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courts. If, however, the courts of North Carolina determine that greater specificity is required by NCRCP 8(a)(1) than by FRCP 8(a)(2), the use of the 12(e) motion in place of the one under 12(b)(6) and the liberal allowance of amendments are recommended as methods of insuring a balanced and equitable system.

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Constitutional Law—Illegality of Police Program To Gather Information on Civil Disorders

In *Anderson v. Sills*[1] a New Jersey Superior Court held that a state-sponsored program of information-gathering about civil disorders and the participating groups and individuals was an unconstitutional infringement of the plaintiffs' rights of free speech and assembly. The state attorney general had ordered preparation of two forms for use by local police departments.

One, the "Security Incident Report Form," was designed to gather information on any "civil disturbance, riot, rally, protest, demonstration, march or confrontation," including "the names of organizations or groups involved, leaders, and the type of organization."[2] The "Security Sum-

[1] 106 N.J. Super. 545, 256 A.2d 298 (Super. Ct. 1969).

[2] *Id.* at 548, 256 A.2d at 300. An excerpt from the report's "instructions for preparation" illustrates its breadth:

9. TYPE OF INCIDENT—Enter the type of incident. EXAMPLES: Civil disturbance, riot, rally, protest, demonstration, march, confrontation, etc.
10. LOCATION—Type the location of the incident. If business or residence, the number and name of street, road, lane or avenue. If open area, give approximate distance to a known geographic location.
11. REASON OR PURPOSE OF INCIDENT—Enter reason for incident or alleged purpose.
12. NUMBER OF PARTICIPANTS—List estimated or announced number of participants or anticipated participants.
13. ORGANIZATIONS AND/OR GROUPS INVOLVED—Give full names and addresses of organizations and/or groups involved. If more space is needed, use Narrative.
14. LEADERS—Enter names, addresses and titles, if any, of leaders of organizations and/or groups involved. Include nicknames, aliases, and other identifying data.

. . . .

17. NARRATIVE
    a. Information previously included elsewhere on this report need not be repeated in the Narrative.

mary Report" recorded the "date and place of birth, marital status, name of spouse, age, race, physical description, occupation and employer, motor vehicle record"[3] and other characteristics of participants in the activity who might therefore be suspected of involvement in future civil disorders. A result of the apprehension induced by recent racial upheavals, the avowed purpose for the reports was prediction and control of potential disorders.[4]

The court, taking judicial notice that some of the individual plaintiffs[5] had been involved in sit-ins and civil rights activities, did not require them to allege that they had actually been subjected to any surveillance or reporting, but followed the federal "concepts of standing in First Amendment cases [that] have had the effect of constituting individual litigants *quasi*-attorneys general for large classes of citizens whose rights might otherwise be oppressed."[6] The plaintiffs sought and obtained a judgment declaring the reporting system unconstitutional per se and ordering that the reports be discontinued and that all forms and files be destroyed.[7] The court found

> "that the directive in question, and Forms 420 [Security Incident Report] and 421 [Security Summary Report] as used therewith, are violative of the First Amendment of the United States Constitution in that they overreach in their attempt to achieve what is probably a legitimate governmental goal . . . . The exercise of power which deters individuals from exercising First Amendment rights is denied to government."[8]

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b. If an organization and/or group is involved in the incident reported, include type and how involved.
EXAMPLES OF TYPES: Left wing, Right wing, Civil Rights, Militant, Nationalistic, Pacifist, Religious, Black Power, Klu [*sic*] Klux Klan, Extremist, etc.
EXAMPLES OF HOW INVOLVED: Sponsor, co-sponsor, supporter, assembled group, etc.

Id. at 559-60, 256 A.2d at 306-07.

[3] *Id.* at 552-53, 256 A.2d at 302.

[4] *Id.* at 551-52, 256 A.2d at 301-02. The Attorney General introduced excerpts from the report of the National Advisory Commission on Civil Disorders urging improvements in police intelligence procedures as valuable aids in preventing and controlling disorders to justify the reporting procedure. *See* Momboisse, *Riot Prevention and Survival*, 45 CHI.-KENT L. REV. 143 (1969), in which the need for adequate police intelligence activity is stressed.

[5] Plaintiffs in this case were the local NAACP chapter and individual members of the chapter who had been involved in civil rights activities. 106 N.J. Super. at 545, 550-51, 256 A.2d at 298, 301.

[6] *Id.* at 551, 256 A.2d at 301.

[7] *Id.* at 557-58, 256 A.2d at 305. This case was an action under the New Jersey declaratory judgment statute.

[8] *Id.* at 556-57, 256 A.2d at 304.

It is useful to review briefly the more important precedent cited by the court in support of its decision. Such analysis will reveal an implicit extension of first-amendment freedoms in the New Jersey court's holding.

Dombrowski v. Pfister,[9] cited by the court to support its decision on standing as well as its determination on the merits, involved an attempt by Louisiana to apply state anti-sedition statutes to individuals and associations working for equal rights for Negroes.[10] The Supreme Court, deciding that the federal district court should not abstain from hearing the complaint, held that the Louisiana statutes under which the plaintiffs had been arrested and indicted were unconstitutionally vague and overly broad since they created a zone "within which protected expression may be inhibited."[11]

In *Lamont v. Postmaster General*,[12] the Supreme Court held that a statute requiring potential recipients of "communist political propaganda" to request its delivery in writing unduly limited first-amendment freedom to receive mail.[13] Mr. Justice Douglas, writing for the Court, concluded that the statute was "unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights."[14]

The state court's contempt conviction of the National Association for the Advancement of Colored People for failing to produce a list of its members was reversed in *NAACP v. Alabama*.[15] The Supreme Court, noting the possibility of private reprisal and threats, held that the forced disclosure would impair the ability of members to pursue their legitimate aims and dissuade other individuals from joining the organization in contravention of the first-amendment right to freedom of association.[16]

NAACP v. Button[17] involved an attempt by Virginia to expand its definition of solicitation of legal business to preclude the plaintiffs from encouraging and supporting litigation aimed at eliminating racial dis-

[9] 380 U.S. 479 (1965).
[10] *Id.* at 482.
[11] *Id.* at 494.
[12] 381 U.S. 301 (1965).
[13] The right to receive mail was considered an integral part of freedom of speech. *Id.* at 308 (Brennan, J., concurring).
[14] *Id.* at 305.
[15] 357 U.S. 449 (1958).
[16] *Id.* at 462-63, 466. The Court derived a freedom of association from the related freedoms of speech and assembly specifically granted by the first amendment. *Id.* at 460. *See* NAACP v. Button, 371 U.S. 415, 430-31 (1963).
[17] 371 U.S. 415 (1963).

crimination. The Supreme Court found that plaintiff's conduct was a form of speech protected by the first amendment and that the state's attempt to make it unlawful could not be sustained.[18]

The Supreme Court was fundamentally concerned in each of the above cases with examining the chilling effect the governmental action had on the exercise of first-amendment rights; once a sufficient inhibition was demonstrated, the state's interest yielded. Considered in this light, the cases cited by the New Jersey court provide a sound basis for its holding in *Anderson*: there can be no doubt that the attorney general's reporting system was a form of state action having the potential effect of discouraging individuals from a constitutionally-protected pursuit of legitimate aims. But by not requiring the plaintiffs to show an actual threat giving rise to a chilling effect on first-amendment rights, the court in *Anderson* reached beyond any of these cases. In both *Dombrowski* and *Button* it was the existence of criminal statutes, likely to be invoked against plaintiffs for their exercise of protected rights, that gave rise to an actual threat. In *Lamont*, the most recent of the cases, the majority of the Supreme Court went to some lengths in its opinion to point out the affirmative obligation that the statute imposed on the addressee before he could receive certain mail.[19] Even in *NAACP v. Alabama*, in which there was no claim that the state statutes involved were unconstitutional on their face, the Court relied in part on the demonstrated probability of "economic reprisal, loss of employment . . . [and] physical coercion"[20] if the state were permitted to force disclosure of membership lists through contempt proceedings.

In contrast to *Dombrowski* and *Button* there was no real threat of prosecution for engaging in protected activities in *Anderson*, for while the investigation of activities such as sit-ins and protest marches was the medium for obtaining information, the purported uses of that information were limited to preventing riots and civil disorders,[21] which are surely not protected speech and assembly. Unlike *Lamont* and *NAACP v. Alabama*, there was no affirmative action required of the plaintiffs before they could carry out protected activities. Moreover, it does not appear in *Anderson* that there was any showing of possible intimidation or har-

[18] *Id.* at 437. Virginia argued without success that the restraint was only incidental to the legitimate pursuit of the state's goal of ensuring high professional standards for the legal profession. *Id.* at 438.

[19] 381 U.S. at 305, 307.

[20] 357 U.S. at 464.

[21] 106 N.J. Super. at 552-53, 256 A.2d at 302.

rassment by state agencies either in obtaining the information or in its later use.

Although the court in *Anderson* recognized "that plaintiffs and others may well be subjected to abuse as a result of this intelligence system,"[22] the main thrust of its conclusion is that such files are inherently dangerous since the mere knowledge of their existence tends to inhibit advocation of social and political change.[23] If any chilling effect similar to that found in the cases that the court cited is to be found in *Anderson,* it must rest on a judicial inference that the police will misuse information contained in their files or will harrass and intimidate individuals while collecting it.[24] Granting that such an inference may be justified if required for the protection of first-amendment freedoms, one must still consider whether it is always necessary or desirable in light of public-policy decisions favoring police functions of crime prevention and detection.

If police limited their activities to investigation of reported crimes after the occurrence, their operations would rarely be disturbed by charges of repression and abuse of power; the first amendment would never be the gravamen of a complaint against police excesses. Perhaps unfortunately, however, the law arms the police with conspiracy statutes and expects them to stop crime in its incipiency without furnishing clear-cut guidelines of acceptable methods of prevention. One of the most effective crime-prevention tools is the information-collection system condemned in *Anderson.*[25]

The harm caused to first-amendment freedoms by such a system is twofold: first, the knowledge that the police are noting people's presence at a particular event may dissuade individuals from participating in legal political activity and discussion; second, police presence at gatherings tends to inhibit participants from speaking out as freely as they otherwise might.[26] A more serious problem arises when the police use clandestine

[22] *Id.* at 557, 256 A.2d at 304-05.

[23] *Id.* at 556-57, 256 A.2d at 304.

[24] The court obviously gave some credence to this possibility: "[T]he probability that it [the directive to gather information] will be interpreted by some as requesting investigations of political trouble makers is too apparent." *Id.* at 557, 256 A.2d at 304. "[P]laintiffs and others may well be subjected to abuse as a result of this intelligence system." *Id.,* 256 A.2d at 305.

[25] *See* Momboisse, *supra* note 4.

[26] This precise deterrent effect came before a federal district court in *Local 309, United Furniture Workers v. Gates,* 75 F. Supp. 620 (N.D. Ind. 1948). Following picket-line violence, state and local police began attending—but did not actively interfere with—union meetings in the county courthouse. The union mem-

surveillance or infiltration of groups to obtain information. Unless the presence of the police is realized at some point, there is no inhibition of the exercise of first-amendment freedoms absent a general, persisting fear that an informer may be present. Moreover, it is seldom possible to attack covert surveillance successfully on fourth- or fifth-amendment grounds unless there has been some trespass, and this affirmative remedy is not available if the infiltrator's presence is at least tacitly condoned,[27] as is the case at public meetings.

Granting that harm flows from the knowledge that the police are engaging in information-collecting, is it really essential to impute to them either bad motives or harrassing tactics to find a judicial basis for stopping or limiting such activities?[28] Since the harm to the plaintiffs in *Anderson* was solely in their individual reaction and not in the possibility of affirmative state action against them, the court was, in effect, protecting a right to exercise *in privacy* first-amendment rights. By recognizing a distinction between protecting the freedom to exercise first-amendment rights and protecting a right of privacy from governmental intrusion, and accepting *Anderson* as a case involving the right to privacy,

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bers sought and obtained an injunction prohibiting the police from attending the meetings on the basis that such attendance "restrained and hampered those who had thus met in lawful and peaceful assembly." *Id.* at 625.

[27] Considering the assiduous efforts of the courts to protect individuals from invasions of privacy by electronic and mechanical surveillance methods, the unrestricted leeway given unaided eavesdroppers and informers is surprising. *Compare* Katz v. United States, 389 U.S. 347 (1967) *and* Berger v. New York, 388 U.S. 41 (1967) *with* Hoffa v. United States, 385 U.S. 293 (1966), in which the Supreme Court upheld a conviction based on testimony from an informer and did not consider it significant that the police probably had introduced him into the group. *See also* Osborne v. United States, 385 U.S. 323 (1966) and Lewis v. United States, 385 U.S. 206 (1966). The latter decisions have been criticized: *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 193-94 (1967); Note, *Judcial Control of Secret Agents*, 76 YALE L.J. 994 (1967). The acceptance of the use of eavesdroppers and informers perhaps stems from the difficulty in formulating a theory placing "overhearing" within any category of state activity presently held to violate enumerated rights or freedoms, but it should not be overlooked that the cases permitting eavesdropping did not involve first-amendment freedoms and might have been decided differently if they had. The Court in *Katz* held that a physical trespass was not necessary for finding an illegal search and seizure by electronic bugging and used language that could be equally applied to unaided eavesdropping.

[28] Besides furthering an obvious policy conflict by resting decisions on imputations of bad faith, courts would seem to be guilty of that old legislative mistake of overbreadth since this inference, once applied, cannot logically be limited to reports of the type involved in *Anderson*, but must be applied to all information-gathering and use of official records.

the court could have avoided trying to find a deterrent effect based on possible police misbehavior.[29]

The existence of a right to privacy in exercise of certain first-amendment freedoms has clearly been accepted by the Supreme Court.[30] When an attack on governmental activity is based on a violation of this right to privacy, plaintiff does not bear the burden of proving an additional affirmative, deterrent state activity; it is sufficient to show only an invasion of privacy and a lack of justification for that invasion. Indeed, once an investigation into protected activities is shown, the burden is then on the state to justify it.[31] The court in *Anderson* came very close to accepting a right to privacy in the exercise of both actual and symbolic speech, and the case has been interpreted by one writer as authority for such a right.[32] If this interpretation is correct, *Anderson* brings the judiciary one step closer to accepting the suggestion by Mr. Justice Douglas[33] that the proper solution is to adopt a "right to be let alone" and to establish that until an organization or individual acts illegally, no governmental unit should be authorized or allowed to investigate. A less drastic suggestion is to place information collected by surveillance and infiltration on the same basis as wiretapping and to require prior judicial approval by use of warrants[34] before evidence obtained as a result of such police action can be used in any court.

The injunctive remedy granted in *Anderson*, depending as it does on

[29] The court came close to adopting this approach: "[I]t is not too difficult to imagine the reluctance of an individual to participate in any kind of protected conduct which seeks publicly to express a particular or unpopular political or social view because of the fact that by doing so he might now have a record . . . ." 106 N.J. Super. at 556, 256 A.2d at 304. "I conclude that plaintiffs' complaint, that they do not want to be investigated and the subject of central surveillance as potential problems, bears merit." *Id.* at 557, 256 A.2d at 304. *But cf.* note 24 *supra*.

[30] *See, e.g.*, DeGregory v. Attorney Gen., 383 U.S. 825, 829 (1966); Gibson v. Florida Legis. Inves. Comm'n, 372 U.S. 539, 544 (1963); Talley v. California, 362 U.S. 60, 65 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958); United States v. Rumely, 345 U.S. 41, 57-58 (1953) (concurring opinion). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965).

[31] *See* Gibson v. Florida Legis. Inves. Comm'n, 372 U.S. 539 (1963); *cf.* Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Katz v. United States, 389 U.S. 347 (1967) for application of this principle to a fourth-amendment situation.

[32] Schlam, *Police Intimidation Through "Surveillance" May be Enjoined as an Unconstitutional Violation of Rights of Assembly and Free Expression*, 3 CLEARINGHOUSE REV. 130, 157 (1969).

[33] Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963).

[34] *The Legitimate Scope of Police Discretion to Restrict Ordinary Public Activity*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 233, 341 (1969).

affirmative action initiated by the plaintiff, will not provide relief from pervasive covert collection of information. The combination of an exclusionary evidentiary rule, based on the requirement of a warrant, and injunctive relief would, however, be a potent weapon for discouraging police activities likely to stifle the free and open exercise of the rights of freedom of speech, assembly, and association. Since surveillance would be permitted only if the need for it could be demonstrated to a judicial officer, the police would not be forced into illegal conduct to carry out the investigative and preventive activities demanded of them by society.

DONALD W. HARPER

Constitutional Law—Power of Congress To Exclude Persons Duly Elected

In the congressional elections of 1966, Adam Clayton Powell was duly elected to the Ninetieth Congress from the eighteenth congressional district of New York. When the House of Representatives convened, Powell was not administered the oath. On the same day, the House provided for the appointment of a select committee to determine Powell's eligibility to take his seat.[1]

The committee found that Powell met the standing qualifications of article I, section 2 of the Constitution.[2] The committee further reported, however, that Powell had misappropriated public funds, had made false reports on expenditures of foreign currency, and had asserted unwarranted privilege and immunity from the processes of the courts of New York.[3] The committee recommended that Powell be sworn and seated, but that he be fined 40,000 dollars, censured, and deprived of his seniority.[4] When the proposed resolution was presented to the House, an amendment was offered calling for Powell's exclusion and a declaration that his seat was vacant.[5] After heated debate, the amendment was adopted,

[1] 113 CONG. REC. 16 (daily ed. Jan. 10, 1967).

[2] H.R. REP. No. 27, 90th Cong., 1st Sess. 31 (1967). The relevant part of article I, § 2 declares:

> "[n]o person shall be a Representative who shall not have attained to the Age of twenty-five years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

[3] H.R. REP. No. 27, 90th Cong., 1st Sess. 31-32 (1967).

[4] *Id.* at 33.

[5] H.R. Res. 278, 90th Cong., 1st Sess., 113 CONG. REC. 4997, 5020 (1967).