

Covert Facilitation and Crime: Restoring Balance to the Entrapment Debate

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Covert facilitation of crime by or on behalf of government agents has always been viewed with suspicion, but the recent use of this technique of enforcement against power elites has resulted in a storm of protest from civil libertarians. The argument of this paper is that, although there is virtue in the standard libertarian objections, the use of covert facilitation is essential to ensure that the law is applied effectively against crime in high places. Covert facilitation should be subject to probable cause and other safeguards that would prohibit most of the covert facilitation presently undertaken by police. The greater concern, however, is that the technique will not be used frequently enough to combat the offenses of the powerful. Given this concern, enforcement agencies should be placed under a responsibility to use covert facilitation against white-collar offenders to even up the scales of justice. The use of covert facilitation for this purpose is advocated because of the low visibility of much white-collar crime and the principle of noblesse oblige. Concrete suggestions are set out for implementing this egalitarian policy, together with proposals for safeguarding persons against unjustifiable interference and abuse.

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Police have long used trickery, undercover tactics, and sting operations to beguile suspects into perpetrating crimes in the presence of witnesses (see, generally, Marx, 1977). Until recently, there has been little community concern for the targets of police impersonation when they were limited to prostitutes, homosexuals, and persons interested in buying or selling illicit drugs. Outside the United States, entrapment remains a matter of indifference; indeed, unlike the United States, the legal systems of other countries do not provide for an entrapment defense (Stober, 1985).

Two dramatic cases transformed community attitudes toward undercover deception in the United States—Abscam (short for Abdul scam, an undercover operation in which U.S. congressmen and others were enticed to accept bribes from a fictitious company, Abdul Enterprises (Bok, 1984, chap. 17; Gershman, 1982b; Greene, 1982; Noonan, 1984, pp. 604-620; Verrone, 1984) and the John De Lorean case [which involved an attempt to trick a high-flying motor industry executive and entrepreneur into cocaine trafficking (O'Neill, 1985)]. When the targets of police undercover operations became members of Congress and a wealthy business entrepreneur rather than gays, whores, and junkies, the time had arrived for reassessment of the propriety of such undercover tactics (see e.g., Blecker, 1984; Seidman, 1981). The scholarly community suddenly showed unprecedented interest in entrapment when representatives of the elite appeared in the lens of the hidden camera. In this paper we continue the noble scholarly tradition of neglecting civil rights questions while only the powerless are threatened, and pondering them earnestly when affronts to the powerful demand our attention.

Abscam (and to a lesser extent the De Lorean case) spawned a variety of sound suggestions for limiting the civil liberties fallout from undercover operations. These include restricting covert facilitation aimed at securing criminal convictions to cases (1) where there is probable cause to believe a suspect has committed or intends to commit a serious offense, (2) where judicial approval of the operation has been granted, (3) where a defense of extraordinary coercion or temptation is made available to those trapped, and (4) where third parties (e.g., people whose property is stolen for sale to a police "fence") can be protected.

We generally support these recommendations, but we argue that the civil libertarian backlash against Abscam puts us in danger of legitimating structural tendencies in law enforcement that support reactivity (waiting for complaints) and reject proactivity (seeking out violations). Proactivity is the major hope for subjecting powerful offenders to the same investigative scrutiny as powerless offenders. It is an incomplete policy analysis that specifies the circumstances where covert facilitation should be *proscribed*; this article seeks to reach a further position on when it should be *prescribed*.

We define *covert facilitation* as the practice of law enforcement officials who seek through the conscious use of deception to encourage criminal acts

under circumstances where they can be observed by undercover operatives. The aim is to obtain convictions in relation to those acts or to enable civil or disciplinary sanctions to be imposed. This definition excludes undercover operations that do not depend on the use of deception [contrast the broader conception of covert facilitation that includes passive undercover operations (e.g., Marx, 1981)].

Covert Facilitation and the Erosion of Privacy

The Importance of Privacy

Because trust and intimacy are things that we legitimately value, privacy, as a principle that supports these values, becomes an important foundation to be protected. As Fried (1970, p. 142) explains,

Intimacy is the sharing of information about one's actions, beliefs or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.

Levinson (1983, p. 50) argues from these ideas that a police practice such as turning a criminal to inform against coconspirators "is deeply subversive of the possibility of friendship, love and trust" (but see Seidman, 1981, p. 139).

Criminal justice practices have become increasingly subversive of privacy (see, generally, McLaughlan, 1981). There has been expanded use of undercover agents and informers, and increased emphasis on campaigns to have citizens report drug users to the police (including instances of children turning in their parents), phone tapping, electronic eavesdropping, hidden cameras, periscopic prisms, electronic bracelets for tracking persons under house arrest, lie detector tests, "spy dust," computerized data banks, satellite surveillance, and similar procedures (cf. Feder, 1986). Gary T. Marx (1977, 1980, 1981, 1982, 1986) has been the leading figure in documenting what Michel Foucault (1977, pp. 220-221) called the modern state's "subtle calculated technology of subjection." Account should also be taken of the expansion of private police functions: the greater the reliance on private policing, the less the significance in practice of constitutional and other public law constraints on invasion of privacy (e.g., Stenning & Shearing, 1984).

Covert facilitation is thus but one part of the trend toward more sophisticated intervention into private domains. It is a trend that in general needs to be resisted, indeed reversed, because privacy is to be esteemed for its own sake and because societies that put people in jeopardy by use of such tactics as secret police files are deplorable and intolerable (see, generally, Chapman, 1970). As Marx (1982) has observed,

A major demand in totalitarian countries that undergo liberalization is for the abolition of the secret police and secret police tactics We may be taking small but steady steps

toward the paranoia and suspicion that characterize many totalitarian countries. To many observers, American society is fragmented enough without the government's adding a new layer of suspiciousness and mistrust. It is possible that, the greater the public's knowledge of such tactics, the greater the mutual distrust among American citizens. (pp. 191-192)

A Right not to be Tempted?

We share many of the general concerns of the critics of emergent criminal justice practices, including covert facilitation. We find less persuasive their contention that, as Gerald Dworkin (1985) puts it, covert facilitation is morally wrong because "it is not the purpose of officers of the law to encourage crime for the purpose of punishing it" (p. 32). We fail to see why "it is certainly unfair to the citizen to be invited to do that which the law forbids him to do" (Dworkin, 1985, p. 32). We do not condemn the Abscam prosecutors (nor God for what he is said to have done in the Garden of Eden) on such grounds. Childhood is full of situations where parents confront children with opportunity and temptation to see if they resist and if they are ready to be trusted. Nothing is morally wrong with this; socialization would be impossible if some agents of social control, such as parents and school teachers, did not contrive temptation in situations that are gradually subjected to less and less adult monitoring. As Eleanor Maccoby (1980) points out,

a hallmark of moral development in children is the achievement of control over their own behavior in situations where no outside agent is present to enforce the rules [C]hildren in every culture have at least occasional opportunities to engage in forbidden but desired activities. In Western society, for example, children may be tempted to sneak a piece of candy before dinner, cheat on a test, watch a forbidden television program, push or pinch a sibling, and so forth. (pp. 30-31)

Dworkin (1985) seems to find monitored temptation and punishment acceptable if it is done to benefit the person being tempted but he distinguishes police entrapment:

It is not always incoherent to invite someone to do the very act which one is trying to get them to avoid doing. Consider a parent trying to teach a child not to touch the stove. In the case of a particularly recalcitrant child the most effective technique might be to encourage the child to touch the stove in one's presence. The slight pain now will teach the child to avoid greater pain later. But this is surely not the model being used by the police. They are interested in either deterring others or in punishing guilty people. The end being served is not that of the person being invited to commit the crime. (p. 32)

This distinction is not altogether persuasive. It is wrong to assume that police officers who engage in covert facilitation are only interested in deterrence. When covert facilitation is used against drug users, a major aim is to save the young people caught before it is too late. Likewise, when teenage prostitutes are entrapped, the police often have no illusions about deterring prostitution; they

may see themselves more as rescuers. In any event, it is false to suppose that the use of temptation by parents is dedicated entirely to serving the ends of the child: the ends of society are also served by the inculcation of law-abiding habits and norms within the family.

While human beings inevitably must be tempted, there obviously are concerns applicable to the police that do not apply to parents or teachers as agents of social control. Citizens can lose confidence in a criminal justice system that devotes resources to creating new crimes to the neglect of existing ones. This is particularly likely if covert facilitation is abused to snare people who otherwise never were likely to confront the proffered temptation in their everyday life. That is, the police will understandably fall into disrepute if they use covert facilitation in circumstances never likely to be serious crime problems.

Critics of covert facilitation are right to say that it is a simplistic model of human behavior to suggest, as the Abscam undercover man, Melvin Weinberg, did, that "A guy's either a crook or he isn't. If he ain't a crook, he ain't gonna do anything illegal no matter what I offer him or what I tell him to do" (Greene, 1982, p. 126). Many hold the opposite view that "all persons have their price." They believe the police should not be allowed arbitrarily to target people and offer them "their price." They recall ugly instances of police undercover tactics, from those of J. Edgar Hoover (Lowenthal, 1950) to the more recent undercover targeting of radicals for drug busts as a proxy for arresting them for their political beliefs (Marx, 1982, pp. 174-175).

Restricting the Use of Covert Facilitation

Covert facilitation, in our view, is not morally wrong because it violates a right not to be tempted, but morally dangerous because it is susceptible to use as a tool of political oppression, because it threatens privacy (and all that privacy in turn protects), and because, if it is used on implausible targets or with unrealistic temptations, it undermines the confidence of citizens in the fairness of the criminal justice system. There are also legitimate additional concerns about the effects of undercover operations on the police themselves, on informers, and on third parties (Marx, 1977, 1982, pp. 176-185).

These dangers lead us to accept most of the suggestions offered for controlling covert facilitation and to agree that much of the covert facilitation currently undertaken by police should be forbidden. First, covert facilitation, we are inclined to think, should not be used unless there is probable cause to believe that within a relevant time span the target (whose identity may be unknown) has engaged or is intending to engage in the type of crime targeted by the undercover operation. That is, covert facilitation can be used to ascertain whether those who are reasonably believed corrupt are in fact corrupt; it should not be used for fishing expeditions to determine whether randomly selected citizens can be

punished for being corruptible (but see Heymann, 1985; Sherman, 1983). Most importantly, it should not be used to punish a citizen who is targeted for reasons of revenge or malice, or for any grounds other than probable cause relating to the particular kind of offense triggered by the undercover operation. It has been urged that the test should be the less demanding criterion of reasonable suspicion rather than of probable cause (Gershman, 1982a, pp. 1588-1589; Whelan, 1985). However, where undercover operations are used not merely to collect evidence or to gain strategic intelligence but also to obtain convictions by facilitating crime, the higher standard of probable cause seems warranted by the severity of the consequences that threaten suspects who are targeted. This is not to suggest that a requirement of probable cause would offer infallible protection. The practical content of probable cause would depend on judicial interpretation and, no matter how the process of judicial review might be upgraded, variations in approach would be inevitable. The same is true of any judicially testable procedural protection.

Second, covert facilitation should not be permitted to commence until independent judicial approval has been granted for a period sufficient for only one integrity test, rather than repeated tests (see, generally, Gershman, 1982a, pp. 1587-1589; Whelan, 1985).

Third, where defendants are able to sustain in court the contention that probable cause did not exist, any charges arising from covert facilitation by government agents or their unwitting intermediaries (see Anonymous, 1982; Callahan, 1983; Witkes, 1982) should be dismissed.

Fourth, it should be a defense that any temptation (or coercion) was so extraordinary as to be unlikely to be something that the defendant would confront without contrivance by the police or vigilantes (see, further, Gershman, 1982a, pp. 1583-1584; Seidman, 1981, pp. 121-123; Stitt & James, 1984, p. 129).¹

¹Like Dworkin, and Stitt and James, we support the objective test (which is based on police behavior) for an entrapment defense rather than the one based on the predisposition of the defendant which has been enunciated by the U.S. Supreme Court in four cases (*Sorrells v. United States*, 1932; *Sherman v. United States*, 1958; *United States v. Russell*, 1973; *Hampton v. United States*, 1976; see further, Dworkin, 1985; Stitt & James, 1984). As Stitt and James point out, an objection to the Supreme Court test is that it allows police to engage in the most unconscionable deception against people with criminal records, knowing that, because of their past, no court is apt to find them lacking a criminal predisposition. Second, the use of the subjective test allows the introduction of hearsay, suspicion, and rumor in establishing criminal predisposition:

This type of testimony is not allowed in other court proceedings because it is unreliable and tends to prejudice the jury. . . . [The subjective test] places a defendant with a past record in a "Catch-22" situation. In order for the defendant to employ the entrapment defense he must admit that he committed the specific crime in question and open himself to discussions of his past. Since this prejudices the jury against him, the entrapment defense is usually not a rational defense for defendants with a past record. This in effect denies the defendant the right to a fair trial. (Stitt & James, 1984, p. 116)

Fifth, covert facilitation should not be permissible if there is a substantial risk that innocent parties will be harmed physically or financially, unless a judge is persuaded that such parties have consented or, in the case of financial harm, that arrangements have been made for their compensation (compare Gershman, 1982a, p. 1588; Stitt & James, 1984, pp. 127-128). There have been cases of police sting operations, which involved setting up an undercover "fence," that caused property to be stolen that would not otherwise have been stolen and that even led to death in the course of such a robbery. For reasons such as nonreporting and inadequate identification, perhaps as much as half the property sold to police-run fencing operations is not returned to its owners (Department of Justice, 1979, p. 4; Marx, 1982, pp. 182-183).

Sixth, covert facilitation should be permissible only to punish crimes that the community regards as extremely serious. Under no circumstances should a judge be able to approve a covert facilitation operation for victimless crimes, such as drug use, consensual sexual acts between adults, or illegal gambling (see generally Schur, 1965).

Seventh, vigorous enforcement and severe criminal and disciplinary penalties should be directed at police who engage in covert facilitation without the required judicial approval, as well as at any person (such as a con artist working with the police) who breaches a condition of an approved operation.

Guidelines might be promulgated detailing what is and what is not permissible for the police to do when engaged in covert facilitation (see, generally, Dix, 1975; Gershman, 1982a, pp. 1585-1586). A possible problem is that such guidelines could become known, and attorneys then could offer advice to ensure that anyone their client dealt with violated the guidelines in some nugatory way (see Skolnick, 1966; Stitt & James, 1984, p. 121). Besides, such guidelines probably would have to be kept so general as to offer little true guidance. Take the possibility of a guideline that prohibits putting the target in a situation where a corrupt act seems to be in the public interest. Marx complains that some Abscam defendants were presented with a goal that was both legal and commendable (providing a convention center for Philadelphia): the illegal act was only a minor part of something otherwise in the public interest (Marx, 1982, p. 170). This, however, is precisely how sophisticated corrupters do their work in the real world. When pharmaceutical executives offer government officials bribes to allow dangerous drugs to be marketed, they do not tell them that marketing is being held up because of concern about side effects; they say that bureaucratic red tape is delaying the introduction of a new life-saving drug (Braithwaite, 1984, pp. 34-37).

Marx (1982, p. 171) also expressed concern that "in Philadelphia, the situation was structured so that the acceptance of money would be seen as payment for private consulting services and not as the acceptance of a bribe."

Again, the literature on nonsimulated bribery shows this to be a widespread practice that makes the crime easier to rationalize and harder to detect (Boulton, 1978; Braithwaite, 1984, pp. 11-50; Herlihy & Levine, 1976; Jacoby, Nehemkis, & Eells, 1977; Kennedy & Simon, 1978; Kugel & Gruenberg, 1977; Reisman, 1979; Securities and Exchange Commission, 1976). To forbid such practices would make enforcement by covert facilitation useless against standard bribery tactics.

Marx (1982, p. 172) was also understandably concerned about the *Robinson* case (see Lardner, 1977) in which the defendant was acquitted on grounds of entrapment. The defendant had been coerced into corruption after a threatening telephone call to his wife and a warning that he might end up missing. Yet even a guideline that forbade mixing coercion with temptation is unrealistic; it is a common modus operandi of criminals to advance corrupt propositions with the accompanying message that cooperation will be rewarded and lack of cooperation punished. The court should be allowed to render a particularistic determination as to whether the coercion applied was extraordinary, and that it would not have been likely to occur without the contrived police intervention. If it is determined that the level of coercion was unacceptable, the defendant, like Robinson, should be acquitted.

Covert facilitation guidelines cannot be written to provide much practical protection against abuse. Nor can the prior approval of a judge bring in substantial practical control over any unfairness by the police in carrying out the undercover operation as it unfolds. The main point of judicial control is to limit targets to those against whom probable cause can be shown. Making the defense of extraordinary temptation or coercion available to defendants is the best way of giving the police an incentive to exercise restraint. They are unlikely to waste large sums on covert operations if the charges are likely to be thrown out of court, a risk that may be high where the operations are videotaped.

Detailed guidelines aside, we support the strong controls on covert facilitation advanced by Abscam critics. Apart from rejecting the notion of a right not to be tempted, we share their concerns.

We are critical of the Abscam detractors not because of their bleeding-heart views about when covert facilitation should be forbidden (we bleed with them), but because they fail to indicate when contrived temptation should be used. By neglecting to address the question of circumstances under which covert facilitation should be permitted, actively encouraged, indeed required, the Abscam detractors become accomplices to tightening the grip of class bias on the criminal justice system. This conclusion follows from the analysis in the section after next about the types of offenses that are virtually unsusceptible to control by any mechanism other than covert facilitation.

Beyond Privacy: Controlling the Manufacture of Criminal Liability

A fundamental objection to covert facilitation is that government agents should not be allowed to manufacture criminal liability by facilitating the commission of an offense that, but for the governmental action, would not have occurred (Griffiths, 1965). To impose liability because a defendant is shown by the use of deception to be socially dangerous violates the libertarian principle that a person should be held criminally liable only for specific acts that cause harm or danger to others, and not merely for being a potentially dangerous person (see, generally, Eser, 1966; Kleinig, 1978; Levenbook, 1982; Seney, 1971). Thus, the law of attempt requires that a defendant commit an act proximate to the offense allegedly attempted. The effect of this requirement is that the defendant must manifest an objective danger by performing an act that is a substantial step toward success; it is not enough merely to display a dangerous intention to cause harm or danger, nor is it sufficient to act in a way that shows merely a dangerous propensity. Similarly, under the rule of factual impossibility that applies in some jurisdictions, a person cannot be guilty of attempting to commit a crime unless, objectively, it was possible to commit the complete offense. For attempted murder, to take a standard example, an assailant must be trying to kill a human being and not a wax effigy or other thing mistakenly believed to be a human being.

Although the objection to punishing dangerousness is fundamental, it has been neglected in the contemporary debate about Abscam-type operations; criticism has been stuck excessively in the groove of privacy. It might be assumed that the defense of entrapment provides a sufficient safeguard against the manufacture of criminal liability, but such an assumption is unwarranted. The defense often cannot be successfully pleaded, as in cases where the police have not offered an inducement but merely have provided an opportunity for an offense to be committed. Where entrapment cannot be made out, and where covert facilitation has been used to promote the commission of an offense that would not have occurred but for the facilitation, the target is subject to criminal liability for being a dangerous person rather than for causing harm or danger. The nub of the matter is that the defendant has failed to pass a crime-resistance test and, in failing this test, has shown a willingness to commit a crime in circumstances that may closely resemble those encountered in real life but that are in fact simulated by means of police deception.

That covert facilitation be limited to cases where there is judicially verified probable cause does not meet the objection under consideration. To show probable cause that the suspect would commit an offense similar to that involved in a proposed trap is merely to show that there are reasonable grounds to believe the

suspect is potentially dangerous. Alternatively, to show probable cause that the suspect has previously committed an offense similar to that involved in the trap proposed is to show that there are reasonable grounds to believe the suspect has committed an offense in the past. In neither case does the showing of probable cause preclude the conviction of the suspect for a simulated offense that would not have been committed but for the governmental facilitation. A requirement of probable cause provides a useful control, but it does not resolve the substantive issue of whether criminal liability should be imposed for dangerousness.

A more persuasive position is to challenge the claim that the criminal justice system imposes liability only for causing harm or danger (risk of harm). Subjecting the dangerous to criminal liability is not nearly as exceptional as orthodox theory insists. Henry Seney (1971) points out that Anglo-American criminal law is based not on any coherent precept of social harm but on an "absurd morass" of harm, danger, and dangerousness:

Our criminal law theory has pretended that harm is a fundamental and indispensable element of criminalization. In seeking to make that theory fit the facts of what we have been labelling "criminal," scholars have so inflated the concept "harm" . . . that it has lost contact with real world deprivations and can therefore no longer restrain decision-makers or limit crime-making (see also Seney, 1972). (pp. 1141-1142)

Many existing offenses are defined in terms of dangerousness. The classic instance is conspiracy, which requires no more than an agreement between two or more persons to commit an offense; there is no requirement of proximity parallel to that for attempt. Other mainstream examples include possession of tools of crime, driving in excess of the speed limit, and such public order offenses as unlawful assembly. Moreover, even in the context of attempt, the rules of proximity and possibility do not necessarily mean that the defendant must engage in conduct amounting to clear and present danger: the inept burglar who by reason of woefully inadequate equipment fails to gain entry into a house is still liable for attempt. However, to argue that the criminal law is confused and compromised in other areas hardly provides persuasive support for the use of covert facilitation: it can be contended that the criminal law should be revised so as to remove all instances of liability for mere dangerousness (e.g., Seney, 1972).

Putting aside the myth that dangerousness is not sufficient for criminal liability, the use of covert facilitation might be defended on the utilitarian basis that it is just to punish people for being dangerous if the net result is more good than harm. Thus, as Seidman (1981) has contended,

It is also true that we would have no prison breaks if we tore down penitentiaries, and that assaults on policemen would decline dramatically if officers were kept off the streets. Obviously, the question is not whether a particular law enforcement strategy creates crime, but whether it creates more crime than it prevents. That question is hard with

respect to entrapment, because, while the strategy unquestionably creates crime, it may also be an effective tool for stopping it. (p. 140)

Broad utilitarian claims, however, cut little ice because they do not respond specifically to the concern that utilitarians and nonutilitarians have about the dangers of punishing dangerousness.

The major concern is that punishing dangerousness creates the risk of false prediction: until a defendant actually causes harm or danger, we do not know whether a prediction about dangerousness is accurate (see, generally, Nozick, 1974, chap. 2). This concern, as portrayed by Seney (1971), has been a perennial theme in the literature of crime control:

We have transformed the suppositious basis of criminal law from harm to danger to dangerousness; from fact to probability to prediction, and in spite of comfortable assurances that criminal law is filled with predictions, that even the trial of Did-he-or-didn't-he? involves the "prediction" of a past event, I remain unconvinced that our entrail reading is any more dependable in criminal law than elsewhere. Yet, where dangerousness is an accepted criterion for decision, the effect of our crystal-balling is infliction of certain and substantial harm on great and growing numbers of people. And who is not "dangerous"? (pp. 1129-1130)

In the setting of covertly facilitated crime, however, the risk of false prediction is different from that created by inchoate offenses such as attempt, conspiracy, and unlawful possession of tools of crime. With inchoate offenses the defendant's resolve is not put to the test of willingness to carry a criminal intent through to completion. By contrast, where covert facilitation is used to simulate the commission of a complete offense, the defendant must get beyond the stage of preparation or proximity and commit what he or she believes to be the complete offense. Provided the simulation of criminal opportunity is realistic (extraordinary temptations might tend to ensnare the harmless without necessarily catching the dangerous, who might smell a rat), covert facilitation may provide a superior means for screening out the dangerous. Moreover, it is not a matter of "entail reading" or "crystal-balling." On the contrary, covert facilitation may be viewed as a method of enforcement designed to avoid speculative predictions of dangerousness (cf. Fisse, 1974). Offenders convicted through covert facilitation have broken the law; with respect to that law they are demonstrably dangerous.

Thus, we might distinguish offenses based on probable dangerousness where evidence of intention to do harm is not necessarily present (e.g., possession of housebreaking equipment), offenses based on probable dangerousness where evidence of intention to do harm is present (e.g., attempted murder by means of a weapon that cannot be fired), offenses based on demonstrated dangerousness where evidence of intention to do harm is present (e.g., bribery

covertly facilitated), and offenses of intentionally creating actual danger (e.g., administration of lethal poison).

If one takes the view that the criminal law should not extend to punishing dangerousness only because of the risk of false prediction and the absence of evidence of an intention to commit a specific crime, then demonstration of dangerousness by covert facilitation should be acceptable. If one views criminal liability in the absence of actual harm as wrong—even if criminal intent, patent dangerousness, and a specific act of law violation are demonstrated—then covert facilitation should be unacceptable. Even if one adopts the latter position, covert facilitation may nonetheless have an important role to play in relation to civil sanctions, an area discussed in a later section. With this backdrop in place, we now focus on the inequalitarian bias of conventional attempts to police crime in high places.

Invisible Offenses

The conventional wisdom is that reactive policing is a bulwark of liberty in a free society:

Police in the United States traditionally have relied heavily on unsolicited information from citizens to direct their efforts (Black, 1980; Reiss, 1971). In a democratic society there is much to be said for this means of mobilization. It can offer a degree of citizen control over police discretion. This, along with other limitations on the autonomy of the police to initiate investigations, is surely a necessary feature of liberty. (Marx & Reichman, 1984, p. 423)

Dworkin (1985) also has endorsed the libertarian advantages of reactive over proactive law enforcement. In contrast, our contention is that, to the extent that the criminal justice system rejects proactiveness in favor of reactivity, it is at risk of serving upper class interests to the neglect of other interests.

Under a libertarian commitment to reactive enforcement as the democratic ideal, pandemic class inequality in criminal justice is inevitable. Because upper-class crimes are largely invisible—because as crime in the suites they largely occur in private space, while working-class or street crimes disproportionately occur in public spaces (Stinchcombe, 1963)—proactiveness becomes a necessary, though not sufficient, condition for equality under the law. Class equality under the law becomes possible only when there is a willingness to shift emphasis to proactive enforcement, including covert facilitation. Granted, such equality may only be achieved if we decline to use proactive enforcement resources against victimless crimes and employ it against otherwise untouchable upper-class offenders who violate the law as part of their business, political, or professional activity.

The main reason why structural injustice is inevitable under libertarian

reactive enforcement is that upper-class crimes are generally incapable of stirring complainants. Citizens do not know when they are paying higher taxes as a result of a massive tax fraud by a large company or bribes and misrepresentations by defense contractors. They do not know when they pay a premium for a product as a result of a price-fixing conspiracy. They do not know that the reason their stock has dropped in value is because of insider trading or embezzlement by top company executives. They do not know that they have developed cancer because they lived near an illegal hazardous chemicals dumping site, or used a hair dryer with an asbestos shield, or worked in a factory with illegal airborne concentrations of toxins. Accordingly, a choice must be made between proactive enforcement and neglect of the crimes of the powerful.

Mark Moore (1983) has provided the most systematic account of the types of crimes that are "invisible" or complaintless. The two main types he considers are those that have been noted—victimless crimes, and white-collar crime where victimization is obscured by its diffuseness or its longer term effects. We can examine the other types of invisible crimes that Moore discusses to see if they challenge our argument that a categoric ban on covert facilitation will unjustifiably bias the law by protecting white-collar criminals.

A third type of crime noted by Moore is that where the victims know they have been victimized but are unwilling to come forward. This category includes extortion, such as protection rackets, loan-sharking, and blackmail. Protection rackets and loan-sharking are widespread, often serious, and rarely amenable to control by reactive enforcement. Covert facilitation can have an important place here.

Also likely to be invisible are "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" (Moore, 1983, p. 22). Spouse assault and child abuse are the most important crimes of this type. They clearly are not susceptible to undercover operations because it would be unconscionable to invade the private space of a victim to trap an offender against whom she was unwilling to lay a complaint, and it is impossible to contrive a decoy victim. Sexual harassment by employers or landlords is another matter. These complaintless offenses are eminently suitable to covert facilitation. Policewomen have posed as patients to trap dentists suspected of sexually molesting patients under anesthetic (Dworkin, 1985, p. 19). The final example of this type mentioned by Moore is obstructing justice by intimidating witnesses. Covert facilitation is a real option for dealing with this offense.

Moore's fourth class is essentially that of offenses of criminal preparation or risk taking—driving in excess of the speed limit, illegal possession of weapons, possession of burglar's tools, possession of narcotics paraphernalia, and conspiracy. These offenses are not susceptible to covert facilitation. Driving offenses

are certainly almost totally detected by proactive enforcement—but a radar trap is not covert facilitation under our definition since there is no deception (Stitt & James, 1984, p. 112). Even if these offenses were amenable to control by covert facilitation, the harm to persons or property is too small to make it likely that they could pass a seriousness test for approval. There may, of course, be exceptions, as in the case of a sting operation to uncover a cache of terrorist weapons or materials that could be used for the manufacture of nuclear weapons.

If we accept that victimless crimes are inappropriate for covert facilitation, what potential areas remain for covert facilitation? Beyond a long list of white-collar crimes, Moore's work leads one to add only protection rackets; loan-sharking; sexual harassment by employers, landlords, and others in powerful relationships; and obstructing justice by intimidating witnesses. Moreover, all but the last of these might arguably be regarded as primarily white-collar crimes.

Thus, we seem justified in concluding that a policy of shutting out covert facilitation will benefit predominantly white-collar offenders so long as entrapment is not used against victimless crimes. We are not suggesting that we are opposed in principle to covert facilitation in the context of blue-collar crimes such as intimidating witnesses. It just happens that the areas where covert facilitation is defensible are overwhelmingly in the domain of white-collar crime.

One further question is whether Moore is justified in treating all "narcotics offenses" as victimless crimes (Moore, 1983, p. 21). Use of narcotics might be a victimless crime, but dealing can be regarded as a serious crime against the person. Indeed, this is probably where most proactive police resources have gone in recent years. Because drug selling is a transaction in which buyers consent to the risk they run, we agree with Moore's classification of it as a victimless crime. (Although we would outlaw covert facilitation for all drug offenses, we understand that many would disagree with us here [see, generally, Glassner & Loughlin, 1986]). Even if covert facilitation for selling illicit drugs is countenanced and even if this brings within the scope of covert facilitation a much larger array of suitable targets than are available from white-collar crime (we doubt it), we still believe principled pursuit of contrived deception will tend toward evening up the scales of structural inequality in the criminal justice system. Because so conspicuously few white-collar offenders are brought to justice, covert facilitation holds out the prospect of a substantial increase in punishment for such criminals. There is some evidence that Abscam also had a significant deterrent effect, but it must be emphasized that such evidence is anecdotal:

The deterrent effect of the operation is not so easily measured, but the evidence of substantial deterrence is clear. In Philadelphia, after the jury verdicts were rendered, the council president pro tem said, "It means that the old politics, backroom politics, darkroom politics, has come to an end. You're going to see the leadership of leaders who

are open, more responsive to the people''. . . . According to recent testimony by FBI officials, undercover agents in some of these continuing [undercover] investigations have reported conversations in which suspects attributed their caution to concerns about the possibility of ABSCAM-type probes. (Nathan, 1983, p. 3)

The next section places some illustrative flesh on the bones of our view that contrived deception is likely to promote greater equality between the treatment of the powerless and the powerful in the criminal justice system.

Illustrative Cases

Fraud Against the Government

Medical benefit program fraud by doctors, pharmacists, hospitals, and nursing homes, tax fraud, defense contractors fraudulently misrepresenting the cost of components—these and many other types of crime against government rarely generate complainants and are difficult to detect (see e.g., Wilson, Geis, Pontell, Jesilow, & Chappell, 1985). Imaginative covert facilitation can be the most promising control strategy in many of these areas.

A bogus foreign component wholesaler—actually a government agent—can offer a defense contractor an invoice for a larger amount than the components would cost in return for payment in a form that could make it possible for the wholesaler to evade tax. Under the terms of the deal, the contractor receives an inflated invoice for the purpose of claiming reimbursement from the government, and the wholesaler gains a tax break. The agreement to accept the false invoice and to conspire in the tax offense could be filmed. Another possibility, already used by the Internal Revenue Service from time to time, is to have agents acting as purchasers intimate to sellers that they want to buy a business that generates cash income that can be “skimmed” and hidden from the IRS. This technique is likely to unearth false record-keeping practices that may not show up in a standard audit.

Corrupt defense subcontracting practices are a fertile area for covert facilitation. The payment of kickbacks by subcontractors to senior executives of large corporations in the defense industry, for instance, is rife and threatens the competitive basis of the defense procurement system. Notorious as this form of corruption is, it is difficult to control and prosecutions are rare. The “Japscam” operation mounted by the FBI to find out about the theft of trade secrets from IBM (Tinnin, 1983), suggests that it would be possible to set up a small subcontracting firm to supply some standard components (e.g., imported specialized semiconductors) and to use that firm as a vehicle to catch those believed to be insisting on kickbacks.

Fraud in the Safety Testing of Products

The widespread fraudulent misrepresentation by doctors and toxicologists of safety-testing results in order to obtain approvals from health authorities to market drugs has been documented by one of the present authors (Braithwaite, 1984, pp. 51–109). Practices include failing to report adverse reactions to the drug, exaggerating therapeutic effects, eliminating rats that develop tumors and replacing them with healthy rats, or “graphiting” (fabricating) test results and pouring the pills down the toilet. There are almost never complainants of these offenses, and evidence sufficient for a conviction is exceedingly difficult to obtain.

Health authority agents could visit doctors suspected of fraud. They could claim they have a condition for which the doctor has just received pharmaceutical company funding in order to test a new product. The undercover operatives later could report to the doctor severe side effects from the drug. The question would be whether this led to the patient being dropped from the study or led to the side effects being suppressed. Even those who oppose such undercover operations as evidence gathering for a criminal prosecution must surely support them if they are used only so that health authorities might blacklist data collected by the crooked doctor from consideration in any future marketing approval application.

Sexual Harassment

An employer is the subject of numerous confidential complaints from employees afraid to make their reports openly for fear of being fired. The anti-discrimination agency has an undercover operative apply for a job with the target; the operative puts herself in situations where harassment has been known to occur, attempts to get in situations where she can be a corroborating witness of acts of harassment, or places recording equipment in locations where such acts are likely to occur. Such a tactic could prove particularly helpful where the possible defendant might claim that the regular employee lured him into the harassment or led him on by her “provocative” behavior.

Assault By Criminal Justice Officials

Uncorroborated allegations of assaults by police and prison officers are commonplace (e.g., Jewson, 1978; Pallas & Barber, 1980; *Report of the Royal Commission into New South Wales Prisons*, 1978). Criminal justice officials often are sophisticated enough to do their dirty work in the absence of hostile witnesses. Proof beyond reasonable doubt is unlikely when it is the word of a criminal victim against that of a criminal justice official. An undercover operative could smuggle recording equipment into his cell and engage in the kind of

verbal provocation believed to have resulted in assaults previously. This might be asking too much of an undercover agent; perhaps the role should be limited to witnessing and corroborating bashings inflicted on others. Even if such an operation does not produce a conviction, spreading the word that undercover agents are at work could inhibit prisoner beatings.

International Dumping

In 1986 Australia amended its Trade Practices Act to ban the export of designated consumer products unless exempted by the minister. Previously, only the sale of such products within Australia had been an offense. The law is a fine gesture of international comity, but international dumping of hazardous products is rarely detected in a manner that could bring about prosecution in the exporting country.

It would be a simple matter, after a product has been banned, for a fictitious foreign importer to contact a suspected company, saying he had learned about the ban, and inquiring whether he could pick up the banned products cheaply.

Insider Trading

The recent exposure of the machinations of Ivan F. Boesky, an arbitrager who played fast and loose with the law, seems to represent an argument for routine enforcement procedures, since they succeeded in unmasking a major culprit. But questions now are being asked about why it required the cooperation of an apprehended investment banker to catch Boesky's insider trading. The New York Stock Exchange had investigated 46 cases of suspicious trading by Boesky over four years, but none resulted in referrals to the Securities and Exchange Commission (SEC), and none figured in the case finally put together against him. Congressional investigators suspect that the SEC relies too much on its sophisticated technology (Ingersoll, 1986). Considerable time and much money might have been saved had the SEC launched a covert facilitation operation designed to determine whether Boesky operated honestly or whether he relied upon tainted insider information to reap huge profits.

Environmental Protection

Case 1. A shipping company is suspected of oil spills of a minor nature; these are thought to result from inadequate operating procedures. When slicks are discovered upstream, the company is always suspected, but successfully pleads that the oil must have come from some other vessel. Chemical analysis of the oil spill may be unable to indicate clearly from which of a number of suspect

sources the spill originated. The environmental agency plants an undercover employee with the company to witness the next spill, to document the inadequate standard operating procedures that led to it, and to ensnare top management by advising them in advance of the conditions likely to produce the spill that does subsequently occur.

Case 2. A waste disposal company is suspected of being infiltrated by organized criminals and of dumping hazardous solid wastes in open country, as well as disposing of toxic liquid wastes by driving trucks with a slowly dripping tap. Location signaling devices are placed in decoy loads, the volume of which is carefully measured before the operation. A dye in the fake liquid toxic waste, together with the location signal, indicate where the load has been and what happened to it. The device can be used to home in officers for an arrest at the dumping point.

Occupational Health and Safety

One of the greatest occupational health and safety scandals in Australia's history occurred in connection with the Baryulgil asbestos mine when aboriginal workers were exposed to shocking concentrations of airborne asbestos for many years (House of Representatives Standing Committee on Aboriginal Affairs, 1984). When inspectors visited, operations were slowed down to minimize dust production; dust control procedures that always should have been in place were activated only for the duration of the official visit. A diligent regulatory authority would have sent in an undercover worker with a dust sampler to prove that this was happening. Individual managers might be incriminated by reporting extreme dust conditions to them and observing whether instructions were given to continue production regardless.

Consumer Protection Offenses

Approximately a third of the used cars sold in Queensland, Australia, probably have their odometer mileage reading turned back (Braithwaite, 1978, pp. 101-122). Yet prosecutions have been all but nonexistent because the Consumer Affairs Bureau acts only on complaints from victims. People who pay an extra \$1000 for a car because they believe the recorded mileage are not likely to discover that they have been cheated. One solution is for a consumer affairs officer to sell a car with a known odometer reading to a dealer and observe what happens to it. Similarly, with auto repair fraud, the solution is for a car, certified to be in perfect running order, to be submitted to a suspected fraudulent auto repair operation to establish whether it recommends replacement of a part known to be in working order and whether it then puts in a new part (Jesilow, Geis, & O'Brien, 1985; Ogren, 1973).

Consumer affairs traditionally has been an area of almost totally reactive enforcement, although the scope for cost-effective enforcement by covert facilitation is enormous (see, further, Schrag, 1972, chap. 8). Salespersons who prey on poor consumers with illegal high-pressure techniques, abuses of tenancy laws by landlords, and weights and measures offenses can all be subject to control by covert facilitation.

Enforcement agencies in consumer affairs have at times shown a tendency to concentrate on small-time operators and to use much of their resources to protect business organizations from those who victimize them, such as persons writing checks on insufficient funds. A treatise on economic crime units (police agencies formed specifically to deal with white-collar offenses) notes that proactive enforcement is necessary at first to identify targets, but that it can be "curtailed if there are limitations on investigative resources and time, especially if the unit begins to receive a steady influx of citizens complaints or state agency inquiries" (Whitcomb, Frisina, & Spangenberg, 1979, p. 4). This, however, is precisely the point at which proactive vigilance ought to be strongest and not abandoned. As Richardson, Ogus, and Burrows (1982) have observed, in reactive enforcement the ordering of priorities will commonly reflect the preferences of the public, whereas in proactive enforcement the preferences of agency personnel predominate. There is nothing wrong with serving the public will, but it is also essential to represent the public's interest in cases where it is not possible for citizens to know that they have been gulled.

False Advertising

False advertising is unusual among white-collar crimes in that it is relatively easy to detect. A major exception is the area to which most pharmaceutical advertising resources are directed—visits by sales representatives to doctors' offices. In some countries as much as \$10,000 per doctor per year is spent on this kind of advertising. Side effects and contraindications can be covered over and exaggerated claims for efficacy made with impunity (Braithwaite, 1984, pp. 204-244). A valuable control strategy would be to set up an undercover "doctor" as a locum in an existing or fictitious practice (there would be no need for the operative to be qualified as a doctor), and tape the pitch of the sales representatives in response to questions that lead them into the area of suspected abuse.

Employment Discrimination

Employment discrimination does not fail altogether to generate complainants. But if, for instance, a woman maintains that she has been discriminated against because of her gender, the employer generally argues that she lacked competence. It could be useful to use proactive deception to establish patterns of discrimination. Equal numbers of letters from male and female applicants could

be manufactured, with the two groups matched on a range of formal qualifications. If none of the women, but a number of men, get interviews, an employer who has been the subject of previous complaints for refusing to employ women, or to appoint them to a certain type of job, can then be effectively demonstrated to be discriminatory.

Banking and Finance Regulation

Integrity of banks in regard to foreign exchange rules can be tested by having undercover agents approach banks with money to be laundered. Another possibility, suggested by the E. F. Hutton scam (e.g., Koepp, 1985, p. 54), is to set up a computer consulting firm that offers a targeted suspect programs designed to facilitate check-kiting or manipulation of interest payable on accounts. Such a vehicle could be used to target finance executives against whom there is evidence of fraudulent manipulation of accounts, but who are not prosecuted for that conduct because a cover-up or other defensive action by their organization has prevented the collection of sufficient evidence to prove criminal liability beyond a reasonable doubt.

Evasion of individual responsibility for offenses committed on behalf of organizations is indeed a perennial problem in the enforcement of white-collar crime and this gives covert facilitation special relevance as a means of enforcement against corporate crime. Organizations are usually skilled at presenting a blurred picture of managerial responsibility for offenses committed on behalf of the enterprise, whereas a manager subjected to covert facilitation is the focus of attention and, if caught, has laid his or her individual responsibility on the line.

Product Safety

With many products even sophisticated tests are totally inadequate to ensure that the item has been manufactured safely. A car cannot be shown to be free from structural defects as a result of poor quality control by testing to see that it starts. It is similar with drugs. If a number of in-process controls are not followed, capsule contents later may break down and become dangerous, but this can rarely be detected by analyzing the end product. Pharmaceutical companies often "spike" production runs to ensure that in-process controls are being complied with (Braithwaite, 1984, p. 139); for example, a batch that is overstrength on a particular ingredient may be put through the production line to check whether the assay staff pick it up. Such staff can be under enormous performance pressures from supervisors not to hold up the line. If they discover something wrong they are tempted to assume that they have made a mistake in conducting the test. This kind of "spiking" of production lines could be used by Food and Drug Administration Good Manufacturing Practices inspectors. Meat inspectors historically

have placed trichinosed material into tins to determine if any would be detected (Leighton & Douglas, 1910, p. 798).

Building Regulation

The building inspectorate in Mexico City, desiring to upgrade construction standards so as to reduce loss of life in any future earthquake, recruits workers to seek jobs with builders after first training them to detect evidence of inadequate building reinforcements. In major cases, the workers are bugged and ask questions of management, the answers to which establish criminal intent.

Bribery

We have left to last the area where covert facilitation is most needed. Bribery is the quintessential "invisible" offense. It has led to Abscam tactics against politicians, prosecutors, and police suspected of taking bribes from criminals (Lardner, 1977; Marx, 1982, p. 172). The Securities and Exchange Commission (1976), rather than relying on voluntary disclosure of "questionable payments" (bribes to civil servants, generals, prime ministers, and airline executives by aerospace companies: see Boulton, 1978), could have used Abscam tactics to unearth those not likely to comply with the law.

Corruption is the most insidious of crimes. Bribes usually are paid to ensure that some private interest is secured at the expense of the public interest. While all societies have corruption problems, no society, until the United States took a first tentative step with Abscam, has attempted to fight bribery by using covert facilitation, the only strategy that makes effective enforcement possible.

The Responsibility to Engage in Covert Facilitation

The covert facilitation examples outlined earlier would be permissible under the guidelines endorsed in this article. Most entrapment critics might concede that they should be permitted. Where we disagree with them is that we advocate active programs making wider use of covert facilitation to punish the kinds of complaintless crimes discussed above.

A principled position on covert facilitation requires that one have a stance, both on when it should not be used and on when there is a responsibility to use it. The common position of people who have written on the subject specifies forbidden conditions of use, finds its use in other conditions permissible, if perhaps repugnant, and then abdicates its employment in these latter conditions to uncontrolled police discretion.

We know what happens when the community fails to attend to the police use of discretion. Covert facilitation is an appealing law enforcement tactic to nab

drug addicts, dissidents, or prostitutes, but a less attractive strategy when it comes to white-collar criminals. It is unattractive because law enforcers know that, when the civil liberties of the upper class are seen as threatened, a formidable coalition of opposition will be forged between conservative ideologues who see white-collar crime enforcement as antibusiness and antiauthority and liberal ideologues who become indignant when they read about Abscam.

We hope that liberals will be persuaded that to push a position regarding when not to use entrapment without establishing principles for its legitimate use is to perpetuate structural class injustice under the criminal law. As Lawrence Sherman has expressed the matter:

It is the failure to use deception that distorts the statistics on race and crime, making poor blacks appear more prone to crime than rich whites. It is the failure to equalize law enforcement through deception that puts poor blacks in prison for stealing \$70 while whites commit tax evasion and other financial frauds without ever risking an investigation, much less a prison term. (Sherman, 1983, pp. 118–134; see also Seidman, 1985, pp. 1201–1202, 1208)

Covert facilitation is not the key to the control of all white-collar crimes. However, across the board, a shift of the already large covert facilitation resources into the enforcement of the laws against white-collar crime may well be the foremost step we could take toward approaching class equality in the administration of the criminal law.

We see a responsibility to use covert facilitation whenever there is probable cause to believe a judge, police officer, senior business executive, prosecutor, senior civil servant, or legislator uses his or her position to engage in or plan a crime, so long as covert facilitation holds out a reasonable prospect of success and so long as there is no more efficient and less intrusive way to gather evidence for a conviction. Enforcement policy should be reformulated so as to require covert facilitation in these circumstances explicitly.

Privacy

What, then, of all we said earlier about the value of privacy and the way covert facilitation intrudes upon it? In advocating reactive enforcement for the poor and intrusive proactive enforcement for the rich, are we not inferring that the privacy of the rich counts less than that of the poor? In a sense we are because, as the Abscam and De Lorean furors adequately demonstrate, the rich have a greater capacity to mobilize social and political pressure, as well as legal challenge against incursions upon their privacy. We accept Eugen Ehrlich's dictum that "the more the rich and the poor are dealt with according to the same legal propositions, the more the advantage of the rich is increased" (Ehrlich, 1936, p. 238). But that is not one of our central defenses.

First, we believe an *ethical* law enforcement official should not ignore the existence of probable cause that a serious invisible crime has been or is about to

be perpetrated by a powerful person. Such evidence infrequently becomes available and no law enforcement official with a commitment to maintaining the appearance of evenhandedness of the law should overlook such probable cause. If the crime is invisible, however, then all investigative options are unpalatable from the standpoint of priority. The usual tactic is to put the person under surveillance; this might involve a wiretap or something more intrusive. Unfocused surveillance takes a long time to produce useful evidence. We doubt whether a quick covert facilitation exercise is a greater invasion of privacy than years of gathering files that include gossip gleaned from unreliable informants and unfaithful lovers, wiretaps, electronic eavesdropping, tracking devices, prying into bank accounts, building up diagrams of friendship networks, compelling persons to give damaging grand jury testimony against the target, and obtaining warrants to search private homes. Covert facilitation most certainly will be less invasive of the privacy of family members, friends, and others caught in the web of traditional criminal intelligence.

Covert facilitation might occasionally *reduce* invasions of the privacy of public figures by *clearing* their names. If a politician is being hounded by journalists on the strength of malicious rumors put out by a disgruntled former associate, it could serve the politician well to be able to issue a statement that the allegations have led to her being targeted for a covert integrity test in which she *refused* the corrupt proposition. Persons subject to covert facilitation should have the right to copies of videotapes of the facilitation operation should they wish to use them to clear their name.

The privacy of victims, such as those in sexual harassment cases, is a special concern. There are also victims who resist the investigator because there are aspects of their financial affairs that, for the most proper of reasons, they do not want to have divulged in a court of law. Or they may be more hostile to public authorities than they are to the offender who, notwithstanding their victimization, they do not wish to destroy. Or they may want to be left alone because they fear the offender or because they have little faith or perhaps interest in his ultimate apprehension and conviction (see, generally, McGarrell & Flanagan, 1985, pp. 284-285).

In sexual harassment cases, the harassment of the victim by the justice system and the media is often more damaging than the treatment of the offender. The victim's most private thoughts and actions are set out in the presence of others, including strangers, some of whom are masters at innuendo. Might it not at times show more reverence to the value of privacy to keep the real victim out of the spotlight by building an open-and-shut case with a decoy?

When reliance is placed on paid informers rather than on covert facilitation as a technique, there are dangers, as Marx has recognized:

Part of the increased homicide rates in the 1970s . . . , particularly among minority youths, has been attributed to vastly augmented amounts of federal "buy" money for

drugs. This increased the opportunity for youths to become informers, and some of them were subsequently killed. (1981, p. 225)

A bullet in the head, after all, is the ultimate invasion of privacy.

After an initial period of surveillance, progress under traditional methods usually will depend on "turning" a coconspirator within the organization. Such coconspirators "often are motivated to portray the other parties to the crime in an unfavorable light in order to shift legal and moral responsibility to them" (Kerstetter, 1983, p. 142). In other words, turning witnesses of white-collar crimes can produce a flood of malevolent falsity that could lead to further intrusive investigation.

Such considerations give pause to the assumptions that covert facilitation provides innocent parties less chance of proving innocence, and that it subjects both innocent and guilty persons to more intrusive investigation. As Abscam prosecutor Irving Nathan argued,

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 . . . (Nathan, 1983, p. 16; see also Kerstetter, 1983, p. 143)

Noblesse Oblige

Another reason for accepting a level of covert facilitation for white-collar crimes that is unjustifiable for common crimes is the principle of *noblesse oblige*. We believe the holders of public office and the primary beneficiaries of the economic system have a special obligation to obey the law and to resist temptation. Having more advantages than other people, they have an extra responsibility to set a good example.

Noblesse oblige has a long tradition in the English-speaking world, from the middle ages to contemporary times. Recent studies of community attitudes to white-collar crime show extraordinarily punitive attitudes toward white-collar offenders (see the review in Grabosky, Braithwaite, & Wilson 1987). St. Jerome's directions for confessors, adopted by the English church of the 12th century, stated: "And always as a man is mightier, or of higher degree, so shall he the more deeply amend wrong, before God and before the world" (Beckerman, 1981, p. 162). The detailed implementation of noblesse oblige in medieval Europe is illustrated in the Roman Penitential:

If anyone commits fornication by himself or with a beast of burden or with any quadruped, he shall do penance for three years; if [he has] clerical rank . . . seven years. (McNeill & Gamer, 1965, p. 303)

For drunkenness the Penitential of Silos specified 20 days penance for a person of clerical status, and 40 days for drunkenness accompanied by vomiting. By

contrast, a drunken lay person was liable to do penance for 10 days, and 20 days where vomit was present as an aggravating factor (McNeill & Gamer, 1965, p. 286). This form of sanction is still used against social elites in some societies, as recently illustrated by the fate of Surti Singh Barnala, chief minister of the Punjab, who was required to polish the shoes of Sikh pilgrims as penance for having ordered a commando raid on the Sikh Golden Temple at Amritsar.

We find merit in the fact that the legal systems of some nonliterate societies provide more severe sanctions for powerful than for powerless offenders (Nader & Todd, 1978, p. 20), and in the fact that the Polish Penal Code decrees higher penalties for economic crimes tied to the seniority of the offender (Lernell, personal communication, August 1979). The British parliamentary system of ministerial responsibility is underpinned by noblesse oblige, and noblesse oblige guides allocations of responsibility in some Japanese companies (Braithwaite & Fisse, 1985). We see noblesse oblige as a counterweight to the more powerful pressures to push responsibility for wrongdoing downward in the class structure onto junior scapegoats (Braithwaite, 1982). Equally, some might invoke the Kantian principle that those who enjoy greater benefits can reasonably be asked to balance these with greater burdens (Kant, 1797/1965, pp. 99-107). Noblesse oblige should not be taken to extremes, of course, as by making wholesale use of covert facilitation. Covert facilitation is so powerful a tool of enforcement that it needs to be constrained by a number of safeguards.

Beyond this, when an offender is an important public official—whether a judge, a president, a school principal, or a law enforcement official—there is a special responsibility to be a moral exemplar. As Justice Brandeis noted in his famous dissent in *Olmstead v United States* (1928), “Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example.” Christopher Stone (1982) agrees:

If an actor or action is identified in the public mind with the government, we should be more demanding for that reason alone. . . . For example, it is true that General Motors is big and powerful; nonetheless, its actions are not likely to be interpreted as the expression of the collective will. Similarly, when a private club is tolerated to discriminate against Negroes, it does not convey the message that racial discrimination is an accepted norm in the same way that message was conveyed, for example, when the United States Armed Services were segregated. (p. 1497)

An interesting argument advanced by Bernstein (1985) is that the targeting of political figures by agencies attached to the executive branch of government could violate the principle of separation of powers, and thereby pose a special threat to the independence and integrity of the diverse branches of government. Legislators, for instance, often will prove tempting targets to an administration because they are seen as presidential aspirants. In addition, it is claimed that targeting legislators weakens their ability to set policy and to represent their

constituents satisfactorily—arguments undoubtedly accurate, but true in parallel regards for all persons who legitimately are suspected of wrongdoing. Certainly no one who has been targeted for an income tax audit can have doubts about the debilitating effects, in terms of time and emotion, that such an experience carries. Bernstein (1985) grants, however, that judicial preclearance of investigations of officials such as members of Congress “would honor the specific separation of powers found in the arrest clause [of the Constitution], while respecting at the same time the needs of legitimate law enforcement” (p. 648). She rejects, as we do, the idea that a legislature, such as the U.S. Congress, should be the judge of its own privileges and that its leadership should be notified when an undercover intrusion is contemplated. Such a procedure, it is cogently argued, “centralizes too much power and invites abuse” (p. 677).

To the extent that a society is seen by its citizens to offer legal immunity to the “apparatchiks” yet offers legal oppression for the poor, that society commits moral suicide. It forfeits the right to demand order and morality from its citizens.

Corporations and Probable Cause

We have said that wherever there is probable cause that a large corporation has engaged or intends to engage in a criminal act, covert facilitation should be prescribed where feasible and where no less intrusive enforcement strategy is available.

With corporations, however, we see no basis for *requiring* probable cause before covert facilitation strategies are implemented. That is, we see no reason why enforcement agencies should not go on “fishing expeditions” to tempt corporations. If there is evidence suggestive of a particular kind of problem in a particular industry—bribery in the aerospace industry, price fixing in the electrical equipment industry, fraudulent misrepresentation of costs in the defense contracting industry—we see no moral argument against random covert integrity testing that leads to conviction of corporations that succumb to temptation. We do not advocate the profligate use of such expeditions, and we see no evidence from outside the United States, where there is no inhibition on enforcement agencies undertaking them, that significant intrusion into corporate life has occurred. Besides, exploratory expeditions are costly and investigators who unjustifiably take on industries tend to be kept in check by the power of the corporations within them, to say the least.

There is no need to require probable cause with corporations because this restriction is grounded in the value of privacy and corporations do not share with individuals the same right of privacy. As the U.S. Supreme Court has pronounced; “Corporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes. They have a collective impact on society, from which they derive the privilege of acting as

artificial entities'' [*U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); quoted with approval in *California Bankers Association v. Schultz* (1974)]. Corporations are not sentient beings and for this reason alone have a lesser legitimate expectation of privacy. There is also the factor of limited liability, a privilege in return for which companies give up privacy rights, at least in relation to financial matters. For these reasons we can demand records and minutes from a company, whereas access to a private individual's diary raises other, more restrictive, privacy concerns.

More generally, the tendency to attribute traditional rights to corporations because they are available to individuals is legal anthropomorphism at its worst (see, generally, Dan-Cohen, 1986). Traditional criminal law rights are grounded in the notion that financially weak and politically powerless individuals were not to be crushed by the prosecutorial might of the state. This rationale does not sit well with the financial and political strength of modern corporations, separately as well as collectively through industry associations.

The second primary rationale for extraordinary due process protections in the enforcement of criminal law is the threat of loss of life or liberty to wrongdoers. The combination of stigma and loss of liberty involved in a sentence of imprisonment sets that sanction apart from anything else the law imposes. Although in theory corporations can be subjected to much more stringent and intrusive forms of punishment than the fine (e.g., community service orders, punitive injunctions), the consequences for individual managers and shareholders are insignificant compared with the experience of being locked in jail.

When covert facilitation operations are directed at a corporate target, judicial review should be required so that the judge can make certain that the target is indeed a corporation and that an organizational target is not being used as a subterfuge to trap an individual against whom there is no probable cause to believe illegality. The other protections against the abuse of covert facilitation discussed earlier should also apply when corporations are targeted.

Abscam and the Responsibility to Engage in Covert Facilitation

The juries in the Abscam trials found six U.S. congressmen and a senator guilty of accepting a bribe from a man (a convicted swindler) who posed as the American representative of a wealthy Arab businessman. Nonetheless, Abscam has been painted by critics such as the American Civil Liberties Union as a "fishing expedition" that "violated the rights of innocent people" (A.C.L.U. says Abscam inquiry became "Fishing Expedition," 1982).

Abscam was not an operation that set out to randomly test whether members of Congress were corruptible, as opposed to testing whether congressmen against whom there was reasonable suspicion were corrupt. It began as an operation to

catch traditional blue-collar criminals—to solve property crimes, and to recover stolen or forged securities or art work. The Abscam prosecutor explained it this way:

No one . . . ever sat down and selected public officials at whom the ABSCAM operation was to be aimed. All the public officials who became involved in ABSCAM came into the operation as a result of the representations and actions of corrupt intermediaries. These "bagmen" boasted to people they believed were fellow criminals (but who actually were government agents) about their ability to produce these public officials for illegal actions, sometimes supporting their claims by citing past illegal ventures. . . . No political official was put off limits; no allegation, regardless of the party, power, or position of the official involved was disregarded as too hot to pursue. When corrupt intermediaries, who had participated in criminal ventures with the undercover operatives, claimed that they could produce a public official to take a bribe, they were invariably invited to live up to their claims. . . . Philip B. Heymann, the head of the Justice Department's Criminal Division, who monitored the investigation and made final prosecutive decisions, testified before a congressional committee, "If a middleman had claimed that he could produce President Carter to take a bribe, we would have swallowed hard but we would not have backed off" (Nathan, 1983, pp. 4-5).

The Justice Department pursued every offer by the intermediary to deliver a crooked congressman. Who can disagree that it would have been scandalous to do otherwise? To have turned away from the corrupt congressmen and stuck with the common criminals would have been a flagrant act of class bias; to selectively follow up only some of them would have been, potentially, an act of political bias (see, further, Seidman, 1985, pp. 1199-1120, 1210-1213).

It would have been better to have had the prosecutors' seemingly responsible judgment reviewed by a judge applying the test of probable cause. As soon as new targets were presented, the prosecutors should have been required to seek judicial approval to continue the operation against them.

Covert Facilitation and Civil Sanctions

Temptation, we have noted, is a method of social control used in every societal institution from the family to the school to the factory. One wonders, therefore, about the upbringing of the *Washington Post* editorial writer who wrote, "No citizen, member of Congress or not, should be required to prove his integrity by resisting temptation" (Abscam wasn't worth it, 1981, p. 24). Consider the earlier example of pharmaceutical companies spiking production runs so that they can act against employees who violate regulations. Should they be allowed to do this? They are randomly entrapping employees against whom there is no probable cause. It certainly violates Stitt and James's principle (1983, pp. 125-126) that "no one should ever be tested to see if he or she will break a law unless there is sufficient evidence to show that the person is engaged in ongoing criminal activity."

We accept the right of employers to randomly test the integrity of their employees with contrived temptation, even in the absence of probable cause (as

to randomness see, generally, Seidman, 1985, pp. 1210-1213). One reason the intrusion is tolerable is that, as with entrapment of corporations by the state, it is not used to deprive citizens of their life or liberty. Loss of job is the worst that the employer can inflict on the employee. The second reason is that employees can be regarded as entering into a form of contract to perform their work with integrity. This, it seems to us, grants a right to the employer to test the integrity of the performance of the employment contract.

For these reasons, we see nothing morally objectionable about police chiefs randomly tempting their officers—by planting money in cars to be towed by police tow-truck operators, by having a decoy hand in money and observing whether it is pocketed, by randomly offering vice team officers bribes, by giving drug squad detectives a seemingly undetectable opportunity to sell drugs, and so on. These kinds of integrity tests do occur in at least some police departments (Sherman, 1978). The chief has an employer's right to demote or dismiss officers who succumb to the random integrity test. However, police chiefs would be moving from their role as employer to that of enforcer of the criminal law if a criminal prosecution was commenced as a result of a fishing expedition. The defendants should then be able to avail themselves of an objective entrapment defense where covert facilitation is undertaken without a judicial finding of probable cause.

This raises the interesting question of whether the *people*, as the employers of *politicians*, should equally be able to conduct random integrity tests without probable cause against their representatives, with the sanction limited to the civil action of dismissal from office. If it is permissible to conduct integrity tests on all other kinds of employees (public and private), why should politicians be exempt?

Politicians, however, are at the top of the accountability structure. Police chiefs can order accountability checks against their officers and politicians can direct accountability tests against police chiefs. But who directs, monitors, and takes responsibility for the fairness and impartiality of integrity tests against the politicians?

Such operations directed against politicians pose extraordinary risks of political favoritism and destabilizing of democracy. Yet the reasons for assurances of incorruptibility are so much more profound for politicians than for anyone else, that to have politicians subject to a lower standard of integrity testing is itself not conducive to confidence in the democracy.

The solution may be not to exempt politicians from integrity tests that can be applied to police officers and other employees in sensitive positions. However, any random testing without probable cause should be required to be carried out under strict guidelines of randomness and political impartiality, supervised by more than one judge. This process should be implemented only after thorough public discussion and, ideally, a referendum. Politicians found to be corrupt by covert facilitation should not be prevented from contesting the matter before their ultimate employers—the people—at the next election.

Psychology and Covert Facilitation

It would be useful if we had available a comprehensive array of experimental evidence by psychologists to provide deeper insight into issues surrounding covert facilitation. Milgram's (1963) renowned work indicated that experimental subjects are prone to obey authority figures when commanded to perform hurtful and, by general standards, immoral acts. West, Gunn, and Chernicky (1975) staged a test in which they asked undergraduate majors in criminology to participate in a Watergate-style burglary. The various conditions in the experiment were (1) sponsorship of the crime by a U.S. government agency, (2) an offer of a relatively large amount of money for committing the crime, and (3) an offer of immunity from prosecution when the crime is allegedly under official sponsorship. A control situation specified that "the crime was being committed merely to determine whether the burglary plans designed by the experimenter would work" and that "absolutely nothing would be stolen from the office" (West et al., 1975, p. 59). Relatively few subjects agreed to participate in the burglary under any condition except when there was both government sponsorship and the promise of immunity from prosecution. For that condition, almost half (45%) indicated that they would go along.

What can we make of such findings? Kenrick (1986), who uses them to buttress a defense of the relevance of contemporary psychology, finds significant the result "that almost half of [the] subjects approached in a tavern were willing to perform a Watergate-like break-in if they were told that it was sanctioned by a government agency" (p. 841). Putting aside some misreading of the original study, Kenrick's enthusiasm is overdone. The subject pool, those ubiquitous undergraduates, is further distorted by the criminological specialization. The experimental blueprint has students who agree to participate being asked to come to a final planning meeting in the experimenter's office, but apparently the inquiry was terminated (and debriefings conducted) prior to any determination of how many actually would show up. Indeed, it is not unlikely that some of the students might have agreed to go along with the theft and thereafter reported the plot to the authorities.

There are, of course, profoundly complicated ethical difficulties involved in conducting experimental work that reflects the actual circumstances of interest. Psychologists seeking "relevancy" often pretend that they are dealing with a matter of current popular interest when instead they are inaugurating a line of investigation that, however important, bears at best only an oblique relation to the eliciting issue. In the realm of crime, for instance, an outpouring of research work on bystander intervention followed in the wake of the slaughter of Kitty Genovese in Kew Gardens, New York (Rosenthal, 1964), but little, if any, of it came within sight of duplicating the fearful conditions of the event that was alleged to have spawned it (Latané & Darley, 1970).

We believe psychologists perhaps might contribute further to issues of

political concern, such as that of covert facilitation, by adding to their repertoire techniques that sacrifice some of the undoubted strengths and appeals of tight experimental design and captive participants, but that come nearer to the core concern. Jury studies, for instance, could, as the British do, rely on "shadow jurors," actual members of the panel who are not selected for a particular case but who agree for experimental purposes to sit through it and meet in groups of 12 afterward to fashion a decision (McCabe & Sutcliffe, 1978). Covert facilitation investigations could look more closely at the true scenarios and the actual participants, something that was done for bystander intervention by studying persons who had plunged into ongoing criminal events (Huston, Ruggiero, Conner, & Geis, 1981).

Qualitative analysis of videotapes and transcripts from actual covert facilitation operations would be a good start for building a knowledge base on the social psychological processes that unfold in these situations. Quite apart from the light these data might cast on the risks and benefits of covert facilitation, they might be an untapped resource to explore more general concerns about temptation and the cognitive techniques used to neutralize immorality.

Because covert facilitation is itself a temptation experiment contrived by the state, psychologists are in a strong position to contrive highly comparable experiments. When they do, we can learn empirically whether in fact all "honest citizens" do have their price or whether most will not cooperate in serious crime regardless of the size of the reward. We can also learn much more about the potential unfairness of the situational pressures that undercover operatives improvise in seeking to trap their quarry.

Conclusion

To reject covert facilitation out of hand as an enforcement and investigation strategy is to block one of the few avenues available in a criminal justice system for treating more evenhandedly the crimes of the powerful and the powerless.

This article contends that a balanced policy position should take due account of the need to safeguard privacy and to protect citizens (and the reputation of the criminal justice system) from acts of overbearing and unjustified beguilement. Due account also must be accorded to the need for the criminal justice system to treat crimes of the powerful as seriously as the community expects (e.g., Cullen, Link, & Polanzi, 1982; Cullen, Clark, Mathers, & Cullen, 1983; Newman, 1976; Schrager & Short, 1980; Scott & Al-Thakeb, 1977; Sebba, 1983; Wolfgang, 1980) and as seriously as the crimes of the powerless. Such a balanced position, we suggest, would not allow covert facilitation as a means of obtaining evidence for criminal convictions unless

1. the test of probable cause can be satisfied against an individual target (whether the identity of the target be known or unknown, and whether

- the covert facilitation be performed by a government agent or an unwitting intermediary);
2. all aspects of the proposed operation are subjected to judicial review and sanction;
 3. the judge is satisfied that the interests of third parties can be adequately protected;
 4. the behavior targeted is not a victimless offense and is regarded by the community as a serious crime;
 5. severe penalties and vigorous enforcement are directed at law enforcement officers who engage in covert facilitation *without* judicial approval and at any person who breaches the conditions of judicially approved covert facilitation; and
 6. the defendant can be acquitted on the ground that covert facilitation was mounted
 - (a) without probable cause,
 - (b) without judicial approval, or
 - (c) in such a way that proffered coercion or temptation so extraordinary as to be unlikely to be a situation that citizens would confront in the absence of police contrivance.

Public corporations, which do not have the same claim on a right to privacy as private citizens, should enjoy all of these protections except the probable cause requirement.

A properly balanced policy position would prescribe covert facilitation when all the above tests were passed in relation to crime in the exercise of the power of a judge, prosecutor, police officer, senior business executive, large corporation, legislator, or other actor who shares disproportionately in the benefits (in power, privilege, or wealth) of the society, provided that

1. covert facilitation holds out a reasonable prospect of securing a conviction and
2. other less intrusive enforcement strategies are unlikely to succeed.

Because we see merit in the principle of noblesse oblige and in the notion that the state should act as a moral exemplar, proactive monitoring of the integrity of senior public officials is more important than in the private sector, especially with those who exercise unusual power in the justice process itself—legislators, police officers, judges, and prosecutors.

However, with politicians there are special dangers of political victimization inherent in targeting for covert facilitation without probable cause, even though the results cannot be used in criminal prosecutions. It is an ignoble choice to allow all other public and private sector employees to be subject to integrity tests, but not the politicians whose corruptibility is apt to be the more serious

issue. Yet the dangers of corrupt investigators using adverse findings against politicians and the risk of selective, politically motivated employment of the findings are daunting.

A further danger is that covert facilitation may chill communications between citizens and their elected representatives. This concern, however, might be turned upon its head: whereas covert facilitation only intrudes upon the privacy of the politician and decoy citizens, alternatives—such as the use of wiretaps, search warrants, and informers—can invade the privacy of all with whom the politician deals over an extended period. Covert facilitation operations should be designed so that they do not inhibit encounters between electors and their representative; indeed, this is a special political privilege guideline we would recommend for the approval of any covert facilitation operation directed against a politician.

No issue is more fundamental to the shape of criminal justice than the nature of future shifts from reactive to proactive enforcement. Gary T. Marx, in particular, has performed an inestimable service in documenting the dangers in such shifts. To restore balance to the debate we have argued that greater emphasis be placed on covert facilitation as a mode of enforcement. We confess to continuing uncertainty and uneasiness as to whether we have wisely balanced the competing considerations, particularly in the context of covert facilitation without probable cause directed against politicians. The policy trade-offs here seem especially perplexing. We would encourage a thousand flowers to bloom in the debate, and we heartily endorse Moore's advice to seek or develop a body of knowledge on what really happens when people go undercover to snare invisible offenses. It is to psychologists that we should turn for "systematic experimentation with managing these methods so that we can find out what is really at stake, and base our policies on experience" (Moore, 1983, p. 39).

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