

Overt Observations on Covert Facilitation: A Reply to the Commentators

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We are indebted to our critics for drawing notice to several matters to which we should have been more attentive, for convincing us that on some things we were off target, and for reinforcing our original commitment to our thesis, despite (indeed, perhaps because of) many of their reservations. The commentators did their work, we believe, in a fair-minded and provocative manner.

Our most general reservation about the commentaries is that their authors were mostly, though not invariably, unwilling to state what they themselves stood for, warily confining their attention to what they saw as deficiencies in our own explicitly stated position. This is, of course, a prerogative of critics. It is possible that an unrocked boat is better than one afloat in treacherous waters. Our view, however, is fundamentally more adventuresome. In the face of ill winds (to keep the metaphor afloat), we prefer to do something—to set sail and seek more favorable waters rather than stay anchored in port. Or, abandoning the metaphor, we maintain that we have identified a problem and have offered a reasonable solution. It is this view, essentially, that must be held in mind as we deal with the reservations of the commentators.

We would note, initially, that we were upbraided by some for failing to stipulate or to endorse other policy options for dealing with the white-collar crime problem. In our article, we focused on covert facilitation; in other publications, all three of us have argued for a great variety of alternative control strategies. Covert facilitation, we believe, is a vital addition to the arsenal of enforcement tactics. Our advocacy is rooted in our stated conviction that alternative methods, however valuable and however underutilized, do not fundamentally confront certain enforcement dilemmas based on the essential need for proactive approaches.

There is common ground between us and the commentators on the need to do *something* to rectify the structural injustice between tough criminal enforcement against blue-collar criminals and the relative immunity of white-collar

criminals. At least five commentators agree with us on this, with Stotland's views being particularly congruent with ours. In regard to covert facilitation, only Penrod rules it out in any circumstances whatsoever, because he regards it as a breach of a "right not to be further tempted through the contrivance of the government" (p. 76). Sherman is unrepentantly lupine compared to the "sheep in wolf's clothing" that Marx finds us to be. The remaining five writers are more reticent about the aggressive use of the tactic against white-collar criminals. At times, they offer cautionary tales of other proposals in criminal justice that flopped; we could, of course, set out at least as imposing an array of ideas, startling at the time, which after being adopted, have functioned reasonably satisfactorily. It must be granted, of course, that few innovations in criminal justice or elsewhere are flawless—and, after the passage of time, most will need to be altered in some ways.

Given the heavy majority in opposition to expanded use of covert facilitation against white-collar crime, one might have expected equally strong endorsement for our contention that most of the covert facilitation currently used by the police should be halted, and specifically, that covert facilitation operations against victimless crimes are indefensible. Not one of the critics, however, supported us on this—although agreement is implicit in Penrod's position. Stotland is against us, partly because the controllers of markets for drugs and illegal gambling—the criminals in black hats—are as wealthy and as powerful as those in white collars. Skolnick has doubts about our view, because complaints against prostitutes and drug dealers often are made by working-class people who he believes have a right to safer streets. Baumgartner sees the prevention of covert facilitation against what we call nonserious and victimless crimes so utopian as to be unworthy of debate, while the others do not offer a position on what existing kinds of covert facilitation should be stopped.

The Inequality Issue

The main reason we were moved to support greater use of covert facilitation against white-collar crime and abolition of the tactic for nonserious and victimless crime was that both policies would contribute to rectifying class inequality in criminal justice. Only a small fraction of those arrested for victimless crimes are the wealthy barons of the drug, gambling, and prostitution trades. Those caught are overwhelmingly the prostitutes, the low-level dealers, and the addicts. Granted, the targeting of powerful organized criminals has improved in a few Western societies and in the United States covert facilitation has had some role in this. But, compared with legitimate organizations, organized crime groups have a superior capacity to arrange their affairs so that it is low- and middle-range operatives who are ensnared. Informants and electronic surveillance, not traps, produce the most convictions of crime bosses.

We are not opposed to covert facilitation being used against crime bosses.

We would concentrate on their multimillion dollar tax offenses and their corruption of public officials rather than focus on transactions in illicit goods and services, a strategy that accomplishes little more than inflating their price and, occasionally, forcing a rearrangement of the syndicates' command structures. The addicts on the street, the powerless participants, rarely pay bribes or engage in massive tax evasion. Our strategy would concentrate enforcement against powerful racketeers rather than against addicts.

Marx accuses us of failing to take "indignation over class inequity" (p. 43) to its logical conclusion. If achieving class equality is what we are about, he observes, we should support the position advocated by Sherman (1983), which involves random integrity testing of the powerful, without particularized probable cause and followed by criminal prosecutions. But achieving class equality (Goal A) is by no means the only value we espouse. We also value privacy (Goal B), together with trust and intimacy (Goals C and D), which are protected by privacy. If a person desires, as we do, to secure a society with characteristics A, B, C, and D, action that leads to A at the expense of B, C, and D is *not*, despite Marx's claim, the kind of action that our position "logically leads to."

Similarly, Skolnick offers the following irony: "in the interests of class bias reduction," he notes of our theme, "demands of residents of low-income areas for safer streets are ignored because they involve 'victimless crime'" (p. 80). We are against covert facilitation of victimless crime because the harm sought to be prevented does not justify the intrusiveness of the technique—the enforcement activity does greater harm than the crime. We also support the prohibition of covert facilitation of victimless crime because to do so will, in the aggregate, decrease class inequality under criminal law.

Our policy does not preclude the "irony" of allowing covert facilitation against the poor or prohibiting covert facilitation that would protect the poor. If our tests for seriousness, probable cause, protection of third parties, extraordinary coercion or temptation, judicial approval, reasonable prospect of conviction, and unlikelihood that less intrusive enforcement strategies would succeed were all met for a blue-collar offense, then our policy makes covert facilitation available. Blue-collar offenses will far less frequently pass these tests than serious white-collar offenses. We can think of a variety of blue-collar offenses, however, that would satisfy the criteria and warrant covert facilitation. Take, for instance, the case of an unemployed ghetto resident hired to intimidate jurors. Stock working-class offenses such as car theft, however, will consistently fail several of the tests proposed, and the practical effect of our policy would be to make covert facilitation an enforcement technique used overwhelmingly against invisible offenses of the powerful.

Marx takes us to task at the level of our basic assumption. We have not shown, he says, that the crimes of the powerful are less likely to be sanctioned than the crimes of the powerless. We maintained that a reactive enforcement policy will not work against invisible or complaintless crimes, that most of the

latter are white-collar crimes, and that for most of those that are not (e.g., spouse and child abuse) covert facilitation is not a feasible enforcement tactic. Beyond child abuse, Marx draws specific attention to welfare fraud as an invisible offense negatively correlated with class. Welfare fraud certainly cannot be combated by responding to complaints; a proactive enforcement strategy is needed. We are confident that Marx would agree, however, that covert facilitation is no more necessary in dealing with welfare fraud than it is in dealing with nondeclaration of interest and dividend income to tax authorities by investors. These are offense types best resolved by computerized data matching. Welfare frauds are easy pickings.

Marx is right to suggest that we could have done more to sustain the assumption that white-collar offenses go untouched to a greater extent than traditional forms of lawbreaking. He does not cast a relevant doubt on this view, however, by citing research on the impact of socioeconomic status on police reaction to juvenile delinquency or by citing a study that found convicted higher status white-collar offenders do not receive lighter sentences than convicted lower status white-collar offenders (Wheeler, Weisburd, & Bode, 1982). Put aside the controversy over the interpretation of the latter results (cf. Shapiro, 1985) and that they make a comparison only within the category of white-collar offenders. This was an analysis of sentences given to convicted offenders; covert facilitation cannot be advanced as a means of increasing class equality in the sentencing of such offenders. All we can claim of covert facilitation is that it could be used to increase the proportion of *prosecutions* and *convictions* for white-collar criminal offenses.

We cannot systematically count the ratio of blue-collar crimes to blue-collar convictions and compare that to the ratio of white-collar convictions to white-collar crimes. However, beyond the analysis of invisible offenses we provided, there are a number of other ways of meeting the burden of proof Marx puts upon us to show low enforcement rates for white-collar crime.

The location of enforcement responsibility for the different offenses offers one clue to varying rates of resolution. Enforcement against white-collar lawbreaking typically lies in the hands of specialized regulatory agencies. Such agencies are concerned with consumer and environmental protection, occupational health and safety, antitrust, tax, broadcasting, nuclear safety, and a great many other white-collar areas. Compared with the police, regulatory agencies are systematically less oriented to prosecution as the favored means of securing compliance with the law—see, for instance, the recent study of the enforcement practices of 96 Australian business regulatory agencies (Grabosky & Braithwaite, 1986). Notwithstanding a massive volume of offenses, a third of the agencies in the cited study had not launched a single prosecution in the three-year period examined.

The distribution of enforcement resources in Australia may differ slightly from that elsewhere, but white-collar crime enforcement is largely removed from

the police in all Western societies. Nor is it a lack of personnel that dictates the absence of criminal enforcement. The Australian Taxation Office has half as many staff as all the police officers combined. There are almost as many federal meat inspectors as there are members of the federal police.

In such figures, incidentally, also lies an answer to Skolnick's concern that local police are inevitably driven to an emergency service emphasis, with little scope for deployment of resources to proactive enforcement. We would see the solution as lying primarily in reliance on specialized regulatory agencies, although federal and state police would also play a role.

One can suggest that the number of nontrivial white-collar offenses in a community exceeds the number of nontrivial blue-collar offenses (i.e., excluding victimless and traffic offenses) by showing the sheer volume of relatively insignificant parts of the white-collar crime problem. We mentioned in our article a study of odometer fraud that loosely estimated that one-third of the vehicles sold in Queensland had their odometer turned back. This would imply less than one prosecution for every 200,000 offenses of this sort over the past 15 years. The smallest regulatory agency in Grabosky and Braithwaite's (1986) study was the Australian Capital Territory Weights and Measures Inspectorate. A survey in 1981 found that 32% of the gas pumps in the Australian Capital Territory sold short-measure gas to motorists. When one considers the number of times each car has its tank filled, the annual number of offenses involved is in the millions for this tiny jurisdiction. And this is only a small part of the responsibilities of the smallest regulatory agency of the 96 in the study. As for the ratio of prosecutions to offenses, there has not been a single prosecution since 1974. We can move from such small-time white-collar offenses to paint a similar picture with the most egregious offenses of transnational corporations. Nineteen of the 20 largest American pharmaceutical companies have admitted to bribery of government officials on a large scale (Braithwaite, 1984, chap. 2). None of these corporations or its executives appears to have been convicted of bribery since 1965 (Braithwaite, 1984, p. 22). Contrary to the impression conveyed by Marx, it is not difficult to find data consistent with the "received wisdom" of criminology that the powerful escape capture (see Braithwaite, 1982, pp. 742-745; Reiman, 1979).

Defining Covert Facilitation

We are encouraged that some of the commentators are more relaxed about many of the illustrations we give of the sorts of deception needed than about covert facilitation as we define it: "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." (p. 6). To the extent that we can agree when we talk specifics, there is hope for reconciliation with our critics.

The word in the definition that creates difficulty is *encourage*. Stotland understands *encourage* as we meant it to be understood. Beyond providing an opportunity, he says it indicates "an active effort on the part of law enforcement personnel to get a person to commit a crime" (p. 95). But he believes many of our illustrations do not involve "encouragement." For example,

undercover agents were introduced into a company to witness illegal oil spills, to document company procedures leading to the spills, and to make sure management was aware of the illegality. Again, no encouragement here, even discouragement. (96)

We still think that encouragement is involved in such a setting because it is possible to encourage the target not only to commit the wrongful deed (*actus reus*) but also to manifest the guilty mind (*mens rea*) required to render the actor criminally liable. The example above was a case of the latter; the undercover operative was to ensure that top managers had the knowledge requisite to holding them individually responsible. We have, perhaps, created confusion by using the word *encouragement*. But the alternative possible terms also have slippery meanings. Dworkin distinguishes deceptively creating opportunities for crime from *inviting*, *suggesting*, *requesting*, and *urging*. The four latter words might convey quite distinctive meanings also, so that a person might say that *inviting* is permissible although *urging* is not.

The distinction between Abscam and an undercover cop dressed as a drunk to decoy muggers seems clear. The mugging decoy is no more than the deceptive creation of an opportunity, while Abscam involved encouragement. The decoy involves passive deception; Abscam was an active effort to persuade a target to offend.

Take another example. The policewoman posing as a prostitute in the red-light district is clearly in the same category as the mugging decoy. If, however, she says, "Would you like a girl?" to a passerby, she becomes active. She no longer simply embodies an opportunity, she has encouraged the potential client, and is in the same covert facilitation mode as Abscam. The distinction becomes rather fine in light of the difference these conventional words of encouragement make.

To render the distinction even more problematic, consider which of the following two forms of temptation involves a greater degree of encouragement: Late at night you are a lone male walking in the red light district. A beautiful woman, revealingly dressed, moves close to you, gently purses her lips, head cocked to the side, apparently waiting for you to say something. In a second incident, it is 8 A.M. on a genteel suburban street when a dowdy decoy shouts to you from a distance of five yards: "Do you want a girl?" In the first encounter, the policewoman asks for \$50, half the going rate; in the second, she sets a \$100 price. Can we persist in the view that in the first case the undercover policewoman merely supplies an opportunity, while in the second she encourages the crime?

The issue of fairness in temptation, it seems to us, turns on how extraordinary or coercive the temptation is rather than on whether the temptation involves an opportunity, or encouragement, or persuasion, or even urging commission of the offense. How extraordinary a temptation is depends on situational factors that the law cannot resolve by definitional fiat.

When one tries to write rules to circumscribe police discretion in relation to phenomena inherently slippery and situationally specific, one usually fails to achieve what is desired (Pepinsky, 1984). At times we must reject the binary logic of the law (its impetus to categorize behavior in terms of "opportunity" vs "encouragement"), and not fall into "the assumption that justice can be broken down into rules of infinite inclusiveness" (Baldwin & Hawkins, 1984, p. 578).

We think it is a mistake to strive for a sharp, unproblematic, universalistic definition of what distinguishes acceptable from unacceptable temptation. We adhere to the doubts expressed in the article about detailed guidelines. We continue to believe the preferable route is to provide for the acquittal of defendants when the court finds that the covert facilitation was implemented "in 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" (Braithwaite et al., p. 36).

We, like some of the commentators, have little confidence in rules that inhibit police discretion as a route to fairness. What we seek is to structure incentives for law enforcers so that the best advice a superior officer can give her minions is to covertly facilitate crime in a way that encourages and persuades as little as possible and as passively as possible. This is the best way to ensure that the judge will not throw out the case on grounds of extraordinary temptation. Given the great costs of covert facilitation, and the embarrassment for the agency in being thrown out of court and criticized in the media, a little uncertainty as to how judges will apply the test of fair temptation will motivate the rational enforcer to pitch temptation at a level sufficient for the target to take the bait, and no more. If that degree of temptation raises serious doubts about the possibility of a judicial finding of extraordinary temptation, then the agency would be foolhardy to press on. Most enforcement agencies are anything but foolhardy in prosecuting powerful white-collar criminals.

The definitional debate has important implications. Dworkin opposes the encouraging of crime on the ground that it produces an incoherence in the criminal justice system. "We say that X ought not to be done, but we invite people to do X" (Dworkin, p. 58). Public policy, however, is justifiably full of such incoherences. What is the relevant difference between (a) the government taking money away from people by increasing taxes to get the deficit down so that people will have more money, and (b) the government manufacturing crime to achieve deterrence so that there will be less crime? Dworkin then asks,

But, it might be replied, in cases where we create the opportunity to commit crime, are not we tempting people to break the law and is not that equally incoherent? (p. 58)

We too wonder how creating criminal opportunities can be any less “incoherent” than encouraging crime. There is a clear distinction between deception with no purpose other than to observe naturally occurring crime, such as the speeding motorist caught by an unmarked police car, and deception either to create opportunities or to encourage crimes that would not have occurred without the police intervention. The first of these is a “coherent” enforcement policy in Dworkin’s terms. Any crime creation by the police, however, must be “incoherent.” We have argued that there is no clear distinction between creating an opportunity for crime and encouraging crime. Even if there were, it is hard for us to see how it might be a distinction relevant to Dworkin’s point about coherence.

We are guilty nonetheless of sowing the seeds of confusion through our use of *encouragement* in the definition of covert facilitation. It might have been better had we chosen the word *temptation*, a term that encompasses both encouragement and provision of opportunity.

This would leave us with a definition clearly reflecting our policy of banning covert facilitation that poses a temptation so extraordinary as to be unlikely to be confronted without state contrivance. If we attempt to limit police discretion by defining things more precisely, we risk actually increasing police discretion by giving officers an open playing field so long as they comply with the letter of the rule (e.g., so long as the decoy prostitute does not ask the possible client if he wants a girl, she can do almost anything to tempt him). Pepinsky (1984) has argued that the *Miranda* rules paradoxically have increased discretion in a similar way. More police accountability, not precise rules intended to limit discretion, is the more promising route to controlling unfair temptation. This path can be taken not only by way of judicial oversight backed by the power to quash the prosecution, but also by means of citizen boards that oversee enforcement practices, a possibility discussed at length in the police accountability literature (Anderson, 1984; Bayley, 1983; Downes & Ward, 1986; Jefferson & Grimshaw, 1984; Reiner, 1985).

Alternatives to Covert Facilitation

Our paper sought to show that advocates of the democratic virtues of reactive policing, such as Marx and Dworkin, had failed to recognize that a shift to proactiveness is “a necessary, though not sufficient, condition for equality under the law” (p. 16). We are pleased to see both Marx and Dworkin writing in a more positive vein about the value of proactive policing in their contributions to this debate.

Covert facilitation, we argued, is an important part of a shift to proactive enforcement: “principled pursuit of contrived deception will tend toward evening up the scales of structural inequality in the criminal justice system” (Braithwaite et al., p. 18). We did not claim, as Marx suggests, “that covert facilitation is the only means for dealing with low-visibility offenses (and that it must be

used)" (p. 43). What we do contend is that some types of offenses have proven incapable of effective control by reactive policing, and that covert facilitation is the only feasible and tolerably intrusive way of dealing with them.

Marx thinks that political corruption in the United States is not an example of such an offense. He writes that "just prior to Abscam, 13 members or former members of the 95th Congress had been indicted or convicted of crimes" (Marx, p. 51). How many of these indictments, however, were bribery or white-collar crime convictions, and how many were achieved without proactive enforcement techniques, such as wiretaps and undercover operations? We maintain that vigorous criminal intelligence targeted on our political leaders—wiretaps, putting undercover operatives into ongoing positions of trust with politicians so that they can extract all manner of secrets from them, pumping informants for material about the politician's private life, what Sherman calls "sponge policing"—is an unconscionable threat to democracy. A covert facilitation policy, it seems to us, is a protection against that threat, because it means that enforcers have a proper course to follow when they can show probable cause against a politician for a serious and otherwise unprovable offense. There then can be no excuse for sponge policing targeted on political opponents.

For the first three quarters of this century, members of the Congress enjoyed virtual immunity from conviction for accepting bribes (Noonan, 1984). The major reason American politicians taking bribes have become more vulnerable over the past decade, we believe, has been the use of either covert facilitation or other proactive techniques even more intrusive than covert facilitation. Empirical work on these cases may refute our supposition, and we would encourage such work. Recent U.S. history, we might note, is exceptional in this regard. No federal Australian politician has ever been convicted of bribery during the lifetime of the two Australian authors of this article.

Covert facilitation also has a defensible role in more minor white-collar offenses, such as the weights and measures offenses noted earlier. If consumers complain about a butcher selling short-weight meat, or complain of an allergic reaction to sausages advertised as containing no preservative, inspectors rarely prosecute on the basis of this information because they are likely to lose. Instead, they pose as a consumer and buy the advertised meat. They ask the butcher, "Are you sure this is the meat without preservatives?" If the answer is "yes," the inspector splits the sample, giving a portion back to the butcher so that he can do his own testing. He then determines whether the meat has preservatives in it and whether the amount of preservative is within legal limits. Given the volume of offenses of this kind, proactive enforcement that includes covert facilitation is the only credible enforcement short of massive public investment in a comparatively minor white-collar crime problem. This is an example of covert facilitation that is defensible partly because the invasion of privacy is minor, although we cannot agree with Dworkin that it is nonexistent.

If the substantial resources currently deployed on covert facilitation against

drug offenders and other victimless and nonserious offenses were totally directed to covert facilitation against white-collar crime, quite massive enforcement successes could be achieved in the latter area. Such a dramatic turnabout is indeed a utopian fantasy, as Baumgartner points out, but we do not resile from the policy we advocate as an ideal to move toward.

Finally, Marx accuses us of endorsing the prescribing of police behavior, a position that, he argues, “runs contrary to the American tradition.” Prescribing police behavior has a distinct place in the American tradition—note the *Miranda* warning, for example. We merely argued that the enforcement policies of the police and other regulatory agencies should be reformulated to require covert facilitation when there is probable cause for serious crime with certain unusual characteristics. We did not suggest a law or regulation to this effect, simply an administrative policy that would be a resource for those within enforcement agencies who have the courage to argue for aggressive enforcement against powerful and respectable criminals. Moreover, it is not a policy of first recourse, but of last resort—when it can be demonstrated to a judge that no less intrusive method of enforcement will secure a conviction.

Probable Cause

We proposed that covert facilitation be used only in cases where there is probable cause to believe that, within a relevant time span, an individual (whose identity may be unknown) has engaged or is intending to engage in the type of crime targeted by the undercover operation. For corporations we argued that there should be no such requirement but that, as in the case of individuals, the use of covert facilitation should be judicially screened. This proposal has met with a varied reaction from our critics. In one view, the requirement of probable cause should be strengthened (Stotland). In another, probable cause should be required in relation to corporate as well as individual targets (Dworkin, Penrod). Quite a different position is taken by Marx, who contends that a safeguard of probable cause would deprive covert facilitation of much of its effectiveness. Then there is the suggestion of Sherman that the test be one of categorical probable cause.

An initial question, raised by Skolnick, is where our proposal stands if in fact there was no probable cause against the suspects caught in the Abscam case. Skolnick maintains that the Abscam operations proceeded without probable cause and implies that this tends to undermine our proposal. Whether or not there was probable cause in Abscam is open to question, since this matter was never subjected to judicial review. Nonetheless, even if Skolnick’s view is accepted, we do not see this as undermining the proposal that judicially reviewed probable cause should be required. We are not prepared to back away from a probable cause standard because there may have been celebrated cases where covert

facilitation was used to advantage without probable cause. We have argued that covert facilitation should be subject to tighter controls and, given the introduction of tighter controls, that covert facilitation should be used more often as a means of preventing white-collar crime. We commend the Abscam strategy for seeking to even up the scales of justice against crooked politicians, but we also deplore the lack of adequate safeguards under the present law for ensuring that the scales are counterweighted against abuse. The defense of entrapment is too limited and uncertain a solution to this risk of abuse (see Whelan, 1985). This is partly why we have supported the additional protection afforded by a requirement of judicially reviewed probable cause. Nonetheless, a defense of entrapment does provide some safeguard and we have proposed that it be strengthened (see also Gershman, 1982). Our position in this respect has been mistaken by Baumgartner, who seems to assume that, because the federal defense of entrapment does not work well at present, it cannot be redefined to provide a worthwhile form of protection.

Does our formulation of the requirement of probable cause go far enough? Stotland is concerned that we have blurred the distinction between the dangerousness of acts and the dangerousness of persons, and he suggests that the uncertainty of predictions about the dangerousness of persons be managed by making covert facilitation contingent on the prior occurrence of more than one instance in which there is probable cause to arrest the target. Our response takes three forms.

First, the issue is less the distinction between dangerousness of persons and dangerousness of acts than whether it is justifiable to impose criminal liability on someone who has neither caused harm nor manifested a clear and present danger of inflicting harm. Where a defendant has acted without causing harm or creating a clear and present danger of causing harm (as is entirely possible in the context of exceeding the speed limit, unlawful assembly, or conspiracy), Stotland echoes our concern about the riskiness of imposing liability on the basis of prediction about the dangerous potential of the defendant.

Second, as we explained in our article, imposing on a defendant who has been tempted by the police into committing an offense that would not otherwise have occurred raises the same problem: liability depends on a prediction about the dangerous potential of the defendant. However, as we also sought to explain, there is one major respect in which prediction is safer in the context of covert facilitation than it commonly is: with inchoate offenses such as conspiracy the defendant's resolve is not necessarily put to the test of willingness to carry a criminal intent through to completion. By contrast, where covert facilitation is used to simulate the completion of an offense, the defendant must get beyond the stage of preparation or proximity and commit what he or she believes to be the complete offense. We agree with Stotland that further research is needed on predictability in the setting of covert facilitation; but he has not challenged our

hypothesis that the predictive power of covert facilitation is superior to that achieved by the minimal tests of liability now applied in the context of conspiracy and attempt.

Third, the modification suggested by Stotland—that targets be allowed one free bite at the apple of probable cause—seems an inflexible and unduly restrictive rule. It might, for instance, preclude the use of covert facilitation against a group of suspects, only some of whom have previously been sufficiently conspicuous to attract notice.

A more controversial element of our proposal is the elimination of any requirement of probable cause where the targets are corporations. Dworkin and Penrod suggest that we have mistaken the nature of the interests that warrant protection behind the corporate veil. For Dworkin, our position depends on the false premise that probable cause is grounded in respect for privacy; in his view it is grounded in protection from temptation. We disagree for the reasons set out in our article for rejecting the idea of a right not to be tempted. This leaves the question as to whether privacy is the primary basis for having a requirement of probable cause and, if so, whether privacy warrants the same degree of protection where the defendant is a corporation.

Dworkin has pointed to a police fencing detail's undercover operations in hotel bars as an example of covert facilitation, which is objectionable not because of invasion of privacy but because random individuals are subjected to integrity testing. We agree that some covert facilitation operations pose much less of a threat to privacy than do others. Yet even in the example given by Dworkin there is invasion of privacy: those citizens who were offered "hot" television sets in bars were subjected to police prying into their disposition to commit the offense of receiving.

Freedom from prying is a much less important interest in the context of corporate entities. Dworkin and Penrod contend, however, that it is unrealistic to view corporate privacy in isolation from the privacy of corporate personnel. Corporations do not make decisions, it is commonly said, people do. We agree that the two realms of privacy should not be viewed in isolation, but disagree that this necessitates a requirement of probable cause for corporate targets. We did not contend that corporations have no right to privacy, but insisted that the right is different and less than an individual's right (see, further, Dan-Cohen, 1986). For corporations, we have taken this to mean that covert facilitation should be permissible without a showing of probable cause but that the other safeguards recommended should still apply. Covert facilitation would usually be focused on personnel acting on behalf of a corporate target, but failure to resist the temptation offered would subject the corporation alone to liability. Where a conviction is sought against an individual on the basis of a covertly facilitated offense, probable cause should be required whether the defendant is acting in a private or in a corporate capacity.

We do not accept that our approach to covert facilitation would be justified in relation to wiretapping (cf. Dworkin). Unlike covert facilitation, wiretapping usually works in a hit or miss way that invades the privacy of individuals who have nothing to do with the illegality for which surveillance is mounted. This problem is kept within some bounds by requiring probable cause, a limitation that may be all the more necessary where the intended target is a corporation engaged in thousands upon thousands of internal and external communications.

Corporations are not human beings but are legal entities for achieving particular human ends. When individuals act in corporate roles on behalf of those legal entities, they enjoy certain privileges granted for utilitarian reasons (e.g., limited liability, protection of trade secrets), but they cannot claim the same rights to privacy that they enjoy when acting in their capacity as private individuals. When the executive writes a letter to his wife, he enjoys a right to privacy in relation to the communication. When he writes to one of the corporation's customers he does not enjoy the rights of a private person. He then is not acting for himself, but for a legal entity not born with rights but created to produce utilities, with spheres of privacy that should be evaluated on utilitarian grounds (Dan-Cohen, 1986). Public corporations not only lack the birthright of private individuals, but because they generally have greater powers for good or ill than individuals, they must be subjected to greater public accountability. That means, for example, greater public disclosure of corporate financial data of a kind that is properly private for individuals.

Marx suggests that our probable cause requirement might defeat our own purposes by worsening class inequality. This, Marx indicates, will happen because of the invisible nature of many white-collar crimes: "It is precisely because there is *no* probable cause that many undercover investigations are carried out" (p. 50). We never advocated a probable cause requirement for *all* undercover operations. We did so only for an especially intrusive and potent form of undercover operation—covert facilitation. It may be that less intrusive and threatening forms of undercover work do not justify the safeguards we suggest for covert facilitation. A requirement of probable cause for all undercover operations would have even more drastic implications than are suggested by Marx; it would forbid almost all of the undercover work of security agencies, such as the CIA, for example.

Marx may be right that undercover operations are needed to build evidence of probable cause against white-collar criminals. On the other hand, he may be right elsewhere in his article when he says that "federal agents often report feeling overwhelmed by the volume of information they receive regarding violations and violators. In general, they have far more information than they can act on now" (p. 52). Whether undercover operations to gather information on white-collar crime are needed and defensible is the subject for another debate.

According to Marx, the solution (if one is prepared to pay the price) to

evidentiary difficulties is not to resort to covert facilitation but to relax restrictions on the gathering of evidence, such as the Fifth Amendment. An alternative conclusion, we suggest, is that covert facilitation offers a valuable method for following up leads and converting probable cause into convictions, and that this solution, if subject to the priorities and safeguards we have recommended, is less drastic than dilution of protections such as the Fifth Amendment.

Finally, we have contended that, where covert facilitation is used for civil disciplinary purposes by the state as an employer of police and politicians, there is a much stronger case for dispensing with probable cause and for allowing judicially supervised random testing. Marx does not pursue this possible way of managing the uncertainty surrounding the feasibility of a requirement of probable cause but seems locked within a one-dimensional criminal frame of reference. Adding a civil dimension to the range of solutions creates the possibility of requiring probable cause in the context of criminal liability, yet leaving the door open to civil disciplinary use of covert facilitation where the test cannot be satisfied.

Sherman has criticized our proposed requirement of probable cause on the basis that particularized probable cause is too high a standard and that the test should be one merely of categorical probable cause. He contends that we have implicitly supported a test of categorical probable cause by suggesting that probable cause can be made out in relation to targets whose identity is unknown. We disagree. Sherman's interpretation of our proposal attempts to transmogrify it into something that fits his preconception of categorical probable cause. The concept of categorical probable cause fails to provide citizens with the degree of protection warranted against enforcement measures as intrusive as covert facilitation of crime.

Sherman claims that our proposed requirement of probable cause is "virtually oxymoronic" on the ground that a test of probable cause that allows unknown persons to be targeted lacks the specificity required for probable cause and amounts in effect to a test of categorical probable cause. In supporting this claim, he refers to the requirement of particularity of description under the Fourth Amendment and contends that the Fourth Amendment requires "at least a description of a specific human being" (Sherman, p. 88).

This line of argument is unpersuasive, for several reasons. First, our proposal is intended to cover situations where there is probable cause to believe an offense is likely to be committed at a particular location, but where the identity of the suspect is unknown (e.g., where a marauder has engaged in a pattern of brutal robberies without having been seen by any living victim or witness). This proposal echoes the U.S. statutory requirements for probable cause in the context of electronic surveillance [18 U.S.C. s. 2518(1) (b)], and responds to a particular problem that commentators have previously identified (e.g., Heymann, 1985, pp. 332-333; Whelan, 1985, pp. 1218-1219). Second, the Fourth Amendment

does not invariably require "at least a description of a specific human being," as Sherman maintains. There is no such requirement where a warrant relates to search of premises (La Fave, 1978, pp. 441-443) and it is difficult to see why the position should be any different where covert facilitation is used at a particular location for the purpose of gaining evidence as to the identity of an unidentified suspect. Third, the Fourth Amendment does not govern covert facilitation (there is no *search* as that term has been interpreted) and hence does not preclude some relaxation of the test of probable cause. We do not concede that any such relaxation is warranted at present, although as we have said experience with the test of probable cause might ultimately create a stronger case for adopting a test of reasonable suspicion (see Whelan, 1985).

Sherman also contends that a test of particularized probable cause is too demanding, and is likely to be unworkable or inequitable in practice. This is essentially a criticism voiced by Marx and there is no need to repeat our response to Marx's critique. However, two additional points are made by Sherman. First, he claims that where there is probable cause against a suspect there is little need to resort to covert facilitation because the suspect could be arrested. Second, he urges that a test of particularized probable cause does not overcome the problem of fairly selecting targets: there must still be a method for picking certain individuals for exposure to temptation.

In our view the first of these points is overstated and the second seems of little consequence. As to the first, it is hardly curious that enforcement agencies should wish to rely on covert facilitation rather than proceeding to make an arrest. On the contrary, it is trite law that the information sufficient to make out probable cause falls well short of the evidence needed to establish criminal liability beyond a reasonable doubt (Polyviou, 1982, p. 98). For this reason it is quite common in practice for searches or electronic surveillance to be conducted prior to the making of any arrest despite the existence of probable cause. As to the second point (the need for fair selection of individuals targeted), we do not see this as a major issue under our proposal for particularized probable cause. The problem of fair selection is acute where covert facilitation is not subject to a requirement of particularized probable cause, but that is not the approach we are suggesting. Particularized probable cause, coupled with the further safeguards we have proposed, would screen out targets on a highly selective basis. Possibly some element of unfairness may arise in the targeting of suspects within the highly selective group of suspects who pass the threshold of safeguards proposed, but this risk could be managed by means of judicial supervision at the time of authorization of covert facilitation and by the monitoring of covert facilitation in practice that we advocated.

Sherman's concept of categorical probable cause represents a loosely defined compromise between a requirement of particularized probable cause, on the one hand, and abandonment of the requirement, on the other. We do not

understand why this loose compromise should be adopted instead of the much tauter possibility of differentiating between criminal liability of citizens and civil liability of employees, requiring particularized probable cause in relation to the former and either categorical probable cause or particularized suspicion in relation to the latter.

The concept of categorical probable cause harks back to the watered-down version of probable cause adopted by the U.S. Supreme Court in the context of administrative inspections (see, generally, Polyviou, 1982, pp. 221-231). Administrative inspections involve relatively minor intrusions of privacy, a factor relied upon by the Supreme Court to justify the departure from the standard requirement of particularized probable cause (*Camara v. Municipal Court*, 1967). Contrived temptation to pry into a target's disposition to offend is a more infiltrating privacy invasion, one that poses a greater threat than administrative inspection to the trust and intimacy that privacy protects. Thus, we think citizens should feel they can remain free from such intrusive criminal enforcement by the state so long as the state cannot demonstrate particularized probable cause against them.

A defining ingredient of liberty is a citizenry with expectations that all individuals need do to protect themselves from criminal enforcement that encroaches on their freedom is to comply with the law. Such a definition of liberty forbids the state from intruding upon private spheres of our lives merely because we satisfy categorical probable cause for criminal enforcement. It does not preclude categorical integrity tests by our employer to ensure that we comply with the law in fulfilling the obligations of the employment contract. Nor does it preclude civil disciplinary action by the employer flowing from such covert facilitation.

How Easy Are People to Tempt?

Penrod mounts a good case from the psychological literature that it can be easy to get people to perform antisocial behaviors. This seems to us a sufficient basis for rejecting Sherman's advocacy of criminal enforcement based on random integrity tests. The question is whether even particularized probable cause is a sufficient safeguard against a worrying statistical probability that significant numbers of law-abiding folk will be tempted at a given price. To answer this question, a systematic program of controlled temptation experiments is needed that compares known offenders and "cleanskins," with membership in the categories assessed by both official records and self-reports of crime.

The second safeguard is the crime-seriousness test that must be passed before covert facilitation can be mounted for purposes of criminal enforcement. The data Penrod discusses on widespread diffusion of criminal behavior in the community (e.g., Farrington's and Wolfgang's delinquency cohorts) are

swamped by mostly minor offenses that would not pass any appropriate seriousness test.

What is the level of seriousness required? We do not apologize for failing to specify this because it is clearly one of the issues that should be informed by psychological research. It is plausible that a large proportion of businessmen who would not go out in search of a prostitute could be tempted when confronted with a sufficiently enticing and affordable decoy. However, it is implausible that a normally law-abiding businessman would be tempted by an opportunity to knowingly do something as serious as selling a consumer product banned because it caused death. Between the plausible and the implausible there is a wide terrain of temptation. Empirical work is needed to determine what kinds of crime are unthinkable at any price for most of us. We believe if the seriousness standard is set sufficiently high, covert facilitation will be limited to offenses that are unthinkable for normally law-abiding people and only thinkable for targets who justified the assessment of probable cause against them.

For similar reasons, research is required on what kinds of extraordinary temptations and what kinds of situational manipulations of temptation experiments turn Dr. Jekylls into Mr. Hydes (among both the con artists who do the tempting and those targeted by it). Such research would be an invaluable resource for civil libertarians to draw to the attention of judges who, under our proposal, would have the power to throw out charges on the basis of extraordinary temptation or coercion.

Guidelines

Skolnick and Stotland support firm guidelines for the conduct of covert facilitation without dealing with the problems to which we draw attention. Guidelines sound like a good idea, but can actually be exploited by both criminals and the police who can paradoxically increase their discretion by working around them. There are also dangers in introducing precise guidelines at the level of judicial approvals. Here Marx hoisted us on our own petard when he pointed out that restricting judicial approvals for a period sufficient for only one (rather than repeated) integrity tests "offers a built-in means for any would-be culprit familiar with the restriction to defeat it: simply, always refuse the first offer" (p. 53). Thus even at the level of the judicial accountability that we advocated as preferable to detailed administrative guidelines, we must be on guard against seemingly sensible precise standards that can in practice compromise the entire exercise.

None of the critics disagreed in principle with our proposals for judicial approval of each covert facilitation operation, in particular, to ensure that third parties were protected. Nor did anyone take issue with our idea that judges be able to dismiss charges based on extraordinary temptation. Some, however, were

cynical about the capacity of judges to effect adequate oversight in these ways. That cynicism may go too far. There is an important difference between covert facilitation and, say, phone tapping. A police officer can engage in an unconscionably intrusive act of illegal phone tapping, use the information gained to stake out a location where a drug sale is to occur, and get a conviction without a judge ever knowing of the illegal act. The same is true for illegal interrogation techniques and for any number of other matters that are beyond effective judicial scrutiny.

Judicial oversight of covert facilitation is in a different category. The circumstances of the police contrivance are at the center of the actual offense subjected to legal argument during the trial. The prosecutor cannot fail to discuss these circumstances in the way she can fail to discuss the illegal phone tap that supplied the tip-off. The judge has to know that the contrivance occurred; this renders the police more vulnerable to judicial assessment of the trap. This does not mean that the police will not lie, but at least they are forced to lie rather than to enjoy the relative security of silence. Moreover, they are forced to lie about conduct usually witnessed by a number of participants, often with a tape recorder or camera operating, and where at least one of those present has an interest in drawing untruths to the judge's attention.

Account should be taken of career risks an officer runs by spending substantial department resources on a covert facilitation operation that is then wasted on a finding of extraordinary temptation. We agree with Sherman when he says more generally that "the danger of such methods blowing up on the law enforcement officials who use them seems sufficiently great to encourage extreme caution" (Sherman, p. 92). The incentives that enforcement officials have when dealing with crimes of the powerful are for the utmost circumspection—they are vulnerable to the well-heeled legal talent of the defense, to the judge, to the media and public opinion, to subsequent political retaliation by friends of the powerful person in the dock. With working-class offenders, the incentive for law enforcers is to cut corners on justice to keep the production line moving. With powerful offenders it is to keep yourself and the department out of trouble by being scrupulously just. Overzealousness is a great problem in the former area, timidity in the latter.

Finally, it should be said that not all guidelines run the risks established during the debate. Stotland's suggestion of tight rules on the sharing of information about ongoing covert facilitations to protect against political abuse of such information cannot be faulted. Skolnick's implied policy of striving for the undercover technique that is at the lowest possible level of "infiltrativeness" and that involves the least severe breach of trust relationships, is plainly desirable and consistent with the incentives of enforcers when dealing with powerful persons.

Yet Skolnick makes guideline dilemmas seem more difficult than they really are. He poses problems for us that seem resolved by our approach:

Should it be possible for a government agent, posing as a Mafia member, to kill so as to prove his false identity? To smoke a marijuana cigarette? To suggest that criminal acts be carried out? (p. 83)

Under our policy package, the answers to these questions are respectively “no,” “yes,” and “sometimes.” The investigator is not allowed to injure third parties, but can otherwise participate in the criminal activities of the organization, and he can suggest criminal acts in ways that will pass the extraordinary temptation and protection of third party tests.

Utopianism

Baumgartner devotes almost all of her contribution to showing that attempts such as ours to suggest how class inequality in criminal justice might be redressed are utopian designs to change the sociological inevitability of immunity from the law for the powerful:

Things that people want are nonetheless unattainable if their existence defies natural principles. In order to create anything—a skyscraper, for example, or an airplane, or a cure for a disease—people must work in accordance with the regularities that govern their environment. (p. 61)

Skyscrapers and airplanes might be seen as examples of human ingenuity used to put matter together in ways that defy gravity. For most of human history, the idea that man could fly was viewed as in defiance of natural laws. We do not want to overdraw analogies between the physical and the social worlds, but we think Baumgartner lacks a sense of the possibilities for fundamental social change evident from human history. Marx, in contrast, sees modest progress toward a less class-biased criminal justice system during the short historical span of two decades:

Prior to the 1960s, white-collar crime was treated much less seriously than today. One positive legacy of that decade’s emphasis on equality and environmental issues, and later of Watergate, has been increased attention to white-collar offenses. The FBI has made white-collar crime one of its major priorities. Agencies such as the Customs Service and the Internal Revenue Service have become much more enforcement oriented in recent years. New agencies—such as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Justice Department’s Office of Professional Responsibility—have appeared. . . . Perhaps this is a drop in the bucket. But at least there is now a bucket and there is something in it. This is very different from the situation in the 1940s described by Sutherland (1949). (Marx, p. 45)

Reformers rarely change the world unless they understand the cross-cutting sources of power and pursue change by leveraging the support of one sphere against another. There is no doubt that human agency can be exercised strategically to do just that. It is always wise to put your money on those with the greatest power, but the powerful sometimes lose. A fresh-faced law graduate can toss General Motors; two *Washington Post* journalists can bring down a president; a peasant

army from a minor Asian country can defeat the greatest military power in the world.

There are some domains of egalitarian reform wherein, even though the reformers lose most of their battles, when they win they tend to hold on to much that is gained. Reform may be gradual, as Marx notes, but it tends to be cumulative. Regulatory measures to control the abuses of big business is one such domain. In the 1970s, a considerable number of new regulatory agencies came into existence. President Reagan cut back these agencies, but he could not abolish them. He can reduce some areas of business regulatory enforcement, but all the might of the American political and business establishment cannot turn the white-collar crime clock back to the 1960s. Even more implausible is the proposition that there could be a return to the world of the 19th century in which there were no laws regulating food and drugs, meat inspection, antitrust, consumer protection, stock market manipulation, prudential control of banks and insurance companies—to a world where business could do virtually as it liked.

One reason for the partially cumulative nature of reform in this area is that there is widespread popular support for enforcement of community standards of decency and justice against the most powerful members of the community. And here we think Penrod, Marx, and Baumgartner have got the evidence wrong. Penrod offers a selective account of the now-voluminous literature from many countries regarding community attitudes to the seriousness of white-collar crime. Even the studies he cites do not substantiate the community tolerance of white-collar crime that he portrays. The international literature based on surveys testifying to community punitiveness toward white-collar crime has been summarized by Grabosky, Braithwaite, and Wilson (1987):

The community perceives many forms of white-collar crime as more serious, and deserving of more severe punishment, than most forms of common crime. There are exceptions to this pattern. Tax offenses and false advertising in most studies are not viewed as serious crimes. . . . Most types of individual homicide are viewed as more serious than all types of white-collar crime. Nevertheless, white-collar crimes which cause severe harm to persons are generally rated as more serious than all other types of crime and even some types of individual homicide. (p. 42-43)

The community is far more punitive in its attitudes to white-collar crime than we are. We are horrified at the heavy prison sentences that most members of the community indicate in these attitude surveys as appropriate for a great variety of white-collar crimes.

The reasons for ineffective law enforcement against white-collar crime include, most fundamentally, a combination of the technical difficulties of enforcement and the social realities of power. Our paper has considered a pertinent strategy—covert facilitation—for reducing the technical difficulties of enforcement. We are not persuaded, as Baumgartner is, that our proposal “runs counter to the social logic of the law,” although we would agree that we have no right to

expect the legal system, again in her words, "to respond compliantly." Power systems rarely are altered significantly without a struggle. No change would take place if reformers abandon the field because they take the status quo to be beyond influence.

The commentaries, in our view, have contributed admirably to clarifying issues about the propriety of covert facilitation. Covert facilitation remains for us an apt technique for responding to the inequalities of law enforcement directed against the offenses of the powerful compared with those of the powerless. We do not pretend to have a detailed campaign strategy to overcome the powerful forces that may fight reform; our advocacy for the moment is of carefully evaluated law enforcement programs combined with scientific experimentation on the covert facilitation of white-collar crime.

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