Tradeoffs in Undercover Investigations: A Comparative Perspective

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Undercover: Police Surveillance in Comparative Perspective, Cyrille Fijnaut and Gary T. Marx, eds. Kluwer, 1995. Pp x, 337.

Undercover Policing and Accountability from an International Perspective, Monica den Boer, ed. European Institute of Public Administration, 1997. Pp xiii, 218.

One of the darker sides of the increasingly unregulated movement of persons and goods across national borders is the internationalization of crime and the networks that sponsor it. Efforts to expand criminal investigations across national borders create an urgent need to coordinate U.S. efforts with those of other governments. To meet this need, cooperating countries will have to assess the legitimacy of law enforcement methods that, while routine in the United States, are greeted with skepticism elsewhere. Among the most controversial of these methods is the use of covert tactics, especially undercover investigations, to infiltrate criminal networks.

Different countries vary significantly in their attitudes toward the legitimacy of undercover investigations and in their approaches to regulating them. Responding to the increasing need of European and American policymakers to coordinate their efforts against crime, two highly synthetic and wide-ranging anthologies have collected the contributions of legal scholars, sociologists, criminologists, police officials, and policymakers in an effort to illuminate the differing national contours of the debate about undercover policing. The first of these books, *Undercover: Police Surveillance in Comparative Perspective*, came out in 1995. The editors are the Dutch criminologist Cyrille Fijnaut, who has written extensively about the European experience with undercover policing, and the American sociologist Gary Marx, who has authored seminal work on American undercover policing, including the invaluable *Undercover: Police Surveillance in America*.[1] The second work, *Undercover Policing and Accountability from an In-*

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1 Gary T. Marx, *Undercover: Police Surveillance in America* (Twentieth Century Fund 1988).

ternational Perspective, was published in 1997. Its editor is Monica den Boer, a senior lecturer in Justice and Home Affairs at the European Institute of Public Administration. This volume collects the papers contributed to a Dutch symposium on undercover policing in 1996. Held in the aftermath of a scandal about misuse of undercover tactics by the Dutch police, the symposium invited international contributors to rethink the place of such methods in a democratic society. The two books under review illuminate differences between American and European perspectives on undercover operations. These anthologies also explore the shared difficulties of controlling undercover operations and the ways in which increasing international cooperation will affect the choices facing national policymakers.

Together, these works make it possible to identify a series of tradeoffs among competing goals, interests, and strategies in undercover operations that different countries negotiate in dissimilar ways, but that all of them must confront. I have identified and coined labels for eight tradeoffs. A few of these tradeoffs are mentioned in the volumes. Some are implicit.[2] The rest are my own suggestions for organizing the material. I will use these tradeoffs as headings to discuss the issues and questions presented in the books under review and, more generally, to reflect on the challenges of undercover investigations.

Distinguishing policy, institutional, and political tradeoffs makes it possible to see the variety of approaches to domestic and international undercover policing as compromises struck between competing values and techniques. These competing values and techniques include: (1) deception as against coercion; (2) crime detection as against prevention; (3) electronic surveillance (intruding on privacy) as against infiltration (intruding on autonomy); (4) undercover agents as against civilian informants; (5) intelligence (and national security) as against evidence (and criminal enforcement); (6) protecting society from the excessive diffusion of undercover police work (by quarantining covert methods in specialized units) as against protecting society from the specialized units (and the potentially corrupting effect of their insulation from regular police work); (7) embracing undercover policing as an effective technique as against preserving a sense of its

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2 With its focus on domestic and international accountability mechanisms, the den Boer volume highlights some of the policy concerns that guide constraints on undercover methods, but without always identifying competing goals and interests, the tensions between these competing concerns, and the possible compromises between them. Some of the contributions to the Fijnaut and Marx volume also make passing reference to competing policy considerations, noting tensions, for example, between facilitating crime and preventing it, between coercion and stealth, or between collecting intelligence and gathering evidence. These observations are incidental, however, to the editors' and contributors' own themes and purposes. Marx discusses paradoxes of undercover work in his essay *Undercover: Some Implications for Policy* (Fijnaut and Marx, eds, p 319).

ethical ambiguity; (8) accommodating the selection of law enforcement goals, the definition of offenses, and the rules of procedure and evidence to undercover techniques, as against preserving independent criteria for assessing whether covert tactics work.

In Part I of this Review, I introduce the aims and themes of these volumes on their own terms. In Part II, I present my own distillation of the central tradeoffs as a way of bringing structure to the debate about undercover policing and of organizing the contributions under review. Part II will draw on the national differences discussed in both anthologies to illustrate these tradeoffs. In Part III, I will examine the ways in which the rise of transnational undercover investigations complicates these tradeoffs, while introducing a new conflict between the demands of effective cooperation, on the one hand, and of national autonomy and sovereignty, on the other.

I. THE BOOKS: CONFLICTING PERSPECTIVES ON A "NECESSARY EVIL"

The Fijnaut/Marx anthology ranges widely from Canada and the United States across Iceland and Western Europe to the former Soviet Union and its successors. The contributors include American and European legal scholars, criminologists, and sociologists. Among their central aims is to analyze the division of national investigative powers among competing police forces and intelligence services. In so doing, the contributors go beyond speaking of "the state" as a unified entity and carefully distinguish those branches of the police or intelligence services that perform covert functions from those that do not. The covert functions that the contributors describe include not only undercover infiltration by police agents or civilian informants but also secret surveillance, particularly the electronic interception of conversations through telephone wiretaps and ambient microphones.[3]

The French, German, and Swedish contributions focus on the autonomous domestic evolution of infiltration and surveillance. They each recount the gradual process by which their countries legalized covert practices, accepting some tactics as the price for prohibiting others. By contrast to these more self-contained articles, the Dutch, Belgian, and Icelandic accounts connect the gradual legalization of covert policing to the influence of American techniques, particularly those of the U.S. Drug Enforcement Administration ("DEA"). Ethan Nadelmann describes the "'Americanization' of European drug enforcement" in his contribution, *The DEA in Europe* (Fijnaut and Marx, eds, pp 269–89). In their account of undercover policing in Ice-

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3 I will term both of these "electronic surveillance."

land, an American sociologist and an Icelandic sociologist directly question the value of importing American undercover methods into a country with almost no drug use and almost no crime.

Articles about the Canadian and British experience with undercover investigations complement the European picture. They depict the lesser role of such tactics in two common law legal systems that interpose fewer legal obstacles to such practices than does the rest of Europe. Canada's and Britain's lesser reliance on undercover techniques (particularly against the powerful) contrasts even more strikingly with the widening American use of such tactics against all sectors of society, including against the government and the police, as depicted in one of Gary Marx's contributions, *When the Guards Guard Themselves: Undercover Tactics Turned Inward* (Fijnaut and Marx, eds, p 213).

Fijnaut and Marx's introduction to their volume makes it clear that the prevalence of undercover methods in the United States stands in stark contrast to the deeply ingrained distaste, even abhorrence, for such tactics in Western Europe. What worries Western European critics is not that these methods are foreign, but rather that they are all too familiar and rooted in only recently discredited practices. Europeans associate undercover agents with a long history of internal spying by state security services, who used "agents provocateurs" to infiltrate and radicalize dissident political movements, occasionally inciting acts of violence to discredit these movements (Fijnaut and Marx, eds, pp 3–10, 15, 32–33, 272). The term "agent provocateur" itself comes from France, which adopted the use of undercover tactics on a significant scale in the seventeenth century and perfected these techniques during the revolutionary terror, Napoleonic rule, and the subsequent ascendancy of centralized state power (Fijnaut and Marx, eds, pp 2–5, 29). Widely used and abused as a form of social control throughout the nineteenth century, undercover infiltrations have become associated as much with the suppression of political deviance as with the control of crime (Fijnaut and Marx, eds, pp 5–10, 15, 29, 142–43). At the end of the Second World War, Western European democracies nominally renounced undercover activity as a crime-fighting tool, while continuing to use such methods more freely in the service of national security (Fijnaut and Marx, eds, p 15).

The Fijnaut/Marx volume is largely organized by country, placing the plethora of approaches to undercover policing within their distinctive national contexts. The collection supplements these accounts with useful historical perspectives on the European origins of undercover police work and on more recent American efforts to reimport such tactics into Europe (Fijnaut and Marx, eds, pp 2–10, 15–16, 269–89). As Fijnaut and Marx emphasize in their introduction, much of the story

of Western Europe's response to American undercover methods is therefore a tale of reaction to the reimportation of a tactic that Europe had successfully exported to the United States (Fijnaut and Marx, eds, p 15). However, European concerns do not center only on the discredited history of these tactics, but also on the recognition that the methods that the DEA and U.S. Customs Service are reintroducing to Europe have been greatly transformed since they first crossed the Atlantic to America (Fijnaut and Marx, eds, pp 13–15, 269–71). These changes reflect not only innovations in the technology of surveillance, but also our unique experience with Prohibition, American organized crime, and the drug trade (Fijnaut and Marx, eds, pp 11, 15, 270–71, 274).

Among the countries surveyed, the great division in attitudes that emerges from this anthology is between the freer and more self-confident use of covert methods by those countries (namely the United States, France, and the former Soviet Union) that draw upon their own well-rooted traditions of undercover policing, and the more cautious approach of those countries that are reimporting a dormant and once-discredited tactic (or which, like Britain (Fijnaut and Marx, eds, pp 23, 177–78, 210–11) and Canada (Fijnaut and Marx, eds, pp 18–19), have a weaker domestic tradition of undercover policing). Louise Shelley's *Soviet Undercover Work* complements the accounts of French and American traditions with a cautionary depiction of the abuses of such methods in a system lacking a strong commitment to the rule of law and civil liberties (Fijnaut and Marx, eds, pp 155–74). Without countervailing protections for privacy or autonomy, and without aspiring to make the police accountable to the public, the unfettered pursuit of social control enabled the Soviet government to infiltrate all sectors of society with informants who not only aided in the enforcement of the criminal law but also "mold[ed] . . . society to the state ideology" (Fijnaut and Marx, eds, p 157). The commitment to that ideology faded with the end of the Soviet era. But the use of infiltration has not abated significantly, nor has there been much effort to make the police accountable for their tactics (Fijnaut and Marx, eds, pp 157, 170–73).

While the Fijnaut and Marx anthology includes one contribution about the special characteristics of transnational undercover investigations (Fijnaut and Marx, eds, pp 291–309), the anthology focuses more on differing national attitudes to domestic undercover policing than on transnational undercover operations in which several countries cooperate. By contrast, the den Boer volume is thematically organized around two central inquiries. First, how can undercover work become international without undercutting domestic efforts at control? Second, how should undercover policing be controlled domestically?

Like most of the contributors to the Fijnaut and Marx anthology, the den Boer presenters treat proactive, covert policing as more invasive and dangerous than traditional, reactive police work (den Boer, ed, pp 71–75). By contrast to such traditional methods, proactive probes target organized criminal activity, which may be ongoing and diverse. The goals of such infiltrations may be at once more diffuse and more complex, and may therefore require greater direction and control than the aims of more open and reactive detective work. Undercover agents intrude into private homes and private relationships. They may offer inducements that entice the unwary into committing crimes they might not otherwise have contemplated. Informants and undercover agents alike may become complicit in the offenses they investigate. Enmeshing themselves in the lives of their targets, offering criminal opportunities, and themselves subjected to temptation and the lure of easy money, undercover agents may pose a moral hazard to those around them and to themselves.

While taking note of American influence and of the increasingly transnational character of undercover investigations, the contributors to these volumes are reluctant to predict a convergence of national norms or regulatory approaches. Yet such a convergence of national approaches is clearly a goal for many of the presenters published in the den Boer collection, since it would improve international cooperation and accountability. This matters to the contributors, because the theme of the den Boer volume is how to control undercover investigations, both nationally and internationally. This concern echoes Peter Klerks's cautionary note in describing Dutch reliance on undercover methods (Fijnaut and Marx, eds, pp 103–40): "[I]f these most intrusive and precarious methods are not handled in a very prudent manner, and if the Dutch police fail to keep the spectre of corruption from the special teams and closed departments, then scandals and a subsequent reform process will be inevitable in the coming years" (Fijnaut and Marx, eds, p 136).

These worries proved prophetic. Den Boer's volume, published only two years after the Fijnaut and Marx anthology, starts with the aftermath of such a scandal.[4] A firestorm of protest erupted over disclosures that Dutch undercover squads allowed drugs to be imported into the Netherlands and released onto the street as a way of testing the accuracy of informants' information and perhaps of enhancing the standing of informants within the drug organization or rewarding informants for their cooperation (den Boer, ed, pp 17–18, 21, 49–50).

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[4] The scandal, which occurred in 1993, predated the publication of Klerks's article in the Fijnaut and Marx anthology, but its aftermath was the focus of the symposium that forms the basis of den Boer's volume.

Undercover methods came into further disrepute when it became public that the Dutch infiltration of narcotics networks had enmeshed investigators in the narcotics economy. Agents had used drug proceeds to pay large sums of money to informants and to purchase cars and radios for the police. These operations escaped oversight by Dutch prosecutors and went on virtually in seclusion (den Boer, ed, p 18). Until the scandal, the Dutch government had been among the most receptive in Europe to DEA undercover methods. Afterwards, the Dutch came to question their willingness to adopt American undercover tactics.[5]

The den Boer anthology is divided into two sections. The first section examines other Western European attempts to regulate undercover activity in an effort to identify viable mechanisms for making agents accountable to the executive and legislative branches of government. Should criminal investigations be subjected to centralized review? Should rules concerning permissible and impermissible tactics be developed through case law, enacted through legislation, or regulated through secret executive guidelines? Should electronic surveillance be subject to different controls than undercover infiltration? Should undercover methods require prior judicial authorization through something akin to a warrant requirement? Or do executive controls suffice to ensure compliance with legal requirements? The contributors generally agree on the need for centralized accountability mechanisms but would limit statutory regulation of covert methods to those methods, like electronic surveillance, that they view as the greatest threats to privacy; they distinguish between methods that infringe fundamental rights under the European Convention on Human Rights and those that do not (den Boer, ed, pp 22, 74, 85–86, 105). They also agree that regulation is necessary to ensure accountability for decisions about whether to allow the police to commit crimes to maintain their cover or about whether to make deals with cooperating criminals (Fijnaut and Marx, eds, pp 64–65, 152–53; den Boer, ed, pp 32–35, 44, 89).

The second section of the den Boer anthology addresses the difficulties of regulating undercover investigations that spill across national borders. These may start out as domestic or as multinational initiatives. Either way, they require special mechanisms of accountability and control. Domestically, reviewing courts must have access to information about undercover activities abroad. They must know how evidence was gathered before deciding whether to allow its use at

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[5] The scandal prompted a parliamentary inquiry into the best means of controlling undercover investigations (den Boer, ed, p 17). The commission of inquiry responded with sweeping proposals for change, which the den Boer contributors debated at the Dutch symposium where these papers were first presented (den Boer, ed, pp 4–5).

trial. At the operational level, investigators in one country may not understand the legal requirements that govern the use of certain methods abroad. Over and over again, the presenters advocate: (a) greater harmonization of criminal laws and criminal procedures across national borders; (b) international conventions on permissible undercover methods and uniform definitions of "organized crime"; (c) "tagging" shared computer data with indicators of their source and reliability; and (d) adjudication of permissible methods according to a uniform European law under the umbrella of the European Union (den Boer, ed, pp 118, 121–26, 138–41, 167–68, 181–82, 196–97). Inevitably, countries must balance the need for effective cooperation against national autonomy in the regulation of undercover methods. This tradeoff organizes many of the contributions about international undercover policing in both of the volumes under review and forms the topic of Part II of this essay.

II. THE COMPROMISES UNDERLYING UNDERCOVER POLICING

Perhaps the greatest contribution of these collections is that they suggest the legal, political, institutional, and policy tradeoffs behind covert policing.[6] Some of these tradeoffs involve choices between undercover methods and other law enforcement techniques. Others trade some limitation on the scope or nature of undercover activity for another interest, or one form of undercover activity for another.

A. Tradeoff: Deception versus Coercion

Conventional police methods could be characterized as "necessary evils" since they involve some use of the state's coercive power and therefore some infringement of liberty. (Searches, seizures, arrests, and interrogations all reduce liberty, property, or privacy in the name of some countervailing state interest.) Undercover methods differ from conventional techniques because they substitute one "necessary evil" (deception) for another "necessary evil" (coercion).

Limiting the use of deception (by preventing the police from posing as drug dealers, fences, and the like) may entail greater reliance on conventional tactics, and may therefore substitute coercion for stealth and pretense. Conversely, limiting the coercive powers of the police and their ability to conduct warrantless searches invites development of "proactive" alternatives, including undercover agents, informants, and electronic surveillance. Marx's work on undercover investigations in the United States suggests that much of the rise of American un-

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6 By covert policing I mean electronic and other secret surveillance, along with undercover infiltration.

dercover policing can be traced to heightened legal constraints on the state's use of coercive power (such as limitations on the interrogations of suspects and protection of the right to counsel).[7] Likewise, in his contribution to the essay collection *Abscam Ethics: Moral Issues and Deception in Law Enforcement*,[8] Sanford Levinson argues that "the real villain . . . might be the Fifth Amendment and the extent of its protection against compelled self-incrimination."[9] The Fifth Amendment invites the use of undercover tactics as a means of obtaining by deceptive stratagems prior to arrest what the police may not elicit by coercion afterwards.

There is a tradeoff, then, between some police methods decried as coercive and others derided as deceptive (Fijnaut and Marx, eds, pp 331–32). If the police may not question a suspect, they may postpone his arrest and obtain his confession by stealth (for example, by posing as a criminal confederate). If they may not search a residence, they may send an informant to gain admittance under the cover of friendship. Indeed, Levinson suggests that criticism of intrusive spying and the personal betrayals this entails is somewhat inconsistent with our legal system's willingness to countenance other intrusions into personal relationships, such as forcing friends and relatives to testify against each other under the subpoena power of the court.[10] In breaching the intimacy of personal relationships (through the infiltration of an undercover agent or informant), the police do no more than what the subpoena power already allows.

B. Tradeoff: Prevention versus Detection

The tradeoff between traditional police work and undercover tactics is also a choice between detecting crime after it has been committed and preventing crime before it occurs. Preventing crime may seem better than detecting it. But if the government's undercover operation tacitly encouraged the offense, the investigation may have created a crime rather than prevented it.

Helgi Gunnlaugsson and John F. Galliher's account of undercover operations in Iceland casts doubt on the preventive value of undercover drug investigations in a country with virtually no internal net-

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7 Gary T. Marx, *Undercover: Police Surveillance in America* 35, 49 (California 1988).

8 Sanford Levinson, *Under Cover: The Hidden Costs of Infiltration*, in Gerald M. Caplan, ed, *Abscam Ethics: Moral Issues and Deception in Law Enforcement* 43, 59 (Police Foundation 1983) (arguing that the Fifth Amendment's prohibition on "direct questioning" of the defendant if he "refuses to cooperate" forces police to seek evidence through undercover tactics and by seeking out informants).

9 Id at 59.

10 Id at 57 (asking how one can "consistently exhibit outrage against infiltrating private lives while at the same time supporting the compelled testimony of friends, lovers, family members, and colleagues whom they would otherwise wish to protect by remaining silent?").

work of drug crime (Fijnaut and Marx, eds, pp 235–47). One of the most "successful" undercover operations that they discuss involved an incarcerated defendant's reluctant offer to distribute cocaine in Iceland rather than sell it in Denmark, as he had originally planned. Giving voice to the authors' own skepticism about the value of this "preventive" infiltration (given that no crime would have occurred on Iceland's soil but for the informant's suggestion that the offender divert his shipment to Iceland), the head of Iceland's drug rehabilitation unit "dismissed the danger of this individual and the significance of the charges. . . . He said: 'I don't have the slightest idea of how 1.2 kilos of cocaine can be marketed [in Iceland]' because there [are] only 5–10 heavy users of cocaine diagnosed in the nation each year" (Fijnaut and Marx, eds, p 243). Likewise, Gary Marx's account of the Abscam corruption scandal in the United States (Fijnaut and Marx, eds, pp 224–25) casts doubt on whether congressmen who reluctantly yielded to an undercover agent's corrupt entreaties would have committed any comparable acts of corruption had the government not enticed and pushed them in that direction. Yet even when an investigation does not create the crimes being probed, the government must choose whether to prevent a crime or to allow it to go forward in the interest of strengthening a later prosecution or uncovering a criminal network (Fijnaut and Marx, eds, p 321).

C. Tradeoff: Privacy versus Autonomy (or Electronic Surveillance versus Infiltration)

Covert operations may require a choice between undercover infiltration and secret forms of surveillance, such as wiretaps or ambient microphones. Unlike electronic surveillance, which does not alter the target's environment, beliefs, and perceptions,[11] undercover operations may alter the target's criminal opportunities and incentive structure or manipulate his conduct, creating a risk that the investigation may encourage his criminal actions.[12] Unlike undercover investigations, electronic surveillance avoids the risk of affecting the conduct of the target, but at the cost of intruding more deeply into his personal affairs. The distinction between intruding on privacy and intruding on autonomy is the difference between observing the target's behavior in his most authentic, but also most private, moments versus observing behavior that may not be a genuine expression of his intentions if the undercover infiltration changes his plans. Accordingly, a legal system

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11 This assumes that the target is not aware of the surveillance.

12 The risk of altering behavior in the process of investigating it, a danger latent to some extent in all undercover infiltrations, becomes manifest when the target commits a crime because of the opportunities introduced by the undercover agent.

that permits covert tactics may use undercover infiltration as a substitute for electronic surveillance,[13] or may make greater use of electronic surveillance than undercover infiltration (which is riskier and harder to control).

Many of the differences in national approaches to undercover work result from choices between electronic surveillance and undercover infiltration. As we learn from Jean-Paul Brodeur, Canada conducts many fewer undercover investigations than the U.S. (Fijnaut and Marx, eds, pp 18, 76–77). But Canadian authorities authorize twenty times as many wiretaps as the U.S. government, for a population much smaller than our own (Fijnaut and Marx, eds, p 18). Indeed, most Western European countries discussed in these anthologies make it significantly easier to obtain authorization for electronic surveillance than we do (Fijnaut and Marx, eds, pp 286–87). Moreover, most of the countries surveyed limit undercover investigations to crimes that are serious enough to warrant the intrusiveness of covert infiltration and that may not be effectively investigated by less intrusive means (such as electronic surveillance). These are known as the principles of "proportionality" and "subsidiarity."[14]

This reverses our own norms. In the United States, undercover investigations need not be the last resort. In fact, they may be one of the first. On the other hand, we must satisfy our own principles of proportionality and subsidiarity to obtain authorization for electronic surveillance.[15] Before obtaining such authorization, the government must establish the seriousness of the offenses being investigated (which must be drawn from a list of offenses eligible for investigation through electronic surveillance).[16] The applicant must further show that the wiretap is necessary and that no less intrusive means will suffice.[17] The government typically makes this showing by adducing evidence gathered through undercover agents and informants.[18]

The use of undercover investigations thus may involve some decision whether to favor interpersonal deception over covert surveil-

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13 Electronic surveillance may supplement undercover infiltration, but will more likely be used in a more targeted and limited fashion when the police introduce an undercover agent than when they do not.

14 The Netherlands and Germany further impose some hurdle of reasonable suspicion as a prerequisite to the initiation of undercover investigations (den Boer, ed, p 104).

15 See 18 USC §§ 2516, 2518 (1994).

16 18 USC § 2516.

17 18 USC § 2518.

18 United States Department of Justice *U.S. Attorneys' Manual*, § 9-7.110, available online at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/> (visited Apr 9, 2002). Marx questions this ordering of investigative preferences: "If a case for indictment cannot be made before a grand jury, or before a judge for permission to search, wiretap or bug, is it appropriate to . . . [initiate an undercover investigation] for which there is no legal minimum threshold?" (Fijnaut and Marx, eds, p 229).

lance, as we do, or whether to mandate exactly the reverse. (Notice that this tradeoff is not inevitable. The Soviet Union placed no restriction on either form of covert policing (Fijnaut and Marx, eds, p 160), although Russia has established a nominal ban on unauthorized wiretaps.) The perceived need to balance these intrusions reflects the tensions between two of the values (privacy and autonomy) that covert operations may compromise. Ironically, by elevating privacy to a fundamental right (den Boer, ed, p 80), the European Convention on Human Rights lays the groundwork for reversing the European preference for electronic surveillance over undercover infiltration. Because electronic surveillance invades the target's privacy, the European Convention on Human Rights and some European constitutions (like Article 10 of the Dutch Constitution) require that invasions of privacy be authorized by formal legislation (den Boer, ed, pp 71–72). At the same time, the European Court of Human Rights views undercover policing as less intrusive into privacy, because the target knows that he is engaged in criminal conduct and "that consequently he [runs] the risk of encountering an undercover police officer whose task would in fact be to expose him" (den Boer, ed, p 81). It remains to be seen whether this will lead member states of the European Union to rethink their preference for electronic surveillance over undercover infiltration.

D. Tradeoff: Informants versus Undercover Agents

Undercover policing involves tradeoffs between reliance on trained undercover agents and the use of civilian informants. Marx notes that the greater distance between undercover agents and their targets ensures that investigations that rely on undercover agents will be more objective than those that use informants in the central undercover role (Fijnaut and Marx, eds, p 319). On the other hand, that distance makes it harder for agents to enter and understand the criminal milieu (Fijnaut and Marx, eds, p 319). How different countries strike the balance between professional and civilian infiltrators depends on a number of factors. To begin with, it varies with the degree to which police work has become professionalized. The increasing assignment of covert duties to highly specialized task forces often brings with it a reluctance to employ citizens as undercover operatives (Fijnaut and Marx, eds, p 149; den Boer, ed, p 11). This emphasis on using trained agents rather than citizen-informants becomes possible when governments use covert tactics "in a targeted fashion in response to intelligence . . . which suggests that a crime is occurring, [rather than] routinely using them absent specific suspicions" (Fijnaut and Marx, eds, p 220). As investigators' methods are subjected to tighter controls, the gap between the methods of police professionals and informants in-

evitably widens. It is much harder to detect the possibly unlawful inducements and pressures by which informants entice their targets than it is to monitor the performance of undercover agents. The greater emphasis on police accountability increases pressure on the police to reduce their reliance on informants. As Brodeur notes in criticizing Canada's use of informants, the police may be "licensing informers . . . to commit [more risky] crimes." The police also run the risk that the informants may turn against their handlers. (Fijnaut and Marx, eds, pp 89, 95). The secrecy surrounding civilian cooperators also shields informant handling and police misconduct from oversight (Fijnaut and Marx, eds, pp 93–94). For these reasons, the Dutch Commission of Inquiry recommended minimizing the use of informants as a way of ensuring greater control and accountability over undercover investigations as a whole (den Boer, ed, pp 22–23).[19]

Investigators prefer to use their own trained personnel because of a host of practical concerns. Even the best informant can turn out to be a double agent (Fijnaut and Marx, eds, p 260). Even if informants do not secretly retain their allegiance to the target (or some third party), their interests will typically diverge from those of the agencies that employ them (den Boer, ed, pp 15–16). The most useful informants are often those who are themselves most deeply implicated in the crimes being investigated (Fijnaut and Marx, eds, p 320). The more an investigation relies on informants, the more willing it must be to reward them either financially, or through favorable plea bargains, or simply by ignoring or even facilitating their criminal activities as a cost of apprehending the targets. Accordingly, the chairman of the Dutch parliamentary inquiry into undercover investigations recommended that "crimes committed by confidential informants with the knowledge of police and judges should not be allowed" (den Boer, ed, p 22).[20]

Despite concerns about accountability and control, there are powerful reasons for continuing to use informants. Some types of investigations, such as those into money laundering and other financial crimes, might be difficult to conduct without "civilian" aid. In calling for greater British use of undercover tactics to investigate money laundering, Michael Levi advocates reliance on bank employees as "undercover assistants," provided that the investigators "regulat[e] the

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19 "[I]n too many cases it has become unclear whether . . . the police runs [sic] the criminal informer or whether the criminal informer runs the police. . . . This brought the Inquiry Commission to the conclusion that the State has been taken hostage" (den Boer, ed, p 21).

20 For example, "a truckdriver from a criminal organization willing to act as an informer who declares that he is driving the truck for a criminal organization and that he will do it again next week [should] not be allowed to do so. . . . [He should not be allowed] to commit a new series of criminal activities under police supervision" (den Boer, ed, p 22).

extent to which [the bank employees] are allowed to encourage people to engage in unlawful acts" (den Boer, ed, p 158). And despite the risks of using informants, investigators may prefer to use them precisely because "informants are generally freer than law enforcement agents to stretch some of the guidelines defining appropriate [law enforcement] behavior in the service of the law" (Fijnaut and Marx, eds, p 283).

Informant use may depend on the state's willingness to guarantee secrecy. Many European countries that consistently use informants make it difficult for defendants to discover not only the identities of these cooperators but whether the investigation even involved an informant (Fijnaut and Marx, eds, pp 149–50). This is also true of the United States. The existence and identities of cooperating persons need to be disclosed only if they are expected to testify or if they took direct part in the criminal activity.[21] In Britain, on the other hand, where liberal disclosure rules make informants' identity more readily discoverable, critics fear that civilian cooperators will become unwilling to supply information to the police (Fijnaut and Marx, eds, p 210).

Finally, informant use depends on the legal system's willingness to tolerate deals with cooperating criminals. Such deals may be open or secret. The Netherlands, where the parliamentary commission of inquiry severely criticized the practice of granting favorable plea bargains to crown witnesses (den Boer, ed, pp 22–23), may follow Denmark in outlawing the use of informants as undercover operatives (den Boer, ed, p 277). It is not clear, though, to what extent such a prohibition will simply force the use of such informants underground. Countries that have authorized plea bargains with informants may simply have formalized and regulated secret agreements between the informants and the police—making it possible to secure at least some punishment for an offender who might simply receive full immunity absent the intermediate possibility of a negotiated term.

Some of the national differences in the use of informers are hard to assess, because few countries regulate them (den Boer, ed, p 12). Even where regulations exist, legal restrictions may only apply to one category of cooperating persons, but leave unofficial helpers virtually unregulated. Canada, for example, distinguishes "delators," or crown witnesses who are granted reduced sentences and financial benefits to testify, from informants who work undercover and may be granted complete immunity from prosecution (Fijnaut and Marx, eds, p 80). Italy, similarly, regulates so-called "pentiti,"[22] which are roughly the

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[21] Identifying information must also be provided if it tends to exculpate the defendant or impeach a government witness.

[22] Recent Italian legislation regulating informants, namely, the "Modifica della disciplina

equivalent of Canadian "delators." This term does not apply to those informants who have not yet been formally arrested. Consequently, these unregulated helpers may assist the police in undercover activity despite the outright ban that Italian law places on pentiti. And although civilians are prohibited from participating in criminal activity in an undercover capacity, they may nonetheless play an important but less visible role in supplying information to undercover agents, arranging introductions, and otherwise influencing the investigation or the underlying offenses in ways that are difficult for anyone but their handlers to monitor and control.

Despite these obstacles to understanding the use of informants, two disparate traditions emerge from the contributions to these anthologies. Marx contrasts a democratic informant culture in societies with some history of citizen responsibility for community policing and a tradition of decentralized government with a rival informant culture in countries with authoritarian governments (Fijnaut and Marx, eds, p 328). In the former societies, which include the United States, the Netherlands, Belgium, and Britain, law enforcement agencies make some use of citizen hotlines (Fijnaut and Marx, eds, pp 23, 189) as a source of information, while increasingly substituting undercover agents for informants in any direct operational capacity (Fijnaut and Marx, eds, pp 149, 210; den Boer, ed, pp 22–23). The increasing fungibility and anonymity of the actors in many criminal transactions (particularly drug and money laundering offenses) abets this development by facilitating the introduction of undercover agents who have no close personal relationships with the targets.

By contrast, the articles describing the use of undercover investigations in France, the Soviet Union, and its successor states depict a very different informant culture. This culture obtains not only in authoritarian regimes, but also, more generally, in countries with a strong central government. What characterizes this second informant culture is its reliance on a pervasive network of citizen spies. In France, the term "informant" must be understood to include political parties and trade unions, which consent to be interviewed by the French police several times a year. The term also encompasses "noteworthies of the community" (Fijnaut and Marx, eds, p 43) and concierges, who have traditionally maintained a close relationship with the police, providing information about the comings and goings of residents (Fijnaut and Marx, eds, p 327). In the Soviet Union, analogous informants included so-called "trusted persons" not directly employed by the militia or state security services, such as "enterprise

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della protezione dipentiti," is available online at <http://www.unibo.it/crimen/> (visited Apr 9, 2002).

managers . . . telegraph operators, [and] academics . . . report[ing] popular feeling in professional circles," as well as "observers, consultants, agents of influence and residents . . . [who reported] on the popular mood and opinions of specific personnel" (Fijnaut and Marx, eds, p 168). Many informants were simply citizens whose job responsibilities were defined to include cooperation with the police and state security services, including workplace personnel departments, building commandants, doormen, and watchmen (Fijnaut and Marx, eds, p 162).[23]

This tradition of implicating the citizenry as informants has its counterpart in an increasing willingness, both in France and in the Soviet Union and its successor states, to employ undercover agents in ways that target the workplace, personal relationships, and political organizations in addition to criminal networks.[24] France used undercover agents of the security services to infiltrate demonstrations and then provoke violence and destroy property (Fijnaut and Marx, eds, pp 32–33). These agents also spied on opposition political parties and infiltrated unions and workplaces in order to monitor the potential for unrest, forestall the occupation of factory floors, or call in the riot police in anticipation of protests (Fijnaut and Marx, eds, p 34). In the Soviet Union and post-Soviet Russia, security personnel worked undercover to monitor political beliefs, workplace mores, and social relationships in virtually all sectors of society (Fijnaut and Marx, eds, p 167).

The French, Soviet, and post-Soviet intelligence agencies are hardly unique in their use of undercover tactics for political ends. Nonetheless, the Montjardet and Levy article about France (Fijnaut and Marx, eds, pp 29–53), like the Shelley article about Soviet and post-Soviet Russia (Fijnaut and Marx, eds, pp 155–74), suggests a possible contrast between the first kind of informant culture and the second. In the first, a growing central state asserts its authority against the older, decentralized tradition of community policing by concentrating the use of deceptive stratagems and undercover powers in a specialized professional cadre. In such a setting, the use of informants circumvents legal and administrative constraints on official undercover activity. By contrast, the second informant culture may be associated with an already self-confident central state, where the clear

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23 The network's pervasiveness can be inferred from the passage of Russian legislation in 1992, newly prohibiting the police from recruiting "legislators, prosecutors, defense attorneys, judges, [and] priests," while allowing these services to continue to recruit doctors and journalists, who were traditionally considered "arms of the state" (Fijnaut and Marx, eds, p 171).

24 Unlike their French counterparts, Soviet and post-Soviet informants not only supplied intelligence but also conducted surveillance, redirected behavior through various forms of social control, and participated in undercover operations by "posing as electrical employees or utility personnel to enter apartments and elicit information from neighbors" (Fijnaut and Marx, eds, p 163).

separation of police from community may be taken for granted. In such a setting, the pervasive use of informants in the same realms where undercover agents operate suggests that informants do not substitute for agents so much as lay the groundwork for their more effective deployment.

E. Tradeoff: Intelligence Gathering versus Collecting Evidence for Criminal Enforcement

In all countries surveyed in the den Boer anthology as well as the Fijnaut and Marx volume, the criminal enforcement agencies are not the only organizations performing undercover operations. There are the shadowy state security services. And there are private security agencies, who have traditionally performed covert functions (such as the Pinkerton agents who played such a large role in the suppression of American labor movements) (Fijnaut and Marx, eds, p 11). In authorizing undercover operations for the police, governments draw on practices that have long antecedents in security and counterespionage work as well as in private policing, even when such powers are new as a weapon against crime. Governments must make two significant jurisdictional decisions about how to allocate and control covert operations: first, how to demarcate the powers of police officials from those of the intelligence services; and second, whether to license undercover work by private or semiprivate entities.

Like the United States, most of the countries surveyed grant significant covert powers to their state security services, often through separate laws that make it easier for state security services than for criminal investigators to obtain warrants for electronic surveillance.[25] Statutes governing undercover work by criminal investigators sometimes limit permissible objectives to the gathering of evidence (Fijnaut and Marx, eds, p 256; den Boer, ed, pp 103–04, 107). By contrast, the covert operations of state security investigations may be more open-ended. They may gather intelligence without expecting to use that information as evidence in a criminal prosecution (Fijnaut and Marx, eds, p 256).[26] In addition to the powers they grant to their intelligence branches, some countries also permit covert operations to be performed by private or semiprivate security agencies. Examples include

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[25] (Fijnaut and Marx, eds, p 257) (Sweden); (Fijnaut and Marx, eds, p 48 n 26) (stating that nonjudicial French warrants are available only for the promotion of national security, "the protection of national economic and scientific interests," or the investigation of terrorism and organized crime, not for ordinary criminal violations); (Fijnaut and Marx, eds, p 287) (stating that throughout Europe, "[t]he broad exception to all restrictions on electronic surveillance is national security").

[26] In Sweden, for example, national security concerns are often invoked to justify unrelated investigations peripheral to an agency's ostensible concerns (Fijnaut and Marx, eds, p 254).

Canada's Hydro-Québec, which has a mandate to infiltrate aboriginal saboteurs of hydroelectric projects (Fijnaut and Marx, eds, p 75); Britain's semiprivate Post Office Investigation Department (Fijnaut and Marx, eds, p 204), which uses covert tactics to observe the activities of British postal workers; and France's past reliance on private companies to install judicial wiretaps (Fijnaut and Marx, eds, p 48 n 26).

Whether private or public, these parallel undercover organizations create a dilemma for governments seeking to make covert tactics available to criminal investigators. If the state imposes greater restrictions on the police than on private or state security agencies, the police may invoke the aid of these parallel agencies to evade such constraints. This temptation becomes more acute in countries, such as Germany, that allow evidence to be used in criminal prosecutions even when that evidence has been gathered by state security services using tactics forbidden to the police (den Boer, ed, p 31). State security agencies and private organizations "carry out tasks that government agencies are unable or unwilling to undertake" (Fijnaut and Marx, eds, p 305). Such initiatives "spring up as a result of constraints on government bodies that are perceived as unreasonable" (Fijnaut and Marx, eds, p 305).

Even when the state security branches are subjected to the same constraints as the police, their violations of legal norms for the conduct of investigations may escape detection. The activities of state security services may not result in criminal prosecutions and may therefore not be subject to judicial oversight. In Sweden, Tollborg notes, ambient surveillance is a criminal offense for police and security services alike. Nonetheless, the security police make extensive use of ambient bugs (Fijnaut and Marx, eds, pp 260–61) because of a legal loophole that permits the importation and possession of such devices, which the security police routinely obtain for "educational purposes" (Fijnaut and Marx, eds, pp 260–61).

The confluence of undercover tactics available to the police and the intelligence branches may also lead to a blurring of the distinction between political and criminal policing. Most countries surveyed developed their operational expertise in the state security agency's investigation of political dissidence and terrorism before exporting those tactics to the police (Fijnaut and Marx, eds, pp 4–6, 142–43, 273). Criminal enforcement agencies gradually shift from gathering evidence to gathering intelligence as infiltration becomes an end in itself. As criminal investigators adopt undercover tactics, Marx observes, the police and the state security services become more alike (Fijnaut and Marx, eds, p 336).

But while criminal policing acquires more of the covert powers hitherto reserved to the state security services, the activities of the

state security services remain subject to fewer legal constraints and less accountable for transgressing those that apply to them. The greater leeway given to the intelligence branches enables governments to shelter illicit practices from judicial oversight by shifting such practices to the state security services. The tolerated illegalities in turn provide a continual impetus to legalize tacitly accepted practices. Montjardet and Levy illuminate the process by which France gradually legalized administrative wiretaps (Fijnaut and Marx, eds, pp 47–48). Though illegal, these were officially accepted and even regulated through an authorization procedure controlled directly by the prime minister (Fijnaut and Marx, eds, p 47). Like the practice of creating false passports for undercover operatives, the administrative wiretaps went from being illegal and unregulated to being illegal and administered through a highly centralized procedure (Fijnaut and Marx, eds, p 48). Eventually they were legalized and controlled after a scandal that erupted when the wiretaps became public (Fijnaut and Marx, eds, p 48).[27]

F. Tradeoffs: Protecting Society by Creating Specialized Units versus Protecting Society from the Abuse of Power by Such Units

While covert tactics have come to pervade policing in the United States, the Western European democracies have largely confined these powers to highly specialized forces (within state security agencies and regular police alike). Undercover operatives often work in secrecy and isolation from the mainstream of criminal enforcement. The Netherlands, for example, formed interregional serious crime teams to operate in isolation from the rest of the force (Fijnaut and Marx, eds, p 103 n 1). Gradually shifting their emphasis from evidence gathering to intelligence acquisition, they came to merge many of the functions of criminal policing and national security (Fijnaut and Marx, eds, p 104). In so doing they successfully avoided the "traditional controls of ... police management and the judiciary" on the one hand and "the oversight apparatus that monitors security and intelligence services" on the other (Fijnaut and Marx, eds, p 104). Germany created specialized undercover units to investigate organized crime, drug trafficking, terrorism, and political crime (Fijnaut and Marx, eds, pp 60–62). These

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[27] The illegal practice of keeping records on private citizens went through a process of development similar to that of wiretaps. At first, a limited version of record keeping was legalized while other practices remained illegal. Later, investigators chafing under the remaining constraints on data gathering provided a new impetus to expand the practice beyond legal boundaries and then to ratify that expansion (Fijnaut and Marx, eds, pp 47–48). Tollborg gives a similar account of the push to legalize illegal wiretaps and video surveillance in Sweden, which the intelligence community freely deployed, despite the official ban on their use, until new legislation was proposed to legitimate the practice (Fijnaut and Marx, eds, p 261).

tasks were separated from routine police work. Germany segregated the specialized units from regular police units and provided them with their own computer networks, which were inaccessible to the rest of the criminal investigation department.[28]

Belgium and France also sought to control undercover investigations by concentrating these activities in specialized units. France tried to limit the power of some of these specialized forces by withholding from them many of the routine coercive powers of the uniformed police. In Montjardet and Levy's account of French policing, the Renseignements Généraux, a branch of the political police, is entrusted with a "battery" of undercover capabilities, but may not stop or interrogate suspects, conduct searches, or employ other conventional tactics (Fijnaut and Marx, eds, pp 34–37). Instead, they must pass their information to the judicial police (charged with enforcement of the criminal laws) and leave the follow-up to them (Fijnaut and Marx, eds, pp 34–35). Conversely, the Gendarmerie Nationale (whose mission is the maintenance of public safety and the enforcement of the criminal laws) must act openly and in uniform and may generally not dissimulate their activities or take on secret missions (Fijnaut and Marx, eds, pp 42–43). The Customs Service may infiltrate drug trafficking networks, create storefront money laundering operations, and open bank accounts for drug traffickers, but with the official aim of compelling compliance with administrative regulations, rather than for purposes of criminal prosecution (Fijnaut and Marx, eds, pp 44–45). The Judicial Police, which is the primary body charged with the investigation of criminal offenses, must comply with the Code of Criminal Procedure and has more restricted undercover capabilities, which are subject to judicial oversight and to the threat that illegally gathered evidence will be excluded (Fijnaut and Marx, eds, pp 38–40).

If countries form specialized units to prevent the diffusion of tainted practices, the creation of such units may itself generate expansions or abuses of covert powers. Prohibiting the Gendarmerie Nationale from conducting undercover operations may be designed to control the dissemination of undercover power and the associated risks of abuse. The restrictions on the Customs Service and the Renseignements Généraux may be designed to avoid too great a concentration of power in any one agency. And the constraints on the undercover activities of the Judicial Police may be designed to ensure a divide between the undercover capacities of those who are charged with

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[28] These special units were also given the authority to order regular officers to abandon certain investigations and to collect information from patrol officers without sharing their own intelligence (Fijnaut and Marx, eds, p 61). They alone were authorized to delay arrests in order to infiltrate a criminal network and detect higher level offenders. They alone were allowed to create false documents and to assume an undercover identity (Fijnaut and Marx, eds, pp 60–62).

enforcement of the criminal laws and those who protect the national security. As a practical matter, however, Montjardet and Levy point out that these jurisdictional divisions have not done much to stem the abuse of undercover operations or unofficial expansions of their official powers, at least in those branches not subject to judicial oversight and the discipline of the exclusionary rule. Unable to interrogate, search, or arrest, the Renseignements Généraux use intelligence they collect to intimidate politicians (Fijnaut and Marx, eds, pp 35–36). Though officially prohibited from going undercover, officers of the Gendarmerie Nationale receive special exemptions to wear civilian clothing and infiltrate terrorist networks (Fijnaut and Marx, eds, pp 43, 47). And the Customs Service is demanding that its agents be made part of the Judicial Police, which will make it possible for them to prosecute their targets (Fijnaut and Marx, eds, p 45).

G. Tradeoff: Embracing Undercover Policing versus Preserving a Sense of Its Ethical Ambiguity

Separating covert operations from regular police work reinforces the tendency of most of the surveyed countries (with the exception of the United States) to reserve undercover investigations for restricted categories of crime. The decision to adopt but circumscribe undercover tactics rests, first, on a fear of tainting undercover agents with complicity in the crimes they investigate, and second, on a preference for deploying intrusive techniques against marginal sectors of society. Both of these concerns are largely foreign to the United States. In adopting undercover tactics, European countries seek a clear demarcation, first, between "real" criminal conduct and acts which would be criminal if not performed undercover, and second, between the targeted (marginal) milieu and the mainstream of society.

1. Protecting agents from the taint of complicity when they commit crimes in their undercover capacity.

European concerns about police complicity are puzzling to American observers. In the United States, but almost nowhere else, entrapment is a defense wholly relieving the defendant from liability. Most Western European legal systems instead treat entrapment as a mode of complicity that fails to excuse the target but implicates the investigator in the crime. Defining entrapment subjectively rather than objectively (Fijnaut and Marx, eds, pp 275–76), the American test largely focuses on the offender's predisposition. Even powerful inducements will fall short of entrapment if the offender is predisposed to commit the crime. By contrast, the offender's predispositions are less important to European legal systems that focus on the undercover

agent's complicity (Fijnaut and Marx, eds, pp 196–99). Suppose an agent offered a suspect too tempting an opportunity to commit a crime—securing, for instance, essential resources such as hard-to-get ingredients for a bomb or criminal contacts that the offender would not have been likely to locate on his own. If so, the agent may be complicit in the attempted crime, despite the target's subjective willingness to commit it (Fijnaut and Marx, eds, p 197). Even if the investigator has not entrapped the target, he may himself have engaged in illegal conduct by handling contraband, transferring funds, or using false documents. European legal systems treat such conduct as criminal (Fijnaut and Marx, eds, pp 276–77) unless a law expressly exempts the investigator from liability for specified acts.[29] Many of the contributors to these volumes contend that the continuing risks of agents being charged with criminal offenses for what they do undercover creates an urgent need for legislation that clarifies not only what target crimes the investigators may participate in undercover but also what incidental crimes undercover agents may commit to maintain their cover (Fijnaut and Marx, eds, pp 64–65, 152–53; den Boer, ed, pp 32–34, 89). These critics decry the present need for ad hoc legal justifications, such as "supra-legal emergencies" and a modified necessity defense, to relieve agents from potential liability (Fijnaut and Marx, eds, pp 332, 283).[30]

Agents incur a risk of criminal liability not only by participating in crimes undercover, but also by postponing the arrest of targets until the conclusion of the covert investigation. European police forces also "have less formal discretion with respect to whether to report an offense and to arrest" than their American counterparts (Fijnaut and Marx, eds, pp 332, 283).[31] Accordingly, the investigators' failure to arrest the target as soon as the target's involvement in criminal activity becomes apparent may itself expose the investigators to sanctions. If a country lacks prosecutorial discretion and requires prosecution of all apparent offenses committed by police officials and civilians alike, un-

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29 Thus, a British storefront fencing ring that operated undercover to purchase stolen property came under criticism for complicity in theft. Its activities were ultimately vindicated because the offenses had already been committed when the goods were offered to the agents for sale and because the targets self-selected themselves by bringing their goods for sale without prior solicitation (Fijnaut and Marx, eds, pp 197–98). Germany is notable for having gone farther than many other European countries in creating legal exemptions for undercover investigators, who may now construct false identities and use false documents to perpetuate their cover, though only for "crime[s] of significant proportions" (den Boer, ed, p 32). Austria is following suit (den Boer, ed, p 32–33).

30 Contrast Sweden, which still prohibits false identities and fictitious companies (den Boer, ed, pp 179–80).

31 In France, the judiciary police arrested French customs agents for engaging in undercover activities that only police officers are currently authorized to conduct (den Boer, ed, pp 152–53).

dercover operatives may face a very real danger of punishment unless they confine their activities within legislatively defined bounds (Fijnaut and Marx, eds, p 332).[32] In Britain, these risks were heightened by the residual right of private prosecution, which theoretically permitted victims of entrapment to prosecute investigators as accomplices (Fijnaut and Marx, eds, p 197).[33]

Legal constraints comparable to the duty to arrest without delay also operate on the undercover support team. Surveillance officers who monitor undercover activities may be required by law to seize illicit drugs immediately upon identifying them, or to ensure that all imported goods are properly declared at customs, or to arrest offenders immediately (Fijnaut and Marx, eds, p 284), instead of allowing them to operate unimpeded until higher-level offenders can be identified. These interpose significant obstacles to "controlled deliveries," (again, a U.S. export), by which investigators covertly shepherded intercepted drug shipments to their ultimate destinations and arrested its recipients (Fijnaut and Marx, eds, p 284). The legal obligation to seize a shipment immediately upon detecting it and to ensure that its contents were declared whenever it crossed a national boundary made such operations virtually impossible (or at least illegal) until the Schengen Convention obligated its European signatories to facilitate controlled deliveries (Fijnaut and Marx, eds, p 285; den Boer, ed, pp 168–69, 188).[34]

Undercover criminal investigations returned to Europe in the 1970s, first as a tactic against terrorism and drug trafficking, then against organized crime more broadly construed (Fijnaut and Marx, eds, pp 15, 279–81). Lacking legal protections for their undercover techniques, operatives adapted their methods to the prevailing twilight of legitimacy, frequently shielding their activities with a secrecy that was designed to insulate them from the risks of judicial oversight (Fijnaut and Marx, eds, pp 278, 282). Because the Europeans generally rejected the American notion that criminal acts "are justifiable and not criminal when done by a government agent in the reasonable exercise of law enforcement power," the police were legally prohibited from even "go[ing] through the motions of a criminal act" (Fijnaut and Marx, eds, pp 148, 276, 288, 332). They "could not pretend to take or

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32 The Netherlands is an exception to the general principle of compulsory prosecution (den Boer, ed, p 82).

33 No crime of entrapment exists in Britain, though one has been proposed (Fijnaut and Marx, eds, p 197).

34 The Schengen Convention establishes the legal underpinnings of national uniformity and mutual assistance in transborder policing operations that involve controlled deliveries, because it requires the signatories to pass domestic legislation that allows drug shipments to pass through their countries to their ultimate destination. Unfortunately, the Convention does not regulate undercover policing generally (den Boer, ed, pp 168–69, 188).

offer a bribe in order to catch a corrupt politician[35]. . . [nor] play the role of a fence . . . [nor] assume the guise of a drug trafficker" (Fijnaut and Marx, eds, p 276). Any such actions made the investigator (including informants) "as guilty as any criminal performing the same act for real" (Fijnaut and Marx, eds, p 276). According to the law on the books, the undercover buyer of drugs was as guilty as the seller (Fijnaut and Marx, eds, p 276). Struggling to overcome "the tendency of most Europeans to regard all undercover operations as an unacceptable form of entrapment" (Fijnaut and Marx, eds, p 276), American DEA agents stationed in Europe helped to gain acceptance for undercover methods by going undercover themselves. Often this involved charades. The undercover agent might meet with a dealer to buy drugs, show the dealer a flashroll of cash, and then run away without the drugs as the Spanish, French, Dutch, or Belgian police arrived to make the arrest (Fijnaut and Marx, eds, pp 148, 277). The agent thereby avoids completing a criminal transaction that would have exposed him to sanctions, while allowing local police officials to arrest the perpetrator. In the ensuing criminal case, police officials and prosecutors operated with both an official case file and an unofficial case file in order to avoid disclosing the undercover status of the "fugitive" (Fijnaut and Marx, eds, pp 113, 148, 278, 280). Dutch and Belgian judges frequently issued arrest warrants for the missing "accomplice," though usually in the name of his alias (Fijnaut and Marx, eds, pp 148, 278).

Gaining acceptance for American undercover tactics required taming them. Nadelmann's account, *The DEA in Europe*, describes the lengthy process by which the DEA eventually persuaded Germany, Austria, Belgium, and the Netherlands to legitimate undercover "buy-busts"; to permit illicit deals to be completed and, if necessary, arrests to be delayed; and finally to authorize domestic police agencies to act undercover themselves (Fijnaut and Marx, eds, pp 269–89).[36] But in accepting such tactics, European governments also set limits on permitted undercover activities. In this way, the development of European undercover policing diverges most sharply from the relatively freewheeling American methods.[37] Now that the buy-bust has been le-

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35 Bribery is a clear example of the difference between the European and American approaches to police complicity. Marx describes a public corruption investigation that went badly awry. An FBI informant offered a bribe to the superintendent of police, who pretended to be interested, then rejected the bribe and arrested the informant. The superintendent sought to have the FBI agents involved arrested for bribery. In the United States, neither the superintendent nor the FBI agents were guilty of any crime. In most European legal systems they all would be guilty of bribery (Fijnaut and Marx, eds, p 230).

36 Nadelmann notes that such transactions remain deeply problematic in Southern Europe, particularly France and Spain (Fijnaut and Marx, eds, p 280).

37 When American investigators discover an opportunity to conduct the functional equiva-

galized in Europe, it is also being regulated, so that the undercover "agent may properly be introduced into a situation in which a drug transaction is going to take place anyway, but he may not create the situation" (Fijnaut and Marx, eds, p 283).[38] Nadelmann also notes a "persistent resistance to the [ ] 'buy and bust'" as provocation (Fijnaut and Marx, eds, p 283).[39] The common U.S. practice known as the "reverse buy" (or sale) of drugs, whereby the undercover agent offers to sell narcotics to the dealer, remains illegal in most of Europe (Fijnaut and Marx, eds, p 283).[40] And many European legal systems prohibit "deep cover" operations (Fijnaut and Marx, eds, pp 149, 283).[41] These involve long-term infiltrations that heighten the risk that an undercover operative will be required to commit criminal acts or otherwise be corrupted.[42] Likewise, in legalizing controlled deliveries, European governments subject them to supervision by prosecutors, who can "require the police to guarantee that they will not lose the drugs once they walk," and "insist upon an assurance that the courier will be prosecuted in the destination country" (Fijnaut and Marx, eds, p 285).[43] By circumscribing the newly legalized tactics in this way, European governments sought to preserve some sense of the ethical ambiguity of such practices and to avoid the taint of complicity in the targeted crimes.

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lent of a buy-bust with contraband other than drugs, American prosecutors and investigators can rely on the functional equivalence of the operation to ensure its legality.

38 In the United States, "creating the situation" does not necessarily involve entrapment, as that term is defined by American jurisprudence. Asking a known dealer to sell some quantity of cocaine that the seller has yet to acquire need not involve any extraordinary inducement, nor does it target someone who would not otherwise be disposed to engage in such a transaction; but it does *create* the situation, by initiating a transaction which would not otherwise have occurred, even if the dealer routinely conducts similar transactions with other buyers.

39 Belgian regulations provide that the deal must be offered to a third party who notifies the police and that it must be clear that the transaction would occur even without the police. They also provide that "the police should be offered enough freedom of movement so that any criminal activity may be stopped during the operation," which would preclude the routine American practice of conducting multiple buys of increasing size before arresting the dealer (Fijnaut and Marx, eds, pp 147–48).

40 The point of this operation is to seize the purchaser's money and arrest him for attempting to purchase narcotics. Even in the U.S., internal law enforcement guidelines prohibit agents from releasing the drugs into the market, though they may show the drugs to the buyer.

41 These limitations on newly legalized practices are counteracted only by the increasing pressure from criminal investigators to investigate new and broadly defined areas of organized crime. As European agencies develop new undercover methods to deal with other domains of criminality, their activities may eventually undergo the same process of reutilization and constraint that has tamed law enforcement practices in the investigation of narcotics offenses.

42 "The struggle [against organized crime] necessarily places policing very close to the daily work of spies and criminals themselves" (den Boer, ed, p 88).

43 Prosecutors may prefer that the courier be "flipped" before delivering the shipment, "that the drugs be discreetly seized and that only a small portion of drugs combined with some innocuous white powder be substituted for the original package" (Fijnaut and Marx, eds, p 285).

2. Avoiding social taint: demarcating the target by limiting undercover policing to marginal milieus.

European countries steer undercover investigators' activities to safely marginal milieus, including the haunts of soccer hooligans in Britain (Fijnaut and Marx, eds, pp 175–91), Kurdish expatriates in Sweden (Fijnaut and Marx, eds, p 257), and drug trafficking networks everywhere. Gary Armstrong and Dick Hobbs's account of the British experience with the undercover investigation of soccer hooliganism (Fijnaut and Marx, eds, pp 175–93) characterizes the deployment of undercover agents among soccer hooligans as an effort "to promote and extend both the tactics and ideology of a pervasive and intrusive surveillance culture" (Fijnaut and Marx, eds, p 175). Armstrong and Hobbs contend that the police shrewdly exploited the moral panic surrounding publicized incidents of violence by British soccer fans to garner legitimacy for the systematic use of surveillance technology (often financed by interested pressure groups) and the deployment of infiltrators and provocateurs in a context not likely to arouse public condemnation (Fijnaut and Marx, eds, pp 190–91). They argue that the undercover tactics, including profiles of people "known to keep the company" of targeted individuals, would have garnered far less support if used against groups such as labor unions (Fijnaut and Marx, eds, pp 176, 185, 191).

Sweden provides another example of covert powers specially designed to target only a marginal milieu. Dennis Tollborg shows that Swedish law authorizes far more intrusive covert tactics against socially marginal people, particularly "immigrant groups and shadowy political groups with low social legitimacy" (Fijnaut and Marx, eds, pp 256–58, 266) than against coteries of military officers, politicians, and policemen whose crimes have particularly serious consequences (Fijnaut and Marx, eds, p 266). Tollborg also points out that the Swedish Terrorism Act provides the police with virtual carte blanche in wiretapping deportable and incarcerated aliens, while placing significant limitation on the application of similar measures against citizens (Fijnaut and Marx, eds, pp 256–58).

Why are the socially marginal treated differently than powerful groups? Tollborg suggests that Swedish police fear using undercover methods against the elite, because "[t]he price of failure for the investigators in such cases is so high that it is not worth the risk" (Fijnaut and Marx, eds, p 266). In their account of international undercover policing, Nikos Passas and Richard Groskin suggest that undercover work may be harder "when the targets . . . can manipulate political power elites" (Fijnaut and Marx, eds, p 305). Marx offers another explanation. Europeans focus on immigrants, foreigners, and on targets

not well integrated into the community because the governments possess significant overt coercive powers in dealing with citizens (Fijnaut and Marx, eds, pp 331–32). These methods include compulsory registration and the requirement that all citizens carry identification at all times (Fijnaut and Marx, eds, p 332). There is less perceived need to apply the new surveillance tactics to the mainstream.

In many respects, the United States has followed a different path than Europe. Undercover investigations are unhampered by concerns about agent complicity or constraints on whom investigators may target. Americans treat the entrapment defense as a sufficient legal constraint on undercover conduct. Prosecutorial discretion ensures that criminal liability remains confined to those undercover agents who shift their loyalties to the law breakers or who pursue their own illegal objectives (such as theft or extortion). Turf issues aside, American investigators are subject to no comparable subject matter constraints on the sorts of crimes they may investigate or the types of milieus they may infiltrate. Assisted by the breadth of legal concepts such as the "racketeering enterprise," which includes licit and illicit organizations alike, American investigators target more than the criminal activities of "lower status and marginal groups" (Fijnaut and Marx, eds, p 13). American agencies routinely investigate white collar crime, frequently focusing on mainstream and elite institutions like the financial trade and health care industries, and even government itself (Fijnaut and Marx, eds, pp 13, 213). Because American agencies face fewer constraints than European agencies, they can pursue freewheeling and unfocused investigations. Consider Abscam, in which members of Congress were persuaded to accept bribes from an "Arab sheikh" (who was in fact an undercover FBI agent) (Fijnaut and Marx, eds, p 224). Quoting a U.S. senate report, Marx describes Abscam as "'unlimited in geographic scope, persons to be investigated, [and] criminal activity to be investigated'" (Fijnaut and Marx, eds, p 224).[44] The FBI did not initiate Abscam in response to any allegations about particular individuals or known offenses (Fijnaut and Marx, eds, p 224). While critics decried what they viewed as entrapment, no undercover agent was prosecuted for complicity in the crimes, which the critics branded an artifact of the investigation.

If the systematic targeting of marginal milieus diminishes accountability, Marx's account of American use of covert tactics against mainstream violators suggests that the wider use of such techniques is also fraught with peril.[45] The risks of misuse and political targeting are

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[44] Quoting Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice, *Hearings, Law Enforcement Undercover Activities* (GPO 1983).

[45] To be sure, the "collusive nature of many official violations operate against [their] dis-

significant (Fijnaut and Marx, eds, p 228). While more likely to invite popular scrutiny than the limited use of such tactics against marginal groups, undercover investigation of the mainstream creates a "culture of surveillance" that may undermine workplace morale and (as Levinson fears) create a climate of suspicion that undermines social relationships.

H. Tradeoff: Accommodating the Selection of Law Enforcement Goals, the Definition of Offenses, and the Rules of Procedure and Evidence to Undercover Tactics versus Retaining Some Independent Measure of Whether Covert Tactics Work

Undercover investigations should be accountable. But what are the proper criteria for measuring accountability? Ideally, policymakers evaluate undercover tactics by asking a series of questions. Are the ends of an investigation important enough to justify the intrusiveness of the means? Could the ends be better served by conventional police tactics? These questions are easier to pose than to answer. Measuring undercover tactics against the ends that justify them is difficult because "success" is a moving target. Investigative tactics (the means) influence the formulation of the law enforcement goals (the ends) used to judge the success and propriety of the tactics. The difficulty here is not that the ends justify the means so much as that the means help create the ends by which they are evaluated.

How do undercover tactics shape the ends by which these investigative means are justified? Consider Armstrong and Hobbs's account of undercover efforts against soccer hooligans in Britain. Armstrong and Hobbs argue that the British government presented undercover tactics to the public in order to dramatize the fight against crime in highly personal terms (Fijnaut and Marx, eds, pp 176, 185). The government celebrated the heroic and risky elements of undercover infiltration (for example, of "soccer hooligans") over the "boring, routine" aspects of conventional police work (Fijnaut and Marx, eds, pp 176, 185). Dramatization of this struggle, partly through elaborate trials of soccer hooligans, enhanced the status of the investigator as it demonized his target. The spectacle of infiltration and secret surveillance fueled the perception that the hooligans against whom these tactics were arrayed must be sophisticated and well-organized (Fijnaut and Marx, eds, pp 186–90). This belief in turn justified the undercover tactics, despite the relative absence of proof that the violence had really been orchestrated by an organized core of ringleaders. One might speak, in this instance, of the undercover means justifying the end—

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covery and prosecution," and covert methods may be the only effective way of revealing public corruption (Fijnaut and Marx, eds, p 219).

namely, the capture of dangerous "organized" criminals conceived to be dangerous and organized because of the tactics deployed against them.

Another way in which undercover operations ensure their own success is by affecting the behavior of their targets. In his account of Swedish efforts to infiltrate "dangerous" dissenting groups, Tollborg argues that the covert methods themselves demonize the secretive targets as conspiratorial (Fijnaut and Marx, eds, p 267). The very process of investigation drives such groups underground (which makes them look guiltier and more dangerous) while reinforcing "paranoid" convictions among the targets that "their fear [of the government is] justified" (Fijnaut and Marx, eds, p 267). This may well radicalize the targeted groups, confirming the need for infiltration while "contributing to the security problems" these methods are designed to detect (Fijnaut and Marx, eds, p 267). Similar phenomena are familiar in the United States, where stalled investigations may generate perjury, retaliation against suspected informants, or obstruction of justice, and thus may prove "successful" after all.

To ensure that their efforts will be accounted a success, or simply to avoid being judged, undercover investigators must be flexible about their goals. Investigators may choose to define their success by their ability to infiltrate a target organization and gather "intelligence" rather than by their ability to gather evidence for trial (which will put an end to the covert investigation) (Fijnaut and Marx, eds, pp 119–22). The information collected may be used to prosecute other, higher-level targets, to prevent future crimes, to infiltrate other, worthier targets, or to disband the organization at some future date, or it may simply become an end in itself. The need to preserve secrecy and protect the identity of informants and agents may further divert police efforts from evidence to intelligence. Criminal investigations that rely on undercover tactics may thus gain bureaucratic approval while resisting more stringent judicial oversight, converging in this way with the undercover operations of state security services (Fijnaut and Marx, eds, p 336). Why spoil a successful infiltration by bringing criminal charges?

Investigators' ability to choose when and how to terminate an undercover investigation also enables them to influence the criteria by which they are judged. Undercover investigations may lead to arrests, convictions, and seizures of contraband. Statistics concerning the volume of seized contraband and the number of persons arrested encourage the perception that undercover methods work, even if the investigation itself helped expand the market for the contraband and encouraged crimes by the targeted suspects (Fijnaut and Marx, eds, p 298). Icelandic drug investigations provide an example of under-

cover investigations that appear successful on their own terms (resulting in seizures and arrests) but feed off a largely invented drug problem. Iceland is a society in which less than four percent of all emergencies involving intoxication involve illegal drugs and in which there has never been a single death from a drug overdose (Fijnaut and Marx, eds, p 245).

Part of the difficulty in judging the success of undercover operations derives from the inherent tension between preventing crime and allowing it to continue (temporarily) in the service of a larger end. The seizure of a drug shipment may be counted as a success because it precluded distribution on the street. However, the seizure may also represent failure if it terminated undercover efforts before agents traced the delivery to its intended recipient. The tension between detection and prevention and the need to choose between them may well give investigators the option to adapt their announced objectives to their results, thereby ensuring success. For example, the pressure for "results" at the end of a fiscal year or presidential term may produce seizures that validate the investigation but undermine promising long-term in-depth investigations (Fijnaut and Marx, eds, p 306). Responding to such pressures, investigators can conceal the opportunity cost of a premature drug seizure (which cuts off hope of arranging bigger deals with prominent dealers) by emphasizing their success in preventing the shipment from reaching the market. The plurality of possible objectives makes it possible to ensure success by guiding the selection of goals by which the results will be judged.

A criminal conviction is not a truly independent measure of whether undercover tactics are effective. Covert policing influences the interpretation of the substantive criminal law by which investigative results will be judged. In corruption cases, in particular, the definition of a crime may well be an artifact of the investigation. Suppose undercover investigators target activities such as patronage that are at the margin of tolerated practices, but that are not clearly criminal (Fijnaut and Marx, eds, p 229). In such cases, conviction may not be a truly independent gauge of the success of undercover tactics. The targeted conduct whose criminal nature supposedly validates covert tactics may be defined as corrupt by the guilty pleas of suspects who cooperate early in the investigation. The suspects may be responding to newly created applications of malleable federal offenses such as the mail fraud statute. They may be pleading guilty in exchange for sizeable penalty reductions. Their convictions establish a precedent for the criminality of conduct that subsequent suspects will find it harder to contest.

The substantive criminal law accommodates undercover tactics and ensures their success in the courtroom in many other ways. Un-

dercover tactics uncover crime, because the substantive criminal law expands the definitions of the criminal phenomena (such as "racketeering") to ratify the criminality of infiltrated organizations and criminalize the conduct of peripheral actors (Fijnaut and Marx, eds, p 215). Britain deployed undercover agents against unruly soccer fans as a way of testing new theories of liability, including "conspiracy to cause an affray," in settings in which they had never previously been applied (Fijnaut and Marx, eds, p 176). Likewise, the law of impossibility and the development of inchoate offenses, including conspiracy and attempt, ensure the availability of a legal theory criminalizing conduct that did not attain its criminal ends. If the infiltrator's intention of frustrating a planned offense renders its completion impossible, the target is still guilty of solicitation, conspiracy, or attempt. Likewise, limits on the entrapment defense insulate many undercover tactics from challenge. Not least, undercover investigations yield corroborating testimony from offenders because rising penalties encourage cooperation with the government (Fijnaut and Marx, eds, p 20).

Procedural and evidentiary rules also validate undercover methods at trial. Undercover tactics produce convictions because judges admit into evidence secretly recorded conversations and hearsay testimony,[46] approve plea bargains with convicted coconspirators and informants, protect the identity of informants who operated on the periphery of an undercover investigation, and permit cooperating defendants to testify under penalty of perjury.[47] In myriad ways, the legal system accommodates undercover tactics, adapting evidentiary and procedural rules and amplifying the substantive criminal law to vindicate police efforts at trial. In examining recent changes in European criminal law and procedure, it may be worth examining the extent to which legislation expanding the covert powers of the police has accompanied favorable definitions of organized crime, a greater willingness to accept negotiated guilty pleas, harsher penalty structures, new rules governing the status and use of informants, and rules of evidence adapted to the products of undercover work.

Undercover operations also ensure their success by shaping the definition of the criminal phenomena that they are charged with investigating. Instead of only investigating crimes defined by the sub-

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46 In the United States, they do so under the co-conspirator hearsay exception at trial and without need of such an exception at sentencing, since the rules of evidence often do not apply. FRE 801(d)(2)(E); *Williams v New York*, 337 US 241, 249, 251 (1949) (emphasizing the distinctions in evidentiary procedure between the trial and sentencing process, and noting that the Constitution does not restrict the view of the sentencing judge to information received in open court); United States Sentencing Commission, *Guidelines Manual* § 6A1.3(a) (GPO 1997).

47 Systems that allow witnesses to lie about their guilt do not produce effective government witnesses.

stantive criminal law, police officials are increasingly given a broad mandate to investigate criminal networks, whose contours the investigators themselves delineate during the course of their infiltration. In Germany, for example, vague definitions of organized crime and a broad conception of preliminary crime fighting give investigators the flexibility to respond quickly to new kinds of organized crime. The breadth of this mandate "transform[s] the legally defined reality of the criminal offense into a world of crime defined by the police" (Fijnaut and Marx, eds, p 67). The definition of organized crime, which provides the primary limit on investigative powers, becomes the responsibility of administrative experts. By controlling the definition of the phenomenon they investigate, the police control the criteria for evaluating the success of their tactics.

The dangers of allowing the police to define the terms by which to evaluate their success were most evident in the Soviet Union, with its 98 percent conviction rate in the late 1980s (Fijnaut and Marx, eds, p 165).[48] Undercover operations were spectacularly successful on their own terms, namely, in protecting the interests of the state. Such methods were also virtually costless to those who discounted the invasion of privacy or individual rights as a legitimate problem (Fijnaut and Marx, eds, p 160). The Soviet Union, which criminalized so much ordinary behavior (Fijnaut and Marx, eds, pp 162, 164), also provides an excellent example of how crimes can be defined and innocuous behavior criminalized to enlarge the focus of investigative attention (Fijnaut and Marx, eds, p 164). To the extent that the desire to accommodate the new investigative methods drives the many adaptations of substantive criminal law, criminal procedure, and evidence that produce success in the courtroom, undercover investigations have succeeded in shaping the measures by which they are judged.

III. TRANSNATIONAL UNDERCOVER INVESTIGATIONS: THE TENSION BETWEEN NATIONAL AUTONOMY AND EFFECTIVE COOPERATION

Countries undertake covert investigations not only domestically but transnationally (in conjunction with other countries). Transnational operations are sometimes pursued by multination task forces, but more often arise when one country seeks the assistance of another with what had started as a domestic matter.[49] Conducting undercover

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[48] That figure was down from a 99.8 percent conviction rate during earlier years of the Soviet era (Fijnaut and Marx, eds, p 160).

[49] Cross-border investigations not only infiltrate transnational crime networks through undercover agents and informants (who pose as storefront money laundering operations for drug dealers, or as high-level arms dealers, or as corrupt bankers, businessmen, and the like) (Fijnaut and Marx, eds, pp 197–99, 293–96). They also include controlled deliveries of intercepted drug or arms shipments and the pursuit, tracking, and electronic surveillance of suspects (Fijnaut and

investigations across national borders complicates the policy choices facing national decisionmakers and threatens to undercut each country's efforts to develop its own approach to covert policing. At the same time, each nation's interest in making its own policy choices about covert policing impedes international cooperation and makes transnational undercover investigations more difficult.

Transnational operations undermine national autonomy by creating pressure for greater uniformity of laws across borders. Countries that cooperate in covert policing also try to coordinate on a host of ancillary issues (a process that requires abandonment of distinct or idiosyncratic approaches). These countries typically seek agreement: (a) on the crimes that may be targeted through undercover activity; (b) on how to define those crimes; (c) on whether to permit foreign agents and informants to act undercover; (d) on what crimes agents may commit in their undercover capacity; (e) on whether agents may use false documentation; (f) on when to authorize electronic surveillance; (g) on whether to allow foreign drug shipments to pass through without arresting the courier; and (h) on whether certain undercover intrusions require judicial warrants or high-level approval within government ministries (den Boer, ed, pp 92–93, 104–05). All of this requires cooperating countries to harmonize both their substantive criminal law and their criminal procedure.

Transnational operations also undercut national autonomy by circumventing domestic constraints on undercover policing. Police in one country can use foreign undercover operatives to accomplish by proxy what they themselves cannot do directly.[50] Agents from one country may choose to conduct prohibited undercover operations in a neighboring country that imposes fewer restrictions—a practice known as "forum shopping" (den Boer, ed, pp 42, 174–75). Investigators may also "launder" information received from unreliable sources by transferring it to a foreign law enforcement agency and then bringing it back as a report from that agency (den Boer, ed, p 166). Worse, an investigative method that was improper in the country in which it was used may produce information that is admitted as evidence in another country (den Boer, ed, pp 175–76). Some European legal systems do not apply an exclusionary rule for evidence illegally obtained elsewhere (Fijnaut and Marx, eds, p 331; den Boer, ed, p 176). Many countries do not require that the prosecution disclose the legality of

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Marx, eds, p 284). These investigations target organized crime, money laundering, drug trafficking, and alien smuggling, as well as terrorism and other offenses against national security (Fijnaut and Marx, eds, pp 303–04; den Boer, ed, pp 92, 119, 151).

[50] Peter Tak voices this concern about the future of Dutch policing, if the Parliament responds to the recommendations of the Inquiry Committee by giving fewer powers to the Dutch police than their foreign counterparts enjoy (den Boer, ed, p 42).

the means used to obtain information abroad. British courts, for example, have allowed prosecutors to introduce into evidence transcripts of conversations that were illegally taped by the DEA in France (den Boer, ed, pp 175–76). And some treaties between the United States and other nations go so far as to provide that "defendants cannot submit a complaint concerning the irregularity of the evidence that has been obtained pursuant to the [Mutual Legal Assistance Treaty]" (den Boer, ed, p 176). Investigators may therefore escape domestic controls by conducting their operations in another country where they are legal, or by ensuring that defendants will be tried in jurisdictions where the illegality of a technique deployed abroad carries no adverse consequences for the prosecution. By undercutting national controls, these methods of evasion provide a powerful impetus to harmonize approaches among groups of countries—an impetus perhaps more powerful than any diplomatic initiative.

If transnational undercover investigations threaten national autonomy, it is no less true that national autonomy and national differences make cross-border cooperation more difficult. In the terminology of Christine van den Wyngaert, cooperation may be "horizontal" or "vertical" (den Boer, ed, pp 166–68). Horizontal cooperation requires investigators to coordinate national monitoring bodies of different countries. This becomes difficult when some states place less reliance than others on an investigating judge, when one country has no clear counterpart to another country's monitoring agency, or when the counterpart agencies have different powers (den Boer, ed, pp 166–67). In addition, cooperating investigators will inevitably encounter uncertainties about whether to coordinate their activities at the police level or the judicial level (Fijnaut and Marx, eds, pp 172–73). Often that choice depends on whether coercive measures (such as arrests and seizures) must be taken, or whether there will be an infringement of the European Convention's "fundamental right" of privacy (Fijnaut and Marx, eds, pp 171–73). But not all countries require judicial approval for the same invasive measures. It may be unclear to investigators whether they need to seek a judicial warrant or may cooperate informally with their foreign police counterparts (Fijnaut and Marx, eds, pp 172–73).

By contrast, vertical cooperation relies on transnational organizations, such as the European Union's Europol or anti-fraud unit, Unité de Coordination de la Lutte Anti-Fraude (UCLAF) (den Boer, ed, p 167). In the future, the European Union may exercise vertical controls through a European prosecutor charged with balancing federal and national powers and ensuring compliance with the European

Convention on Human Rights (den Boer, ed, p 167).[51] However, this form of vertical coordination appears possible only in a transnational legal space such as the European Union, and may encounter the resistance of member states even there.

The contributors to the volumes under review disagree about the prospects for overcoming national variation in the regulation of undercover policing. The authors consider two different ways of reducing national distinctiveness in the service of improving international cooperation. First, cooperating nations could agree to adopt and be bound by transnational norms defining permissible undercover conduct (Fijnaut and Marx, eds, pp 27, 308, 324; den Boer, ed, pp 129–31, 151–52, 181–82, 191). Second, they could agree voluntarily to bring their domestic regulation of undercover policing into harmony with other countries' approaches (Fijnaut and Marx, eds, pp 27, 324; den Boer, ed, pp 22–24, 188–89, 191).

The first way of overcoming national differences requires high-level cooperation through negotiated agreements. This approach has advantages. It would "accommodate disparate political views," specify the "cases when assistance may be denied," and set forth the relative responsibilities of cooperating states (Fijnaut and Marx, eds, p 308; den Boer, ed, pp 199–201).

This vertical mechanism of cooperation would only work under certain conditions. Participating countries would need to fashion international norms about what crimes to target, how to collect evidence, when to apply for a judicial warrant, and what the police may do undercover (Fijnaut and Marx, eds, p 308; den Boer, ed, pp 199–200). Passas and Groskin foresee difficulty in reaching agreement about which crimes to target through transnational operations (Fijnaut and Marx, eds, pp 303–04). While countries cooperate readily in international money laundering investigations (which may produce financial rewards to the investigating countries), their agreement seems confined to the pursuit of drug money[52] (although it may now be extended to terrorist funds). Most treaties and conventions that promote international cooperation exempt the laundering of proceeds from crimes such as tax evasion, corruption, capital flight, arms trafficking, and smuggling (Fijnaut and Marx, eds, p 303). Indigenous and ideologically motivated crime has until recently produced little interna-

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51 For covert operations, this means ensuring compliance with the Convention's guarantee of privacy as a fundamental right, which may require member states to impose greater restrictions on electronic surveillance (den Boer, ed, pp 167–68).

52 As of the publication of the Fijnaut and Marx anthology, Turkey had not yet recognized even drug money laundering as a criminal offense, and its bank secrecy laws, which permitted anonymous accounts, made it easier to shelter the proceeds of criminal activity (Fijnaut and Marx, eds, p 303).

tional cooperation, "unless the terrorist acts are considered crimes in the countries from which information and assistance is requested" (Fijnaut and Marx, eds, p 304). "International terrorism attracts . . . more support and cooperation," they note presciently, particularly as cooperating countries perceive that they may themselves become targets of the terrorists (Fijnaut and Marx, eds, p 304).

Despite these obstacles to the creation of international norms, there have been many calls to bridge national differences by federalizing criminal law and procedure within the European Union. Germany has pushed to federalize undercover policing and organized crime within the European Union, advocating that Europol (which currently investigates drug crimes, money laundering, and alien smuggling) be turned into a pan-European police force with proactive covert powers analogous to those of the federated German police bureau and the American FBI (den Boer, ed, pp 132–41). Brice De Ruyver, Gert Vermeulen, and Tom Vander Beken advocate the creation of "a 'centralized' system in which every Member State could be represented by . . . liaison officers . . . [and] liaison magistrates" to test the legitimacy of undercover activities ahead of time (den Boer, ed, p 148). Jürgen Storbeck, the Coordinator of the Europol Unit in the Netherlands, proposes to staff Europol with public prosecutors from each member state to coordinate transnational undercover investigations (den Boer, ed, pp 127–28). Van den Wyngaert believes that the European Parliament may be willing to create a separate European Prosecutor's Office for the investigation and prosecution of fraud against the European Community (den Boer, ed, pp 167–68).

Fijnaut and Verbruggen take the federal idea further yet in weighing the merits of creating a single European-wide statute on organized crime (den Boer, ed, p 137). Modeled on the American RICO statute,[53] the European organized crime statute would require individual predicate violations (establishing a "pattern" akin to the American "pattern of racketeering activity") (Fijnaut and Marx, eds, p 137). These violations would be determined under the law of the country where the predicate crimes were committed (Fijnaut and Marx, eds, p 137). The European-wide definition of organized crime might invite formulation of uniform transnational principles governing undercover investigations of such offenses.

But Fijnaut and Verbruggen see risks in this approach and conclude that predictions about a federalized European criminal law and procedure are premature. They warn that laws broadly defining transnational criminal conduct could be used against unintended targets (de Boer, ed, p 137). They also observe that subjecting a federalized

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53 18 USC §§ 1961 et seq (1994).

criminal law and procedure to interpretation by the European Court of Justice would break with the principle "that national judges should be the primary guards of Community law, with the [European Court of Justice] monitoring harmonious interpretation" (den Boer, ed, p 138). The European Union, the authors contend, is not yet a "real" federal government with a democratic mandate (den Boer, ed, pp 134–35).

Fijnaut and Verbruggen also doubt that the member states will be willing to entrust a federal European police force with the proactive powers necessary to investigate transnational or international crime. Fijnaut and Verbruggen believe that the Task Force for the Coordination of Fraud Prevention ("UCLAF"), the European police force in charge of investigating fraud against the European Union, is more likely than Europol to acquire such powers, since Europol is mainly responsible for the exchange of intelligence, training, and technical support (den Boer, ed, pp 140–41). (Under the Maastricht Treaty, the European community, through UCLAF, has the right of initiative in combating international fraud, while the member states have the right of initiative for all other crimes (den Boer, ed, p 151).) With no operational powers of its own and no mandate to initiate criminal investigations except for international fraud (den Boer, ed, pp 134, 136–37, 151–53), Europol currently exists purely to support the investigative activities of its member states (den Boer, ed, pp 117–21, 134). Absent a truly democratic mandate from the European Parliament[54] and absent an operational mandate for a federal European police force to initiate its own undercover investigations, Fijnaut and Verbruggen doubt that European criminal investigation and law will be federalized anytime soon. (It is worth noting, however, that the European Union has recently agreed on a uniform definition of terrorism.[55] Further agreements of this nature may lie ahead.)

Willy Bruggeman is more optimistic than Fijnaut and Verbruggen about the prognosis for overcoming each nation's attachment to autonomous policies. He contends that a certain "Europeanization" of law enforcement will be the inevitable result of abolishing internal borders within the European Union (den Boer, ed, p 191). His approach marks a second "horizontal" means of overcoming national differences—a "Europeanization" that will not result from countries formally adopting international norms, but will grow up incrementally as nations agree to change their domestic regulation of undercover policing to align better with each other's policies. Within the framework of the Maastricht Treaty, national governments should appeal to

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54 Europol and UCLAF answer to the European Parliament (den Boer, ed, p 138).

55 Edward Taylor, *Europe Announces Antiterror Measures*, Wall St J A16 (Dec 7, 2001).

each other to formulate compatible rules about what offenses may be targeted by undercover investigations, about what level of factual predication is necessary to initiate such investigations, about what forms of undercover activity are permissible, and about who should hold investigators accountable (den Boer, ed, pp 191–92). Bruggeman believes that European institutions can encourage these domestic developments. To avoid competition among the police forces of different legal systems, a European Union fund should "remunerate police forces that make a substantial contribution to a criminal case" when these result in no direct arrests or seizure within the contributing country (den Boer, ed, p 195). Bruggeman also advocates creating a federal prosecuting agency for the European Union and reforming Europol to ensure that it clearly tags the provenance and reliability of all information that may be used as evidence in criminal prosecutions. With these reforms, he believes that the ongoing trend to regulatory convergence and cooperation will continue (den Boer, ed, pp 196–97).

By contrast, Neil Walker predicts neither a convergence of differing national approaches nor any agreement on international norms. He believes that a national backlash against the Maastricht Treaty will lead European governments to invoke national security concerns in resisting any pan-European system of accountability for undercover methods (den Boer, ed, pp 206–08). A serious commitment to transnational cooperation would require governments to entrust the European Parliament or the European Court of Criminal Justice with the task of supervising police coordination. Yet the regulation of undercover policing impinges too closely on national autonomy and identity to support the requisite political efforts (den Boer, ed, pp 207–08).

Walker also believes that differences between domestic and international covert policing reduce political pressures for insisting on accountability in transnational undercover operations. Citizens of the various nations worry less about the abuse of proactive undercover techniques when these are turned against organized crime and terrorism, the paradigmatic international offenses (den Boer, ed, pp 208–10). The investigation of such offenses is considered "too pressing, too dependent upon highly specialized types of law enforcement skills, and too difficult to chart in terms of the indices of success associated with 'normal crime', to attract the intensity of skeptical assessment which is now the lot of domestic police" (den Boer, ed, p 208). Accordingly, techniques that are controversial when used against mainstream organizations domestically enjoy considerably greater legitimacy when deployed against foreign criminal networks engaged in organized crime and terrorism (den Boer, ed, pp 208–10). International undercover work also depends much less than does domestic policing on mutual trust and a flow of information between investigators and the

public. Such mutuality requires public confidence in police accountability. In the international context, the absence of such an interchange with a national constituency reduces pressures to hold the police accountable for their methods and legitimates the investigators' autonomy (den Boer, ed, pp 208–10).

Walker predicts that these obstacles to control will make many forms of close or routine supervision impossible (den Boer, ed, pp 213–16). But if transnational investigators escape pan-European norms, will they be held accountable under the national norms of the countries where they conduct their activities? Or will they escape control because national accountability mechanisms are designed with domestic investigations in mind? If international investigators cooperating informally are able to avoid international and domestic controls, unregulated transnational undercover practices developing in a competitive environment might spur imitation domestically and thus lead indirectly to the expansion of undercover powers and to greater convergence of national norms.

CONCLUSION

The books under review use two separate starting points to conduct a comparative analysis of undercover policing. The Fijnaut and Marx anthology surveys a variety of national policing systems in order to understand how each country legitimates, regulates, and controls undercover policing domestically. The anthology highlights certain features shared among different countries and puts the variety of national approaches in a wider historical context. Central themes include the influence of American undercover tactics upon European systems and the recurring difficulties in taming covert techniques that continually threaten to evade the rule of law. By contrast, den Boer's collection places less emphasis on the varieties of domestic regulation. Instead, it refers to differing national approaches primarily as a source of ideas for restructuring Dutch regulation of covert policing. At the same time, the anthology takes a more international approach to the problem of undercover investigations. It explores how Dutch practices will have to harmonize with the needs of transnational undercover investigations and supranational legal norms, like those imposed by Dutch membership in the European Union and Dutch adherence to the Schengen Convention and other international treaties.

From their separate vantage points, both volumes illuminate the difficulties of imposing accountability on law enforcement techniques whose inherent secrecy insulates them from oversight. Both anthologies discuss the challenges of accommodating domestic solutions to the increasingly transnational character of undercover investigations. The den Boer anthology is strongest in its exploration of suprana-

tional approaches to regulating undercover investigations. In particular, it assesses the prospects of federalizing European legal norms, and of harmonizing national approaches informally (through supranational police organizations) and formally (through international accords). The Fijnaut and Marx volume is strongest in identifying recurrent themes like the ambiguous legal and moral status of undercover policing and the influence of foreign models. It also highlights persistent differences in the ways in which different legal systems respond to these ambiguities and influences.

In discussing the vexing problem of accountability, the den Boer contributors manifest a somewhat too uncritical enthusiasm for centralized bureaucratic controls as a cure-all for the moral risks and ambiguities of undercover policing. Future discussions of police accountability might profit from a closer look at how centralized oversight will affect undercover policing at the operational level. Scholars should attend as much to the norms that should be applied to undercover policing as to the mechanisms for securing compliance. What sorts of ruses are permissible? What kinds of personal relationships may the investigators establish with their targets? What sorts of crimes may undercover agents commit to maintain their cover? Should foreign governments or international agencies assist in the investigations of crimes that violate the laws of only one country?

Because of its greater focus on the varieties of domestic policing, the Fijnaut and Marx anthology has more to say about how the surveyed countries answer some of these questions. One tantalizing question that both anthologies leave open, however, is whether the rules governing transnational investigations will diverge from those governing domestic undercover policing. Will such investigations play by their own supranational rules, or will they be judged by the laws that govern domestic policing among their cooperating countries? And if they do develop their own rule book, will the investigators who run transnational investigations continue to exert as much influence on the domestic legal systems of their partners as American undercover tactics have thus far exerted on much of Western Europe?

Precisely because of their richness, these anthologies suggest further avenues for research. Both volumes make it clear that undercover policing involves difficult tradeoffs between competing tactics, goals, and values. How will the increasing importance of transnational undercover investigations affect domestic compromises between the pursuit of intelligence and the collection of evidence? Will the use of undercover tactics against terrorism reinforce the tendency to legitimate the introduction of controversial tactics by quarantining them in specialized units for use only against marginal sectors of society? How will the more international character of undercover work affect the

tendency of undercover means to shape the crimes they investigate, and in some measure to justify their ends? With their focus on the varieties of legal frameworks through which countries accommodate and limit undercover policing, these works also suggest a series of questions about how these regulations translate into practice. How do investigators interpret these constraints in their day-to-day work? What forms of deception do they engage in, and how do these compare with the policy choices struck at higher levels? Who sets the objectives of undercover operations? To what extent, and why, do they change? The tradeoffs between deception and coercion, or detection and prevention, like so many of the others, are not only choices made by institutions, but also choices made by individuals within institutional settings and constraints. Both of these informative and well-constructed anthologies should inspire new efforts to link the course set by governments and legal systems to the institutions and individuals who put these mandates into practice.