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Governmental Deception In Consent Searches

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COMMENTS

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Fourth amendment protection against unreasonable searches and seizures has long been held a barrier to the use of trickery by the government; yet government officials, in their combat against modern sophisticated crimes, have voiced a need to employ some types of misrepresentation. Governmental deception, once forbidden by by the courts, has become a common occurrence. The author discusses the tension created by this circumstance and traces the solutions offered by the courts.

I. INTRODUCTION

One unsettled question in the area of law enforcement is the extent to which government officials may use deception to gain access to private premises. Machiavelli and his latter-day counterparts suggest that the Prince may, or even must, employ whatever

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deceit and trickery is necessary to maintain order among and power over his subjects.[1] Stability in government during the Renaissance was something of a luxury and therefore even gross deceit was a small price to pay for the maintenance of the public peace.

Ostensibly, however, the relationship between government and governed has matured since then, at least in the United States. Both criminal and civil penalties in our present law reflect an almost universal distaste for deception by government officials. Events of this past decade indicate that even the highest government officials are subject to penalties for fraud, obstruction of justice and other deceptive activities.[2] Statutes requiring financial disclosure and sunshine laws reflect a growing popular aversion to fraudulent tactics by political figures.[3] Moreover, both state and federal courts may not, in many instances, admit evidence obtained illegally.[4]

The cohesiveness of this concept of governmental integrity breaks down when it becomes apparent that many illegal activities cannot be thwarted and punished without the use of some form of governmental deception.[5] Popular and legal support for undercover police work, intrigue, and investigative activities short of entrap-

1. N. MACHIAVELLI, THE PRINCE AND OTHER WORKS (University classics ed. 1941) (Italy 1513): "A prudent ruler, therefore, cannot and should not observe faith when such observance is to his disadvantage and the causes that made him give his promise have vanished." *Id.* at 148.

2. *See* B. WOODWARD & C. BERNSTEIN, ALL THE PRESIDENT'S MEN (1974); B. WOODWARD & C. BERNSTEIN, FINAL DAYS (1976); D. RATHER & G.P. GATES, PALACE GUARD (1974).

For the sake of avoiding unnecessary repetiton, this comment will use a variety of words to convey the idea of deception such as misrepresentation, deceit, fraud, ruse, trickery and guile. As noted later in the comment, the legal and vernacular nuances in meaning between these terms disappear when they are used in the context of consent searches. *See, e.g.*, Radowick v. State, 145 Ga. App. 231, 244 S.E.2d 346 (Ct. App. 1978); State v. Blackburn, 6 N.C. App. 510, 170 S.E.2d 501 (Ct. App. 1969).

3. *E.g.*, FLA. CONST. art. II, § 8. A means for sustaining public trust in officials, Florida's "Sunshine Amendment" provides for public disclosure of the financial interests of candidates for elective constitutional offices. In addition, it requires disclosure of campaign financing, restitution to the state for private gain derived through a breach of the public trust, forfeiture of state retirement benefits upon the conviction of a felony, and the establishment of an independent commission on ethics.

4. *See* notes 40-42 and accompanying text *infra*.

5. C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 223-33 (1976); M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT 24-30 (1968).

Advanced domestic intelligence activities were recommended as vital to the future security of public officials by THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, REPORT (1964) [hereinafter cited as THE WARREN REPORT]; PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME IN A FREE SOCIETY *passim* (1971); *see* A. KORNBLUM, THE MORAL HAZARDS 10-45 (1976); PRESIDENT'S TASK FORCE ON ORGANIZED CRIME 91-97 (1966). *See also* F. EGEN, PLAINCLOTHESMAN 15-26 (1952); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1094 (1951); Note, *Judicial Control of Secret Agents*, 76 YALE L.J. 944, 946-52 (1967).

ment, continues today as it has for centuries.[6]

The coexistence of these two contradictory legal concepts creates significant legal tension. A focal point for this tension has been the issue of consent as it relates to the fourth amendment prohibition against unreasonable searches and seizures.[7] It is settled law that one may forego his fourth amendment rights by voluntarily consenting to a search or seizure without prior warning of his right to refuse.[8] If, however, a court decides that the consent was involun-

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6. Primitive authority often cited as support for the use of covert police tactics is the command to Moses to send out men to spy on the land of Canaan. *Numbers* 13:1. The need for limited police deception is codified in MODEL PENAL CODE § 2.10(3) (Tent. Draft No. 9, 1959), which provides, "The defense [of entrapment] afforded by this section is unavailable in a prosecution for a crime involving conduct causing or threatening bodily injury to a person other than the person perpetrating the entrapment."

The acceptance of such deception is also exemplified by a question given in a United States Civil Service examination, administered on May 18, 1974, for qualification to the status of "Investigator." The question read:

> 23. "The Investigator is justified in misleading the interviewee only when, in the Investigator's judgment, this is clearly required by the problem being investigated." Such a practice is
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> (A) necessary; there are times when complete honesty will impede a successful investigation
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> (B) unnecessary; such a tactic is unethical and should never be employed
>
> (C) necessary; an investigator must be guided by success rather than ethical considerations in an investigation
>
> (D) unnecessary; it is clearly doubtful whether such a practice will help the investigator conclude the investigation successfully.

Reprinted in D. TURNER, DETECTIVE INVESTIGATOR 35 (1973). The correct answer was (A).

See also A. BOUZA, POLICE INTELLIGENCE 66-69 (1976) (historical discussion of New York City's Bureau of Special Services Investigations (BOSSI), organized in 1912 as the "Radical Bureau" to infiltrate socialist groups); V. LEONARD, THE POLICE DETECTIVE FUNCTION 32-33 (1970); M. OTTENBERG, THE FEDERAL INVESTIGATORS 154-59 (1962) (traces the development of federal undercover activities against narcotics traffic).

> 7. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. As a matter of convenience in this comment, the term "fourth amendment" will signify not only the limitations upon the federal government as expressed in that amendment, but also the same limitations upon the states by virtue of the incorporation of the fourth amendment into the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

8. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The Supreme Court of the United States cast the criterion of valid consent in terms of "voluntariness." The issue in the *Schneckloth* case was whether knowledge of the right to refuse to consent to a search is a prerequisite to a valid consent. The Court, in holding it was not required, said a factual finding that consent was voluntarily given was to be based on the totality of circumstances surrounding the consent. Knowledge by the consenting party of his right was just one factor to be considered. The Court refused to mandate prior warnings for consent searches under

tary, any search based solely upon such consent will be deemed void under the fourth amendment.[9] Because illegally obtained evidence may not be admissible at trial,[10] the validity of the consent will many times determine the viability of the subsequent prosecution.

Tension surrounding this consent rule arises when government officials feel compelled to use deception to gain the consent of prospective criminal defendants for entry into private premises. If the consent effects an official entry into private areas not accessible by the general public, the fourth amendment will usually apply.[11] When law enforcement officers enter the premises and witness illegal activity, they will necessarily make some form of search and seizure, whether it be a physical taking or simply the view of an interior room and the aural reception of statements spoken. A problem arises in that there is often not sufficient probable cause to support a search warrant or exigent search.[12] The government agents must then rely solely on the express or implied consent of the prospective defendants in order to gain access to the private areas where the crimes are committed. The quandary of the agents is apparent. If they attempt to procure a knowing and intelligent waiver of the consentor's rights, their investigation will quickly terminate. Rather than forfeit law enforcement, the agents might induce the prospective defendants to believe they are potential partic-

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the fourth amendment as it had for in-custody interrogations under the fifth and sixth amendments. Miranda v. Arizona, 384 U.S. 436 (1966). Although the holding of *Schneckloth* encompasses only the issue of "knowledge of right to refuse," the justices reached their holding by changing the definition of valid consent. They rejected the "knowing and intelligent" definition of consent previously required for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458 (1938), and stated that consent need only be "voluntary." The Court discussed the word "voluntary" only in contradistinction to the idea of coercion. Because deception is not truly a form of coercion and because the idea of "voluntariness" does not definitionally exclude the possibility of valid deception in obtaining consent, one might conjecture that the *Schneckloth* definition of consent has, at least through dictum, validated consent gained by ruse. Whether this accurately reflects the Court's view of governmental misrepresentation in consent searches will be debatable until the Court finally settles the matter.

The Federal Bureau of Investigation, however, has routinely given such warnings to prospective consenting parties. *See* Note, *Consent Searchers: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 143 (1967).

9. *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543 (1968).

10. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). For two critical examinations of the exclusionary rule, see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) and Wright, *Must the Criminal Go Free if the Constable Blunders*, 50 TEXAS L. REV. 736 (1972).

11. *See* notes 26-35 and accompanying text *infra*. The equivocation in text is prompted by the vague explanation of fourth amendment protection in Katz v. United States, 389 U.S. 347 (1967).

12. *See* notes 26-35 and 37-39 and accompanying text *infra*.

ipants in the crime. The agents then become privy to the criminal events and are able to recount the incidents or produce the seized evidence later at the prosecution. Although this system seems virtually institutionalized in this country,[13] its validity is not clear in light of the rule that consent must be voluntary.[14]

Before the advent of the fourth amendment exclusionary rules, the validity of consent to searches was seldom litigated, although the allied, but completely distinct, concept of entrapment had been well defined as a criminal defense.[15] The announcement of the federal exclusionary rule in 1914, however, provided the necessary motivation for litigating the issue of governmental misrepresentation in consent searches.[16] Thereafter, states randomly introduced their own exclusionary rules until 1961 when the Supreme Court in *Mapp v. Ohio*[17] made the rule mandatory under the federal model.

The first federal cases dealing with deception in consent searches were governed by a strict view of the issue and held that any consent dependent on deceit or misrepresentation was vitiated.[18] This view was based on the clearly intrusive effect of such

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13. A. BOUZA, *supra* note 6; P. MANNING, POLICE WORK 180-83 (1977); *see* S. DASH, THE EAVESDROPPERS 253-56 (1971) (assumes constitutional validity); D. SCHULTZ & L. NORTON, POLICE OPERATIONAL INTELLIGENCE 117-27 (1968). *See generally* R. HICKS, UNDERCOVER OPERATIONS AND PERSUASION (1973); C. MOTTO, UNDERCOVER (1971).

The system is rather prevalent in Great Britain also, as a plainclothes police officer recounted:

> [One night] we planned to search a flat occupied by a suspected (convicted) drug dealer. We did not have a search warrant. We "talked our way in" by asking if we could come in and simultaneously showing badges (I was told to flash anything that "looked official" and produced my American Express Card on cue) . . . The flat renter asked presently to see our search warrant. The sergeant said, "Under paragraph 721 of the Police General Orders—Criminal Code, officers are not required to show a warrant during a preliminary investigation." He told me later, "people never listen to you and believe what a copper says about the law." He explained that he always refers to some fictitious passage in the code and quotes it if asked.

P. MANNING, *supra*, at 182.

14. If the word "voluntary" as it is used in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), means simply that consent was not coerced, there is no longer any question that all types of governmental deception may be used to gain entry into private premises. This comment proceeds on the assumption that the word is not construed so broadly.

15. Sorrells v. United States, 287 U.S. 435 (1932). In his concurring opinion, Justice Roberts said, "[s]ociety is at war with the criminal classes, and courts have uniformly held that [the government] may use traps, decoys, and deception to obtain evidence of the commission of crime." *Id.* at 453-54. Because the issue in *Sorrells* was entrapment, the forms of deception involved did not necessarily implicate fourth amendment issues. For a contrast of the two ideas, see notes 65-72 and accompanying text *infra*. *See* United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958).

16. Weeks v. United States, 232 U.S. 383 (1914).

17. 367 U.S. 643 (1961).

18. Gouled v. United States, 255 U.S. 298 (1921). In Boyd v. United States, 116 U.S.

searches and the close analogies to it in tort law.[19] State courts later followed suit.[20]

As the twentieth century wore on, it appeared that some forms of governmental deceit were appropriate if not absolutely necessary for the enforcement of certain laws.[21] This was underscored by the emergence of powerful organized crime syndicates, terrorist groups and sophisticated narcotics rings.[22] The process of rationalizing deception by undercover agents was relatively simple under the flexible due process standards of entrapment;[23] however, the stringent restrictions on misrepresentation in consent searches proved troublesome. Resolution of the conflict was attempted in a series of cases before the Supreme Court, culminating in *United States v. White*.[24] While ostensibly allowing undercover agents to use deception to gain entry into private premises, the cases were imprecise in their effect upon the consent rule. Instead of simply creating an exception to the consent rule accommodating undercover searches, the cases introduced an approach to fourth amendment consent which, as evidenced by later lower court decisions,[25] has virtually eliminated the restrictions on governmental deception.

It is the purpose of this comment to examine the historical restrictions on the use of governmental misrepresentation in consent searches. This discussion will also analyze judicial attempts to fit the undercover investigation into the consent scheme and the alterations to the consent rule attendant thereon. The comment will finally suggest a more useful standard by which courts will be able to accommodate limited deception by government agents without eliminating the consent rule.

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616 (1886), the Court alluded to allied fourth amendment concepts in a discussion of compelled testimony via printed documents under the fifth amendment. *See* United States v. Bloom, 6 F.2d 584, 585 (D. Mass. 1925) (cites *Gouled* as authority for restricting deception in procuring consent).

19. *See* Gouled v. United States, 255 U.S. 298, 305-06 (1921); Boyd v. United States, 116 U.S. 616, 627 (1886).

20. *See, e.g.*, People v. Reeves, 61 Cal. 2d 268, 391 P.2d 393, 38 Cal. Rptr. 1 (1964); Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963).

21. M. OTTENBERG, *supra* note 6; *see* Lewis v. United States, 385 U.S. 206, 208-10 (1966) (deception used to enforce narcotics laws).

22. A. BOUZA, *supra* note 6, at 8-25.

23. *See* United States v. Russell, 411 U.S. 423 (1973) (It is only when the government actually implants the criminal design in the mind of the defendant that the defense of entrapment is available). *See also*, Lewis v. United States, 385 U.S. 206 (1965); Sherman v. United States, 356 U.S. 369 (1957); Sorrells v. United States, 287 U.S. 435 (1932).

24. 401 U.S. 475 (1971).

25. *See, e.g.*, United States v. Locklear, 237 F. Supp. 895 (N.D. Cal. 1965).

II. FOURTH AMENDMENT FUNDAMENTALS

A. *The Warrant Requirement*

Reasonableness is the heart of the fourth amendment limitation on the ability of the government to enter into and search private areas.[26] To help ensure the reasonableness of searches, the latter part of the amendment, dealing with the issuance of warrants, has been read into the former so as to require in most instances warrants based upon probable cause.[27] To effectuate the warrant process, courts have interpreted probable cause to mean the point at which there is substantial reason to believe that evidence of a crime exists at a particular location.[28] A neutral magistrate may issue a warrant whether based upon sworn testimony before him or upon an affidavit if he feels probable cause exists.[29]

The scope or reach of the fourth amendment limitation defines its applicability. If an otherwise illegal search or seizure is committed outside of the sphere of fourth amendment protection, the search or seizure will not be branded illegal.[30] In the past, the scope of the amendment followed property concepts.[31] A person was to be protected from intrusion in private spheres such as the home or office. The Supreme Court of the United States, however, in *Katz*

26. The fourth amendment to the United States Constitution declares, "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . ." U.S. CONST. amend IV (emphasis added).

27. United States v. Ventresca, 380 U.S. 102 (1965). In Johnson v. United States, 333 U.S. 10 (1948), the Court invalidated a warrantless search although probable cause existed had the officers chosen to procure a warrant. The Court's delineation of several exceptions to the warrant requirement in *Ventresca*, 380 U.S. at 107 n.2, underscored the rule that if there exists the ability to procure a warrant, it must be procured. *See* United States v. Lefkowitz, 285 U.S. 452, 464 (1932). The Court expressed the same preference for *arrest* warrants in Beck v. Ohio, 379 U.S. 89 (1964). Nonetheless, a threshold finding of probable cause must exist to validate even a warrantless search or seizure. *See* Draper v. United States, 358 U.S. 307 (1959). *See generally* Vale v. Louisiana, 399 U.S. 30 (1970).

28. *See* Spinelli v. United States, 393 U.S. 410 (1969). Although affidavits supporting search warrants may be based on hearsay evidence, they must at minimum provide the magistrate with the circumstances relied upon by the person providing the basic information and the circumstances from which the affiant concluded that the informant was reliable. Aguilar v. Texas, 378 U.S. 108 (1964).

29. *See* Aguilar v. Texas, 378 U.S. 108 (1964); *see, e.g.*, FLA. STAT. § 933.07 (1977); N.Y. CRIM. PROC. LAW § 690.40 (McKinney 1970).

30. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 393 n.6 (1971); Hester v. United States, 265 U.S. 57 (1924).

31. Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928) (fourth amendment protection held not to attach until government officials trespass upon the aggrieved party's property; therefore, electronic eavesdropping through a wall was not illegal). *But cf.* Silverman v. United States, 365 U.S. 505, 509 (1961) (Electronic eavesdropping through a heating duct was considered illegal as "unauthorized physical penetration into the premises . . . .").

v. United States[32] altered the reach of the amendment beyond proprietary boundaries. It achieved this by defining the protected area as any transactional sphere wherein there exists a *reasonable expectancy of privacy* on the part of the persons involved.[33]

As pronounced in *Katz*, the subjective nature of the definition was intended to expand the reach of the fourth amendment beyond proprietorial boundaries. After *Katz*, the locale is not as important a factor in determining the scope of the amendment as is the nature of the activity and interests of the participants in the transaction. The word "reasonable", however, again may allow expansion or contraction of the reach of the amendment. In this respect, *Katz* and its progeny allow a trial judge a degree of discretion in applying the fourth amendment in search and seizure cases.[34] It is, however, safe to presume in light of interim case law that the traditional fourth amendment protection of persons, homes, offices and papers will remain viable, with occasional extensions of protection to areas such as phone booths and public restrooms.[35]

B. *The Plain View Doctrine*

The "plain view" doctrine is an important judicial rule engrafted upon the fourth amendment, and thus plays an important role in consent analysis. The doctrine holds that where evidence is located in a constitutionally protected area, but is viewed by a government official whose vantage point was assumed legally, the observation itself is not illegal under the fourth amendment.[36] The

32. 389 U.S. 347 (1967).

33. The defendant in *Katz* made calls from a public telephone booth to which federal agents had attached a listening and recording device. Katz was convicted of illegally transmitting wagering information on the basis of the recorded statements made in the telephone conversations. The Court of Appeals for the Ninth Circuit sustained the use of the statements because there had been no physicial intrusion into the area occupied by the defendant as he made his calls. 369 F.2d 130, 134 (9th Cir. 1966). On appeal, the Supreme Court of the United States brought the protection of the fourth amendment to the defendant's conversations although there could have been no physical trespass. Katz's conviction was reversed upon the exclusion of the recorded statements. 389 U.S. 347.

34. *E.g.*, Marshall v. Western Waterproofing Co., 560 F.2d 947 (8th Cir. 1977) (no expectation of privacy in outdoor scaffolding); United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977) (justifiable expectation of privacy in motel room); United States v. Speights, 557 F.2d 362 (3d Cir. 1977) (patrolman's locker in police headquarters reasonably relied upon as private).

35. *See* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968 (1968).

36. Harris v. United States, 390 U.S. 234 (1968). In *Harris*, a police officer, rolling up a window in an impounded automobile, saw a registration card lying on the car door frame. The Court held the card admissable because it was discovered by the officer who had a right to be in the position to make the visual observation. *See, e.g.*, United States v. Woods, 560

evidence found in "plain view" may be admitted at trial or used to establish probable cause. For example, if a police officer observes, through the window of a parked automobile, contraband within the vehicle, the view itself is legal because the officer's vantage point was assumed without illegal entry into any protected area. If exigent circumstances are present, an immediate search may be justified on the basis of probable cause engendered by the view. If an immediate search is not required, the view could supply the probable cause necessary to obtain a search warrant to seize the contraband.

C. *Exigent Circumstances*

As suggested, a warrant is not required if probable cause exists, but exigent circumstances arise which make obtaining a search warrant impracticable.[37] This exception is a necessary corollary to the rule that warrants must be procured when it is physically possible without jeopardizing the opportunity to search.[38] Probable cause is nevertheless required even in exigent searches.[39]

D. *The Derivative Evidence Rule*

The derivative evidence rule also impinges upon the issue of fourth amendment consent.[40] As a logical extension of the exclusionary rule, this rule prohibits the prosecution from using evidence

F.2d 660 (5th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978); United States v. Worthington, 544 F.2d 1275 (5th Cir.), *cert. denied*, 434 U.S. 817 (1977). *See also* South Dakota v. Opperman, 428 U.S. 364 (1976).

37. Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

38. *See* note 27 *supra*.

39. *Id.* Other exceptions to the warrant requirement exist, but do not arise often in the context of consent by deception. The Court, in Chimel v. California, 395 U.S. 752 (1969), permitted the search of the arrestee and his immediate surroundings to ensure the removal of any weapons or tools of escape. Where the arrest involves removal of the arrestee for confinement, the Court has held that a complete search of the person is reasonable. United States v. Robinson, 414 U.S. 218 (1973). The Court has also permitted a very limited search of "suspicious" individuals, commonly referred to as a "stop and frisk" search. If an officer is led to believe that criminal activity may be afoot and upon confrontation with the individual nothing dispels the officer's suspicion and he reasonably fears for his own safety, he may search the individual's outer clothing for weapons. Terry v. Ohio, 392 U.S. 1 (1968). When vehicles are impounded, police may search them to secure any valuables, contraband or weapons found therein. *See* South Dakota v. Opperman, 428 U.S. 364 (1976); Chambers v. Maroney, 399 U.S. 42 (1970). Although not considered true searches for fourth amendment purposes, entries to execute *arrest* warrants and to make arrests usually involve searches, and most obviously, seizures. These entries are discussed as exceptions to the search warrant requirement at note 107 *infra*.

40. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); *see* Harrison v. United States, 392 U.S. 219 (1968).

procured indirectly from an unconstitutional search. If any evidence obtained by an illegal search is thereafter used to procure additional information, the information is "tainted" and thus inadmissible. An illustration of the doctrine is when officials who illegally enter and search private premises do not make the seizures and arrests at that time, but leave the premises to procure a search warrant based on information gained during their initial entry. Under the doctrine, the warrant procured thereafter is defective and any evidence gained under its authority is "tainted" with illegality and therefore inadmissible.[41] If, however, the eventual means of acquiring the evidence are substantially distinct and causally removed from the original illegality, the "taint" may be removed and the evidence rendered admissable.[42]

III. The Consent Rules Restricting Deception

A. Gouled *and Its Progeny*

Although some commentators trace the history of consent analysis back to the 1600's with *The Six Carpenters' Case*,[43] its true beginning for fourth amendment purposes lies in some highly pervasive dicta in *Gouled v. United States*.[44] Within the first decade of the fourth amendment exclusionary rule, the Supreme Court of the United States faced in *Gouled* a set of facts that demanded absolutely no consideration of consent by deception. Nevertheless, the Court spoke to that issue and dicta emanating from the opinion served as gospel for over forty years.[45]

41. *E.g.*, Fraternal Order of Eagles, No. 778 v. United States, 57 F.2d 93 (3d Cir. 1932).

42. Wong Sun v. United States, 371 U.S. 471 (1963); *see* United States v. Sor-Lokken, 557 F.2d 755, 758 (10th Cir.), *cert. denied*, 434 U.S. 894 (1977); United States v. Mayes, 552 F.2d 729, 732 (6th Cir. 1977).

43. 8 Coke 146(a) (1611), *reprinted in* 77 Eng. Rep. 695. The carpenters complained sucessfully that when the King's men were admitted legally, but later abused the license granted them, they became trespassers *ab initio*. In effect, the later abuse rendered the earlier consent to enter void. The argument was raised anew in McGuire v. United States, 273 U.S. 95 (1927), where federal officials entered the defendant's premises under a valid search warrant, and having discovered illegal alcohol upon executing the warrant, they proceeded to destroy several gallons of the defendant's prime stock of whiskey. The Supreme Court summarily rejected the argument of the *Six Carpenters' Case* on the ground that it had been applied only against officials in civil tort actions, and never as a defense in criminal cases. Nevertheless, the *Six Carpenters' Case* was again exhumed by the defense in On Lee v. United States, 343 U.S. 747, 752 (1952), and again rejected on the same ground.

44. 255 U.S. 298 (1921).

45. *See* note 50 and accompanying text *infra*. The Court itself paid homage in the form of limitation upon the *Gouled* dicta in Olmstead v. United States, 277 U.S. 438, 463-64 (1928). *Olmstead* was overruled on other grounds in Katz v. United States, 389 U.S. 346 (1967). The Court in *Olmstead* recognized the rule restricting governmental deception in consent searches

The exact factual setting of the case proved important to the Court when it was distinguished in later cases.[46] Intelligence officials in the Army, investigating the defendant for fraud, needed documentary evidence to aid in the eventual prosecution. Because the officials knew Gouled had no idea that he was being investigated, they enlisted a former acquaintance of his to pay a call on him.[47] After gaining entry to Gouled's business office in the guise of a social caller, the acquaintance searched for and seized incriminating documents while the defendant had momentarily left the room.

In finding the evidence illegally obtained under the fourth amendment, the Court made a much quoted and often incorrectly relied upon statement:

> [I]t 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.
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> . . . [W]hether entrance to the home or office of a person suspected of crime be obtained by a [government agent] 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 subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment.[48]

According to the Court, because the only evidence taken and used at trial was procured *without any consent whatsoever*, the preliminary misrepresentation was irrelevant to the finding of illegality in the search. Had the acquaintance procured incriminating evidence in conversation with the defendant or taken the papers with consent prompted by the guise, however, the quoted statement would not have been dicta.[49] Nevertheless, most lower courts up through the mid-1960's considered the dicta binding.[50]

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as supposedly stated in *Gouled*, but limited the *Gouled* "holding" to documentary evidence. For examples of lower courts which either in dicta or holding followed the consent rule in the *Gouled* dicta, see Gatewood v. United States, 209 F.2d 789, 791 n.1 (D.C. Cir. 1953); Fraternal Order of Eagles, No. 778 v. United States, 57 F.2d 93 (3d Cir. 1932); United States v. General Pharmacal Co., 205 F. Supp. 692 (D.N.J. 1962).

46. *E.g.*, Lewis v. United States, 385 U.S. 206, 209-11 (1966); Lopez v. United States, 373 U.S. 427, 437-38 (1963).

47. For a discussion concerning the determination of an agency relationship, see notes 73-80 and accompanying text *infra*. In *Gouled*, the "acquaintance" was a private in the army.

48. 255 U.S. 298, 305-06 (1921).

49. The words spoken would have been the objects seized and those would have been exposed to seizure only through the consent given the acquaintance to enter. Hence, consent would have been the matter at issue in the case and the Court's decision would have included the discussion of the deception as a necessary component, not as dicta.

50. *E.g.*, Bolger v. United States, 189 F. Supp. 237 (S.D.N.Y. 1960), *rev'd on other*

B. *Coercion Compared*

In light of even modern definitions of consent under the fourth amendment, the *Gouled* dicta presents a logical formulation of the consent rules concerning misrepresentation. Consent that is coaxed by deception ought to be no more effectual than consent prompted by coercion. As to coercion, the Court has never receded from holding that consent acquired through show of force by authorities will not support a search entirely dependent upon that consent. In *Bumper v. North Carolina,*[51] the Court restated that principle in a factual context which resembled consent through deception, rather than through coercion.

In order to gain entrance to a private dwelling without the aid of a search warrant, the state law enforcement officials in *Bumper* untruthfully led the owner to believe they had a search warrant. Believing the officers' statement, the owner thought a search would be inevitable, and thus consented. The Court could have viewed this in terms of either misrepresentation or coercion. The police had no warrant,[52] yet they falsely stated that they did—an affirmative, material misrepresentation which was relied upon by the consenting party.[53] Viewed in a different light, however, the officials approached the owner with a show of authority and force which strongly suggested a coercive effect upon the consent. The Supreme Court viewed it as coercion and held that the consent was vitiated.[54]

C. *Allied Concepts in Tort and Criminal Law*

The Court's dicta in *Gouled* was strongly justified by the traditional abhorrence in tort and criminal law for fraud and misrepresentation.[55] The analogies and nexus to tort law consent were

grounds sub nom. Cleary v. Bolger, 371 U.S. 392 (1963); United States v. Guerrina, 112 F. Supp. 126 (E.D. Pa. 1953); United States v. Mitchneck, 2 F. Supp. 225 (M.D. Pa. 1933); Commonwealth v. Wright, 411 Pa. 81, 190 A.2d 709 (1963). *But see* Chieftain Pontiac Corp. v. Julian, 209 F.2d 657 (1st Cir. 1954) (dictum).

Even after the undercover cases of the 1960's attempted to narrow the *Gouled* dicta to virtual oblivion, *see* notes 142-71 and accompanying text *infra*, the Court of Appeals for the Fifth Circuit in United States v. Tweel, 550 F.2d 297, 300 (5th Cir. 1977), still maintained that the consent rule of *Gouled* was good law. *Accord*, United States v. Gorman, 355 F.2d 151, 159 (2d Cir. 1965) (consent rule stated in dicta), *cert. denied*, 384 U.S. 1024 (1966); *see* Graves v. Beto, 424 F.2d 524 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970).

51. 391 U.S. 543 (1968).

52. Because the State averred that it was not relying on a warrant for the search, the Court decided the case on the premise that none existed. *Id.* at 546.

53. *See* notes 73-80 and accompanying text *infra*.

54. 391 U.S. 543, 548-49 (1968).

55. W. PROSSER, LAW OF TORTS § 105 (4th ed. 1971). The aversion to fraud in criminal law exists in both state and federal statutes. The broad reach and severe penalties of these

strong.[56] Consent to an intentional tort such as battery must be "informed"[57] so as to render it as similarly "intelligent" or "knowing" as that in the previous definition of consent.[58]

As in fourth amendment consent, the rule developed early in tort law that when consent is procured through deceit or negligent misrepresentation, the consent is ineffectual. In such cases, consent cannot be a valid defense to the tort. The classic case of *De May v. Roberts*[59] clearly illustrates the point. The case concerned assault and battery upon a woman undergoing childbirth. A physician was summoned to her home. Because it was a stormy evening and the physician was weary, he asked his friend, Mr. Scattergood, to help him carry his instruments. Scattergood was an unmarried man "utterly ignorant of the practice of medicine. . . ."[60] Upon reaching the woman's home, the physician introduced Scattergood to her husband as a "friend [who came] along to help . . . ."[61] The husband said "all right"[62] and seemed satisfied with the state of affairs. At the physician's request, an allegedly reluctant Scattergood held the woman's hand and observed the medical examination and treat-

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laws are reflected in the Florida provisions, which attempt to punish every type of deceit from the misleading use of the word "free," to the fraudulent decapitation of animals. *Compare* FLA. STAT. § 817.55 (1977) with *id.* § 817.27.

56. *See* 4 RESTATEMENT (SECOND) OF TORTS § 892B (1979). This section with Comment states:

> (1) Except as stated in Subsection (2), consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it.
>
> (2) If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other *or is induced by the other's misrepresentation,* the consent is not effective for the unexpected invasion or harm.
>
> (3) Consent is not effective if it is given under duress.
>
> Comment:
>
> a. This Section is concerned only with the effect of fraud, mistake or duress as invalidating the consent, rendering it ineffective and entitling the plaintiff to maintain any tort action that would be available to him if the consent had not been given. Thus if he is induced by the fraud, mistake or duress to consent to a harmful or offensive contact with his person, he may maintain an action for battery; and if he is induced to surrender goods, he may recover for conversion.

Id. (emphasis added). *See generally* W. PROSSER, *supra* note 55, at 105-07.

57. Bang v. Charles T. Miller Hosp., 251 Minn. 427, 88 N.W.2d 186 (1958). *See* Plante, *An Analysis of "Informed Consent,"* 36 FORDHAM L. REV. 639 (1968).

58. *See* note 8 *supra.*

59. 46 Mich. 160, 9 N.W. 146 (1881).

60. *Id.*

61. *Id.* at 162, 9 N.W. at 147.

62. *Id.*

ment. Upon learning that Scattergood was not a medical student or physician, the husband and wife sued for assault, battery and what appears to be breach of privacy. In response to the defense of consent, the Supreme Court of Michigan stated that the initial consent to the presence and actions of Scattergood was defeated by the "deceit" used in procuring the consent.[63] Although the failure of the physician to inform the plaintiffs of Scattergood's true character could at worst be deemed negligent misrepresentation, the consent was nonetheless obviated.

The intentional tort concept of fraud combined with the derivative tort consent rule stated above provided courts following the *Gouled* dicta with a substantial policy argument. Owing to the congenital gullibility of American society, the strategic advantage of using police plants *inside* premises not open to the public would create an imbalance in the fight against crime. The advantage is even more pronounced where the undercover agents do not participate in the commission of the crimes. The wrongdoer, of course, ought not be provided with rules of the game designed only to provide sporting chances. The strength and importance of fourth amendment limitations, however, simply could not be reconciled with the interior surveillance possible without restrictions on the use of deception. The rules of consent, on the other hand, provided a relatively clear standard by which to judge surveillance advantages.[64] Even more importantly, they were well established legal concepts with simple applicability.

63. *Id.* at 165, 9 N.W. at 149.

64. Under the pre-*Katz* proprietary "scope" of the fourth amendment, discussed at note 31 *supra*, there emerged the logically necessary "public access" postulate. It held that those areas of one's premises which are open to the public under implied or express invitation, such as a commercial business, are not within the scope of the fourth amendment. Because the average citizen could walk in from the street, there was no sense in restricting government officials from doing the same thing. In United States v. Bloom, 6 F.2d 584 (D. Mass. 1925), a prohibition agent wandered into a commercial junk yard during business hours and discovered illegal alcohol. The court found the fourth amendment offered no protection. The problem has recurred in more recent cases dealing with publicly shown X-rated movies. Moody v. Thrush Corp., 33 Ohio Misc. 84, 91-92, 291 N.E.2d 922, 926 (Ct. C.P. 1972). *See also* United States v. Miller, 425 U.S. 435 (1976).

Similar rules emerged in this regard, called the "open fields" and "curtilage" doctrines, which allowed officials without a warrant to enter into areas of land or buildings not in close proximity to the dwelling or family sphere of a given premises. *See* Hester v. United States, 265 U.S. 57 (1924). Although the public access doctrines underlay Lewis v. United States, 385 U.S. 206 (1966), the *Katz* decision has greatly limited their application. *See* McDowell v. United States, 383 F.2d 599 (8th Cir. 1967). For facility in reference, the expression "consent rule" will mean the rule developed by case law restricting the government's use of deception to gain consent for entry into areas reasonably relied upon as private.

D. *The Entrapment Rules Distinguished*

The consent rules concerning misrepresentation have become closely intertwined with the rules of entrapment.[65] While it may seem reprehensible that government agents might use "dirty tricks" to gain entry to a private area, it may seem all the more obnoxious that the same agents, once inside, coax and goad the prospective defendant into committing a crime. The deception is then woven into a much more complex ruse, typically involving compounded misrepresentations as to the agent's identity or purposes. The quantum and quality of the deceit used in such an "entrapment" seems most insidious, yet under most decisions dealing with entrapment rules, these misrepresentations are not considered violative of any constitution or statute.[66] Unless the government agents plant the seed of intent[67] to commit the crime, all the histrionics and inducements they can muster will not serve as a defense against the crime when it is committed.

The entrapment doctrine is less sensitive to the effects of governmental misrepresentation than the consent rules under the fourth amendment, for several legal and policy reasons. Most importantly, the entrapment doctrine does not comprehend, in itself, the ability of government agents to enter into private property or areas imbued with a reasonable expectation of privacy. It simply stands for the premise that government agents may play along with the defendants and coax them into committing crimes. The only constitutional limitation upon this activity may lie in the requirement of due process.[68] This limitation, however, is surmounted by showing the activity is fundamentally fair or reasonable. Where no fundamental rights are involved, the courts are willing to allow a wide range of deceptive tactics by police. Therefore, so long as the fourth amendment is not implicated, encouragements by government agents short of "planting the seed" are constitutional.[69]

The close connection between the entrapment doctrine and the

65. *E.g.*, Sorrells v. United States, 287 U.S. 435 (1932). *But see* Sherman v. United States, 356 U.S. 369 (1958).

66. United States v. Russell, 411 U.S. 423 (1973) (defendant only need harbor a "predisposition" to commit the charged offense to render the defense void). Further, the Court held that entrapment will not raise constitutional issues unless the government's conduct becomes "shocking to the universal sense of justice" so as to violate due process. *Id.* at 431-32.

67. *Id.* at 436.

68. *Id.* at 431-32.

69. *See generally* Rotenberg, *The Police Detection Practice of Encouragement: Lewis v. United States and Beyond*, 4 HOUS. L. REV. 609 (1967).

consent rule became apparent during the development of the undercover exception to the consent rule. In *Lewis v. United States,* the government argued strenuously that misrepresentation was authorized historically by the courts.[70] For the most part, however, they cited to cases involving only entrapment concepts.[71] The argument became, in effect, that the fourth amendment does not protect individuals from breaches of trust and that it does not provide a privilege against disclosure of anything said or done within a home. Invariably, the position stressed the breakdown of law and order without a prerogative to use deception.[72] The logical end to the argument was that the standards of entrapment should envelop and subsume the consent rule. That argument may well have prevailed.

E. *The Government Action Requirement*

Courts and commentators alike have failed on occasion to distinguish in consent cases the difference between governmental and nongovernmental action. Constitutional claims may only be recognized against governmental action, whether state or federal.[73] Therefore, fourth amendment limitations are applicable only where the search or seizure is contrived and executed by the government through its various agents. Although a nongovernmental search by a private citizen may involve criminal and civil penalties, and in some instances render evidence inadmissable by statute,[74] it nevertheless does not carry any constitutional implication.

Once the government establishes an agency relationship with a private individual, any activities done by the person within the scope of that agency will be considered governmental action[75] and will almost invariably implicate constitutional limitations. The determination of an agency relationship is a question of fact, and because it is most often determined at the threshold of the suppression hearing, the findings of fact are usually made by the court and not the jury. Therefore, when the trial court finds as a matter of fact that no agency relationship existed between an informant and the

70. Brief for Respondent at 6-11, Lewis v. United States, 385 U.S. 206 (1966).

71. *Id.* at 7-11.

72. *Id.* at 18-22.

73. Burdeau v. McDowell, 256 U.S. 465 (1921). The Court in *Burdeau* stated, "[The fourth amendment is] a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . ." *Id.* at 475.

74. *E.g.,* FLA. STAT. § 934.01-.10 (Supp. 1978) (inadmissibility of evidence gained through illegal wiretap).

75. *See* People v. Tarantino, 45 Cal. 2d 590, 290 P.2d 505 (1955); People v. Scott, 43 Cal. App. 3d 733, 117 Cal. Rptr. 925 (Ct. App. 1974).

government, the fourth amendment claim is foreclosed.[76]

A unique example of this rule occurred in *Hoffa v. United States.*[77] The trial court found as a matter of fact that the informant involved was not an agent of the government.[78] There was, therefore, no governmental action and consequently no grounds for constitutional challenge. The Supreme Court, however, opined at some length upon the fourth, fifth and sixth amendment claims of the defendant.[79] Because the Court did not overturn the trial court's finding of no agency relationship, the only conclusion that can be drawn is that the *Hoffa* opinion is almost totally dicta.[80]

F. *Materiality*

Although communications and assertive conduct may convey false, misleading or imperfect information, consent will not be vitiated by a misrepresentation unless it is *material* to the consent decision. The test for materiality is basically one of legal relevancy. If the misrepresentation could not have logically affected the decision for or against granting consent, it will not void that consent. As in the analogous relevancy rules of evidence,[81] the concept of

76. Barnes v. United States, 373 F.2d 517 (5th Cir. 1967). The defendant in *Barnes* left his travel case in a motel room. The motel owner, on his own initiative, searched the travel case and turned over the incriminating evidence found within to federal authorities. Following *Burdeau*, the Fifth Circuit held the evidence admissible. *See generally* Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964) (admissible in a domestic relations case); People v. Randazzo, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (Dist. Ct. App. 1963).

77. 385 U.S. 293 (1966). During a previous trial of the former Teamster leader, an acquaintance, Partin, made periodic visits to the defendant's hotel suite and overheard incriminating statements concerning jury tampering. The federal agents forwarded cash to Partin and accommodated his gathering of the information. At no time did Partin reveal his true purposes to Hoffa or the other Teamster officials involved in the scheme to bribe the jurors. In the subsequent trial for jury tampering, Hoffa claimed that Partin's evidence was procured in violation of the fourth amendment. It was held, however, that Hoffa relied in making incriminating statements, not on the security of his hotel room, but on his misplaced confidence that Partin would not reveal the scheme and therefore Hoffa was nonetheless convicted primarily on the basis of Partin's testimony. *Id.* at 302.

78. United States v. Hoffa, 349 F.2d 20, 36 (6th Cir. 1965).

79. 385 U.S. 293, 301-12 (1966). *See also* Lewis v. United States, 385 U.S. 206 (1966).

80. The Court stated:

> The findings of the trial court support this version of the facts [that Partin was not a government agent], and these findings were accepted by the Court of Appeals as "supported by substantial evidence." 349 F.2d at 36. But whether or not the Government "placed" Partin with Hoffa in Nashville during the Test Fleet trial, we proceed upon the premise that Partin was a government informer from the time he first arrived in Nashville on October 22, and that the Government compensated him for his services as such. It is upon that premise that we consider the constitutional issues presented.

385 U.S. 293, 298-99 (1966) (footnote omitted).

81. McCormick on Evidence § 185 (2d ed. 1972).

materiality in consent questions reflects a logical connection tested by the standard that the assertion must tend to influence the consentor to grant consent. For example, an official's inaccuracy as to the ultimate scope of the intended search may not prove detrimental to the consent if, while searching within the scope stated, the agent sees in plain view an object to be seized. The plain view doctrine by law extends the scope of the search;[82] therefore the misstatement has no relevance to the expansion of the search beyond the stated limits.

In *People v. Cioffi*,[83] a New York trial court confronted the situation where a police officer investigating sales of untaxed cigarettes sought to search an area on the premises of a suspected cigarette smuggler. Having spotted several packs of clearly untaxed[84] cigarettes in open view, the officer told the proprietor that the cigarettes were illegal and that he would "like to have the rest of them."[85] The statement was inaccurate. Applicable New York law allowed up to two cartons of untaxed cigarettes to be possessed in the state.[86] On the basis of that misrepresentation by the officer, the proprietor immediately consented to the officer's search of the back room where some 1700 cartons of untaxed cigarettes were kept.

The court in *Cioffi* correctly recognized that the officer's statement was not truly accurate. Yet, it decided that the misstatement was not a moving factor in the proprietor's decision to consent to the search, and therefore was immaterial. The search was upheld.[87] This case illustrates the factual nature of the question of materiality. The logical nexus in *Cioffi* between the misrepresentation and the grant of consent could not reasonably be considered substantial. Although it may be a psychological catharsis for some criminal types to bare all guilt in an arrest situation, it is not a necessary reaction or reasonably probable in the usual course of law enforce-

82. *See* note 36 and accompanying text *supra*.

83. 81 Misc. 2d 1, 365 N.Y.S.2d 434 (Sup. Ct. 1975).

84. Although the packs bore the North Carolina tax stamp, they did not bear the New York State stamp. *Id.* at 2, 365 N.Y.S.2d at 437.

85. *Id.*

86. N.Y. TAX LAW § 471-a(3) (McKinney 1972).

87. 81 Misc. 2d 1, 9, 365 N.Y.S.2d 434, 444 (Sup. Ct. 1975). The ultimate finding that the consent had not been the result of the state agent's statements illustrates the basic concept of materiality in consent. Beyond this, however, *Cioffi* illustrates to a limited extent how the decision of the Supreme Court in *Schneckloth*, *see* note 8 *supra*, shifted the concern in forth amendment consent simply to avoiding coercion. Deception is not necessarily coercion unless it is accompanied by a show of force or authority. Bumper v. North Carolina, 391 U.S. 543 (1968). If *Schneckloth* is to be taken literally in this manner, the whole issue of deception is foreclosed.

ment.[88] Therefore, the result and rationale of *Cioffi* are correct under the materiality standard stated.

G. *Affirmativeness*

The "affirmativeness" requirement for misrepresentation in consent searches bears little similarity to any of the allied concepts in tort law. Therefore, it provides some unique definitional and logical problems of its own. Although a misrepresentation may be material to a consent decision, it may not render a consent invalid if it was not presented to the consentor in an affirmative manner.[89] Thus, materiality may be distinguished as raising more a question of causation than the affirmativeness standard which looks to the form of the assertion. Affirmativeness is then an additional, yet less distinct, threshold inquiry beyond materiality.

In order to be sufficiently affirmative to trigger invalidation of consent, the misrepresentation must achieve a level of activity and directness somewhat higher than that attained by assertions generally. Because all assertions are attempts to convey ideas by word or action, affirmativeness for consent purposes must signify communication with a stronger element of intent than that of mere innuendo. Elemental assertions whose communicative content is miniscule will not meet the standard. An example often given to illustrate an elemental assertion, is where a person with normal vision wears a pair of dark sunglasses late at night. Except where identity is meant to be concealed, the practice is ludicrous. The only motivation the person could have for wearing the sunglasses would be to communicate, in an ornamental way, his desire to be categorized with other persons who wear dark sunglasses late at night. To that extent, the activity constitutes an assertion. The assertion, however, is of so slight and vague a communicative nature, that its message ought not to be deemed affirmative. The conclusion that an assertion is sufficiently affirmative is reached upon a reasonable consideration of the facts and circumstances of the incident.[90]

Case law indicates the intuitive nature of the standard. In *United States v. Lehman*,[91] the Internal Revenue Service sought to

88. *See* 81 Misc. 2d 1, 6-7, 365 N.Y.S.2d 434, 441-42.

89. *See* United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970), *cert. denied*, 400 U.S. 831 (1971); *cf.* United States v. Tonahill, 430 F.2d 1042 (5th Cir. 1970), *cert. denied*, 400 U.S. 943 (1971) (silence cannot be affirmative deception if there is no duty to speak). *See generally* United States v. Stamp, 458 F.2d 759 (9th Cir. 1971), *cert. denied*, 406 U.S. 975 (1972).

90. As a question of fact, findings of the trial court may not be overturned if they were supported by substantial evidence. United States v. Hoffa, 349 F.2d 20, 36 (6th Cir. 1965).

91. 468 F.2d 93 (7th Cir. 1972), *cert. denied*, 409 U.S. 967 (1973).

investigate a certain taxpayer. Having neither a search warrant nor an administrative summons, a special agent and a revenue agent[92] asked the taxpayer's consent to view his records. The agents stated that they "were going to make an investigation . . . ."[93] The taxpayer consented upon hearing this statement. Although the agents displayed their credentials, they did not state whether the audit was intended for criminal prosecution or simply for civil collection. Because a special agent was involved and neither the special agent's function nor the purpose of the investigation was explained, the taxpayer argued that he was deceived into giving up his records because he inferred from the agents' assertions that they intended only a civil audit.[94] Although the knowledge of a criminal audit would be material to a decision of consent in this matter, the court nevertheless determined that the misrepresentation was of such a passive nature that it did not meet the affirmativeness standard.[95] In effect, the misrepresentation was so indirect that it could not have led the taxpayer to believe the investigation was civil in nature. Hence, the consent was not vitiated.

The purpose behind the affirmativeness standard, layered on top of the materiality requirement, seems to be to establish a de minimis rule. Because elemental assertions may be material, the courts, without such a standard, would be flooded with insignificant yet troublesome claims of misrepresentation.

The standard of affirmativeness is not, by definition, limited to intentional misrepresentations. Intentional assertions naturally carry with them, in most cases, a greater degree of affirmativeness, yet, negligent misrepresentations could possibly achieve the required state of affirmativeness given the specific circumstances. An unintentional communication may be more assertive than a comparable intentional statement in that the extemporaneous nature of a

92. The distinction between the functions of the IRS agents is important. The *revenue* agent is to conduct civil audits only, *i.e.*, tax investigations with the intended purpose of determining civil liability. As the investigation changes in mode from civil to criminal (*i.e.*, when evidence of criminal violations emerges), the case is transferred to the Criminal Investigation Division (formerly the Intelligence Division) where a Special Agent of that Division is assigned to the case. *See also* Bray, *Production of Documents and Seizure of Evidence*, 32 N.Y.U. INSTIT. ON FED. TAX 1223 (1974).

93. 468 F.2d 93, 97 (7th Cir. 1972), *cert. denied*, 409 U.S. 967 (1973).

94. *Id.* at 100. The INTERNAL REVENUE MANUAL presently requires all special agents to give warnings, on first contact with the investigatee, as to his function and the possibility of criminal liability. *MT* 9900 (1-29-75), § 242.132, *cited in* Harris & Warner, *Fifth Circuit Reaffirms Distaste for IRS Misrepresentation*, 56 TAXES 28, 31-33 (1978). For dicta strongly confirming the consent rule, see United States v. Griffin, 530 F.2d 739, 743 (7th Cir. 1976); People v. Quinlon, 245 Cal. App. 2d 624, 54 Cal. Rptr. 294, 297-98 (1966).

95. 468 F.2d 93, 100, 104-05 (7th Cir. 1972), *cert. denied*, 409 U.S. 967 (1973).

negligent communication may cloak it in a higher degree of credibility to the listener.

H. *Misrepresentation Cases*

The decisions described in this section, although not necessarily the leading cases in the field, develop a more direct focus on the issue of governmental misrepresentation in consent searches than do those cases usually relied on by most courts. In each situation, the validity of the search or seizure is not dependent upon the existence of a search warrant, although one may have been procured.

Intentional and direct verbal misrepresentation constitutes the most easily recognizable type of deception and therefore is well developed from a decisional standpoint. In *Commonwealth v. Wright,*[96] police detectives sought to recover stolen money. They had a suspect under arrest, but could not persuade him to confess to the crime or state where the money was hidden. Frustrated by this, the detectives, to retrieve the funds without waiting for the suspect to change his mind, went to the suspect's apartment where they found his wife waiting in the hallway. Sensing that she was aware of the suspect's plight, the detectives announced the totally false report that her husband had confessed all and that he had stated that he wanted her to hand over the "stuff" to the detectives.[97] In the face of those statements, she complied and told them where the money was located. The trial court ordered the suppression of the evidence.[98]

On appeal by the State, the defendant claimed the money was illegally seized because the officers had gained the consent of the wife by using fraud and deception. The Supreme Court of Pennsylvania agreed with the defendant and affirmed, citing *Gouled.*[99] Because the detectives had neither a search warrant nor probable cause to believe the money was at the suspect's apartment, their seizure of it was totally dependent upon the validity of the wife's consent. Two years prior to the case, the Supreme Court of the United States ordered state courts to enforce an exclusionary rule for illegally obtained evidence.[100] Therefore, the court in *Wright* held the money inadmissible and affirmed the trial court's order.[101]

96. 411 Pa. 81, 190 A.2d 709 (1963).
97. *Id.* at 82, 190 A.2d at 710.
98. *Id.*
99. *Id.* at 83, 190 A.2d at 711; *see* note 44 *supra.*
100. Mapp v. Ohio, 367 U.S. 643 (1961).
101. 411 Pa. 83, 190 A.2d 709 (1963).

Wright serves as an important model for the analysis of materiality and affirmativeness in consent searches. Had the detectives stated only that the suspect had "confessed," the misrepresentation would most likely not have been considered material to her handing over the money. The logical link between such deception and the wife's consent to the seizure would at best be tenuous; it does not necessarily follow that she would have disclosed the location of the money simply upon a representation that her husband had confessed. The detectives, however, need not have been so brief. They could probably have avoided running afoul of the affirmativeness test by rephrasing their statements only slightly. Instead of stating, in effect, "He has confessed and wants you to give us the stuff," they could have said, "We have got him. He has talked. Now why don't you hand over the stuff?" Some courts might consider this assertion rather affirmative in its deception also,[102] but it comes considerably closer to being mere innuendo than the statements which the detectives actually made.

A slightly less overt variation of the intentional and direct verbal type of deception arose in one of the long line of moonshine cases. In *United States v. Reckis,*[103] alcohol tax agents arrived at a suspect's farm and told one of the defendants, "The boss sent me down to fix the still."[104] Believing this statement, a defendant gave the agent a key which, in turn, allowed him to discover the illegal distillery. The agent's misrepresentation was material because it could have reasonably induced the consent. Further, it was affirmative because it required few, if any, additional assumptions on the part of the consentor. Therefore, the court deemed the consent vitiated by the misrepresentation.[105]

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102. *Cf.* United States v. Tweel, 550 F.2d 297 (5th Cir. 1977) (see notes 123-33 and accompanying text *infra*).

103. 119 F. Supp. 687 (D. Mass. 1954). The federal agent kept the premises under surveillance prior to his entry, and even smelled the distinctive aroma of sour mash emanating therefrom. The agent, sensing he did not have quite enough probable cause for a warrant, failed to obtain one.

104. *Id.* at 689.

105. *Id.* at 690-91. The defendant lessor, however, failed in his suppression motion because of his lack of standing. In order to exert one's fourth amendment rights in any given controversy, the claimant must show that *his* rights, and not those of a third party, were violated by an official search and seizure. Alderman v. United States, 394 U.S. 165 (1969). To have standing, one must prove that he has a possessory interest in or was legitimately present at the location searched, has a reasonable expectation of privacy therein, or a possessory interest in the articles seized. Jones v. United States, 362 U.S. 257 (1960). If the article seized was illegally possessed, the possession of which the defendant is being charged, the defendant will have "automatic" standing to object to any search or seizure of those items. *Id.* at 261-62. To accommodate the claimant's challenge to such a search or seizure, the Court has held that any evidence presented by the defendant to establish possession for the purpose

Intentional but indirect verbal misrepresentation is more difficult to detect. It arises where the statement is facially correct, but fails to state the actual or whole purpose behind the search and seizure.[106] Although the case dealt with entry for arrest, *People v. Superior Court*[107] is relevant to this issue. Local police sought to

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of the suppression motion may not be used against him on the merits of the criminal charge. Simmons v. United States, 390 U.S. 377, 390-91 (1968). *See generally* Flast v. Cohen, 392 U.S. 83 (1968).

106. *See* text accompanying notes 127-30 *infra* for an instance where failure to speak was considered a misrepresentation.

107. 73 Cal. App. 3d 65, 139 Cal. Rptr. 343 (Ct. App. 1977). The question whether deception may be used to gain entry to make an arrest, with or without a warrant for the arrest, stands on different footing than the question in standard consent searches. From a conceptual viewpoint, it probably ought not, because the government's entry into private premises to make an arrest of the owner is as much a search and seizure as the taking of inanimate evidence. Nevertheless, arrest entry presents a completely distinct set of rules from those of fourth amendment consent. The complicating factor in the analysis of entry for arrest is that the common law presented such entry as an exception to the probable cause and warrant requirements of the fourth amendment. *See* Barnard v. Bartlett, 64 Mass. (10 Cush.) 501, 502 (1852). At common law, an officer serving criminal process, *e.g.*, an *arrest* warrant, could break into private premises to search for and arrest the owner as long as the officer announced his purpose before he entered. *Id.* Probable cause as to the arrestee's whereabouts was not necessary to validate the search and eventual seizure (arrest) unless the premises to be searched belonged to a third party. The rules for execution of *search* warrants were basically the same. If a breaking were necessary, the officer executing the warrant had to announce his purpose first, and then enter. Of course, by the fact of its existence, the *search* warrant presumes probable cause to believe the person or object to be seized is located in the place to be searched. The *arrest* warrant, however, presumes only probable cause to believe that the person sought committed the alleged crime. Therefore, entry of premises to arrest the owner was a significant exception to the rule that probable cause is necessary for the government to search private property.

The common law rule for executing search warrants was codified at 18 U.S.C. § 3109 (1975). The Supreme Court in Miller v. United States, 425 U.S. 435 (1976), held that § 3109, which requires an announcement of purpose before a "breaking" into premises, would also control the execution of arrest warrants and exigent arrests. The Court then made exceptions to this statutory rule by holding in Ker v. California, 374 U.S. 23 (1963), that no announcement is necessary where it is reasonably believed that evidence is being destroyed or that life and limb are in jeopardy. *Id.* at 37-43. Because the arrest rule was an exception to the requirements of the fourth amendment as to warrants to search, federal courts looked no further than § 3109 in assessing the validity of a given entry for arrest. The statute said nothing of entry by deception and more importantly, there was little authority to the effect that entry by ruse was not a "breaking" for the purposes of § 3109 and its state counterparts. Thus, the deception issue in making arrests within private premises totally circumvented the consent rules under the fourth amendment. *See generally* Note, 8 HOUS. L. REV. 977 (1971). Lower federal courts tended to allow deception. *See* United States v. Beale, 445 F.2d 977 (5th Cir. 1971); Dickey v. United States, 332 F.2d 773 (9th Cir. 1964), *cert. denied*, 379 U.S. 948 (1965). Although the Supreme Court extended the meaning of the word "breaking" to include the simple opening of an unlocked door, Sabbath v. United States, 391 U.S. 585 (1968), it specifically reserved the deceptive entry question. *Id.* at 590 n.7. The Courts of Appeal for the District of Columbia and Ninth Circuits have applied more stringent requirements for entry to arrest, especially for entries made during the night. In Dorman v. United States, 435 F.2d 385, 390 (D.C. Cir. 1974), the court established the guidelines for making searches of

arrest a defendant who they thought to be within a certain dwelling. They had neither an arrest nor a search warrant, nor probable cause to believe that he was in the house. When the defendant's brother answered the door, the police, in order to gain entrance by the consent of the brother, stated that they merely wanted "to talk to" the defendant.[108] They were allowed into the dwelling on the basis of those representations, and once inside, immediately proceeded to arrest the defendant.

This consent to enter can be analyzed from two points of view. The court recognized that in one respect, the police action exceeded the *scope* implied by the brother's consent under the facts and circumstances surrounding it.[109] The brother could have been inferred to say, "You may enter only to talk." In a different respect, however, the brother was induced by the misrepresentation as to the purpose of the entry. The officers did not directly state an untruth. They had every intention of doing some talking while inside the dwelling. They also intended to arrest the defendant, however. The purpose of the search was very material to any consent given for it, and the deception was affirmative as to effect. Thus, the statement which constituted legal misrepresentation was material and relevant, and the court correctly decided that it rendered the police action invalid.[110]

Direct, nonverbal assertions may also constitute vitiating misrepresentation. Assertive conduct can communicate false, misleading or inaccurate information and if that information is material and affirmative to a consent decision, the consent is vitiated. The analysis is objective; inferences are tested by the triers of fact as if they had observed the transaction.

A juvenile case, *In re Robert T.*,[111] is illustrative of misrepresentation through assertive conduct. In that case, a police investigator in plain clothes sought to inspect the apartment of a party he sus-

private premises, listing several factors needed to conclude that there is "strong reason" to believe the person to be arrested is within the premises. In United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974), the Ninth Circuit categorically rejected the idea that guise entries are valid to make an arrest. *Id.* at 1134. Much like the state counterpart in the case in the text, the court in *Phillips* virtually placed the guise entries for arrest on the same consent standard as warrantless searches under the fourth amendment. *Id.* at 1135. Nevertheless, the exception to the warrant requirement for entries to arrest is firmly grounded in the case law of the other circuits. *See generally* Comment, *Validity of Ruse Entry to Execute A Search or Arrest*, 42 ALB. L. REV. 453, 465 n.93 (1978).

108. 73 Cal. App. 3d 65, 68, 139 Cal. Rptr. 343, 344.

109. *Id.* at 69, 139 Cal. Rptr. at 345-46; see text accompanying note 144 *infra*, for a brief discussion on the "scope" theory of deception in consent.

110. *Id.*

111. 8 Cal. App. 3d 990, 88 Cal. Rptr. 37 (Ct. App. 1970).

pected of concealing stolen goods. Proceeding without a warrant, the officer enlisted the assistance of the owner of the building. The owner knocked on the respective door and a child answered. The owner asked to be let inside and introduced the officer as "[m]y friend Joe."[112] The two were let inside where the goods were discovered; the officer seized the goods and made arrests.

The owner's introduction could have constituted material and affirmative governmental misrepresentation in that the activities could be imputed to the officer through concepts of agency.[113] The court held, however, that it was the officer's acquiescence in the deceit which in itself constituted material and affirmative deception.[114] Because the officer was in plain clothes, and the owner introduced him as a friend, the officer's silence communicated an affirmance of the introduction which would mislead the consentor. Silence in this case did speak louder than words: "I am Joe, a friend of the owner who merely wants to look at the apartment for reasons other than police investigation." In the case, the court cursorily merged the verbal and nonverbal misrepresentations into one unified transaction and relied upon *Gouled* in holding that the misrepresentation vitiated the consent.[115]

Cases demonstrating negligent verbal misrepresentation are rare, mainly because remarks made by police during investigations are typically quite intentional. In *People v. Porter,*[116] however, the misrepresentation involved was actually more negligent than intentional. Plainclothes officers knocked on an apartment door in a routine investigation. They had neither a search warrant nor probable cause to enter the apartment. When they knocked, a voice from within asked, "Is that you, Bill?"[117] Since the officer's nickname coincidently was "Bill,"[118] he replied, "Yes."[119] The occupant unlocked the door and the officers stepped in. After the officers entered, they seized contraband and arrested the occupant.[120]

The court considered the officer's answer as deception in that he could have reasonably assumed that another "Bill" was being addressed.[121] Therefore, the court held the answer to be a wrongful

112. *Id.* at 993-94, 88 Cal. Rptr. at 38.
113. *See* notes 73-80 and accompanying text *supra.*
114. 8 Cal. App. 3d 990, 994-95, 88 Cal. Rptr. 37, 39 (Ct. App. 1970).
115. *Id.*
116. 227 Cal. App. 2d 211, 38 Cal. Rptr. 621 (Ct. App. 1964).
117. *Id.* at 212, 38 Cal. Rptr. at 622.
118. *Id.* at 215 n.1, 38 Cal. Rptr. at 623 n.1.
119. *Id.* at 212, 38 Cal. Rptr. at 622.
120. *Id.*
121. *Id.* at 215 n.1, 38 Cal. Rptr. at 623 n.1.

deception which induced the opening of the door.[122]

A recent case reviewed by the Court of Appeals for the Fifth Circuit, *United States v. Tweel*,[123] stands at the outer limits of consent analysis. Although the court coalesced into this opinion the sum and substance of the traditional rules restricting governmental misrepresentation, the factual circumstances of the case extend the doctrine of affirmativeness to an extraordinary holding. The Internal Revenue Service had sought Nicholas Tweel's tax records for audit purposes. In a telephone conversation with Tweel's accountant, the IRS revenue agent requested production of Twell's tax records. In prior years Tweel had been audited, but no criminal charges had been filed against him. Realizing the high probability that the audit had been instituted for the purpose of criminal prosecution, the accountant asked whether a special agent was involved in the matter. He undoubtedly knew that criminal investigations by the IRS were carried on by special agents, while revenue agents were limited to civil audits.[124] In response to the question, the IRS agent stated truthfully that no special agent was involved with the case. He did not, however, state that the audit had been instituted at the behest of the Organized Crime and Racketeering Section of the Department of Justice.[125] Relying on the answer given by the agent, the accountant turned over Tweel's records to the IRS. Criminal charges of tax evasion were brought based upon the information gained from the records. Tweel was ultimately convicted of tax evasion and making false statements.[126]

The Fifth Circuit remanded the case[127] on the ground that the IRS agent affirmatively misrepresented the purpose of the investigation in order to convince the accountant to hand over the records. Although the misrepresentation amounted to nothing more than the failure to supplement the response with information not specifically demanded, the court viewed the agent's activity as "sneaky, deliberate deception."[128] To support that finding, the court held that in these circumstances, the government agent had a duty to give complete information to the accountant. The silence, in itself, prompted

122. *Id.* at 214-15, 38 Cal. Rptr. at 623-24.

123. 550 F.2d 297 (5th Cir. 1977).

124. *See* notes 92 & 94 *supra*.

125. 550 F.2d 297, 298 (5th Cir. 1977). OCRS, which investigates only criminal matters, requested this audit in its own name. *Id.* at 298 n.4.

126. *Id.* at 298.

127. *Id.* at 300. The court remanded to determine which evidence was tainted by the illegal acts.

128. *Id.* at 299.

a misconception of the truth.[129]

The operative statements in *Tweel* transpired in a telephone conversation. Therefore, no nonverbal communications by the agent could have contributed to any of his assertions. Moreover, the deception did not lie in what was said; the deception lay totally in that which was *not* said. To this extent, *Tweel* breaks new ground in finding *affirmativeness* in nonassertive silence. The decision is even more interesting in that the review of the factual circumstances at the appellate level altered the basic findings of the trial court. In drawing these fine lines between deception and no deception, the Fifth Circuit necessarily reweighed the evidence. Nevertheless, the traditional rules of consent were vindicated in close accordance with the dicta in *Gouled.*[130]

The result in *Tweel,* although based on the well-established consent rule, reflects an important factor in the development of the undercover prerogative.[131] In undercover cases, arguments made by defendants on appeal have greatly understated the importance and function of the consent rule. In those cases, discussion of the consent rule amounted to little more than a brief citation to *Gouled.* The Supreme Court paid little or no attention to whether deception altered the validity of consent.[132] The Fifth Circuit in *Tweel,* however, heard a highly developed discussion reviewing the consent rule in depth.[133] In sum, the strength of the fourth amendment consent rules may have suffered more in the arguments of inept counsel than at the hands of insensitive courts.

IV. Development of the Undercover Prerogative

A. *Through* On Lee

In all of their simplicity, the consent rules restricting governmental misrepresentation stood, until recently, as a considerable impediment to the use of undercover agents. The rules of entrapment would allow almost unbridled deception for coaxing the prospective defendant to commit crimes.[134] On the other hand, even mild deception on the part of officials in gaining consent to enter

129. *Id.* at 299-300.

130. Gouled v. United States, 255 U.S. 298 (1921). The *Tweel* court stated its holding in part: "Since the consent given by appellant was obtained by deception, the microfilming of the documents constituted an unreasonable search in violation of the Fourth Amendment." 550 F.2d at 300. *See* Harris & Warner, *supra* note 94, and cases cited therein.

131. For a discussion of the development of the undercover prerogative, see part IV *infra.*

132. *See* text accompanying notes 165-66 *infra.*

133. *See* Brief for Appellant at 7-15, United States v. Tweel, 550 F.2d 297 (5th Cir. 1977).

134. For a discussion of entrapment rules, see notes 65-72 and accompanying text *supra.*

private premises could render the subsequent search illegal. Although the "standing" rules[135] were of some help to law enforcement officials in this regard, they fretted under this clear double standard and sought to have the consent rules equated with those of entrapment, notwithstanding established fourth amendment principles.

The unyielding power of the consent rule was demonstrated to law enforcement officials in 1932 in *Fraternal Order of Eagles, No. 778 v. United States.*[136] Prohibition was in full swing and state officials were very reluctant to enforce the Volstead Act[137] and its state counterparts. Therefore, the full weight of enforcing those laws fell upon federal officials. In an attempt to halt flagrant violations of the laws by a fraternal organization in Pennsylvania, federal agents visited the lodge premises dressed in plain clothes and pretended to be members in good standing of an out-of-state chapter of the same organization. In reliance on these false assertions by the agents, the proprietors allowed the agents to enter and partake of the alcoholic beverages being served inside. The agents later used the information gained from this initial entry as support for a search warrant. The Court of Appeals for the Third Circuit, in reliance on *Gouled,* held the evidence illegally obtained through the ruse, and therefore inadmissible,[138] thus underscoring the control of the consent rule over use of undercover agents.

Judge Buffington's dissent in the case, however, rejected the consent rationale under these circumstances.[139] He stressed that the consent rule had an unjustified crippling effect upon law enforcement, and especially undercover investigations. Because it articulated the tension between the consent rule and undercover investigations, this dissent presaged the judicial conflict that took almost forty years to resolve. From the end of Prohibition until the "undercover" cases, the strength of the *Gouled* dicta remained intact, with minor exceptions in lower court decisions which either were totally oblivious to the consent rule[140] or treated the issue in dicta.[141] The Supreme Court of the United States would not accept

135. *See* note 105 and accompanying text *supra.*

136. 57 F.2d 93 (3rd Cir. 1932).

137. 27 U.S.C. § 34 (1976).

138. 57 F.2d 93, 94 (3rd Cir. 1932).

139. *Id.* at 95.

140. Whiting v. United States, 321 F.2d 72 (1st Cir.), *cert. denied,* 375 U.S. 884 (1963).

141. Chieftain Pontiac Corp. v. Julian, 209 F.2d 657 (1st Cir. 1954); *see* United States v. Bush, 283 F.2d 51 (6th Cir. 1960), *cert. denied,* 364 U.S. 942 (1961). Although the Sixth Circuit in *Bush* recited the basic *Gouled* dicta, it seemed greatly influenced by the idea suggested in On Lee v. United States, 343 U.S. 747, 752 (1952), that misrepresentation of identity alone was not affirmative enough to negate consent. The record in *Bush* reveals that

certiorari in the matter until 1951, when electronic eavesdropping began to emerge. In *On Lee v. United States*[142] the Court faced a factual situation in which governmental misrepresentation had been used as a medium for effectuating electronic surveillance. Although the opinion centered on the "bugging" issue, it also paid passing notice to the consent rules.

The transactions in *On Lee* were a paradigm of undercover technique. Chin Poy, an old acquaintance of the defendant, had been enlisted by government agents to help investigate alleged narcotics transactions of the defendant. The agents affixed a microphone to Chin Poy's body in conjunction with a device that could transmit the audio signals to a receiver located a short distance away. Upon instructions, Chin Poy visited the defendant's laundry, stood in "public access" areas and struck up a conversation with the defendant.[143] Through the receiving apparatus, a federal agent outside the laundry heard the defendant make incriminating statements in this conversation. On a later occasion, the identical system was used to gain the same sort of admissions in a conversation taking place on a city sidewalk. At trial, Chin Poy did not testify,[144] but the federal agent who had listened to the conversations through the recording device did testify. He was the sole source for the incriminating statements. The defendant was convicted,[145] based primarily upon the admissions.

The Court addressed the issue of deception in gaining the consent of the defendant as a subsidiary point to the questions surrounding the electronic eavesdropping.[146] The opinion suggested the possible application of the misrepresentation restrictions by observing that Chin Poy had committed no overt deception to meet the affirmativeness standard.[147] Therefore, the misrepresentation would

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the federal agent probably did make affirmative misrepresentations under the standards of affirmativeness discussed in the text accompanying notes 89-95 *supra*. The wired agent in *On Lee* had not misrepresented his identity.

142. 343 U.S. 747 (1952).

143. *Id.* at 749.

144. *Id.*

145. *Id.* at 748.

146. Although some form of electronic eavesdropping is an integral part of most undercover activities, the fourth amendment considerations are totally different than those discussed here concerning consent by deception. The introduction of listening devices implicates either the idea of exceeding the scope of consent (by the introduction of a "third ear") or the fact that no consent whatsoever was gained for the introduction. Thus, it ends up at the narrow holding of *Gouled:* there is no warrant *or* consent. Except in the unlikely case where the defendant is deceived as to the actual function of a listening device, no deception is involved.

147. 343 U.S. 747, 752 (1952).

not negate the original consent. Although *On Lee* upheld what Justice Frankfurter labeled a "dirty business,"[148] Justice Jackson's majority opinion at least recognized the consent rule. Precisely what Chin Poy said in each conversation is unclear from the opinions and briefs, but because there was no identity deception and his statements seemed to be couched in vague generalities, Chin Poy may not have affirmatively deceived the defendant under the traditional definition of affirmativeness. These issues, however, were mere surplusage because the Court held that Chin Poy did not at any time enter areas of the defendant's premises that were not openly accessible to the public. Although statements may have been made in an expectation of privacy, there actually was no search or seizure which implicated the fourth amendment under the then prevailing proprietory test.[149]

B. *Lopez*

On Lee may have satisfied law enforcement officials in expanding their use of electronic bugging devises carried on the person, but it did not speak to the issue of undercover investigations in a manner contrary to the *Gouled* dicta.[150] Twelve years later, in *Lopez v. United States*,[151] an IRS agent pretended to "play along" with an unsolicited bribe offer from the defendant. The agent carried a small recording device which stored incriminating statements made in the defendant's private office during meetings with the agent. Again, the electronic eavesdropping issue dominated the discussion. Unlike *On Lee*, however, the Court in *Lopez* failed to address the consent rule in any forthright manner. Justice Harlan's majority opinion cursorily dismissed the claim of misrepresentation in the following manner:

> We need not be long detained by the belated claim that [the agent] should not have been permitted to testify about the

148. *Id.* at 758.

149. The Court stated:

> Petitioner relies on cases relating to the more common and clearly distinguishable problems raised where tangible property is unlawfully seized. Such unlawful seizure may violate the Fourth Amendment, even though the entry itself was by subterfuge or fraud rather than force. *United States v. Jeffers*, 342 U.S. 48; *Gouled v. United States*, 255 U.S. 298 (the authority of the latter case is sharply limited by *Olmstead v. United States*, 277 U.S. 438, at 463). But such decisions are inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods.

Id. at 753.

150. *Id.* at 751-52.

151. 373 U.S. 427 (1963).

> [incriminating] conversation . . . . [The agent] was not guilty of an unlawful invasion of [the defendant's] office simply because his apparent willingness to accept a bribe was not real. He was in the office with [the defendant's] consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without [the defendant's] knowledge. Compare *Gouled v. United States, supra.* The only evidence obtained consisted of statements made by [the defendant] to [the agent], statements which [the defendant] 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.[152]

The Court could have reached the same result in this case as it did in *On Lee* by interpreting the statements by the agent as not constituting an affirmative misrepresentation. That conclusion would probably have been supported by the facts because the agent's statements to the defendant indicated complicity almost totally by innuendo.[153] Moreover, his true identity was known to the defendant. As the quoted discussion reflects, however, the Court in *Lopez* seemed to imply that no misrepresentations had been made. Thus, this decision affirming the trial court's finding that there was no deception under these facts, added little understanding to the Court's position on misrepresentation in consent searches. The importance of *Lopez* lies in the Court's clear rejection of the importance of the *Gouled* dicta. By limiting *Gouled* to its narrow holding,[154] the Court in effect said that at least in these situations, surreptitious procurement of consent is not prohibited.[155]

C. *Lewis*

In 1966, the Court considered the issue of consent by deception in a factual situation not encumbered by the questions surrounding electronic eavesdropping. Since *Lopez,* three years earlier, a President had been assassinated and Chief Justice Warren, presiding over a commission named after him, had called for a greater emphasis on the use of police intelligence operations to combat burgeoning

152. *Id.* at 438.

153. *Id.* at 429-32, 435-36.

154. Searches without a warrant, probable cause or consent are unconstitutional.

155. The Court had earlier recognized but limited the consent dicta in *Gouled* to tangible evidence in Olmstead v. United States, 277 U.S. 438, 463-64 (1928), *rev'd on other grounds,* Katz v. United States, 389 U.S. 347 (1967).

urban violence.[156] In addition, the drug culture had expanded its reach into virgin suburbia and the war in Vietnam had produced what then seemed to be considerable security problems. It was in this setting that *Lewis v. United States*[157] eliminated any application of the consent rule to undercover investigations by government officials.

Federal officials had been investigating marijuana distribution in the Greater Boston area. A narcotics officer learned the defendant's name through a third party and contacted the defendant by telephone. In that conversation, the officer identified himself falsely as "Jimmy the Pollack" and arranged a sale of marijuana at the defendant's home. When the officer knocked at the defendant's door to consummate the sale, the defendant, "Duke" Lewis, opened the door partially and asked the officer to identify himself. The answer was, "I'm Jim."[158] Lewis then asked whether the agent was known by any nickname and the agent answered "the Pollack."[159] Lewis invited the agent into his home and completed the sale.[160]

Although the record clearly showed that the government could have obtained a search warrant at any point in the investigation,[161] none was procured. Upon a subsequent deal made under the same circumstances, the defendant was arrested. Evidence gathered at both transactions was introduced by the prosecution. The defense claimed that the agent's misrepresentations vitiated any consent given by Lewis, thus rendering the searches and seizures illegal.[162] The court nonetheless held the searches legal and Lewis was convicted of illegal transfers of marijuana.

The Court of Appeals for the First Circuit distinguished *Gouled* and affirmed the decision of the trial court.[163] Their short opinion drew a distinction between those "invitations" by the consentor which are for "proper purposes" as in *Gouled* and those that are not, as in *Lewis*.[164]

In disposing of the claims of misrepresentation and vitiated consent in *Lewis*, the Supreme Court, through Chief Justice Warren, again distinguished *Gouled*[165] as it had done in *Lopez* and would

156. THE WARREN REPORT, supra note 5, at 186.
157. 385 U.S. 206 (1966).
158. *Id.* at 207.
159. *Id.*
160. *Id.*
161. *Id.* at 208 n.4.
162. *Id.* at 208.
163. 352 F.2d 799 (1st Cir. 1965).
164. *Id.* at 799; *see* note 200 and accompanying text *infra*.
165. 385 U.S. 206, 209-11 (1966).

do again in *Hoffa,* and hence extinguished any persuasive effect of the *Gouled* dicta. A closer reading of *Lopez* by Lewis' counsel might have demonstrated the uselessness of citing *Gouled* for the claims. Instead, a wealth of lower court decisions demonstrating the deception restrictions could have been cited to make the Court's job in *Lewis* considerably more delicate, if not difficult.[166]

The central holding in *Lewis* actually transcended any discussion of consent or misrepresentation. The Court came to the abrupt conclusion that by turning his home into a virtual "commercial center"[167] for narcotics, "Duke" Lewis had forfeited any fourth amendment protection. According to the Court, the defendant, by commercializing his domicile, established an implied consent to the entry of all comers to his home. Therefore, according to the *Lewis* holding, the actions of the narcotics agent transpired totally outside the scope of fourth amendment protection.

Viewing the case in this manner, the Court insulated its decision in the cloak of factual finding: Lewis' house was not a home; it was in effect a drug merchandising firm open to the public. This imaginative finding ended the fourth amendment issue in the case and seemed to provide a convenient method for supporting undercover searches in the future.

Although only dicta, the Court's distinction of *Gouled* is enlightening. The Court found the agent's activities in *Lewis* different from the activities in the *Gouled* case because the agent in *Lewis* seized the very object contemplated by the defendant in the transaction.[168] The Court seemed to say that the eventual seizure did not exceed the scope of the consent given in that Lewis had intended to give the marijuana to the agent. Gouled, on the other hand, had not intended to surrender the papers. If the misrepresentation problem were simply a matter of exceeding the scope of consent, this approach would have woven the undercover exception into the consent rules with precision. The "scope" approach, however, presumes that the initial consent was valid, which under the deception restrictions was not the case. The agent made material and affirmative misre-

166. *See* cases cited in notes 41 & 46 *supra.*

167. "[W]hen, 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." 385 U.S. 206, 211 (1966). *See* Note, *The Supreme Court 1966 Term,* 81 HARV. L. REV. 69, 115, 125, 186, 192 (1967). *See generally* Comment, *The Applicability of the "New Fourth Amendment" to Investigations by Secret Agents: A Proposed Delineation of The Emerging Fourth Amendment Right To Privacy,* 45 WASH. L. REV. 785 (1970) (author suggests imaginative distinction between quantity and quality of privacy in fourth amendment protection).

168. 385 U.S. 206, 210 (1966).

presentations in order to gain consent to enter the defendant's home. The deal was consummated in the house. All of the evidence admitted at trial was either directly or indirectly derived from the original consent and was therefore tainted by the illegality.[169] The fact that the agent did not exceed the scope of the negated consent was irrelevant.

Beyond its brevity and questionable finding that the defendant no longer lived in a house, *Lewis* indicated an important perspective on the issue of governmental misrepresentation. The Court clearly was struggling for a way to allow undercover investigators to enter private premises, and yet restrict such incursions to factual situations much like those in *Lopez* and *Lewis*. A dissenting opinion by Chief Justice Warren in *Hoffa v. United States*[170] suggested that the Court had not sought to eliminate the restrictions on governmental subterfuge, notwithstanding its rejection of the *Gouled* dicta.[171] In any event, the *Lewis* opinion and dissents substantiated in a cryptic manner the conceptual tension between the need for effective undercover agents and the rules of consent and firmly established the undercover prerogative.

D. *White*

With the emergence of the "reasonable expectation of privacy" standard in *Katz v. United States*,[172] the holdings in *On Lee, Lopez* and *Lewis* appeared to be substantially altered, if not overruled. *Lewis* seemed most vulnerable to the supposed expansion of the fourth amendment right announced in *Katz*, because of the clear and reasonable intent of "Duke" Lewis to establish a private environment for his marijuana sale. This issue was resolved in 1971 in

169. *See* text accompanying notes 40-42 *supra*, concerning the "derivative evidence rule."

170. 385 U.S. 293, 313 (1966) (Warren, C.J., dissenting).

171. The Chief Justice was mainly upset with the majority's failure to overturn the finding of the trial court that Partin was *not* a government agent. *Id.* at 313-14. In addition, he saw the facts in *Hoffa* as distinguishable from the other undercover cases, especially *Lewis*, in that the evidence taken in *Hoffa* was "unrelated to the business purpose of [Partin's] visit. As we said in affirming Lewis' conviction, the principles elaborated in *Gouled v. United States*, 255 U.S. 298 (1921), would protect against such overreaching." *Id.* at 316. As the discussion of the lower court cases indicate (*see* text accompanying notes 182-86 *infra*), the Chief Justice may have meant to state this view of *Gouled*, but his majority opinion in *Lewis* failed to articulate it clearly. Again, he stated in his *Hoffa* dissenting opinion, "An invasion of basic rights made possible by prevailing upon friendship with the victim is no less proscribed than an invasion accomplished by force." *Id.* at 314. It is evident that the Chief Justice wanted something of *Gouled* to remain after the undercover cases.

172. 389 U.S. 347 (1967); *see* text accompanying notes 32-35 *supra*.

White v. United States.[173] In retrospect, the Court's purpose in *White* was to pronounce that *Katz* had not modified the undercover cases.

Although the issue of electronic surveillance cropped up again in *White*, the undercover activities were quite analogous to those in *Lewis*. The federal agents, assuming false identities, procured information through the defendant's consent to entry into his private premises. Several conversations, which included the defendant's incriminating statements, took place during a secret meeting in the defendant's home. For consent purposes, the facts were identical to *Lewis*.

Justice White's opinion addressed the claim of governmental misrepresentation by holding that there was no justifiable expectation of privacy on the part of the defendant.[174] The Court recognized that it is well known throughout society that the government uses undercover agents and that it is reasonable to assume that one's colleagues in an illegal activity may be federal officers incognito.[175] One may expect and even demand privacy in distributing marijuana or participating in other crimes, but such expectation will not be considered reasonable. Misplaced trust in government officials was the damning factor. Thus, the narrow holding of *White* removed the whole investigative transaction from the scope of the fourth amendment and foreclosed any need to discuss consent or misrepresentation. From this perspective, the *Katz* standard made the rejection of fourth amendment coverage in *White* fit the facts more sensibly than the same result in *Lewis* which was decided under the old proprietorial standard.[176] A house may not be a home, but, as the word is used in the fourth amendment, it still is a house, and the expectation of privacy in this house is only as reasonable or justified as the Court sees fit.

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173. 401 U.S. 745 (1971).

174. *Id.* at 751-53.

175. *Id.* Justice White's opinion, in which only the Chief Justice, Justice Stewart and Justice Blackmun joined, developed with more emphasis the assumption of risk idea stated in *Hoffa*, and repeated in *Katz:* "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210 . . . ." 389 U.S. 347, 351 (1967). Whether this conceptualization comported with the facts of these cases is irrelevant. White's opinion stated simply that these situations will not constitute a justifiable expectation of privacy. Although it is clear that one may assume the risk of many nongovernmental detriments, such as a roommate's consent to search of a jointly-used duffel bag, Frazier v. Cupp, 394 U.S. 731 (1969), nowhere else but in the undercover prerogative does one assume the risk that the government is abridging its limitations.

176. *See* text accompanying notes 151-76 *supra*.

From *On Lee* through *White,* the Court was dealing with undercover agents, all of whom achieved their purposes by pretending to be participants or potential participants in the crime involved. While this characteristic attaches to most undercover ploys in the drug world and organized crime, it does not fill the field of possible undercover techniques. In contrast to participational guises, government agents could assume nonparticipational roles in maintaining internal surveillance of suspected criminal activity. This distinction is important in order to extract the narrowest holdings of the undercover cases. The emphasis in *White* upon reasonability of the expectation of privacy among colleagues involved in an illegal act, and the supporting arguments in *Lewis* focusing on an invitation into the house for the very object contemplated, indicate that the undercover prerogative ought not extend to those forms of surveillance which are implimented by agents not intending to become involved in the criminal activity. While this distinction may be deducible from the opinions, it is by no means explicit.

E. *Analysis*

The immediate question raised by the undercover cases is, in what way did the cases alter the rules restricting governmental misrepresentation in consent searches? Clearly, garden variety undercover investigations no longer fall under the protection of the fourth amendment, but questions remain about the status of the rules reflected in the *Gouled* dicta and the definition of "undercover investigation." If "misplaced trust" in one's associates removes the surrounding transactions from the scope of the amendment, then virtually any consent gained by deception might be upheld.

The issue is not purely academic. A major abrogation of the restrictions on governmental deception would undermine the warrant requirement and in many cases obviate the effect of the fourth amendment. If the government is authorized to enter private premises through the use of *any* ruse, much has been gained for law enforcement. Similarly, owing to the general openness with which Americans manage their private premises, the government could maintain almost constant *interior* surveillance of private areas previously protected under the amendment. A greater compromise of the fourth amendment could hardly be envisioned. The mechanics of the system are not difficult to imagine. The economy of this country is heavily geared to the consumption of durable goods and personal services on private premises. With that consumption comes an endless procession of service and delivery personnel. Although the typical American freeholder or lessee does not make

prior acquaintance with most commercial people visiting his premises, there is a typical element of unearned trust reposed in them. This trust is prompted, in major part, by the economic interest of providing goods or services in the most expedient manner possible. To this end, commercial underpinnings engender the very trust which could easily be used by the government to maintain surveillance over a given private area. Added to these opportunities of entry are the social calls made every day to individuals in their private premises by persons previously unknown to them. With very little imagination, but some planning and control, government authorities could employ a host of nonparticipational schemes to gain entry on a repeated basis to practically any private area. Having established a legally permissible vantage point, it would seem senseless for the officials to worry about procuring a neutral magistrate's authorization for a search. A building inspector's or meter man's uniform would be far more convenient than obtaining a search warrant. Besides, search warrants require probable cause; undercover ruses, as in *White,* do not. Thus, the warrant requirement would be resorted to only for searches and seizures in which undercover work would be physically or economically unfeasible.

The argument countervailing these fears is that the undercover prerogative could not or would not be extended to nonparticipational deceptions. In the first place, the undercover cases concerned only participational guises and were limited strictly to the facts of each case.[177] Therefore, those holdings cannot be used for direct support for nonparticipational deception. In addition, the "very purpose contemplated" rationale in *Lewis* and the "colleague" implication in *White*[178] indicate the Court had no intention of extending the undercover prerogative beyond the scope of participational misrepresentation. The object was to allow the police to impersonate drug purchasers and coconspirators, not to impersonate furnace repairmen or travelling salesmen.[179]

This argument is taken completely from the negative, as it must be, because the undercover cases set new powers, not limitations. Contrary to most authority, the cases establish a legal ability on the part of government to use material and affirmative misrepre-

177. "[I]n this area, each case must be judged on its own particular facts." Lewis v. United States, 385 U.S. 206, 212 (1966).

178. United States v. White, 401 U.S. 745, 752 (1971). The Court also used the expressions "companions," "associates" and "trusted accomplices." *Id.*

179. Chief Justice Warren's dissenting opinion in *Hoffa* makes this point unquestionably clear. Hoffa v. United States, 385 U.S. 293, 317-21 (Warren, C.J., dissenting). It is, of course, of only persuasional value in arguing any case under these facts.

sentation for gaining consent to enter private property. Furthermore, it is reasonable to assume that law enforcement officials will be inclined, if not duty bound, to use whatever legal means are available to enforce the law.[180] This itself may be an understatement. The "very purpose contemplated" dicta in *Lewis* is not a strong limitation on the use of the undercover prerogative. The central rationale of the undercover cases, that misplaced confidence in one's colleagues does not trigger fourth amendment protection, imposes no limitation on the government, so long as its actions are "reasonable."[181] If *Lewis* and *White* had concerned very unique factual patterns, one could legitimately aver that the cases turned on their facts. The two cases, however, concerned highly typical undercover investigations in which a participational ruse served as the medium for consent. If misplaced confidence may exempt these two cases from the purview of the fourth amendment, why should it not remove any other forms of misplaced confidence?

If the undercover preogative was conceptually limitable under present law to merely participational schemes, the consent rule would survive, albeit under the weight of a major exception. The judicial leap under present law, however, to allow nonparticipational deception was not long in coming among the lower courts after *White*. In *United States v. Guidry*,[182] the Court of Appeals for the Sixth Circuit held a search legal where a federal agent impersonated a printing press repairman and thereby gained entry into the defendant's home. No search warrant was procured. While inside the house, the agent viewed the premises and by removing a piece

180. New York City's Bureau of Special Services Investigations "wiretapped, infiltrated, bugged, photographed, surveyed, investigated, spied, and unshamefully undertook any strategy that enabled it to do its job effectively. The unit was kept to only one restraint: the Bureau had to obey the law punctiliously." A. BOUZA, *supra* note 6, at 23.

181. For cases which follow *Lewis* on basically the same factual pattern, see United States v. Ressler, 536 F.2d 208 (7th Cir. 1976); United States v. Glassel, 488 F.2d 143, 145 (9th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974); United States v. Boggus, 411 F.2d 110 (9th Cir.), *cert. denied*, 396 U.S. 919 (1969); United States v. Hayden, 397 F.2d 460 (7th Cir. 1968), *cert. denied*, 396 U.S. 1027 (1970); Patterson v. People, 168 Colo. 417, 451 P.2d 445 (1969); Metzler v. State, 229 So. 2d 886 (Fla. 3d DCA 1969); People v. Favela, 31 Ill. App. 3d 453, 333 N.E.2d 284 (App. Ct. 1975); Killie v. State, 14 Md. App. 465, 287 A.2d 310 (Ct. Spec. App. 1972); State v. Anglada, 144 N.J. Super. 358, 365 A.2d 720 (Super. Ct. App. Div. 1976); State v. Goeller, 264 N.W.2d 472 (N.D. 1972) (most cogent decision yet by state court); State v. Sabbot, 16 Wash. App. 929, 561 P.2d 212 (Ct. App. 1977); State v. Duarte, 4 Wash. App. 825, 484 P.2d 1156 (Ct. App. 1971).

182. 534 F.2d 1220 (6th Cir. 1976); *See* United States v. DeFeis, 530 F.2d 14 (5th Cir.), *cert. denied*, 429 U.S. 830 (1976); United States v. Hutchinson, 488 F.2d 484 (8th Cir. 1973), *cert. denied sub nom.* Ennis v. United States, 417 U.S. 915 (1974); United States v. Bradley, 455 F.2d 1181, 1186 (1st Cir. 1972), *aff'd on other grounds*, 410 U.S. 605 (1973); Creps v. State, 94 Nev. ___, 581 P.2d 842 (Nev. 1978).

of green printed paper, confirmed the government's suspicions that the defendants were engaged in a counterfeiting operation. A few minutes after the agent left the house, a small fire was started near the carport. Officials, who had been on continuous outside surveillance, summoned the fire department and rushed into the house to "search the house for fire."[183] While in the house, they saw the counterfeiting machinery, made the arrests and seized the evidence.[184]

The court considered the initial entry and search by the undercover agent legal under the authority of *Lewis*.[185] The close nexus between the later pretextual search of the house during the fire and the earlier undercover search, would have most likely "tainted" the later search had the court determined the earlier search to be illegal.[186] For that reason, the court's determination concerning the first search was not dicta. More important is the fact that this undercover surveillance was achieved through a nonparticipational deception. The court, however, made absolutely no distinction on this basis and viewed the search in *Guidry* as indistinguishable from that in *Lewis*. Thus, the government may, in the guise of a milkman or dry cleaner, pry into the confines of the home on the thin prescription of misplaced trust.

In an appeal of a petition for habeas corpus relief, the Third Circuit also extended *Lewis* and *White* to a situation that should not have fallen within the category of undercover investigation. In *Brown v. Brierley*,[187] the defendant was convinced by police officers, whom he knew to be officers, to turn over a revolver for the stated purpose of selling it to raise funds for the defendant. The officers did sell the gun for the defendant's benefit, but immediately borrowed the revolver from the purchaser and subjected it to a ballistics test. The officers admitted that when they promised to act as the defendant's agent, they had the undisclosed intention to procure the weapon for testing.[188] Based on evidence derived from the test, the government successfully prosecuted the defendant for murder.

Thus, the porous nature of the *Lewis* holding was again appar-

183. *Id.* at 1221.

184. *Id.*

185. *Id.* at 1222.

186. The court considered the subsequent search and seizure clearly pretextual in regard to the claim by the government that the seizures were made in the course of searching for the fire. The seizure was held valid, however, on the grounds that it preserved evidence from destruction. *Id.*

187. 438 F.2d 954 (3d Cir. 1971), *cert. denied*, 402 U.S. 997 (1972).

188. *Id.* at 956.

ent when the Third Circuit held the *Brown* seizure valid upon the force of the arguments in *Lewis*.[189] It is questionable, however, whether the facts in *Brown* fit within the definition of "undercover." Although the deception was not effected through a participational scheme, it is clear that the police activity in *Brown* was open governmental deception not comprehendible within the undercover prerogative. Yet under the force of *Lewis*, the misrepresentation was validated.

The undercover rationale virtually obliterated the consent rule in *Raines v. United States*.[190] The Court of Appeals for the Eighth Circuit followed *Lewis* in validating an entry gained under circumstances previously considered illegal. The record showed there was sufficient probable cause to support a search warrant,[191] and there was enough time to procure such warrant. Nonetheless, outside the premises, a police officer, impersonating an acquaintance of the defendant, spoke to the defendant within. Based upon the statements made, the defendant opened the door wide enough for the officer to step in. Other police officers immediately entered and searched the premises. They found contraband and made the arrest. Again, by the authority of the undercover cases, the court held the initial entry valid and even overlooked the coercive pressure exerted upon the defendant after the support police entered.[192]

The rapid expansion of the undercover prerogative has not been limited to the federal courts. The California Second District Court of Appeal, in *People v. Miller*,[193] validated misrepresentation in a case in which, prior to *Lewis*, it probably would have been held illegal. In order to gain an observation of the interior of an apartment, plainclothes police officers instructed the manager of the apartments to announce at the door that the occupants had "callers." The occupants opened the door, and the officers saw narcotics paraphernalia.[194]

The court in *Miller* candidly reflected upon the precedential distaste for governmental misrepresentation in consent searches, but then admitted that since *Lewis*, such deception had become

189. *Id.* at 958-59; *see* United States v. Hutchinson, 488 F.2d 484 (8th Cir. 1973), *cert. denied sub nom.* Ennis v. United States, 417 U.S. 915 (1974).

190. 536 F.2d 796 (8th Cir. 1976), *cert. denied*, 429 U.S. 925 (1977); *see* United States v. Glassel, 488 F.2d 143 (9th Cir. 1973), *cert. denied*, 416 U.S. 941 (1974).

191. 536 F.2d at 796, 799 n.3 (8th Cir. 1976), *cert. denied*, 429 U.S. 925 (1977).

192. *Id.* at 799-802. Because probable cause for arrest also existed at the point of entry, the court also addressed the issue of entry for arrest under 18 U.S.C. § 3109 (1970). *See* note 107 *supra*.

193. 248 Cal. App. 2d 731, 56 Cal. Rptr. 865 (Dist. Ct. App. 1967).

194. *Id.* at 735-36, 56 Cal. Rptr. at 868-69.

"perhaps not so bad, after all."[195] In the court's view, deception had become absolutely essential to police work and hence not unconstitutional per se. In the case, the misrepresentation was material and probably affirmative enough to be invalid under the relatively large number of California cases prior to *Lewis,* which disallowed such deception.[196] Yet, *Lewis* seemingly compelled the result even though this activity was definitely nonparticipational and hardly "undercover" work in any sense of the word as used in the undercover cases.

V. CONCLUSION

Whether *any* undercover prerogative should exist is a major question in itself.[197] Assuming that it is necessary, to what extent should it be used? The expansiveness of the post-*White* cases in the Third, Sixth and Eighth Circuits noted above illustrate how inadequate the undercover cases were in limiting the scope of governmental deception in consent searches. The undercover case holdings do not compel the prerogative to extend to nonparticipational surveillance. Unlimited deceit would unquestionably compromise the important limitation upon government comprehended in the fourth amendment.[198] In most jurisdictions, however, this is what is occuring. A virtually irrebutable presumption has now arisen among the lower courts that consent gained through governmental misrepresentation is valid. The Fifth and Ninth Circuits, on the other hand, have maintained a semblance of the consent rule.[199] Where the deception is used in a participational scheme to penetrate narcotics rings and bribery conspiracies, to name a few, these circuits will indulge the undercover prerogative. Where nonparticipational ruses are employed, the tendency is to hold to the consent rule.

The split in the circuits over this matter warrants a granting of certiorari by the Supreme Court. The serious imbalances in fourth amendment power caused by the indiscriminate use of governmen-

195. *Id.* at 738, 56 Cal. Rptr. at 870.

196. *See, e.g.*, People v. Reeves, 61 Cal. 2d 268, 391 P.2d 393, 38 Cal. Rptr. 1 (1964).

197. For sources indicating the absolute necessity of undercover investigations in certain fields of law enforcement, see notes 5, 6 & 13 *supra.* The parties in *Lewis* conceded that some form of deception was necessary. 385 U.S. 206, 208-09 (1966).

198. Deceit on the part of the police officer gains much of its power from the fact that it issues from the lips of one supposedly above reproach and acting as government official in his official capacity . . . one expects the "criminal" to lie, but one does not expect an "officer of the law" to lie.

R. Buckner, The Police Culture of a Social Control Agency (1967) (unpublished Ph.D. thesis at University of California, Berkeley), *reprinted in* P. MANNING *supra* note 13, at 180.

199. *See, e.g.*, United States v. Tweel, 550 F.2d 297 (5th Cir. 1977); note 107 *supra.*

tal misrepresentation accentuate the need for settling the issue along the lines already chosen by the Fifth Circuit. The undercover prerogative of using deception to gain entry to private property is undoubtedly justified as a "reasonable search" when serious crimes would be otherwise impossible to detect. Organized crime, terrorist groups and large scale narcotics activities, by their very nature, demand participational deception as a means to gain consent. In fact, this has been the standard method for accomplishing such investigations, as was reflected in *Lewis* and *White*.

By distinguishing between participational and nonparticipational deception, the Court could limit the use of government misrepresentation to cases in which it is absolutely necessary. The participational distinction could be easily articulated in the manner done by the Court of Appeals for the First Circuit in *Lewis*.[200] Where the consent to enter is given for "proper purposes," that is, not to invite participation in the crime, then the consent rule should apply. Where the consent is given for "improper purposes," that is, to invite participation, the undercover prerogative should apply. This would reaffirm in greater part the consent rule by recognizing that the undercover power is an exception to the rule, not the rule itself.

200. 352 F.2d 799 (1st Cir. 1965), *aff'd*, 385 U.S. 206 (1966).