



From morals to practice: Dilemmas of control in undercover policing

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In his seminal work, *Undercover: Police Surveillance in America* (1988), Marx manages to both frighten and reassure us about the enigmatic world of undercover policing. As disturbing as the message may be, his treatment is particularly thoughtful. Given the book's exacting sociological approach, it heartens this practitioner's soul that Marx does not shy away from considering the benefits of undercover work, and even gives his tentative blessing by concluding that, notwithstanding the problems associated with covert tactics, their use is sometimes a necessary evil.

Policing, of course, has always been ripe with opportunities for mischief. Law enforcement agencies have addressed their susceptibility to scandal with a profusion of rules and control mechanisms. We would hardly consider a department's manual complete, for example, unless it prohibited conduct such as sleeping on the job, using excessive force, or exploiting one's position for personal gain. But serviceable guidance about routine tasks is often lacking. What is more, the individualized nature of police work makes routine oversight inconvenient, if not impossible. Some of the most important choices officers make – what tactic to use, when to arrest – of necessity happen “on the fly”. Despite the accepted wisdom that professional policing requires limits on the exercise of discretion (Goldstein, 1977), the fluid and unpredictable nature of streetlevel encounters gives law enforcement bureaucracies limited leverage over their field personnel. Normally, this is not of great concern, as the goals and methods of the police are generally well-known and accepted.¹ It is probably fair to say that, excepting the occasionally egregious behavior of individual officers, politicians and the public are more concerned with the effectiveness of police efforts than with the specific means the police use to carry out their responsibilities.

Marx quickly reminds us, though, that undercover work is different. Undercover operations are at best difficult to control, and even when covert tactics are carefully applied their use may lead to unintended and perhaps undesirable

consequences. Using undercover agents and informants also has important public policy implications. Skeptical scholars have viewed the use of undercover tactics as being “plausibly inconsistent with the proper use of governmental authority in a liberal state” (Moore & Heymann, 1981, p. 4); “at or beyond the margin of acceptability” (Geis, 1981, p. 11); or more simply, just plain “unpalatable” (Schur, 1965, p. 136). A more specific objection is that secret policing can unbalance the delicate reciprocal arrangements that are indispensable to a democracy:

At their heart, these controversies [about undercover work] almost inevitably concern the balancing of competing social values. That is to say, they are, and properly should be, political issues in a most fundamental sense. They represent the need to make appropriate allocations of power between the state and the individual. (Kerkstetter, 1981, p. 2)

We shall soon review some of these concerns in greater detail. For now, suffice it to say that undercover work’s occasionally controversial outcomes have inspired numerous attempts to mitigate its potential for evil. This paper is another effort in that direction.

Truth or consequences

Deception is an unfortunate fact of everyday life. Given the commonplace “little white lies” that characterize common social intercourse, the petty repair frauds and deceptive advertisements that make consumption so worrisome and unpredictable, and the utterly corrupt white-collar schemes that periodically defraud investors of their life savings, it is easy to conclude that lying and cheating are every bit as American as apple pie. Recurrent scandals in business, medicine and the law have occasioned much introspection but spurred little in the way of actual reform. Dishonesty may be a particularly tenacious customer because its appeal often rests on structural factors. Every business person knows that it may be impossible to capitalize upon legitimate commercial opportunities without resorting to deceptive practices (Carr, 1979). Structural imperatives also encourage duplicity in the professions. Lloyd Weinreb (1967) quoted an attorney who, while delivering an address to his colleagues, answered each of these questions in the affirmative:

- Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?
- Is it proper to put a witness on the stand when you know he will commit perjury?

- Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?²

Moral philosophy is punctuated by recurring battles between “absolutists”, who shunned all lies, and “utilitarians”, who preferred to evaluate deceit by computing costs and benefits “to all concerned” (Kant, 1949; Mill, 1951; Bok, 1978).³ Important as these quarrels may be, they were probably settled long ago, when some enterprising caveman cold-cocked a brawnier opponent with a club hidden behind his back. After all, one reason that lying is popular is precisely because it can confer an (admittedly unfair) advantage.

Deceit, while always a troubling practice, seems especially wicked when practiced by public officials. Government lying promotes cynicism and can break the bonds of trust that give representative government its special appeal (Bok, 1978). Actually, official duplicity is undemocratic, as it disenfranchises the electorate by withholding information it needs to make an informed judgment.

Well, Watergate was one thing, but surely police work is another. If the police always had to tell the truth, their job would be much more dangerous:

We used his first name. We tried to con him. I said, “I can’t scream through the door, and besides it’s cold as hell out here and all your wife wants is her clothes.” But he just tells me to do you-know what and I’m sweating. “You can at least give her clothes,” I say to him. “We won’t say a word to you, we won’t even look . . . Tell me what happened; you’re a man. Did she try to put you down?” God, I’m talking to this guy, and the other cops are over by the stairs with their guns out. Finally – I can’t say how long – I feel the lock give and the door opens a crack and we go in and take him. (Sullivan, 1970)

As this example points out, it is probably wise to promise an angry, armed and barricaded husband that he will not be arrested if he will just open the door. Minor deceptions are an everyday feature of policing, and without them routine peacekeeping and order maintenance functions could not be as easily or safely accomplished.

When the police use deception to keep the peace or apprehend wanted persons, the cause seems just, so lies can be brushed off as just another unavoidable cost of urban life. When the police lure fugitives to a storefront by staging an elaborate telemarketed sting that offers prizes to “the first hundred customers,” we read about it, laugh about it, and forget about it.⁴ Deceptive behavior that prevents violence or results in the arrest of a fugitive hardly seems to threaten the fabric of a democracy.

However, lies seem somewhat less benign when the underlying purpose is to collect evidence. For example, detectives may exaggerate the amount of

PROPOSITION		Reject	Objective
All deception is bad	→	Some deception is good	Various
↓			
Government should not deceive	→	Some Government deception is good	Various
↓			
Police should not deceive	→	Some police deception is good	Various
↓			
Police should not deceive ordinary citizens	→	Deceiving ordinary citizens can be good	Keep the peace
↓			
Police should not deceive suspects	→	Deceiving suspects can be good	Prevent violence
↓			
Police should not deceive suspects to get evidence	→	Deceiving suspects to get evidence can be good	Obtain evidence; gain a confession
↓			
Police should not deceive suspects about their identity to get evidence (undercover work)	→	Undercover work can be good	Obtain evidence; have crime committed in presence of the police

Fig. 1. Decision-tree of police deception and undercover work.

information at hand to get a suspect to confess or to become an informant. They may even misleadingly suggest that a co-conspirator has “given up” the rest of the gang. Such practices, though usually legal, are tinged with a lingering notion of unfairness. By highlighting the irony of using lies to reach truth, deception casts a shadow on the integrity and professionalism of the police. From a more practical standpoint, it may even cause unwarranted sympathy for a defendant in court.

Deceptive interrogations obviously capitalize upon the legitimacy conferred by the trappings of office. (If you can’t believe a cop, who can you believe?) But undercover work goes a step beyond: the advantage, in the case of secret policing, falls precisely because suspects are unaware of both the purpose *and*

identity of their antagonists. More than simply falling prey to deceptive suggestions, targets become totally duped, thus literally allowing the police (in the immortal words of the late Allen Funt) to “catch people in the act of being themselves.” This unmatched capacity to invade private space is precisely what gives undercover strategies their peculiarly intrusive – and, to some, frightening – flavor.

Just whose crime is it, anyway?

Undercover work can be an effective way to catch crooks. However, it does constitute a kind of end-run on the conventional process of using victims, witnesses and physical evidence to arrive at the truth. Innocent persons are not usually present during covert encounters, so an important check-and-balance on the adjudicative process – testimony by third-party witnesses – is typically unavailable. (Surreptitious recordings can be a substitute source of corroboration.) One of undercover work’s most intractable dilemmas is that fact finders must often rely strictly on the accounts of undercover operatives – the police and informers – to divine the truth.

Undercover work’s reliance on informers is particularly worrisome. When ordinary citizens phone in complaints about suspicious activity, their agenda is usually straightforward: come rid my neighborhood of undesirables. Their information is frequently so unspecific, though, that it proves of limited value. Informers who are themselves criminals can usually be more helpful, and may even be able to personally introduce an undercover agent to a target. Unfortunately, their credibility is open to question. Criminals, it is felt, will lie as a matter of course. Their motives may also be tainted by factors such as money, consideration on another charge (i.e., “working off a beef”), revenge, or even getting rid of competition. It need hardly be said that informer misconduct is a major pitfall of the investigative process (Skolnick, 1966; Sanders, 1977; Kerkstetter, 1981).

Targets who are snared through undercover work often find that the only defense is to assert police misconduct. Such allegations usually fall into one of two types:

1. *Material acts did not occur.* A person charged with soliciting a murder may claim that their accuser is lying. A person charged with possessing drugs may claim that narcotics were “planted” by police.
2. *Entrapment.* A person charged with selling drugs may say they only did so because of threats from a police informer. Or, even if the behavior was admittedly voluntary, a defendant may claim that it was instigated by the

police. (Prostitutes often say that the idea to trade sex for money was brought up by the officer.)

Asserting that a crime never took place is a complete but rarely successful defense.⁵ Claims of entrapment have been much more fruitful, particularly in State courts. The entrapment defense is inherently more plausible since it essentially admits that the accused did *something*, but with an explanation. Entrapment defenses usually rationalize conduct through a two-step process:

1. There was no pre-existing intent to break the law, *and*
2. The offer of gain was so extreme that it might have tempted virtually anyone to commit an offense.⁶

Assertions of entrapment are easily defeated when there is evidence to show that a defendant had previously committed like crimes or was independently inclined to do so. A sequence of United States Supreme Court decisions have reaffirmed the Federal principle that, while the Government is prohibited from instigating crime, the crucial question to consider is whether a defendant had been predisposed to commit an offense.⁷ At least in the Federal system, this maxim remains true even when inducements are so beguiling that they might tempt a hypothetical person to commit an offense. As the court said in *Russell*:

It [does not] seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because Government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed.⁸

Marx and others fear that court decisions, have encouraged the use of undercover techniques that can actually “amplify” crime, or cause offenses to occur that would not otherwise be committed. Much of this “surplus” crime would be attributable to opportunists lured by an unusually tempting situation. Here are the “amplifying” consequences Marx once forecast for the indiscriminate use of street crime decoys:⁹

Police waiting for packages to be stolen from the front seat of a decoy car parked in a high crime area with its windows open, and those posing as drunks with an exposed wallet, have no trouble making arrests. (1977, pp. 40–41)

Undercover work might lure the non-predisposed into crime in the following ways:

- An undercover setting may be unusually tempting. For example, a wallet with cash spilling out sticking out from the pockets of a seemingly passed-out drunk.
- A setting may be unusually coercive. For example, an informant may intimidate a target into selling drugs.
- A setting (or legal statute) may be so ambiguous that persons are unaware that their behavior violates the law. For example, a manufacturer may not realize that a seemingly innocuous meeting with competitors actually constitutes criminal price-fixing.

Perhaps some temptations *are* too great. A few undercover storefront operations paid so well and provided such a ready marketplace for stolen goods that they apparently encouraged minor thieves to ply their trade (Marx, 1980, 1988). The “granddaddy” of police stings, P.F.F., Inc., was often troubled by petty criminals who persistently brought in certain kinds of goods that were plentiful and easy to steal. Undercover agents became so concerned that criminals were stealing just for them that they eventually began to actively discourage opportunists. On one occasion they “shut off” an enthusiastic car thief by refusing to pay more than \$50 per vehicle (Shaffer, Klose and Lewis, 1977).¹⁰

If arresting opportunists is bad, then the profusive use of what Marx has called “the new undercover integrity tests” must seem like the last straw. Integrity tests depart from the norm in that they seek to reveal misconduct that occurs during otherwise legitimate transactions; for example, the misuse of a public office for personal gain. Undercover agents have posed as motorists in order to trap traffic officers who accept bribes, and as shopkeepers to snare health inspectors who seek kickbacks in exchange for a passing grade. Possibly the most intricately contrived undercover episode of all time – Abscam – was basically an integrity test designed to root out political corruption.¹¹

Other tests fix their sights on the commercial sector. In the “bait-sales” technique, officers pose as thieves and offer to sell supposedly stolen goods to pawnshops and second-hand dealers. According to the law of many jurisdictions, business persons who make a purchase can then be charged with attempting to possess stolen property (Wachtel, 1980).

A key to the successful use of the bait-sales technique is to prove that purchasers “knew” that what they bought was stolen. This can be accomplished by either telling a customer that an item is “hot” or offering it for sale at a ridiculously low price. However, not all integrity tests can place targets on such clear notice. Deciding what constitutes misconduct may be simple enough in ordinary life, but in the murky, ambiguous worlds of commerce and politics the distinction between lawful and criminal behavior is not always so precise. For example, the undercover agents in Abscam would have found it extremely

awkward to warn politicians that their proposed behavior amounted to accepting a bribe. Still, as one of Abscam's prosecutors pointed out, none of the defendants in that imbroglio had their hands twisted behind their back. In essence, they willingly accepted gratuities in exchange for services that at the very least they could have offered for free:

Any of [the Abscam defendants] was free to turn down the proposition, leave the room, and report the matter to the FBI. None of [them] did so. (Nathan, 1981, p. 16)

Regardless of which side in the debate we might choose, there is little doubt that undercover work – particularly, integrity testing – has the power to undermine the social convention that there is a sharp difference between evil-doers and the righteous. Unfortunately, foolproof safeguards are not always available. So critics of secret policing will continue to claim – and not without some justification – that by their very nature covert tactics will not only detect but may also “create” crime.

With a hammer, everything's a nail

Even if we agree that undercover work is a generically troublesome practice, we must also concede that virtually anything the police do can lead to trouble. Cops, after all, are in a relatively nasty business, and even so-called “routine” patrol can easily lead to tragedy. Still, patrol work is an accepted and seemingly indispensable component of local law enforcement. Is the same true of undercover work?

On first blush, the temptation may be to just say “no”, that covert policing is simply too much trouble, forget it. But the solution is not quite that simple. Abolishing undercover work would make it impossible for the police to detect and investigate secretive and consensual crime (Reiss, 1971; Sherman, 1978; Wilson, 1978; Marx, 1988). Indeed, doing away with covert policing would de facto eliminate a lot of law, as the alternative to the “unpalatable” practice of sneaking about may be to simply do nothing.

While police forces throughout the world have employed covert tactics, their application in the United States seems particularly notable. American law enforcement agencies were already making extensive use of undercover work by the latter half of the 19th century. Endorsement of the technique by the Federal courts came quickly. One early Supreme Court decision was precipitated by a Federal inquiry into mail-order pornography. Undercover agents posed as ordinary citizens and ordered (what then was considered) smut through the mails. These materials were subsequently used as evidence and led

to the conviction of several defendants. The judgment of guilt was ultimately affirmed by the Supreme Court.¹²

Today's expansive use of undercover work is attributable to a legacy of enforcement activity against "victimless" crimes, including pornography, liquor trafficking, gambling, narcotics and prostitution. Undercover has also thrived as an effective supplementary technique. Covert techniques can elicit admissions and confessions in their "natural state," and thus overcome the natural reluctance of judges and juries to convict anyone of a serious crime. Undercover methods are particularly apt at dodging legal obstacles, such as *Miranda*, that can play havoc with conventional investigative efforts. Undercover work can also be an effective approach against localized street crime, and may often be the *only* way to gather substantial evidence of wrongdoing in politics and business (Marx, 1980, 1988; Geis, 1981).

Scholars and practitioners who agree that undercover work is a "necessary evil" have identified a number of factors that should be considered before covert techniques are employed. These include the perceived severity of an offense (i.e., danger to the community), the availability of other, less intrusive law enforcement techniques, and the manifest and intangible consequences of undercover work for the public and the police. The effort, according to Moore and Heymann (1981):

[should strike] a delicate balance between protecting an individual's right to privacy (especially from surveillance or investigation), and the society's interest in detecting offenses and punishing offenders. Often this . . . is seen as a tension between a principled defense of civil liberties and a utilitarian interest in reducing crime (p. 1).

Legal scholars have proposed that undercover work could be better controlled by making it subject to a "shock the conscience" standard. Anything beyond this threshold would be deemed fundamentally unfair and thus in violation of the Fifth Amendment (Dix, 1975; Cleary, 1979). However, the Supreme Court has repeatedly refused to set objective guidelines for police behavior. For example, in *United States v. Russell*, the Court refused to overturn a conviction although Government undercover agents had furnished a defendant with a (legal) precursor necessary for the manufacture of illegal drugs.¹³ In another notable case, *Hampton v. United States*, the Supreme Court affirmed the conviction of an individual for selling heroin that was originally supplied to him by a police informant, ruling, instead, that the defendant's proven predisposition to sell drugs and active participation in the transaction blocked any Constitutional relief.¹⁴

Concern with overreaching by the police also underlies another suggestion, that undercover officers strive to act as passively as possible (Dix, 1975).

Passive conduct reduces the opportunity for controversy and places targets in a poor position to claim their acts were involuntarily. Passivity by undercover agents effectively inoculates against the defense of entrapment and mitigates any assertion that an opportunist (rather than a hardened criminal) was involved. Still, passivity is not always a realistic or practical alternative. Being too "laid back" can sacrifice valuable evidence. It can also jinx a deal and arouse suspicion. Wilson (1978) said this about narcotics enforcement:

... the dominant strategy ... is not that of detecting or randomly observing a crime but of instigating one under controlled circumstances. (p. 42)

Some attempts to fashion limits on undercover work have attempted to weigh the relative costs and benefits of using intrusive techniques. One approach evaluates the merits of covert policing on the basis of a criminal's threat to the community:

Arguably ... it may be desirable that [undercover] invasions occur only when they objectively appear justified by the danger to the community posed by the subject. (Dix, 1975, p. 250)

Marx (1977, 1980) once objected to the use of undercover work against so-called victimless crimes, proposing instead that undercover methods be only applied when the crime is a felony or "career criminals" are involved. Others have rejected such obviously fatal restrictions but advanced their own even more quixotic formulae. For example, Moore and Heymann (1981), while agreeing that undercover work was ideally suited for investigating "serious invisible offenses" such as extortion, obstruction of justice and tax fraud, suggested a standard of "minimal intrusiveness" that seems hopelessly inexact:

... the more serious the offense appeared, the more tolerable would intrusive measures become. (pp. 21-22)

Scales of severity are hardly the answer. Even the supposedly most simple covert operations (e.g., street crime decoys) are so complex and expensive to stage that practical considerations alone restrict the use of undercover work to offenses that cannot be investigated through a simpler, more orthodox approach. Some of these crimes (e.g., prostitution) may not be particularly serious as crime scales go, but may have a significant localized impact on the quality of life. To deem them insufficiently serious to warrant covert intrusion would, in effect, make the underlying behavior legal. Wilson (1978) makes the point succinctly:

Some citizens are dismayed by the fact that narcotics agents make undercover buys. Though the amount of such buys can, within limits, be altered, the alternative to behaving in this way is to make, de facto, the sale of narcotics legal. There is no third choice. (p. 208)

As Kerkstetter (1981) once remarked, undercover tactics do not seem nearly so evil once they are compared against other commonplace investigative techniques, such as interrogations and surveillance. His point is that most investigative practices are potentially intrusive, some more so than others, and that undercover work is not necessarily or always the worst offender.

Instead of scaling crime severity, we might evaluate the dangerousness of an *offender*. Thus, the more menace a suspect presents, or the more odious or vicious his or her criminal record, the more might we justify using exceptional means to affect an arrest. Unfortunately, this approach would also effectively “legalize” consensual crime. In addition, its focus on targets (rather than conditions) might discourage the use of anticipatory strategies, such as street crime decoys, unless suspects can be identified in advance.

Some observers have suggested that justification for covert action is more self-evident when the police are mobilized by the community. Kittrie (1967) argues that antagonism to anticipatory law enforcement may actually be an underlying feature of American jurisprudence:

The traditional approach of our Anglo-American society has been for the State to step in only once an anti-social act has been committed or once “clear and present” danger has been demonstrated. (p. 43)

Kittrie’s concern with social necessity is reflected in Marx’ (1981, 1982) distinction between anticipatory and postliminary strategies. Anticipatory techniques, of course, are obviously the harder sell. But avoiding their use would eliminate the need to control undercover work, as precious little of it would be left. Most undercover methods, including vice enforcement and street crime decoys, are inherently anticipatory. As for the residual, to insist that infiltration is only o.k. when crimes are in progress – the equivalent of closing the barn door after the cows have gone – can pose unacceptable risks to public safety, as well.

Rulemaking by the Feds

Federal law enforcement agencies have promulgated rules to guide the undercover decision-making process. The Drug Enforcement Administration (DEA) restricts the provision of an opportunity to commit a crime to situations

“that would [not] induce an ordinary, law-abiding person to commit an offense” (U.S. Justice Dept., 1977, p. 3058). FBI regulations require that all investigations that involve “an invitation to engage in criminal activity” pass a three-pronged test:

1. It is reasonably expected that undercover work will reveal illegal activities;
2. The corrupt nature of the activity is reasonably clear;
3. The nature of the inducement is consistent with the character of the illegal transaction (U.S. Justice Dept., 1981).

Like principles were suggested by Dix over fifteen years ago:

The objective of a controlled offense opportunity should be to present the subject a situation that resembles as closely as possible situations that the investigator has reason to believe the subject would otherwise confront. Efforts to make the opportunity attractive to the subject should be governed by the need to make the opportunity as attractive as – but no more attractive than – those situations in which the investigator has reason to believe the subject will find himself in the near future. (Dix, 1975, p. 270)

From morals to practice

Much of what has been said about undercover work relates to the balancing of competing interests – notably, personal liberty and law enforcement. Although these values need not always be in opposition, critics allege that of all police tactics, undercover work is perhaps the most likely to provoke a clash. This fear has led to a host of proposals – including those discussed above – that promise to temper covert policing’s potential for evil. Translating some of these efforts into practice, though, could cause us to throw out the baby with the bath water. A few suggest that we ignore certain offenses and offenders altogether, while others would require that we construct and obtain agreement on the use of some very complex scales.

Starting here, our goal will be to find a practical way to mitigate the deleterious effects of undercover work. This requires that we explicitly accept three propositions:

1. It is impossible to employ covert practices – indeed, to police at all – without causing at least some damage to fundamental liberty interests.
2. Collecting evidence of secretive and consensual crime is a worthwhile task that merits some social costs.
3. Not all these costs are manageable, and those that are cannot be controlled by rank-ordering the seriousness of an offense and/or the wickedness of an

offender without undermining the goals that undercover policing proposes to support.

The social cost that shall be our main concern is the amplification of crime. Police activity that causes surplus crimes to occur not only poses a direct threat to liberty interests but runs counter to the assumption that the Government should prevent rather than create crime. For the sake of simplicity our definition will be narrowly drawn: that amplification occurs whenever the police instigate a person *not otherwise so disposed* to commit a crime.¹⁵ Our dependent variable – the probability that undercover work will enmesh the non-predisposed in crime – in effect reflects the probability of a classical “type 2” error of misidentification.

Marx’ recent work identifies two variables – targeting and intelligence – as being particularly significant (1988, p. 69). Ideally, undercover methods would only be directed against known targets of whom there is significant intelligence of criminal wrongdoing. However, Marx does not insist that undercover work is only appropriate when there is both a known target *and* prior intelligence, as this would require that suspects always be identified in advance, an impossibility in the case of vice enforcement and street crime decoys. Actually, Marx’ paradigm yields but one practical dimension, targeting/intelligence, since if a target is “known” there is probably intelligence, and if it is “unknown”, there likely is not. It also fails to address one of his own principal concerns, that settings and inducements can be so inexactly drawn as to snare opportunists instead of “real” criminals.

The undercover process

Enforcement strategies strive to make offenders subject to punitive sanctions. This is accomplished through a process that can be analyzed from a systems perspective (Katz & Kahn, 1966). Targets are acquired at the input phase, while during throughput the police apply a specific evidence-gathering technique. If all goes well, the output consists of cases fit for prosecution. Thus, narcotics officers identify dealers (acquire input) by talking to informers, then process suspects (throughput) by attempting to make an undercover buy. When officers succeed, the output consists of criminal defendants.

In conventional police work, input is normally precipitated by victims or witnesses. This is the so-called “reactive” model of law enforcement. But in “victimless” or consensual crime complainants are lacking. Undercover strategies have special value in such cases because they can generate input and process offenders in the absence of mobilization by victims and witnesses.

Clearly, undercover officers need to be mobilized by *something*. This

“something” is often an informer. Informers supply two essential kinds of information: first, that a certain person is allegedly committing an offense; secondly, that the crime is being committed in a certain way, at a certain time and place. If informers are unavailable, targeting becomes problematic and the police must seek other ways to mobilize. An available technique is to identify a “criminal milieu”, or opportunity structure that favors the commission of crime (Cloward and Ohlin, 1961; cf. Marx, 1980).

Two principal elements of criminal opportunity structures are *offender attributes*, including skills and temperament; and *market conditions*, or the cost and availability of contraband goods, the presence of consumers, victims or the police, and so on. Market conditions vary according to time and place. Urban drug supermarkets cannot flourish unless their locations are difficult to police and there is a plentiful supply of cheap drugs.¹⁶ There may be few inebriates to “jack roll” on a university campus, but there are many potential victims in the central city.

A unique feature of some opportunity structures is that their (criminal) inhabitants cannot be extracted from the background or “noise” component of the milieu until throughput occurs. Muggers, for example, usually remain unidentified until they assault a decoy and an arrest is made. In effect, input and throughput occur simultaneously. Two conclusions may then be retrospectively (though not always accurately) drawn:

1. Due to their actions, those arrested are bonafide members of the set of offenders who comprise the milieu.
2. The undercover strategy has successfully displaced crime from citizen-victims to the police (Kuykendall, 1982, p. 139).

By analyzing crime victimization patterns and identifying specific criminal milieux, the police may be able to predict where crime is likely to occur (Hindelang, Gottfredson and Garofalo, 1978; McCauley and Chalmers, 1981). This makes the use of undercover officers economically feasible and, of equal importance, allows the acquisition of targets, though in a rather diffuse sense, in the absence of specific information about the activities of known criminal suspects.

Targeting and opportunity structure

Undercover strategies can be classified along two dimensions. The first, *targeting*, identifies the methods used by the police to acquire suspects. Targeting ranges from “focused” to “diffused”. At the focused end we find instances of

undercover work where specific targets were identified in advance (e.g., an informer-initiated undercover buy). At the opposite, diffused extreme are tactics, such as street crime decoys, that do not select specific targets in advance.

The second dimension, *opportunity structure*, applies to the throughput stage. This use of the term represents the “frame” or context of a covert transaction in its most encompassing sense, including the physical setting, props, offers of gain, and the appearance and behavior of the undercover officers themselves (cf. Goffman, 1974).

Opportunity structures are comprised of three interactive features: *settings*, *inducements*, and *notice*.

1. *Settings* means the physical and methodological features of an undercover transaction, including location, time of day, and specific method or technique.
2. *Inducements* include the tangible and psychological elements of a transaction, as designed or elaborated by the police, that are meant to influence target behavior. Simple offers of cash are probably the most common tangible inducement. Psychological inducements vary. Officers might shape their appearance and conduct in a way that reassures targets and encourages them to “perform”. For example, recalcitrant or suspicious suspects may be swayed by playing on their need for recognition or acceptance.¹⁷
3. *Notice* means the degree to which a target is made aware of the illegal nature of the proposed transaction. Notice is most often a factor in so-called “white-collar” crimes, such as price fixing, where rules of conduct are ambiguous and the authorities must gather evidence of specific criminal intent.

Opportunity structures range from “authentic” to “unauthentic”. Authentic opportunity structures embody attributes that faithfully replicate the known features of actual criminal settings and transactions. Street crime decoy work in New York’s Central Park (without the bulging pockets, of course) would probably represent the authentic ideal case. An example of an unauthentic opportunity structure might be a sting operation that pays generously and openly encourages customers to steal.

		OPPORTUNITY STRUCTURE	
		Authentic	Unauthentic
T A R G E T I N G	Focused	1	2
	Diffused	3	4

Fig. 2. Crosstabulation of targeting and opportunity structure.

A paradigm of undercover work

When the attributes of targeting and opportunity structure are orthogonalized, they yield the classification scheme shown in Fig. 2.

Cell no. 1 – Focused targeting and authentic structure

This cell defines episodes of undercover work that would be least likely to snare opportunists or the non-predisposed. One example would be the authentically staged, informer-initiated drug buy. Other examples include extortion and murder-for-hire schemes, where officers pose as victims or potential killers, and the sale of allegedly “stolen” bait goods to known fences. (Using the bait-sales technique, but giving inadequate notice, would exemplify cell no. 2.)

Cell no. 2 – Focused targeting and unauthentic structure

Undercover episodes characterized by this cell are more problematic since their opportunity structure may be excessively beguiling. Examples of this cell include political and white-collar integrity tests that are directed against known targets, but whose scenarios are unauthentic, involve excessive payments, or provide insufficient notice.

Cell no. 3 – Diffused targeting and authentic structure

Techniques exemplified by this cell are also less desirable since they forego target preselection and thus cannot guarantee that *only* “real criminals” will be apprehended. Most decoy and vice enforcement strategies probably belong

here. Another example is the undercover infiltration of urban drug supermarkets, where officers troll for those who seem willing to buy or sell narcotics.

Cell no. 4 – Diffused targeting and unauthentic structure

Clearly, this combination poses the greatest risk of snaring marginal offenders. One example is a stolen property “sting” that is carelessly staged and makes selling loot a seemingly pleasant and highly rewarding proposition.¹⁸ (Stings that employ realistic settings and inducements are an example of cell no. 3.)

Dilemmas of control

Undercover work is a tough nut to crack. While our paradigmatic approach to rulemaking seems simple enough, its dimensions – targeting and opportunity structure – are not without their own perplexing problems.

Targeting

Focused targeting is usually accomplished with assistance from an informer. For example, an arrested drug user who seeks leniency may introduce an undercover officer to his source of supply. Dealers of contraband participate in open, redistributive marketplaces that are relatively simple for secret agents to penetrate. This is not true for street crimes such as mugging and prostitution, whose ad-hoc nature and independence from outsiders makes advance information difficult or impossible to obtain. Focused targeting may in principle be a superior strategy, but unless we are willing to decriminalize a wide variety of criminal behavior the use of diffused techniques seems unavoidable.

Opportunity structure

The preferred value – authenticity – can compromise safety. Protecting officers who are dealing “on the street” is a vexing proposition, as cover teams must remain hidden but be sufficiently near to quickly respond. In contrast, assuring the safety of officers in a controlled environment, such as a police storefront, is relatively simple. The observation that protection mechanisms grow increasingly cumbersome and ineffective as settings become more authentic is old news to “narcs” and street-crime decoys, who frequently get beat up, cut up and even shot in the inevitable tussles that accompany real life on real streets (Wachtel, 1982).

Authentic settings can also make the evidence-gathering task much more difficult (Wachtel, 1982; Marx, 1988). Surreptitious video and audio recordings are best made at fixed sites, where equipment can be concealed and positioned for proper effect. On the other hand, using electronic surveillance gear in the field generally requires improvisation and compromise, and often yields indistinct images and poor audio. Controlled settings also allow equipment to be properly concealed. This is far safer than the field alternative of strapping on a miniature transmitter and hoping for the best.¹⁹

Authentic opportunity structures carry the risk of enmeshing undercover officers in undesirable behavior. For example, if a narcotics deal takes place in a "dope pad", an undercover agent might be expected to ingest drugs. Undercover officers who infiltrate criminal organizations are exposed to a host of corrupting influences and may be asked to commit illegal or immoral acts. Getting too far into the "cold" could even transform roles into reality. Moss (1977) supplies this poignant historical vignette about the misadventures of a Czarist spy:

The Russian Yegor Azov, who was infiltrated by Czarist secret police into the Social Revolution Party as a double-agent . . . was so carried away with his role as a revolutionary that he organized the assassination of the Minister of the Interior. (pp. 148–149)

Demands for authenticity also conflict with other goals. Sure, letting a decoy's wallet stick out a bit may occasionally trap an opportunist, but in the real world of budgetary and manpower constraints the police cannot wait indefinitely for a bad guy to make his move. Sure, when undercover officers offer too much money for stolen goods they probably encourage thievery, and when they offer large amounts of cash for drugs they probably encourage drug dealing. But what is the alternative? Should officers forego opportunities to recover stolen merchandise, to seize narcotics, or to arrest corrupt officials because doing so might require a breach of authenticity?

Decisions to be or not to be authentic cannot even be made unless appropriate constructs of authentic criminal behavior exist. To be sure, creating standards for offenses of which little is known can result in scenarios that are more a product of the imagination than anything else. (Such, of course, was the charge leveled against Abscam.) But should we reject pursuing the "big fish" simply because we do not know how they operate? Is it in the public interest to give the "high-rollers" that big a break?

Towards an informed public policy

Observers of contemporary policing have repeatedly warned that undercover work can entice essentially law-abiding persons to commit an offense. One way to lessen the threat is to restrict targeting to suspected lawbreakers. Careful *staging* (an authentic opportunity structure) will also diminish the likelihood that something about the intervention itself, such as offering too much money, might encourage a non-predisposed person to commit a crime. But to *insist* on focused targeting limits the range of police activity by making the authorities highly dependent on the availability of informants. It is equally problematic to demand that only authentic opportunity structures be used, as doing so ignores the complex interactions of authenticity, safety and evidence.

Perhaps all that should be required is that the police carefully assess the dimensions of targeting and opportunity structure whenever undercover work is contemplated. But if rules are what we want, the following would seem reasonable:

- Whenever feasible, targets should be selected in a “focused” fashion; that is, based on a reasonable suspicion that they are already involved in crime or are actively planning to commit an offense.
- Opportunity structures should either be genuine or authentically replicated. *This is especially important when targeting is diffused, as in decoy work.*
- If there is concern about the authenticity of settings, inducements should be limited. Targets should also have adequate notice that their proposed behavior is criminal.
- If opportunity structures are unauthentic, or if their “real-world” equivalent is unknown, focused targeting should be used.
- Undercover strategies that require both diffused targeting and unauthentic opportunity structures should be avoided.

With apologies for possibly misreading his mind, it seems that what Marx ultimately intends is that the police set and follow rules that consider the needs of society – not just the interests of law enforcement. Setting the proper boundaries for police behavior requires not only that law enforcement officers decide *what* to do, but also what to *refrain* from doing. As the courts have repeatedly demonstrated, if we cannot (or will not) mind our own store, they will do it for us, sooner or later. When viewed from this perspective, establishing – and following – reasonable standards seems good for the community, good for the justice system, and good for the police.

Notes

1. Aggressive first-level supervision and a competent, dispassionate internal inspection function are a law enforcement agency's lifelines.
2. According to Weinreb, the attorney survived attempts at disbarment and went on to head the ethics committee of the District of Columbia Bar.
3. Utilitarians fail to impress Bok (1978), who is skeptical that judgments regarding the relative merits of lying can ever be impartially rendered.
4. Large-scale police "storefronts" flourished in the seventies under Federal funding. The archetypal front was a commercial site, either a warehouse or second-hand store, that was elaborately rigged with electronic gear. It was often simple to lure small-time thieves to the "store" where they would sell stolen property to undercover "employees". All, of course, was recorded on videotape. Storefronts usually ran for several months; at the conclusion, warrants would issue and mass arrests took place. This task was occasionally made more efficient by staging a "party". Thieves walked in the front expecting a door prize, but left through the back in handcuffs. Variations on this theme are still used today.
5. Claims of complete innocence rarely prevail. However, the use of "planted" evidence is a problem that recurrently plagues narcotics police. These unfortunate events serve to highlight the credibility dilemma that attends to undercover work.
6. The entrapment defense has been widely codified. The following example is from the penal laws of the State of New York:
It is an affirmative defense that the defendant engaged in the proscribed conduct because he was [actively] induced or [actively] encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purpose of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it . . . Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. (N.Y. Penal Law, sec. 40.05)
7. *Sorrells v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973).
8. *United States v. Russell*, at 434.
9. In the decoy strategy, undercover agents or vehicles are placed in situations where they are likely to be victimized. Surveillance officers wait nearby, ready to move in and make an arrest. Decoys are usually seeded with "bait". An undercover officer's pocket may bulge with a wallet, or an expensive camera may be on a car's front seat. If patterns of victimization are known, and targets appear sufficiently vulnerable, using decoys can lead to numerous arrests.
10. Arresting lots of opportunists or minor thieves may be a worthwhile endeavor. (If nothing else, it might so annoy them that they will go somewhere else.) But pressures to make lots of arrests can so drive the system that it will become increasingly attuned to produce body counts, thus possibly foregoing "quality" cases (Wachtel, 1985).
11. Federal undercover agents and an informant posed as royalty and bribed members of Congress to gain assistance in fostering special-interest legislation.
12. *Grimm v. United States*, 15 S.Ct. 470 (1895); *Andrews v. United States*, 16 S.Ct. 798 (1896).
13. 411 U.S. 423 (1973).
14. 425 U.S. 484 (1976).
15. Instigating a criminal to commit additional or more serious crimes than he or she would have otherwise committed may also qualify as "amplification".
16. Drug supermarkets are public locations where flocks of petty dealers and customers engage in illicit transactions. One typically favored location is a large urban park.
17. Not all elements of an undercover setting have value as an inducement. But some character-

istics that seem to be of limited effect – for example, the physical setting of a transaction – may be fashioned into effective influencers. Consider the difference between simply meeting in a parking lot and doing so, but arriving in a limousine.

18. Some storefronts, particularly the larger operations, used an unauthentic approach. Undercover officers sought out thieves at bars and other public places, and persons who seemed favorably disposed were invited to bring their loot to warehouses and other locations that were essentially closed to public view. Later studies questioned the value of some of these stings, as few of those arrested seemed to be habitual offenders (Weimer, Stephens and Besachuk, 1983; Vito, Longmire and Kenney, 1983).
19. Paradoxically, safety and evidence can actually be jeopardized if settings are *too* concocted. Professional thieves apparently shunned some storefronts because they “smelled a rat”. Undercover officers may choose realism if the contrived alternative seems too easy to unmask (Geberth, 1979).

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