CONFESSIONS MADE TO UNDERCOVER AGENTS: LAW, MORALITY, AND PUBLIC POLICY

Marvin Zalman
Criminal Justice Program
Wayne State University
Detroit, MI 48202
(313) 577-2705

A Paper Presented at the Annual Meeting of the
American Society of Criminology
New Orleans, Louisiana
November, 1992

In Arizona v. Fulminante[1] the Supreme Court held that coerced confessions are subject to the harmless error rule and therefore may be introduced into evidence, upsetting a well established rule of Payne v. Arkansas.[2] In Fulminante, however, a majority held that the coerced confession that was introduced into evidence had an effect on the jury's decision and thus was not harmless error. As a result, the case was remanded. In the course of this decision, the Court accepted the assertions of Chief Justice Rehnquist that confessions made to undercover agents, per se, are not unobjectionable. It is clear that under existing constitutional law confessions made to undercover agents are legal. Although it may be the case that the deception involved in such cases always raises ethical questions, deception for law enforcement purposes has been accepted constitutional doctrine at least since Hoffa v. United States.[3] Because the issue of undercover spying to obtain confessions raises questions about the corrosive effects of this practice on police agencies and on the larger society, it is important to review the matter.

The Fulminante Case: Known Facts

Oreste Fulminante, a suspect in the 1982 murder of his eleven year-old stepdaughter in Arizona,[4] initially was not charged with the crime and departed for New Jersey. During the investigation the police discovered he had a record of previous convictions and this information led to a federal conviction in Arizona of possession of a firearm by a felon. Upon release from prison for this crime, Fulminante was again convicted on felony firearm charges and sentenced to another federal prison term.[5] Incarcerated in the Ray Brook Federal Correctional Institution in New York, he was befriended by Anthony Sarivola, a former police officer once implicated in organized crime loansharking, who was serving a 60-day sentence for extortion. Sarivola, who became a paid undercover informant for the FBI, "masqueraded as an organized crime figure"[6] at Ray Brook. Under FBI instructions, Sarivola repeatedly asked Fulminante, with whom he spent several hours a day, about the murder. After many denials of knowledge of the murder, Fulminante confessed to Sarivola that he had choked, sexually assaulted, and shot his stepdaughter. The circumstances of this confession are briefly described by the Court:

> Sarivola learned more one evening in October 1983, as he and Fulminante walked together around the prison track. Sarivola said that he knew Fulminante was "starting to get some tough treatment and whatnot" from other inmates because of the rumor. Sarivola offered to protect Fulminante from his fellow inmates, but told him, "'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.'"[7]

Sarivola was released from prison in November, 1983 and Fulminante in

May, 1984. After his release Fulminate made a second confession to Donna Sarivola, then Anthony Sarivola's fiancee and later his wife.[8] Both confessions were admitted into evidence at Fulminante's September 1984 first-degree murder trial for the murder of his stepdaughter. On appeal from Fulminante's conviction the Arizona Supreme Court, applying the totality of the circumstances standard, ruled that the first confession was not voluntary as "Sarivola's promise was 'extremely coercive' because the 'obvious' inference from the promise was that his life would be in jeopardy if he did not confess."[9] The state court first held that this confession was nevertheless harmless error, but on a motion for reconsideration decided that under federal standards the introduction of the coerced confession was not harmless and ordered a retrial. The State appealed this decision to the United States Supreme Court. The Court, through shifting majorities, held that (1) the confession was coerced, (2) in general coerced confessions are subject to the harmless error rule, but (3) in this case because a "full confession" was presented to the jury rather than a lesser admission, the error was not harmless.

These are the facts presented by the Arizona and United States Supreme Courts. The extent to which facts presented in appellate opinions accurately represent past events is always subject to question. Legal fact, like narrative history, is a matter of selection and reconstruction and thus is subject to error, subconscious bias, partial memory, and the like. In most legal cases the facts -- including human perceptions, sensations, and interpretations -- that would turn a dry record into an interesting story are omitted. In the science of law, only those facts that are required to establish a basis for a coherent opinion, like laboratory notations of data during a scientific experiment, are kept. The factual record revealed by the Arizona and United States Supreme Courts is a minimally sufficient foundation for the harmless error and coerced confession holdings. Yet, a rereading of Fulminante leaves one with the sense of an important story untold. Deeper reflection on the criminal justice practices revealed by the case beckons us to read between the lines, to construct a fiction of how and why Oreste Fulminante came to be friends with Anthony Sarivola.

Reconstructing the Facts of Fulminante

The coincidental orbits of Fulminante's and Sarivola's prison lives are announced in the case with Biblical succinctness, leaving it to the reader to ponder the mundane facts that supported the Court's stark rendering of the events.[10] I suggest that the intersection of their lives was not coincidental at all but planned by the FBI and the prison officials. Although there is nothing in the case to suggest this, we may infer from Fulminante's convictions for weapons possession that the FBI was maintaining a close surveillance on Fulminante. I think that the law enforcement officials in charge of the case were convinced that Fulminante murdered Jeneane and that

they maintained close surveillance in order to arrest and convict him on other charges. This would be done for a combination of reasons: to harass him, to punish him vicariously for the murder, and to place him in a position of vulnerability that might lead to a conviction for the murder.[11] In my scenario, I hypothesize that federal law enforcement officials got the cooperation of federal prison officials to set up the encounter between Sarivola and Fulminante. Sarivola was plainly suited to playing the role of the false friend as a person with a shadowy background that included some "connection" to organized crime. It seems to me that this scenario would have raised serious dangers for the prison. If Sarivola or prison employees leaked a few hints that Fulminante raped and murdered his stepdaughter, the possibility of his being beaten or killed by inmates applying prison mores was a possibility. The prison authorities might have had greater trust in Sarivola because as a former police officer he might have been seen as more disciplined in running the scenario. Sarivola also had a relatively short term and, given the large number of federal prisons, Fulminante could be moved if the prison feared matters were taking a dangerous turn.

Thus, instead of the fortuitous meeting announced by the Court, I believe that the confession was the carefully planned result of planting Anthony Sarivola into the life of Oreste Fulminante. If this scenario was true and was known to the courts, it would nevertheless have had no legal bearing on the case and would not have changed the decision. It does raise policy questions worthy of consideration.

The Court's Treatment of Undercover Confessions

Was Fulminante's confession coerced or involuntary? Let us reflect on this question from the stereotypical American imagery of coerced confessions, the third degree. Grade "B" movie images rise quickly to the surface: the defendant is seated on an armless chair or stool; the room is stifling, with a fan just pushing hot air around; a single high wattage electric light bulb in an inverted metal bowl of a lampshade casts a harsh light on the defendant while leaving the rest of the room in shadows and darkness; the police (all middle aged white men from central casting), dressed in white shirts with collar buttons undone and wide patterned ties askew, feet up on chairs or straddling them with arms resting on the seatback, hurl accusations at the defendant; violence may be used, perhaps a slap, perhaps a rubber hose; if direct physical hitting is not used, the police may use a variety of ploys that the Supreme Court from 1944 to 1977 held unconstitutional or may interrogate the defendant interminably and in relay.[12] In this setting there is no doubt under the present state of the law that a promise of leniency renders a confession involuntary.

What is essential and what is "mere dictum" in the Grade "B" movie image of the interrogation and confession? The focus of most discussions has been on the nature of the techniques used to elicit a confession or admission from

the defendant. While many of the details in the scenario are not legally relevant in isolation, together they form the "coercive atmosphere of the station house" that for all intents and purposes constituted the factual basis for the Miranda ruling. Certainly, the isolation of the defendant from friends, family and counsel is relevant. How important is the underlying fact that the parties all know their roles? Of course, in the well known "Mutt and Jeff" variation of police interrogation, the defendant may be mistaken about the true feelings and intentions of the friendly or supportive officer. In such a case, the cynic may reply, the defendant's misapprehension is only different in degree from the perceptions of a good portion of the human race about the people they encounter in meaningful ways. Nevertheless, the suspect is not mistaken that the person doing the "grilling" is a police officer and that the setting, whether the officers' demeanors are soothing or harsh, is confrontational.

The fact of the officer's identity as a police agent, with its hint of the danger of excessive and illegal force, is missing in Fulminante. Where the defendant is confronted with an undercover agent, the stereotypical setting of the confession is missing. On one level, a confession made to a "plant" in a prison setting is covered by rules developed under the Massiah doctrine, where the suspect is represented by counsel.[13] A person who is not yet indicted and represented by counsel, however, is prey to a more subtle and probably more effective confession-gathering technique, the use of the false friend.[14]

Indeed, Chief Justice Rehnquist, writing for the dissenters on this issue, stressed that the use of undercover agents not only are constitutional, but are inherently less coercive than the stereotypical confession scenario:

> The facts of record in the present case are quite different from those present in cases where we have found confessions to be coerced and involuntary. Since Fulminante was unaware that Sarivola was an FBI informant, there existed none of "the danger of coercion result[ing] from the interaction of custody and official interrogation." Illinois v. Perkins, . . . (1990). The fact that Sarivola was a government informant does not by itself render Fulminante's confession involuntary, since we have consistently accepted the use of informants in the discovery of evidence of a crime as a legitimate investigatory procedure consistent with the Constitution. . . . The conversations between Sarivola and Fulminante were not lengthy, and the defendant was free at all times to leave Sarivola's company. Sarivola at no time threatened him or demanded that he confess; he simply requested that he speak the truth about the matter. Fulminante was an experienced habitue of prisons, and presumably able to fend for himself. In concluding on these facts that Fulminante's confession was involuntary, the Court today embraces a more expansive definition of that term than is warranted by any of our decided cases.[15]

Thus, Chief Justice Rehnquist not only asserted the superior reliability of undercover confessions, but drifted from this point into an unsupported

assertion that it seemed to him that such a confession was voluntary, completely avoiding, at this point, the majority's concern that the confession was coerced by the fear of retaliation by other prisoners.

Justice White's majority opinion, finding the confession coerced, disregarded the point made by the Chief Justice about the value of undercover confessions. It instead relied on a straightforward finding that, as the Arizona Supreme Court found, "Sarivola's promise was very persuasive," in part because of the genuine threat of injury arising from the prison situation and in part because Fulminante's history and psycho-biological state predisposed him to sincerely believing he was threatened and that Sarivola could protect him.[16] Justice White's failure to frontally meet Chief Justice Rehnquist's point may have been an appropriate strategy as the issue was not central to this case. Nevertheless, Chief Justice Rehnquist's argument is not flawless. His quote from Perkins, where the inmates were temporarily held in a local jail, is beside the point when applied to the scenario in Fulminante, pregnant with the threat of prison retaliation against a child abuser. The "length of time" and
"freedom to leave" factors seem to constitute an attempt by the Chief Justice to lay the foundation for a test of acceptability of undercover confessions. The freedom to leave factor seems irrelevant where the parties are confined in a prison where danger could lurk in many places. While the length of time factor could prove of some value, it would seem to be a rather formal factor where the goal of a test would be to ascertain whether an undercover confession scenario amounted to psychological coercion, assuming that a Fifth Amendment test were the proper approach. In any event, the failure of Justice White to respond to the argument allowed the Chief Justice to insert a point that lays the foundation for similar arguments in future cases.

A Policy Analysis of Undercover Confessions

The logic of Chief Justice Rehnquist's approach to confessions elicited by false friends has chilling and very real implications for law enforcement and for the substantial rights of parties. A case can be made that a confession made to an undercover agent who has infiltrated the life of a suspect, made in confidence and in the security born of friendship, shared understandings, and intimacy, is far more persuasive and reliable than a statement made by a suspect who is confronted by police detectives in a station house setting. In the latter setting, interrogation sessions may last for many hours of cajoling and may break down the will of the arrestee under circumstances that do not always produce a reliable or truthful admission.[17] While this was apparently not the case in Fulminante the future of police work may indeed see the replacement of station house questioning by infiltration.

Gary Marx has chronicled the exponential growth of undercover police work in America, in part because of the increase in white collar crime, governmental corruption, and commerce in illicit drugs. Such crimes are

practically undetectable without some use of undercover enforcement.[18] Other reasons for this growth include the increasing education and sophistication of law enforcement personnel. Command officers today are almost uniformly college educated and many departments are imbued with a managerial and result-oriented direction. As it is extremely difficult to reduce overall crime levels by traditional patrol and variations on patrol, result-oriented policing translates into making good arrests. The activist nature of undercover work is appropriate for "pro-active" police departments and allows them to make arrests for crimes that seriously undermine public confidence in government (i.e., corruption), or that are responsible for widespread risks and costs to the public but are difficult to check because of their organizational characteristics (i.e., white collar and organized crime).

The regular use of decoys and undercover agents of various types has institutionalized these skills in law enforcement. When resources are available, it has been possible for law enforcement to infiltrate even "traditional" (i.e., Italian ethnic) organized crime to the extent that high level members have broken vows of silence. One journalistic account of the infiltration of high level "mobsters" indicates that they live in an atmosphere of pervasive intrusion. "There were bugs everywhere -- cars, houses, lamp posts -- so they never talked business on the phone. (Scarfo didn't even have a phone.) And when they talked business in Scarfo's house they'd turn on two televisions and a radio and then whisper in front of the radio."[19] Photographs accompanying this story included several street pictures of various organized crime figures identified as FBI and Philadelphia police surveillance photographs. It is no longer "news" that an intense government effort to survey specified activity or persons can be extremely effective. What has changed steadily over the last two decades has been the scope of such activities.

If police have a suspect to a serious crime and, as in Fulminante, insufficient evidence to bring an indictment, they may begin to seek confessions not by the older stereotypical method of station house questioning, but by the use of undercover plants. In Fulminante the agent may have been an entrepreneur who initiated the contact with the suspect for purposes of receiving leniency. It is equally likely that FBI agents were surveilling Fulminante and used the coincidence of Sarivola's presence in the prison to suggest the acquaintanceship. Another possibility is that Sarivola was given the chance to "deal" even before being sent to Ray Brook for his prison term.

The reported Fulminante cases take the existence of in-prison rumors of Fulminante's crime as given and never explain how they were spread. In my reconstruction of the facts I suggest that the rumors were planted. Once we think of Fulminante as an undercover case, the in-prison rumors cannot be accepted at face value. If, as is apparent, the FBI were pursuing Fulminante in the prison, it is conceivable that they could have leaked the rumor for the

purpose of setting up the scenario that was played out between Sarivola and Fulminante. This is speculative and it is possible that the rumor escaped because of a careless word by Fulminante, or by chance knowledge of another prisoner who had heard of the case, or a leak of information in Fulminante's files by prisoner clerks. But if, in this scenario, the rumor was leaked into the prison community via the prison administration, which must maintain contacts with "snitches" in order to maintain control over the institution, then the possibility arises that law enforcement agents would set in motion events that could lead to the killing or serious beating of an inmate, entrusted into the care of a penal institution, in order to set up a case. This is an example of the kind of temptation that would confront law enforcement agents seeking to get suspects to talk. Even on the street, one can imagine undercover agents stimulating rumors and passions designed to create "natural" crises in the lives of suspects, that make them susceptible "voluntarily" to admit to crimes.

The Dangers of Undercover Confessions

The dangers that accompany the use of body-mikes without prior judicial authorization are similar to those that accompany attempts to obtain confessions by planting spies in the midst of suspects. There are cases where such kinds of law enforcement work are to be applauded. The case of Oreste Fulminante may have been one. Yet, American history is replete with repetitive cycles of political hysteria that lead to excesses in law enforcement that include a heavy reliance on infiltration techniques. Within living memory from the last wave of political justice we can recall episodes such as a wiretapper on the President's payroll, eavesdropping on a moderate columnist, and local police planting officers posing as students in classrooms to ferret out "subversive" statements of professors.[20]

These dangers are confirmed by Professor Marx's conclusions.[21] But if the mystique of accuracy were in fact true, perhaps the nonwarranted use of these techniques would be worth the price of occasional corrupt or illegal use. After all, the use of a warrant exacts a cost in efficiency, at least in the short run. But what is almost more chilling than the potential for an Orwellian society, is the numbing recitation of the number of botched, ambiguous, and morally perverse consequences of what Professor Marx labels "the new surveillance." I suggested above that the government could smother a suspect with informants until a confession is obtained. An example of such infiltration, that led to the seizure of physical evidence, is described by Marx:

> Edmund Burke, who wrote about the fear of being spied on "by the very servant who waits behind your chair," would have been appalled by the case of Arthur Baldwin, the owner of a legal topless bar in Memphis that police wanted to close down. An investigation was carried out to see if Baldwin was liable for criminal prosecution on other grounds. Lacking information that

> would justify a warrant for electronic surveillance or search and seizure and apparently having little or no reason to suspect Baldwin, a generalized undercover investigation was carried out instead. An agent insinuated himself into Baldwin's life. He worked in his bar, served as his chauffeur, looked after his child, and even lived in his house for six months. During this time, the agent took some white powder seen on Baldwin's dresser and had it analyzed. On the basis of this evidence, Baldwin was arrested and convicted on cocaine charges.[22]

There is obviously a different moral imperative at work in Fulminante's alleged killing than in this Memphis fiasco, but it was not apparent to the zealous law enforcement officers in the latter case. When cases involve months if not years of this kind of infiltration into a person's life, what legitimate objection can exist to a warrant requirement? As Marx notes, certain types of undercover activity that are morally ambiguous are either prohibited by some law enforcement agencies, while the FBI requires internal authorization at "the highest level" when agents impersonate reporters, physicians, lawyers, or clergy.[23]

Aside from damage to privacy and trust, Marx documents unintended consequences that cause severe problems for some police agents and notes that third parties can be injured financially, psychologically, physically, and in their reputations.[24] But the use of undercover agents often produces results that are ambiguous or incorrect. Sometimes police move in on a decoy operation too quickly so that it is unclear whether the suspect had any criminal intent. In other cases, entrepreneurial agents plant information on essentially or totally innocent subjects whose only offense may be in not reporting an attempt to bribe or the presence of illegal substances.[25]

Chief Justice Rehnquist in Fulminante was willing to believe that the confession made to an undercover agent has "none of 'the danger of coercion result[ing] from the interaction of custody and official interrogation.'"[26] Professor Marx's examples suggest that this is not always the case. He points out that the use of audio tapes may be doubly misleading because their existence predisposes listeners to believe that they are hearing the "truth" and grainy, poor quality video create the impression of watching a "sleazy B-grade movie" that presumably always has an identifiable bad guy. But such records "create a potentially illusory sense of certainty. They may be manipulated to give a distorted picture and lull observers into uncritical acceptance of the documentary record."[27] Thus, an audio tape was made of an innocent request made of a judge, and out of the presence of the judge a bribe offer was read in by the undercover informant. The tape "spoke for itself." Or, informers may simply fabricate conversations that are not taped. But even tapes of conversations that are not as crudely fraudulent as the taping of the bribe offer, may be manipulated by recording only small parts of lengthy transactions. For example, a subject who is reluctant to enter into a crime may resist for a long time and on many occasions, but finally agree to participate. Only playing the later conversations between informant and

subject eliminates any evidence of possible entrapment. Tapes can also be edited to produce misleading impressions.[28]

> Even when blatant trickery or technical editing in one form or another is absent, careful linguistic analysis may be required to insure that conversations mean what they appear to. . . .
>
> Linguist Roger Shuy has identified four strategies by which persons may be made to appear guilty on tape: scripting, which involves putting words in a target's mouth . . . ; criminalizing, which involves paraphrasing what a subject said to make it sound illegal; camouflaging, which involves hiding incriminating suggestions in language that disguises their meaning; and preventing the target from making statements that might later help the defense. Another strategy involves persisting and the refusal to accept "No" for an answer.[29]

Professor Marx gives several examples of how conversations can be manipulated to put the subject in a uniformly bad light to a later listener. Finally, tapes that include conversations with undercover agents who are prone to "exaggerate their knowledge of others' wrongdoing," may be replete with "hearsay, gossip, distortion, outright fabrication, or slander."[30] While a seasoned officer may discount such conversations, a tape enhances the legitimacy of such words.

Constitutional and Ethical Considerations

The Fourth Amendment law in this area is settled. The false friend is a risk of life at least as old as Judas and as modern as Jimmy Hoffa's labor movement associate Partin. An agent wearing a body-mike may tape any conversation that another foolishly has with him.[31] In a jail cell, a not-indicted inmate is fair game for a police plant initiating Miranda-less questions that in law are not interrogation.[32] A jailed inmate who has been formally charged and is cloaked with the protection of the right to counsel may nonetheless be placed in a cell with a secret plant as long as the human plant imitates a vegetable and does not initiate a conversation.[33] On one reading of constitutional doctrine these rules make sense. But as a matter of constitutional and criminal justice policy, they raise troubling implications. It is to be marvelled that the Supreme Court does not trust municipal health or building departments to generate plans to inspect buildings for ordinance violations without the supervision of a neutral and detached magistrate,[34] but allows the police to totally infiltrate a person's life with the goal of prosecution. The political and constitutional risks to a democracy are considerable. They have never been better stated than by Justice Harlan, dissenting in United States v. White:

> Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the

> Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.
>
> This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties, I am of the view that more than self-restraint is required and at the least warrants should be necessary. . . .
>
> The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact on privacy occasioned by the ordinary type of "informer" investigation. . . . The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting.
>
> Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity -- reflected in frivolous, impetuous, sacrilegious, and defiant discourse -- that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.[35]

The ethical issues raised by Justice Harlan lie not so much in the realm of private morality but in what I would call public morality. Hoffa stands for the proposition that private morality does not control the Court's decisions about law enforcement. In this regard, Hoffa was not revolutionary but was a reflection of long standing practice. This is not to say that "common morality" never intersects with law enforcement. In many if not most instances of police malfeasance, their acts violate rules of law and morality that bind the rest of us. Other areas of unconstitutionality would be viewed not as immoral acts but as policy rules designed to secure interests such as privacy.[36] Justice Harlan's remarkable essay is a testament to the observation that the Court's institutional role requires that it be cognizant that its rules shape and govern the nation, even if adhering to a philosophy of judicial restraint. In shaping the nation, the Court may indeed allow law enforcement to engage in practices that may be immoral and personally corrosive. On the other hand, the Court is obliged to consider the impact of its rulings on the temper of the nation.

The public morality at stake in Fulminante is the risk of creating a nation of informers. In the present climate of opinion, including the end of the cold war and reduction of the political paranoia that anti-communism

spawned, it may seem hyperbolic to use the Orwellian fear of a police state as an argumentative foil. The revelations of the police state that the GDR (East Germany) had become, where husbands spied on wives for years and Stasi files ran for 125 miles of shelf space, containing about 17 million sheets of paper, does not seem apt in the United States.[37] Still, Professor Athan Theoharis has documented FBI excesses of the early 1970s such aa politically oriented spying and illegal break-ins; and, significantly, he has shown that the attempts to control such behavior in guidelines established by Attorney General Levi were reversed by President Reagan's Attorney General, William French Smith, abandoning written authorization and probable cause for domestic security investigations.[38] A recent book by Alexander Charnes, reviewing the FBI's surveillance, infiltration, spying on, and manipulation of the Supreme Court in the J. Edgar Hoover era, shows how reluctant the agency was to give up its files under repeated and extensive FOIA suits in the late 1980s.[39] Recent FBI programs such as the Library Awareness Program, asking librarians to divulge readers' habits, investigations of the Committee in Solidarity with the People of El Salvador, and the lingering racism in the ranks does raise some questions about the extent to which the agency is "reformed."[40]

But looking for specific instances of governmental illegality or programs that tend in the direction of abuse of power is beside the point. The larger point is that our entire Constitutional system is imbued with an attitude of healthy skepticism about governmental power. The Constitution was designed to establish an effective government, but was saddled with inborn inefficiencies (checks and balances) to prevent tyranny. Rather than being shocked that government's agents overstep their lawful boundaries, the proper attitude is that excesses, tendencies to monopolize power, and overzealousness are recurrent problems. The only appropriate direction for legislation is to design laws and policies that force law enforcement agencies to work effectively within the law. Likewise, judicial policies fail in their fundamental constitutional purpose if they do not curb the <u>tendency</u> or <u>realistic potential</u> of abuse.

Conclusion - Rethinking the Lack of Judicial Supervision

The Wickersham Commission report on police brutality defined "the Third Degree" defined as "the employment of methods which inflict suffering, physical or mental, upon a person in order to obtain information about a crime."[41] Police at that time claimed the term was used to denote legal behavior. A police official in 1910 referred to the "first degree" as arrest and the "second degree" as taking the suspect to a place of confinement.

> When the prisoner is taken into private quarters and there interrogated as to his comings and goings, or asked to explain what he may be doing with Mr. Brown's broken and dismantled jewelry in his possession, to take off a rubber-heeled shoe he may be wearing in order to compare it with a footprint in a burglarized premises, or even to explain the bloodstains on his

hands and clothing; that, hypothetically, illustrates what would be called the "Third degree."[42]

The confession scenario in Arizona v. Fulminante takes us to the "Fourth Degree" -- confessions made to undercover police agents.

The basic danger of undercover confessions is not that they currently are part of a police state mechanism, but that they have the tendency to take the nation to such an end. The constitutionally offensive nature of undercover confessions is not the breaches of "ordinary morality" involved: the total deception, the agent's insinuation into the life of the suspect for secret and ulterior motives, the undermining of a person's capacity to trust others. Rather, it is the violation of a "public morality" that is constitutionally cognizable. Justice Harlan's dissent in White puts the finger on the heart of the problem. Undercover confessions, like consent electronic eavesdropping, tends "to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society." The result is to undermine the character of a free people, to violate the constitutional premise of those relationships on which political liberty is based.

If these dangers are felt to exist, one policy prescription is to recommend legislation requiring judicial authorization of the intrusive activity that must necessarily accompany the obtaining of an undercover confession. Given the complexity of Title III electronic eavesdropping warrants, for example, a full review of the issues that would arise in working out the details of such a warrant procedure are beyond the scope of this essay. Of course, the review of Professor Marx's chapter on unintended consequences of undercover operations and the fears of abuse are not meant to deny the value to effective law enforcement of undercover police work that warrant procedure should preserve.[43] But, the risks of error and overreaching are real and documented. The use of undercover informants like Anthony Sarivola almost always carry risks of error, distortion, or falsehood, and present inherently ambiguous ethical scenarios. The easy acceptance of the undercover confessions in Fulminante and Perkins is a dangerous trend insofar it sanctions the unchecked allowance of such police operations. Given the kinds of distortions that are possible even using audio or video tapes, it is questionable whether cross-examination will be sufficient to ferret out the erroneous results of overzealous law enforcement used to obtain undercover confessions. Thus, I believe that the secret infiltration of a person's life for the purpose of obtaining a confession is an intrusion of a person's constitutional right to privacy.

At this point, standing at the intersection of Fourth, Fifth and Ninth Amendment policies, many conceptual difficulties arise. As I see it, the question is not one of a coerced confession arising under the right against self-incrimination, although an undercover confession scenario can raise Fifth

Amendment concerns if the level of intrusiveness is such that the confession is viewed as psychologically coerced. That this position is debatable is beyond the point because the constitutional violation is not in the confession but in the infiltration into the privacies of life.

The doctrinal basis of undercover work may be too deeply set in Fourth Amendment jurisprudence to expect a reversal of the Hoffa[44] and Lopez[45] doctrines. On the other hand, it should be incumbent on state legislatures, state supreme courts, and the Congress to seriously consider the imposition of a warrant requirement for the more involved, well planned, and intrusive forms of incursions into the lives of citizens by undercover agents. One fruitful avenue suggested by Fulminante might be to exclude from evidence confessions made to undercover agents that result from planning, that are not previously authorized by judicial authorization. Spontaneous admissions made to secret agents who have not yet made a serious attempt to become a mole in the subject's life could be excluded from a warrant requirement. The benefit of a legislatively crafted warrant requirement and exclusionary rule is that the process could be tailored to the specifics of undercover operations, focusing on the specific areas of danger and taking into account the legitimate needs of law enforcement. But for both a judicially mandated or legislatively fashioned warrant procedure, it is important for there to be a doctrinal basis for concluding that undercover confessions violate one's constitutional rights.

An avenue to finding such a right of privacy inherent in the Constitution is to extend Griswold v. Connecticut[46] to the kind of police intrusion in Fulminante for the reasons given by Justice Harlan in White, thus in effect merging the Fourth and Ninth Amendments in this situation. Here we have a direct imposition of government power against individuals in ways that can readily be used to create the kind of police state the East Germany was, or that was partially manifested in the United States during the "McCarthy Era."[47] There is clearly some doctrinal difficulty in making this point in the face of Fourth Amendment opinions that would argue that the framers by negative implication saw no constitutional impediment to this level or kind of insinuation by government agents into citizen's lives.[48] Also, the Griswold doctrine has thus far been used only in a few areas that have to do with intimate rights including access to contraception by unmarried partners and abortion.[49]

Nevertheless, let us state the issue in terms of what is really at stake. If the government targets me, whether with or without probable cause, and without a warrant, for surveillance and the infiltration into my life by a stranger who will attempt to become a close friend, and who becomes such a large part of my emotional life that I will confide the most personal secrets to him or her, including incriminatory information, so that the false friend can obtain a confession to be used to convict me of a crime, has such action violated an unenumerated right to privacy that is implied[50] by the Ninth

Amendment or the Ninth read in light of the Fourth Amendment? I have little difficulty in concluding that this is the kind of activity, perhaps not contemplated by the framers, that is protected by the Bill of Rights.

The application of the Ninth Amendment to any area is a matter of the most intense controversy, so I do not expect this analysis to be easily accepted.[51] If, as I believe, Justice Harlan was correct that the Fourth Amendment extended to the practice of the "body mike," there are inherent problems in extending Fourth Amendment analysis directly to undercover confessions. The Fourth Amendment seems to invoke scenarios more circumscribed in scope and in time than the kind and length of infiltration needed to obtain an undercover confession. The Court has allowed the time of the intrusion to 30 days for electronic bugs under Title III. But an undercover confession infiltration may go on for many months before a confession is obtained. Whether the Fourth could be bent so far is doubtful, and even if it were possible such extension is undesirable as a matter of constitutional policy.

The life-infiltrating aspects of an undercover confession seem to fit the constitutional right to privacy better than the Fourth Amendment. One way of viewing Ninth Amendment rights is to see them beyond all aspects of governmental regulation. I don't think this is right as government may regulate contraceptives under food and drug laws and may regulate who may legally perform an abortion. Likewise, merely having a right does not mean it is absolute and subject to no controls or limits. The privacy right contemplated in this article is rather close to Fourth Amendment concerns and therefore may be subject to similar kinds of limitations and controls. In summary I believe that the Constitution protects persons against unreasonable invasions of privacy. It is a major intrusion into privacy when the government fabricates and insinuates a friend into a person's life. Whether such intrusion is reasonable depends upon the existence of probable cause, the gravity of the offense, and the impossibility of gaining sufficient evidence for prosecution in any other way. The reasonableness of such intrusion must be determined by a magistrate in an ex parte hearing prior to the infiltration.

An intrusive warrant procedure focusing on police methods, rather than on a specific search and seizure, raises questions about the separation of powers, and whether magistrates are to become overseers of methods used by police. I grant that our system does not contemplate that magistrates become police commissioners, and therefore the role of magistrates should be limited to reviewing the reasonableness of such operations along traditional grounds such as probable cause. The unprecedented nature of a new warrant procedure is no impediment. As Title III demonstrates, Congress can create an elaborate warrant procedure designed to satisfy constitutional requirements. In the absence of legislation, Court have the authority to receive warrant applications from law enforcement agents. Indeed, the Court in Katz approved

an ad hoc and constitutionally excessive warrant in the Osborn case.[52]

In summary, then, I argue that under the Ninth and Fourth Amendments government infiltration of "moles" into the life of a suspect in order to obtain a confession is an intrusion of privacy that is reasonable only if there is probable cause to believe that the suspect has committed a serious crime and no other means of obtaining evidence for a prosecution exists. A warrant procedure should be required in such cases. The constitutional policy underlying this conclusion is very close to the usual concerns in criminal procedure: the fear of excessive law enforcement invasions of individual privacy resulting from overzealousness. The Fourth Amendment is not an adequate basis for such a right because of its narrower focus on the more limited intrusions that are contemplated by "search and seizure." The right to privacy concept has been established under a form of Ninth Amendment reasoning in Griswold. To extend the right to privacy to the undercover confession scenario is an extension of the intimate privacies thus far covered by the Ninth Amendment but is not a radical departure from the kinds of concerns raised in criminal procedure. A right to privacy from unwarranted and unreasonable police insinuation, would allow law enforcement to use this drastic tool in the most serious criminal cases but would act to check police excesses and to limit the risk of police state tactics.

ENDNOTES

1. 111 S.Ct. 1246, 48 Crim. L. Rep. 2107 (1991).

2. 356 U.S. 560 (1958).

3. 385 U.S. 293 (1966).

4. Early in the morning of September 14, 1982 Fulminante called the Mesa, Arizona Police Department to report that his 11-year-old stepdaughter, Jeneane Michelle Hunt, was missing. He had been caring for Jeneane while his wife, Jeneane's mother, was in the hospital. Two days later, Jeneane's body was found in the desert east of Mesa. She had been shot twice in the head at close range with a large caliber weapon, and a ligature was around her neck. Because of the decomposed condition of her body, it was impossible to tell whether she had been sexually assaulted.
Fulminante v. Arizona, 48 CrL at 2107b.

5. Arizona v. Fulminante, 161 Ariz. 237, 778 P.2d 602, 1988 Ariz. LEXIS 81, at *4-*5, (1988).

6. 48 Crim. L. Rptr. at 2108a.

7. Id.

8. The Arizona Supreme Court ruled that the second confession was not the fruit of the poisonous tree because of attenuation: six months lapsed between confessions, Sarivola's purported protection was no longer needed, the conversation in which the admission was made was casual, and Donna Sarivola was not an agent of the state. Arizona v. Fulminante, 161 Ariz. 237, 246, 778 P.2d 602, 611 (1988). The United States Supreme Court was not called on to review this ruling, 48 Crim. L. Rep. at 2108 n.1. Thus, upon retrial, the second confession would be available to the state.

9. Arizona v. Fulminante, 161 Ariz. 237, 778 P.2d 602, Lexis at *13 (1988).

10. What an appellate judge makes of the bare record of a case is anyone's guess. On occasion there are hints that Supreme Court justices read between the lines and assume the worst about governmental conduct. Graham, supra note ?, at 210, for example, notes that in United States v. Spinelli, 393 U.S. 410 (1969) "[t]here is a heavy hint in the concurring opinion by Justice Byron R. White that the Court believed that the F.B.I.'s 'confidential reliable informant' might well have been a tap on those two suspicious telephone lines (a belief that was widely shared by officials within the Justice Department itself)." About the Fulminante case we can only speculate. But there is value in speculating where a decision is so finely balanced that "[s]ome principle, however unavowed and inarticulate and subconscious" (B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11_ (1921)) is the critical factor. Where the opinion is inadequate we speculate so as to gain greater understanding of otherwise unfathomable reasons for the decision. My penetration of the factual record, to imagine what the justices likely thought, is at the very least plausible.

11. I have found no literature to indicate that such activities are part of police work. One police officer verbally indicated that police departments do engage in surveillance of persons suspected of murders for which no conviction had been obtained or released prisoners who are believed to be predictably violent. I was told that such activity is assigned informally but is taken very seriously by police officers. I have no reason to doubt the veracity of the officer but I ado not know whether such activity is widespread.

12. Excerpts from a 292-page transcript of a 1986 interrogation of a murder suspect by two detectives would make it appear that the stereotypical interrogation situation has not entirely passed from the scene. See Readings: [Transcript] True Confession?, Harper's, Oct. 1989, at 17-20 et seq. and Weiss, Untrue Confessions, Mother Jones, Sept. 1989, at 18-24.

13. United States v. Henry, 447 U.S. 264 (1980); Kuhlman v. Wilson, 477 U.S. 436 (1986).

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

15. Fulminante at 2114a.

16. These factors are specified in footnote 2 of Justice White's opinion, at 2109a.

17. See J. Barthel, A Death in Canaan (1976), W. Lassers, Scapegoat Justice: Lloyd Miller and the Failure of the American Legal System (1973), S. Raab, Justice in the Back Room (1967).

18. G. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 1-15 (1988).

19. Del Giudice, The Mobster Who Could Bring Down the Mob, The New York Times Magazine, June 2, 1991, at 24, 38.

20. D. WISE, THE AMERICAN POLICE STATE 3-30 (1976) (describes activity of John J. Ragan, a former FBI operative, to tap the telephone of the late Joseph Kraft, a nationally syndicated columnist, under the hire of a White House staff member acting for "the top man"); White v. Davis, 13 Cal.3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (Los Angeles police undercover officers posing as students to gather classroom discussion information for intelligence files on professors chills exercise of First Amendment freedoms; the surveillance itself directly violated right of privacy under state constitution).

21. "[T]he new surveillance may be helping to create a degree of suspiciousness that goes too far. Community, liberty and openness can hardly thrive in a society of informers or where everyone is treated as a suspect." Marx, supra note 18, at 225.

22. Marx, supra note 18, at 149 (footnote omitted).

23. Id. at 151. The Los Angeles Police Department forbids officers from posing as news reporters.

24. Id. at 147, 159-79. Participants may be drawn into an illegal scheme by government force or tricks. An informer threatened the life of auto entrepreneur John DeLorean and his children if he failed to participate in a drug deal. Id. at 130. Rommie Ladd, a black sports executive who was financially ruined when the World Football League failed, was drawn into an undercover scheme when he was offered $1 million for a new team if he would "loosen up the financiers with cocaine." Rommie was convicted after initial refusals and an audio tape of the incident records the agent saying that he tricked Ladd. Id. at 131. An undercover agent for the U.S. Fish and Wildlife Service gave "free samples" of illegal falcons to subjects who were then convicted for tampering with identification bands on the birds and falsifying records. Id. Two city councilors drawn into the Abscam case were coached by the government informers that according to the "Arab way of doing business" bribes were required to obtain donations for public purposes. Id. at 131-2.

In several cases political careers were ruined or compromised when it was reported that politicians were investigated during undercover operations but cleared. "Social psychological research has documented the tendency to blame those who are accidentally injured and to see them as deserving their fate." Id. at 141. The dangers of partisan use of such investigations by

unprincipled officials is clear. Such was spelled out in a memorandum from John Dean to President Nixon in 1971. Id. at 138.

25. Id. at 133-34.

26. Fulminante at 2114a, citing Illinois v. Perkins (1990).

27. Marx, supra note 18, at 134.

28. Id. at 135-36.

29. Id. at 136.

30. Id. at 141.

31. 18 U.S.C § 2511 (2) (c).

32. Illinois v. Perkins, ___ U.S. ___, 110 S.Ct. 2394 (1990).

33. United States v. Henry, 447 U.S. 264 (1980); Kuhlman v. Wilson, 477 U.S. 436 (1986).

34. Camara v. Municipal Court, 387 U.S. 523 (1967), See v. City of Seattle, 387 U.S. 541 (1967).

35. 401 U.S. 745, 786-88 (1971) (citations and footnotes omitted). See also dissenting opinion of Hufstedler, J. in Holmes v. Burr, 486 F.2d 55, 65-72 (9th Cir.), cert. denied, 414 U.S. 1116, 94 S.Ct. 850, 38 L.Ed.2d 744 (1973).

36. E.g., Delaware v. Prouse, 440 U.S. 648 (1979) (automobile cannot be stopped without reasonable suspicion).

37. Stephen Kinzer, East Germans Face Their Accusers, New York Times Magazine, April 12, 1992, at 24.

38. A. Theoharis, FBI Surveillance: Past and Present, 69 Cornell L. Rev. 883-894 (1984).

39. Alexander Charnes, Cloak and Gavel: FBI Wiretaps, Bugs, Informers and the Supreme Court xv-xvi (Urbana: University of Illinois Press, 1992).

40. Charnes, at 127.

41. Z. Chafee, Jr., W. Pollock, & C. Stern, The Third Degree: Report to the National Commission on Law Observance and Enforcement 19 (1931, 1969).

42. Id. at 20, quoting from Wigmore, 2 Evidence (2d ed.), sec. 851.

43. "The fact that such techniques [as scripting, criminalizing, camouflaging, preventing, and persisting] can be used does not mean that they will be." Marx, supra note 18, at 136.

44. Hoffa v. United States, 385 U.S. 293 (1966) (use of undercover agent does not automatically violate Fourth, Fifth or Sixth Amendment interests).

45. Lopez v. United States, 373 U.S. 427 (1963) (an undercover agent who wears a listening and recording device does not eavesdrop on a person with whom he has a conversation and no warrant is required).

46. 381 U.S. 479 (1965).

47. David Caute, The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower. New York: Touchstone Book, 1978.

48. This would be an extension of Justice Black's dissenting argument in Katz v. United States, 389 U.S. 347 (1967) that eavesdroppers were known in 1791 and not included within the scope of the Fourth Amendment.

49. Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973).

50. It is hard to see how an unenumerated right can be explicit.

51. See generally Randy E. Barnett, ed., The Rights Retained By the People: The History and Meaning of the Ninth Amendment (1989).

52. Osborn v. United States, 385 U.S. 323 (1966) (district court granted agent authority to wear a wire in a case of alleged crimes by an attorney for Jimmy Hoffa, based on a detailed factual affidavit).