

# Crime & Delinquency

<http://cad.sagepub.com/>

---

## Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work

Gary T. Marx

*Crime & Delinquency* 1982 28: 165  
DOI: 10.1177/001112878202800201

The online version of this article can be found at:  
<http://cad.sagepub.com/content/28/2/165>

---

Published by:



<http://www.sagepublications.com>

**Additional services and information for *Crime & Delinquency* can be found at:**

**Email Alerts:** <http://cad.sagepub.com/cgi/alerts>

**Subscriptions:** <http://cad.sagepub.com/subscriptions>

**Reprints:** <http://www.sagepub.com/journalsReprints.nav>

**Permissions:** <http://www.sagepub.com/journalsPermissions.nav>

# Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work

Gary T. Marx

*In the last decade covert law enforcement has expanded in scale and changed in form. Factors responsible for this are briefly considered. The advantages and successes of recent undercover work have been well publicized. Yet the mere fact that a practice is legal should not be sufficient grounds for its use. Its ethical, practical, economic, and social implications must also be taken into account. Without denying the positive aspects of undercover work, the paper discusses some disadvantages, costs, and risks which have received inadequate public attention. These are discussed with respect to (1) targets of the investigation who may be subjected to trickery, coercion, excessive temptation, and political targeting, (2) undercover police work, which may cause police severe stress, entail lack of supervision, and present police with unique opportunities for corruption, (3) informers, the weakest link in the system, who may exploit their undercover role in a variety of ways, (4) third parties victimized as a result of undercover operations, and (5) the potential of undercover work to contribute unintentionally to crime, through such factors as generation of a market or the provision of ideas, motives, or scarce resources.*

*Recent undercover practices such as ABSCAM and police-run fencing fronts may be portents of a subtle and perhaps irreversible change in how social control is carried out. It is important to reflect on whether this is the direction in which we wish to see our society move.*

## THE CHANGING NATURE OF UNDERCOVER WORK

Recent federal investigations, such as ABSCAM, MILAB, and BRILAB, and the many local variations, such as police-run fencing fronts and anticrime decoy squads, call attention to changes in an old police tactic: undercover work. In the last decade, covert law enforcement activity has expanded in scale and changed in form. At the local level, for example, the

---

**GARY T. MARX:** Professor of Sociology, Departments of Urban Studies and Humanities, Massachusetts Institute of Technology, Cambridge. This paper is drawn from testimony delivered to the House Subcommittee on Civil and Constitutional Rights during its hearings on proposed guidelines for FBI undercover work (Feb. 25, 1981). The author is grateful to Sissella Bok, Jay Wachtel, and Chuck Wexler for their comments.

proportion of all police arrests involving undercover work has roughly doubled in the last fifteen years. This represents in part an increase in work countering drug offenses. But new federal aid for strike forces, the Witness Protection Program, fencing stings, and anticrime decoys has been a major stimulus. With increased attention given to organized and white collar crime, the Federal Bureau of Investigation has dropped J. Edgar Hoover's policy of prohibiting sworn agents from playing undercover roles. Funding for FBI undercover operations increased from \$1 to \$4.8 million from 1978 to 1981. Recent FBI investigations into political corruption, insurance fraud, and labor racketeering have received extensive media attention. Moreover, other government agencies in addition to law enforcement appear to be making increased use of undercover tactics as part of their audit and general inspection procedures.

Undercover tactics have, of course, been used for vice and political crimes since the turn of the century; yet, within professional police circles, these tended to be seen as insignificant and marginal activities. These traditional undercover practices have been supplemented by new and more complex forms and changing emphasis and attitudes.

Undercover work is increasingly viewed as an important and innovative police tactic carried out by carefully chosen, elite units. In many big city police departments, competition for assignment to such units, such as anticrime decoy squads, is intense: Assignment to tactical or special squads which use undercover tactics in new ways brings increased prestige and professional recognition. Their use has been extended to white collar corruption and street offenses, and to consumers of activities constituting vice crimes (reaching beyond the customary targets, the providers of those activities). Examples of the latter can be seen in decoy police women posing as prostitutes and arresting men who proposition them, and undercover officers offering to sell (rather than buy) drugs. The lone undercover worker making isolated arrests has been supplemented or replaced by highly coordinated and staged team activities, involving technological aids and many agents and arrests. Informers have always been central to undercover work for information, introduction, and often participation. Recent complex undercover operations have relied heavily upon unwitting informers, persons unaware that they were part of a police operation, and who therefore were not bound by the legal and administrative restrictions under which police operate.

With such consensual crimes as prostitution or gambling, the undercover transaction has been restricted to the consenting adults involved. But recent undercover work in other types of consensual crimes (such as the buying and selling of stolen property, with police posing as fences) may entail victimization of third parties. Goals and targeting have also changed. Traditionally, undercover work has been used in a targeted fashion as part of a criminal investigation after a crime has occurred, where there is a suspect and his apprehension is the goal. Today, its range is

broader, as undercover work has become part of efforts to anticipate crimes not yet committed, where there is as yet no suspect, and where deterrence is an important goal.

There is neither a single nor a simple reason for changes in the nature and scale of undercover work. Multiple factors are involved, and they interact in complex ways. At a very general level, there appears to be a decline in the acceptance of coercive means to control people, with a concomitant rise in deceptive means. Values of rational organization, planning, and prevention are increasingly important in varied institutions, whether medical, educational, or criminal justice.

For those concerned with criminal justice reform, one of the most interesting issues involves the possible link between the success of demands to change police priorities and limit past abuses by police and increases in undercover work. In the case of the former, the FBI's new white collar and organized crime priorities led easily to increased undercover work as an effective tactic for dealing with consensual or skilled offenders.

While rightfully focusing on continuing abuses and some retreat from earlier gains, civil libertarians can note considerable progress with respect to some aspects of police reform. The legal environment in which police work has changed markedly in recent decades. While the new limitations they face can easily be exaggerated, it is clear that the conditions of police work have altered. The rights guaranteed citizens under the Constitution are better honored than in the past. Supreme Court decisions, legislation, and departmental policies have restricted the conditions under which police can gather information, whether through search and seizure, electronic surveillance, or stressful and coercive interrogation after arrest. Police must build stronger cases in order to arrest and convict, and there is less tolerance in the courts of extralegal techniques for effecting an apprehension.

One response to the exclusionary rule, *Miranda*, *Escobido*, and the like, is for police simply to do less for fear of running afoul of departmental and court rulings. But another is to seek imaginative ways around the rulings, as in the increased use of informants and undercover work involving anticrime decoys, false fencing fronts, and infiltration. There need be little problem with rules of evidence, interrogations, the search for a suspect, testimony, and guilt if the undercover officer is a direct party to the offense, and the crime has even been videotaped in living color. Better still if (as was the case with ABSCAM) an assistant attorney general or prosecutor can monitor the videotape as the action unfolds and even place a call to undercover agents warning them if their behavior verges on entrapment.

As the police use of coercion has been restricted, their use of deception has increased. Restricting police investigation after a crime occurs has increased the attention paid to anticipating crimes. Restricting the conditions under which the police can carry out searches and seizures, partici-

pate in violence or felonies, or engage in coercive persuasion as part of undercover investigations has meant increased use of civilians (knowing and unwitting informants, private detectives), who are less accountable than the police. Thus, increased police respect for individual liberties and rights may come partly at a cost of widening manipulation of citizens by informants and other civilians used by law enforcement. What police want to have done but cannot themselves do legally may be delegated to others.

This ironic link between reform and the spread of undercover practices is an intriguing example of the unintended consequences of reform, a topic that is finally beginning to receive the serious academic attention it deserves.<sup>1</sup>

As police departments have become more bureaucratic, modern management techniques have been adopted. For example, one can see a greater emphasis on measuring output as a means of accountability and an attempt to anticipate and sometimes even create demand. Increased conflict with minorities and the politically and culturally disenchanted may also have made it more difficult for the police to gain crime information or to obtain complaints or testimony from alienated or intimidated citizens. This also means greater reliance on informers and undercover work to gain information and witnesses.

New crime problems are also important. The increase in street crime over the last decade has led to the search for better methods of crime control. The spread of organized crime's activities has stimulated expanded and more sophisticated undercover work, as have the proliferation of heroin and other serious drugs and establishment of sophisticated international distribution networks.

Beyond the provision of new federal financial resources and guidance for undercover work, technical innovations appear to be relevant. The development of highly intrusive and easily hidden surveillance technology has encouraged undercover work. But whatever is responsible for the changes in undercover investigation, it is clear that important policy questions are at stake. Executive and legislative bodies responsible for general police policy and accountability, courts, police managers, and policy analysts have not adequately confronted these questions.

The advantages and successes of recent undercover work have been well publicized. For example, for certain offenses, such as bribery and drug sales, the tactic can permit arrests rarely possible using overt methods. This is also the case for crimes in which a well-organized, skilled, or particularly intimidating group is involved. Knowledge that anyone on the street could be a police officer may deter some offenders and increase feelings of safety among citizens. Conviction rates are high when an undercover officer has been party to a crime, and even higher when

1. See, e.g., Sam Sieber, *Fatal Remedies* (New York: Plenum, 1981).

videotaped evidence is presented. And the courts' willingness to accept complex undercover activities such as ABSCAM as legal has diverted attention from problematic questions.

Given the favorable press that recent undercover work has generally received and the secrecy that surrounds such operations (the relative ease with which agents may overlook or disguise mistakes, abuses, and costs), the public perceptions probably reflect an overestimation of the advantages and underestimation of the disadvantages of the tactic. The mere fact that a practice is legal should not be sufficient grounds for its use. Its ethical, practical, economic, and social implications must also be considered. Without denying the positive aspects of undercover work or arguing that it should be categorically prohibited, I will discuss some disadvantages, costs, and risks which have received inadequate public attention. I also wish to offer reasons why undercover tactics can be more troubling than overt police methods, and, as a result, require greater restrictions and closer supervision. Determining the frequency of unintended consequences of undercover work and weighing the competing values and trade-offs are important tasks for research and policy analysis, and much work remains to be done. Identifying the issues at stake is a crucial first step. I will consider these as they bear upon targets of the investigation, informers, police, third parties, and society in general.<sup>2</sup>

#### TARGETS: TRICKERY, COERCION, TEMPTATION

In considering the targets of undercover investigations, European observers are often surprised at how far American police are permitted to go in generating conditions for crime. The law and courts are very tolerant here. Recent decisions, such as those in the Hoffa, Lewis, Osborne, Russell, Hampton, and Twigg cases,<sup>3</sup> continue this support. The predisposi-

2. The discussion here continues my interest in covert forms of interdependence between rule breakers and enforcers. See also the following: "Thoughts on a Neglected Category of Social Movement Participant: Agents Provocateurs and Informants," *American Journal of Sociology*, September 1974, pp. 402-42; "Double Agents," *New Republic*, Oct. 18, 1975, pp. 8-13; "External Efforts to Damage or Facilitate Social Movements," in *The Dynamics of Social Movements*, Mayer Zald and John McCarthy, eds. (Cambridge, Mass.: Winthrop, 1979), pp. 94-125; "The New Police Undercover Work," *Urban Life and Culture*, January 1980, pp. 400-46; "Ironies of Social Control: Authorities as Contributors to Deviance through Escalation, Non-Enforcement, and Covert Facilitation," *Social Problems*, February 1981, pp. 221-46; "Types of Undercover Operation and Activities" (Paper delivered at Hastings Center Conference on Undercover Activities, Hastings-on-Hudson, N.Y., 1981); "Undercover Police Tactics," *Encyclopedia of Crime and Justice*, forthcoming.

3. Hoffa v. U.S., 385 U.S. 293 (1963); Lewis v. U.S., 385 U.S. 323 (1966); Osborn v. U.S., 385 U.S. 323 (1966); U.S. v. Russell, 411 U.S. 423 (1973); Hampton v. U.S., 425 U.S. 484 (1976); U.S. v. Twigg, 588 F.2d 373 (3rd Cir. 1978).

tion of the offender, rather than the objective methods of police, tends to be seen as the key factor in determining entrapment at the federal level. The fact that the crime could not or would not have occurred had the government not been involved is usually not considered legally relevant if the person is thought to have been predisposed to engage in the prohibited activity. Yet, for understanding causes of behavior, and developing guidelines for the use of scarce law enforcement resources, issues related to the behavior of government agents is crucial. The fact that a tactic is legal does not necessarily imply that its use is ethical. In addition, because of the secrecy surrounding undercover work, it can easily be used in ways that are illegal. This section considers issues bearing on the targets of undercover operations.

Three types of agent behavior are of particular interest: the use of excessive trickery, the use of coercion, and the offer of extraordinarily seductive temptations. Where the behavior of the undercover agent exhibits any of these characteristics, it may be questionable whether the suspect acted with autonomy and full knowledge of the illegal nature of his behavior. Let us consider each of the above.

### *Trickery*

Three common forms of trickery are (1) offering the illegal action as a minor part of a very attractive socially legitimate goal, (2) hiding or disguising the illegal nature of the action, and (3) weakening the capacity of the target to distinguish right and wrong (or choosing a suspect who is already so weakened). In the first case, targets are lured into the activity on a pretext. The goal put forth is legal and desirable, and the illegality is secondary. Thus, in the most questionable ABSCAM case, that in Philadelphia, the defendants were told that their involvement could bring a convention center and possibly other means of financial gain to the city. They were led to believe that the project would not come to Philadelphia if they did not accept the money. Judge Fullam, in his ruling on the Philadelphia case of Schwartz and Jannotte, indicates that neither of the defendants asked for money and both indicated that no payment was necessary.<sup>4</sup>

In another example, Rommie Loudd, the first black executive with a professional sports team, organized the Orlando, Florida, franchise in the World Football League. With the failure of the league, Loudd went broke. A man whom he did not know called and offered him \$1 million to reorganize his team. The caller promised to bring wealthy colleagues into the deal, but Loudd was told he first had to loosen up the financiers with

4. John Fullam, "Memorandum and Order," U.S. District Court for the Eastern District of Pennsylvania, U.S. v. Harry P. Jannotte, George Schwartz, no. 80-166, November 1980.

cocaine. He resisted the offer, but eventually introduced the caller (an undercover agent) to two people who sold him cocaine. Loudd, with no previous criminal record, was sentenced to a long prison term. On tape, the agent involved said to his partner, "I've tricked him worse than I've tricked anybody ever."<sup>5</sup>

Ignorance of the law is, of course, not an excuse for its violation. However, the situation seems different (at least, ethically) when one is led into illegal activities by a government agent who claims that no wrongdoing is occurring. Here the agent creates a subterfuge in order to make it appear to the suspect that nothing illegal is happening.

In several ABSCAM cases, defendants were led to believe that they could make money without having to deliver any promises. The videotape from the case of New Jersey Senator Harrison Williams reveals the main informant coaching the senator in what to say, almost putting words in his mouth: "You gotta tell him how important you are, and you gotta tell him in no uncertain terms—'without me, there is no deal. I'm the man who's gonna open the doors. I'm the man who's gonna do this and use my influence and I guarantee this.'" The senator is then assured that nothing wrong is happening: "It goes no further. It's all talk, all bullshit. It's a walk-through. You gotta just play and blow your horn."<sup>6</sup>

Some ABSCAM defendants were told that, in accordance with the "Arab mind" and "Arab way of doing business," they must convince the investors that they had friends in high places. In order to do this, money had to be accepted from the apparent investors, although the defendants were not required by the undercover agents to offer any commitments contingent on accepting the payment. The key element was appearances. In Philadelphia, the situation was structured so that the acceptance of money would be seen as payment for private consulting services and not as the acceptance of a bribe.<sup>7</sup> The defendants were not asked to behave improperly.

Another problematic situation involves the use of trickery against people with diminished capacity, such as the mentally limited or ill, juveniles, and persons under extreme pressure or in a needy or weakened state (e.g., addicts in withdrawal). Such persons may be more susceptible to persuasion and less able than most citizens to distinguish right from wrong. As part of the investigation, the undercover agent may attempt to create or may aggravate such conditions in the target. Senator Williams refused the first offer of cash. However, he eventually took money after resourceful government agents (who had concluded that he was an alcoholic) gave him liquor.

5. *Newsweek*, Nov. 15, 1976.

6. Nat Hentoff, *Village Voice*, Dec. 31, 1980. In a useful series of articles from November to January, Hentoff gives forceful consideration to the civil liberties issues raised by ABSCAM. In general, these issues have received only cursory attention in the media.

7. Fullam, "Memorandum and Order."



### *Coercion*

Participation may stem from a fear of the failure to cooperate rather than from free choice. An element of this seems inherent in certain sham criminal situations, or in employing as informants those accustomed to using threats of violence to get their way.

For example, two federal agents and a convicted armed robber became involved in a gambling and prostitution front in Alaska. This was part of an anticipatory plan to deal with organized crime, believed to be coming into the area because of opportunities offered by the pipeline project. The agents helped finance a bar which was to be the center of the operation and actively sought participants for the scheme. One of the agents posed as the organization's "heavy muscle"—and appears to have played a heavy-handed role in intimidating and prodding some participants.<sup>8</sup>

In a case growing out of a Washington, D.C., fencing sting, former Assistant United States Attorney Donald Robinson was accused of taking money for information from persons he thought were organized crime figures, but who were actually police. He eventually won his case on the grounds of entrapment. Robinson had at first ignored their approaches, but became involved after persistent telephone calls, a threatening call to his wife, and a warning that he might end up missing.<sup>9</sup> When coercion is mixed with temptation, the incentive to participate can be very strong.

### *Temptation*

Recent undercover actions have transformed the Biblical injunction to something like, "lead us into temptation and deliver us from evil." Temptation raises different issues than coercion or trickery. An act is no less criminal because it is engaged in as a response to a very attractive temptation than if it is committed without the presentation of temptation. The concerns raised are instead the assumptions on which the tactic is based, the questionable fairness of such a technique, and whether scarce resources ought to be used to pose temptation.

Defenders of these tactics usually make the assumption that the world is divided clearly between criminal and noncriminal citizens. It is assumed that presenting a temptation will not endanger the uprightness of the latter, while the former will commit the offense if given any opportunity to do so. Numerous critics have questioned this, noting the importance in criminality of situational factors. A well-known story captures something of this disagreement regarding the nature of motivation to engage in deviant behavior. A man encounters a woman in a fancy bar and asks her, "Would you accompany me to my hotel room for \$10,000?" She says yes.

8. *Los Angeles Times*, Nov. 17, 1977.

9. *Newsweek*, Nov. 15, 1976; John Lardner, "How Prosecutors Are Nabbed," *New Republic*, Jan. 29, 1977, pp. 22–25.

Whereupon he asks her whether she would come to his room for \$10. She indignantly says, "No, what kind of a girl do you think I am?" He responds, "Madam, we have already established that, what we are haggling about is the price." Depending on the side taken in this story, deviance is seen as either an inherent or a conditional attribute.

Of course, much depends on the type of offense. For some, the line between the criminal and noncriminal can be easily blurred through the offer of secret temptations. Al Capone captured this insight (if going too far) when, in response to a reporter's question, he said something like, "Lady, when you get down to cases, nobody's on the legit." Or, put differently, in the immortal words of Mel Weinberg, the key figure in the ABSCAM case, "You put the big honeypot out there, all the flies come to it."

It is certainly not true that everyone has his price or can be tempted. The imagery of turning on a faucet or providing sticky flypaper is overdrawn. However, there are certain types of behavior in which undercover tactics can turn up offenses a goodly proportion of the time among persons not thought of as criminals. This is the case for sexual encounters, underage drinking, marijuana use, minor traffic violations, and certain forms of illegality related to routine job performance. For example, a building inspector or purchasing agent may take a bribe or accept a gift for issuing a permit or purchasing goods that would have been issued or bought anyway; merchants and manufacturers will buy needed goods very cheaply without asking questions; and it is usually little problem to sell consumers goods such as televisions and stereos when offered at big discounts. The number of arrests possible from certain undercover actions is astounding. In situations where illegality is so easy to generate, the secret provision of state opportunities should be handled in accordance with a clear set of priorities with respect to both types of offense and offender. The necessity to make the best use of scarce resources, as well as fairness, requires that seriousness rather than the technical ease of making a case be a major criterion governing law enforcement's uses of culpability.

When there is a well-documented pattern of prior serious infractions or reasons for suspicion, secret testing may be appropriate. It may also be appropriate for persons in positions of special trust or temptation, if they are warned beforehand that the tactic may be used. But there is a danger that, once resources are provided and skills developed, the tactic will be abused. It may have been appropriate for God to test Job. The conditions under which it is appropriate for humans to test one another need careful specification. Some of the new police undercover work has lost sight of the profound difference between carrying out an investigation to determine whether a suspect is, in fact, breaking the law, and carrying it out to determine whether an individual *can be induced* to break the law. As with God's testing of Job, the question "Is he corrupt?" may be replaced with the question "Is he corruptible?" Questions of police discretion are

involved here. With limited resources, how much attention should authorities devote to crimes that appear in response to the opportunity they themselves generate or that can be subtly ferreted out through secret tactics, rather than focusing on offenses that appear without their inducement? As Judge Frankfurter wrote in *Sherman v. U.S.*, "Human nature is weak enough and sufficiently beset by temptations without the government adding to them and generating crime."<sup>10</sup>

Even if temptations are not offered, most complex activities, whether of businessmen, legislators, or academics, have legally gray areas wherein secret investigations could turn up violations. In many bureaucratic settings, "creative bookkeeping" may be illegal or at least violate internal policy, but organizational functioning would be much inhibited without it. Those who get ahead in organizations are often the persons who make things happen by breaking, bending, and twisting rules and by cutting through red tape. Rules are often general, contradictory, and open to varied interpretations. As those in law enforcement bureaucracies know too well, organizations have a vast number of rules that are overlooked until a supervisor wants to find fault with someone. In such cases, morality and conformity are often not the simple phenomena that the record of rule violation may make them out to be. The use of secret forms of information gathering, without there even being temptations, can thus be problematic.

#### *POLITICAL TARGETING AND MISUSE OF RESULTS*

The vagaries and complexities of motivation aside, questions can also be raised about how targets are chosen and how the results of an investigation are used. Undercover operations can be contrasted with conventional investigations which appear in response to the complaint of a victim. The latter offer some controls not present in secret investigations undertaken at police initiative. Openness in an investigation (with respect to the fact that it is being carried out and the means used to do so) and the presence of a complainant as a concerned outside party reduce discretionary power. Secret investigations carried out at police initiative that involve testing of integrity are a powerful means for the discovery or creation of discrediting information. They can offer a powerful way to control a person through arrest, the threat of exposure, or damage to a reputation through leaks of information. The potential for political and personal misuse of undercover work appears to be greater than that with overt police methods.

The last decade offers many examples of undercover targeting of radical activists, who could not be arrested for their political beliefs, for drug and other arrests. In Los Angeles, a top mayoral aid, unpopular with

10. *Sherman v. U.S.*, 356 U.S. 369, 372 (1974).

police because of his role in police department changes, was arrested on a morals charge under questionable circumstances. He lost his job.

Even persons who reject an undercover temptation may still be harmed. Involvement as a suspect in the apparatus of a covert government investigation cannot help but cast a shadow on a person's reputation. To be secretly videotaped or tape recorded and then to have this made public will convey a presumption of guilt to the uncritical. For the unprincipled, undercover tactics may offer a tool for character assassination.

Investigations may be carried out with no intention of formal prosecution. In cases where there is no prosecution because of insufficient evidence, rejection of the offer, or improper official behavior, the subject may still be damaged through leaks to the media. The government's unregulated power to carry out integrity tests at will offers a means of slander, regardless of the outcome of the test. In the case of politicians, for whom matters of public reputation are central, the issue is particularly salient. The breadth of some criminal laws (e.g., conspiracy) in the absence of internal guidelines gives police wide discretion in deciding whom to investigate. This routine discretion can mask the political motivation that may be behind an investigation.

As with other privacy-invading tactics, such as electronic surveillance or access to confidential records, there is the potential in undercover work for blackmail and coercion. Information gained may never be used in court, but may be filed away as long as those implicated continue to cooperate with the controlling agent—in legal ways, such as by offering information or setting up others, or in illegal ways, such as through pay-offs.<sup>11</sup> Getting information on the extent of this type of coercion is very difficult,

11. J. Edgar Hoover, with his files on important people, was a master at the use of this technique. Watergate has been interpreted as an effort to gather data for blackmail and political leverage rather than for publication. In a shocking example, Southern Bell Company executives used wiretap material in an effort to coerce local officials into agreeing to rate increases (George O'Toole, *The Private Sector: Rent-a-Cops, Private Spies and the Police-Industrial Complex* [New York: W. W. Norton, 1978], p. 70). As the main "headhunter" of the Internal Affairs Unit, and later as Chief of Police, William Parker is said to have used such tactics to control the Los Angeles Police Department and its broader political environment. The myth of secret knowledge can be a powerful control factor spreading fear among those who have things to hide. Rumors of the secret information Parker supposedly had worked to his advantage. Joseph Woods ("The Progressives and the Police: Urban Reform and the Professionalization of the Los Angeles Police" [Ph.D. diss., University of California at Los Angeles, 1973], p. 420) observes, "Newspaper reports implied that Parker knew dreadful things about one or another public figure, and that his secret files made him and the Department invulnerable to political interference." Within bureaucracies such as the police, holding in abeyance negative information that can always be used against a person is a major (and unstudied) form of internal control. One policeman notes, "It was like being in a game where the umpires had two rule books and wouldn't tell you which one you were playing under" (Sonny Grosso and Philip Rosenberg, *Point Blank* [New York: Avon, 1979], p. 189).

since undercover police and those blackmailed have a shared conspiratorial interest in keeping silent.

In some jurisdictions where employees are required to report illegal activities, they may face double testing. Thus, an employee of New York City's Buildings Department was approached by an undercover investigator who offered him a bribe if he would submit falsified architectural plans. The bribe was rejected. However, the inspector was suspended from his job for failing to report the bribe attempt.<sup>12</sup> Although legal, this action takes the traditional integrity test to a new extreme. A person may become the target of an undercover opportunity scheme, not because of suspected corruption, but merely to see whether requirements that bribes be reported are followed. The potential for misuse is clear. This technique can be a tool for getting rid of employees seen as troublesome for other reasons.

### *EFFECTS ON POLICE*

Undercover work offers great risks and temptations to the police involved. As is the case with informants, the secrecy of the situation, the protected access to illegality, and the usual absence of a complainant can be conducive to corruption and abuse. As noted, undercover operations can offer a way for agents to make easy cases or to retaliate, damage, or gain leverage against suspects not otherwise liable to prosecution. Issues of entrapment, blackmail, and leaks were considered in the section on targets. Here the focus is on direct implications for police.

The character of police work, with its isolation, secrecy, discretion, uncertainty, temptations, and need for suspicion, is frequently drawn upon to explain (1) poor relations between police and the community, (2) the presence of a police subculture in conflict with formal departmental policy, and (3) police stress symptoms. These characteristics are even more pronounced in the case of undercover work, which also involves other factors that may be conducive to a variety of problems. Beyond the threat of physical danger from discovery, there may be severe social and psychological consequences for police who play undercover roles for an extended period of time.

Undercover situations tend to be more fluid and unpredictable than is the case with routine patrol or investigative work. There is greater autonomy for agents, and rules and procedures are less clear. The expenses in setting up an undercover operation are often significant; thus, the financial costs of mistakes or failure are much higher than in conventional investigations. The need for secrecy accentuates problems of coordination and concern over the great potential for error. Undercover police may

12. *New York Times*, May 17, 1979.

unknowingly enforce the law against one another or have it enforced against themselves, sometimes with tragic consequences.

Undercover agents are removed from the usual controls of a uniform, a badge, a visible supervisor, a fixed place of work, radio or beeper calls, and a delineated assignment. These have both a literal and a symbolic significance in reminding the officer who he or she is.

Unlike conventional police work, activities by the undercover agent tend to involve only criminals, and the agent is always carrying out deception; thus, a criminal environment and role models assume predominance in the officer's working life. The agent is encouraged to pose as a criminal. His ability to blend in, to resemble criminals, and to be accepted is central to effectiveness. It also serves as an indication to the agent that he or she is doing a good job. As positive personal relationships develop, the agent may experience guilt, and ambivalence may develop over the betrayal inherent in the deceptive role being played. The work is very intense; the agent is always "on." For some agents, the work becomes almost addicting, as they come to enjoy the sense of power the role offers and its protected contact with illegal activity.

Isolation from other contacts and the need to be liked and accepted by members of a criminal subculture can have unintended consequences. "Playing the crook" may increase cynicism and ambivalence about the police role and make it easier to rationalize the use of illegal and immoral means, whether for agency or for corrupt goals. In his novel *Mother-Night*, Vonnegut tells us that "we are what we pretend to be, so we must be careful about what we pretend to be."<sup>13</sup> Police may become consumers or purveyors of the very vice they set out to control.

A good example of this can be seen in the case of a northern California police officer who participated in a "deep cover" operation for a year and a half, riding with the Hell's Angels. He was responsible for a very large number of arrests, including heretofore almost untouchable high-level drug dealers, and was praised for doing a "magnificent job." But this came at a cost of heavy drug use, alcoholism, brawling, the break-up of his family, an inability to fit back into routine police work after the investigation was over, resignation from the force, several bank robberies, and a prison term.<sup>14</sup>

Other examples include a Chicago policeman whose undercover work involved posing as a pimp and infiltrating a prostitution ring. He continued in the pimp role after the investigation ended and was suspended.<sup>15</sup> A

13. Kurt Vonnegut, *Mother-Night* (New York: Dell, 1975).

14. Lawrence Linderman, "Underground Angel," *Playboy*, July 1981, pp. 134-36, 142, 220-235, 244.

15. *Chicago Daily News*, Sept. 24, 1975.

member of an elite drug enforcement unit in the Boston area became an addict and retired on a disability pension.<sup>16</sup>

The financial rewards from police corruption, particularly in gambling and narcotics, can be great and the chances of avoiding detection rather good. Ironically, effectiveness and opportunities for corruption may often go hand in hand.<sup>17</sup> Police supervisors and lawbreakers may face equal difficulties in knowing what undercover police officers are really up to. Awareness of the problematic aspects of undercover activity helps explain J. Edgar Hoover's opposition to having sworn agents in such roles. The stellar reputation of the FBI for integrity is attributable, in part, to Hoover's refusal to allow the agents to face the temptations confronting police in agencies routinely involved in undercover activities.

Other costs to police, while not raising ethical or legal issues, can be wasted resources and even tragic consequences. The secrecy, presence of multiple enforcement agencies, and nature of many undercover activities can mean that police end up enforcing the law against one another. Sometimes the instances are merely comical, as in the case described by Whited.<sup>18</sup> Here, an effeminate man wearing mascara went for a walk with another man he met at a gay bar. After a series of suggestive comments, the former, an undercover officer, sought to arrest his companion. He discovered that the companion, also an undercover officer, was hoping to arrest him. Other times, however, the results are far more serious, as undercover police are shot or killed by other police. In recent years in the New York area alone, eight black police officers in undercover roles or working as plainclothesmen have been shot (five fatally) by other policemen who mistook them for lawbreakers.<sup>19</sup>

## INFORMERS

Exploitation of the system by informers can be a major problem. The frequency and seriousness of the problems informers can cause make them the weakest link in undercover systems. But most undercover operations must rely to some degree on such persons in the criminal milieu for information, technical advice, "clients," contacts, and introductions involving legitimation of the agents' own disreputability. A heavy price may be paid for this. Although informers face exceptional risks, they also face exceptional opportunities.

16. *Boston Globe*, Oct. 26, 1979.

17. See, e.g., Peter K. Manning and Laurence Redlinger, "Invitational Edges of Corruption: Some Consequences of Narcotics Law Enforcement," in *Politics and Drugs*, Paul Rock, ed. (New York: E. P. Dutton/Society Books, 1977), pp. 279-310; Robert Daley, *Prince of the City* (Boston: Little, Brown, 1978).

18. Whited, *Chiodo* (Chicago: Playboy Press, 1974).

19. *New York Times*, July 30, 1978.

Some recent cases appear to represent a significant delegation of law enforcement investigative authority. Informers can be offered a license to pursue whatever target they choose, as long as they assert that the person selected is predisposed to commit illegal actions. Verification of such assertions is often difficult. Control agents are dependent on persons whose professional lives routinely involve deceit and concealment. When the informer has a motive to lie, as is often the case, matters are even worse. Because of charges they are seeking to avoid, the promise of drugs or money, or a desire to punish competitors or enemies, informers may have strong incentives to see that others break the law. This can mean false claims about past misbehavior of targets and ignoring legal and departmental restrictions. Whether out of self-interest or deeper psychological motives, some informers undergo a transformation and become zealous super-cops, creating criminals or sniffing them out using prohibited methods.

The convicted swindler in ABSCAM (described by Judge Fullam as an "archetypical, amoral, fast-buck artist") had a three-year prison sentence waived and received \$133,150 for his cooperation in the two-year investigation. Accounts in an internal Justice Department memorandum indicate that he "would be paid a lump sum at the end of ABSCAM, contingent upon the success of the prosecution." In testimony at Representative John Jenrette's trial, the informer acknowledged that he expects to make more than \$200,000 from his undercover activities. He also received a \$15,000 advance for a book on his exploits.<sup>20</sup> In an age where "books by crooks" (not to mention movies and the lecture circuit) can mean big money, informers have a further incentive for dramatic discoveries.

The bridge to the truth and respect for law may be further weakened when brokers or middlemen are drawn into the operation. The latter do not even know they are part of a police operation. For example, a device used by some fencing stings is to employ street persons to spread the word that a new fence is paying good prices. A commission is paid the unwitting informer for each transaction he is responsible for. The informer may also collect a fee from the person selling the property. One of the most

20. Fullam, "Memorandum and Order"; Irving Nathan, "ABSCAM—Production of Supplemental Information to Defense Counsel" (memorandum: Washington, D.C.: Justice Department, Jan. 6, 1981); Stephen Kaufman and Daniel Rezneck, "Post-Hearing Memorandum in Support of Defendant Frank Thompson, Jr.'s Motion to Dismiss the Indictment on Due Process Grounds," March 1980, U.S. v. Frank Thompson, Jr., et al., no. CR-80-00291 (Pratt, J.); *Boston Globe*, July 18, 1980. In the classic fashion of the double agent, some of Weinberg's compensation appears to have come from his deceiving the government, beyond the intended targets of the deception. He was paid a \$15,000 reward for helping to recover \$2 billion worth of supposedly stolen certificates of deposit. However, there is evidence to suggest that the certificates were counterfeit and were never actually stolen, but rather were created under Weinberg's tutelage. He then "recovered" them for the reward money (Jack Anderson, *United Features Syndicate*, May 28, 1981).



troubling aspects of many of the ABSCAM cases is the role played by middlemen. For example, Joseph Silvestri, one such middleman, was apparently led to believe that he could earn a \$6 million broker's fee for helping an Arab sheik invest \$60 million in real estate. A condition for his earning the fee was gaining the cooperation of political figures, to be sure that all would work smoothly. It is not surprising that he apparently cast a wide net in seeking to gain "cooperation" from public officials.<sup>21</sup> Claims about past misbehavior or the predisposition of potential targets become even more suspect when this circuitous path is followed. This may help account for why, under the very tempting conditions of ABSCAM, it appears that only half of those approached took the bait.

Informers and, to an even greater extent, middlemen are formally much less accountable than are sworn law officers and are not as constrained by legal or departmental restrictions. As an experienced undercover agent candidly put it, "Unwitting informers are desirable precisely because they can do what we can't—legally entrap." This need not involve police telling informers to act illegally. But the structure of the situation, with its insulation from observability, skills at deception, and strong incentives on the part of the informer, makes supervision very difficult. Videotapes and recordings are a means of monitoring informer behavior. But the crucial and generally unknowable issue is what takes place off the tape recording. To what extent are events on the tape contrived? Informers and middlemen are well situated to engage in entrapment and the fabrication of evidence. Furthermore, the structure of the situation may enable informers to commit crimes of their own, apart from their role as law enforcement agents.

The informer-controller relationship is usually seen to involve the latter exercising coercion over the former. Through a kind of institutionalized blackmail—the threat of jail or public denouncement as an informer—prosecution is held in abeyance as long as cooperation is forthcoming. What is less frequently realized is that the situation can be reversed. When not able to hide criminal behavior, the skilled or fortunately situated informer may be able to manipulate or coerce the controller as well, with neither able to react.

The relationship can be exploited in other ways. Informers may secretly and selectively "give up" sworn undercover agents. The informer's knowledge of police can be a resource traded within criminal milieus. Or informers may sell the same information to several law enforcement agencies, in each case concealing the similar transactions with the other agencies. This leads to the possibility of confrontations between undercover agents from different agencies who are unaware of each other's identity.

21. Nick Kotz, "ABSCAM's Loose Cannons," *New Republic*, Mar. 29, 1980, pp. 21–25, citing the account of *Newsday* correspondent Anthony Marro.

The price of gaining the cooperation of informers may be the necessity to ignore their rule breaking. But beyond this "principled nonenforcement," these situations lend themselves well to exploitation by informers for their own criminal ends. Major cases may require the government to deal with master con artists operating in their natural habitat. They are likely to have a competitive edge over police.

An insurance expert playing an undercover role in "operation frontload," investigating organized crime in the construction industry, was apparently able to obtain \$300,000 in fees and issued worthless insurance "performance bonds." As part of his cover, he was certified as an agent of the New Hampshire Insurance Group with the power to issue bonds. The problems in this expensive case, which resulted in no indictments, became known through a suit against the government.<sup>22</sup> How many other such cases are there that we do not hear about because no one brings suit?

An informer in the ABSCAM case was apparently able to exploit his role and the false front that had been set up (Abdul Enterprises, Ltd.) to swindle West Coast businessmen. Realizing they had been taken, the businessmen complained to the FBI. However, the informer was able to carry on for a year and a half. The FBI took no action, essentially covering up his crime until after ABSCAM became public.<sup>23</sup>

Here we see a type of immunity that undercover work may offer. In this case, it was only temporary, serving to protect the secrecy of an ongoing investigation. Once the investigation was over, the informer was indicted, although one can speculate on the harm done (and lack of compensation) to the victims. Their victimization was indirectly aided by the government, first through its helping to provide the opportunity and then in its failing to intervene to warn others. Even more troubling are cases in which informers can essentially blackmail police into granting them permanent immunity. This happens when a trial and related publicity would reveal dirty tricks and illegality on the part of government agents,

22. *New York Times*, May 18, 1979. Another potential hidden cost in undercover operations involves the goods or money that is exchanged. In a Seattle case a judge ruled that patrons of a bar who purchased color televisions and stereos from undercover agents did not have to return them. The goods were not actually stolen, but purchased by police through an LEAA grant. The status of the nearly \$500,000 which the government paid out in nine ABSCAM cases is less clear; only \$50,000 had been recovered by the end of 1981 (*New York Times*, Sept. 18, 1981). In a related vein is the dispute over what should happen to a \$5,000 bribe paid by an FBI operative as part of a "staged crime" to the police superintendent of Bridgeport, Connecticut. The superintendent arrested the former convict bearing the bribe and took possession of the FBI's bugging equipment. Moments later FBI agents appeared and unsuccessfully sought the release of the operative and return of the equipment and money. The mayor of Bridgeport ordered that the \$5,000 be spent to buy Christmas toys for poor children, while the FBI continued to demand that the money be returned (*New York Times*, Aug. 21, 1981).

23. *New York Times*, June 4, 1980.

secret sources, techniques of operation, projects, or classified information.

A related phenomenon is crimes committed by persons who have been given new identities and relocated as a result of the Federal Witness Protection Program. The fact that such persons may eventually be prosecuted does not detract from the damage caused to third parties through the government's indirect complicity. Furthermore, prosecution for later crimes is not assured, either because of the witnesses' continuing usefulness, because of what they know, or because of the nature of the offense. For example, no matter what kind of bad debts (including unpaid child support) protected witnesses incur using their phony credentials, the Justice Department apparently will not reveal their identity. A relocated witness may even be moved again and again. Graham cites the example of a witness provided with a new identity who was relocated from Oklahoma to Minnesota to North Carolina, to protect him from the bad debts he continually ran up.<sup>24</sup> The ethical and practical consequences of helping career criminals relocate with a false identity in the midst of an unsuspecting community have received little attention.

### THIRD PARTIES

The possible damage to third parties is one of the least explored aspects of undercover work. Because of the secrecy and second-order ripple effects, much of the damage never comes to public attention. Those who are hurt may not even be aware of it to complain or seek damages. Its invisibility makes the harm even more problematic.

One type of damage to third parties has already been considered, crimes committed by informers under the protection of their role, but unrelated to an investigation. A second type more directly involves the intended law enforcement role. The most obvious cases involve the victims of government-inspired or facilitated crimes. These may be of a collateral nature, as in a Lakewood, Colorado, case, where two young men learned that a local "fence"—in reality a police sting—was buying stolen cars. They stole several cars and sold them to the sting. They showed the undercover officers a .45 caliber automatic taken in a burglary, stole another car, killed its owner in the process with this gun, and then sold the car to the "fence." They repeated this again and were then arrested.<sup>25</sup>

24. Fred Graham, *The Alias Program* (Boston: Little, Brown, 1977). See also the poignant case of Tom Leonhardt. His former wife, their two children, and her new husband, a criminal witness, were relocated by the Witness Protection Program. Leonhardt spent eight difficult years trying to find his children. The story is told in Leslin Waller's *Hide in Plain Sight* (New York: Dell, 1980) and in a film of the same title.

25. *National Law Journal*, Oct. 20, 1980. Of course, it is also possible to argue that third parties may be saved from victimization because such undercover work prevents crime that would have occurred in its absence. This may be through deterrence or incapacitation (e.g., some unknown proportion of persons may be saved from victimization while those arrested through a sting are in jail). But cases such as the one in Colorado have a reality and poignancy that make it hard to give equivalent attention to this argument.

According to one estimate, only about half the property stolen for the purpose of sale to a police-run fencing operation is actually returned to its owners.<sup>26</sup> People may not report their loss, or the property may lack distinctive identification. Even when people do get their property back, it can be argued that the trauma of their victimization should entitle them to some special compensation because of the government's role.

For security reasons or to gain compliance, citizens or businesses approached about cooperating with an undercover operation may not be given the full and candid account necessary for truly informed consent. Such was apparently the case with the informer in "operation frontload." In seeking his certification as an insurance agent with the power to issue bonds, FBI agents described him to the insurance company in question as a former police officer and "a straight arrow," and used a false name. The insurance company was not told of his criminal record, nor of the fact that he had agreed to be an informer to avoid a nine-year prison sentence and a fine. Because of the misbehavior of this informer, as of May 1979 damage suits had been filed in five states against the New Hampshire Insurance Group, the certifying insurance company. Company officials claim that his actions in issuing fake performance bonds to construction companies cost them and insurance brokers more than \$60 million in business losses. The head of a Chicago insurance firm states, "What the FBI did was a disgrace. . . . They've ruined us." He is suing for \$40 million dollars.<sup>27</sup>

26. Department of Justice, *What Happened* (Washington, D.C.: Govt. Printing Office, 1979), p. 4. Even were documentation presented, a high rate of return might simply be an artifact of the method. For example, undercover agents may be encouraged to purchase only easily identifiable stolen goods that can be returned to their owner. Adequate understanding of the effect of government fences on victimized persons requires knowing (1) what percentage of property brought to a government fence by a thief is stolen in the expectation that it will be purchased by the fence, (2) what percentage of this property is actually purchased by the fence, and (3) what percentage of the goods that are purchased is returned? The first question presents the most difficult measurement issues. Yet in many cases it seems clear that the theft is undertaken with a government fence in mind. For example, an El Paso, Texas, fencing sting conducted by local police and the United States Customs Agency set up in a storefront called JRE Apartment Complex Maintenance and Repair Shop. In the year the sting was in operation almost \$2 million in stolen property was purchased. A major contributor to this was a man and his girl friend who, over a five-month period, sold the project seventeen stolen automobiles, four trucking rigs with five semi-trailers, and two trailer loads of merchandise. The total recovery value of the items purchased from this couple was put at \$575,909 (Catherine Cotter and James Burrows, *Property Crime Program: A Special Report: Overview of the Sting Program and Project Summaries* [Washington, D.C.: Justice Department, January 1981]). Making such a large number of purchases from the same persons over a period of time certainly seems questionable policy. Issues related to how long an operation should go on, how many buys should be made from a person after sufficient evidence for prosecution has been obtained, and how many times a target should be approached after initially refusing an illegal offer have received little policy attention, particularly at the local level. Most departments have no guidelines for the conduct of undercover activities.

27. *New York Times*, May 18, 1979.

The web of human interdependence is dense, and by trifling with one part of it for deceptive purposes one may send out reverberations that are no less damaging for being unseen. Have any small businesses been hurt by the competition from proprietary fronts run by police? To appear legitimate, such fronts may actually become competitors during the investigation. Government agents with their skills and no need to make a profit would seem to have an obvious competitive edge over many small businessmen.

The damage to third parties need not be only economic. The most private and delicate of human emotions and relationships may be violated under the mantle of government deceit. As part of an attempt to infiltrate the Weather Underground, a federal agent developed a relationship with a woman. She became pregnant. After considerable indecision and at the urging of the agent, she decided to have an abortion. The agent's work then took him elsewhere and he ended the relationship, with the woman apparently never knowing his secret identity and true motives.<sup>28</sup> One can imagine the publicity and law suits if she had kept the child and the circumstances of the paternity had become known, or if she had died in childbirth, or become mentally unstable.

Another form of damage to innocent third parties may lie in the harmful publicity resulting from having their names mentioned on tapes which become public. This was the case for at least three senators mentioned as possible targets for ABSCAM. The frequent reliance of such investigations on con artists with a proclivity to lie, boast, and exaggerate is conducive to colorful and damaging exchanges or mistaken investigation. The fact that a person wrongly named by an informer may later receive a letter from the Justice Department indicating that an intensive investigation "disclosed no evidence of illegality that warranted our further investigation" seems small compensation once he has been implicitly tried by the newspapers.

While likely infrequent, another problem involves "good samaritans" who happen upon undercover operations and take action through benign motives which police may misinterpret. In a Boston case, for example, two college students heard a woman scream and intervened in what they thought was a crime in progress. They were then arrested and charged with assault and battery and helping a prisoner escape. The "crime" involved a decoy squad trying to arrest the woman's male companion.<sup>29</sup> In

28. Cyril Payne, *Deep Cover* (New York: Newsweek, 1979).

29. Four Philadelphia policemen from a decoy squad were recently indicted by a federal grand jury on the grounds that they had framed eight suspects on robbery charges. In one of these cases two suspects claimed they were arrested as they bent over to help the decoy pick up a roll of bills he had dropped. The police were members of an aggressive squad whose arrest totals easily exceeded those of other decoy squads working in the central business district (*New York Times*, Sept. 13, 1981).

New York, a minister and a former medical student were arrested as a result of what they claimed was an effort to help a "drunk" decoy with an exposed wallet. Charges were dropped. The minister reported feeling shaken and humiliated. He spent thirteen hours in custody after trying to aid the apparently unconscious decoy.<sup>30</sup>

Such occurrences are probably rare, but given the lack of systematic research, one cannot maintain this with certainty. The need to meet arrest quotas and desire to protect the decoy from assault may mean immediate police action once a person bends over or touches a sprawled decoy. This means that arrest of persons without criminal intent will occur.

Indirect damage to third parties may be seen in a possible increase in police impersonators as undercover work becomes more prevalent. Impersonators are offered role models and their initial tales made more credible by the public's knowledge that undercover work is common. Classic con games, such as the game in which the "mark" is persuaded to draw money from his bank in order to test secretly the honesty of bank employees, may be made more believable by public knowledge that various kinds of secret government integrity tests are carried out. Official statistics probably greatly underestimate the extent of police impersonation, since the persons preyed upon are often prostitutes, homosexuals, and persons seeking to buy or sell narcotics, who are relatively unlikely to report their victimization.

### CONVENTIONAL MEASURES OF EFFECTIVENESS

In assessing the consequences of undercover work with respect to crime, a distinction should be made between operations directed against subjects whose identity is known in advance, as with the infiltration of particular organizations, the disguise of police as hit men, or the offer of an opportunity for corruption to a person under suspicion, and operations directed against a more general "market" of suspects, as with decoys and fencing stings. The former type of undercover work is judged by its success in the case in question. Was a serious crime prevented? Were convictions obtained that would not have been possible otherwise or that were achieved at less expense than would be possible with conventional methods? The goal in such cases is not general deterrence, but apprehension. Such offenses tend to involve victims or witnesses who can report an incident, rather than being so defined only as a result of arrest actions, as is the case with consensual crimes. Analyzing the consequences of undercover work is easier with the former type of operation than with work directed against a more general suspect group, in which deterrence is also a goal.

30. *New York Post*, Mar. 29, 1978.

The case for the newer forms of undercover work, such as stings and decoys, rests on a number of inadequately tested assumptions, a fact that is ignored in the public relations efforts of advocates of these tactics, as well as by the media, which appear infatuated with the new investigative techniques. They are heralded as tactics that finally work in the war against crime, and as the only way to deal with conspirators. The dramatic effect of suddenly making a large number of arrests and recovering substantial amounts of property is stressed. But far less attention is given to other questions. What happens to crime rates during and after the operation? Who is being arrested? How does the number of arrests made or amount of property recovered compare with the accomplishments that would be expected over the same period using conventional methods? What is the cost per arrest or value of property recovered as compared with the gains under conventional methods? Any assessment of costs must include the sometimes long waiting periods aimed at establishing credibility and undercover efforts that had to be closed down because of leaks. An operation shut down because its cover is blown is far less likely to receive media attention than is one stopped after a large number of arrests. High vulnerability to discovery is an additional cost.

The research evidence on anticrime decoys and fencing stings is limited and not very reassuring. An analysis of New York City's much heralded Street Crime Unit (which specializes in decoy operations), while laudatory of the group's arrest and conviction record, did not find that the unit was "... decreasing either robberies or grand larcenies from a person."<sup>31</sup> Nor did a careful analysis of Birmingham's experiment with an antirobbery unit, which relied heavily on decoys, find it to have any effect on rates of larceny or robbery.<sup>32</sup>

A 1979 Justice Department study, entitled *What Happened*, makes rather grandiose claims for the success of sixty-two antifencing sting operations carried out since 1974.<sup>33</sup> But in a reanalysis, Klockars casts serious doubt on the quality of these data and their interpretation. Klockars concludes that there is no sound statistical evidence to suggest that the sting operations produced a decline in the rate of property crime.<sup>34</sup> An analysis of the use of federal funds for antifencing projects in San Diego over a five-year period concluded that neither the market for stolen prop-

31. Abt Associates, *New York City Anti-Crime Patrol—Exemplary Project Validation Report* (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, 1974).

32. Mary Ann Wycoff, Charles Brown, and Robert Petersen, *Birmingham Anti-Robbery Unit Evaluation Report* (Washington, D.C.: Police Foundation, 1980).

33. Dept. of Justice, *What Happened*.

34. Carl Klockars, "Jonathan Wilde and the Modern Sting," in *History and Crime: Implications for Criminal Justice Policy*, James A. Inciardi and Charles E. Taupel (Beverly Hills, Calif.: Sage, 1980).

erty nor the incidence of property crimes had been reduced.<sup>35</sup> Walsh notes that police engaged in antifencing operations were positive in their reactions to the experience, but had “. . . serious questions as to what had really been accomplished.”<sup>36</sup>

In general, the stings do not result in the arrest of minors because of concern over civil liability and fear of a bad press (i.e., agents are contributing to the delinquency of minors, or are leading unwary innocents into crime). Yet this age group is disproportionately responsible for property crime. Nationally, slightly over half those arrested for burglary are seventeen and under,<sup>37</sup> yet, in the stings studied, only 3 percent of those arrested were seventeen or under.

If we view the relation between police and criminals (especially those who are highly skilled) not as a war that is ultimately to be won, but as a continuing struggle with each side reciprocally responding to the other's temporary tactical advantage, then a diminishing returns effect is likely to be present. While the costs and risks of the illegality may be increased, committed criminals may simply become more clever. They are likely to make increased use of antibugging devices and engage in more sophisticated investigations and testing of potential co-conspirators.

Although the arrest of street criminals is an appropriate goal, it is important to determine what proportion of such persons are arrested. Seasoned observers note that some street criminals are adept at identifying decoys. Some of those arrested are derelicts or poverty-stricken persons in great need, or children, who cannot resist the temptation of what seems to be easy money, rather than regular street criminals. In a New York City study one in four, and in Birmingham four in ten, of those arrested through decoy operations had no previous arrest record.<sup>38</sup> Of course non-arrest may attest to a person's cleverness rather than purity of character. But given the transparent quality of, and publicity around, exposed wallet decoy operations, what is most striking about those who are arrested is their lack of competence. It thus seems unlikely that a large proportion of such first-time arrestees are criminals skilled in avoiding arrest. What ratio of criminals to noncriminals, or derelicts, arrested in such operations justifies a conclusion that the tactic is appropriate?

Awareness of the above can lead to a revised set of questions about the

35. Susan Pennell, "Fencing Activity and Police Strategy," *Police Chief*, September 1979, pp. 71-75.

36. Mary Walsh, *Strategies for Combatting the Criminal Receiver of Stolen Goods* (Washington, D.C.: Law Enforcement Assistance Administration, 1975), p. 114.

37. Federal Bureau of Investigation, *Uniform Crime Reports* (Washington, D.C.: Govt. Printing Office, 1977), p. 174.

38. New York City Police Department, "Survey of Criminal Records of Perpetrators Arrested by Members of the Street Crime Unit" (memorandum; Apr. 5, 1974); Wycoff, Brown, and Petersen, *Birmingham Anti-Robbery Unit Evaluation*.



effects of undercover work. That is, are there conditions under which undercover work may cause crimes that would not have otherwise occurred? There are many individual examples of this, although evidence in the aggregate is lacking. Among the ways in which undercover work may cause or contribute to crime (at least for the particular offense in question and in the short run) are the following:

It may generate a market for the purchase or sale of illegal goods and services and the indirect generation of capital for other illegality.

It may generate the idea for the crime, for example, vice and bribery operations that involve unwary innocents.

It may generate a motive. In political cases, for example, agents provocateurs may question the commitment or courage of those they seek to goad into illegal actions or may greatly encourage hostile actions which increase intramovement conflict.

It may provide a missing resource, such as chemicals for drug manufacturing or plates for counterfeiting, a resource essential for the commission of the crime. Or it may offer a seductive temptation to a person who would be unlikely to encounter such temptations were it not for police actions.

It may entail coercion or intimidation of a person otherwise not predisposed to commit the offense.

It may generate a covert opportunity structure for illegal actions on the part of the undercover agent or informant.

It may lead to retaliatory violence against informers.

It may stimulate a variety of crimes on the part of those who are not targets of the undercover operation (e.g., impersonation of a police officer, crimes committed against undercover officers).

Highly complex questions with difficult measurement problems are involved here, and they pose a severe task for research. However, there is a need to ask hard questions about these operations. If claims about the effectiveness and benefits of the operations are to be accepted, the Justice Department must go much farther in permitting research by disinterested outside evaluators. Such research should be concurrent with the investigation, and not restricted to evaluations done six months after its close.

Of course, undercover operations and the behavior within them are not all of one kind. Efforts to prevent versus efforts to facilitate a crime raise different sets of issues. Having an undercover agent attempt to purchase illegal goods and services involves questions different from those related to agents' attempts at the sale of such goods and services. In general, problems appear more likely as we move from operations undertaken in response to crimes that have already occurred, or are occurring, to those

that anticipate crimes that might occur. Among the latter, providing a target for victimization, as with the decoy squads, tends to raise fewer problems than do co-conspiratorial operations where the undercover agent is a willing participant in the offense. Undercover investigations which increase the opportunity for self-selection and are organized on the basis of prior intelligence or complaints, and stay close to real-world criminal conditions, seem superior to random integrity testing, or the creation of a highly artificial criminal environment with unrealistically attractive temptations.

### *BROAD CHANGES IN SOCIAL CONTROL*

Whatever the variations among undercover operations with respect to their legal and ethical implications, or short-term effects, actions such as ABSCAM and police-run fencing operations may be portents of a subtle and perhaps irreversible change in how social control in our society is carried out. It is well to reflect on whether this is the direction in which we wish to see our society move. It was roughly half a century ago that Secretary of War Henry Stimpson indignantly observed, in response to proposed changes in national security practices, "Gentlemen do not read each other's mail." His observation seems touchingly quaint in light of the invasions of privacy and the institution of routine surveillance that subsequent decades have witnessed. How far we have come in such a short time.

Fifty years from now will observers find our wondering about the propriety of attempts by police agents to bribe congressmen, distribute pornographic film, and run fencing operations equally quaint?

Broad changes in the nature of American social control appear to be taking place. We are experiencing a general shift away from some of the ideas central to the Anglo-American police tradition. The modern English police system, which Robert Peel established in 1829, worked to prevent crime by a uniformed, visible, twenty-four-hour presence. As societal conditions have changed and as the deterrent effect of this visible and predictable police presence has been questioned, an alternative conception has gradually emerged.

Rather than only trying to decrease the opportunity for crime through a uniformed police presence, or through more recent "target hardening" approaches that increase physical security and educate citizens in crime prevention, authorities now seek to *increase* selectively the opportunity structures for crime ("target weakening"), operating under controlled conditions with nonuniformed police. Anticipatory police strategies have become more prominent.

In this respect, police strategies may be paralleling those of the modern corporation, which seeks not only to anticipate demand through market research, but also to develop and manage that demand through advertis-

ing, solicitation, and more covert types of intervention. By secretly gathering information and facilitating crime under controlled conditions, the police obtain a degree of control over the "demand" for police services hardly possible with traditional reactive practices.

Whenever a market is created rather than being a response to citizen demand, there are particular dangers of exploitation and misuse. This is as true for consumer goods as it is for criminal justice processing. Some of the "demand" for undercover police practices may be spurious. In legal systems in which authorities respond to citizen complaints rather than independently generating cases, liberty is likely more secure. There is a danger that once undercover resources are provided and skills are developed, the tactics will be used indiscriminately.

Where there is a well-documented pattern of prior infraction, the use of undercover tactics may be appropriate. Yet, given pressures on police to produce, and the power of such tactics, it is an easy move from targeted to indiscriminate use of integrity tests, and from investigation to instigation.

The bureaucratic imperative for intelligence can easily lead to the seductions of counterintelligence. On this relationship, former FBI executive William Sullivan observed, "As far as I'm concerned, we might as well not engage in intelligence activities without counterintelligence. One is the right arm, the other the left. They work together."<sup>39</sup>

The allure and the power of undercover tactics may make them irresistible. Just as most societies that have discovered alcohol have seen its use spread, once undercover tactics become legitimate and resources are available for them, they are likely to spread to new areas and be put to questionable use. To some observers the use of questionable or bad undercover means is nevertheless justified because it serves good ends. Who, after all, cannot be indignant over violations of the public trust on the part of those sworn to uphold it, or the hidden taxes we all pay because of organized crime? One of the problems with such arguments is, of course, that there is no guarantee that bad means will be restricted to good ends.

An important party to the elaboration and diffusion of undercover tactics is likely to be police trained in government programs, who may face mandatory retirement at age fifty-five if they are not attracted to the more lucrative private sector long before that. The police lieutenant who was the central figure in the widely publicized stings in Washington, D.C., retired and opened his own securities investigation firm—"Sting Security, Inc."—and Mel Weinberg has started his own private investigation agency, called "Abscam Incorporated."<sup>40</sup> Perhaps we will reach the point

39. William Sullivan, *The Bureau: My Thirty Years in Hoover's FBI* (New York: W. W. Norton, 1979), p. 128.

40. Charles Conconi and Toni House, *The Washington Sting* (New York: Coward, McCann & Geoghegan, 1979); *Newsweek*, Oct. 26, 1981. Of course, undercover tactics are certainly not new to the private sector. Indeed, such tactics were largely brought to federal police agencies from the private sector through persons such as Alan Pinkerton and William J. Burns.

where some type of registration will be needed for former government agents trained and experienced in highly "sensitive" operations who continue such work in private enterprise. The case of the former CIA agents working for Libya could easily have its domestic counterparts.

From current practices, we may not be far from activities such as the following. Rather than infiltrating criminal enterprises or starting up their own sham enterprises, police agents (such as accounting specialists) might infiltrate legitimate businesses to be sure they are obeying the law, or to ensure that they would obey it if given a government-engendered chance not to. The IRS might secretly sponsor a promotion sweepstakes and then prosecute those who fail to report their winnings accurately. Following a wonderful Don Quixote tale, husbands or wives, or those considering marriage, might hire attractive members of the opposite sex to test their partner's fidelity. Businesses might create false fronts using undercover agents to involve their competitors in illegal actions for which they would then be arrested. A business could be sabotaged through infiltration by disruptive workers, or its public image could be damaged by a rival's taking false front actions in its name.

In the case of ABSCAM, we have the irony of Congress giving the FBI funds for undercover activities that were then used to finance actions against Congress. With Watergate not yet a decade past, one can imagine a more sinister reciprocal pattern. This would involve using some of the money and undercover dirty tricks to help elect friendly congressmen, who would then increase the appropriation, generating an endless cycle.

The deterrence sought through the use of undercover tactics comes, in the words of an experienced undercover agent, through "[creating] in the minds of potential offenders an apprehension that any 'civilian' could, in fact, be a police officer." Whether this tactic deters or merely makes sophisticated criminals more clever, while also encouraging new crimes on the part of the weak and the gullible, is a question for research. One can also ask what is the effect of ever more sophisticated ruses and elaborate surveillance on trust among law-abiding citizens? To many observers, American society is fragmented enough without the government's adding a new layer of suspiciousness and distrust. It is possible that, the greater the public's knowledge of such tactics, the greater the mutual distrust among American citizens.

In recent decades, undercover police activities such as COINTEL and the many local varieties damaged the protected freedoms of political dissenters. But now, through a spill-over effect, they may be inhibiting the speech of a much broader segment of society. The free and open speech protected by the Bill of Rights may be chilled for everyone. After ABSCAM, for example, people in government cannot help but wonder who it is they are dealing with. Communication may become more guarded and the free and open dialogue traditionally seen as necessary in high levels of government inhibited. Similar effects may occur in business and private life.

A major demand in totalitarian countries that undergo liberalization is for the abolition of the secret police and secret police tactics. Fake documents, lies, subterfuge, infiltration, secret and intrusive surveillance, and the creation of apparent reality are not generally associated with United States law enforcement. However, we may be taking small but steady steps toward the paranoia and suspicion that characterize many totalitarian countries. Even if unfounded, once such feelings are aroused and become part of the culture, they are not easily dissipated.

Soothsayers of doom are likely to become increasingly apparent as we approach 1984. The cry of "wolf" is easy to utter and hence easy to dismiss. Liberty is a complex condition, and under democratic government there are forces and counterforces serving both to jeopardize and protect that condition. That is, tactics that threaten liberties can also be used to protect them. However, neither complexity, sophistry, nor the need for prudence in sounding alarms should blind us from seeing the implications of recent undercover work for the redefinition and extension of government control. Lewis, in *It Can't Happen Here*, argues that if totalitarianism comes to America, it will be in traditional American form.<sup>41</sup> It will be by accretion and the gradual erosion of traditional liberties, rather than by cataclysmic changes. The issues raised by recent police undercover actions go far beyond whether a given congressman was predisposed to take a bribe or the development of effective guidelines.

Such police actions are part of a process of the rationalization of crime control that began in the nineteenth century. Social control has gradually become more specialized and technical, and, in some ways, more penetrating and intrusive. The state's power to punish and to gather information has been extended deeper into the social fabric, although not necessarily in a violent way. We are seeing a shift in social control from direct coercion used after the fact to anticipatory actions entailing deception, manipulation, and planning. New technocratic agents of social control are replacing the rough-and-ready cowboys of an earlier era. They are a part of what Foucault refers to as the modern state's "subtle calculated technology of subjection."<sup>42</sup>

Here, undercover practices must take their place beside varied technological advances:

New or improved data-gathering techniques, such as lasers, parabolic mikes and other bugs, wiretaps, videotaping and still photography, remote camera systems, periscopic prisms, one-way mirrors, various infrared, sensor, and tracking devices, truth serum, polygraphs, voice print and stress analysis, pen registers, ultraviolet radiation, and helicopter and satellite surveillance.

41. Sinclair Lewis, *It Can't Happen Here* (New York: New American Library, 1973).

42. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977).

New data-processing techniques based on silicone computer chips, which enable inexpensive storing, retrieval, and analysis of personal information that previously was not collected—or, if collected, not kept; or, if kept, not capable of being brought together inexpensively in seconds. To this must be added the increased prominence of computers (with their attendant records) in everyday affairs, whether involving commerce, banking, telephones, medicine, education, employment, criminal justice, pay television, or even library transactions.

An increase in the amount and variety of data available as a result of new reporting requirements (e.g., at one extreme, the pressure for some form of a national identification system), and an increase in private entrepreneurs who collect and disseminate personal data.

The vast and continuing expansion of the private security industry (which is, according to some estimates, now three times the size of the public police force). This is staffed by thousands of former military, national security, and domestic police agents schooled and experienced in the latest control techniques while working for the government, but now much less subject to its control.

Increasing centralization, standardization, and integration of law enforcement agencies (e.g., regionalization and merger plans at the local level; the absorption of the Alcohol, Firearms and Tobacco Agency into the Secret Service and suggestions to add the Drug Enforcement Agency to the FBI at the federal level; joint local-state-federal enforcement efforts; a new domestic role for the CIA; and standardized operating procedures inspired by new Justice Department funding efforts).

Evolving techniques of behavior modification, manipulation, and control, including operant conditioning, pharmacology, genetic engineering, psychosurgery, and subliminal communication.

Taken in isolation and with appropriate safeguards, each of these technological advances may have appropriate uses and justifications. However, the techniques become more problematic when seen in consort and as part of an emerging trend. Observers will differ as to whether they see in this an emerging totalitarian fortress, or benign tools for a society ravaged by crime and disorder. But regardless of how the trend is seen, it is clear that some of our traditional notions of social control are undergoing profound change. There is a need for careful analysis and public discussion of the complex issues involved.