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Chapter 2: Yesterday's Paranoia is Today's Reality: Documentation of Police Surveillance of First Amendment Activity

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Chapter 2: Yesterday's Paranoia is Today's Reality: Documentation of Police Surveillance of First Amendment Activity

MARC STICKGOLD*

I. INTRODUCTION

The February 1974 newsletter of the Michigan Association for Consumer Protection (MACP), a small citizens' group, contained a half-page critique of a state senator who was "Chairman of the subcommittee that has power to kill consumer protection bill 4001."

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2. NEWSLETTER, supra note 1, at 1.

The critique's author, Walter Benkert, president of MACP, called the contents of the senator's 1973-74 report "garbage," and went on to attack the senator as "support[ing] the business preferences over the people's need for protection." Benkert concluded that House Bill "4001 will either die in committee or become a watered down bill . . . ."

The newsletter closed with a verse commemorating MACP's recent struggle over mobile home safety and noting the organization's intentions to continue fighting for consumer rights.

Shortly after the newsletter was issued, a member of the Michigan House of Representatives sent a letter to the director of the Michigan State Police, requesting the director to "note the attached
A copy of the letter sent to Colonel Plants, Director of the Michigan State Police, by Representative Huffman, on February 22, 1974, was also forwarded to the state senator who was the subject of criticism in the MACP newsletter. The letter to Colonel Plants is attached as an appendix to the Plaintiffs' Complaint, supra note 1.

6. This memo is attached as an appendix to Plaintiffs' Complaint, supra note 1.

7. Id.

8. George Corsetti, a member of MACP, indicated, in an interview with the author on March 1, 1975, that an official of a state agency concerned with consumer affairs contacted him and related that the state police had inquired of the official concerning the political views of the MACP and its members.


12. First Amended Complaint for Declaratory and Injunctive Relief, Benkert v. Michigan State Police, No. 74-023-934-AZ (Wayne County Cir. Ct., Mich., filed Apr. 8, 1975) [hereinafter cited as First Amended Complaint]. The expansion of the lawsuit to include the Detroit Police Dep't was the result of investigation by plaintiff's counsel which revealed facts indicating extensive political surveillance by the Detroit Police.
ity.” The complaint further alleged that this spy apparatus operated primarily against those who expressed “political, economic, religious, social or other unpopular or critical views” in “lawful, peaceful and constitutionally protected” ways. That criminality was not the focus of this police surveillance was explicitly alleged.

The specific factual allegations by plaintiffs in Benkert were wide ranging, encompassing numerous police illegalities in addition to the allegation that the state police served as political police for a state legislator. The complaint asserted numerous violations of the United States and Michigan constitutions and laws, and sought wide-ranging relief. The most significant thrust of the complaint focused on first amendment rights and values. It asserted that unless relief were granted,

rights of freedom of speech, freedom of press, freedom of assembly, freedom of association, freedom to petition . . . government . . . [and] right to privacy . . . will continue to be infringed, threatened, impeded, penalized, and otherwise interfered with by defendants . . .

Additional constitutional and statutory questions were raised by the allegations, but it is the first amendment issues that are pertinent to the analysis undertaken in this Article.

This Article in no way intends to litigate vicariously the significant issues raised in Benkert. The brief discussion of that case is to provide some background for an understanding of the empirical study and analytical discussion that follows. It is hoped that this Article will help relieve the first amendment dilemma posed by secret police intelligence apparatuses through a study and analysis of over seven hundred pages of police political intelligence documents obtained through discovery in Benkert.

II. JUDICIAL COMMENT ON POLITICAL SURVEILLANCE

Before proceeding to the study and analysis of police political intelligence documents, consider the present first amendment dilemma posed by police surveillance of political activity. Judicial examination of first amendment values involved in political intelligence gathering has been called inadequate by an earlier commenta-
tor. In discussing only one aspect of the intelligence gathering process, that commentator concluded that "police use of undercover agents has been considered in only the most superficial fashion." The passage of a few years, the Supreme Court decision in Laird v. Tatum, and the post-Watergate cases do not detract from the validity of this conclusion.

In a flurry of activity beginning with Anderson v. Sills, in 1969, courts have been confronted with many first amendment concerns of political surveillance and dossier maintenance. The Supreme Court provided its primary comment on this subject in 1972, with Laird v. Tatum. By 1975, three additional significant opinions had been added—Philadelphia Yearly Meeting v. Tate, Socialist Workers Party v. Attorney General, and White v. Davis.

The "first major court test" of a political intelligence apparatus was in Anderson v. Sills, a case raising issues "on the perimeter of first amendment doctrine." It involved the "right-or-wrong of the police to maintain dossiers on political dissidents."

In April 1968, New Jersey Attorney General Sills issued a memorandum entitled, "Civil Disorders—The Role of Local, County, and State Government," to municipal and county officials within

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19. Note, Police Undercover Agents: New Threat to First Amendment Freedoms, 37 GEO. WASH. L. REV. 634, 637 (1969). "To say that the Supreme Court has not dealt adequately with the threat of police undercover agents is not to single it out for criticism; in general, neither legislatures nor police administrative authorities have performed any more satisfactorily." Id.


27. 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 (1975).

28. Id.


31. Id.
New Jersey. Undoubtedly prompted in part by a "number of civil disorders" in New Jersey during 1967, as well as more general concerns over, and resistance to, social demands of the sixties, the memorandum dealt "with many aspects of the problem of civil disorder, including methods of planning, mutual assistance between municipalities," and other aspects of prevention and control of civil disorders. The Sills plan included the expansion and coordination of local and state intelligence activities. Standardized forms (Nos. 420 and 421) were distributed to every police department in the state, with instructions to "routinely" submit these forms, and the "vital intelligence" therein, to the "State Police Control Security Unit."

Form 420, the Incident Report Form, called for reports on anticipated, in progress, and completed incidents, which include a "[c]ivil disturbance, riot, rally, protest, demonstration, march, confrontation . . . ." Requested were the full details on individuals and organizations involved in those incidents, along with the political designation of all the organizations. Form 421 was utilized for reporting personal data on any individual who, in the judgment of a local police officer, "may be connected with potential civil disorder problems."

The plaintiffs in Anderson—civil rights, anti-war, and community activists—challenged the constitutionality of Attorney General Sills' reporting system. They requested an injunction against the surveillance activities of police, and the destruction of dossiers maintained under the Sills system. After disposing of assertions that plaintiffs lacked standing, the trial court considered the "secret files" mandated by the Sills memorandum to be "inherently dangerous" and by their "existence tend[ed] to restrict those who

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34. 56 N.J. at 218, 255 A.2d at 682.
35. 106 N.J. Super. at 548, 256 A.2d at 306. Forms 420 and 421, and the accompanying instructions, are set out in full in the appendices to the decision. Id. at 558-66, 255 A.2d at 305-13.
36. "EXAMPLES OF TYPES: Left wing, Right wing, Civil Rights, Militant, Nationalistic, Pacifist, Religious, Black Power, Ku Klux Klan, Extremist, etc." Id. at 548, 256 A.2d at 307.
37. Id. at 549, 256 A.2d at 300.
38. Id. at 547, 256 A.2d at 299.
would advocate, within protected areas, political and social changes." Since the attack on Sills' system was "on its face" (i.e., as described in the memorandum, without regard to actual police practices or purposes), and since "there are no relevant issues of fact which must be determined," the trial court proceeded by summary judgment to grant the prayed for relief in full.

Although conceding that "the objects of the actions of the Attorney General taken here are well within the established police power of the State," the trial court found three separate first amendment deficiencies. First, the Attorney General had not borne the necessary burden of establishing a *substantial relation* between information sought and a subject of overriding or compelling state interest. A sufficient "nexus" between the reporting system and the prevention of civil disorder was not established. Second, the "impact of the ... official act" on "those who would not complain because of the chilling effect" outweighed the "governmental goals [of] controlling unprotected and illegal conduct," and therefore constituted an impermissible infringement on first amendment rights. Third, the official action in this case went "beyond areas reasonably necessary to reach the permissible governmental goal." The trial court concluded that the memorandum and reporting forms "overreach in their attempt to achieve" governmental goals, both explicitly and because of the "lack of standards" for use of the forms.

The New Jersey Supreme Court reversed the trial court, indicating that "[h]ere we are dealing with the critical power of government to gather intelligence to enable it to satisfy the very reason for its being," and that, therefore, "the basic approach must be that the executive branch may gather whatever information it reasonably believes to be necessary to enable it to perform the police

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39. *Id.* at 557-58, 256 A.2d at 305.
40. *Id.* at 549, 256 A.2d at 300. The only factual issues determined by the trial court concerned plaintiffs' standing, and those were quickly resolved by judicial notice of the plaintiffs' political activities.
41. *Id.* at 558, 256 A.2d at 305.
42. *Id.* at 552, 256 A.2d at 302.
44. 106 N.J. Super. at 553-55, 256 A.2d at 302.
45. *Id.* at 555, 256 A.2d at 303.
46. *Id.*
47. *Id.* at 557, 256 A.2d at 304.
48. 56 N.J. at 231, 256 A.2d at 689.
49. *Id.* at 226, 256 A.2d at 687.
roles." The court expressed a very restrictive view of the issues and indicated the impropriety of resolving the case by summary judgment.

The New Jersey Supreme Court, whether addressing the issue of summary judgment or plaintiffs' standing, made clear its presumptive approval of the challenged police conduct and its disbelief of plaintiffs' concerns. The court indicated that a constitutional challenge to the police conduct in question would be sustained only if the wrongful conduct was "real and not fanciful" and that, in this case, plaintiffs' allegations were: "merely hypothetical," "academic," or "a figment of fear that the government itself may run amuck."

The trial court and New Jersey Supreme Court opinions in Anderson are archetypal of subsequent opinions in police spy litigation, and illustrate what has been characterized as the "rights-security spectrum." In confronting constitutional attacks on police surveillance of political activity, courts (or judges) initially make a significant value choice, between first amendment rights and public or state security, and then employ almost automatically a complex of presumptions about police and citizen behavior.

The court's avenue of approach to the rights-security spectrum is again exemplified by contrasting the majority and dissenting opinions of the United States Supreme Court in Laird v. Tatum.

50. Id. at 229, 265 A.2d at 688.
51. See Comment, Political Surveillance and Police Intelligence Gathering—Rights, Wrongs, and Remedies, 1972 Wis. L. Rev. 175, 177, quoting 56 N.J. at 226, 265 A.2d at 687.
52. 56 N.J. at 215, 265 A.2d at 681. "[T]he issue as projected by plaintiffs on motion for summary judgment was a mere abstraction." Id. at 226, 265 A.2d at 687.
53. Id. at 215, 218, 265 A.2d at 681, 682. After six years of negotiation and preparation for trial, the complaint in Anderson was dismissed on alternative grounds. Since the Anderson memorandum had been superseded and was no longer in effect, the case was declared moot. The court also stated that even if the complaint was not moot it failed to state a cause of action under the first amendment. Anderson v. Sills, 143 N.J. Super. 432, 363 A.2d 381 (1976).
54. 56 N.J. at 220, 265 A.2d at 684.
55. Id.
56. Id. at 226, 265 A.2d at 687.
57. Id. at 229, 265 A.2d at 689.
59. Id. at 334, (Oakes, J., dissenting) (emphasis added).

408 U.S. 1 (1972).
This case, like Anderson, involved a broad-based challenge to the Army's surveillance of lawful and peaceful civilian political activity. The litigation was admittedly prompted in part by a magazine article by a former Army intelligence agent. The case unearthed an Army "intelligence system . . . aimed principally at gathering information about dissident domestic political activity," and numerous resulting abuses. In Tatum, the Supreme Court addressed the issue:

whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his first amendment right is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

The Court found the "allegations of a subjective 'chill' " inadequate to substitute "for a claim of specific present objective harm or a threat of specific future harm. . . ." The plaintiffs therefore lacked federal standing, and the district court's dismissal was reinstated.

The Supreme Court considered two aspects of federal justiciability other than standing. It hinted at considerations of "mootness," or at least substantial change in circumstances making the complaint stale. The Court also addressed political question concerns, and announced deference to the Army while criticizing the appellate court's conclusion that it could "hear evidence, ascertain facts, and decide what, if any, further restrictions . . . are called for to confine the military to their legitimate sphere of activity. . . ." Federal courts are not the "monitors of the wisdom and soundness of Executive action," the court stated; that role is "appropriate for the Congress acting through its committees and the 'power of the

60. Id. at 2 n.1. "The complaint filed in the District Court candidly asserted that its factual allegations were based on a magazine article: 'The information contained in the foregoing paragraphs numbered five through thirteen [of the complaint] was published in the January 1970 issue of the magazine The Washington Monthly' . . . ." Id.


62. Id. 1010-11.

63. 408 U.S. at 10.

64. Id. at 13-14.

65. Id. at 14.

66. Id. at 26.

67. Military Surveillance, supra note 61, at 1013 n.45.

68. 408 U.S. at 15.
purse' . . . ." The Court indicated that judicial intervention may be appropriate where "actual present or immediately threatened injury resulted[ed] from unlawful government action."70

In Tatum, the "subjective chill" alleged by plaintiffs was insufficient to warrant their standing.71 The Court distinguished prior first amendment cases from the present case, noting that the past first amendment "chilling" resulted from "regulations, proscriptions or compulsions,"72 none of which was involved in the Army's political intelligence apparatus.73 Nevertheless, the manner in which the Court deals with the tripartite avoidance gambit—political question, standing, mootness—all present a restrictive view of the first amendment concerns involved. Chief Justice Burger carefully steps through a lengthy court of appeals opinion, quotes only those phrases supporting denial of review, seems to ignore those phrases pressing otherwise, and then, after stating the appellate court conclusion, finds that the appellate court "decided the issue incorrectly."74

The dissent of Justice Douglas in Tatum expressed two concerns unmentioned by the majority. First, there was no implied authority in the constitution for military surveillance over civilians, and Congress had passed "no law authorizing surveillance over civilians . . . ."75 Justice Douglas concluded, therefore, that there was absolutely no basis for sustaining any military intrusion in this area. Second, Justice Douglas addressed the majority's concerns of standing. Under his perception of the facts, the Army's surveillance activities were "paralyzing," and plaintiffs' first amendment injury was certainly "not a remote, imaginary" one.76

The opposed ends of the rights-security spectrum are exemplified by the two opinions in Tatum. The majority of the Court viewed the case from the "security" end of the spectrum, as did the New Jersey Supreme Court in Anderson, resulting in a maze of security assumptions and lack of standing for plaintiffs. The Tatum dissent, however, like the trial court in Anderson, placed free expression values in the traditional "preferred position," a view from the "rights" end of the same spectrum that would have permitted the court to forthrightly address the first amendment issues raised.

69. Id.
70. See Military Surveillance, supra note 61, at 1025-28.
71. 408 U.S. at 13.
72. Id. at 16.
73. Id. at 11.
74. Id.
75. Id.
76. Id.
After Anderson and Tatum, it appeared that the courts were not ready to impose constitutional restrictions on police surveillance of political activity. Three recent opinions indicate that the courts may have reconsidered this position; all sustained claims of "corruption of the democratic process" caused by political surveillance as justiciable.

The first of these three cases was Socialist Workers Party v. Attorney General,78 in which the trial court awarded plaintiffs a short-lived victory. In the context of an ongoing omnibus suit attacking wide ranging "illegal surveillance and harassment"79 of the Socialist Workers Party (SWP) by various governmental officials and agencies (during which a past FBI program of disruptive activities at SWP and Young Socialist Alliance (YSA) conventions was revealed),80 the plaintiffs moved for a preliminary injunction to prohibit FBI surveillance of an upcoming YSA convention scheduled for December 28, 1974.81 The trial court, noting that a "principal use" of the information gathered by the FBI was to deter government employment and that "FBI surveillance would inevitably put a substantial inhibition and barrier upon the normal carrying out of these meetings and the normal ability to attract young persons to attend them," granted plaintiffs' request on December 13, 1974.82

Eleven days later, the Second Circuit reversed the lower court's declaration of "a substantial impairment of the First Amendment rights" of the SWP and the YSA, and the finding of "no compelling interest and no other necessity" for FBI surveillance of the convention.83 The court of appeals was not persuaded by the admitted program of disruption against the SWP, and found the surveillance justified by national security concerns. The appellate court's opinion relying primarily on in camera inspection of FBI materials, was

79. 387 F. Supp. at 748.
80. 510 F.2d at 254.
81. Id.
82. 387 F. Supp. at 749-50.
83. 510 F.2d at 257. Plaintiffs, on October 25, 1974, asked for a preliminary injunction restraining the FBI from attending and surveilling the 14th National Convention of the Young Socialist Alliance to be held from December 28, 1974 to January 1, 1975. Because of the shortage of time before that Convention, the matter was adjudicated on an accelerated basis. The district court granted an injunction on December 13, 1974. On December 24, 1974, the court of appeals vacated that order (except as to certain restrictions on the dissemination of information obtained). Plaintiffs then requested a stay of the court of appeals' decision and reinstatement of the district court injunction, both of which were denied on December 27, 1974, by Justice Marshall, sitting as Circuit Judge.
shallow at best and disingenous at worst.\textsuperscript{84} The Second Circuit twice chastised the trial court for proceeding when no "urgency" was present,\textsuperscript{85} and therefore vacated the preliminary injunction.\textsuperscript{86}

On December 27, 1974, Justice Marshall, sitting as circuit judge, heard an emergency application to stay the order of the court of appeals and to reinstate the preliminary injunction.\textsuperscript{87} Justice Marshall noted the "unsavory picture of deceit and political sabotage" presented by plaintiffs\textsuperscript{88} and that "government surveillance and infiltration cannot . . . be taken lightly," but warned that "abhorrence for abuses of governmental investigative authority cannot be permitted to lead to indiscriminate willingness to enjoin" such activities.\textsuperscript{89} Therefore, the plaintiffs' requested relief was denied,\textsuperscript{90} and the YSA convention began on December 28, 1974 with the FBI surveillance apparatus in tact. The significance of this case, aside from its fault of no "urgency," is that Justice Marshall found plaintiffs' allegations sufficient to satisfy federal standing require-

\textsuperscript{84} Even accepting the fact that the Second Circuit had only a few days to prepare its opinion, its cavalier acceptance of the applicability of Laird v. Tatum, 408 U.S. 1 (1972), was feeble, and without any analysis of the differing allegations and evidence in the present case. The court simply concluded, "We are not greatly persuaded with respect to the validity of these or other asserted distinctions . . . [T]he FBI's use of the information gathered by it from attendance of the YSA conventions seems parallel to that of the Army as described in Mr. Justice Douglas' dissent in Laird v. Tatum." 510 F.2d at 256.

The court borders on the disingenuous not only by its failure to recognize the differences between \textit{Tatum} and the present case, but also because it applies the rule of the majority in \textit{Tatum} to a set of facts analogized to those set out in the \textit{Tatum} dissent. As is clearly pointed out by Judge Winter, dissenting in Donohue v. Duling, 465 F.2d 196, 202 n.1 (4th Cir. 1972), another police surveillance case, the majority and dissenting Justices in \textit{Tatum} had different interpretations of the record in that case.

The court of appeals decision in \textit{Socialist Workers Party} is also feeble because of its limited consideration of the first amendment implications involved. The court's total discussion involved a quotation from Justice Jackson's concurring and dissenting opinion in American Communications Assoc. v. Douds, 339 U.S. 382, 445 (1950), which, even when written, took a severely restrictive view of first amendment rights—more restrictive than the full Court has ever taken. The view of the first amendment put forth in the \textit{Douds} opinion has never been applied to clandestine governmental surveillance of, and intrusion into, protected political expression.

\textsuperscript{85} The Second Circuit first noted that the urgency resulted from the trial judge's determination of disputed factual issues, improperly made on the basis of affidavits. 510 F.2d at 255. Secondly, the court indicated that it found no urgency requiring the FBI to cease its continuing surveillance of the YSA, which, it felt, had not resulted in serious injury in the past. \textit{Id.} at 256.

\textsuperscript{86} \textit{Id.} at 257. Only that portion of the injunction which barred transmission of names to the Civil Service Commission was affirmed.

\textsuperscript{87} 419 U.S. 1314 (1974).

\textsuperscript{88} \textit{Id.} at 1317.

\textsuperscript{89} \textit{Id.} at 1319.

\textsuperscript{90} \textit{Id.} at 1320.
ments. The courthouse door was opened again, but only ever so slightly.

As in Anderson and Tatum, Socialist Workers Party illustrates how the basic values or presumptions of a court (in reference to the rights-security spectrum) may dictate the resolution of the case. The trial court in Socialist Workers Party predicted injury to rights of expression if FBI surveillance continued, and, therefore, granted the preliminary injunction. The court of appeals foresaw serious threats to our society, if surveillance is limited, and vacated the injunction. The tension created by these opinions will be reduced only when courts have an "empirical basis on which to make judgments about the necessity, and the danger, of police covert investigative activities directed at lawful political expression." It is hoped that this Article will provide some of that badly needed empirical basis.

The second case was Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate. In this case, a complaint was brought under the Civil Rights Act of 1871 against the City of Philadelphia police officials for their political surveillance program that included photographing and recording attendants at peaceful and lawful public assemblies and demonstrations, and maintaining dossiers on individuals' political and personal backgrounds. The suit also challenged the dissemination of gathered information (a) to other law enforcement agencies, (b) to private agencies and government agencies with no law enforcement concerns, and (c) on a television broadcast in which certain individuals and groups were specifically identified as subjects of police information-gathering.

The district court, feeling bound by Laird v. Tatum, dismissed plaintiffs' complaint as to both the information-gathering and dissemination, holding that such activities did not give rise to a

91. Id. at 1319. The litigation has proceeded, with the most important developments revolving around a May 31, 1977 Order by District Judge Griesa that the government release to the plaintiffs files on eighteen informers. The propriety of the Order was affirmed by the court of appeals, In re United States, 565 F.2d 19 (2d Cir. 1977), cert. denied sub nom., Bell v. Socialist Workers Party, 98 S.Ct. 3082 (1978). When Attorney General Griffin Bell failed to comply with the Order, he was adjudged in civil contempt. Socialist Workers Party v. Attorney General, No. 73-3160 (S.D.N.Y. July 6, 1978). The Second Circuit stayed the order, pending appeal, No. 78-6114 (2d Cir. July 7, 1978) (bench opinion).
92. 387 F. Supp. at 754.
93. 510 F.2d at 256.
95. 519 F.2d 1335 (3d Cir. 1975).
97. 519 F.2d at 1336.
98. Id. at 1337.
"specific present objective harm or a threat of specific future harm"—the test of *Tatum*. The Third Circuit concurred with the district court's decision about the information gathering, and dissemination of information to "other agencies of government having a legitimate law enforcement function." The Third Circuit found, however, that the other allegations as to the uses and disclosures of the gathered information were "sufficient to withstand a motion to dismiss," since it concluded, "no safeguards exist on the disposition of or access to the political and personal information and conclusions contained in the dossiers . . . ." The Third Circuit found that "since it [was] alleged that plaintiffs [were] subject to surveillance only because their political views deviate[d] from those of the 'establishment';" the allegations showed "immediately threatened injury"—such as interference with "job opportunities, careers or travel rights." It is not clear from the court's opinion, however, why these same injuries were not equally threatened by the uncontrolled gathering and exchange of information among law enforcement agencies.

The Third Circuit further distinguished between the "subjective complaints" of *Tatum* and plaintiffs' complaint, in *Tate*, of television disclosure, which, "although not concrete, [was] nonetheless strikingly apparent." The appellate court found that this public identification of surveillance subjects, coupled "with the absence of a lawful purpose" warranted a grant of standing to the *Tate* plaintiffs. The Third Circuit concluded:

We are unwilling to say that the Supreme Court in *Tatum* intended to leave our citizens judicially remediless against the types of police action discussed. If plaintiffs' allegations are true, this type of activity strikes at the heart of a free society.

It appears that, but for the court's feeling that *Tatum* directly controlled intra-police exchange of intelligence, at least portions of the allegations would also have been sufficient to warrant standing. In *Tate*, as in *Socialist Workers Party*, the plaintiffs remained in

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100. 519 F.2d at 1338.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* See also *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975) (plaintiff found to have standing to seek both expungement of her files and damages against the FBI).
106. *Id.*
court to determine the merits of the case; standing had been established, apparently by the court’s approach to the cases from the “rights” end of the spectrum. The court in Tate made clear that it was “not called upon to express an opinion as to the compatibility of such [police] practice with desirable standards under our political form of government.”

The third case, White v. Davis, discussed fully and vigorously supported first amendment values in a discrete context of political intelligence. In White, a U.C.L.A. professor challenged the Los Angeles Chief of Police, and others, in a taxpayer’s suit “to enjoin the alleged illegal expenditure of public funds in connection with the police department’s conduct of covert intelligence gathering activities at U.C.L.A.” The complaint alleged that secret informers and undercover agents had registered as students at U.C.L.A., attended classes, and submitted reports of discussions occurring in those classes. It was also alleged that “undercover police agents have joined university-recognized organizations, and have made reports on discussions at such meetings.” The materials gathered, the complaint stated, “pertain to no illegal activity or acts.”

The trial court sustained defendants’ demurrer and the case, like others dealing with police surveillance, was appealed on the pleadings. The California Supreme Court clearly indicated its basis for reversal of the demurrer. First, the court held that “[t]he allegations of the complaint state a prima facie violation of freedom of speech and assembly as well as of the state constitutional right of privacy.” Second, in addressing the issue of standing, the court rejected that applicability of Laird v. Tatum, finding that under the California Code of Civil Procedure the use of a taxpayer’s suit “as a means of challenging the legality of ongoing police investiga-

107. Id. at 1336.
108. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).
109. Id. at 762, 553 P.2d at 225, 120 Cal. Rptr. at 97.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id. at 760, 533 P.2d at 224, 120 Cal. Rptr. at 96.
115. Id. at 763-65, 533 P.2d at 226-27, 120 Cal. Rptr. at 98-99. The surveillance activities at issue in White had been raised previously in the federal court, but dismissed on the same narrow doctrine of federal justiciability articulated in Tatum. Id. at 763, 533 P.2d at 226, 120 Cal. Rptr. at 98. See Bagley v. City of Los Angeles, No. 71-166-JWC (C.D. Cal. 1971).
116. 13 Cal. 3d at 763, 533 P.2d at 225, 120 Cal. Rptr. at 97, quoting CAL. CIV. PROC. CODE § 526 (a) (West 1977): “An action to obtain a judgment, restraining and preventing any illegal expenditure of . . . funds . . . of a county, town, city or city and county of the state may be maintained against any officer thereof . . . by a citizen resident therein . . . .” Id.
tory activities has a long and firmly established heritage in this state.”\textsuperscript{117}

The California Supreme Court felt that \textit{Tatum} was decided on “a restrictive federal doctrine of justiciability.”\textsuperscript{118} In stating the first amendment test by which it would measure plaintiff’s allegations, the court decided that “in light of this potentially grave threat to freedom of expression, . . . the government bears the responsibility of demonstrating a compelling state interest which justifies such impingement and of showing that its purposes cannot be achieved by less restrictive means.”\textsuperscript{119} The California Supreme Court, like the trial court in \textit{Anderson}, placed first amendment values in a “preferred position”—a view from the “rights” end of the spectrum, requiring (a) a close “nexus” between the government’s means and ends, (b) a compelling state interest, and (c) the least restrictive means to “justify such impingement.”\textsuperscript{120}

In \textit{White}, the California Supreme Court’s approach from the “rights” end of the rights-security spectrum resulted in a skeptical view of police surveillance, with the court concluding: “[W]e visualize a substantial probability that this alleged covert police surveillance will chill the exercise of First Amendment rights.”\textsuperscript{121} The defendants’ contention that such activity was to “enable the police to anticipate and perhaps prevent future criminal activity”\textsuperscript{122} did not sway the court:

Although the police unquestionably pursue a legitimate interest in gathering information to forestall future criminal acts, the identification of that legitimate interest is just the beginning point of analysis in this case, not, as defendant suggests, the conclusion. The inherent legitimacy of the police ‘intelligence gathering’ functions does not grant the police the unbridled power to pursue that function by any and all means. In this realm, as in all others, the permissible limits of governmental action are circumscribed by the Federal Bill of Rights . . . .\textsuperscript{123}

The court continued with a discussion of first amendment

\begin{thebibliography}{9}
\bibitem{117} 13 Cal. 3d at 763, 533 P.2d at 225-26, 120 Cal. Rptr. at 97-98, citing Wirin v. Parker, 48 Cal. 2d 890, 313 P.2d 844 (1957), and Wirin v. Horrall, 85 Cal. App. 497, 193 P.2d 470 (1948). Both of these cases involved allegedly unconstitutional police practices.
\bibitem{118} 13 Cal. 3d at 764, 533 P.2d at 227, 120 Cal. Rptr. at 99.
\bibitem{119} \textit{Id.} at 761, 533 P.2d at 224, 120 Cal. Rptr. at 96.
\bibitem{120} \textit{Id.}
\bibitem{121} \textit{Id.}
\bibitem{122} \textit{Id.} at 766, 533 P.2d at 227, 120 Cal. Rptr. at 99.
\bibitem{123} \textit{Id.} at 766, 533 P.2d 227-28, 120 Cal. Rptr. at 99-100.
\end{thebibliography}
rights and values in relation to "ongoing police surveillance of a university community," noting that surveillance would "inevitably inhibit" free expression by both students and professors, and remedied the case for a trial on the merits.\textsuperscript{124}

The foregoing discussion of judicial consideration of police spy litigation reveals two interrelated theories. First, the outcome of such litigation, at least concerning justiciability and standing, is dependent upon that end of the rights-security spectrum from which the court chooses to approach the matter. Second, the courts have not readily accepted plaintiffs' arguments of a "specific present objective harm or a threat of specific future harm"\textsuperscript{125} resulting from political surveillance activities. It is hoped that the empirical study and analysis which follow will provide a basis upon which to determine the "harm" of such surveillance activities, or that it will at least show evidence of intelligence-gathering by which the courts will be prompted to lean more towards the "rights" end of the rights-security spectrum in their initial analysis of police spy litigation.

\section*{III. Study Sample}

\subsection*{A. Obtaining the documents}

In the course of discovery in \textit{Benkert v. Michigan State Police},\textsuperscript{126} a significant quantity of files, documents, and other materials were obtained from the Detroit Police Department's Reconnaissance Unit. These materials, relating to ten of the fourteen named plaintiffs in \textit{Benkert}, make up the following study sample.\textsuperscript{127}

\begin{itemize}
  \item \textsuperscript{124} Id. at 772, 533 P.2d at 232, 120 Cal. Rptr. at 104.
  \item \textsuperscript{125} Laird v. Tatum, 408 U.S. 1, 14 (1972).
  \item \textsuperscript{126} No. 74-023-934-AZ (Wayne County Cir. Ct., Mich., filed July 26, 1974). See text accompanying notes 8-18 supra.
  \item \textsuperscript{127} The ten \textit{Benkert} plaintiffs, whose Detroit Police Files compose the study sample, have each been assigned a letter of the alphabet for easy reference in this article. The assignment is as follows: Janet Goldwasser (A); Stuart Dowty (B); Bonnie Garvin Lafferty (C); Selma Goode (D); The Fifth Estate (newspaper) (E); Abdeen Jabara (F); James B. Jacobs (G); James T. Lafferty (H); Michigan Assoc. for Consumer Protection (I); and Peter Werbe (J). The letters K through Z will be used to refer to those targets whose identity is still protected under the Modified Protective Order, infra note 128.

In this Article, references to specific pages in the Detroit Police Files concerning an identified target (e.g., Target E) often are followed by a coded parenthetical indicating the part of the target's file in which the information is found (e.g. Detroit Police Files, Target E, at 150 (MIC)). These codes indicate either the Master Index Card file system (MIC), the Intelligence Exchange Card System (IE), or the dossier file system (no parenthetical). The term "file," as employed in this Article, includes all index systems, dossiers, and other materials in the Detroit Police materials which can be referenced to a particular target (i.e., an individual, organization, or event) [hereinafter cited as Detroit Police Files].

In determining the pagination of a particular target's file, for purposes of this Article,
The materials were originally obtained under a strict protective order,128 which was subsequently modified to allow substantial portions of the materials to be used without limitation.129 The limited protection still in effect is that the "named plaintiffs . . . [may] disseminate and use without limitation all information [contained in their files] so long as that information does not name or identify third parties . . . who have been included in these files and materials as a result of the activities of defendants . . . ."130

The purpose of this section is to organize and interpret these files and materials in a way that might provide evidence to help explain political intelligence gathering; to analyze this evidence to determine what presumptions and generalizations made by the courts concerning such police activity are justified; and to then pose for consideration certain principles and presumptions that should govern the resolution of first amendment concerns and dilemmas involved in this type of activity.

A number of research caveats should be noted at the outset. First, the plaintiffs were not selected in a random fashion and, therefore, are not necessarily statistically representative of all persons and organizations included in the Detroit Police subversive files. The plaintiffs are, however, sufficiently representative of all surveillance targets to have been certified by the court as proper representatives of a class consisting of all persons or organizations who have been, are currently being, or will be investigated by the subversive units of the Michigan State Police and Detroit Police Department.131

As a necessary corollary, therefore, the study sample materials are not necessarily completely representative of all materials main-
tained by the police subversive unit. Examination of additional files, however, has revealed that the study sample materials are typical of those present in most subversive files. There is, therefore, some substantial verification that the study sample is representative of all the Michigan State Police and Detroit Police Department subversive files.

In addition to the study sample materials, other files and documents, mentioned above, have been examined, but were excluded from the study sample because still protected under the court’s order. Also, the court ordered the city of Detroit defendants to disclose all “index cards, file cards, I.E. cards and files pertaining to the named plaintiffs . . . and all other files and documents pertaining to those persons and organizations in [their] possession . . . ,” but at least four additional filing systems containing information about the Benkert plaintiffs were revealed but not disclosed in the course of discovery. The materials in those additional filing systems are still under the court’s protective order, and therefore cannot be included in the study sample.

In addition, there is presently no means of determining whether additional filing systems or materials exist, but remain undiscovered. The study sample and analysis is, therefore, only a first effort at an in-depth consideration of a limited amount of materials from political surveillance files. Nevertheless, it is sufficient material to

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132. In addition to the production under court order of the materials making up the study sample, substantial additional discovery, has occurred in the Benkert case. Depositions were taken of police officers who are, or were recently, with the Subversive Unit, and thousands of pages contained in files and dossiers on individuals and organizations were examined under the Modified Protective Order, supra note 128.

133. See note 14 supra. The Modified Protective Order, supra note 129, released from the original order the files concerning the named plaintiffs in Benkert, but denied plaintiffs’ motion to also release all materials concerning “consenting third parties.” General concepts and information that have been developed and obtained as a result of this discovery process are inevitably included throughout this Article.

134. See Order to Produce Documents for Inspection and Copying, Benkert v. Michigan State Police, No. 74-023-934-AZ (Wayne County Cir. Ct., Mich., entered May 9, 1975). See also note 127 supra.

135. The four additional filing systems that have been isolated are designated by the city as: (1) the picture or photograph file, which may also include videotapes and motion pictures, and has been admitted to exist; (2) the demonstration file, which is apparently a chronological indexing and recording of all public demonstrations that have occurred in the city, as well as a number of other “events” that the police determine merit surveillance, many of which have involved the primary targets; (3) the source file, which is apparently a filing system in which the original reports or written information submitted by all informants and undercover agents concerning individuals and organizations are kept according to a coded numerical informant or undercover agent designation; and (4) the surveillance file, which is a chronological file of logs turned in by police officers of the Subversive Unit assigned to surveillance duty, which may involve a stationary or a moving surveillance of a particular individual, location, or event.
provide significant insights into the nature of police political spying apparatus. Although the study sample embraces only subversive files from the Detroit Police Department, there is evidence to believe that many local subversive units operate in similar ways.  

The few writings available on police intelligence units, and the various techniques they employ, seem to reveal a basic outline or program similar to that pursued by the Detroit Police Department—at least from 1963 to 1974, which is the time span covered by the study sample.  

This provides further support for the value of the study sample analysis beyond the locale out of which it arose.

B. Physical Description

The compilation of materials which constitute a target's "file" has three categories, each of which is apparently maintained in a physically separate filing system. The three categories or types of material are: Master Index Cards, Intelligence Evaluation or Intelligence Exchange Cards (I.E. Cards), and Dossiers. Including all these types of documents, the study sample contained a total of 747 pages, 116 pages of Master Index Cards, 26 pages of I.E. Cards, and 605 pages of dossier material. In addition, the dossiers contained a significant number of publicly distributed documents, which were not counted as pages of the study sample.

1. Master Index Cards

The Master Index Card, a conventional four-by-six card, appears to form the basis of the primary name filing system. In some instances, these cards have had certain information categories printed on them. Often a target will have more than one Index Card in the set of cards relating to it, in which case the cards are consecutively numbered. Some files contain two separate sets of Index Cards, apparently due to the fact that the Detroit Police had two

136. Discovery in Benkert revealed numerous references to similar material contained in, or received from, local law enforcement agencies in Michigan, and some references to out-of-state police departments as sources of information gathered by the Michigan State Police.


138. See Detroit Police Files, supra note 127.

139. Most of these additional documents are leaflets, brochures, and other handouts publicly distributed by various political organizations. In addition, the files contained entire copies of many newspapers of political organizations and papers characterized as "underground" or "alternative press." For example, target E, supra note 127, was a newspaper, and its file included almost a complete set of the paper for the past few years.
separate details engaged in political intelligence gathering during the late 1960's. 140

The face card in a Master Index Card set contains primarily personal or organization information, and subsequent cards in a set contain activity entries. 141 Changes in personal information—particularly address, phone number, and employment—are regularly entered on the cards, but the main purpose of the Master Index set seems to be exactly as its name implies—a master index to all activities of a target individual or organization, with references to where more-detailed information can be found.

2. Intelligence Exchange Cards

The Intelligence Exchange (I.E.) Card is another summary index of a target's history and activities. These cards are approximately eight and one-half by ten inches, with a fold in the middle for filing. One or more photographs are often included on the cards. 142

The entries on the I.E. Cards are similar in nature to and sometimes duplicate the entries on the Master Index Cards. As with the Master Index Cards, an individual or organization has often had two or more I.E. Cards in a set, which would be numbered consecutively and stapled together.

The I.E. Cards are apparently a newer index form used by one of the two subversive units of the Detroit Police whenever a target appeared more than a few times in the subversive files. When the two units merged in 1970, the I.E. Cards were retained. 143

Chart No. 1 indicates the number of Master Index (MIC) and I.E. Card (IE) pages for the 10 targets of the study sample.

140. See Detroit News, Sept. 4, 1975, at 1A, col. 2. In the 1930's, the Detroit Police created a "subversive detail." After the 1967 Detroit riots, a second unit, the "security detail," was created to surveil political protest groups. See also L. Loukopoulos, The Detroit Police Department: A Research for the Committee on Public Awareness (May 1970) (unpublished report in Wayne St. Univ. L. Sch. Lib.). Depositions of police officers in Benkert confirmed the existence of these two separate units, but any further discussion is precluded by the Modified Protective Order, supra note 129.

141. See Note 156 & accompanying text infra.

142. A detailed exploration of the photographing, videotaping, and filming activities of the Subversive Unit is beyond the scope of this Article, since these materials were not included in the study sample. It is interesting to note, however, that many of the targets of the Police files have never been arrested or otherwise subjected to known police photography. It appears, therefore, that the Detroit Police obtain photographs surreptitiously from a variety of sources. For example, Abdeen Jabara, target F, indicated in an interview with the author, on June 1, 1975, that the two photographs included in his file were (1) a photograph furnished to a local bar association for an attorney registry and (2) a photograph submitted for passport renewal some years ago.

The third type of documentary compilation in the study sample is the dossier; one or more eight-by-eleven-inch folders labelled with a designation of the target individual or organization by name, code number, or both. The primary police-prepared documents contained in a dossier are called "Detroit Police Department Inter-Office Memorandum." These vary in length—the longest in the study sample containing ten pages—and are always signed by at least one, and often two, police officers and a police supervisor who has "read and approved" the report.

The dossiers also contain appropriately labelled and dated originals or copies of newspaper and magazine clippings, including letters to the editor. In addition, the dossiers contained a variety of additional documents printed or distributed by the target or someone associated therewith, including: publicly distributed literature; leaflets; and organizational position papers intended for limited private distribution such as agendas, rosters, and treasurers' reports. The dossiers also contained various documents from other government agencies—law enforcement and otherwise—which relate to the target, an associate or relative thereof, or an organization to which one of those individuals allegedly belonged. A number of

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144. City of Detroit Forms D-77-ME and DPD 568 (12-63).
145. A sample of this document, and the accompanying signatures, is contained in Appendix C of this Article.
146. See text accompanying notes 195-200 infra.
147. See, e.g., Detroit Police Files, supra note 127, Target E, at 164 (underground newspaper) & Target C, at 131 (mass mailing).
148. See, e.g., id. Target E, at 171 (leaflet announcing anti-war demonstration).
149. See, e.g., id. Target C, at 51, 59 (invitations to organizational meetings) 70 (internal proposal).
150. See, e.g., id. Target E, at 197, 203 (articles of incorporation and annual report of
organizational mailing and membership lists, usually provided by a "confidential source," were also found in the dossiers of the study sample. 151

The majority of pages constituting the study sample were from nonpublic sources, since publicly distributed leaflets, newspapers, and other documents were excluded from the study sample pagination. 152 The Master Index and I.E. cards, none of which is from public sources, account for 141 pages of the study sample. The bulk of the remaining 606 pages of the study sample were documents prepared by police officers and other government agencies, or by the surveillance targets for private use. For example, there were fifty-seven different police memoranda in the dossiers of the study sample, one dossier containing twenty-two such memoranda.

Other police-prepared documents in the dossiers include teletype requests for information on the targets, often accompanied by a teletype response. 153 Documents prepared or furnished by other police departments or other government agencies also appeared in the dossiers. In some instances, the Detroit Police Department Memoranda, the basic police-prepared document in the dossiers, 154 specifically indicated that the Michigan State Police supplied or participated in gathering the information entered. 155

C. Typical Examples of Information Gathered

1. Introduction

An examination of some representative examples of the information contained in the various types of documents in the study sample illustrates the range of activity and concerns recorded by the police department, and the techniques employed to gather that information.

As noted earlier in Chart No. 1, there were 116 pages (or sides) of Master Index Cards and 25 pages of I.E. Cards, each containing entries of a similar nature. In most cases, the face card (Master Index or I.E.) included the following information: name; aliases; nonprofit corporation); Target J, at 364-71 (application for permit to carry a concealed weapon), 426 (marriage license).

151. See, e.g., id. Target at 204 (first page of 24-page mailing list); Target C, at 94 ("contact list" of political organization).

152. As discussed earlier, Detroit Police Files, supra note 127, the Master Index and Intelligence Exchange Cards are included in the sample study pages. See also note 138 & accompanying text, supra.

153. See, e.g., Detroit Police Files, supra note 127; Target J, at 363; Target C, at 142.

154. Full reports from the Michigan State Police, FBI and other state and local police agencies appear frequently in a number of files examined, but are not included in the study sample because they are still under the Modified Protective Order, supra note 129.

former and present home and business addresses and phone numbers; date of birth; brief physical description; automobile license and registration information; employment information; family information; FBI number (if one existed); and similar identifying, locating, and historical information. 156 The cards following the face card in a given Master Index or I.E. card set included very little of this basic information, including only name and activity or surveillance entries. Often, the face cards also contained activity or surveillance entries, but there is only room for a few such entries under the basic information entered. As can be seen in Chart No. 2, in the study sample there were 329 activity entries on the Master Index Cards, and 258 such entries on the I.E. Cards. 157 The number of entries on a single Master Index Card ranged from 0 to 122, while the entries on a single I.E. Card ranged from 0 to 67. The study sample contained relatively few instances where activity entries were duplicated between the two index card systems.

<table>
<thead>
<tr>
<th>Target</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>G</th>
<th>H</th>
<th>I</th>
<th>J</th>
<th>Total Entries</th>
</tr>
</thead>
<tbody>
<tr>
<td>MIC</td>
<td>17</td>
<td>34</td>
<td>87</td>
<td>4</td>
<td>30</td>
<td>no</td>
<td>24</td>
<td>8</td>
<td>3</td>
<td>122</td>
<td>329</td>
</tr>
<tr>
<td>IE</td>
<td>38</td>
<td>67</td>
<td>4</td>
<td>4</td>
<td>13</td>
<td>9</td>
<td>25</td>
<td>40</td>
<td>no</td>
<td>58</td>
<td>258</td>
</tr>
<tr>
<td>Total</td>
<td>56</td>
<td>105</td>
<td>97</td>
<td>9</td>
<td>43</td>
<td>9</td>
<td>49</td>
<td>48</td>
<td>3</td>
<td>180</td>
<td>587</td>
</tr>
</tbody>
</table>

CHART NO. 2

The examination of the study sample materials will proceed by identifying certain basic categories of information gathered, and then provide examples of the entries followed by explanatory comments.

2. Personal History Items

2. 1963, Sept., subj. registered for the Fall Semester at Wayne State University Liberal Art Student. 159

156. See Appendices A and B.
157. See note 157 & accompanying text supra.
158. Detroit Police Files, supra note 127, Target J, at 338 (MIC).
159. Id.
3. July 10, 1967, Mr. K. called above phone number and learned that J and his wife reside at the above address. A female who identified herself as SUE answered the phone and indicated that she was J's sister.  

4. 3-5-70 Checking Bressers, subj. gave same address and phone number at—Coplin as a X same address, Also Det. Edison has subject still living at—Coplin.  

5. 9-6-72 subj. now lives at—York, —Twps, with his wife M, W, X, Y, and Z per 142.  

6. 3-6-74 Subj. was divorced from his wife P. Subj. was Plaintiff case No: 73 —.  

7. 1974 Subj. is suppose [sic] to be married to C per source info.  

The form of the above entries—a date followed by short phrases—is typical of almost all the Master Index and I.E. Card entries. In some instances, however, there were long single-spaced entries covering as much as three index cards. The index card entries are never signed or initialed, and therefore there is no means of identifying, from the cards alone, who in the police department made or authorized the entry. In some instances the entries refer, or correspond, to one or more documents in the dossier of the target or of another subject. In other cases, however, the items on the Master Index and I.E. Cards appear to stand alone.  

In terms of content, the first set of entries on all the Master Index and I.E. Cards, or on the face card of a set of cards, contain a substantial amount of personal history information which, if needed, is updated by chronological data entries, rather than by amending the original entries. As with all entries on the index cards, only occasionally has a source been referenced. In entry 5, for example, "per 142" is a reference to a police informant, undercover agent, or confidential source of the information entered, whose code designation is "142." In entry 4, Detroit Edison obviously provided some information. The use of elaborate source referencing is clearly indicated by other entries on documents in the study sample and will
be fully explored in a subsequent section of this Article which deals with cross-referencing.

3. Employment

8. 1967, employed as ass't instructor, Department of Political Science, MSU, East Lansing, Michigan.\(^{166}\)

9. 10-20-70 Issue of [community college paper] states that subject has been fired from his teaching job at MCCC [Macomb County Community College].\(^{167}\)

10. 1971 Subj. reported to be a part-time employee at Main Library.\(^{168}\)

11. 11-13-71 Surv. Crew Obs subj's wife pick him up at work and then go to—Cass [food market], and from there they drove to—Grand River.\(^{169}\)

12. 3-9-72 Subj. resigned from Warren Truck Plant.\(^{170}\)

13. 10-28-72 Subj. has a talk show (RADIO) called NIGHT CALL, Station WRIF, 101. FM, 3:30—4:30 A.M., Phone number 345- WRIF. Guest speaker this night was [X]. Subjs. talked about [3 political organizations].\(^{171}\)

14. 6-73 Secretary at WCCC [Wayne County Community College].\(^{172}\)

15. 7-9-73 Subj. now works as a news broadcaster for WPON, a radio station in Pontiac.\(^{173}\)

16. Works for Florist Trans-World Delivery,—Lafayette St.\(^{174}\)

17. 10-1-73 From source 142 subj. resides at—Gratiot, Mt. Clemens. Also subj. was fired from newspaper for a radical article. Believe he no longer teaches.\(^{175}\)

Most of the files in the study sample contain employment entries. Often more than one is included as a target changes employment. These employment entries are often joined with other personal history information, although sometimes they are alone.

Historically, there is no question that the accumulation of political intelligence information concerning citizens was primarily for

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166. Id. Target B, at 215 (MIC).
167. Id. Target G, at 255 (IE).
168. Id. Target C, at 5 (MIC).
169. Id. Target B, at 208 (IE).
170. Id.
171. Id. Target A, at 231 (IE).
172. Id. Target C, at 21 (MIC).
173. Id. Target G, at 255 (IE).
174. Id. Target J, at 330 (IE).
175. Id. Target A, at 231 (IE).
the purpose of monitoring and influencing employment\textsuperscript{176} and that the intended effect was the denial or termination of employment of "subversives." In 1950, when the Michigan Legislature authorized the Commissioner of the Michigan State Police to create a Subversive Activities Investigation Division,\textsuperscript{177} the release of any confidential information accumulated by that unit on matters "subversive of government" was made a felony, but it was specifically provided "that the commissioner may furnish information... to responsible heads of any agency having charge of employment by the state..."\textsuperscript{178} Additionally, the Communist Control Act, or "Trucks Act," was adopted by the Michigan Legislature in 1952,\textsuperscript{179} following other states which had mimicked the federal communist-control legislation passed in 1950. This act was also concerned with the employment of alleged "subversives." Hence, the Michigan State Police became very active in surveillance of political activity during the 1950's.\textsuperscript{180}

Although most provisions of the Trucks Act were declared invalid by virtue of the federal preemption in \textit{Albertson v. Attorney General},\textsuperscript{181} still in effect was the section providing that:

No person may hold any non-elected position, job or office for the State of Michigan, or any political subdivision thereof... where reasonable grounds exist, on all the evidence, from which... the employer or superior of such person can say with reasonable certainty that such person


\textsuperscript{178} \textit{Id.} § 28.53.


\textsuperscript{180} 1953 Michigan State Police Report, at 42. \textit{See also} 1959 Michigan State Police Report; Donner, \textit{The Theory and Practice of American Political Intelligence, New York Rev. of Books}, April 27, 1971, at 27. Mr. Donner quotes at length from the 1969 Annual Report of the Massachusetts State Police Division of Subversive Activity, wherein it is indicated that along with a wide range of governmental agencies, "industrial plants and educational institutions now clear with this division on security checks." \textit{Id.}

POLICE SURVEILLANCE

is a Communist or a knowing member of a Communist front organization. 182

The Michigan State Police and other police departments were still concerned with efforts to infiltrate the educational field, defense plants, labor, civic, state, and other organizations, and continued their surveillance of political activity. 183 It now appears, however, that concern with "subversives" extended far beyond the statutory mandate concerning governmental employment.

4. Accumulation of Names

18. The following were recognized as taking part in the anti-war Sing Along Demonstration: [26 names]. Also present was [X's] mother, name unknown. 184

19. The following were recognized as being in attendance at this meeting: [list of names]. 185

20. The following is a registration of vehicles observed in the immediate area of the meeting: [list of automobiles including license number, year and make, followed by names and addresses, purported the registered owners of the vehicle]. 186

It is apparent now that the primary concern of political information gathering is the listing of names of all persons possibly involved or associated with any target or activity that is under surveillance. Within the study sample, this effort to associate as many individuals as possible with as many organizations and occurrences as possible has resulted in specific references, by name, to over 150 different organizations. 187 As revealed by the documents in the study sample, a person's name may appear in a list of the subversive unit in a number of ways. First, various organizations and their meetings were regularly monitored. At the conclusion of the reports of these meetings appeared a list of persons identified as being in attendance. 188 Second, certain events or activities, chosen by police be-

184. Detroit Police Files, supra note 126, Target C, at 25.
185. Forty of the fifty-seven police reports in the study sample contained such attendance lists, with three to sixty-five entries included therein.
186. Twenty of the fifty-seven police reports in the study sample included such license plate lists, The lists ranged from three to eighty-one entries.
187. Because the organizations referred to in the study sample are often indicated by initials, many sets being similar and, therefore, confusing, it is impossible to determine the exact number of organizations reported in the study sample, without conducting extensive interviews and investigations, which is beyond the scope of this Article. The estimate of 150 is conservative.
188. The dossiers of the primary targets contained many police reports focusing on
cause of their political nature or sponsor, were monitored. In the case of public demonstrations or events, subversive unit officers, or their informers, would be in attendance and file reports—again, with a list of persons identified at the event. These lists included the names of individuals in attendance, regardless of whether they were members of the sponsoring organization of an event that would otherwise have prompted the subversive unit's surveillance.\textsuperscript{189}

A third means of gathering names was by observing vehicles in various locations, or in the vicinity of various activities, and recording and checking the registrations of the vehicles observed. Organizational offices, meeting places, functions, and persons' homes were the primary focus for this type of police activity. On a few occasions the police reports indicated that police actually observed the named individual leaving the observed vehicle,\textsuperscript{190} but in most cases, it is clear that the names listed were merely the result of obtaining registration information.\textsuperscript{191} In this way, persons not at a monitored event would have their name appear in subversive unit reports if their vehicle was parked in the vicinity of an event or activity under surveillance. Persons attending merely as observers, and not participants, were named on a police list, without distinction.

Often, names of persons were also obtained by the subversive unit from leaflets or other publically distributed documents of an organization or of organizers of an event under surveillance.\textsuperscript{192} The names of announced speakers at such events were listed by police, regardless of whether the speaker actually appeared.\textsuperscript{193} Thus, errors in preparation of leaflets or event agendas, and changes in plans were often unrecognized in the police lists. Names were also listed in the subversive files if they appeared in any periodical or newspaper issued by political dissenters. Indeed, detailed files were maintained on dissenting periodicals—one of which became a plaintiff in \textit{Benkert}.\textsuperscript{194}

\begin{footnotes}
\item[189] For example, one's name might be discovered on lists entitled: Identification of Persons Taking Part in Anti-War Demonstration at the Federal Building, Sponsored by \[name of organization or individual\]; or Anti-War and Free Angela Davis March and Rally.
\item[190] \textit{See}, e.g., Detroit Police Files, \textit{supra} note 127, Target C, at 100. "This subject was observed driving the vehicle with Minnesota license plates listed below. X was observed being transported in this vehicle . . . ." \textit{Id.}
\item[191] \textit{See}, e.g., id. Target J, at 378. This report states: "[T]he following is a registration of vehicles parked in the immediate area of police headquarters. Occupants took part in the demonstration." \textit{Id.}
\item[192] \textit{See} note 139 \textit{supra}.
\item[193] Interviews with Targets A, B, F, H, and J, Detroit Police Files \textit{supra} note 127, conducted May 1975.
\item[194] Target E, \textit{supra} note 127, is such a newspaper. \textit{See} note 139 \textit{supra}.
\end{footnotes}
of the study sample was the inclusion in the dossiers of letters to the editor and other articles from major metropolitan newspapers. The letters and articles collected were those expressing views critical of government policy, but never dealing with proposed action. For example:

21. The U. S. walkout on the Paris peace talks proves once again that Nixon has no intention of ending U. S. involvement in Southeast Asia. During the entire time we were supposedly negotiating a settlement, 100 tons of bombs were dropped each hour on the Indochinese people. By the end of this month, the U. S. will have dropped as many bombs on Vietnam as were dropped in all of 1971. Our representative, William Porter, says that the U.S. will not return to the talks until the Vietnamese decide to negotiate "seriously". But if we were serious, we would not even be there. We have nothing to negotiate; we need only to withdraw all troops and material from Indochina now. That is the only serious way to end the war.

[Target C and another]195

22. When Tricky Dick tells us the cure for the imbalance of dollars will balance out with the surtax on all foreign goods, we are again being led deeper into disaster. When the foreign countries are forced to do the same to our goods, what has the world got but a depression that will make the 30's look like fun? What we should realize is the cost of Vietnam alone with the cost of maintaining an Army all over the world is what is leaving our money there instead of here. The answer is to cut back on the military and end the war now.

[Target C and another]195

23. To the small businessman: Aren't you offended when Mr. Connolly appears on TV and states "interest rates don't have to be frozen, they're at an all time low"? Bank interest rates are at 9½% Either he thinks the public is a pack of idiots or he is.

[Target C and another]195

Other examples, too lengthy to present here, are headlines:

\hspace{1cm} 

195. Detroit Police Files, supra note 127, Target C, at 49.
196. Id. 83.
197. Id. 84.

Names also appeared in the police files through police examination of other government files in which names are listed for nonpolice purposes. For example, articles of incorporation, assumed name files, bar association records, applications of various sorts, occupational licensing files, and the like, appear to have provided names for the subversive unit. In checking an individual or organization whose name has come to police attention, the police examination of public documents has often resulted in the names of people associated with the target being included in the police report. For example, stockholders appearing on corporate papers filed with the Secretary of the Treasury;201 parents, parties, and attendants at weddings whose names appear on a marriage license;202 and references acknowledged on gun permits,203 may find their names, and possibly their own dossiers, in the police subversive files.

5. Organizational Lists

24. April 1967 Subj. listed as member of the [political organization]. From Extremely Confidential Source.204

25. 1968, File 3396, RADICALS IN PROFESSIONS CONFERENCE, is alleged to have taken place. See file for confidential list obtained from 009, people who attended, listed according to interest. (It appears to be a list of Professions engaged in the radical left.)205


198. Id. 38. This letter, in the Detroit News on May 15, 1972, challenged the editorial position opposing student disorder on campuses while supporting “indiscriminate terror bombing” in Vietnam.

199. Id. Target C, at 44. This letter was included in the target’s file even though it was written by the target’s father.

200. Id. 96. This letter criticized a senator for his position on the Vietnam war, and was included in the target’s file even though it was written by the target’s father.


202. See, e.g., Detroit Police Files, supra note 127, Target J, at 426. In this instance, the names of J’s parents, the witnesses, and the rabbi at the wedding were included with a copy of the marriage license in an entry on J’s Master Index Card.

203. See, e.g., id. Target J, at 364-72.

204. Id. Target B, at 217.

205. Id. 213, 220; Target A, at 247. Source 009 is a police informant.
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[political organization newspaper] MAILING LIST per 009.

27. July 1971, See File 1692, confidential phone list put out by the local chapter of the [political organization]. This in reality is a . . . membership list. Subj. first name, last initial and phone number appears on same.

28. [twenty-five page alphabetical mailing list]

One means of gathering a large number of names, and apparently also an end in itself, is the collection of confidential organizational lists which have been prepared by a group solely for its internal use. This includes mailing and phone lists and contributor records as well as membership lists. While some of these lists have been made public, most are closely guarded and can be obtained only by stealth, misrepresentation, or compulsion.

In the examples given above, police comment itself indicates that in four instances the material gathered was considered "confidential" or was supplied by a "confidential source." In three of the four instances, a covert police agent was responsible for obtaining the list. The fifth item, 28, has no indication as to how the police obtained it for filing in the target's dossier. It is noted, however, that of the four different confidential sources who provided information concerning target E, the contact in 1972 was source 009. This is the same confidential source who provided the confidential lists in items 25 and 26, and tends to corroborate their acquisition by misappropriation through misrepresentation (e.g., a covert agent obtaining access for alleged organizational reasons), or through stealth (e.g., theft, false arrest, or reproduction without authorization).

The two lists referred to in items 27 and 28 contain 79 and 170 names, respectively. It is apparent that the gathering of a fair number of lists, like those in the examples above, will quickly flesh out the files of a spy unit. It is not yet certain, however, whether each person or organization whose name appears in a police report—by virtue of affiliation with a surveilled individual, organization, or event—ultimately finds that he, she, or it has a personal police file. The study sample material does not reveal whether the police subversive unit operates a selection process whereby some names merely remain on acquired lists, and other names result in new files being opened. A number of Master Index Cards in the study sample

206. Id. Target C, at 10.
207. Id. 12. A copy of the list referred to also appears on page 94 of Target C's file.
208. Id. Target E, at 204.
do suggest that a file may be opened solely on the basis of a name's appearance on a list, since some Master Index Cards contained only a single entry noting the target's attendance at an event, or the target's membership in an organization. The use of lists in the subversive files also provides a ready method of cross-referencing persons among organizations and associates, without laboriously surveilling all events which may occur.

6. Cross-Referencing

It is clear from the study sample materials that information on a given individual or organization may exist in anywhere from two to dozens of files, and an examination of the study sample would be incomplete without a discussion of the elaborate cross-references.

a. Specific Cross-Referencing

In the study sample, there were specific cross-references to fifty-nine files maintained under names or code numbers different from those of the ten targets in the sample. As noted earlier, individuals or organizations had files designated by name, code number, or both. Specific cross-referencing is the cross-referencing of information to another file by specific name or number. A few examples are:

29. 10-5-70 Attended meeting at — Harper, DCEWN. See rpt. dtd 10-7-70 in DCEWN file [anti-war group].
32. 10-16-71 Subj. took part in demonstration at DeHoCo [Detroit House of Correction]. See [political organization] file.

209. Computerization could certainly be an effective means of maintaining and compiling the information gathered by a subversive unit, and would enhance the cross-referencing system apparent in the study sample. Whether the Detroit Police Department and the Michigan State Police have computerized their subversive file systems remains an unanswered question. Considering the magnitude of information gathered and the number of targets surveilled and cross-referenced, the likelihood of computerized file systems should not be discounted.

210. Detroit Police Files, supra note 127, Target C at 1 (MIC).
211. Id. 10 (MIC).
212. Id. 8 (MIC).
213. Id. Target J, at 330 (IE).
33. 8-25-72 Det. News art. in file 3308. . . Subj. V, W, X, Y and Z cosigned a letter to the Editor complaining of the "harrassment" that their respective groups encountered in and at a recent AIR WAR HEARING held at the City County Building. See report of 8-14-72, C-File. 214

34. 6-5-73 File 2756, Subj. was identified at this meeting of the [Detroit political organization] held this date at the Central Methodist Church. 215

The total number of specific cross-references in the study sample was 189; as many as 26 were in a single file. Given that some of the references were to the same files, the ten targets in the study sample would be obliged to examine a minimum of fifty-nine additional files to find all information concerning themselves. And, if those fifty-nine files are similar to those of the study sample, an examination of those files will necessitate another geometric jump in order to fully explore the total amount of information which may be contained on a single target in the Detroit Police subversive files. Indeed, the cross-referencing is so extensive that it is impossible to determine whether one possesses all information concerning a given target, particularly an organization, without examining all the files maintained by the subversive unit.

There are other compilations of material maintained by the Detroit Police to which study sample items are specifically cross-referenced, but which were not included in the list of fifty-nine other files because they appear to be of a different nature—supplemental filing systems. There is independent verification of the existence of at least two such supplemental systems. 216 For example, numerous items in the study sample were cross-referenced to the "demonstration file" and numerous items referred to the "photo file," indicating that there was information contained in those other filing systems concerning an event, meeting, individual, or organization. 217

For many events and demonstrations scheduled to occur in the city of Detroit, at least two reports were prepared by the Detroit Police to be filed in the demonstration file—aside from event entries

214. Id. Target C, at 19 (MIC).
215. Id. Target B, at 227 (MIC).
216. Discovery in Benkert revealed portions of the Detroit Police "demonstration file" and "photo file." These materials are not included in the study sample, and are not available for further discussion because of the Modified Protective Order, supra note 129. See also note 135 supra.
217. The names of these files have varied over the years; the "demonstration file" was apparently known as the "chrono file" and the "photo file" was once the "pict. file." Detroit Police Files, supra note 127, Target J, at 207.
in target files. These reports are supplemental to the Detroit Police Department Memorandum reports of demonstrations which frequently appear in the dossiers of the study sample. The supplemental demonstration file contains (1) pre-demonstration documents, which provide notification of pending demonstrations to the police and other agencies, and (2) post-demonstration reports, indicating the time, place, and details of demonstrations.

In addition, the Detroit Police have photographed numerous individuals at various events and demonstrations, sometimes collecting hundreds of photographs of a single event. Of the police photographs examined in the study sample, a large number appeared to be concerned with isolating one or a small group of persons—probably for purposes of identification. The photographs were general, long-range shots of a demonstration or meeting in progress, tables distributing literature, or the wording of various signs carried by demonstrators. Most of the photos examined related to events open to the public, although it is impossible to determine from the study sample whether nonpublic events were also photographed. The photo file, and references thereto, made no indication as to the uses of the gathered photographs, or as to whether copies of them had ever been disseminated or used in any fashion.

b. Nonspecific Cross-Referencing

The use of nonspecific cross-referencing, in the study sample and other subversive files, presents a problem even more complex than that of the specific cross-referencing systems. It appears that, in some instances, a large amount of information concerning a target is contained in a file that is not mentioned by name (or number) in the target's file. Some examples will indicate how this conclusion was reached, and show the wide variety of entries used for nonspecific cross-referencing:

35. 5-1-69 Subj. took part in a Black Panther rally at the Detroit Federal Building to free Huey Newton.218

While there is no specific reference in this item to any file concerning the Black Panther Party, the entry resulted from surveillance of a Black Panther event. For clarity, consider the following entry that preceded item 35 in the target's file:

36. 10-18-68 Sur. obs. X at WSU [Wayne State University] Black Panther Meeting, Eldridge Cleaver is a scheduled speaker.219

218. Id. Target J, at 329 (IE).
219. Id.
It is interesting to note that the target in whose file the above entries are contained is a white male who at no time was a member of the Black Panther Party. The cross-referencing becomes more apparent in the next entry, which preceded item 36:

37. 8-17-68 Sur. obs. [license number of target’s vehicle] vicinity of Michigan Union Building, Ann Arbor. See Black Panther file.220

While there is no specific cross-reference to items 35 and 36, unlike item 37, the question is raised whether there is information concerning items 35 and 36 in the Black Panther Party file. Unfortunately, this question cannot be answered solely on the basis of information contained in the study sample.

Another type of nonspecific cross-referencing results when the subversive unit deploys “surveillance crews.” Many files frequently referred to “surveillance crews,” in cars or otherwise, observing certain addresses and actually following specific individuals around the city or state. The resulting entries are quite similar:

38. 12-29-70 Subj. car obs. by sur. crew pk. vic. of——John Lodge.221
39. 5-8-73 Subj. Obs. at U. S. Post Office at Greenfield and Longfellow, Dearborn.222
40. 6-1-73 Surv. Obs. subj. and unk. w/f into [sic] the McKenny Union at EMU, Ypsilanti [Eastern Michigan University], later followed to apt. complex at——Rose, Ann Arbor.223

It is not clear from these entries whether there is information concerning the targets, or related to these entries, in other files of the subversive unit. Two factors, however, suggest that such further information may be found: first, no report or document in the target’s file made any references to the information and surveillance noted in the surveillance crew entries for that target, and no report or other information dated on or near the date of the crew entry appeared in the target’s file. The surveillance crew entry must, therefore, have come from information not contained in the target’s file, but maintained elsewhere. Second, documents entitled “surveillance reports” were observed in a target organization’s file, and appear to be part of extensive surveillance operations directed

220. Id.
221. Id.
222. Id. Target B, at 208 (IE).
223. Id. 209 (IE).
at that organization and some of its members. This indicates that various organizations are subjected to an information gathering process that is more intense than is ordinarily employed, including, perhaps, 24 hour surveillance of the organizations’ offices and meeting places or of the homes of some of its members, or moving surveillance of organization members as they go about their daily business. It is apparent, therefore, that the files of all organizations with which a target was associated during the period of surveillance must be explored in order to isolate and examine the source and meaning of the usually cryptic entries in the target’s own file. For example, what is the significance of this entry?:

41. 5-6-73 Subj. observed in Wayne State area.\(^{224}\)

Comparison of addresses placed under surveillance with home addresses of the targets in the study sample reveals that many surveillance crew entries resulted from extensive surveillance of a target’s home, and indicates that not only public forums and events received intensive surveillance from the subversive units.

Another type of nonspecific cross-referencing occurs when an entry included the name of a target as well as the names of other individuals, the other individuals likely being subjects of separate subversive files. This type of silent cross-referencing is illustrated by the following entries:

42. 1-12-71 Subj. spoke at MCCC [Macomb County Community College] along with R, Y and Z, copy of speech in R’s file.\(^{225}\) [R is a nationally known performer and political activist.]

item 42 indicates that the subversive unit maintained a file on nationally known activist R. The same reference to R in another target’s file (item 43) suggests that R’s file may contain information concerning the target in item 43, even though no specific references were made to R’s file.

Even basic personal history entries generate suspicion that information may be contained in other files, for example: “9/6/76 subj. now lives at—York,—Township, with his wife M, W, X, Y and Z,

\(^{224}\) Id. 208 (IE).
\(^{225}\) Id. Target G, at 255 (IE).
\(^{226}\) Id. Target J, at 329 (IE).
While a significant amount of information concerning a target, whether an individual or organization, may be found in files under the target’s name or number, an equally significant amount of information concerning a target can be found in subversive unit files of other individuals and organizations, as well as special "demonstration," "photo," and "surveillance" files. The number of different files that would have to be examined to discover all the information gathered on a single individual or organization would be staggering, particularly when an individual has participated in a large number of political organizations and events. Likewise, examination of large numbers of files would be required to determine the nature of police techniques and activities directed against a single target.

IV. ANALYSIS

The presentation of the evidence from the study sample necessitates some analysis and interpretation, not only of the structure and outline of the gathered information, as appeared previously in this Article, but also of its content.

A. Method of Analysis

1. Definitions and Categories

The key to a system of analysis lies in the guideline chosen. Since the concern of this Article, and often of courts confronting police-spying litigation, is whether the police are improperly invading protected first amendment activities, the definition of "protected political activity" becomes the touchstone of this analysis.

The first step in the analysis is determining the “activity” element of the definition of “protected political activity.” If an I.E. Card entry does not indicate an activity, but rather indicates some other type of information, e.g., marital status or organizational affiliation, then that entry will be categorized as an “other item”—a miscellaneous category for items not “protected political activity.” The second element of “protected political activity,” and the second step in the analysis, is determining what activity is political and categorizing nonpolitical activity entries as “other items.”

227. See note 162 & accompanying text supra.
“Political” is used here in a broad sense, embracing all expressive activity involving the use of speech, press, association, assembly, or petition rights to present a point of view on an issue of public concern.

The final element of “protected political activity” is distinguishing between “protected” and “nonprotected” political activity. Political activity is not necessarily synonymous with expressive activity protected by the first amendment: bombings, kidnapping, hijacking, and other violence are often undertaken in the name of a political principle. There is no question that such events have occurred, but their frequency and relation to peaceful political activity is much less clear. Of course, criminal acts have also occurred in the context of otherwise protected political activity, whether a street corner speech, leafletting, or a mass demonstration. The extent to which police have been involved with this latter type of political violence, as provocateurs rather than gendarmes, raises serious questions of whether police surveillance of political activities is actually for legitimate violence- and crime-prevention purposes. Unfortunately, these questions are beyond the scope of this Article.

The distinction between protected and nonprotected political activity, for the purpose of this analysis, is determined by categorizing those items on the I.E. Cards that the police have characterized as “political,” and that the United States Supreme Court has determined are entitled to first amendment protection. It should be noted that, in this analysis, the categorization of activity noted in the I.E. Card indexes and police reports has been drawn solely from the police descriptions of the activity contained in those documents. In all instances, it is the language and perception of the police that is used in categorizing and defining “protected political activity.”

After the primary analysis, categorizing items as either “protected political activity” or “other items,” a further analysis will be made of the items falling in the “protected political activity” category. This further analysis will divide the items into those ap-

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parently occurring in a public forum and those apparently occurring elsewhere—either on private property or on public property not dedicated in any way to public dissent. It is obvious that demonstrations, rallies, parades, and picketing conducted in public streets, parks, and other areas raise different municipal concerns than non-public forum activities. Likewise, nonpublic forum activities raise different constitutional concerns than public forum activities.229

An item on an I.E. Card was placed in the public forum subcategory if the police language indicated the location of the event as a public forum. In addition, the event was assumed to have occurred in a public forum if the police described the event as a “rally,” “parade,” or “demonstration,” unless there was specific indication in the police description to indicate that the activity did not occur in a public forum. This means of subcategorizing is likely to favor placing more—rather than fewer—items in the public forum subcategory. Items included in the nonpublic forum subcategory include large rallies and demonstrations occurring in private buildings as well as small gatherings in private homes and offices. On occasion, reference was made to documents in the study sample other than the I.E. Cards to determine whether an activity in an I.E. Card entry occurred in a public or nonpublic forum.

2. Example of Analysis Method

To illustrate and clarify the method of analysis explained above, consider the following detailed examination of the entries on the I.E. Card indexes for target H. Of the forty entries on the three cards which make up the I.E. Card index for H, thirty-six have been categorized as “protected political activity,” and the remaining four have been categorized as “other items.” Although it seems laborious to list all forty entries, it is, in reality, the shortest, most efficient means of demonstrating the system of analysis and it shows that the categorization is not difficult.

Target H had the following seventeen entries for apparent public forum protected political activity:

(a) 12/24/1965 Chairman of “citizens for Peace in Vietnam” procession.
(b) 2/1/1966 [anti-war group] parade and rally.
(c) 3/26/1966 [anti-war group] parade and rally.
(d) 10/26/1968 Anti-war parade.

229. Police Surveillance of activities in private nonpublic forums also raise interesting questions with regard to the right of privacy and the fourth amendment, unfortunately this too is beyond the scope of this Article.
(e) 2/28/1969 Member of [legal organization] picketed Common Pleas Court (Landlord-Tenant).
(f) 6/30/1969 Federal Building . . . demonstration.
(g) 4/14/70 Sur obs subj. at GM Building protesting GM profits from Vietnam War.
(h) 4/15/70 Sur obs subj. at Kennedy Square anti-war rally, appeared to be running rally.
(i) 5/30/70 Coordinator for Memorial Day march and rally at Kennedy Square.
(j) 6/15/70 Participated in rally at Cobo Hall against V. P. Agnew.
(k) 10/31/70 Attended demo at Kennedy Square (Moratorium to End the War).
(l) 11/24/70 Sub participated in anti-war demonstration at Federal Building sponsored by [anti-war organizations].
(m) 2/10/71 Per 321—spoke at [political organization] rally WSU [Wayne State University].
(n) 2/18/71 Attended a [anti-war organization] meeting at WSU.
(o) 10/12/71 Subj. spoke at candlelight ceremony at City Hall sponsored by the [peace group].
(p) 4/29/72 Subj. obs. at Northland Shopping Center Mall at [anti-war organization] demonstration against the war.

The 19 other entries contained in target H's index which relate to protected political activity apparently occurred in nonpublic forums:

(aa) 10/5/70 Attended a meeting at police hdgs. re: [anti-war organization] march on 10/31/70 in Detroit (National Peace Action Day) anti-war march.
(bb) 10/26/70 Subj. chaired steering comm. meeting of [anti-war organization].
(cc) 11/9/70 Subj. chaired a meeting of the [anti-war organization] . . . . Also talked about the 3 day Winter Soldier Investigation (American War Crimes) to be held at Veterans Mem. Bldg. 12-1-2-3-70.
(dd) 11/23/70 Chaired meeting of steering comm. of [anti-war organization] held at First Unitarian Church.

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(ee) 12/4/6/70 Sub attended convention of [national peace group] and met with National Steering Committee at Chicago, Illinois.

(ff) 11/21/70 Subj. spoke at a political meeting at U of D [University of Detroit]. Spoke regarding the [peace group] convention to be held in Chicago . . . per 321 rpt.

(gg) 10/19/70 Member of steering comm. [national peace group]—see rpt. from Parma, Ohio PD dated 11/17/70 in [political organizational] file. Subj. representing [anti-war organization].

(hh) 12/26-31/70 Attended [political organization] Natl Conc. NYNY. See MSP rpt dtd 1/7/71 in [political organizational] file.

(ii) 1/16/71 Attended a [national peace group] meeting, —Howard, subj. was chairman.

(jj) 1/25/71 Sub attended and chaired meeting of [anti-war organization] at—Third (steering committee).

(kk) 2/8/71 Attended meeting of the [anti-war organization] held at —Third.

(ll) 2/22/71 Chaired meeting of the [anti-war organization] held at —Third.

(mm) 4/5/71 Attended meeting of the [anti-war organization] held at —Methodist Church.

(nn) 5/3/71 Chairman meeting of the [anti-war organization] at—Methodist Chrch.

(oo) 7/2-4/71 Sub attended [anti-war organization] Conv. NYNY per source 1023.

(pp) 7/1/71 Subject attended [anti-war organization] meeting, WSU per source 1023.

(qq) 2/8/72 Sub. attended meeting of steering committee of [political organization].

(rr) 2/11/72 Sub. reported to have gone to Paris for leftist rally re: Vietnam Peace Talks.

(ss) 7/28/72 Sub. obs with wife exiting vehicle and entering [address of political organization].231

Finally, of the four entries in target H’s index that were categorized as “other items” because they do not relate to a specific political activity, two are clearly of political nature (but not “activity”):

12/15/69 Co-chairman of [anti-war organization].

231. Id.
12/15/70 Sub is reported to be a national coordinator for the [national peace group] (per report dated 12/10/70).232

The other two items included in the "other items" category are nonpolitical:

3/6/74 Subj. was divorced from his wife . . . . Subj. was plaintiff case no.73-[number].
74 Subj. is suppose [sic] to be married to [X] per source info.233

There is, of course, much information not revealed by the I.E. Card entries, and the scope of this analysis is thereby limited. For example, it could be argued that the various "steering committee" meetings which H attended were for planning the imminent overthrow of the government, the bombing of a government building, or the disruption of a public rally. This could be the case with any meeting between two or more human beings. This uncertainty is the reason for basing the categorization on police language in the entries—their language reflects their concerns. If the primary police concern was the occurrence or planning of criminal, disruptive, or violent activity, the analysis presumes that some indication of that concern would appear as part of the index entry or in supporting reports. If the police choose not to make such indication, but rather to focus their index entry on the political views expressed, the political nature of the organization or event, or both, then the analysis and categorization will not deviate from their choice of focus which precipitated the index entry.

B. Analysis of The I.E. Card Indexes

The above-described method of analysis and categorization was applied to all the Intelligence Exchange Card indexes in the study sample. There were nine such indexes, totalling twenty-five pages, which contained a total of 258 entries. Chart No. 3 describes the statistical conclusions reached by examining these entries.

Of the 258 entries in the nine I.E. Card indexes, 223 (86.4%) focused on protected political activity. Even more interesting is that 130 (50.4%) of those entries were concerned with protected political activity occurring in nonpublic forums, and only ninety-three (36%) of the entries concerned political activity in public forums. Target A was under surveillance for ten years and had thirty-eight entries in her I.E. Card index, thirty-five (92%) of which concerned pro-

232. Id. 249-50.
233. Id. 251.
tected political activity. Target J, who was under surveillance for eleven years, had fifty-eight entries, fifty-two (90%) of which concerned protected political activity. What is just as important as the fact that an extremely high percentage of surveilled activity was protected by the first amendment is the fact that, in the fifty-four human years of surveillance represented by the matrix, there was not one reported act of serious violence, criminality, or public disruption.

In the matrix of Chart No. 3, a number of entries which were categorized as “other items” related to political information but did not involve any “activity,” and were thus excluded from the “protected political activity” category. For example, consider the following entries:

[In the index of Target A:]
3/6/71 Sur. obs. [license no.] registered to X of Mitchell, arrived at —Grand River, with a small child, entered with the child.\textsuperscript{234}

[Target B:]

8/6/69 Info. received from Source that above is the president of [political organization]. SEE [POLITICAL ORGANIZATION] FILE.\textsuperscript{235}

[Target H:]

12/15/69 Co-chairman of [anti-war organization].\textsuperscript{236}

[Target J:]

2/3/71 Info. per 219 subject professes to believe in Anarchy.\textsuperscript{237}

All four of these items relate to political information. The items concerning Targets B, H, and J are self-evidently political. The item concerning Target A is found to be political in nature when it is revealed that the addresses included in the entry are, at other points in A's I.E. Card index, identified as meeting places of a particular political organization. It is quite likely, therefore, that this item concerning A could also warrant categorization as a nonpublic forum protected political activity item. Thus, even though nonactivity and ambiguous items were categorized as "other items," nearly all of the thirty-five items could have been included in the political category.

V. CONCLUSION

The information and analysis in this study is useful in addressing two related concerns. First, it casts new light on the issue of whether the traditional police justifications for political surveillance comport with the product of their efforts. Second, it challenges certain presumptions and attitudes adopted by many judges in evaluating court challenges to police surveillance activities.

A. Police Justification vs. Police Product

While the interests assertedly pursued by police through their political surveillance systems have been variously stated, almost all characterizations come down to the need to prevent disruptions, violence, and other criminal activity provoked or caused by political dissenters.\textsuperscript{238} Few persons would disagree with the police that pre-
vention of crime and violence is a proper governmental function, but two critical questions remain unanswered, notwithstanding this concession. First, in the case of political surveillance, are the asserted justifications real, or are they only illusory and put forth to meet criticism and forestall further inquiry? Second, even if, to some extent, these justifications really are the concern of the police, are the various means allegedly used to meet the concerns related in any significant way to their accomplishment?

The conclusions of this study appear to indicate that prevention of crime or violence is not a substantial police concern in their use of political surveillance. First, all of the material examined is written in the police department's own words. The documents reflect actual police concerns, and were never intended for public disclosure or examination. They therefore do not reflect any police need to "justify" their activities, but only what they actually did.

Second, none of the information in the study sample—an accumulation of fifty-four years of surveillance—relates to, or reflects a concern with, the prevention or solution of crimes or violence. Not a single violent or criminal act is discussed in the materials. The only violent or criminal acts suggested in the materials involve the activities of police or police informants. Third, virtually all of the information contained in the materials is concerned with the political views and associations of the people placed under surveillance.

While police have consistently maintained that their interest is in the prevention of law violation, and not in political surveillance causing infringement of first amendment rights, this study sample indicates that the opposite is true. The study sample reflects no evidence of violence or illegality, and further, no police concern with it. This, then, should begin to instruct courts that the dilemma which the police version of events has thrust upon us—that there are apparently irreconcilable demands between security and free expression—is not a real dilemma at all. Unless one is willing to equate dissent with criminality and protest with violence, there is


239. "[W]e can no longer seriously doubt that the main purpose of such activity is [the] political control of dissent or that the frequently advanced justifications of law enforcement or national security are often no more than a 'cover'." Donner, The Theory and Practice of American Political Intelligence, New York Rev. of Books, April 27, 1971, at 27-39.

240. See, e.g., Kelley, Message From The Director, 43 FBI Law Enforcement Bulletin (1974).

little, if any, "security" interest which the present political surveillance apparatus serves.\textsuperscript{242}

Even assuming that surveillance does, to some extent, serve the government interest of crime prevention, this study has concluded that, contrary to police assertions, there is a total absence of precision, care, or meaningful evaluation involved in implementation of the system. Thus, it is impossible to tell how a decision is made to include an individual or organization in the surveillance pattern. The decision appears almost haphazard. The only sure guidepost is that it will be the political views or associations of a target which will trigger the initial inquiry. The police argument that innocent people are only occasionally or accidently included in the files along with subversives and potential lawbreakers is completely unsupported by this study. Indeed, two of the study sample targets were kept under constant surveillance for over ten years without the slightest hint of impropriety or illegality.\textsuperscript{243}

The operation of the system as demonstrated in the study was overbroad and undisciplined in another way. There appears to be no meaningful way to explain when and why certain surveillance techniques were used. Whether the technique was physical surveillance, shadowing, use of informers, inquiries to third parties, or unlawful police intrusions, the "trigger" for the use of the technique, and the limits on it once implemented, appeared without rational pattern.

Whether the "means" analysis of police political spying focuses on who the police include as a target, or on what the police do in implementing the system, the conclusion drawn from this study is the same: the system is drastically overbroad, and is structured in such a way that it would appear to be impossible to narrow its reach short of dismantling it. Since "who" is included is explicitly based on political views and associations, and "what" the police do is governed by no discernable standards whatever—except to further the ultimate goal of deterring dissent—there appears to be nothing legitimate to preserve.

\textbf{B. Enlightening Judicial Attitudes}

"How to inform the judicial mind . . . is one of the most com-


\textsuperscript{243} See Detroit Police Files, \textit{supra} note 127, Targets A and J. Targets B, C, E, F, G, and H were under surveillance for over five years.
A judge's performance on the bench is largely based upon his life experience. The conflict often arises as to whether judges are "in sympathy with the spirit of their times" or merely with the spirit of the group "in which the accidents of birth or education or occupation or fellowship" have placed them. Yet one hopes that whatever prejudices judges may harbor will be substantially reduced if accurate information on the critical issues is readily available.

What this study hopes to convey to the judiciary is twofold. First, police activity in the area of political surveillance is the opposite of what it is projected as being. Second, judicial withdrawal from the evaluation of the merits of challenges to surveillance activities reinforces the police myth that spying on political activity is for the prevention of unlawful violence. At this juncture the courts are asked only to fulfill their constitutional mission to undertake the task of evaluating challenges to surveillance systems on the merits.

The judicial system is no part of the national security-law-enforcement establishment. The courts should make a commitment to reconciliation of the conflicting demands of the government and citizen when actual disputes arise. Judges must recognize that resolving these cases in favor of the police by obscure holdings fashioned around justiciability issues without a more thorough analysis is capitulation to, and acceptance of, the very assumptions under challenge.

While in any individual case, the government may ultimately prevail on the merits, the decision would be reflective of mythology rather than reality if the court refuses to allow the challenger's claims to be litigated fully. The New Jersey Supreme Court, in the Anderson decision, could not have appreciated the full irony of its comment when it deferred totally to the governmental position and stated: "We cannot know how little we know until we listen." Justice Marshall very aptly expressed the basic feeling that envelops the domestic political surveillance system when he said: "[T]he value of a sword of Damocles is that it hangs—not that it drops."


246. Id.


248. Id. at 228, 265 A.2d at 687.

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<td>10-5-70 attended meeting at 60 Harper, [organization] See rpt dtd 10-7-70 in [same] file. 10-31-70 attended moratorium day anti war demo at Kennedy Sq. Sponsored by [organization]</td>
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*The information portrayed is the printer's simulation of the original Master Index Card.
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**ADDRESS**
Meadow Lake (Birmingham, Mich)

**PHONE**

**AUTOMOBILE**
Pont. Conv

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<td>grn</td>
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**INFORMATION SUBMITTED BY**
Crouter

**DATE**
2-28-71

**ASSOCIATES**
members of: ....; ....; ....

**FBI NO**
SS 000-00-0000

**IPC**

**LOCALITIES FREQUENTED**
### MO SPECIALTY BUSINESS OR OCCUPATION

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**SEE INDEX CARD FOR DETAILED INFO. PRIOR TO FEB. 28, 1972.**

**REMARKS:**
- 10-5-70 to present has been very active with the [org], usually helps to make arrangements for transportation for out of town demonstrations or meetings.
- 5-8-71 sub. attended meeting of the Steering Comm. of the [org] Wash. DC
- 7-2, 4-71 attended [org.] convention NY, NY.
- 11-18-72 subj att demo at Kennedy Square sponsored by [org.].

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**INTELLIGENCE EXCHANGE CARD**

*The information portrayed is the printer’s simulation of the original I.E. Card.*
DETROIT POLICE DEPARTMENT

INTER-OFFICE MEMORANDUM

Date: January 10, 1973

Commanding Officer, Intelligence Section

Subject: MEETING OF [Anti-War Organization]

Covered by Sergeant Stanley Perich and Patrolman Harold Mertz of the Intelligence Section, Subversive Detail.

On Monday evening January 8, 1973 at 7:30 P.M., the .......... held a meeting at the .......... METHODIST CHURCH .......... Detroit, Michigan.
There were 62 persons in attendance.

The Chairman for the meeting was one, ................. white/male of .......... Apt. No. 304, Detroit, Michigan. He is a tall male 23 years old/175 lbs. This subject is new to this area and active in the [Political] PARTY and the [Anti-war organization]. NOTE — this subject was referred to in previous reports as .................

The principle speaker was ................. white/male Attorney of .......... Griggs, Detroit, Michigan. This subject is co-chairman of the [Anti-war organization], gave an inspirational speech explaining why the anti-war demonstration will be held in Washington D.C., explaining it is being conducted as a reminder to the American people that they did not vote for an escalation of the war in Vietnam, but instead voted for the peace promises given by Nixon. ................. called for a united effort for the upcoming D.C. demonstration against the President.

................., white/female of .......... Meadow Lake, Birmingham, Michigan. Dob: 6-17-48/5'6"/125/ brown hair/green eyes. This subject is co-ordinator for the [Anti-war organization]. This subject gave a report on the planned happenings to occur prior to the groups leaving for Washington D.C. She detailed the plans for a heavy distribution of literature, showing a leaflet she wanted especially distributed to High Schools and College Campuses, and among all organizations which have shown .........

*The information portrayed is the printer's simulation of the original Memorandum.
an interest in anti-war activities. She stated that the Coalition office is being swamped with phone calls from people with requests regarding transportation to the Capital. 

................. asked for help in setting up information and distribution centers throughout the Detroit area, so people would not have to go to the New Center area to pick-up literature. She pleaded with those present to help in the planning of the Capital demonstration.

................., white/female of ...... Seward Apt No. 403, Dob: 6-1-52 active in the [org.] and the [org.], gave a report on the transportation set-up. The Coalition has ordered six buses to date. They are not actually organizing car pools per se, but will do the best they can to line up a registration of available vehicles for the pool, and provide information to people calling them for same.

................., male/black of ........ Townsend. This subject is a member or supporter of the ........ movement. On 10-25-72 subjects brother, ........ was involved in a shooting at the Martin Luther King Jr. High School. ........ gave a report on the contacts he made with with labor organizations, reading off a lengthy list of labor indorsers for the D.C., demonstration. He called on others to get members of their own unions to endorse the demonstration.

An Unknown Methodist minister, white/male gave a talk asking for closer co-operation among the anti-war activist, especially between the Coalition and the [another anti-war org] OFFICE. He stated that it is confusing to the outsider when they see the antagonism which exists between the two groups.

Several persons from the audience gave run-downs of anti-war activities taking place at Wayne State University, University of Detroit, Ann Arbor, Lansing, etc. One said that there is a bus load of people leaving from Mt. Pleasant and some from Oxford Michigan.

The ........ was heavily represented at this meeting with approximately 15 to 20 persons present. Four made talks with regard to ........ plans stating that they (the ........) plans to stay in D.C., to conduct a War and Racism seminar over the inaugural week-end. They invited the Coalition members to take part in the same. They said that the ........ will cooperate with the Coalition in their endeavor with the anti-war movement.

Discussions: speakers for the rally to be held at Kennedy Square
prior to the trip to Washington D.C. for the anti-war demonstration at inauguration time. ...............’s name was mentioned as one of the speakers. A long list of probable speakers were mentioned but nothing was confirmed as yet. The speakers will be announced at a press conference to be called by the coalition.

A report meeting will be held as soon as possible after the D.C., demonstration. This meeting will also be used to make additional plans for future long range programs.

The following were identified as being in attendance at the meeting:

(Names of 22 individuals)

LNU/WM

The following is a registration of vehicles observed in the immediate area, occupants entered for the meetings:

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Sergeant Stanley Perich
Subversive Detail

Patrolman Harold Mertz
Subversive Detail

READ AND APPROVED:

DENNIS J. MULLAHY
Inspector - Commanding
Intelligence Section