ABSCAM Ethics: Moral Issues and Deception in Law Enforcement

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Contents

rely, in large measure, on audio and videotaped reproductions of the pivotal events to rule on any allegations of government overreaching or other misconduct.

When courts determine the fundamental fairness of these operations, they should compare, among other things, the quality of evidence in such videotaped operations with, for example, the testimony of a disaffected participant in an alleged bribe transaction committed years earlier by a prominent public official of theretofore unblemished reputation. They should also consider the likelihood that there will ever be a report of a bribe between two consenting individuals, each of whom has profited from the transaction. The court should also consider whether an operation such as ABSCAM is not less intrusive and less coercive than other judicially sanctioned techniques. They should compare the consensually recorded conversations between public officials and strangers to court-ordered wiretaps and bugs, where no party to the conversation knows that it is being overheard or recorded; judicially issued search warrants executed in private homes and offices against the wills of the owners; and grand jury or trial testimony compelled against friends or even relatives. All that the undercover technique relies upon is the willingness of public officials to engage in criminal conduct and make damaging admissions voluntarily and intentionally to those they believe are colleagues in crime. They recognize, of course, the risk that at some later date these people could reveal damaging information to the authorities, but they believe either that this is a remote possibility or that if a case is brought they will be able to put their credibility on the line against these criminal actors. What they do not know is that their voluntary words or actions are being recorded and are available for future use against them.

When all of these factors are considered, it becomes apparent that sophisticated undercover operations are fair and effective and represent the wave of the future in combatting public corruption as well as a variety of other consensual crimes. I suggest that this is good news, at least for law-abiding citizens.

2

Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement

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LAW ENFORCEMENT IN A FREE society must strike a delicate balance between protecting individual rights to privacy (especially from government-sponsored surveillance) and the society's interest in detecting

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criminal offenses and punishing offenders.[1] Often this tension is seen as one between a *principled* defense of civil liberties and a mere *utilitarian* interest in reducing crime. In this formulation, the protection of civil liberties seems the nobler cause. It is tempting, therefore, to resolve issues concerning enforcement policies and methods by appeal to constitutionally based principles guarding civil liberties.[2]

Undoubtedly, there is wisdom in looking first to constitutional principles for guidance in regulating enforcement strategies. But reliance on constitutional principles guarding individual privacy as the touchstone for enforcement policy is insufficient. In important areas of enforcement activity such as informants, undercover operations, and grand jury investigations, constitutional principles leave, perhaps, too much latitude to enforcement agencies.[3] Moreover, the society has more at stake in the design of enforcement strategies than the protection of individual privacy from government scrutiny. As a matter of principle, for example, we should assure the overall rationality and fairness of enforcement strategies.[4] This means that enforcement efforts should be directed toward serious offenses, not wasted on trivial matters. It also means that, holding the nature of the offense constant, the risks of investigation, effective prosecution, and punishment should be approximately equal among criminal offenders. Or, somewhat less restrictively, the risks should be independent of the social position or sophistication of the offender, as well as of any special hostility of enforcement agencies.[5] Finally, we can reasonably be interested in preventing criminal offenses and promoting social order at the least possible cost. To the extent that constitutional principles are silent or ambiguous in important areas, and to the extent that other social interests deserve to be recognized and accommodated in designing enforcement strategies, it is necessary to take the design (or evaluation) of enforcement strategies out of the realm of purely constitutional issues and place the enterprise in the more ambiguous realm of social policy, where diverse values compete without a clear hierarchy.[6]

Viewed from this perspective, the tensions in the design of enforcement strategies are more apparent. We would like to detect and solve crimes, but we don't want to intrude in private areas or field a massive enforcement bureaucracy. We would like our enforcement efforts to be

fair among offenders, but interests in non-intrusiveness and economy prevent us from positioning public agencies to note and respond to all offenses, thereby creating the potential for systematic biases in enforcement operations.

As is often the case, we have solved this tangle of competing interests not through explicit discussion, but through the evolution of an enforcement strategy that seems to balance the interests rather nicely. Essentially, the solution leaves most of the burden of detecting and investigating criminal offenses to private individuals.[7] As part of this strategy, we have established legal doctrines and enforcement procedures that restrict public investigative activities to *reactions* to criminal offenses.[8] In our conception, the public interest in controlling crime and punishing offenders overwhelms a general interest in protecting privacy only when an offense occurs or becomes imminent. Moreover, we imagine that enforcement agencies learn of such offenses not by positioning themselves in every nook and cranny of the society, but through private individuals who come forward to tell the agency about the offense, or through relatively superficial and visible patrol measures.

By limiting efforts to detect offenses to private mobilization and visible patrol activities, we solve the problem of detecting offenses in an inexpensive and non-intrusive way. Moreover, there is an appearance of full and impartial enforcement of the law because all allegations from citizens receive a certain amount of investigative activity, and because the patrol activity, although relatively superficial, is nonetheless fairly distributed over the space within which offenses might occur. Thus, by relying on private mobilization, a broad but superficial patrol activity, and investigative apparatus activated only when a crime has occurred, we create an enforcement apparatus that minimizes government threats to individual civil liberties, is inexpensive to operate, and appears fair in its application of the law.[9]

This strategy of enforcement seems to work well in terms of controlling crime and promoting security as long as we think of crimes such as robbery, rape, and assault, and as long as we think of apprehending offenders after the fact rather than trying to prevent these offenses. In such situations, it is plausible that victims and witnesses, motivated by nothing more than a sense of injustice, will come forward to say that an

offense has occurred, and assist the police in identifying and apprehending the offender. Of course, some difficulties arise when the motives of witnesses seem tainted, or, as in many domestic quarrels and barroom brawls, when it is difficult to distinguish the offender from the victim. Still, for many important offenses, the reactive strategy for deploying enforcement effort seems to work well.

Problems with this conception arise, however, when we try to enforce against offenses for which no victims and witnesses are willing to report that an offense has occurred, or when we try to thwart specific crimes before they occur. For such activities the reactive strategy may be inappropriate, and some different principles of enforcement action must be brought to bear.

The purpose of this chapter is to explore the wisdom of departing from the traditional reactive strategy of enforcement and engaging in more aggressive *proactive* strategies for more or less limited purposes. The argument is that some important criminal offenses are largely invisible to traditional enforcement methods and, consequently, that if we relied solely on traditional methods, offenders committing these offenses would be relatively immune to effective prosecution. This not only creates a nagging weakness, but also introduces an important inequity into our system of enforcement. The only way to shore up enforcement against these invisible offenses is to rely on enforcement strategies that are much more intrusive than the traditional methods; for example, covert surveillance, heavier reliance on informants, the use of undercover operations to instigate offenses, and so on. Interests in enhancing the equity and overall effectiveness of enforcement strategies will, therefore, counsel the use of these techniques against invisible offenses despite the risks to individual privacy. But these intrusive techniques can also be effective against traditional offenses. If that is true, and if we are not barred *in principle* from using the techniques, then perhaps they should be used in enforcing against traditional crimes as well. And, indeed, the more we think about these alternative approaches, the less obviously inferior they seem to reliance on the whims and caprices of private individuals who do most of the actual policing in our current system. Thus, the existence of invisible offenses and the specialized patrolling and investigative strategies

for dealing with them challenge our conventional thinking about the best way to balance competing social interests in the design of enforcement strategies.

Invisible Offenses

By now, we are all familiar with the idea of victimless crimes.[10] We understand that for narcotics offenses, vice offenses, gambling, and so on, we lack an indignant victim to assist police investigations. There may be indignant witnesses, of course, and they may mobilize the police, but the witnesses can rarely establish convincingly that a crime occurred and the police arrive too late to see the crime in progress. To enforce effectively against such offenses, then, we have been forced to rely on a variety of measures that depend crucially on deception. We encourage covert physical surveillance of areas where such activity is suspected; we recruit informants to tell us when and where offenses are likely to occur and who is involved; and we organize undercover operations to instigate offenses.[11] Since these enforcement methods extend the scope of government surveillance and involve the government in suspect acts and relationships; the offenses do not seem all that serious and, indeed, are plausibly inconsistent with the proper use of government authority in a liberal state; and little effective deterrence seems to result; the enforcement of laws against victimless crimes seems to many a bad bargain. The jurisprudential lesson typically drawn from this analysis is that it is a mistake to legislate personal morality.[12]

If we looked at these offenses from a slightly different perspective, however, and understood that from an investigative point of view the problem with these offenses was not that they legislated morality, but that they deprived investigators of the focus and assistance provided by victims and witnesses, then we would see that at least three other kinds of offenses posed similar difficulties.

One kind produces victims but the victims do not notice that they have been victimized because the effects are broadly diffused or occur far in the future. White-collar offenses such as tax evasion and counterfeiting fall within this class. So does bribery, where inappropriate uses of public authority fail to produce a cognizant victim. Among offenses that pro-

duce effects far in the future are the illegal disposal of toxic wastes, the embezzlement of pension funds, and the sale of phony securities to people with long-term savings plans.

A second sort of offense produces victims, and the victims know they have been victimized, but, for a variety of reasons, the victims are reluctant to come forward. The most obvious offenses here are extortionate crimes—protection rackets, loansharking, blackmail, or simply extortion. Less obvious are ordinary crimes of violence or exploitation carried on in the context of a continuing relationship in which one individual is much more powerful than the other. Spouse abuse, child abuse, and sexual harassment by employers or landlords are examples of these sorts of offenses. It is important to note that obstructing justice by intimidating witnesses falls into this category as well.[13] In fact, the intimidation of witnesses could make many ordinary street offenses, ones that should, in principle, be easy for the government to observe, invisible.

A third class of offenses will produce victims, but has not done so because they have not yet occurred. The most obvious offenses here are violations of laws that make preparing or attempting to commit offenses a crime. Conspiracy laws provide the most salient example. In addition, some acts are made crimes not because they indicate preparation, but simply because they are statistically related to future harms that are criminal. To a degree, laws against speeding, drunk driving, and perhaps even public drunkenness can be understood as efforts to prevent criminal offenses. Finally, there is an intermediate category of offense where the acts lie between conscious preparation for criminal offenses and acts that are statistically linked to the probability that a criminal offense will occur. Illegal possession or carrying of weapons, possession of burglar's tools, and possession of narcotics paraphernalia are examples of these sorts of offenses.

What all of these offenses have in common is that there is no victim willing to indicate that an offense has been committed and assist in the identification of the offender. There may be witnesses, but the witnesses are apt to be co-conspirators, or people who find themselves reluctant to come forward for the same reasons as the victims. From the point of view of most private citizens, and therefore the government, then, the offenses are largely invisible. Or, more precisely, for any given level of

enforcement effort, these offenses will be detected less commonly than offenses that leave indignant victims, outraged witnesses, and scattered physical clues in their wake.

Enforcement Strategies and Intrusiveness

The central problem in enforcing against invisible offenses is that no private individual is motivated to sound an alarm that an offense has occurred, or to assist public agencies in identifying and apprehending the offender. To deal with such offenses, then, we must find some special ways of motivating victims to assist us, or of positioning enforcement agents to observe and report on the offenses. In effect, we must create publicly sponsored substitutes for privately motivated victims and witnesses. Inevitably, the efforts to encourage victims and witnesses or to position agents to observe the invisible offenses will be more objectionable than enforcement efforts designed primarily to react to clearly visible offenses. The question, of course, is how intrusive various enforcement methods are. To answer that question, we need to be a little more precise about the concept of intrusiveness.

As we think about the idea of intrusiveness in the context of enforcement activities, it seems that it can be calibrated in at least six dimensions. One dimension is simply how *extensive* the government surveillance is; that is, how large a piece of the world is subject to some degree of government surveillance. In setting limits on the scope of government information gathering, our legal tradition has marked out spheres that are specially deserving of protection from government surveillance because they are linked to conditions necessary for private autonomy or effective political expression: private spaces such as houses and offices are protected from government surveillance more rigorously than public spaces such as commercial establishments and streets;[14] some relationships such as lawyer-client, doctor-patient, husband-wife are considered sancrosanct while others (such as mere friendship) are less reliably protected from government intrusion;[15] speech and conversation are protected more carefully than records of transactions, and records are protected more than behavior in public locations. To the extent that government information gathering crosses these barriers and intrudes

into ever more intimate areas, it may be thought of as becoming more extensive—of reaching more areas of activity than we ordinarily expect.

A second dimension of intrusiveness is how *intensive* the surveillance becomes. This dimension is concerned not with the size and kinds of spaces that are vulnerable to some degree of government surveillance, but instead with how deeply or thoroughly the spaces are explored. A cop on every corner would be experienced as intrusive by most citizens, not because official surveillance had moved into previously well defended areas, but because it has reached a high degree of intensiveness with respect to a traditional area. Similarly, an extensive search of a house or office by a squad of police officers armed with sledgehammers would probably be experienced as more intrusive than a casual examination of one's desk by a single detective, even if both searches were covered by a warrant justifying the intrusion into ordinarily private areas. Our ordinary expectations that the government's information-gathering efforts will be limited by scarce resources as well as legal protections cause us to feel intruded upon by unusual thoroughness in information gathering, even when the government surveillance meets all legal requirements. In effect, expectations of privacy, which is the constitutional bulwark in deciding what is tolerable and what not, are defined by common knowledge of the resources available to the police as well as by legal guarantees.[16]

Note that resource constraints impose a natural balance between the extensiveness of government information gathering and its intensiveness. A rational enforcement enterprise (mindful of its obligations to solve crimes at low cost) would not willingly spend its resources searching in areas where the likelihood of finding a crime or a criminal was very low. Instead, it would concentrate on areas where crimes and criminals were very likely to be found. In this respect, the economizing interests of enforcement agencies parallel a legal interest in assuring that some justification can be given for focusing unusually extensive and intensive information gathering in a limited area. The predicate established for unusual levels of enforcement activity, or the probable cause required for government searches, has the effect of marking out a limited area of social life that is unusually likely to contain a criminal offense, and thereby both justify and limit intensive government information gathering. This is in

the interests of both minimally intrusive and inexpensive law enforcement methods.

A third feature of enforcement strategies linked to perceived intrusiveness is the extent to which the information gathering is *focused on persons* (or classes of persons) rather than on times, places, or activities. Ordinarily, government information gathering is organized around acts: the government seeks to position itself so it can observe criminal activity, or it seeks to discover how a past act occurred. As a practical matter, we could try to find criminal acts by watching people as they moved through the social environment as well as by trying to pick out pieces of the social environment particularly likely to contain crimes. For example, we could trail known muggers as well as watch the areas around subway stops, or we could rely on "profiles" describing typical characteristics of drug smugglers as well as using particular itineraries or nervousness in preliminary inspections to trigger more thorough searches. In fact, if a few people committed many crimes and did so in very unpredictable times and places, it would probably be more efficient to organize surveillance and information gathering around the people rather than the acts: that is, we could do better both in controlling crime and in minimizing government intrusion.

Despite this possibility, however, tradition regards surveillance organized around persons (particularly suspect classes of persons) as more dangerous to civil liberties than similar levels of surveillance organized around places or activities in which the people being observed are anonymous. The justification for making this distinction is probably that expectations of anonymity are closely tied to privacy interests. Combining pieces of information about an individual strips away privacy much more quickly and thoroughly than simply making the observations and leaving them unrelated to individuals.[17] Another justification may be that focusing on persons has the potential of reflecting, or even stimulating, improper *ad hominem* motivations within the government information-gathering enterprise. We are more capable of feeling angry and vicious about people whom we regard as reprehensible than we are of feeling passionate about discrete acts. Thus, a focus on acts helps to banish atavistic passions from our enforcement efforts.

A fourth feature of government information-gathering techniques that affects the perceived degree of intrusiveness is the role of *deception* or disguise. In general, the use of disguised or deceptive surveillance dramatically increases the felt "extensiveness" of government information gathering. This occurs for at least two reasons. First, the general guarantees to citizens about the extensiveness and intensiveness of government surveillance tend to become less certain. After all, deceptive techniques can intrude into very private areas. If the government is allowed to recruit informants from among one's friends, or to place electronic devices in one's home or office, or to insinuate an undercover operation into a business relationship by establishing phony credentials, then one must feel vulnerable even in areas that were well defended. Moreover, because the techniques are secret, the public lacks reliable information about how commonly and widely they are used. Thus, it is hard for the public to form reasonable views about how likely it is that they are under surveillance at any given time. If everyone exaggerates risks in situations of uncertainty, the effect of deceptive techniques will be to amplify public fears about the extent of government surveillance. Second, not only will the most general guarantees totter, but the capacity of the citizens to determine at any given moment whether they are under surveillance will also weaken. Deception means that citizens can no longer rely on what they see around them to help them form judgments about whether they are under observation or investigation.[18] They must keep in mind that they might be under surveillance even when there is nothing in the environment that suggests that this is true. Of course, there may be many other reasons to object to the government's use of disguise and deception. For example, it may be morally wrong in itself. But what is being argued here is that one of the reasons that governments might choose not to engage in deception is that it inevitably magnifies the perceived intrusiveness of government surveillance.

A fifth dimension of government information gathering associated with intrusiveness is government efforts to *enlist victims and witnesses* in making cases against defendants. Many government activities in this area are unobjectionable—even virtuous. The offer of protection to witnesses who feel afraid, the willingness to schedule court hearings to accommodate the schedules of victims and witnesses, the provision of

counseling and support services to rape victims, and so on, all seem tolerable. If anything, such measures seem to protect the capacity of the victim or witness to play his or her appropriate role in the criminal justice system. But other ways of attracting support, such as offering rewards, guaranteeing anonymity, dropping criminal charges against potential witnesses, and so on, seem more troublesome. The reason is that such actions confound our understanding of the motivations of the victim and witnesses. These people have the greatest credibility when they have nothing at stake in the outcome of a case other than an interest in justice. If that is their only motivation, we can feel more confident that they are telling the truth. If, on the other hand, there is something else at stake, such as a reward or a diminished penalty, then we are less confident that the person is truthful. It is hard to know exactly when the government's efforts to allow people to say what they know shades into efforts to persuade them to say things that they do not know. Worries about this phenomenon make government efforts to "recruit" victims and witnesses seem threatening and intrusive.

In fact, there is one special way that the government recruits witnesses and victims to cooperate that deserves special recognition because it depends exclusively on the coercive power of the state. That is the use of grand juries to compel testimony (on pain of jail sentences for contempt of court) from immunized witnesses.[19] In the amount and kind of state power employed, grand juries represent broad powers to reach into the social arrangements surrounding offenders, victims, witnesses, and their associates.

A sixth dimension of investigative techniques that raises civil liberties concerns is government's involvement in *instigating* (as opposed to merely observing) criminal offenses.[20] Note that the instigation could involve undercover agents whose salaries are paid entirely by the government, or informants recruited for a short-run purpose. The difference between instigation and passive observation is that, in instigation, the government agent plays a role in encouraging the offense to occur. The agents offer themselves as victims to muggers in the park, or buy illegal drugs, or provide some of the information or materials that offenders might need to commit an offense. It is obvious that instigation always depends on deception: the government informant or employee must

disguise his or her real position and intentions. Thus, all the intrusive features associated with covert information gathering is inherent in instigation as well. In addition, however, instigation is in some sense coercive: it tempts offenders into committing crimes that they might otherwise not have committed.[21] As in the case of government efforts to recruit witnesses, the government's role in helping the crime to occur confounds our interpretation of the crime. The offender's motivation and willingness to commit the offense remain uncertain because of the government's complicity. No doubt, there is a continuum ranging from passive observation through very minor and easily duplicable sorts of "assistance" the government provides, to large and unique contributions by the government. Exactly where one crosses a line on that continuum that makes government actions intolerably intrusive remains both unclear and unjustified. Nevertheless, that government intrusiveness increases as one moves along that complex continuum is fairly well agreed.

In sum, the intrusiveness of government enforcement strategies can usefully be characterized in six dimensions linked to civil liberties and due process concerns: 1) the *extensiveness* of the effort (how large a piece of social activity is exposed to government surveillance, and how many boundaries marking especially private areas are crossed); 2) the *intensiveness* of the effort (how thoroughly the areas under observation are observed); 3) whether the focus is on *persons* or on time, place, and activity; 4) the *covertness or deceptiveness* of the information gathering; 5) the size and character of *inducements offered to witnesses* or victims of offenses; and 6) the government's role in *instigating or facilitating the offense.* The overall intrusiveness of a given enforcement strategy depends on how many of these qualities it possesses and to what degree. With this vocabulary, it possible to characterize the intrusiveness of alternative enforcement strategies with greater, but still rough, precision. To see how the vocabulary works, and to remind ourselves about the minimal degree of intrusiveness associated with our standard enforcement machinery, it is useful to review the machinery we use for enforcing laws against street offenses such as homicides, assaults, robberies, and rapes.

Enforcement Against Street Offenses

The standard enforcement procedures for street offenses can be

described quite simply. Typically, a uniformed, overt patrol roams the city watching for these offenses. While the reach of this patrol is fairly extensive, in the sense that it covers broad swatches of space and time, it is typically restricted to physical surveillance of public spaces and is focused on activities and places rather than persons. Moreover, the patrol is typically not very intensive: while its potential reach is large, its actual reach is quite limited. Of course, enforcement strategists may sometimes choose to give relatively greater attention to some piece of their terrain and thereby increase the intensiveness of surveillance in that area at the expense of intensiveness in the other areas for which they are responsible. But still, patrol operations are legally barred from invading private spaces and are traditionally reluctant to follow persons closely rather than observe spaces or activities. Finally, the patrol operations are overt and are not deceptive.

This relatively unobtrusive form of uniformed patrol is the only government information-gathering activity until an offense occurs. After a crime is committed and reported, a different form of government information gathering begins. It becomes more extensive in the sense that previous restrictions on government surveillance may now be breached, or the self-imposed boundaries expanded. Upon a showing of probable cause, the private spaces of suspects may be invaded. Homes can be searched and conversations monitored. Moreover, the surveillance may now be organized around persons rather than activities and places. The surveillance also becomes more intensive within the relatively narrow areas indicated by the investigation. Special efforts, including rewards, promises of future consideration, and so on, may be used to recruit co-conspirators as witnesses. Finally, some deception (and even instigation) may be used to identify and apprehend the offender. Thus, once an offense has occurred, government surveillance becomes much more intrusive with respect to all dimensions except one aspect of extensiveness; that is, the number of people, places, and activities that are vulnerable to government surveillance. The scope of these methods is tightly restricted by the limited number of people and activities relevant to the question of culpability for a specific known offense.

Note that a key concept structuring government information gathering for this type of offense is the concept of an investigative predicate.

The establishment of a predicate—some reason to believe that a crime has occurred in a specific area—stands between the limited, superficial (though wide) surveillance associated with overt patrol and the much more intrusive surveillance associated with investigation. The predicate justifies the intrusive surveillance by assuring people that a crime has been committed and thereby making it very likely that an enforcement benefit will result if more intrusive methods are allowed. It limits the intrusiveness of the methods by assuring that relatively intrusive forms of surveillance will be applied to only a small number of people, places, and activities. Thus, narrow investigative predicates assure a very favorable relationship between enforcement effectiveness and the intrusiveness of enforcement methods.

In enforcing against street offenses, then, we can maintain a satisfactory level of enforcement with minimal intrusive government surveillance. The effort to detect the offenses leaves much to private individuals and relies only on a minimally intrusive overt patrol effort. The more intrusive methods associated with investigation are unleashed only after an offense has been committed, and are narrowed and limited to the restricted number of people and activities plausibly connected to the known offense. Deception, recruitment of witnesses, and instigation are employed only rarely.

Enforcement Against Invisible Offenses

The enforcement problem changes dramatically when we turn to invisible offenses. For such offenses, enforcement must face the usual demanding investigative challenge of linking a known offense to a specific offender. But what is unusually problematic about invisible offenses is that enforcement faces an equally difficult task simply in detecting offenses. From the point of view of minimizing intrusiveness, equipping enforcement agencies to detect as well as investigate offenses will always create significant problems. Without a complaining victim or witness, we do not know where official surveillance should begin or end. Without a known offense, it is difficult to rely on predicates and the probable-cause standard to regulate degrees of intrusiveness. The problem, then, is that we might end up using enforcement methods whose degree of intrusiveness is characteristic of investigations, but using them for broad surveillance purposes spanning a large area of possible offenses and offenders. Detecting invisible offenses may require a higher degree of intrusion than we think appropriate. To explore the extent to which this is true, let us consider four enforcement techniques for detecting invisible offenses.

One is to increase the intensity of overt official patrols in areas where invisible offenses might occur. For victimless crimes such as narcotics and prostitution, this could take the form of denser patrolling in areas where such activities are common. For white-collar offenses such as employer and client fraud, overt patrol takes the form of audits of official records.[22] For political corruption, patrol becomes requirements of financial disclosure that allow easier detection of potential conflicts of interest.[23] For toxic wastes, overt patrol is managed by requirements that manufacturers report quantities of waste handled and disposed, and routine compliance audits of these records.[24]

Patrolling to discover extortionate crimes is probably the most difficult. One possibility is to interview people showing up at hospitals or doctors' offices with evidence of beating to determine if they are victims of loan sharks, spouses, offenders whose crimes they witnessed, and so on.[25] A way to patrol for cases of police brutality is routinely to photograph all arrested persons. Finally, patrolling for offenses such as drunk driving, speeding, illegal carrying of weapons, and so on can be accomplished through routine physical surveillance.

This brief review serves to show that opportunities to detect invisible offenses through overt patrol efforts do exist. They take different forms as one moves from one offense to another. Sometimes they rely on what we ordinarily think of as uniformed patrol. Other times they resemble audit and regulatory functions. What makes them similar is that they are all efforts to monitor, however superficially, relatively large areas within which specific offenses might occur without evidence that offenses have been committed. Moreover, they accomplish this overtly. There is no effort to disguise or conceal the monitoring effort, though there may be some uncertainty as to exactly when and where the surveillance will occur.

To describe the similar characteristics of these patrol efforts is also to describe their weaknesses. Because they are extensive, they are rarely intensive. It is simply too expensive to search broad areas thoroughly.

Moreover, because they are overt, offenders can arrange for their offenses to take place out of view. In short, these methods have the usual weaknesses of patrol functions: superficiality and visibility. They may require offenders to be cautious, and they may occasionally uncover an offense in progress, but one suspects that it is fairly easy for offenders to evade such operations. In this, overt patrol efforts are not dissimilar to ordinary patrol by uniformed officers in cars, commonly directed at street crime. We imagine that random motor patrols will observe offenses in progress, but the fact of the matter is that they rarely do.[26] The offenses are hidden until a citizen mobilizes the police, and even then, the mobilization usually comes too late to catch the offender.[27]

These observations suggest a second potential strategy in patrolling for invisible crimes: encouraging victims and witnesses to report the offenses, despite their hesitations. At a minimum, this involves reducing the hassle associated with reporting offenses. To this end, we remind people of the acts prohibited by law; give them a toll-free, 24-hour hotline to call; and accept tips from anonymous as well as identified complainants. Such strategies have been tried routinely in dealing with narcotics, illegal possession and transfer of weapons, and fraud in government programs.[28] Somewhat more ambitiously, we have sometimes *required* people in a position to witness offenses to report when they have done so. Thus, auditors are required to report on financial discrepancies, and physicians are required to report bullet wounds or possible instances of child and spouse abuse.[29] Even more ambitiously, we have tried to reassure victims and witnesses by providing them with protection and special kinds of service.[30] Such programs are particularly important in encouraging people to report on extortionate crimes such as loansharking, obstruction of justice, and police brutality. Finally, we often offer to pay people for information leading to the arrest and conviction of offenders. This, for example, is an important mode of enforcement against income tax evasion.[31] Private individuals are offered a share of whatever the government recovers as a reward for directing the Internal Revenue Service to people who may be cheating on their taxes.

Again, this quick review shows that some options exist for stimulating the flow of information from private citizens, even when dealing with invisible crimes. But to list the possibilities is also to reveal weaknesses.

We worry that the private surveillance stimulated by these strategies will be spotty and motivated by inappropriate private motives, and will generate false allegations. In effect, by leaving the burden of detection in private hands, and by making it convenient and even profitable for private individuals to make complaints, government surveillance ends up being directed by the whims and passions of private callers—a system of surveillance that may be no less intrusive and conceivably less fair than a system where the government assumes more of the burden of surveillance. (Of course, similar objections can be made against relying on private individuals to report street crimes such as robbery and assault. And, indeed, charges in such cases are often made or withheld by private individuals for reasons that have nothing to do with the legal question of whether an offense has been committed.) But for invisible offenses where the incentives of the victims and witnesses are weaker from the outset, the objections seem to acquire additional weight.

A third strategy in patrolling for invisible offenses is simply an extension of offering to pay people to report on offenses: namely, the recruitment of informants. After all, the only thing that distinguishes informants from paid "tipsters" is that informants have a continuing relationship with enforcement agencies. The continuing relationship is significant because it means that the informant loses the status of a private citizen and becomes, in an important sense, an employee or agent of the government. The informant acquires the interests of the government in observing the world, and loses the presumption of disinterest and innocence of other private citizens. Moreover, he or she operates deceptively; the relationship with the government is concealed from those the informant observes and deals with. Thus, informants can be thought of as covert government patrols reporting more or less regularly on a variety of possible offenses and offenders.[32]

It is useful to pause for a moment and consider the kind of social position informants would have to occupy to make a continuing relationship with an enforcement agency worthwhile. The simple answer is that they must be in a position to provide a *continuing* flow of information about criminal offenses: they may be in charge of records commonly used as evidence in criminal cases (for example, telephone records, bank records, travel records, and so on); they may engage in occupations that

allow them to see the fruits of criminal activity (pawnbrokers, or tax accountants); they live or work in areas where criminal activity is planned or executed (a hotel clerk in an area of prostitution, a bartender in a nightclub frequented by criminals, or a police officer involved in processing prisoners); they may associate with frequent offenders (the gardener for an organized crime figure, or the childhood friend of a bank robber, or the uncle of a known narcotics dealer, for example); or they themselves may be criminal conspirators. The important fact to notice in this list is that many of the positions are valuable because they are linked to potential *offenders* rather than to knowledge of *offenses*. Recruiting informants by virtue of their association with offenders as distinguished from their relationship to criminal actions crosses an important line in terms of the intrusiveness of government surveillance. Yet it seems likely that this is an important basis for recruiting informants.

Informants can and do play an important role in uncovering invisible offenses. Their role in victimless crimes such as narcotics, gambling, and prostitution is well known.[33] They are also crucially involved in exposing criminal conspiracies that have not yet matured. In principle, they probably *could* be important in exposing white-collar crimes, political corruption, extortion, police brutality, and obstruction of justice. That they have not yet been extensively used in these areas is due less to their inadequacy than to current conventions. We have typically thought of informants as being drawn from the underworld. Consequently, it has seemed odd to think of recruiting informants from the ranks of business owners whose firms generate or dispose toxic wastes, or police officers in departments suspected of systematic civil rights violations, or politicians and public officials managing programs in which large amounts of money are at stake. Yet, there is no reason to suppose that informants could not be developed in these areas if we wanted to use them to enforce against white-collar crime, police brutality, or public corruption.

The strengths of informants in enforcing against invisible offenses are also their weaknesses. As deceptive government agents selected by virtue of their proximity to criminal offenders and offenses, they are in a position to see and hear a great deal. They will see many offenses that would otherwise be invisible. On the other hand, they will see a lot that is not unlawful. Unless their social position restricts their observations to

specific offenses and offenders (which makes them more like complaining witnesses for specific offenses than informants with continuing relationships to enforcement agencies), the range of activities and people that falls under their scrutiny is quite large. Moreover, in conducting their observations for the government, they easily cross important boundaries: intruding into private spaces, overhearing conversations, taking advantage of friendship, and so on. Thus, their surveillance is quite extensive. The intensiveness of their surveillance is determined by how many of them exist and how active they are on behalf of the government. It is worth noting in this regard that the economic arrangements between informants and the government allow the government to operate a large number at a relatively low cost, at least when compared to undercover agents. The reason is that while informants work full time for the government by being constantly aware of what is going on around them and having the government's interest in mind, they are paid only as part-time employees. Typically, they receive small, irregular payments as a retainer, and larger bonuses when they contribute information of unusual value. This arrangement is very favorable to the government. Finally, informants are always deceptive and occasionally are involved in instigating as well as simply observing. Thus, their value as instruments of government surveillance is matched (some would say over-matched) by their intrusiveness.

A fourth strategy that enforcement agencies can follow in ferreting out invisible offenses is to rely on undercover agents. To the extent that they are merely passive observers, undercover agents resemble informants, and a similar analysis of positioning and intrusiveness applies. The major difference between the two modes concern cost. To field undercover agents to conduct surveillance as informants do, the government must not only pay a full-time salary to agents in the field, but must also pay to establish the position of the agents (e.g., train them to be bartenders, assign them to cultivate a relationship, and so on). Thus, for any given level of expenditure, undercover agents will produce a level of surveillance that is less extensive and less intensive than could be produced by informants.[34]

The more common role for undercover agents, then, is not passive surveillance, but instigation. In order to shorten the amount of time and

we had hoped. Some of the most serious crimes, such as robbery, assaults, homicides, and rapes, committed among strangers in public locations are not only not being prevented, but are also not being solved by traditional methods.[35] It is plausible that more proactive methods could be more successful.

Given these difficulties, we can choose to respond to the challenge of invisible offenses in one of three ways. We can decide that the offenses are not worth enforcing against and strike them from the books, or let them die of neglect. This has been the recommended solution for many victimless crimes. It has also been commonly recommended for the "crimes aborning" categories, such as conspiracies, possession of burglary tools, possession of guns, and so on. Perhaps this is wise. The case seems much harder, however, when the offenses to be dropped include extortion, obstruction of justice, police brutality, political corruption, illegal disposal of hazardous wastes, and criminal tax fraud.

If we decide that we cannot afford simply to ignore these offenses, we could make a second response. We could propose a principle of minimal intrusiveness consistent with effective enforcement against serious invisible offenses. This principle would not bar intrusive measures in all circumstances. Nor would it limit their use to situations where probable cause could be established. Instead, judgments would have to be made with respect to the various kinds of offenses in particular areas at particular times. The more serious the offense appeared, the more tolerable would intrusive measures become. This seems to be our current implicit policy.

A third more radical response would be to extend the principle of minimally intrusive measures to ordinary street crimes and effectively change our current conceptions about the organization of government surveillance. It would accept intensive patrols, special efforts to mobilize citizens, and use of informants and undercover operations as ordinary parts of our efforts to enforce existing laws against all crimes, rationally, effectively, and decently.

My own view is that we are not yet ready to respond to the challenge of invisible offenses and intrusive investigative techniques with any of these general policy lines. We simply have not thought enough about nor had enough documented experience with the intrusive enforcement methods to understand what is at stake in using or failing to use them for some or all categories of offenses. We need to arrange for some common law to develop quickly in this area. To this end, we should allow—even encourage—enforcement agencies to experiment with some of the techniques directed at different sorts of offenses. At the same time, we should step up efforts to document that experience, to see what happens both in individual cases and in terms of aggregate performance. Finally, we should analyze that experience—trying to locate the important social values at stake in the use of these techniques—and the real nature of the links between the intrusive methods and the important social values.

One can imagine developing this body of knowledge through the courts, but it might be quicker and more effective to allow this development within the administrative agencies of the criminal justice system overseen by the courts. In effect, rather than imagine at the outset that all important issues in this area should or will be covered by constitutional principle, it might be better to think of invisible offenses and intrusive methods as primarily an administrative problem whose solution might have constitutional implications, and leave most of the burden of fact gathering and policy development to an administrative agency. To be consistent with the degree of responsibility entrusted to it, the administrative agency would have to represent broad social interests in civil liberties; in fair, rational, and effective enforcement; and in justice. Although no one quite believes that police agencies now represent this sort of institution, it might be possible to arrange oversight or review committees for police agencies that could review with them both existing policies regulating intrusive enforcement methods and their actual experience. Such arrangements might lead more quickly and more surely to the development of effective policies in these areas than reliance on the courts.

In sum, I think we should resist the urge to regulate the use of intrusive enforcement methods prematurely. I also think we should resist the temptation to rely on the courts as the major policy-making agency. Instead, we should allow some systematic experimentation with managing these methods so that we can find out what is really at stake, and base our policies on experience.

NOTES

1. The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: U.S. Government Printing Office, 1967) pp. 7–12.
2. It is interesting to contrast our approach to police departments with, for example, our approach to a regulatory agency such as the Food and Drug Administration. The enormous body of Fourth Amendment law makes it seem as though all important questions concerning government information-gathering methods raise constitutional issues. Consequently, we have the Supreme Court examining police patrol strategies in microscopic detail. In the regulatory area, we assume state power is less directly engaged, and therefore that fewer constitutional issues arise. As a result, the agencies are left with more discretion to establish policies and procedures in accord with an administrative rationale emphasizing appropriate purposes, fair and economical procedures, and so on. Yet the consequences of regulatory action are often as significant as criminal enforcement activities. I sometimes wonder whether we would have as much Fourth Amendment law as we now have, and if it would be of the same character, if we had invented municipal police departments *after* we had invented the idea of administrative agencies rather than before.
3. In a forthcoming publication, my colleague, Professor Philip B. Heymann, illustrates the great latitude that constitutional principles leave in relying on undercover operations, grand jury investigations, and informants. See Philip B. Heymann, "From Hoffa to Abscam by Way of Koreagate: Thinking About Civil Liberties and Law Enforcement."
4. This is not a constitutional principle, but it has great power as a legal and political idea. Indeed, it is precisely this principle that (however modestly) limits the discretion of prosecutors. See James L. Vorenberg, "Decent Restraint of Prosecutional Power," 94 *Harv. L. Rev.* 7 (May, 1981). The crucial Supreme Court case allowing fair and rational prosecutorial decision is *Oyler* v. *Bates* (1961).
5. This principle provides an important part of the motivation for focusing attention on white-collar crime. See Mark H. Moore, "Notes Towards a National Strategy to Deal With White Collar Crime," in Herbert Edelhautz and Charles Rogovin, *A National Strategy for Containing White Collar Crime* (Lexington, Mass.: D.C. Heath and Company, 1980).
6. Perhaps the most important difference between the way lawyers think and the way policy analysts, managers, and economists think is that lawyers tend to think of lexically and hierarchically ordered values, while the others think of more fungible values where achievements with respect to one interest can be traded for losses on others. To a degree, this corresponds to making decisions on the basis of constitutional principles rather than administrative rationality. Part of the argument of this article is that we might usefully think of enforcement strategies as raising primarily administrative and policy rather than constitutional issues.
7. For empirical studies of the extent to which we depend on private citizens for identifying and apprehending offenders, see Peter W. Greenwood, et al., *The Criminal Investigation Process* (Lexington, Mass.: D.C. Heath and Co., 1977).
8. The most important legal doctrine here is the need for warrants to make arrests and searches. This constitutional requirement—paired with current strategies of policing—assures that most enforcement activity will occur after an offense has occurred.

9. The extent to which citizens control enforcement activities by triggering their response is rarely appreciated. In effect, anyone with a dime can command some degree of police attention. This suggests a high degree of democratic control over police operations. On the other hand, the police may not patrol all parts of a city with equal interest, and they may not give equal attention to all complaints. For a discussion of systematic social biases in policing, see Donald Black, *The Manners and Customs of Policing* (New York: Academic Press, 1980).
10. Edwin M. Schur, *Crimes Without Victims* (Englewood, N.J.: Prentice-Hall, 1965).
11. James Q. Wilson, *The Investigators* (New York: Basic Books, 1978).
12. Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, Calif.: Stanford University Press, 1968).
13. I am indebted to Professor Heymann for this point.
14. The original court interpretations of the Fourth Amendment's guarantee of the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" emphasized a property concept that gave special status to dwelling places. More recently, the Court has relied on a more abstract notion of a privacy interest as the basis of the Fourth Amendment protections. The change occurred with *Katz* v. *U.S.*, 389 U.S. 347 (1967). Still, dwelling places retain a special status and they are protected against warrantless searches more determinedly than other locations. See *Coolidge* v. *N.H.*, 403 U.S. 443 (1971).
15. One of the most surprising exceptions to the Court's steadfast commitment to protecting "reasonable expectations of privacy" is its willingness to allow testimony from a suspect's close friend who also happens to be an informant. See *Hoffa* v. *U.S.*, 385 U.S. 206 (1966). This contrasts oddly with the Court's protection of professional relationships such as doctor-patient.
16. This standard was set out in *Katz*.
17. I am indebted to Professor Heymann for emphasizing this point. For an extensive discussion of privacy interests, see Ruth Gavison, "Privacy and the Limits of Law," 89 *Yale L.J.* 3 (January 1980): 421–471.
18. For further elaboration of this point, see Sanford Levinson's chapter, "Infiltration and Betrayal: A Legal and Theoretical Analysis," in this volume.
19. Again, I am indebted to Professor Heymann for emphasizing this point.
20. Wilson, *The Investigators*.
21. Economists tend to view great benefits and temptations as analytically similar to great penalties and threats. Both motivate behavior by changing a person's calculus about the consequences of given actions. Thus, instigation can be coercive by making offenses very tempting to offenders. Even if one thinks that this way of thinking distorts the meaning of "coercive," it is interesting to note that the law also tends to treat both threats and temptations symmetrically: their presence in a situation makes it more difficult to understand the true motivations and values of the offenders. Since one must have an improper mental state to be judged guilty of most offenses, the confusion introduced by unusual threats and temptations makes it more problematic to find an offender guilty of a crime.
22. Mark H. Moore "Notes Towards a National Strategy to Deal with White Collar Crime."
23. For illustrative statutes, see Massachusetts State Ethics Commission, General Laws of the Commonwealth of Massachusetts, Ch. 268B, section 2.

24. Melvin T. Axilband and Herbert Edelhartz, "An Introduction to Hazardous Waste for Prosecutors and Investigators," mimeo. (Seattle, Washington: Batille Research Institute, undated).
25. For an analysis of strategies to deal with extortion, see Jay Francis, "Enforcement of Extortion Laws in Boston," unpublished mimeo. (Cambridge, Mass.: Kennedy School of Government, Harvard University, 1978).
26. George L. Kelling, et. al, *The Kansas City Preventive Patrol Experiment* (Washington, D.C.: Police Foundation, 1974).
27. William G. Spelman, *Calling the Police: A Replication of the Citizen Reporting Component of the Kansas City Response Time Analysis* (Washington, D.C.: Police Executive Research Forum, 1981).
28. For several years, a "heroin hotline" was maintained by the U.S. Customs Service to catch smugglers at the border. Similarly, the Bureau of Alcohol, Tobacco and Firearms has mounted a public campaign to "Disarm the Criminal" complete with posters describing the legal requirements of the Gun Control Act, and giving a number to call for tips. Finally, government "whistleblowers" have been encouraged through various protections to give information about "fraud, waste and abuse" to inspectors-general.
29. M.H. Alderman, *Child Abuse and Neglect Reporting Laws* (Washington, D.C.: Herner & Co., 1979).
30. The most common are victims/witnesses services operated as adjuncts to courts. For an evaluation of their impact, see Vera Institute of Justice, "Impact Evaluation of the Victim/Witness Assistance Project's Appearance Management Activities," mimeo. (New York: Vera Institute of Justice, 1976). More ambitious is the federal government's Witness Protection Program managed by the United States Marshals. This program offers to relocate key witnesses and equip them with new identities.
31. That this tactic remains an important enforcement practice in IRS was confirmed by several high level Internal Revenue Service officials attending an executive training program at the Kennedy School of Government in the summer of 1982.
32. Michael R. Bromwich, "The Use and Control of Informants," mimeo. (Cambridge, Mass.: Kennedy School of Government, Harvard University, 1980).
33. Malachi Harney and John C. Cross, *The Informer in Law Enforcement* (Springfield, Illinois: Charles C Thomas, 1960). See also Mark H. Moore, *Buy and Bust: The Effective Regulation of an Illicit Market in Heroin* (Lexington, Mass.: D.C. Heath and Co., 1977), and Wilson, *The Investigators.*
34. Brenda Gruss, "The Detection and Investigation of Crime By Citizens, Informants, Undercover Agents, and Undercover Operations: A Comparative Perspective," mimeo. (Cambridge, Mass.: Kennedy School of Government, Harvard University, 1981).
35. Clearance rates for robbery are currently less than 20 percent. See Greenwood, et al., *The Criminal Investigative Process.*

3

Under Cover: The Hidden Costs of Infiltration

Sanford Levinson*

CONSIDER THE MOVIE *The Sting.* In that lighthearted film, Paul Newman and Robert Redford (or, rather, the characters they acted) devised a "Big Con," outwitting the gambler played by Robert Shaw. They created an entire reality—a Chicago betting parlor—for Shaw's observation, even if not for his benefit. As viewers we took delight in knowing what Shaw did not—that nothing was as it appeared to be, and that he

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