht, or footlocker. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 738-40 (1993).

fallacious conception of privacy. As an alternative to the current approach, I argue that the government's authority to use informants and secret agents can and should be controlled by the Warrant Clause of the Fourth Amendment. Police operations involving the planting of informants in a home or the recording of private conversations should be subject to the same constitutional restraints that currently control governmental wiretapping and bugging. My conclusion that the procedural safeguards of the Warrant Clause should regulate the use of informants stems from the belief that the central meaning of the Fourth Amendment is distrust of police power. As the law exists today, the police can decide for themselves who will be targets of secret surveillance. Such untrammelled police power is at odds with the values that inspired the Fourth Amendment.

### I. HISTORY OF THE FOURTH AMENDMENT

The anxiety and distrust that many feel toward government spies parallel the text and history of the Fourth Amendment. When government informants are sent to gather information, their surveillance activities are directed toward the very object that the Amendment seeks to protect—the security and privacy individuals have “in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>19</sup> When the Fourth Amendment was adopted in 1791, the unreasonable searches and seizures that preoccupied Americans primarily involved forcible intrusions into homes by officials under the authority of general warrants and writs of assistance.<sup>20</sup> While much

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19. U.S. CONST. amend. IV.

20. See, e.g., William J. Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 372 (1980). The principles of the Fourth Amendment “arose from the harsh experience of householders having their doors hammered open by magistrates and writ-bearing agents of the crown. Indeed, the Fourth Amendment is explainable only by the history and memory of such abuse.” *Id.*

The history of the Fourth Amendment is richly detailed in several sources that have enlightened me. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937); JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772*, app. I (Russell & Russell 1969) (1865); M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969); Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Gerard V. Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 ST. LOUIS U. L.J. 1031 (1986); O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE*

has been written about the constitutional evil of general warrants and writs of assistance, the history of the Fourth Amendment transcends a singled-minded focus on them. As William Cuddihy explains, "The [Framers'] concern with warrants, in short, embraced a concern with houses, which encapsulated still deeper concerns. The [A]mendment's opposition to unreasonable intrusion, by warrant and without warrant, sprang from a popular opposition to the surveillance and divulgement that intrusion made possible."<sup>21</sup>

Why is this history relevant to informants and spies today? The history of the Amendment reflects a rejection of the unchecked and promiscuous intrusion that general warrants and other colonial laws authorized. Although early Americans were quite slow to embrace the proposition that general searches and seizures were illegal on their face, the language and spirit of the Fourth Amendment ultimately embody this view.<sup>22</sup> The collective history of the Amendment also reveals that the primary tools chosen by the Framers to combat what they considered to be "unreasonable searches and seizures" were procedural and substantive safeguards, many of which were delineated in the Warrant Clause.<sup>23</sup> If the surveillance activities of government informants constitute unchecked and promiscuous intrusions of our "persons, houses, papers and effects," then we should consider whether this conduct is consistent with the central values that have emerged from the historical

AMERICAN REVOLUTION 40-75 (Richard B. Morris ed., 1939); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); Morgan Cloud, *Searching Through History: Searching For History*, 63 U. CHI. L. REV. (forthcoming 1996) (reviewing Cuddihy, *supra*); Joseph R. Frese, *Writs of Assistance in the American Colonies 1660-1776* (Nov. 1951) (unpublished Ph.D. dissertation, Harvard University).

The historical discussion in this Article relies heavily on William Cuddihy's unprecedented scholarship on the history of the Fourth Amendment. See Cuddihy, *supra*. As Justice O'Connor recently acknowledged, Cuddihy's scholarship "is one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia Sch. Dist. 47J v. Action*, 115 S. Ct. 2386, 2398 (1995) (O'Connor, J., dissenting).

21. Cuddihy, *supra* note 20, at 1546.

22. See *id.* at 345.

Colonial Americans agreed with Englishmen that certain types of search and seizure were unreasonable but not that general warrants and equivalent warrantless procedures were among those types.

Americans continued to assume the legitimacy of general warrants, searches, and arrests for at least a hundred and twenty years after Englishmen had started to reject it . . . .

Only during the three decades that preceded the Fourth Amendment did Americans come around to the British view that the general warrant was an unreasonable category of search and seizure.

*Id.* at 345-46 (footnote omitted).

23. See *id.* at 1554-60.

development of the Fourth Amendment.<sup>24</sup>

British common law rules dominated colonial thought on search and seizure questions. In the late seventeenth century, however, English law did not discourage discretionary invasions by governmental officials.<sup>25</sup> Instead, it generally confined those intrusions within identified “social and occupational boundaries.”<sup>26</sup> Despite the well-worn adage that “a man’s home is his castle,” the homes of eighteenth-century English citizens were increasingly subject to discretionary searches for a variety of grounds.<sup>27</sup> Not surprisingly, British procedures were followed by colonial officials responsible for formulating search and seizure policies.<sup>28</sup> In fact, British officials often dictated what those policies would be. As a result, “[d]iscretionary searches were as

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24. [H]istory discloses that the chief vice the [F]ramers sought to prevent was suspicionless searches and seizures. The Supreme Court has considered the historical context to be a primary source for understanding the Amendment. Thus, in interpreting whether a search or seizure is reasonable, reference should be made to the meaning that the framers gave to the term.

Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 489-90 (1995) (footnote omitted); see also Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUND. RES. J. 1193, 1199, 1211 (noting that forcible entries into the home were the “paradigmatic Fourth Amendment search and seizure,” and advocating that definitions of the scope of the Amendment be “rooted in the paradigm” and “within historically meaningful bounds”); James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 191 (acknowledging the difficulties that lawyers have with examining history, yet urging that “some attempt should be made, for the authority of the Court and of its judgment begins in large measure with the connections it can draw with its own past”). *But cf.* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) (cautioning against placing too much reliance on the intention of the Framers when constructing Fourth Amendment rules for today’s world).

25. See generally LASSON, *supra* note 20; SMITH, *supra* note 20.

26. English law aimed less at abolishing discretionary intrusions than at confining them within certain social and occupational boundaries. Though coated with a veneer of restraints, the discretionary core of British laws of search remained starkly discernible. The lines along which relevant legislation was drawn reflected the hierarchical stratification of a “deferential society.” The freedom with which the government might penetrate a subject’s dwelling varied roughly in accord with his location on the social pyramid.

Cuddihy & Hardy, *supra* note 20, at 380 (footnote omitted).

27. *Id.* at 382. In the eighteenth century,

the vulnerability of Englishmen’s houses to the excise grew enormously. In the seventeenth century, chiefly the houses of persons vocationally connected with intoxicating beverages were subject to unwelcome, warrantless inspection by the exciseman. As the eighteenth century advanced, however, so did the number and range of excised commodities, until such diverse articles as salt, soap, paper, and glass were included. When an item became taxable under the excise, the houses of everyone whose occupation was concerned with it became subject to search.

*Id.* (footnote omitted).

28. *Id.* at 387.

common in the colonies as in the mother country."<sup>29</sup> What is surprising, however, is the time it took for the colonists to condemn the abuse associated with general searches. It was not until the 1760s that a concerted and sustained movement began in the colonies to resist discretionary and promiscuous searches and seizures.<sup>30</sup>

Prior to the 1760s, "most American commentators on search and seizure approved or ignored general warrants."<sup>31</sup> Although early Americans often objected to particular forms of government intrusion, there was no universal consensus that general warrants and discretionary searches were per se illegal. Long after British legal theorists and precedent had repudiated general warrants and promiscuous searches, much of colonial society continued to accept the legitimacy of these practices.<sup>32</sup> "The general warrant, or something resembling it, was the usual protocol of search and arrest everywhere in colonial America, excepting Massachusetts after 1756."<sup>33</sup> Particular searches and seizures did arouse colonial wrath, but such episodes "usually originated in violent crises that evoked outrage towards an extraordinary political event, not dispassionate evaluations of the ordinary legal process of search and seizure, promiscuous or otherwise."<sup>34</sup> As William Cuddihy describes it, "Colonial Americans championed privacy but ignored the general warrants eroding that privacy."<sup>35</sup> Massachusetts Bay Colony was the first colonial jurisdiction to repudiate the general warrant and "to substitute specific warrants for general ones as the orthodox method of search."<sup>36</sup> But the Bay Colony's move toward the specific warrant in the mid-1750s did not

29. *Id.*

30. Cuddihy, *supra* note 20, at 1002-181.

31. *Id.* at 344.

32. *Id.* at 345-46.

As late as 1760, . . . Americans were still articulating the same austere arguments on search and seizure that Englishmen had voiced nearly two centuries earlier, about 1580, when criticism of those processes had commenced. Since the colonists also enacted and used general warrants, the conclusion that they did not yet endorse the English arguments against them was inescapable.

*Id.* (footnotes omitted); see also LASSON, *supra* note 20, at 55-56 (noting that as late as 1756, objection to general warrants in Massachusetts Bay had not solidified among the citizenry).

33. Cuddihy, *supra* note 20, at 468.

34. *Id.* at 360; see George G. Wolkins, *Daniel Malcolm and Writs of Assistance*, 58 MASS. HIST. SOC'Y 5, 5-36 (Oct. 1924-June 1925) (describing Daniel Malcolm's and other Boston residents' resistance to customs officers' search of Malcolm's cellar).

35. Cuddihy, *supra* note 20, at 363. "[G]eneral warrants, the method of search and seizure that the framers of the [Fourth Amendment] regarded as most unreasonable, were as much American as British. Door-to-door searches and mass arrests characterized legislation in the colonies no less than in the mother country." *Id.* at 377.

36. *Id.* at 377-78.

immediately trigger similar reactions among her sister colonies. Even after victory over the British and the prohibition of general warrants in many state constitutions, discretionary intrusion by government officers remained the norm on American soil.<sup>37</sup>

Search and seizure procedures slowly started to change in the 1780s. The states began to take seriously their constitutional prohibitions against general searches. Indeed, during the early part of the decade, "American law carried development of the right [against unreasonable search and seizure] to new heights by enacting various concepts of unreasonable search and seizure that Englishmen had demanded but that English law had ignored. Although Britons had long advocated the specific warrant, Americans did more to actualize it in five years, 1782-87, than Britain had in a century."<sup>38</sup>

The newly emerging "Americanization" of the right against unreasonable search and seizure was not confined to rejection of the general warrant.<sup>39</sup> Other types of intrusion were also deemed unreasonable. For example, nocturnal searches were universally condemned; in the 1780s "American law rejected night time searches even more than general ones."<sup>40</sup> Unannounced entries were also denounced. Although the Supreme Court recently decided that the common-law "knock-and-announce" rule forms a part of the reasonableness requirement of the Fourth Amendment, early Americans long ago recognized the fundamental nature of the right to notification before forcible entry is permitted.<sup>41</sup>

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37. Cuddihy & Hardy, *supra* note 20, at 398-400.

38. Cuddihy, *supra* note 20, at 1357.

39. Opposition to general searches was not confined to the state level. "In the most widely publicized protests on the search process prior to the [A]mendment, the Continental Congress, in 1774, had unconditionally condemned promiscuous, warrantless searches by customs and excise officers." *Id.* at 1499-500 (footnote omitted).

40. *Id.* at 1510.

Perhaps the most dramatic divergence of the American law of search from the British pattern . . . was the American rejection of the nocturnal search. . . . [T]he Americans turned [the British rule] into an almost categorical extinction of official entry at night. Although an occasional wartime measure provided the contrary, the statutes of all the states except diminutive Delaware generally forbade searches at night on the dawn of the [A]mendment.

*Id.* at 1346 (footnotes omitted). Although the issue of nocturnal searches arose in *Gooding v. United States*, 416 U.S. 430 (1974), the Court chose to put off deciding whether such searches are unreasonable for constitutional purposes. *See id.* at 461-65 (Marshall, J., dissenting). Lower courts, on the other hand, have allowed nocturnal searches, despite the historical precedent against them. *See, e.g., State v. Seyferth*, 397 N.W.2d 666, 668 (Wis. Ct. App. 1986) (adopting the position that nocturnal searches are not unconstitutional *per se*).

41. In *Wilson v. Arkansas*, 115 S. Ct. 1914, 1918 (1995), the Court ruled that the knock-and-announce rule is part of the reasonableness inquiry of the Fourth Amendment when judging the validity of a police entry into a private home. For a helpful discussion of the common-law knock-and-

Another type of intrusion that became illegal in the 1780s was the multiple-specific warrant. During the Revolutionary War, many states employed multiple-specific warrants.<sup>42</sup> A multiple-specific warrant identified the target or object of a search or arrest, but allowed many persons or places to be subjected to governmental intrusion.<sup>43</sup> Coinciding with the move toward specific warrants, a number of states also limited search warrants to specific locations.<sup>44</sup> The text of the Fourth Amendment indicates that the Framers followed the lead of the states on this matter. The Warrant Clause requires particularity with respect to the “place”—as opposed to “places” or “locations”—to be searched.<sup>45</sup> Accordingly, a warrant could no longer authorize the search of multiple locations, which had occurred with multiple-specific warrants.<sup>46</sup> This change was no trivial matter. Under the common law, a multiple-specific warrant was a powerful tool for the government.<sup>47</sup> In the American colonies, for instance, the New Hampshire Council once authorized search warrants for “all houses, warehouses, and elsewhere in this Province,” and the Pennsylvania Council once required a weapons search of “every house in Philadelphia.”<sup>48</sup>

Therefore, when reviewing the history of the Fourth Amendment, it is imperative to consider its broad background. The general warrant and its

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announce rule and what role it should play in judging entries by the police in today's world, see G. Robert Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499 (1964); Note, *Announcement in Police Entries*, 80 YALE L.J. 139 (1970); Charles P. Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685 (1993); and Jennifer M. Goddard, Note, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights*, 75 B.U. L. REV. 449 (1995).

42. Cuddihy, *supra* note 20, at 1341-42.

43. *Id.* (“Several states had used multiple-specific warrants during the revolution to arrest persons by the dozen and to search houses for contraband.”) (footnote omitted).

44. *Id.* at 1341-44, 1494-98.

45. The Warrant Clause provides that “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 (emphasis added).

46. Although the Warrant Clause confines warrants to a specific location, its language permits a warrant to authorize multiple seizures of “persons or things,” provided they are particularly described. *See id.*

47. [T]he multiple house search via a single warrant or similar device was not an infrequent, extreme response to rare emergencies but England's conventional method of search for most purposes. Every suspicious residence in a village could be entered and examined not just for pesky vagrants, religious fanatics, and political conspirators but also for stolen merchandise, smuggled contraband, illicit gambling establishments, anyone accused of committing any felony, and even for persons eating meat in their own homes on prohibited days.

Cuddihy, *supra* note 20, at 168.

48. *Id.* at 478 nn.44-45.

close cousin—the writ of assistance—dominated much of the discussion among our constitutional ancestors concerning what was an unreasonable search or seizure. The fear and condemnation of broad warrants and writs of assistance are evidenced by the Framers’ specific prohibition of general warrants in the latter clause of the Fourth Amendment. But the general warrant was not the only type of intrusion that early Americans considered “unreasonable:” “Legislation, case law, legal treatises, pamphlets, newspapers, constitutional debates, and correspondence in America during the 1780s condemned not only the general warrant but also certain other methods of search and seizure so consistently that their constitutional designation as unreasonable would have been almost superfluous.”<sup>49</sup>

History reveals the flaw in a narrow, textualist approach to the Fourth Amendment.<sup>50</sup> “[T]he original Fourth Amendment was not a single idea but a cluster of disparate ideas.”<sup>51</sup> One of the ideas embraced by the Amendment was a rejection of the discretionary and promiscuous intrusions that had flourished in England and America until the 1780s.<sup>52</sup> Although it did not explicitly outlaw all discretionary searches and seizures, the Amendment initiated and symbolized an ideal that was uniquely American—discretionary invasions of privacy and personal security, whether by warrant or without, violated constitutional liberty. Accordingly, when considering whether intrusion by government informants and undercover spies satisfies constitutional norms, we should remember that the Fourth Amendment was

49. *Id.* at ciii.

50. As Justice Brandeis recognized the language of the Amendment, if read narrowly, would not cover warrantless searches of private letters placed in the mail. *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting). “No court which looked at the words of the Amendment rather than its underlying purpose would hold, as this Court did in *Ex parte Jackson*, 96 U.S. 727, 733 (1877), that its protection extended to letters in the mails.” *Olmstead*, 277 U.S. at 476.

51. Cuddihy, *supra* note 20, at civ.

52. *See id.* at 1555.

[A]bolition of the general warrant was part of a larger effort to eliminate all general searches on land. By 1789, general warrants had expanded in meaning to include multiple-specific warrants and were only the most significant of several unreasonable searches and seizures. Promiscuous house searches without warrant were also unreasonable; for that matter, so were nocturnal and “no-knock” searches.

*Id.*; *cf.* Clancy, *supra* note 24, at 528.

The core complaint of the colonists was not that searches and seizures were warranted, warrantless, or unauthorized actions; it was the general, suspicionless nature of the searches and seizures. . . . As they sought to regulate searches and seizures, the framers held certain principles to be fundamental, of which particularized suspicion was in the first rank.

Clancy, *supra* note 24, at 528 (footnotes omitted).

designed to check the discretionary power of government to invade individual privacy and security.<sup>53</sup>

## II. MODERN INFORMANT CASES

Although the relevance of history in resolving current Fourth Amendment problems may be debated, no disagreement exists concerning the meaning of

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53. Whether by accident or design, the history of the Fourth Amendment and its relevance to current search and seizure law is again being debated by constitutional scholars. *See, e.g.*, Amar, *supra* note 20; Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994); Clancy, *supra* note 24; Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 596-609 (1996); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again"*, 74 N.C. L. REV. 1559, 1600-16 (1996); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994); Steiker, *supra* note 24; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 399-411 (1995); Cloud, *supra* note 20; Sherry F. Colb, *Innocence, Privacy and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. (forthcoming Oct. 1996).

A full discussion of this debate is beyond the scope of this Article. It is important, however, to note that the history of the Fourth Amendment answers some questions, but leaves open many more. As William Cuddihy has noted, the text of the Amendment "mingles ambiguous and precise language, for it forbids all types of unreasonable searches and seizures but identifies only one unreasonable type and that one only implicitly." Cuddihy, *supra* note 20, at ci (footnote omitted). Moreover, the historical record "did not illuminate all aspects of the Fourth Amendment equally, nor did [it] explain all of its original meaning. Th[e] [historical] documents, however, did explain a great deal of that meaning and were indispensable to its understanding." *Id.* at ciii.

Thus, an interpretation of the Fourth Amendment that focuses on the reasonableness clause will be unenlightened. Instead, we should look to the Amendment's underlying purpose. *See* Cloud, *The Fourth Amendment During the Lochner Era, supra*, at 625 ("When the background purposes and underlying values for a portion of the Constitution can be discerned, these purposes and values should drive the interpretation of the text."). While the history of the Fourth Amendment reveals many facets, one central aspect of that history is pervasive: controlling the discretion of government officials to invade the privacy and security of citizens, whether that discretion be directed toward the homes and offices of political dissentients, illegal smugglers, or ordinary criminals.

The Fourth Amendment was the product of a historical debate that progressed beyond the events of colonial America. Even after the American Revolution, and after state constitutions recognized rights against unreasonable searches and seizures, state officials continued to use discretionary and general intrusions "for such commonplace activities as collecting taxes, protecting wildlife, pursuing fugitives, and subjugating slaves. In one jurisdiction, Connecticut, general warrants were still used to recover stolen property." Cuddihy, *supra* note 20, at 1276 (footnote omitted). "Pennsylvania and Virginia used general search warrants or executive proclamations worded like them to apprehend accused murderers, thieves, and counterfeiters." *Id.* at 1282. Thus, the events prior to the Revolution tell only part of the story of the Fourth Amendment's development. Many of the promiscuous and discretionary search and seizure methods employed by government officials between 1776 and 1789 influenced the debate on the Amendment as much as the controversy surrounding the writs of assistance and the general warrants employed by British officials. In urging the adoption of the Fourth Amendment, "Americans served notice that they wanted a federal right regarding search and seizure that transcended the mere denunciation of general warrants that their state constitutions provided," but failed to enforce. *Id.* at 1402-03. Controlling the discretionary authority of federal officials was the central focus of their concerns.

the Supreme Court's modern informant cases. These rulings place few, if any, restrictions on the use of secret informants.<sup>54</sup>

Interestingly, government officials have not always held *carte blanche* to infiltrate our lives with informants and spies. The current state of the law is a relatively recent phenomenon. The Warren Court, which political conservatives blame for "handcuffing" the power of the police to catch criminals,<sup>55</sup> actually solidified the government's power to use informants free of constitutional restraint.<sup>56</sup> Before the Warren Court rulings of the 1960s authorized the use of secret police spies and informants, there was a time when the Fourth Amendment had been interpreted to provide greater protection against government infiltration of homes and offices.

#### A. *Gouled v. United States*

*Gouled v. United States*<sup>57</sup> is the Supreme Court's first secret spy case. The government had suspected that Gouled and another were conspiring to defraud the United States Army.<sup>58</sup> A government agent, who was a friend of Gouled, went to Gouled's office to gather information about the alleged

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54. See *infra* Section II.

55. See LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 224 (1983) (describing presidential candidate Richard Nixon's recognition of the public's anger toward the Supreme Court: "The public resentment at the nine men who had changed the relationship between the police and their prey was real enough, the fear of crime being second only to the fear of blacks."); FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 14 (1970) ("To its critics, the [Warren Court was] taking the side of the forces of evil, to the peril of the good people."); Richard Harris, *Annals of Legislation: The Turning Point*, *NEW YORKER*, Dec. 14, 1968, at 68, 80 (noting Sen. John L. McClellan's frequent complaint that "[t]he reason the police cannot stop crime is the Court decisions").

56. Cf. Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 63 (Vincent Blasi ed., 1983) (noting that both the Warren Court and the Burger Court "took the position . . . that one who speaks to another not only takes the risk that his listener will later make public what he has heard but also takes the risk that his listener will electronically record or simultaneously transmit what he is hearing") (footnote omitted).

Ironically, much of the Court's current search and seizure doctrine on informants stems from one source: Justice William Brennan, one of the most progressive and influential justices of the twentieth century. See, e.g., Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 *U. MICH. J.L. REF.* 537, 541 (1990) (noting that Justice Brennan "was widely regarded as the leading voice of liberalism on the Court and (a view held by many of his critics as well as his admirers) as one of the most influential and effective Justices in the Court's history").

57. 255 U.S. 298 (1921). For modern students, *Gouled* is better known as the case that established the "mere evidence" rule. This rule announced that police seizures of mere evidence were inconsistent with the Fourth Amendment. *Id.* at 309. This portion of *Gouled* was overruled by *Warden v. Hayden*, 387 U.S. 294, 306-07 (1967).

58. *Gouled*, 255 U.S. at 304. The Court does not indicate the basis of the government's suspicions that Gouled had engaged in criminal conduct.

conspiracy.<sup>59</sup> “[P]retending to make a friendly call,” the agent obtained admission to the office and “in [Gouled’s] absence, without warrant of any character, seized and carried away several documents,” one of which was later introduced at Gouled’s prosecution for fraud.<sup>60</sup>

The government had two responses to Gouled’s protest that his Fourth Amendment rights had been violated. First, the government argued that force was the touchstone of an unreasonable search or seizure.<sup>61</sup> Although it conceded that its agent had taken advantage of his friendship with Gouled to gain entry to his office, the government insisted that this ploy did no harm to Fourth Amendment values.<sup>62</sup> Because Gouled had unwittingly allowed entry to his office, the government contended that it could exploit the situation to secure any evidence available, provided no force or legal compulsion was directed at Gouled.<sup>63</sup>

The government’s second argument assumed a search and seizure had occurred in Gouled’s office, but noted that “[e]very search and seizure made by an officer without a search warrant is not within the condemnation of the Fourth Amendment.”<sup>64</sup> Gouled had either consented to the agent’s entrance and subsequent seizure, or waived his Fourth Amendment rights by allowing his friend access to the office. The government reasoned that

[the Fourth Amendment is] not violated if an officer goes to the accused and asks and is granted *permission* to enter his house or his office. Equally [the Amendment is] not violated if the officer, without express invitation or permission, enters a place of business which is *open to the public*. And again, if the *personal relations* existing between the officer and the accused are such that the former is in the habit of visiting the latter at his office or his home, there is nothing unlawful in his making such a visit, even though he may not disclose that he is in search of evidence. When an officer has lawfully entered a house or an office in any of these ways, the Constitution does not require him to shut his eyes to any evidence of crime that may be open to his observation.<sup>65</sup>

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59. *Id.* It is not clear from the Court’s opinion whether Gouled was aware of the agent’s attachment to the Intelligence Department of the Army.

60. *Id.*

61. *Id.* at 299-300.

62. *Id.* at 300-01.

63. *Id.* at 299-301.

64. *Id.* at 301.

65. *Id.* (emphasis added).

In two short paragraphs, a unanimous Court dismissed these arguments. First, Justice Clarke, writing for the Court, broadsided the government's claim that force or coercion was an essential ingredient of a Fourth Amendment violation. He explained that because a forcible, warrantless intrusion into a house or office to search and seize violates the Constitution,

it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.<sup>66</sup>

This statement leaves no doubt that a secret, deliberate governmental intrusion into an individual's home or office offends the Fourth Amendment as much as a forcible intrusion. On this point, Justice Clarke probably had in mind the Court's seminal ruling in *Boyd v. United States*.<sup>67</sup> *Boyd* explained that the principles embodied in the Fourth Amendment

apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . . .<sup>68</sup>

*Gouled* established that a covert and planned government entry into a home or office, whether by force or stealth, could not escape Fourth Amendment scrutiny.

The Court's response to the argument that *Gouled* had consented to the government agent's intrusion is cryptic. The Court stated:

[W]hether entrance to the home or office of a person suspected of crime be obtained by a [government officer] by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure

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66. *Id.* at 305-06.

67. 116 U.S. 616 (1886). Justice Clark did not cite the case, however.

68. *Id.* at 630.

subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment . . . .<sup>69</sup>

Although it offers passing reference to the government's waiver and consent claims, the Court never takes the position that Gouled consented to the entry. Instead, the Court seems to focus on the "search and seizure subsequently and secretly made in [Gouled's] absence."<sup>70</sup> If, however, Gouled's absence is a necessary element of a Fourth Amendment violation, then the manner of the agent's entry is unimportant. What matters is Gouled's ignorance of the agent's seizure; if Gouled witnessed the seizure without protest or knowingly acquiesced in the agent's conduct, then he would have had a diminished constitutional complaint. But because he was momentarily absent during the agent's seizure of the incriminating document and did not learn of the government's possession of it until much later, Gouled was unable to protect or assert his Fourth Amendment rights when it mattered most.

The traditional view of *Gouled* focuses on the secret seizure that occurred in Gouled's absence.<sup>71</sup> Under this view, if a person unwittingly grants access to private premises or activities and knowingly reveals to another otherwise protected conduct, no Fourth Amendment intrusion has occurred.<sup>72</sup> This traditional view is misplaced for two reasons. First, as noted, the Court never endorses the government's submission that Gouled "waived" or "consented" to the agent's entry by unwittingly granting access to his office. Second, and equally important, the traditional view of *Gouled* proves too much.

Let us consider two slightly altered scenarios of the *Gouled* facts. First, after gaining entry to Gouled's office by "pretending to make a friendly call,"<sup>73</sup> the informant observes an incriminating document while Gouled is still in the room, but does not snatch the document while Gouled's back is

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69. *Gouled*, 255 U.S. at 306.

70. *Id.*

71. See *Lewis v. United States*, 385 U.S. 206, 209-10 (1966) (stating that *Gouled* rested on the absence of the target and the secret seizure that occurred during that absence).

72. Professor LaFave has summarized the Court's holdings on this point as follows:

[W]hen an individual gives *consent* to another to intrude into an area or activity otherwise protected by the Fourth Amendment, aware that he will thereby reveal to this other person either criminal conduct or evidence of such conduct, the *consent* is not vitiated merely because it would not have been given but for the nondisclosure or affirmative misrepresentation which made the *consenting* party unaware of the other person's identity as a police officer or police agent.

3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.2(m), at 700 (3d ed. 1996) (emphasis added) (footnote omitted).

73. *Gouled*, 255 U.S. at 304.

turned. The informant then reports to his superiors that Gouled possesses the incriminating document, whereupon the government obtains a search warrant to seize it.

Under the second scenario, the informant is unable to discover the incriminating document he was sent to find, but while chatting with Gouled observes contraband liquor in plain view on a shelf high above Gouled's desk. After reporting his failure to locate the incriminating document to his superiors, the informant mentions noticing the contraband liquor. A warrant to search for the illegal alcohol is then obtained. While executing that warrant, agents seize both the liquor and the incriminating document which is discovered in plain view on the same shelf holding the whiskey bottles.

In both hypotheticals, Gouled is in the room. Nevertheless, the reasoning of *Gouled* would not support either intrusion.<sup>74</sup> Both hypotheticals involve covert and deliberate conduct that invaded Gouled's security and privacy and that constituted a "search and seizure . . . as much against his will"<sup>75</sup> as the actual intrusion condemned in *Gouled*.<sup>76</sup> When the hypothetical agent came to Gouled's office to determine whether incriminating material was present, he certainly "searched" the office.<sup>77</sup> In the second hypothetical, although the agent failed to locate the incriminating document, he did observe contraband liquor. Was this not a "search" of the office?<sup>78</sup> While the agent in these hypotheticals did not seize a tangible item, that fact is irrelevant when determining whether a search has occurred. If a search is still a search even though nothing of great personal value is exposed,<sup>79</sup> deliberate government

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74. See *Hajdu v. State*, 189 So. 2d 230, 231-32 (Fla. Dist. Ct. App. 1966) (extending the applicability of *Gouled* to a search conducted in the unwitting presence of the defendant), *cert. denied*, 189 So. 2d 230 (Fla. 1967); see also Osmond K. Fraenkel, *Recent Developments in the Law of Search and Seizure*, 13 MINN. L. REV. 1, 11 n.87 (1928) (stating that *Gouled* "condemned a taking by stealth whether in the presence or absence of the owner").

75. *Gouled*, 255 U.S. at 305-06.

76. As one modern commentator has put it, "[t]he police undercover agent operation, in short, has precisely the same objective and serves precisely the same function as more traditional overt investigative methods, most of which are now subject to the limitations imposed by the [F]ourth [A]mendment." Joseph R. Lundy, Note, *Police Undercover Agents: New Threat to First Amendment Freedoms*, 37 GEO. WASH. L. REV. 634, 648 (1969) (footnote omitted).

77. See *Fraternal Order of Eagles, No. 778 v. United States*, 57 F.2d 93, 94 (3d Cir. 1932) (stating that the object of the surreptitious police entry, gained by misrepresentation, was to use what they could see as the basis of an application for a search warrant); cf. Amar, *supra* note 20, at 768 n.38 ("Perhaps merely looking without touching is not a 'seizure,' but it surely should count as a 'search' for one who believes in plain meaning . . .").

78. Cf. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (noting in a discussion of the appropriate scope of the exclusionary rule that "testimony as to matters *observed* during an unlawful invasion has been excluded in order to enforce the basic constitutional policies") (emphasis added).

79. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (stating that "[a] search is a search, even if it

conduct that discloses the existence of private information or conversation is certainly no less of a search.

Some might contend that these hypotheticals bear none of the traits associated with general warrants and writs of assistance and thus should not trigger Fourth Amendment concerns. Such skepticism ignores *Boyd*'s admonition that the protection of the Fourth Amendment is not confined to traditional ways of thinking:

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, . . . it contains their substance and essence, and effects their substantial purpose. 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.<sup>80</sup>

Was *Gouled* responsible for the intrusion? Had he "waived" his Fourth Amendment rights? After all, if *Gouled* had not permitted his friend access to the office, no search or seizure would have occurred, either in the above hypothetical cases or in *Gouled* itself. As the government argued, when one of its officers obtains access to a private enclave through disguise or trickery, the officer should not be required "to shut his eyes to any evidence of crime that may be open to his observation."<sup>81</sup>

Closer analysis suggests that this tempting stance is insufficient to justify infringing Fourth Amendment liberties. Admittedly, the Constitution does not require that police spies ignore evidence of a crime. However, the key question in *Gouled*, as in many search and seizure contexts, is *how* a government officer gained access to the observed criminal evidence.<sup>82</sup> In *Gouled*, entry was gained by deliberate deceit, which provided the opportunity to search and seize. The *Gouled* Court left no doubt that a stealthy and deceptive entry infringes constitutional values as much as a

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happens to disclose nothing but the bottom of a turntable").

80. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

81. *Gouled v. United States*, 255 U.S. 298, 301 (1921).

82. *Cf. Segura v. United States*, 468 U.S. 796, 833 n.27 (1984) (Stevens, J., dissenting).

The element of access, rather than information, is central to virtually the whole of our jurisprudence under the Warrant Clause of the Fourth Amendment. . . . Thus, suppression is the consequence not of a lack of information, but of the fact that the authorities' access to the evidence in question was not properly authorized and hence was unconstitutional.

*Id.*

forcible one.<sup>83</sup>

The constitutional evil inherent in a covert entry is not diminished by the fact that someone like *Gouled* unwittingly allows access to his or her privacy. Granted, the Constitution does not protect against stupidity, or even against a private friend who later reveals embarrassing or incriminating information to the authorities. However, the Fourth Amendment does protect against unfettered, deliberate efforts by *government* officials to obtain information from one's home or office.<sup>84</sup> When *Gouled* opened his office to his friend, he had no knowledge of, and did not consent to, the planned *governmental* intrusion that occurred.<sup>85</sup>

Thus, the traditional, narrow view of *Gouled* was not predetermined. There is a better way to read that case: when government agents deliberately seek access to private premises or private conversations by "stealth, or through social acquaintance, or in the guise of a business call"<sup>86</sup> without complying with the safeguards of the Fourth Amendment, the subsequent search and seizure is constitutionally infirm. Put another way, fictive notions of consent or waiver cannot undercut the basic tenet that planned, covert intrusions of a protected area or activity violate the Fourth Amendment, just

83. See *Gouled*, 255 U.S. at 305.

84. This was the view adopted by some lower courts before the Supreme Court decided its modern informant cases, which took a very different and narrow view of *Gouled*. See *United States v. Reckis*, 119 F. Supp. 687, 690 & n.1 (D. Mass. 1954) (interpreting *Gouled* to stand for the proposition that incriminating statements and evidence obtained by means of fraud violate the Fourth Amendment); *People v. Dent*, 19 N.E.2d 1020, 1021-22 (Ill. 1939) (relying upon *Gouled* to hold that permission to enter a home, given in ignorance of the identity and purpose of those seeking admission, renders a subsequent entry and search invalid); cf. *Amsterdam*, *supra* note 20, at 407 ("[I]t is not betrayal against which the [F]ourth [A]mendment protects us: it is the privacy of a free people living free lives.").

85. See, e.g., *People v. Reeves*, 391 P.2d 393, 396 (Cal. 1964) (relying upon *Gouled* for the proposition that the Fourth Amendment proscribes stealthy and fraudulent entry into the home); *People v. Roberts*, 303 P.2d 721, 723 (Cal. 1956). According to one commentator,

[u]ndercover agents often violate [the] sanctity [of a home or office] when they gain access to a person's home or workplace without a warrant. They may be invited in, but only because of deception—under the guise of friendship, a business partnership, or through the access granted a phony housing inspector or meter reader. It is sophistry to argue that that such searches are voluntary. A person may give consent to a meter reader, but only to have the meter read, not to have the house searched. Consent is highly circumscribed; if the target was not duped, access would be denied. When the public-private boundary can be transgressed at will, whether through deception or coercion and force, liberty is impossible. Liberty exists partly because there are private and personal spaces that are beyond official reach.

MARX, *supra* note 13, at 99-100; see also Zechariah Chafee, Jr., Note, *The Progress of the Law, 1919-1922, Evidence III*, 35 HARV. L. REV. 673, 700 (1922) (explaining the holding of *Gouled* as turning upon the violation of the security and privacy of the home).

86. *Gouled*, 255 U.S. at 306.

as open and forcible invasions do.<sup>87</sup>

One might find this interpretation of *Gouled* troubling because it imparts both to the Constitution and the Court an intent to bar all governmental efforts to use secret methods and personnel for law enforcement purposes. While such a broad view of the Fourth Amendment is not without merit, the Court has rarely interpreted the Amendment as an “all-or-nothing” proposition.

Many years before *Gouled*, in *Ex parte Jackson*,<sup>88</sup> the Court explained that federal officials did not have discretion to invade the secrecy of letters and packages placed in the mail.<sup>89</sup> *Ex parte Jackson*, however, did not completely bar opening suspicious mail. The Court simply reminded federal officers that mail “can only be opened and examined under [a judicial] warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one’s own household.”<sup>90</sup>

The same can be said about *Gouled*. Although the issue was not specifically discussed because the informant went to *Gouled*’s office without judicial authorization, the Court did not suggest that covert efforts to secure evidence are impermissible.<sup>91</sup> Indeed, in describing the informant’s conduct in *Gouled*’s office, the Court pointedly noted that the informant had acted “without warrant of any character.”<sup>92</sup> If the Court believed that no warrant could have properly been issued to secure the targeted evidence, there would have been no need to reference the lack of a warrant.

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87. For the proposition that *Gouled* invalidates fraudulently procured consent to search, see *United States v. Sclafani*, 265 F.2d 408, 415 (2d Cir.) (stating that the rule of *Gouled* condemns fraudulently obtained consent to search), *cert. denied*, 360 U.S. 918 (1959); *Dent*, 19 N.E.2d at 1021-22 (holding that after *Gouled*, valid consent to enter must be predicated upon knowledge of the identity of the agent as a police officer); *Commonwealth v. Wright*, 190 A.2d 709, 711 (Pa. 1963) (relying upon *Gouled* to hold that “consent [to search] may not be gained through stealth, deceit or misrepresentation”).

88. 96 U.S. 727 (1877).

89. *Id.* at 733.

90. *Id.*

91. In dicta, the *Gouled* Court stated “[W]e cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.” *Gouled*, 255 U.S. at 309.

92. *Id.* at 304. Of course, it must be acknowledged that *Gouled* also ruled “mere evidence” was outside of the scope of even validly issued warrants. *Id.* at 309. As described in *Gouled*, this prohibition on the permissible objects of search warrants “does indeed loom as an awesome barrier,” Yale Kamisar, *The Wiretapping—Eavesdropping Problem: A Professor’s View*, 44 MINN. L. REV. 891, 915 (1960), to regulating the use of informants under the Warrant Clause. But as Professor Kamisar has explained, even during its heyday, the “mere evidence” rule was “cluttered with inconsistencies and uncertainties as to permit much freedom of movement” for judges that wanted to avoid its formulaic restrictions and to admit evidence helpful to the prosecution. *Id.* at 917 (footnote omitted).

In sum, the traditional explanation—Gouled’s absence from the room, when the incriminating documents were seized, constituted the key element of the constitutional harm—provides only a partial analysis of the Court’s concern with secret government informants who invade an individual’s privacy and security.<sup>93</sup> This orthodox view discounts the *Gouled* ruling that stealthy, warrantless governmental intrusions trigger Fourth Amendment scrutiny. Furthermore, when one realizes that intangible effects (*e.g.*, conversations and observations),<sup>94</sup> as well as tangible effects, are subject to search and seizure by government informants, the current and narrow view of *Gouled* fails to protect places and activities ordinarily included under the umbrella of the Fourth Amendment.

When thoughtfully examined, *Gouled* establishes the principle that the police cannot decide for themselves when to send a secret informant into a person’s home or office to gather otherwise protected information. Gouled’s absence from the room was certainly a “circumstance[] of aggravation”<sup>95</sup> that made it easier for the agent to accomplish his mission, but absence during the actual seizure of information should not be considered the *sine qua non* of a constitutional violation.<sup>96</sup>

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93. Before the modern Court’s view of the Fourth Amendment and secret informants was solidified, some lower courts did not read *Gouled* as narrowly as it is read today. *See Fraternal Order of Eagles, No. 778 v. United States*, 57 F.2d 93, 94 (applying *Gouled* to a stealthy search conducted in the defendants’ presence); *Hadju v. State*, 189 So. 2d 230, 231-32 (Fla. Dist. Ct. App. 1966) (applying the holding of *Gouled* to a search conducted by an agent in the unwitting presence of the defendant), *cert. denied*, 196 So. 2d 923 (Fla. 1967); *Fraenkel, supra* note 74, at 11 n.87 (suggesting that the Fourth Amendment violation did not depend upon Gouled’s absence); *see also Chafee, supra* note 85, at 700 (explaining the holding of *Gouled* as turning upon the violation of the security and privacy of the home).

94. *See Fraternal Order of Eagles, No. 778*, 57 F.2d at 93-94 (holding that the stealthy observation of contraband liquor by agents posing as lodge members was a violation of the Fourth Amendment). In later rulings, the Court definitively ruled that intangible objects are protected under the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347, 353 (1967) (reaffirming that “the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any ‘technical trespass under . . . local property law’ (omission in original) (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

95. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

96. Although Justice Black was no fan of the Fourth Amendment, *see generally* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 371-72 (1994); Jacob W. Landynski, *In Search of Justice Black’s Fourth Amendment*, 45 *FORDHAM L. REV.* 453 (1976), he captured the essence of *Gouled*’s reasoning in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where he argued in dissent that the Fourth Amendment protects more than privacy, *id.* at 509 (Black, J., dissenting). “The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth.” *Id.*

*B. Why Has Gouled Been Accorded a Narrow Interpretation?*

As the above discussion highlights, *Gouled* can be read in alternative ways. Under one view, *Gouled* stands for the narrow proposition that a clandestine search or seizure in the absence of the target violates the Fourth Amendment. Alternatively, *Gouled* establishes the common-sense rule that secret and deliberate governmental intrusions of private premises or private activities will not escape Fourth Amendment scrutiny. Under this alternative vision, *Gouled* does not forbid the use of informants and secret spies; it merely holds that these forms of surveillance are subject to the same procedural safeguards of the Warrant Clause as more overt and more violent forms of search and seizure. In light of the history of the Amendment,<sup>97</sup> particularly the concern with searches of private homes,<sup>98</sup> this interpretation of *Gouled* is a logical and moderate interpretation of the Fourth Amendment.

Despite its modest conclusions, this alternative view of *Gouled* has never been accepted by a succeeding majority on the Court. The Court's subsequent cases have never even fully discussed these competing visions of *Gouled*. However, if one keeps in mind that the Fourth Amendment is essentially about prohibiting promiscuous and discretionary intrusions by government officials into a person's home or office,<sup>99</sup> then a core principle emerges from *Gouled*. That principle states that police officials are not free to decide for themselves when an individual's private space and conversations will be invaded by secret governmental surveillance. Rather than grapple with this cardinal point, the modern Court has undermined the crux of *Gouled* with slogans, unproven assumptions about how individuals organize their private lives, and unsubstantiated fears that taking *Gouled* seriously would mean the end of undercover police operations.

The Court first questioned *Gouled* in *Olmstead v. United States*.<sup>100</sup> *Olmstead* ruled that governmental wiretapping of telephone conversations fell outside the protection of the Fourth Amendment.<sup>101</sup> The Court based its

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97. See discussion *supra* Part I.

98. As former Senator Sam Ervin, Jr. has aptly described, an individual's home has always occupied a special place in our constitutional history. "The oldest and deepest hunger of the human heart is for a place where one may dwell in peace and security and keep inviolate from public scrutiny one's innermost aspirations and thoughts, one's most intimate associations and communications, and one's most private activities." Sam J. Ervin, Jr., *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283, 283.

99. See discussion *supra* Part I.

100. 277 U.S. 438 (1928).

101. *Id.* at 465-66.

conclusion on two findings and one supposition. First, the Court found that words spoken into a telephone were not tangible things and thus could not be subjected to a search or seizure.<sup>102</sup> Second, the Court found that because wiretapping could be accomplished without a trespass, there was no physical invasion of property to justify invoking the Fourth Amendment.<sup>103</sup> Finally, the Court assumed that one who uses the telephone “intends to project his voice to those quite outside.”<sup>104</sup>

In distinguishing *Gouled*, the *Olmstead* Court gratuitously and without explanation announced that *Gouled* had “carried the inhibition against unreasonable searches and seizures to the extreme limit.”<sup>105</sup> The Court then distinguished wiretapping from the precise facts of *Gouled* by noting that in *Gouled* “[t]here was actual entrance into the private quarters of [the] defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.”<sup>106</sup>

*Olmstead*'s holding on wiretapping was immediately challenged both on and off the Court, and has been properly rejected by the modern Court.<sup>107</sup> Putting aside *Olmstead*'s faulty analysis on wiretapping, what support is there for the dictum that *Gouled* “carried the inhibition against unreasonable searches and seizures to the extreme limit”?<sup>108</sup> Is it extremist to believe that secret and deliberate intrusions by governmental agents infringe the privacy and security of homes and offices, just as overt breakings and enterings by uniformed police officers do? Does it stretch the protections of the Fourth Amendment to the breaking point to suggest that the FBI or state police officials should not be allowed to decide for themselves when our homes, offices, or social groups will be subjected to government infiltration by spies and informants? Is it asking too much to require the police to explain to a neutral judicial officer the basis for their belief that a particular individual or organization is engaged in criminal activity prior to any intrusion into one's privacy? The answer to all these questions is “no.” The police should have to demonstrate good cause for deliberate intrusions into the privacy of citizens when using informants, just as they must do when they conduct conventional searches and seizures.

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102. *Id.* at 464.

103. *Id.* at 464-66.

104. *Id.* at 466.

105. *Id.* at 463.

106. *Id.* at 464.

107. See *Katz v. United States*, 389 U.S. 347, 352-53 (1967); *infra* notes 216-26 and accompanying text.

108. *Olmstead*, 277 U.S. at 463.

Perhaps the *Olmstead* Court viewed *Gouled* as reflecting the “extreme limit”<sup>109</sup> of Fourth Amendment protection because, properly understood, *Gouled*’s reasoning would not only apply to informants who swipe incriminating documents while the target’s back is turned, but also to informants who read or examine incriminating documents in full view of the target. Another possibility is that the Court foresaw that *Gouled*’s inclusion of secret governmental intrusions under the protective umbrella of the Fourth Amendment would mean that informants who monitor and report conversations with government targets could no longer escape constitutional scrutiny.

*Olmstead* resolved a controversial constitutional issue<sup>110</sup> with simplistic analysis. Considering only the literal text of the Amendment as its words were understood by the Framers, *Olmstead* sanctioned governmental wiretapping without legal restraint.<sup>111</sup> Although the *Olmstead* Court insisted that its reasoning was consistent with previous cases,<sup>112</sup> in reality, the decision “represented a clear break from the Court’s prior precedents.”<sup>113</sup>

After *Olmstead* gave police officials a license to wiretap at will, strong notes of disapproval arose from Congress and the general public.<sup>114</sup> Still, when confronted with claims that government spies and informants have violated the Fourth Amendment rights of their targets, subsequent majorities of the modern Court have performed no better than the *Olmstead* majority. Indeed, when considering whether deliberate police surveillance jeopardizes Fourth Amendment values, the modern Court has not carefully examined

109. *Id.*

110. The issue of wiretapping has always deeply divided the Court and the nation. “Even the solicitor general in his *Olmstead* brief claimed that the government was ‘not defending wiretapping as a method proper generally to be used for detection of crime.’” ALEXANDER CHARNS, CLOAK AND GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT 19 (1992) (footnote omitted) (quoting Brief for the United States at 41, *Olmstead*). In *Olmstead*, the Court split five to four—“the first such close division in any search case.” LANDYNSKI, *supra* note 20, at 201. See generally Alan F. Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952).

111. See *Olmstead*, 277 U.S. at 466 (noting that the wiretapping did not amount to a Fourth Amendment violation).

112. *Id.* at 458-64.

113. Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 658 (1988) (footnote omitted).

114. See Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 11 & n.48 (1983) (citing proposed bills to overrule *Olmstead*); Westin, *supra* note 110, at 173 & n.43 (same). Eventually, of course, the modern Court rejected the constitutional premises and conclusions of *Olmstead*. See *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967).

*Gouled's* reasoning.<sup>115</sup> In the end, the Court has never asked the obvious question that Justice Brandeis posed in his famous and elegant dissent in *Olmstead*: "Can it be that the Constitution affords no protection against such invasions of individual security?"<sup>116</sup>

### C. Informant Cases Since *Gouled*

*On Lee v. United States*<sup>117</sup> was the next case after *Gouled* to raise the issue of informant spying. Chin Poy, a friend and former employee of defendant On Lee, went to On Lee's laundry shop.<sup>118</sup> Unknown to On Lee, Chin Poy was a government informant "wired for sound, with a small microphone in his inside overcoat pocket and a small antenna running along his arm."<sup>119</sup> Also unknown to On Lee, an officer from the federal Narcotics Bureau was stationed outside the laundry shop and equipped to listen to the conversation between On Lee and Chin Poy.<sup>120</sup> Several days later, another conversation between On Lee and Chin Poy on the street was monitored by the same officer.<sup>121</sup> During both conversations, On Lee made incriminating statements.<sup>122</sup> At trial, the officer was allowed to testify about On Lee's incriminating statements.<sup>123</sup>

The *On Lee* Court saw no Fourth Amendment violation in these facts. There was no constitutional trespass because "Chin Poy entered a place of business with the consent, if not by the implied invitation, of the [defendant]."<sup>124</sup> The companion claim that the officer had committed a trespass because the electronic equipment allowed him to secretly overhear what transpired inside was, in the eyes of the Court, "frivolous."<sup>125</sup> Only a "physical entry," such as one associated with force, submission to legal coercion, or without any sign of consent, would trigger constitutional protection against this form of stealthy government surveillance.<sup>126</sup>

The Court also dismissed the contention that it should treat informant

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115. See *supra* Part II.B.

116. *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting).

117. 343 U.S. 747 (1952).

118. *Id.* at 749.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 749-50.

124. *Id.* at 751-52.

125. *Id.* at 752.

126. *Id.* at 752-53.

surveillance on an equal footing with police wiretapping. To the Court, the use of a radio wire suggested only “the most attenuated analogy to wiretapping.”<sup>127</sup> On *Lee* was talking confidentially with a trusted friend, and he was overheard.<sup>128</sup> The Court stated:

It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here.<sup>129</sup>

*On Lee*'s discussion of the Fourth Amendment typifies the modern Court's neglect of *Gouled* and illustrates how loose language can generate a misunderstanding of what the Fourth Amendment protects. *On Lee* was authored by Justice Robert Jackson, a hard-nosed former prosecutor who sometimes took a narrow view of the constitutional rights guaranteed criminal suspects.<sup>130</sup> Jackson's hard-line views are evident in *On Lee*. He found that it was “frivolous” to argue that the recording and monitoring of Chin Poy and On Lee's conversation merited constitutional review.<sup>131</sup> Only a “physical entry,” Jackson explains, triggers constitutional concern.<sup>132</sup> Placing concealed electronic equipment on an informant to gain government access that otherwise would not have been granted raised no constitutional concern.<sup>133</sup>

In later years, the Court would reject the notion that Fourth Amendment

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127. *Id.* at 753.

128. *Id.* at 753-54.

129. *Id.* at 754.

130. Although Justice Jackson's dissent in *Brinegar v. United States*, 338 U.S. 160, 180-88 (1949), is often cited by judges and lawyers urging an expansive interpretation of the Fourth Amendment, *infra* note 329, Justice Jackson is better known among experts in criminal procedure for his opinions in *Irvine v. California*, 347 U.S. 128, 129-38 (1954) (principal opinion upholding conviction despite several illegal police entries into the defendant's home to install a secret microphone, and then moving that microphone to his bedroom to facilitate the recording of conversations); *Ashcraft v. Tennessee*, 322 U.S. 143, 156-174 (1944) (Jackson, J., dissenting) (disagreeing with the Court's reversal of a conviction resulting from a confession that had been obtained after 36 hours of continuous interrogation by the police); and *Watts v. Indiana*, 338 U.S. 49, 57-62 (1949) (Jackson, J., concurring in part and dissenting in part) (disagreeing with the reversal of a conviction obtained after a suspect had been held for five days in solitary confinement, subjected to constant interrogation without being advised of his constitutional rights, and denied an opportunity to sleep, eat decent food, or consult with counsel).

131. *See On Lee*, 343 U.S. at 752.

132. *Id.* at 752-53.

133. *See id.* at 751.

liberties turn on the arcane and confusing concepts of property or tort law.<sup>134</sup> As stated in *Katz v. United States*,<sup>135</sup> “[T]he Fourth Amendment protects people, not places.”<sup>136</sup> However, the Court’s de-coupling of search and seizure doctrine from property and tort law concepts in the 1950s and 1960s<sup>137</sup> does not adequately explain why *On Lee*’s claim was “frivolous” when three decades earlier the Court had debunked the notion that force or violence is needed to trigger Fourth Amendment scrutiny.<sup>138</sup> *On Lee*’s claim of a secret and deliberate government scheme to invade the privacy of his business and to record his conversations was hardly a “frivolous” argument in light of *Gouled*.

The *On Lee* Court also focused on whether “eavesdropping on a conversation, with the connivance of one of the parties,” deserved protection under the Fourth Amendment.<sup>139</sup> The majority emphasized that the government’s conduct was no more intrusive than common law eavesdropping, and the use of technology to enhance human perception was not unreasonable.<sup>140</sup> But what occurred in *On Lee* could hardly be characterized as eavesdropping.<sup>141</sup> On the contrary, the government’s

134. See *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (“[A]rcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control.” (citing *Jones v. United States*, 362 U.S. 257, 266 (1960))); *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (“The premise that property interests control the right of the Government to search and seize has been discredited.”); *Chapman v. United States*, 365 U.S. 610, 617 (1961); *Jones*, 362 U.S. at 266; *United States v. Jeffers*, 342 U.S. 48, 52-54 (1951); *McDonald v. United States*, 335 U.S. 451, 454 (1948); cf. *Dow Chem. Co. v. United States*, 476 U.S. 227, 232 (1986) (“State tort law governing unfair competition does not define the limits of the Fourth Amendment.”).

135. 389 U.S. 347 (1967).

136. *Id.* at 351.

137. See *supra* note 134.

138. See *supra* notes 57-68 and accompanying text.

139. *On Lee v. United States*, 343 U.S. 747, 754 (1952).

140. *Id.* at 753-54.

141. Although beyond the scope of this Article, the Court’s casual suggestion that governmental eavesdropping raises no Fourth Amendment concerns is not obvious. As one commentator has noted:

When a policeman overhears a private conversation, the conversants are surely denied the privacy they desired whether or not he uses electronic devices. Nevertheless, it is generally accepted that the naked ear eavesdropper is beyond legal proscription, while the electronically equipped snoop is the object of considerable limitation. It is not clear that this distinction is justifiable from a theoretical point of view.

Michael S. Josephson, Book Review, 15 *UCLA L. REV.* 1586, 1593-94 (1968).

Some may see no threat to Fourth Amendment values when a police officer overhears a private conversation between two persons. For example, imagine that an off-duty police officer overhears the incriminating conversation of Joe and Moe while sitting in the bleacher seats of Yankee Stadium. Surely, he is free to report his discovery without fear of violating the Constitution. If this is true, why should the constitutional result be different when the officer is deliberately positioned to hear the conversation? The difference turns on the fact that in the latter case the government has *planned* to

placement of Chin Poy inside On Lee's laundry shop with a microphone to monitor subsequent conversations was a calculated police operation, without judicial supervision, to seize words that On Lee assumed would not be broadcast.

The fact that Chin Poy had been wired for sound is not determinative of the constitutional issue. Certainly, the use of electronic equipment to transmit Chin Poy and On Lee's conversations to a third party was a "circumstance[] of aggravation."<sup>142</sup> But the crux of the constitutional harm in *On Lee* occurred when Chin Poy, "pretending to make a friendly call,"<sup>143</sup> and "without warrant of any character,"<sup>144</sup> was sent into On Lee's laundry to capture private conversations. On Lee no more consented to this secret and planned seizure of his words than did Gouled when he invited his friend into his office. Like the intrusion in *Gouled*, which resulted in the secret seizure of a document that Gouled believed would remain private, the intrusion in *On Lee*, which facilitated the seizure of words that On Lee believed would remain private, invaded privacy. Thus, both intrusions should be controlled by the Warrant Clause.<sup>145</sup>

*On Lee* also emphasized that the government should not be prevented from using modern technology to enhance human perceptions.<sup>146</sup> The use of such technology, so the argument goes, does not transform a government intrusion into a forbidden search or seizure, even if the target is unaware of the government's surveillance.<sup>147</sup> To be sure, the Court has not erected constitutional barriers for police officials who testify about what they see or

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intrude upon the privacy of Joe and Moe's conversation. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 471 n.27 (1971) (plurality opinion) ("In assessing these claims, it is well to keep in mind that we deal here with a *planned* warrantless seizure. . . . [It is] beyond doubt that the mere fact that the police have legitimately obtained a plain [hearing] . . . of incriminating evidence is not enough to justify a warrantless seizure."). As both history and current doctrine indicate, the Fourth Amendment was designed to control police *discretion* to search and seize, not simple happenstance. *See Broyer v. County of Inyo*, 489 U.S. 593, 596 (1989) (Fourth Amendment addresses *intentional* misuses of government power.); *cf. Morgan Cloud, The Dirty Little Secret*, 43 EMORY L.J. 1311, 1335 (1994) ("The Fourth Amendment . . . [is] not directed at some hypothetical government agent and what he might or would have done. [It] exist[s] to regulate the actual conduct of actual government agents in actual cases.").

142. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

143. *Gouled v. United States*, 255 U.S. 298, 304 (1921).

144. *Id.*

145. *Cf. Lopez v. United States*, 373 U.S. 427, 449 (1963) (Brennan, J., dissenting) ("If a person commits his secret thoughts to paper, that is no license for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words.").

146. *See On Lee v. United States*, 343 U.S. 747, 753-54 (1952).

147. *See id.*

hear.<sup>148</sup> The question in *On Lee*, however, was not whether government officials would be barred from relying upon modern technology, or even whether an officer must “shut his eyes to any evidence of crime that may be open to his observation”<sup>149</sup> due to the use of such technology. Rather, as in *Gouled*, the question involved *how* a government agent gains access to evidence that may be open to his perception because of advanced technology.<sup>150</sup> As in *Gouled*, the government gained access to On Lee’s private office and conversations by deliberate deceit and exploitation of the target’s ignorance.<sup>151</sup> *Gouled* found that this form of entry and seizure offends constitutional values as much as a forcible intrusion does. This same reasoning also applies in *On Lee*.

Finally, *On Lee* declared that Fourth Amendment freedoms should not be equated “with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure.”<sup>152</sup> This passage is bewildering. What are the “spurious liberties” the Court has in mind?

Was On Lee asserting a “spurious liberty” when he claimed that his private conversations were deserving of Fourth Amendment protection? Soon after *On Lee*, a majority of the Court would take the view that private conversations are protected by the Fourth Amendment.<sup>153</sup> Was On Lee asserting a “spurious liberty” when he protested against a secret and deliberate governmental scheme to seize his private conversations? The holding of *Gouled*, when combined with the updated view that private conversations are “effects” within the meaning of the Fourth Amendment, strongly suggests otherwise.<sup>154</sup>

To continue, was On Lee asserting a “spurious liberty” when he claimed he had not consented to the government’s conduct? Again, the reasoning of

148. See *Olmstead v. United States*, 277 U.S. 438, 465 (1928) (A liberal construction of the Fourth Amendment does not justify applying it so “as to forbid hearing or sight.”); *United States v. Lee*, 274 U.S. 559, 563 (1927); *Hester v. United States*, 265 U.S. 57, 58-59 (1924).

149. *Gouled*, 255 U.S. at 301 (argument of the United States government).

150. As Professor Kamisar has noted in a related context, in determining whether evidence has been obtained in a constitutional manner, we should not “dwell on the nature of the evidence in the abstract or focus exclusively on the last step of a multistep course of action by the police. We should consider, instead, the entire course of police conduct from beginning to end.” Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 960 (1995).

151. *On Lee v. United States*, 343 U.S. 747, 749-50 (1952).

152. *Id.* at 754.

153. See *Clinton v. Virginia*, 377 U.S. 158 (1964) (per curiam); *Silverman v. United States*, 365 U.S. 505 (1961).

154. See *supra* notes 86-96 and accompanying text.

*Gouled* indicates otherwise. Finally, was On Lee asserting a “spurious liberty” when he urged that deliberate government efforts to invade his privacy and seize his words ought not be left to the discretion of police officials? Was he not invoking the core of the Fourth Amendment—the distrust of police power, the need to check the discretion of government officials when their authority jeopardizes the security and privacy of individuals, and the desire to protect the sanctity of private areas and activities from unchecked government invasion?

Considered separately, the factors listed by the *On Lee* Court<sup>155</sup> did not justify a secret and planned invasion of On Lee’s laundry shop and the seizure of his words any more than did the similar factors asserted three decades earlier in *Gouled*, when the government tried unsuccessfully to justify a comparable intrusion.<sup>156</sup> At bottom, *On Lee* upheld the challenged intrusion because it appeared to be no more intrusive than official eavesdropping “with the connivance of one of the parties,”<sup>157</sup> but this fact cannot justify the result in *On Lee*. Although the intrusion in *On Lee* proceeded “with the connivance of one of the parties,” the same can be said about the facts in *Gouled*.<sup>158</sup> Therefore, the Court must explain why the intrusion in *On Lee* is permissible, while the similar intrusion in *Gouled* is not.<sup>159</sup>

Three Warren Court cases—*Lopez v. United States*,<sup>160</sup> *Lewis v. United States*,<sup>161</sup> and *Hoffa v. United States*<sup>162</sup>—were the next rulings that advanced the “demise” of *Gouled*. Each shows how far the Court has moved from the logic and constitutional understandings established in *Gouled*.

In *Lopez* the defendant appealed his conviction for the attempted bribery of an Internal Revenue agent.<sup>163</sup> The agent had visited Lopez’s business to inquire about the payment of excise taxes.<sup>164</sup> During the visit, Lopez had offered the agent a bribe.<sup>165</sup> Pretending to go along with the bribery scheme, the agent returned to Lopez’s office several days later equipped with a pocket

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155. See *On Lee*, 343 U.S. at 753-55.

156. See *Gouled v. United States*, 255 U.S. 298, 301-02 (1921).

157. *On Lee*, 343 U.S. at 754.

158. See *supra* notes 82-85 and accompanying text (discussing how informant in *Gouled* gained entry to Gouled’s office “[p]retending to make a friendly call upon the defendant”).

159. The Court has yet to offer such an explanation.

160. 373 U.S. 427 (1963).

161. 385 U.S. 206 (1966).

162. 385 U.S. 293 (1966).

163. *Lopez*, 373 U.S. at 427.

164. *Id.* at 429.

165. *Id.* at 430.

recorder.<sup>166</sup> During this second visit, Lopez made additional incriminating statements.<sup>167</sup> At Lopez's trial, the agent testified about the conversation that Lopez had initiated, and a tape recording of the conversation was played to corroborate the agent's testimony.<sup>168</sup> On appeal, Lopez argued that the agent's testimony, as well as the tape recording, were inadmissible because the agent's visit to his office violated the Fourth Amendment.<sup>169</sup>

Four Justices in *Lopez* declared that both *Olmstead* and *On Lee* were wrongly decided.<sup>170</sup> Nevertheless, a majority of the Justices upheld the conviction. Speaking for the majority, Justice Harlan saw no unlawful invasion of Lopez's office because the agent had had Lopez's "consent, and while there [the agent] did not violate the privacy of the office by seizing something surreptitiously without Lopez' knowledge."<sup>171</sup>

The only evidence obtained [by the agent] consisted of statements made by Lopez to [the agent], statements which Lopez knew full well could be used against him by [the agent] if he wished. We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication.<sup>172</sup>

For Justice Harlan, Lopez's consent and knowledge were enough to distinguish *Gouled*. Should they have been enough? True, the revenue agent had been in the office with Lopez's permission, but the same can be said about the informant in *Gouled*. Of course, the *Gouled* Court never accepted the claim that Gouled had "consented" to the government entry of his office.<sup>173</sup> Unlike Gouled, however, Lopez had known that he was confronting a federal law enforcement officer. In addition, Lopez had initiated the conversation with the federal agent and had encouraged that agent to return to

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166. *Id.*

167. *Id.* at 431-32.

168. *Id.* at 427.

169. *Id.* at 437.

170. Chief Justice Warren and Justices Brennan, Douglas, and Goldberg would overrule *On Lee*. Chief Justice Warren argued that *Lopez* and *On Lee* were different cases. In *On Lee* "[t]he use and purpose of the transmitter . . . was not to corroborate the testimony of [the informant], but rather, to obviate the need to put him on the stand." *Id.* at 443 (Warren, C.J., concurring in result). For the Chief Justice, electronic surveillance, when used in the manner at issue in *On Lee*, raised substantial questions of due process. *Id.* at 441. Justice Brennan, speaking for two other Justices, contended that *On Lee* and *Lopez* were indistinguishable. *Id.* at 446-47, 451 (Brennan, J., dissenting). Justice Brennan urged that *On Lee* be reversed on the merits. *Id.* at 446-53.

171. *Id.* at 438.

172. *Id.*

173. See *Gouled v. United States*, 255 U.S. 298, 305-06 (1921).

his office.<sup>174</sup>

In *Gouled* and the Court's subsequent informant cases, covert agents were deliberately sent to search and monitor premises or activities otherwise constitutionally protected, whereas in *Lopez* an obvious police official approached Lopez with no intent to search and seize. This distinction is critical. Lopez's awareness that he was facing a law enforcement official and his subsequent conduct demonstrated consent to the police entry and accordingly undermined his Fourth Amendment claim. Instead of distinguishing *Lopez* in this manner suggested, the Court divided on whether the use of a transmitter to record the conversation between Lopez and the agent was constitutional. The majority saw no constitutional vice because the transmitter had been "used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose."<sup>175</sup> The *Lopez* dissenters, on the other hand, argued that the presence of a recording device was constitutionally significant because it allowed third parties to monitor private conversations.<sup>176</sup> When electronic equipment is removed from the constitutional calculus, however, all of the Justices in *Lopez* seemed to agree that the agent's oral testimony was admissible and not the "fruit" of an unlawful search or seizure.<sup>177</sup> The rationale underlying this agreement, although not particularly distinct, was most explicitly articulated by Justice Brennan's dissent.

Justice Brennan appeared to borrow from a theme that first surfaced in *Olmstead*. In that case, the Court justified its conclusion that wiretapping was not a search or seizure under the Fourth Amendment by speculating about the subjective views of the "reasonable" person. "The reasonable view is that one who installs in his house a telephone instrument with connecting wires

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174. See *Lopez*, 373 U.S. at 429-32.

175. *Id.* at 439.

176. As Justice Brennan described it:

[T]he risk which both *On Lee* and [*Lopez*] impose is of a different order. It is the risk that third parties, whether mechanical auditors like the Minifon or human transcribers of mechanical transmissions as in *On Lee*—third parties who cannot be shut out of a conversation as conventional eavesdroppers can be, merely by a lowering of voices, or withdrawing to a private place—may give independent evidence of any conversation.

*Id.* at 450 (Brennan, J., dissenting).

177. See *id.* at 438 (holding that the agent could testify as to the statements by which Lopez offered the agent a bribe); *id.* at 442 (Warren, C.J., concurring in the result) (stating that the recording of the conversation between Lopez and the agent was a permissible means of corroborating the agent's testimony); *id.* at 450 (Brennan, J., dissenting) (stating that Lopez assumed the risk that the agent would use Lopez's statements against him).

*intends* to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment.”<sup>178</sup> This finding on what the “reasonable” person intends was not, of course, empirically based. It was merely the Court’s unsupported assumption about how individuals organize their privacy.

In *Lopez*, Justice Brennan adopted a similar approach in explaining why ordinary conversations between an individual and a disguised government informant fall outside the scope of the Fourth Amendment. According to Brennan, such conversations “do not seriously 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.”<sup>179</sup>

Justice Brennan’s comments were doubly unfortunate. First, his dictum was an unnecessary detour from the facts in *Lopez*. The case could have been decided on straightforward consent grounds in light of Lopez’s awareness that he was confronting a police official.<sup>180</sup> Justice Brennan’s discussion of secret police informants and eavesdroppers was unwarranted because such activity was not even remotely at issue in *Lopez*.

Second, Justice Brennan’s conclusion about the risks we assume by speaking was no more based on hard facts than was Chief Justice Taft’s conclusion in *Olmstead*.<sup>181</sup> Nor were Justice Brennan’s views tied to a principle embraced by the Fourth Amendment. It was simply his conclusion about how most folks live their lives.

Three years later, the Court adopted Justice Brennan’s risk model in *Lewis v. United States*<sup>182</sup> and *Hoffa v. United States*.<sup>183</sup> The facts in *Lewis* were straightforward: an undercover police officer misrepresented his identity during a telephone conversation and obtained an invitation to visit Lewis’s home to purchase narcotics.<sup>184</sup> The officer came to the home and consummated the illegal purchase.<sup>185</sup> At a later visit to the home, the officer

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178. *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (emphasis added).

179. *Lopez*, 373 U.S. at 465 (Brennan, J., dissenting).

180. See *id.* at 429-32 for the Court’s discussion of the facts in *Lopez*.

181. Compare *Lopez*, 373 U.S. at 465 (Brennan, J., dissenting) with *Olmstead*, 277 U.S. at 466 (Taft, C.J.).

182. 385 U.S. 206 (1966).

183. 385 U.S. 293 (1966).

184. *Lewis*, 385 U.S. at 207.

185. *Id.*

made another illegal purchase.<sup>186</sup> The narcotics and the officer's testimony about his conversations with Lewis were admitted at trial.<sup>187</sup>

In upholding Lewis's conviction, the Court was careful to frame the issue narrowly. Chief Justice Warren emphasized that there was no question about whether a "search" of Lewis's home had occurred or whether "anything other than the purchased narcotics [had been] taken away."<sup>188</sup> The only issues were whether "in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation" and whether "the fact [that] the suspect invited the intrusion can[] be held a waiver when the invitation was induced by fraud and deception."<sup>189</sup>

Not surprisingly, Lewis urged that *Gouled* controlled.<sup>190</sup> The Chief Justice disagreed. *Gouled*, according to the Chief Justice, involved a "secret and general ransacking" while the target was absent.<sup>191</sup> In contrast to *Gouled*, the officer in *Lewis* did not "see, hear, or take anything that was not contemplated, and in fact intended, by [Lewis] as a necessary part of his illegal business."<sup>192</sup> A different result would amount "to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*."<sup>193</sup>

Well aware that the undercover officer had entered Lewis's home, the Chief Justice maintained that generally one's home was "accorded the full range of Fourth Amendment protections"—but not in this case.<sup>194</sup> Where a home

is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. 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 purposes contemplated by the occupant.<sup>195</sup>

Without saying so directly, the Chief Justice inferred that by selling

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186. *Id.* at 207-08.

187. *Id.* at 208.

188. *Id.*

189. *Id.*

190. *Id.* at 209.

191. *Id.* at 210.

192. *Id.*

193. *Id.*

194. *Id.* at 211.

195. *Id.*

narcotics Lewis had “waived” his Fourth Amendment right against a secret and deliberate government invasion of his home.<sup>196</sup> What the Chief Justice implied, concurring Justice Brennan made explicit: “[Lewis’s] apartment was not an area protected by the Fourth Amendment as related to the transactions in the present case.”<sup>197</sup> Professing allegiance to a broad view of the Amendment, Justice Brennan insisted that a homeowner can “waive his right to privacy” and does so “to the extent that he opens his home to the transaction of business and invites anyone willing to enter to come in to trade with him.”<sup>198</sup>

On the same day that *Lewis* was decided, the Court also issued its opinion in *Hoffa v. United States*.<sup>199</sup> There, a government informant reported to the FBI incriminating conversations overheard while a member of Jimmy Hoffa’s entourage, including conversations that were spoken inside Hoffa’s hotel suite.<sup>200</sup> Finding it unimportant to the constitutional issue, the Court chose not to decide whether the government had “placed” the informant inside Hoffa’s circle of friends and advisers.<sup>201</sup> Instead of ruling on narrow grounds, as it did in *Lewis*, the *Hoffa* Court spoke broadly.

Borrowing much of his reasoning from Justice Brennan’s earlier opinions in *Lopez* and *Lewis*, Justice Stewart stated that it was “evident that no interest legitimately protected by the Fourth Amendment [was] involved” in *Hoffa*.<sup>202</sup> Justice Stewart noted that the informant had not entered Hoffa’s suite “by force or by stealth.”<sup>203</sup> Nor was there any surreptitious eavesdropping.<sup>204</sup> Because the informant had been given access to the hotel suite and had been allowed to hear and to participate in incriminating conversations, Justice

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196. Interestingly, Chief Justice Warren never uses the term “consent” in explaining why the entry in *Lewis* was reasonable. This omission is understandable. There was no valid consent because Lewis was unaware of the officer’s official status. As Professor Weinreb has cogently noted, the notion that consent to enter a home can be obtained by police officials through fraud and deceit is obviously unsound. See Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 67 (1974).

197. *Lewis*, 385 U.S. at 213 (Brennan, J., concurring).

198. *Id.*

199. 385 U.S. 293 (1966).

200. *Id.* at 296.

201. *Id.* at 299. Edward Grady Partin, the informant in *Hoffa*, was “a jailbird languishing in a Louisiana [prison]” when he was put in contact with the Justice Department after insisting that he could help convict Jimmy Hoffa. *Id.* at 317 (Warren, C.J., dissenting). For a detailed discussion of Partin’s involvement with the “Get-Hoffa Squad” of the Justice Department, see VICTOR S. NAVASKY, KENNEDY JUSTICE 419-24 (1971).

202. *Hoffa*, 385 U.S. at 302.

203. *Id.*

204. *Id.*

Stewart concluded that Hoffa had in effect forfeited his right to rely on the security of his hotel suite.<sup>205</sup> All that could be said about Hoffa's constitutional interest was that "he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing."<sup>206</sup>

Such "misplaced confidence," according to *Hoffa*, had never been afforded Fourth Amendment protection.<sup>207</sup> Recalling the unanimity of the *Lopez* Court regarding the revenue agent's oral testimony, Justice Stewart resurrected and recast Justice Brennan's assumption of risk theory into an attractive cliché: The Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."<sup>208</sup>

With *Hoffa*, the Court had finally arrived at a consensus to justify secret and deliberate government surveillance of our private lives and conversations. This form of governmental intrusion does not implicate the Constitution because "no interest legitimately protected by the Fourth Amendment is involved."<sup>209</sup> Under this view, whenever we choose to invite someone into our homes or offices or to discuss private matters with another, we assume the risk that the person may be a government spy. By conducting our lives in this manner, we "waive" the protection that the Fourth Amendment normally provides against official intrusions, and we "consent" to a secret police search of our homes or to the seizure of our words.

205. *Id.*

206. *Id.* (footnote omitted).

207. *Id.*

208. *Id.* Justice Stewart's disregard of even the narrow view of *Gouled* is obvious. First, the fact that "Partin [the informant] did not enter [Hoffa's] suite by force or stealth," *id.* at 302, is irrelevant for constitutional purposes because *Gouled* had established that both stealthy and forcible intrusions are searches under the Fourth Amendment. See *Gouled v. United States*, 255 U.S. 298, 305 (1921) ("[I]t is impossible to successfully contend that a like search and seizure would be a reasonable one if only admissions were obtained by stealth instead of by force or coercion.").

Moreover, Justice Stewart's efforts to distinguish Hoffa's behavior from the risk assumed by *Gouled* is quite unconvincing when one recalls the circumstances of *Gouled*. Justice Stewart made much of the fact that Hoffa knew that Partin would overhear any incriminating conversations. *Hoffa*, 385 U.S. at 302. Thus, Hoffa could not invoke the protection of the Fourth Amendment because he had relied on the "misplaced confidence" that Partin would not reveal Hoffa's misdeeds. *Id.* But *Gouled* assumed the same risk assumed by Hoffa. Justice Stewart's

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.

William D. Iverson, Note, *Judicial Control of Secret Agents*, 76 YALE L.J. 994, 1012 (1967).

209. *Hoffa*, 385 U.S. at 302.

Put another way, because we live in a society where an individual is free to choose whether to associate or to communicate with another, that freedom is exercised at the individual's own peril. Because one has this freedom, law enforcement officers may exploit it. They may use fraud, deceit, and stealth to obtain information from individuals who unwittingly invite covert informants and spies into their lives.

The Court's settlement of the scope of the Fourth Amendment after *Lopez*, *Lewis*, and *Hoffa* might be easier to accept if the Court had directly addressed *Gouled*. Unfortunately, no serious effort was made to analyze the constitutional core of *Gouled*. The *Gouled* Court was unyielding in its view that a secret government scheme to enter a home or office to obtain information is a "search" under the Fourth Amendment.<sup>210</sup> *Hoffa*, on the other hand, relies on Justice Brennan's risk analysis for the conclusion that a secret police entry does not trigger Fourth Amendment scrutiny.<sup>211</sup> In reality, Justice Brennan's "assumption of risk" model ignored this aspect of *Gouled*. While subsequent rulings have relied on Justice Brennan's risk theory, *Gouled's* conclusion that the Fourth Amendment protects against stealthy entries obtained by trick or disguise has been dismissed with a notation that the current case under review involves a defendant who "consented" or "invited" the government agent's presence and who "intended" that the agent obtain the incriminating information that was eventually seized.

The Court's subsequent cases ignore the fact that *Gouled* never adopted the government's submission that *Gouled* had "consented" to the entry of his home.<sup>212</sup> The best that can be said about the government's consent claim is that the *Gouled* Court remained neutral on the point. My reading of *Gouled* proffers a more substantive position: *Gouled* rejected the view that fictive notions of consent or waiver would trump Fourth Amendment liberties. It must be recalled that the *Gouled* Court dismissed the following submissions: (a) *Gouled* had "granted permission" for a police entry into his office; (b) the entry was constitutional because the informant had entered "a place of business . . . open to the public"; and (c) the informant's exploitation of "the personal relations existing between [himself and *Gouled*]" sanctioned his access to the incriminating information.<sup>213</sup>

Without disputing the accuracy of these factual assertions, *Gouled* ruled

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210. See *supra* notes 64-69 and accompanying text.

211. See *supra* notes 202-08 and accompanying text.

212. See *supra* notes 69-70 and accompanying text.

213. *Gouled v. United States*, 255 U.S. 298, 301 (1921) (argument of the United States government).

that secret intrusions are controlled by the Fourth Amendment notwithstanding the unwitting consent of the target.<sup>214</sup> The logic behind *Gouled's* unbending rejection of the government's consent and waiver arguments was summarized forty-five years later: "[W]hen a homeowner invites a friend or business acquaintance into his home, he opens his house to a friend or acquaintance, not a government spy."<sup>215</sup>

*D. Katz v. United States: A New Way of Thinking About the Fourth Amendment?*

One year after *Lewis and Hoffa* were decided, the Court's ruling in *Katz v. United States*<sup>216</sup> initiated a new way of looking at the Fourth Amendment. In *Katz*, FBI agents attached an electronic listening and recording device to the outside of a public telephone to monitor the conversations of the defendant Katz, who was suspected of being involved in illegal wagering.<sup>217</sup> After rejecting the litigants' formulation of the issues,<sup>218</sup> the *Katz* Court signaled that the old ways of thinking about search and seizure were no longer acceptable.

For starters, *Katz* announced that the Fourth Amendment did not grant a general "right to privacy."<sup>219</sup> Without recognizing that it was doing so, *Katz* echoed a theme implicit in *Gouled* when it stated that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."<sup>220</sup> The Court also explained that the scope of the Amendment could not be measured simply by focusing on whether a particular "area" is "constitutionally protected."<sup>221</sup> A more nuanced approach was necessary because

the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to

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214. *Id.* at 305-06.

215. *Osborn v. United States*, 385 U.S. 323, 346 (1966) (Douglas, J.). Years later, the Court would recognize the wisdom of this point, albeit in a different context. *See infra* notes 288-300 and accompanying text.

216. 389 U.S. 347 (1967).

217. *Id.* at 348.

218. *Id.* at 349-50.

219. *Id.* at 350.

220. *Id.* (footnote omitted).

221. *Id.* at 351.

preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>222</sup>

Finally, *Katz* extinguished the lingering notion that physical invasion by the government was necessary to trigger constitutional review of governmental searches and seizures. Acknowledging the steady judicial trend away from the rationale that supported *Olmstead*, *Katz* declared that “the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”<sup>223</sup>

Equipped with this new way of thinking about the Fourth Amendment, the *Katz* Court concluded that wiretapping without judicial authorization violated the Constitution.<sup>224</sup> While conceding that *Katz* had chosen to make his illegal calls in a public place, this fact was not dispositive because “what [*Katz*] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear.”<sup>225</sup> By using the telephone in a conventional manner, *Katz* was “surely entitled to assume that the words he utter[ed] into the mouthpiece w[ould] not be broadcast to the world. To read the Constitution more narrowly [would be] to ignore the vital role that the public telephone has come to play in private communication.”<sup>226</sup>

While *Katz* fostered a new approach, it did not take long to see that the

222. *Id.* at 351-52 (citations omitted). This quote from *Katz* can be misunderstood. Although what a person “knowingly exposes to the public, even in his own home or office, is not” protected by the Fourth Amendment, the police should not be excused from constitutional restrictions merely because they can point to some knowing exposure to the public by an individual. For example, I knowingly expose the privacy of my home to a cleaning service every two weeks. Anyone who stays at a hotel also knowingly exposes the privacy of his or her room to cleaning personnel every day. Both places, however, retain Fourth Amendment protection notwithstanding the fact that there has been a knowing exposure to some members of the public. *Cf.* Joseph D. Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 432 n.70 (1978) (“To immunize conduct from [F]ourth [A]mendment scrutiny, the government should make its observations in the same manner as that available to any member of the public.”).

On the other hand, imagine that I leave contraband on the kitchen counter in plain view of anyone whom I admit to my home. If a police officer disguises himself as a cleaning person and I admit him to my abode unaware of his official status, does the Fourth Amendment have anything to say about his conduct? I hope so. Although I have knowingly exposed my home to a member of the public, that disclosure was not made to the public. On the contrary, it was a limited exposure to a single individual. More importantly, I did not expose my privacy to the government, nor did I consent to any police intrusion. While the Fourth Amendment offers no protection against private intrusions, it *is* concerned with police intrusions. For Fourth Amendment purposes, the difference between a knowing exposure to a third party and a knowing exposure to the government is crucial.

223. *Katz*, 389 U.S. at 353.

224. *Id.* at 358-59.

225. *Id.* at 352.

226. *Id.*

new mode of thinking would not change the law governing the age-old use of informers and secret spies. *United States v. White*,<sup>227</sup> a case that closely mirrored the facts of *On Lee*,<sup>228</sup> soon came before the Court. A plurality of the Court in *White* found that *Katz* did not affect the rationale supporting *Lopez*, *Lewis* or *Hoffa*.<sup>229</sup> In fact, the *White* plurality could find nothing in *Katz* that undermined the reasoning of *On Lee*.<sup>230</sup> Thus, the plurality reaffirmed *On Lee*'s understanding that the Fourth Amendment would be ill-served if its protection were equated with "spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure."<sup>231</sup>

At issue in *White* was whether the testimony of federal officers about conversations between the defendant and a government informant, which were overheard by the officers monitoring the frequency of a radio transmitter carried by the informant, implicated the Fourth Amendment.<sup>232</sup> The Court answered in the negative.<sup>233</sup>

Acknowledging the Court's prior holdings, the *White* plurality explained that if an individual assumes the risk that a secret informant, acting without electronic equipment, might later reveal the contents of a conversation, the risk is the same when the informant simultaneously records and transmits the conversation to a third party.<sup>234</sup> In either situation, "the risk is his," and the Fourth Amendment offers no protection against police efforts to obtain information in this manner.<sup>235</sup>

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227. 401 U.S. 745 (1971).

228. In *White*, like in *On Lee* the defendant's conversations with a government informant were transmitted by radio to listening government agents. *Id.* at 746-47; *On Lee v. United States*, 343 U.S. 747, 748-49 (1951).

229. *See White*, 401 U.S. at 749 (plurality opinion).

230. *Id.* at 750 (plurality opinion).

231. *Id.* at 750 (plurality opinion) (quoting *On Lee*, 343 U.S. at 753-54). In *United States v. Caceres*, 440 U.S. 741, 744 & n.2 (1979), a majority of the Court indicated its acceptance of the rationale of the *White* plurality.

232. *White*, 401 U.S. at 746-47.

233. *See id.* at 747.

234. *Id.* at 751 (plurality opinion). "If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case." *Id.* at 752 (plurality opinion).

235. *Id.* at 752-53 (plurality opinion).

### III. THE SUPREME COURT'S INFORMANT CASES REST UPON A MISTAKEN NOTION OF PRIVACY

If society's sole concern was the identification and prosecution of criminal behavior, the Court's informant rulings would be logical. But our nation also has an interest in the preservation of the freedoms embodied in the Bill of Rights. From this perspective, the logic of the Court's cases is much less impressive.

Consider the result in *Lewis*, the least controversial of the Court's secret spy cases. Some see no constitutional harm where a covert agent enters a home to purchase narcotics from someone like Lewis, "because the only ordinariness of life that would be so protected is the expectation that an apparent criminal is what he appears to be."<sup>236</sup> An undercover operation like that in *Lewis* "expose to police spying only those people who express to strangers a willingness to engage in criminal activity."<sup>237</sup> Professor LaFave has also suggested that the key point in *Lewis* is that the undercover officer "indicated in advance that it was *his* purpose to participate in the criminal activity."<sup>238</sup>

At first glance, *Lewis* does appear to be an easy case. One may wonder why the Court even decided to review *Lewis* in light of the holdings in *On Lee* and *Lopez*.<sup>239</sup> But on further study, *Lewis* is a very troubling case.

First, despite the Court's efforts to downplay the point,<sup>240</sup> the facts showed

236. White, *supra* note 24, at 230; *see also* Sanford Levinson, *Under Cover: The Hidden Costs of Infiltration*, HASTINGS CTR. REP., Aug. 1982, at 29, 33 (accepting Professor White's rationale as "persuasive" provided that (a) society can "agree on what counts as (properly) criminal conduct" and (b) undercover agents only learn about a suspect's "willingness to continue violating the law").

237. White, *supra* note 24, at 230; *see also* Josephson, *supra* note 141, at 1605 (There is no need for judicial authorization "where the informant is merely ordered to make a buy of drugs and the seller's 'trust and confidence' arises entirely within the context of an illegal transaction. There is no social utility to a purely illegal relationship.").

Others have accepted *Lewis* because the defendant, under the circumstances, unreasonably assumed a risk that the person he was dealing with would not reveal his misdeeds to the government. *See* Iverson, *supra* note 208, at 1011 (proposing multi-factor test that considers "where [a] conversation is carried on; to whom [an] individual is speaking; and the circumstances leading to [a] conversation"); Eric F. Saunders, Case Comment, *Electronic Eavesdropping and the Right to Privacy*, 52 B.U. L. REV. 831, 844 (1972) ("When one speaks confidentially with another, he assumes the patent risk that the listener will disclose the substance of the conversation to a third person.").

238. 3 LAFAVE, *supra* note 63, § 8.2(m), at 703; *see also* YALE KAMISAR ET AL., THE SUM AND SUBSTANCE OF CRIMINAL PROCEDURE 122-25 (1977) (explaining *Lewis* as a case where the defendant voluntarily chose to reveal his illegal conduct to anyone interested in participating).

239. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 388 (8th ed. 1994).

240. *See Lewis v. United States*, 385 U.S. 206, 211 (1966).

a police *entry* of Lewis's home that was neither authorized by a warrant nor an exigency. Even if some doubt about the matter existed in 1963 when *Lewis* was decided,<sup>241</sup> that lack of authorization alone triggers the most scrupulous protection under the Constitution and the Court's current precedents.<sup>242</sup>

Second, the waiver theory relied upon by Chief Justice Warren and Justice Brennan proves too much. Imagine that the police are strongly convinced that a house is filled with illegal weapons. Imagine further that the police also have solid evidence that the owner willingly sells the weapons to anyone who can produce sufficient cash. Can the police enter the house without a warrant because the owner obviously does not use it as a home and thus, for constitutional purposes, has "waive[d] his right to privacy"<sup>243</sup> by converting the premises into an unlawful weapons storage facility? The answer, of course, is no. Despite the suspect's illegal conduct, there is no "waiver" of his Fourth Amendment rights.<sup>244</sup> Therefore, the fact that Lewis sold drugs from his home should be irrelevant.<sup>245</sup>

The reasoning of *Lewis* is more typical of the Burger or Rehnquist Courts' Fourth Amendment jurisprudence than that of the Warren Court. Chief Justice Warren and Justice Brennan emphasized that Lewis had turned his home into a commercial center for the sale of narcotics.<sup>246</sup> Such conduct evidently excused the otherwise illegal, warrantless police entry of his home. This logic is regrettable. A Fourth Amendment entry of a home cannot "be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."<sup>247</sup> When the police agent entered

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241. *But cf.* *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); *McDonald v. United States*, 335 U.S. 451, 455 (1948); *Johnson v. United States*, 333 U.S. 10, 16-17 (1948).

242. *See* *Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."); *see also* *United States v. Karo*, 468 U.S. 705, 714-15 (1984) ("Searches and seizures inside a home without warrant are presumptively unreasonable absent exigent circumstances."); *Steagald v. United States*, 451 U.S. 204, 211 (1981) ("Except in . . . special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.").

243. *Lewis v. United States*, 385 U.S. 206, 213 (1966) (Brennan, J., concurring).

244. *Cf.* *Katz v. United States*, 389 U.S. 347 (1967) (no waiver of Fourth Amendment rights by using a public telephone to conduct illegal gambling operations).

245. *Cf.* *United States v. Dunn*, 480 U.S. 294, 311 (1987) (Brennan, J., dissenting) ("A barn, like a home, may simultaneously be put to domestic and nondomestic uses, even the manufacture of drugs. Dual use does not strip a home or any building within the curtilage of Fourth Amendment protection.").

246. *See* *Lewis*, 385 U.S. at 211 (Warren, C.J.); *id.* at 213 (Brennan, J., concurring).

247. *United States v. Di Re*, 332 U.S. 581, 595 (1948) (footnote omitted).

Lewis's home without a warrant, the consent of Lewis, or exigent circumstances, his actions were bad from the start. His unconstitutional behavior cannot be justified by what he discovers once inside.

Nor should our attitude about the Fourth Amendment's protection of privacy change whenever the police are able to obtain entry to a home via stealth or trickery. As its text suggests, the Fourth Amendment provides substantive, not just procedural, protection against unreasonable governmental intrusion.<sup>248</sup> Therefore, the concept of waiver of "[t]he right of the people to be secure . . . against unreasonable searches and seizures"<sup>249</sup> must be defined in a principled manner. Central to the *Lewis* Court's conception of waiver is the fact that Lewis had "invited the undercover agent to his home."<sup>250</sup>

For constitutional purposes, however, this "invitation" is neither a valid waiver nor a reasonable consent to enter.<sup>251</sup> One may consent to a private party's entrance to one's home, but such consent is a far cry from consent to a police search. Some skeptics wonder why the police should be restricted from obtaining access to a home or recording a conversation when a private person acting independently of the police can do the same thing. The difference is that the Fourth Amendment imposes on police conduct limits that do not apply to private persons.<sup>252</sup> Moreover, the Amendment recognizes that certain interests deserve special protection from police scrutiny. The Amendment does not impose an impenetrable barrier to unconsented police intrusion, but it does require compliance with certain procedural safeguards before an intrusion is permitted. This historical judgment and constitutional norm regarding police entries is pertinent whether the police choose an overt entry with badges and weapons drawn or a covert entry with badges and weapons concealed.<sup>253</sup>

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248. *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 827 (1994) (Stevens, J., dissenting).

249. U.S. CONST. amend. IV.

250. *Lewis*, 385 U.S. at 210.

251. Suppose, for example, that the police deployed a squad of men to pose as gas and electric

company inspectors in order to make a general survey of the contents of cellars. Plainly, the [F]ourth [A]mendment would prohibit such a practice, notwithstanding that the "inspector" was invited to enter in each case. We do regard deliberate deception about an obviously material—indeed controlling—fact as inconsistent with voluntariness.

Weinreb, *supra* note 196, at 67.

252. As Justice White ironically recognized, the distinction highlighted by skeptics focuses "on relationships between private parties, but the Fourth Amendment is concerned with the relationship of one of those parties to the government." *Rakas v. Illinois*, 439 U.S. 128, 167-68 (1978) (White, J., dissenting).

253. Professor Grano, in a thoughtful reply to the concerns raised by Professor Weinreb's

In the final analysis, many accept the result in *Lewis* because the defendant was selling drugs in his home, and the covert entry efficiently and effectively identified that crime. This “deny-the-guilty-their-rights” mode of Fourth Amendment analysis would be unfamiliar to the Boston merchants who retained James Otis, Jr., to oppose the writs of assistance.<sup>254</sup> Moreover, it is unprincipled constitutional decision-making. “A home is still a sanctuary, however the owner may use it.”<sup>255</sup> Whatever my motives, when I open my front door to a friend, to an overnight delivery worker, or to a complete stranger, access is afforded only to those whom I knowingly admit. If the police want access to my home, they should follow lawful procedure. At times, stealthy entries may be necessary; but under the Constitution, the police cannot decide by themselves when they will enter a home.

Similar criticism applies to *Hoffa*. Our constitutional ancestors did not

criticism of *Lewis*, see Weinreb, *supra* note 196, argues that Weinreb’s hypothetical of a squad of government agents posing as utility inspectors is distinguishable from *Lewis*. Grano, *supra* note 222, at 438 n.114. According to Grano, “[t]he agent in *Lewis* only provided an opportunity for the defendant to commit a crime; the agents in Professor Weinreb’s hypothetical would obviously intrude upon the justifiable privacy expectations of innocent and guilty people alike.” *Id.*

While Grano is highly critical of the Court’s informant cases, see *id.* at 432-37, he submits that *Lewis* was probably correctly decided because

the police conduct in *Lewis*, unlike that in *Hoffa*, did not constitute a threat to any justifiable expectation of privacy. . . . [A] simple request for an individual to sell narcotics can only ascertain whether that individual is willing to do so. The request in *Lewis*, unlike the spying in *Hoffa*, posed no threat to justifiable expectations of informational privacy.

*Id.* at 438 (footnote omitted).

Although I agree that there are significant distinctions between *Hoffa* and *Lewis*, see Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 150, these differences do not support the reasoning and result in *Lewis*. As Professor Grano recognizes, *Lewis*’s disclosure was not offered to the general public, but instead was “only a limited disclosure.” Grano, *supra* note 222, at 434 n.94; see *id.* at 437 n.111. Moreover, the fact that *Lewis*’s disclosure concerned an illegal transaction that the government was able to predict in advance does not justify a warrantless intrusion of his privacy. Even in cases where the police know with absolute certainty that illegal conduct is occurring, the Court has repeatedly said that, absent exigent circumstances, uniformed police agents may not enter a home without a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) (plurality opinion).

Thus, under the Fourth Amendment, one has a justifiable privacy interest against overt police entries in situations even where the government is certain of criminality. It is not apparent why that same privacy interest is no longer justifiable when the government chooses to enter a home covertly, particularly given that *Gouled* drew no distinction between an overt, forceful entry and a covert, stealthy one. See *Gouled v. United States*, 255 U.S. 298, 305-06 (1921).

254. “The mercantile community of the Bay Colony challenged writs of assistance because they threatened not only civil rights but the smuggling from which that community profited. . . . Opposing the writs made sound business sense.” Cuddihy, *supra* note 20, at 802-03. *But cf.* Stuntz, *supra* note 53, at 409 (“The dispute over the writs, in short, had at least as much to do with the regulation of trade—with the substance of the rules being enforced—as with general principles of search and seizure.”).

255. *Osborne v. United States*, 385 U.S. 323, 346 (1966) (Douglas, J.).

trust the officers who entered their homes and businesses to determine whether they were complying with the law; the Fourth Amendment was *the response* to the discretionary power that customs agents possessed to invade the privacy of early Americans. Relying on the reasonableness and good faith of law enforcement officers to guarantee the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”<sup>256</sup> was a foolish proposition for those who urged the creation of the Fourth Amendment. Yet, this is exactly the regime authorized by *Hoffa*.

If one accepts the fundamental historical point that the Fourth Amendment reflected the colonists’ distrust of the police power and was designed to limit the discretionary power of the police to invade one’s home, it becomes paradoxical for the *Hoffa* Court to allow law enforcement officers unchecked discretion to plant spies and informants into one’s privacy. Like the customs officers who forced open the doors of colonial homes, the secret informant is on a similar mission for the state. “The modern police undercover agent operation is in purpose, if not in detail, the same as any traditional police investigative technique: to gather information from and about private citizens on possible violations of the law.”<sup>257</sup>

If one of the values protected by the Fourth Amendment is freedom from discretionary police intrusion of the home or office, that norm is doubly offended in cases like *Hoffa* because the target chosen for scrutiny at the whim of the police “does not even know that he is ringed by the state, his reactions probed and his words marked.”<sup>258</sup>

The Court found *Hoffa*’s privacy interests illegitimate because the Fourth Amendment does not protect “a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”<sup>259</sup> This statement is specious because the informant in *Hoffa* was not a friend who

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256. U.S. CONST. amend. IV.

257. Lundy, *supra* note 67, at 664. This statement is certainly true in *Hoffa*. Partin, the informant in *Hoffa*, did not arrive at *Hoffa*’s hotel suite by accident.

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. . . . 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.

Iverson, *supra* note 208, at 1012.

258. Iverson, *supra* note 208, at 1011; *see also* Christopher Slobogin, *The World Without A Fourth Amendment*, 39 UCLA L. REV. 1, 104 (1991) (informant spying “is more inimical” to privacy interests than other searches “[b]ecause it allows the government to use personal and commercial relationships for investigative purposes unbeknownst to the target, . . . open[ing] up to government inspection virtually all of those affairs that are shared with anyone else”).

259. *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

subsequently decided to betray Jimmy Hoffa, but a government spy right from the start.<sup>260</sup> More importantly, the Court's description of the constitutional interest at stake in *Hoffa* turns upside down the value system inherent in the Fourth Amendment. When positive proof that an individual has committed a crime exists in the traditional search and seizure context, the burden is still on the state to justify and to limit the intrusion.

Consider again the hypothetical case where the police know that a house is being used to store illegal weapons. Or, consider a case where the police have good reason to believe that a defendant has murdered a child and evidence of the crime is in his home.<sup>261</sup> No one familiar with the history of the Fourth Amendment would suggest that these defendants' constitutional interests are illegitimate, thus permitting a search of their homes without a warrant simply because these defendants may have miscalculated society's willingness to respect their privacy in the face of serious governmental interests.

In the secret spy cases, however, Fourth Amendment values are reversed. After *Hoffa*, the government need not first assemble objective evidence of wrongdoing to covertly invade the homes and offices of its citizens. After *Hoffa*, the government may bypass neutral judicial authorization for the intrusion sought by its undercover agents. After *Hoffa*, secret spying missions need not particularize the person, place, and nature of the conversations subject to surveillance and recording. Whatever the informant sees and hears, regardless of the nexus to criminal behavior, is information known to the police. After *Hoffa*, such wide-ranging surveillance is without time limit and

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260. As Professor Kitch has explained:

[T]he reality to which Hoffa was exposed was not that Partin would decide to tell but that he was in fact working for the government at the very time Hoffa spoke. Partin did not turn out to be a friend who later "revealed wrongdoing." He was exactly what he did not appear to be—a government agent—and Hoffa was induced to speak to him because of this very deception. It is one thing to say that people must take the risk that their friends will report wrongdoing. It is another to say that people must take the risk that their friends have already promised to report whatever they do and say to the government.

Kitch, *supra* note 253, at 151-52.

Summarizing the Court's prior precedents in *United States v. White*, Justice White stated that "the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent." 401 U.S. 745, 752 (1971) (plurality opinion) (emphasis added). The phrase "is or becomes" is important. Because the Fourth Amendment is concerned with government action, it offers no protection against a friend or accomplice who, in effect, "becomes" a police source by subsequently revealing private information to the authorities. Where, however, the friend "is" a police agent from the start, his surveillance activities implicate Fourth Amendment interests. Justice White, of course, never made this distinction. Nevertheless, there is a big difference between a person acting independently of the police who "becomes" the reservoir of private information for the police and a person sent or encouraged by the police who "is" a police agent from the very start.

261. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

need not be supervised by a judge.

While there is no proof that most law-abiding individuals would rebel against such a regime if they were targeted like Hoffa, fortunately such proof is unnecessary. The Fourth Amendment does not bar only those intrusions that the citizenry reasonably condemns or require that individuals rely on the “good faith and self-restraint” of law enforcement.<sup>262</sup> Rather, the Fourth Amendment is a positive check on discretionary power whenever the government intrudes upon the “right of the people to be secure in their persons, houses, papers, and effects,”<sup>263</sup> irrespective of whether the people are innocent or guilty. Therefore, *Hoffa* was wrong in holding that the Fourth Amendment offers no protection against spies and undercover agents who invade our homes and offices.

### A. Assumption of Risk Theory

The informant cases embrace “risk analysis.” The *White* plurality reaffirmed the Court’s commitment to the risk theory first elaborated in Justice Brennan’s *Lopez* dissent.<sup>264</sup> For the plurality, the intervening decision in *Katz* was irrelevant. Although *Katz* announced that the Court would no longer be controlled by rigid and antiquated concepts when formulating the scope of the Fourth Amendment,<sup>265</sup> the *White* plurality read *Katz* as having no

262. One commentator’s criticism of *United States v. White* is equally applicable to *Hoffa*:

Those people who assume that government agents will act with self-restraint and respect the privacy of innocent citizens may overlook or dismiss the possible impact of electronic eavesdropping on private conversation. Whether this assumption is warranted or not, it is not a substitute for the protection provided by a judicial determination of probable cause. If the [F]ourth [A]mendment were premised on the good faith and self-restraint of police, its controls would be superfluous. Instead, it functions as a check on abuses of authority and the worst tendencies of government which courts should anticipate whenever the police are given an unrestricted license to employ such investigative techniques as electronic eavesdropping.

Saunders, *supra* note 237, at 842-43.

263. U.S. CONST. amend IV.

264. See *supra* notes 227-35 and accompanying text.

265. While it has been rightly described as an innovation in the Court’s thinking, *Katz* did not impose, as one might expect the Fourth Amendment would, an affirmative duty on the government to respect the privacy of its citizens. As Professor Gutterman has observed:

By focusing on the precautions that *Katz* took, the Court disclosed that it might not believe in an “entitlement theory,” a right of the people to expect their government to respect their privacy. The *Katz* formula could, if desired, be used to protect only those sensible persons who had the foresight to take precautions to keep their property, activities, and even ideas hidden from public view. By grasping upon this particular ingredient of the *Katz* formula, major significance could be given to the lack of protective means used to shield otherwise private conduct.

Gutterman, *supra* note 113, at 664 (footnote omitted).

impact on the secret spy cases.

After offering a meaningless reference to *Katz*'s "expectations of privacy" model,<sup>266</sup> the *White* plurality did not pause to consider whether the doctrinal shift declared in *Katz* demanded a reversal, or at least a reconsideration, of cases like *On Lee*, *Lewis*, and *Hoffa*. The plurality simply restated the conclusions of earlier cases by noting that the law permits unchecked invasion of privacy where informants can be found to gather information for the police.<sup>267</sup> Instead of a discussion or explanation of whether the *Katz* model conflicted with the risk analysis of earlier cases, the *White* plurality gave new life to a theory that had never been harmonized with the foundation established in *Gouled*.

As applied, risk analysis establishes a de jure waiver of constitutional protection, even though the citizen is unaware and never informed that such a waiver has occurred. From the Court's perspective, risk analysis is a useful doctrinal tool because wired informants are given the same license to infiltrate homes and offices as informants without electronic devices.<sup>268</sup> Moreover, when the constitutional issue is framed in terms of the risks assumed by criminals,<sup>269</sup> the Court can always play a trump card favoring law enforcement interests: reliable evidence of a defendant's guilt may be obtained by the informant's intrusion.<sup>270</sup> This reasoning is attractive if one is bent on bringing criminals to book. While the logic of *White* emerges

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266. *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion).

267. *Id.* According to the *White* plurality, if the intrusions permitted in *Hoffa* and *Lewis* are constitutionally valid, it is a short and logical step to accept equivalent intrusions where the informant is wired for sound. "If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case." *Id.* (citation omitted).

Although there is much to criticize in *White*, I see little difference between wired and unwired informants. As Professor Grano has already noted: "From the perspective of informational privacy, . . . bugged and unbugged informants are difficult to distinguish." Grano, *supra* note 222, at 435; see also Amsterdam, *supra* note 20, at 407 ("The only difference [between an informant wired for sound and an informant without a wire] is that under electronic surveillance you are afraid to talk to anybody in your office or over the phone, while under a spy system you are afraid to talk to anybody at all.").

268. *White*, 401 U.S. at 752-53 (plurality opinion) (finding no convincing evidence to justify distinguishing "between the electronically equipped and the unequipped agent . . . substantial enough to require discrete constitutional recognition, particularly under the Fourth Amendment which is ruled by fluid concepts of 'reasonableness.'")

269. See, e.g., *id.* at 752 ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his.")

270. See *id.* at 753 ("Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable.")

naturally from the Court's earlier precedents,<sup>271</sup> the Court's risk analysis has not generated widespread support off the bench. There are good reasons for this unfavorable response.

First, the Court does not and cannot reconcile risk theory with the origins of the Fourth Amendment. True, the use of secret informants has deep historical roots.<sup>272</sup> Moreover, the Framers of the Constitution left no specific clues regarding their intent as to whether the Fourth Amendment would regulate or forbid secret informants. The Framers also said nothing about eavesdropping, but that omission did not justify leaving eavesdropping and its modern equivalent, wiretapping, to the whims of the police.<sup>273</sup>

The Framers were initially preoccupied with the intrusions associated with general warrants and writs of assistance.<sup>274</sup> Those law enforcement tools were especially loathsome because they permitted unchecked and promiscuous invasions of the home. The Fourth Amendment was adopted to halt this type of intrusion. In light of this history, is it fair to surmise that the Framers would have favored an interpretation of the Fourth Amendment that grants the police absolute authority to send informants and secret spies into an individual's home? Or, is it not more likely that the Framers, who despised writs of assistance and general warrants because they allowed government agents to search and seize at will,<sup>275</sup> would have also opposed giving those

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271. See Saunders, *supra* note 237, at 834-35. According to the *White* plurality, "a constitutional license to employ secret agents generates the correlative right to electronically eavesdrop without prior judicial authorization. If the government may lawfully invade an individual's privacy by using an informer, the constitutional protection around his private conversation collapses." *Id.* at 835 (footnote omitted).

272. See Iverson, *supra* note 208, at 994 n.1 (referring to "the espionage which [historically] forms part of the administrative system of continental despotisms") (quoting 2 THOMAS E. MAY, CONSTITUTIONAL HISTORY OF ENGLAND 275 (1863)); Lundy, *supra* note 76, at 648 n.70 (quoting congressman's distasteful description of a domestic spy network in 1798). One interesting historical precedent occurred in 1580, when English officials used spies to infiltrate groups of Catholic priests who had come to Britain to minister to their worshippers. Cuddihy, *supra* note 20, at 142.

273. *But see* Katz v. United States, 389 U.S. 347, 366 (1967) (Black, J., dissenting) ("There can be no doubt that the Framers were aware of [eavesdropping], and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment.")

274. See *supra* Part I.

275. See LASSON, *supra* note 20, at 54, for an explanation that writs of assistance were more arbitrary and open to abuse than general warrants.

The more dangerous element of the writ of assistance . . . was that it was not returnable at all after execution, but was good as a continuous license and authority during the whole lifetime of the reigning sovereign. The discretion delegated to the official was therefore practically absolute and unlimited. The writ empowered the officer and his deputies and servants to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye.

same agents absolute discretion to use secret informants in order to search and seize at will? I believe that our constitutional ancestors, who proposed and ratified the Fourth Amendment to bar government agents from entering the front doors of their homes without a proper warrant, would have invoked the same "realm of values"<sup>276</sup> inherent in the Amendment to bar secret spies and informants from slipping into their homes via the back door without warrant or adequate justification.

Even if the history of the Fourth Amendment is ignored, there are still serious problems with the Court's risk theory. First, the Court's risk analysis is a legal conclusion masquerading as legal analysis.<sup>277</sup> The Court's opinions have been transparent in their desire to affirm the convictions of guilty defendants, while blinking at the implications of giving the police untrammelled authority to unleash informants on the population.<sup>278</sup>

In some circumstances, a result-oriented approach is predictable in "hard" Fourth Amendment cases. Governmental use of informants and secret spies, however, hardly qualifies as such a case. On the eve of the Watergate scandal, the *White* Court, like the rest of the nation, was well aware of the history and abuse of governmental spying. Objectionable spying has always included the use of informants to investigate individuals and infiltrate groups disfavored by government officials.<sup>279</sup> Aware of the history and impact of police spying

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*Id.* (footnote omitted).

276. *United States v. White*, 401 U.S. 745, 778 (1971) (Harlan, J., dissenting).

277. *See* Gutterman, *supra* note 113, at 674 ("The Court's risk exposure concept became a conclusion, not a reasoned analysis of what privacy claims are desirable in a democratic society."); *cf.* Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 *GEO. WASH. L. REV.* 529, 541-42 (1978) (explaining how the Court's Fourth Amendment risk analysis distorts and misconstrues traditional assumption of risk analysis).

278. *See, e.g., White*, 401 U.S. at 752 (plurality opinion) ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police."); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."); *Lewis v. United States*, 385 U.S. 206, 211 (1966) ("But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street."); *id.* at 213 (Brennan, J., concurring) ("The petitioner . . . opened his apartment for the conduct of a business, the sale of narcotics; the agent . . . took nothing [from the apartment] except what would be taken away by any willing purchaser. There was therefore no intrusion upon the 'sanctity' of petitioner's home or the 'privacies of life.'"); *Lopez v. United States*, 373 U.S. 427, 438 (1963) ("We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication.").

279. *See, e.g., DONNER*, *supra* note 13, at 36-38 (noting the federal government's use of informants in organizing and facilitating the Palmer raids in 1920); *O'REILLY*, *supra* note 13, at 7 (stating that FBI Director J. Edgar Hoover defended the FBI's infiltration and surveillance of civil

in this sensitive area, the public was right to expect a more principled decision than the one provided by the *White* Court, which simply outlined the appropriate expectations and assumptions fit for criminals.

Second, there is no substantive distinction between the modern Court's risk analysis and the Court's prior conclusion in *Olmstead* that an individual who uses a telephone intends to project his voice to those outside. Why is the former conclusion constitutionally reasonable but not the latter? There is no more empirical support for the modern Court's conclusion that citizens assume certain risks whenever they speak to a third party than there was for the now-discredited assumption in *Olmstead*. And while the modern Court has never suggested that this issue turns on an empirical evaluation, the Court's normative judgment about informant spying is not convincing.

The *White* plurality insisted that wiretapping involves "no revelation to the Government by a party to the conversations with the defendant."<sup>280</sup> This assertion is true, but the factual characterization of the mechanics of wiretapping neither justifies nor explains the Court's *legal* conclusion about the risks associated with informant spying. It merely begs the question, and question begging cuts in many directions. The Court's assumption is equally applicable to other contexts: If people like *White* and *Hoffa* assume the risk that their companions are police agents, "then why does one using the phone not 'assume the risk' that the police will be tapping the wire? And why does one using the mails not assume that the police will be reading his letters? Are these other risks small only because the Court has made them so?"<sup>281</sup>

Seven decades ago, the Court interpreted the Fourth Amendment to exclude private telephone conversation from constitutional protection. Today's Court has rejected the literal approach of *Olmstead* and substituted the "expectation of privacy" model, which considers "assumed risks,"<sup>282</sup>

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rights groups as being done "for their own good"); Gary T. Marx, *Thoughts on a Neglected Category of Social Movement Participant: The Agent Provocateur and the Informant*, 80 AM. J. SOC. 402 (1974) (discussing the "origins and motives of informants" and "their roles in radical groups"); cf. JOHN T. ELLIFF, *THE REFORM OF FBI INTELLIGENCE OPERATIONS* 125 (1979).

Up to now the courts have not extended the warrant requirement to undercover informants, on the theory that anyone who discusses criminal actions with another must assume the risk that the other will inform. But the courts now have before them a record of widespread use of such investigative tools as informants to report entirely lawful conversations and private activities, as well as to take lawless disruptive action for the purpose of inhibiting political expression and association.

ELLIFF, *supra*, at 125.

280. *White*, 401 U.S. at 749 (plurality opinion).

281. *KAMISAR ET AL.*, *supra* note 239, at 391 (citations omitted).

282. See, e.g., *White*, 401 U.S. at 752 (plurality opinion).

“waived rights of privacy,”<sup>283</sup> and “interests legitimately protected.”<sup>284</sup> But after all the legal jargon and question begging is stripped away, the Court ultimately confronts a value judgment about government power. Professor Amsterdam put it well when he said:

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.<sup>285</sup>

The *White* plurality never addressed the reality that secret police informants would target, just as wiretapping had targeted, the privacy and security of all citizens, the guilty and innocent alike.<sup>286</sup> Such stilted reasoning is inevitable when the Court considers only the expectations of criminals. An objective approach would have recognized that “[w]hat was at stake in *White* was nothing less than the soul of *Katz*.”<sup>287</sup> We assume the police lack the discretion to listen to telephone conversations because the Court has interpreted the Constitution in a manner that requires the police to satisfy certain legal safeguards before such intrusions may occur. That judgment was not dictated by the words of the Constitution; it came instead from a distrust of unchecked police power that threatens the interests embodied in the Fourth Amendment. If the Fourth Amendment restrains the discretion of the police to wiretap or “bug” private conversations, it is not apparent why that same provision is inapplicable when the police monitor and record private conversations through the use of a secret informant deliberately positioned to hear those conversations. After all, a secret informant acts as a “human bug” for the government. If there is a constitutional difference between unrestrained wiretap surveillance and unrestrained informant spying, I have not yet found it.

Interestingly, in other search and seizure contexts, the current Court has shown signs that a risk analysis which focuses on the risks and assumptions

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283. See, e.g., *Lewis v. United States*, 385 U.S. 206, 210-12 (1966).

284. See, e.g., *Lopez v. United States*, 373 U.S. 427, 438-40 (1963).

285. Amsterdam, *supra* note 20, at 403.

286. See, e.g., Goldsmith, *supra* note 114, at 34 (“[B]y the 1960’s it had become apparent that, . . . the privacy rights of thousands of Americans had been unlawfully violated.” (footnote omitted)).

287. John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1172 (1989).

of criminals, rather than “the expectation of the ordinary citizen,”<sup>288</sup> distorts the meaning of the Fourth Amendment. For example, when deciding whether a controversial police encounter triggers constitutional scrutiny, the Court recently explained that the intrusiveness of police conduct must be judged from the perspective of the innocent person.<sup>289</sup> If this analysis is employed in cases where informants are planted in homes or sent to record private conversations, the flaw in the reasoning of the *White* plurality is manifest.<sup>290</sup>

The Court has also recognized that “an individual can have a reasonable expectation of privacy against the government even though such an expectation may not exist against certain private individuals.”<sup>291</sup> Adopting reasoning contrary to the logic of his earlier opinion in *White*,<sup>292</sup> Justice White explained in *Marshall v. Barlow’s, Inc.*,<sup>293</sup> that there is a critical difference between governmental intrusion and a similar intrusion by a person not affiliated with the government.<sup>294</sup> Defending a scheme of warrantless

288. *United States v. White*, 401 U.S. 745, 790 (1971) (Harlan, J., dissenting).

289. *Florida v. Bostick*, 501 U.S. 429, 438 (1991). *Bostick* ruled that no seizure under the Fourth Amendment automatically occurs when police officers board a bus, randomly approach passengers, ask to see their identification and tickets, and seek permission to search their luggage for illegal drugs. *Id.* at 437. The test for determining whether a seizure occurs in this context is whether “a reasonable person” would feel free to decline the police requests or terminate the encounter. *Id.* at 439. The so-called “reasonable person” that the Court has in mind “presupposes an *innocent* person.” *Id.* at 438.

290. When the Court is confronted with the impact of unchecked informant surveillance on the innocent as well as the guilty, there is

no compelling reason why the privacy of one’s home ought not to be protected against deceptive as well as secretive and forcible intrusions. The Court’s argument, that the risk that persons in whom one confides will inform is inevitable in human affairs, is conclusory as applied to government action: we must assume the risks only of those types of government action which the Court has declared permissible. . . . If deceptive intrusions by government agents were [accorded the same treatment given to forcible searches and wiretapping], this risk would also be substantially lessened. The real question is what risks of government intrusion ought a person be required to face.

*The Supreme Court, 1966 Term*, 81 HARV L. REV. 69, 193-94 (1967) (footnote omitted). It has also been commented that:

[w]hen the innocent citizen is used as a model, . . . risk analysis breaks down. The innocent citizen, unlike the calculating criminal, does not assume the risk attendant to crime by crossing the bounds of legality into an area of legitimate official interest. On the contrary, these risks come to him when, as in *White*, the police are granted a license to unilaterally decide whether to monitor his private activities by “bugging” an informer.

Saunders, *supra* note 237, at 843.

291. Grano, *supra* note 222, at 430; see also Gutterman, *supra* note 113, at 684-85 (“Risking observation by a limited category of persons is not the equivalent of ‘public exposure’ and should not displace privacy rights against ‘government intrusion.’”) (footnote omitted).

292. See Grano, *supra* note 222, at 430-38.

293. 436 U.S. 307 (1978).

294. *Id.* at 314-15.

The critical fact in this case is that entry over Mr. Barlow’s objection is being sought by a

administrative inspections of factories for health and safety violations, the government unsuccessfully argued that an employer has a diminished privacy interest in those areas of a factory where employees and other third parties are granted access.<sup>295</sup> The disclosure of limited information to a private party, Justice White explained, “furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.”<sup>296</sup> When measuring Fourth Amendment privacy interests, “*Barlow’s* indicates that the relevant question is the individual’s reasonable expectation of privacy vis-a-vis the government,” not what has been disclosed to a third party.<sup>297</sup>

Consider, finally, the logic of *United States v. Karo*.<sup>298</sup> There the Court decided that a homeowner possesses a reasonable expectation of privacy against warrantless monitoring of an electronic beeper located in his private residence.<sup>299</sup> In another opinion by Justice White, *Karo* rejected “the Government’s contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual’s home at a particular time.”<sup>300</sup>

What is the difference between the search proscribed in *Karo* and a search that occurs in informant spying? Both involve police access to places and activities “in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant.”<sup>301</sup> As Justice White acknowledged, if an agent in *Karo* had secretly entered the defendant’s home without a warrant to verify the location of the beeper-laden container, “there

Government agent. Employees are not being prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond the employer’s reasonable expectation of privacy. *The Government inspector, however, is not an employee.*

*Id.* (emphasis added) (footnote omitted); cf. *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (noting that under the rationale of *Katz*, Fourth Amendment protection does not depend “upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion”) (emphasis added) (citation omitted).

Certainly the result in *Barlow’s* would not have been different if, rather than demanding overt entry into *Barlow’s* factory, OSHA inspectors had disguised themselves as workers and searched the premises as undercover agents.

295. Grano, *supra* note 222, at 429-30 (quoting Brief for Appellants at 29, *Barlow’s*).

296. *Barlow’s*, 436 U.S. at 315 (footnote omitted).

297. Grano, *supra* note 222, at 431.

298. 468 U.S. 705 (1984).

299. *Id.* at 714.

300. *Id.* at 716.

301. *Id.* at 714.

is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment.”<sup>302</sup>

If that is so, why is an informant not engaged in a search when through disguise or stealth he deliberately gains access to a home or office to gather information valuable to the government? In words equally pertinent to informant spying, Justice White explained why the Fourth Amendment denies the police the untrammelled power to invade the privacy of a home: “Indiscriminate monitoring of property [or conversation] that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.”<sup>303</sup>

*B. A Coherent Interpretation of the Fourth Amendment Would Treat Government Informants the Same Way the Court Treats Governmental Wiretapping*

Not too long ago, many thoughtful persons believed that if Congress or the Court sanctioned electronic wiretapping or bugging by law enforcement officials, society would move toward an oppressive police state.<sup>304</sup> Some opponents of electronic surveillance argued that the Fourth Amendment compelled an absolute prohibition on electronic wiretapping and bugging.<sup>305</sup>

302. *Id.* at 715.

303. *Id.* at 716 (footnote omitted). In a footnote, Justice White responded to Justice O'Connor's attempt to utilize the reasoning of the informant cases to sanction the beeper monitoring at issue in *Karo*. In Justice White's view, “[a] homeowner takes the risk that his guest will cooperate with the Government but not the risk that a trustworthy friend has been bugged by the Government without his knowledge or consent.” *Id.* at 716 n.4. This reply to Justice O'Connor's concerns is more assertion than analysis. The scope of the Fourth Amendment should not depend on fortuitous events subject to the manipulations of police agents who often have slight concern about constitutional interests. As Justice O'Connor cogently noted,

[e]xpectations are formed on the basis of objective appearances, not on the basis of facts known only to others. . . . The homeowner's expectation of privacy is either inherently reasonable or it is inherently unreasonable. A guest's undisclosed status as a government informant cannot alter the reasonableness of that expectation.

*Id.* at 724 (O'Connor, J., concurring in part and concurring in the judgment).

304. See ALAN F. WESTIN, *PRIVACY AND FREEDOM* 174 (1967) (noting that during the first half of the twentieth century, “the public . . . displayed a nervous awareness that surveillance devices, if used improperly or too widely by public or private authorities, could endanger legitimate personal and group needs for privacy in a free society and could concentrate a menacing amount of power in the hands of those collecting surveillance data”). See generally Kamisar, *supra* note 92 (detailing the pre-1960 arguments raised by opponents of governmental wiretapping).

305. See *Berger v. New York*, 388 U.S. 41, 65-66 (1967) (Douglas, J., concurring); *Osborn v. United States*, 385 U.S. 323, 353 (1966) (Douglas J., dissenting) (“[Wiretapping and electronic bugging] devices lay down a dragnet which indiscriminately sweeps in all conversations within its

The rulings in *Berger* and *Katz*, however, signaled that the Court would accept some form of regulated electronic surveillance. In 1968, Congress accepted the Court's challenge and enacted a comprehensive law that authorized electronic wiretapping and bugging so long as enumerated constitutional and statutory limitations were followed.<sup>306</sup> With the passage of this law, the constitutional debate over wiretapping and bugging has largely been put to rest.<sup>307</sup>

While it rejected the view that law enforcement officials should be free to wiretap or bug without restraint, Congress expressly sanctioned unchecked informant spying, even though "[s]uch surveillance was far more frequent than [wiretapping or electronic bugging]."<sup>308</sup> Perhaps Congress was persuaded by the logic of *On Lee* and its progeny, or more likely, Congress was unwilling to abandon an effective technique that the Court had declared constitutionally permissible. Whatever their motives, Congress and the Court have erred in exempting informant spying from the constitutional limitations imposed on other forms of electronic surveillance.<sup>309</sup>

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scope, without regard to the nature of the conversations, or the participants. A warrant authorizing such devices is no different from the general warrants the Fourth Amendment was intended to prohibit.")

306. This law was enacted in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90-351, § 802, 82 Stat. 197, 211-23 (codified as amended at 18 U.S.C. §§ 2510-2522 (1994)). For helpful analysis of Title III, see JAMES G. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* (1986); CLIFFORD S. FISHMAN, *WIRETAPPING AND EAVESDROPPING* (1978 & Supp. 1989); Goldsmith, *supra* note 114.

307. While the nation appears to have reached a consensus on the constitutional validity of the nation's electronic surveillance laws, Professor Herman Schwartz has been a forceful critic. See HERMAN SCHWARTZ, *TAPS, BUGS AND FOOLING THE PEOPLE* (1977); Herman Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969).

308. Goldsmith, *supra* note 114, at 46 (footnote omitted). Congressional approval of informant spying is referenced in 18 U.S.C. § 2511(2)(c) (1994), which provides: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." *Id.*

309. Some argue that judicial scrutiny of police informants is unnecessary, at least with respect to federal investigations, because the Executive Branch has promulgated internal guidelines controlling the use of informants and other undercover operations. *Cf.* John T. Elliff, *The Attorney General's Guidelines For FBI Investigations*, 69 CORNELL L. REV. 785, 814 (1984) (noting, in the context of a discussion about the FBI's charter, that FBI internal "guidelines have also demonstrated that judicial enforcement is not essential to effective formal standards and procedures for FBI investigations").

Several responses seem appropriate. First, internal guidelines can be changed at any time. Second, it is not for the Executive Branch to determine the scope of Fourth Amendment protections. Third, and most critically, a review of the Attorney General's Guidelines reveals that the quantum of evidence needed to authorize use of an informant is extremely minimal.

As set forth in the current Attorney General's *Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations*, FBI officials may initiate a full investigation or "general crimes investigation . . . when facts or circumstances reasonably indicate that

Some doubt, however, whether the safeguards of the Fourth Amendment could or should be applied to informant spying. For example, it has been said that because informants “must be developed or placed over a long period of time and the objectives of their ‘search’ will almost always be broad and impossible to delineate with any precision in advance,” the particularity requirement of the Amendment cannot be satisfied.<sup>310</sup>

This very argument was raised by Justice Douglas and others in their

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a federal crime has been, is being, or will be committed.” Memorandum from Dick Thornburgh, Attorney General, on The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations § II.C(1), at 7 (Mar. 21, 1989) (on file with author) (revising *Smith Guidelines, infra*). The Guidelines plainly state that “the standard of ‘reasonable indication’ is substantially lower than probable cause.” *Id.* In *Illinois v. Gates*, 462 U.S. 213, 235, 245 n.13 (1983), the Court made clear that probable cause under the Fourth Amendment does not require a prima facie indication of criminal behavior; all that is needed is a “probability or substantial chance” of criminality. Reasonable suspicion, of course, is a lower threshold than probable cause. The Guidelines explain, however, that a “preliminary inquiry” may be initiated in circumstances that do not warrant a full investigation:

On some occasions the FBI may receive information or an allegation not warranting a full investigation—because there is not yet a “reasonable indication” of criminal activities—but whose responsible handling requires some further scrutiny beyond the prompt and extremely limited checking out of initial leads. In such circumstances, though the factual predicate for an investigation has not been met, the FBI may initiate an “inquiry” involving some measured review, contact, or observation activities in response to the allegation or information indicating the possibility of criminal activity.

*Id.* § II.B(1), at 4.

For a preliminary inquiry, the Guidelines permit the use of informants and the consensual monitoring of telephone conversations, pen registers, and beepers as proper “lawful investigative technique[s]” subject to the approval of a supervising agent. *Id.* § II.B(6), at 6; *Id.* §§ IV.B(12)-B(5), at 16-17; see also Memorandum from Director, FBI, to Attorney General on The Attorney General’s Guidelines (AGG) on Federal Bureau of Investigation (FBI) Undercover Operations (Oct. 28, 1992) (on file with author).

Thus, two things are clear about the Guidelines. First, the government’s definition of a “reasonable indication” of crime is “substantially lower probable cause.” Second, the FBI is allowed to use informants and other self-described “highly intrusive” investigative techniques even in circumstances that do not satisfy the very low standard of a “reasonable indication” of criminal conduct.

This interpretation of the Guidelines was confirmed by the statement of then-FBI Director William Webster in testimony to Congress. See *Attorney General’s Guidelines for Domestic Security Investigations (Smith Guidelines): Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 98th Cong. 23, 25-26 (1983) (statement of William H. Webster, Director, Federal Bureau of Investigation); see also Elliff, *supra*, at 806-07 (discussing the Guidelines and similar, earlier congressional testimony of William H. Webster in 1982); cf. KATZMANN, *supra* note 11, at 79-80 (quoting congressional testimony from Assistant Attorney General Phillip B. Heymann, who stated that undercover operations are initiated only when the government “reasonably suspect[s]” that a crime will occur or perceives “reasonable indications” of criminal activity).

310. Kitch, *supra* note 253, at 142. Professor Kitch has stated that “[t]he Fourth Amendment warrant requirement can be used to control abuses of electronic surveillance, but it would effectively prevent altogether the use of informers and secret agents.” *Id.*

opposition to court-sanctioned electronic surveillance.<sup>311</sup> As an abstract matter, this complaint is not without merit. But Fourth Amendment safeguards often take a beating when the Amendment is viewed as an "all-or-nothing" proposition. Moreover, defenders of the Fourth Amendment must heed Professor Kamisar's warning that sophisticated legal arguments must be capable of working in both directions.<sup>312</sup>

If a comprehensive wiretapping law can be structured in a manner consistent with the demands of the particularity requirement, there is no apparent reason why informant spying cannot be subjected to similar constitutional restraint.<sup>313</sup> Application of the particularity rule to informants will limit the unbridled and open-ended intrusions that often occur with informant spying.<sup>314</sup>

Some, however, have argued that traditional constitutional safeguards should not be applied to informant spying.<sup>315</sup> The costs to effective law enforcement would be too burdensome, especially when certain "types of crime are particularly difficult to investigate because their perpetrators are

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311. See *Osborn v. United States*, 385 U.S. 323, 353 (1966) (Douglas, J., dissenting); see also EDITH J. LAPIDUS, *EAVESDROPPING ON TRIAL* 193 (1974) (relating Justice Douglas's opposition to wiretapping and bugging in *Gelbard v. United States*, 408 U.S. 41, 61 (1972) (Douglas, J., concurring)); Schwartz, *Electronic Eavesdropping*, *supra* note 307, at 457-73.

312. The [A]mendment does call for a warrant "particularly describing" the "things to be seized." However, if to rule that conversations are not "papers" or "effects" or capable of being "seized" is to read the [F]ourth [A]mendment "with the literalness of a country parson interpreting the first chapter of Genesis," to contend on the other hand that such conversations are not only constitutionally protected, but incapable of being "particularly described" in advance, and therefore beyond the reach of any court order, is not to display much more sophistication. Surely wiretapping opponents do not have to be reminded that "it is a Constitution we are expounding."

Kamisar, *supra* note 92, at 912-13 (footnotes omitted).

313. See Kent Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 230 (1968) (stating that in monitoring informants, "a high degree of specificity . . . will be possible and . . . the monitoring of extraneous conversations can be kept to a minimum").

314. See, e.g., *Baldwin v. United States*, 450 U.S. 1045, 1047 (1981) (denial of cert.) (Marshall, J., dissenting) (arguing that a six-month informant search of a home "undertaken for the general purpose of gathering any incriminating evidence rather than the specific purpose of seizing certain incriminating documents," violated the Fourth Amendment).

315. George E. Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203, 220 (1975). Professor Dix has observed that the traditional probable cause rule of the Fourth Amendment should not control undercover operations.

The invasion of personal security involved in undercover surveillance is less direct than that involved in a traditional search or arrest. Furthermore, . . . [undercover surveillance] should be available to secure evidence necessary to make arrests or conduct traditional searches; therefore, an evidentiary standard less stringent than that required for those actions is appropriate.

*Id.*

able to restrict sharply the traces of criminal activity they leave behind.<sup>316</sup> Of course, similar claims were raised when Congress and the Court considered restricting discretionary electronic surveillance. And even when some states enacted absolute prohibitions on wiretapping, police officers still employed it for investigatory purposes and as a tool to obtain "leads."<sup>317</sup> Long before Congress adopted detailed regulations, law enforcement officials who opposed wiretapping conceded that electronic surveillance was often essential for certain prosecutions.<sup>318</sup>

As late as the 1970s, the FBI stubbornly refused to acknowledge that its electronic surveillance activities were subject to constitutional norms.<sup>319</sup> "Wiretapping has been a standard technique throughout the [FBI]'s history. Indeed, in the early years, . . . it was the agency's single most useful intelligence-gathering tool."<sup>320</sup> Notwithstanding the many benefits that wiretapping holds for law enforcement officials, the Court recognized that unless the traditional safeguards of the Fourth Amendment are followed, "the conversations of any and all persons coming into the area covered by [electronic surveillance] will be seized indiscriminately and without regard to their connection with the crime under investigation."<sup>321</sup>

The traditional safeguards of the Fourth Amendment will (and should) apply to informant spying in the same way they apply to electronic surveillance. Thus, the probable cause rule, which partially helps to deter the promiscuous and rampant intrusions inherent in wiretapping, will also check the intrusions associated with informant spying. As in wiretapping and bugging, the probable cause requirement defines and limits the person,

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316. Philip B. Heymann, *Understanding Criminal Investigations*, 22 HARV. J. ON LEGIS. 315, 333 (1985).

317. See Kamisar, *supra* note 92, at 905; see also Westin, *supra* note 110, at 172. In 1938, the regulations of the Department of Treasury prohibited all wiretapping. WESTIN, *supra* note 304, at 121. This rule was re-issued regularly in the 1940s, 1950s, and 1960s. *Id.* Nevertheless, Treasury agents routinely ignored the rule for several decades and engaged in extensive wiretapping and bugging throughout the nation. *Id.* at 121-25.

318. See Kamisar, *supra* note 92, at 900 n.49 (quoting the statement of former Senator Thomas F. Eagleton, who at the time was a St. Louis prosecutor); see also *Wiretapping, Eavesdropping, and the Bill of Rights: Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary United States Senate Pursuant to S. Res. 234, 85th Cong., 2d Sess. 259 (1958)* (statement of Thomas F. Eagleton, Circuit Attorney, City of St. Louis, MO).

319. See ELLIFF, *supra* note 279, at 7 ("FBI officials had believed for many years that legal standards did not govern collecting intelligence if the information was not used in a criminal prosecution. The operating premise was that, so long as the government was not gathering evidence for prosecution, its intelligence techniques need not adhere to constitutional requirements.").

320. JEFFREYS, *supra* note 15, at 199.

321. *Berger v. New York*, 388 U.S. 41, 59 (1967).

location, conversation, and time period targeted for surveillance.

The so-called “sound tactical reasons”<sup>322</sup> for exempting informant spying from compliance with the probable cause rule mostly promote law enforcement efficiency concerns and have little, if any, connection to constitutional values.<sup>323</sup> Objections to the probable cause rule stem from the view that “[i]f the requirement of probable cause were applied accurately, law enforcement agencies would need grounds to arrest the subject for past offenses before they could begin the undercover investigation. . . . Grounds for arrest should not be required for an investigation that is clearly intended to precede arrest.”<sup>324</sup>

Of course, a similar objection can be (and has been) lodged against the restrictions on police wiretaps and bugs.<sup>325</sup> But defenders of the federal wiretapping law readily acknowledge that the probable cause requirement of Title III—mandated by the holdings in *Berger* and *Katz*—was formulated to address “those [constitutional] problems which might otherwise make electronic surveillance indiscriminate and inordinately prolonged.”<sup>326</sup> Indeed,

322. Goldsmith, *supra* note 114, at 46.

323. In a 1976 report, the National Wiretap Commission listed several factors that counseled against imposing a probable cause requirement for informant spying. According to the Commission, if a probable cause rule applied, law enforcement officials would be unable to confirm the “veracity and credibility” of informants of dubious backgrounds, handicapped in “protect[ing] the agent or informant” who is placed in a dangerous situation, and restricted in their “mobility and flexibility” in protecting agents and in coordinating “raids and related activities.” Goldsmith, *supra* note 114, at 46 n.289 (quoting NAT’L COMM’N FOR THE REVIEW OF FED. AND STATE LAWS RELATED TO WIRETAPPING AND ELEC. SURVEILLANCE, ELECTRONIC SURVEILLANCE: REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 113-14 (1976) [hereinafter ELECTRONIC SURVEILLANCE]). The Commission also noted that wiring an informant, especially in cases where political corruption is alleged, may benefit the suspected target. “Not infrequently, persons making such charges withdraw them when asked to be wired. In such circumstances, the official is protected, and it has been suggested that elimination of consensual surveillance would adversely affect innocent people and potential defendants as much as it would harm law enforcement.” *Id.* (quoting ELECTRONIC SURVEILLANCE, *supra*, at 114 (footnotes omitted)).

None of the factors noted by the Commission promote interests served by the Fourth Amendment. All but the last factor are concerned with police efficiency. Admittedly, forcing a source to wear a wire might reveal the dubious nature of certain allegations. This benefit to the innocent, however, is not a reason for eliminating the probable cause requirement. It merely demonstrates the need for careful screening by law enforcement officers prior to launching undercover operations that jeopardize the privacy and security of innocent persons. The probable cause requirement serves the same goal.

324. Dix, *supra* note 315, at 223 n.34.

325. *Cf.* MCGEE & DUFFY, *supra* note 17, at 71-76 (relating the objection of the U.S. Attorney’s Office in Miami to the Department of Justice Criminal Division’s rejection of an application to wiretap public pay phones based on insufficient probable cause).

326. Goldsmith, *supra* note 114, at 51; *cf.* Michael Goldsmith, *Eavesdropping Reform: The Legality of Roving Surveillance*, 1987 U. ILL. L. REV. 401, 427 (“Roving [electronic] surveillance is justified by law enforcement needs only when a crime has clearly been or is about to be committed. In

many of the constitutional evils that the Court saw in discretionary wiretapping are extant where the police decide for themselves when to infiltrate a home or record private conversation with an informant. The constitutional requirements of probable cause, particularity, minimization and necessity—all vital elements for a valid wiretap or electronic bug<sup>327</sup>—can and should be applied to informant spying.

#### IV. CONCLUSION

In describing the dilemma often created by the Fourth Amendment, the Fourth Circuit remarked that “[o]ne who would defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply.”<sup>328</sup> The defendants in the informant cases were certainly “scoundrels.” Although they were scoundrels, their Fourth Amendment claims were the arguments of “Everyman.”<sup>329</sup>

Perhaps a more plain-speaking comparison will illustrate the error of the Court’s post-*Gouled* informant cases. A few years ago Justice Scalia reminded us:

It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one’s personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded.<sup>330</sup>

Justice Scalia’s logic is equally pertinent here. A home or private

view of this fact, Congress should amend Title III to allow roving surveillance only in cases where there is clear and convincing evidence of a predicate crime.” (footnote omitted)).

327. See Goldsmith, *supra* note 114, at 51-53, 98, 126; Daniel F. Cook, Note, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 HASTINGS CONST. L.Q. 571, 577-86 (1975) (asserting that Title III’s necessity requirement is derived from the constitutional holdings in *Berger* and *Katz*).

328. *Kopf v. Skym*, 993 F.2d 374, 379-80 (4th Cir. 1993). Thanks to my colleague Professor Kathryn R. Urbonya for pointing me to the Fourth Circuit’s opinion in *Kopf*. See Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HASTINGS CONST. L.Q. 623, 627 n.13 (1995).

329. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

330. *O’Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring in the judgment).

conversation should not lose its constitutional protection against promiscuous police intrusion merely because an individual has allowed a third party's presence. When it comes to Fourth Amendment rights, the difference between the police and everyone else matters.

