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Toward a Common Law for Undercover Investigations - A Book Review of ABSCAM Ethics: Moral Issues and Deception in Law Enforcement

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Book Review

Toward a Common Law for Undercover Investigations— a Book Review of ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT. *Edited by Gerald M. Caplan.* Cambridge, Mass.: Ballinger Press. (1983) 147 pp.*

Reviewed by Bennett L. Gershman**

I.

In the afterglow of ABSCAM, and the looming shadows of 1984, concerned citizens are searching for emerging trends. Is American society becoming a police state with superficial democratic trappings? Or are the new secret tactics of the police merely a rational and noncoercive means to secure greater freedom through more effective crime control? Questions such as these are being asked with increasing frequency, and neither the courts, legislators, social scientists, nor moralists have provided answers, much less a coherent framework in which to analyze the relevant factors or standards for resolution. Confusion abounds. Consider the following examples.

Ten years ago, allegations of corruption in New York City's criminal justice system led to the appointment of a special prosecutor with broad and independent powers of investigation. Traditional investigative methods proved ineffective because acts of corruption, such as bribery, ordinarily do not produce complainants, witnesses, or tangi-

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ble evidence of wrongdoing. The discovery of criminal offenses in this covert, well-insulated, and mutually protective criminal justice system required infiltration and deception. The investigators devised an imaginative plan: they created a fictitious crime and subsequent arrest, with undercover agents playing the roles of victim, defendant, and arresting officer.[1] The staged arrest proceeded routinely through the New York court system, tricking judges, court officials, and jurors. The bait was successful; evidence uncovered implicated several judges and lawyers in acts of corruption.[2] Efforts to prosecute these officials, however, met with furious judicial condemnation. The undercover investigation was characterized by shocked courts as "foul, illegal and outrageous,"[3] and "a perversion of the criminal justice system."[4] Clearly, although the end may have been laudable, the means were unjustifiable.

Four years later, without specific allegations of corruption against any government official, federal law-enforcement officials launched a massive undercover investigation into legislative corruption. Code named ABSCAM,[5] the investigation was designed to test the honesty and integrity of high governmental officials by manufacturing opportunities for their corruption. Undercover agents, assisted by a career swindler, pretended to be representatives of wealthy Arab sheiks who sought friendship and assistance from public officials in return for payment of huge bribes. Aided by corrupt intermediaries ignorant of the scam, roving undercover agents were able to lure several prominent congressmen in front of hidden cameras and ensnare them in corrupt transactions. The courts overwhelmingly endorsed the opera-

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1. For a discussion of this case, and the use of staged arrests generally, see Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest,* 66 MINN. L. REV. 567 (1982). As Special Assistant Attorney General in the Office of the Special Prosecutor of the State of New York from 1973 to 1976, I investigated and prosecuted several corruption cases employing undercover techniques. In these prosecutions, one of the principal issues litigated was the propriety of such techniques.

2. A similar investigation, "Operation Graylord," was recently conducted in Chicago. Staged arrests and undercover agents posing as corrupt prosecutors and judges were used to uncover extensive corruption within the criminal justice system. Several judges and lawyers have already been indicted. N.Y. Times, Dec. 15, 1983, at A1, col. 1.

3. Rao v. Nadjari, No. 75 Civ. 2376 (S.D.N.Y. Sept. 30, 1975); Rao, Jr. v. Nadjari, No. 75 Civ. 2377 (S.D.N.Y. Sept. 30, 1975).

4. Nigrone v. Murtagh, 46 A.D.2d 343, 347, 362 N.Y.S.2d 513, 517 (1974), *aff'd,* 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975). For a similar condemnation, see United States v. Archer, 486 F.2d 670 (2d Cir. 1973) (Friendly, J.) (government's instigation of bribery by a local assistant district attorney through the use of a staged arrest went beyond any proper prosecutorial role).

5. The word is an acronym combining the first two letters of Abdul Enterprises, Ltd., a fictitious Middle Eastern corporation, and the word "scam," a slang expression for a swindle or confidence game. The Federal Bureau of Investigation originally created the organization in 1978 as a front to receive stolen property. In 1979, the FBI shifted its focus to that of uncovering political corruption, first in New Jersey, then among the members of Congress. *See, e.g.,* Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment,* 91 YALE L.J. 1565, 1571-75 (1982).

tion.[6] As one typical appellate panel observed:

> Given the special relationship between the public and those who serve the Government, it is inevitable that the public will call for, and law enforcement officials will rely upon, special investigative techniques to uncover insidious corruption. Modern crime fighting methods such as videotapes and carefully devised and supervised covert investigations often are the only means of discovering breaches of the fundamental mandate of one's office.[7]

Needless to say, the contrasting judicial responses to these two undercover investigations raise extremely complex and troubling questions. Were the two investigations so dissimilar as to evoke such markedly dissimilar reactions? Is sneaking under judicial robes any less indispensable to discovering judicial corruption or any more justifiable than sneaking into congressional chambers to discover legislative corruption? Were both undercover operations, and others like them, regardless of their success, so unreasonable and unfair, and their implications so frightening as to deserve condemnation not only legally, but also from an ethical, social, and political standpoint as well?

Covert police tactics, while seemingly inconsistent with a democratic society, have long been used in American law enforcement without significant criticism.[8] Recently, however, such tactics have been subjected to sustained attack and have evoked a much more focused and less visceral reaction. Several reasons may account for this change. First, covert law-enforcement operations are no longer directed only against narcotics peddlers, gamblers, or organized-crime figures, but are now being aimed at persons of wealth, social prestige, and political prominence.[9] Although indignation at this new direction may be spurred in part by class biases, such operations may also provoke latent fears that, like our ancestors in the Garden of Eden, no one is completely impervious to seductive temptations. Second, the dramatic increase in the use of undercover methods and the increasingly imaginative forms of the deception heighten the anxiety that areas of society and personal relationships previously perceived as sanctuaries of confidentiality might become the next

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6. *See* United States v. Kelly, 707 F.2d 1460 (D.C. Cir.), *cert. denied,* 104 S.Ct. 264 (1983); United States v. Williams, 705 F.2d 603 (2d. Cir.), *cert. denied,* 104 S.Ct. 524 (1983); United States v. Myers, 692 F.2d 823 (2d Cir. 1982), *cert. denied,* 103 S.Ct. 2437 (1983); United States v. Alexandro, 675 F.2d 34 (2d Cir.), *cert. denied,* 103 S.Ct. 78 (1982); United States v. Jannotti, 673 F.2d 578 (3d Cir.) (*en banc*), *cert. denied,* 457 U.S. 1106 (1982).

7. United States v. Alexandro, 675 F.2d 34, 43 (2d Cir.), *cert. denied,* 103 S.Ct. 78 (1982).

8. *See, e.g.,* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs,* 60 YALE L.J. 1091, 1091-96 (1951); Mikell, *The Doctrine of Entrapment in the Federal Courts,* 90 U. PA. L. REV. 245, 245-47 (1942). American law-enforcement authorities have used undercover tactics for over a century to enforce a variety of laws, such as those regarding immigration, Woo Wai v. United States, 223 F. 412 (9th Cir. 1915); gambling, State v. Torphy, 78 Mo. App. 206 (1899); bribery, People v. Mills, 91 A.D. 331, 86 N.Y.S. 529, *aff'd,* 178 N.Y. 274, 70 N.E. 786 (1904); obscenity, Grimm v. United States, 156 U.S. 604 (1895); vice, State v. Dingman, 232 S.W.2d 919 (Mo. 1950); and liquor, Sorrells v. United States, 287 U.S. 435 (1932).

9. *See* Wilson, *The Changing FBI — The Road to Abscam,* 59 PUB. INTEREST 3 (1980); S. BOK, SECRETS 268 (1982).

targets for infiltration.[10] Third, the development of new and sophisticated technologies for surveillance and information gathering generate fears that these devices will permit broader and more intensive intrusions into personal privacy than ever before.[11] Finally, the absence of significant legal restraints on police undercover activities raises serious concerns about the potential for abuses of power. Although the fourth and fifth amendments empower the courts to exercise some control over traditional investigative procedures, such as arrests, searches, and interrogations,[12] which usually are conducted without deception, these controls often do not apply to undercover investigations, which rely on secrecy for their success. Moreover, the entrapment defense offers little protection against the government's ability to instigate crimes, particularly when those persons instigated have demonstrated some predisposition toward criminal behavior.[13] Except for an absolutely shocking case, law-enforcement officials' ability to use infiltration, manipulation, and deceit to investigate, and even to manufacture crime, is largely unfettered by judicial controls.[14]

II

ABSCAM Ethics: Moral Issues and Deception in Law Enforcement[15] is a significant contribution to the public debate over the propriety of undercover tactics in criminal investigations. The book arose out of two conferences on deceptive law-enforcement techniques and police ethics held at Harvard University in 1981 and at the John Jay College of Criminal Justice of the City University of New York in 1982. The high level of debate at these conferences prompted the Police Foundation to ask Professor Gerald M. Caplan of The George Washington University National Law Center to assemble and edit the best papers

10. The rate of increase in the FBI's use of undercover operations is staggering. From 1978 to 1981, the FBI initiated approximately 1,200 separate undercover operations. By contrast, beginning in 1972 the FBI conducted on the average only about 50 undercover operations a year. American Civil Liberties Union, The Lessons of ABSCAM 4-5 (Oct. 10, 1982) (unpublished manuscript) [hereinafter cited as ACLU Report]. The budget for such operations also increased dramatically, from $1 million in 1977 to $4.8 million in 1981. Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, in ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT, 66 (G. Caplan ed. 1983) [hereinafter cited as ABSCAM ETHICS].

11. *See, e.g.*, A. WESTIN, PRIVACY AND FREEDOM (1967). *See also* Hoffa v. United States, 385 U.S. 293, 317 (1966) (Warren, C.J., dissenting) (The "unbridled use of electronic recording equipment . . . used to invade privacy . . . appears to be increasingly prevalent in our country today."); Osborn v. United States, 385 U.S. 323, 341-42 (1966) (Douglas, J., dissenting) ("The aggressive breaches of privacy by the Government increase by geometric proportions.").

12. *See, e.g.*, Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE, 211-437, 543-665 (1980).

13. *See* United States v. Russell, 411 U.S. 423, 435 (1973); Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 178 n.44 (1976).

14. *See infra* text accompanying notes 71-81.

15. *Supra* note 10.

for publication. The result is a collection of seven essays dealing with the specifics of ABSCAM, the use of informants in law enforcement, the selection of targets for investigation, strategies for dealing with victimless crimes, and the social and ethical implications of the new police undercover operations. The essays vary in their approaches and methodologies. Several of them are sensitive, enlightening, and provocative; a few are superficial and dull. Notwithstanding its title, the book transcends any particular undercover operation and provides a framework for further analysis of one of the most difficult and controversial issues facing law-enforcement officials today. The book demonstrates the need for new legal approaches to the problem of police undercover work, both to ensure fair and rational policies and to provide safeguards against abuse. One such approach, which I shall discuss below,[16] is to create a new common law for undercover investigations, based on the overriding public interests in controlling law-enforcement misconduct and protecting citizens against governmental oppression.

The ABSCAM investigation is chronicled and defended by Irvin B. Nathan, formerly a deputy assistant attorney general in the Department of Justice and coordinator of the ABSCAM prosecutions.[17] I tend to agree with his assessment that, by every objective standard, ABSCAM was a huge success. A senior United States senator, six congressmen, a mayor, and an assortment of other public officials and attorneys were convicted of corruption, usually with videotaped evidence of the crime in progress. Every conviction was affirmed on appeal. One congressman was expelled from office, some resigned, and others were defeated for reelection. The operation's effect in deterring corruption, though difficult to measure, probably has been substantial.

In addressing one of the most controversial issues raised by ABSCAM, Nathan denies that prospective defendants were impermissibly targeted: "All of the public officials who became involved in ABSCAM came into the operation as a result of the representations and actions of corrupt intermediaries," such as Angelo Errichetti, mayor of Camden, New Jersey, who provided the FBI undercover agent with a written list of names of those he alleged were corrupt federal and state politicians in New Jersey.[18] Failure to have pursued these allegations would have occasioned a scandal and may have provoked the charge of a "cover up." Moreover, FBI operatives were given careful ground rules designed to thwart unscrupulous middlemen and to eliminate any possibility that a subject would be lured into criminality without fully appreciating the illegal nature of the

16. *See infra* text accompanying notes 85-108.

17. Nathan, *ABSCAM: A Fair and Effective Method for Fighting Public Corruption*, in ABSCAM ETHICS, *supra* note 10, at 1.

18. *Id.* at 4. A recent report evaluating the ABSCAM operation, based largely on congressional testimony, disputes this claim and points to evidence indicating that ABSCAM operations were seeking out corrupt politicians in New Jersey before Errichetti ever became involved in the operation and before the FBI could reasonably have suspected a pattern of prior criminal activity. *See* ACLU Report, *supra* note 10, at 12-19.

transaction.[19]

Plainly, the government "set the bait" by having its undercover agents tell the corrupt intermediaries that they were willing to pay for political favors. But, Nathan argues, the government did not know who would bite and made no effort to push the bait toward any particular individual. He suggests that ABSCAM resembled common undercover investigations into urban crime in which police in "granny squads" disguise themselves as elderly women with handbags visible and ready to be snatched. The entrapment defense was rarely invoked, Nathan observes, probably because it would have been "far-fetched" to suggest that sophisticated public officials were so impressionable as to be enticed into doing something they would otherwise not be inclined to do.[20]

Acknowledging that every law-enforcement procedure, not just the ABSCAM operation, is subject to abuse, Nathan calls for reliance on the basic integrity and decency of prosecutors and investigators, following elaborate administrative guidelines,[21] under close judicial scrutiny, and aided by vigilant defense counsel. The "good news, at least for law-abiding citizens," he concludes, is that sophisticated undercover operations to combat crime "represent the wave of the future."[22]

Two of the major issues in ABSCAM— the use of informants and the selection of targets — figure prominently in the book. Peter Reuter, a senior economist at the Rand Corporation, focuses on informants, the "dirty secret" of police work.[23] Because of the public's high expectations of police performance, some police, Reuter claims, have entered into long-term relationships with informants, whose frequent criminal behavior is tolerated, and even permitted, on a regular basis. In effect, the police are "licensing criminals," and there is very little control over this sordid practice. In the enforcement of nar-

19. These ground rules apparently did not provide sufficient safeguards. The FBI initially authorized the establishment of bribe-offer meetings with 27 public officials solely on the basis of representations from middlemen. Although two authorizations were cancelled, the others were not. Five of the officials never attended such a meeting. Twenty meetings were held but only 12 convictions resulted. Congressman Edward Patton of New Jersey and Senator Larry Pressler of South Dakota declined a bribe offer in front of the FBI cameras. *See* United States v. Myers, 527 F. Supp. 1206, 1225 (E.D.N.Y. 1981), *aff'd in part,* 692 F.2d 823 (2d Cir. 1982); ACLU Report, *supra* note 10, at 6.

20. Nathan, *supra* note 17, at 13.

21. In the aftermath of ABSCAM, the United States Justice Department and the FBI issued comprehensive guidelines for undercover operations. *See* Department of Justice, Office of the Attorney General, *Attorney General's Guidelines on FBI Undercover Operations* (1981). In an earlier article, I suggested that the protections purportedly provided by these guidelines is illusory. *See* Gershman, *supra* note 5, at 1586 n.100.

22. Nathan, *supra* note 17, at 16.

23. Reuter, *Licensing Criminals: Police and Informants,* in ABSCAM ETHICS, *supra* note 10, at 100-17.

cotics laws, for example, such transactions are commonplace. Indeed, Reuter's essay recalls my own experiences as a prosecutor in New York County when, during arraignment proceedings, members of the police narcotics unit often asked me to intercede with the judge for the release of an informant recently arrested by another police squad. On one occasion, I was even approached by federal drug-enforcement agents on behalf of a purportedly valuable informant who was about to stand trial on major kidnapping charges.

Reuter believes that attempts to control this practice by promulgating guidelines or by requiring that informants be registered are of questionable value. Such controls tolerate broad discretion, are easily evaded, and can produce more secrecy and diminished control within police agencies. He does not specify the seriousness of this problem[24] and does not grapple with the overriding moral question of whether police-licensed crime should ever be tolerated in a free society. Reuter assumes, I think incorrectly, that such a practice is a necessary means justified by a legitimate end, and that "[e]ither we must accept the tensions created by the ill-monitored licensing or we must lower our demands upon the police to apprehend certain classes of criminals."[25]

The problem of informants is considered in a skillful and provocative essay by Sanford Levinson, a professor at the University of Texas Law School. Professor Levinson presents a constitutional and ethical analysis of the government's use of informants and the "hidden costs" of infiltration and deceit.[26] Spies are a product of classical liberalism, he suggests, enabling a paranoid government to invade the private lives of those who might be plotting its destruction. Using as a model the archetypal informant, Judas Iscariot, Professor Levinson offers a typology of informants and develops a concept that might be termed a morality of betrayal. The first type of informant is the "snitch," who betrays another's confidence without the disguise of deceit. Because all relationships are contingent anyway, Professor Levinson believes an autonomous choice to betray should be respected, though he does not fully explain what constitutes an "autonomous choice." Certainly, testimony elicited by a grant of immunity is not autonomous.[27] To a lesser degree, neither is a promise of leniency to an accomplice in exchange for his or her testimony.[28] But what about a person who "snitches" to curry favor with the government? Is such a choice autonomous? In considering the autonomous choice to betray, Professor Levinson must also confront the law of

24. He suggests that characteristics of some federal agencies like the FBI and the Drug Enforcement Administration (DEA) make it unlikely that many agents can enter into unmonitored arrangements with informants that violate the agencies' rules. *Id.* at 114.

25. *Id.* at 102.

26. Levinson, *Under Cover: The Hidden Costs of Infiltration*, in ABSCAM ETHICS, *supra* note 10, at 43.

27. New Jersey v. Portash, 440 U.S. 450, 459 (1979) (such immunized testimony "is the essence of coerced testimony").

28. *Cf.* Napue v. Illinois, 360 U.S. 264, 267-70 (1959) (promise of leniency may induce perjury).

privileges. He believes that although American law generally is unconcerned with protecting intimate relationships, it does recognize the existence of legal privileges that seek to protect the intimacy of certain relationships by barring autonomous choices to betray specfic confidences.[29] A second type of informant is the double agent, who exploits what was once an authentic relationship to induce the revelation of secrets. Here, the government initiates the betrayal by inducing a person to infiltrate the confidence of a friend, neighbor, or lover to gather incriminating information secretly.[30] Under this typology, however, the infiltration need not be governmentally engineered to make it "socially subversive"; the informant just as easily could be a newspaper reporter who betrays a trust for a story. A third type of informant presents a wholly false self from the outset. No genuine relationship ever existed, and the informant must employ deceit to gain the confidence of the target.[31]

Types two and three are the "moral equivalent to . . . violence, . . . indeed torture," in their capacity to destroy private realms of love, intimacy, and friendship.[32] To the extent that persons are unable to trust "normal appearances," social disorder is created. Paradoxically, this erosion of trust, quite apart from its moral implications, will make successful infiltration for purposes of crime control more difficult. The Constitution broadly sanctions spying and deceit, Professor Levinson observes, notwithstanding the protections of the fourth amendment. As the Supreme Court repeatedly has stated in authorizing the government's broad license to spy, eavesdropping and betrayal are "inherent in the conditions of human society."[33] Some governmental deception may be defensible, he concludes, particularly where the police spy on persons who have previously expressed a willingness to engage in criminal activity.[34] Although he does not

29. *See, e.g.,* 8 J. WIGMORE, EVIDENCE §§ 2285-2396 (McNaughton rev. 1961). The Supreme Court recently modified the spousal privilege, so that one spouse could not bar the other from exercising the autonomous choice to betray the spouse's confidence. Trammel v. United States, 445 U.S. 40, 53 (1980). Nevertheless, in most American jurisdictions, the marital testimonial privilege still protects confidential communications from disclosure even if one spouse voluntarily desires to make such disclosure. *See* 8 J. WIGMORE at §§ 2336-2338.

30. A good example of this type is found in the events giving rise to Hoffa v. United States, 385 U.S. 293 (1966). Edward Partin, a friend and associate of Hoffa, frequently visited Hoffa while Hoffa was preparing for a federal trial involving violations of the Taft-Hartley Act. Partin apparently was a paid federal informant, who reported back to the government agents his conversations with Hoffa that disclosed Hoffa's efforts to bribe members of the jury. *Id.* at 297-98.

31. The undercover agents in the ABSCAM operation exemplify this type of informant.

32. Levinson, *supra* note 26, at 51.

33. Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J. dissenting). *See* United States v. White, 401 U.S. 745, 749 (1971) (plurality opinion); Hoffa v. United States, 385 U.S. 293, 302 (1966).

34. One such decision which Professor Levinson apparently agrees with is Lewis v. United States, 385 U.S. 206 (1966). An undercover agent, misrepresenting his identity, was invited into defendant's home on two occasions for the purpose of buying

specifically discuss the issue, I believe Professor Levinson would find undercover operations like ABSCAM, which involve extensive infiltration to test the morality of government officials, both dehumanizing and socially destructive.

In a surprising denouement, Professor Levinson proposes that the "private realm of trust and intimacy" should be protected by redressing a constitutional imbalance and removing the protections of the fifth amendment— "the real villain of the piece"— as a "trade-off" for greater fourth amendment safeguards of privacy.[35] Apparently he regards the fifth amendment as the villain because it prevents law-enforcement officials from directly asking a defendant to explain evidence that suggests criminal behavior.[36] As a result, the government is compelled to use techniques such as informants to secure convictions.

Professor Levinson's attempt to relate the fifth amendment's protection against compelled self-incrimination to the use of deception to gather evidence of crime is problematic. The privilege against self-incrimination does not appear especially relevant to operations like ABSCAM, in which all the incriminating statements were obtained secretly, or to any other undercover investigation of organized crime or official corruption. The defendants in these cases are usually sophisticated and knowledgeable in the law, and have high-priced lawyers to protect their rights. They are unlikely to make the type of self-incriminating statements protected by the fifth amendment. Yet the poor and uneducated, who are usually arrested for traditional street crimes, would be severely disadvantaged by this "trade-off" because they are more easily induced to incriminate themselves. Professor Levinson's proposal is risky, as he himself acknowledges. Relinquishing the right to silence on the assurance of enhanced safeguards of privacy might constitute the ultimate betrayal of all.

The problem of selecting the target of undercover operations is discussed by Lawrence W. Sherman, director of research for the Police Foundation and professor of criminology at the University of Mary-

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drugs. No reasonable expectations of privacy can be grounded upon such representations of criminal behavior, Professor Levinson believes. He would caution, however, that for such undercover activity to be permissible the prospective conduct must generally be accepted as criminal, and the undercover agent must learn nothing more about the person than his or her continued willingness to violate the law. Levinson, *supra* note 26, at 55. Nevertheless, is there not a distinction of constitutional magnitude between a householder who invites a friend into his home, clearly taking the risk that the friend will "snitch" (Levinson's Type I informant) and law-enforcement conduct that actively "plants" an agent inside the person's home to secure incriminating evidence (Levinson's Type III informer)? *See* Osborn v. United States, 385 U.S. 323, 347 (1966) (Douglas, J., dissenting); *infra* text accompanying notes 99-102.

35. Levinson, *supra* note 26, at 59.

36. *Id. Cf.* Griffin v. California, 380 U.S. 609, 615 (1965) (fifth amendment forbids both comments by the prosecutor on the accused's silence and instruction by the court that silence is evidence of guilt). Several eminent scholars and jurists also believe that the privilege against self-incrimination has outlived its usefulness, but for reasons different from those of Professor Levinson. *See* 7 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 445-49 (1843); Wigmore, *Nemo Tenetur Seipsum Prodere,* 5 HARV. L. REV. 71, 85-86 (1891); Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change,* 37 U. CIN. L. REV. 671, 671-72 (1968).

land.[37] He begins by describing the class bias inherent in traditional law-enforcement techniques which target the poor and minority groups in the investigation of street crimes. By contrast, "proactive" undercover methods — the currently fashionable term for police tactics seeking to prevent certain crimes — are more often aimed at persons of wealth and high social status. "Deception is the only way to even up the score between the rich and the poor criminals," Professor Sherman believes.[38] Yet, although no moral outrage is exhibited when deceptive techniques are applied to drug pushers or organized-crime figures, quite the opposite reaction occurs when persons of wealth or political prominence are exposed to undercover investigations. Such operations, including ABSCAM, often are characterized as witch hunts, fishing expeditions, or political vendettas. To allay such criticism, to make target selection more equitable, and to increase law-enforcement productivity, Professor Sherman proposes a radical procedure to select targets fairly. Rather than selecting individual targets based on an inductive method of tips or leads, which often produces a biased sample and results in wasteful efforts (although he offers no empirical evidence for these conclusions), Professor Sherman proposes selecting identifiable groups deductively, based on the probability that some members of this group are committing crimes, and then launching an investigation against randomly selected members of the group. Indeed, this is precisely the process used by law-enforcement officials when they establish roadblocks to catch intoxicated motorists, customs checkpoints to intercept drug traffickers, or random audits of income tax returns.[39] Professor Sherman's unusual three-point proposal includes: the promulgation of the investigative plan through administrative rulemaking to give affected groups an opportunity to debate the proposal; the articulation of explicit criteria for selecting crimes and population groups, such as numbers of lives lost, or degree of threat to democratic government; and the provision of proper notice to the target groups (personal letters or public advertisements) that they might be exposed to deceptive investigations. The disadvantages of his plan, Professor Sherman concedes, are both a sacrifice of the element of surprise and the difficulty of defining target groups in sufficiently general categories. On the other hand, he maintains that deductive target selection would have a significant deterrent impact, would be more productive than traditional methods of target selection through tips or leads, and would be ethically superior because it would remove any stigma from

37. Sherman, *From Whodunit to Who Does It: Fairness and Target Selection in Deceptive Investigations,* in ABSCAM ETHICS, *supra* note 10, at 118.
38. *Id.* at 121.
39. *See, e.g.,* United States v. Ramsey, 431 U.S. 606, 607 (1977) (customs checkpoint search); United States v. Ortiz, 422 U.S. 891, 893-94 (1975) (vehicle checkpoint search).

people who are tested and commit no crime.[40]

Professor Sherman's proposal, while imaginative and provocative, is unrealistic. What do law-enforcement authorities do with Errichetti's list of corrupt public officials? Throw it in the lottery? Assuming the existence of a desire to investigate the judiciary based on allegations of corruption, isn't it unrealistic to expect self-interested judges or attorneys to participate in a public debate over whether they should be randomly selected for corrupt overtures? Are there not ethical and social, to say nothing of constitutional, problems inherent in using factors like race or gender in selecting classes to be investigated?[41]

The problem of structuring undercover investigations to maximize effectiveness and minimize intrusiveness is discussed by two of the authors. Neither of these essays is particularly enlightening. Mark H. Moore, professor of criminal justice policy at Harvard University's Kennedy School of Government, offers a somewhat turgid analysis of law-enforcement strategies for dealing with so-called "invisible" crimes.[42] Detection of offenses such as public or political corruption, narcotics trafficking, and organized crime usually requires law-enforcement officers to position themselves in strategic locations to observe and report the offenses. Such enforcement efforts, however, are likely to be dominated by the most intrusive undercover techniques, including extensive and intensive surveillance, targeting of specific individuals, coercion of witnesses, use of informants and undercover agents, and instigation and entrapment into committing crimes. The challenge to the government, Professor Moore argues, is to develop new and possibly unconventional strategies to attack effectively invisible offenses, while simultaneously protecting the important social values of privacy, investigative rationality, fairness, and economic efficiency. Yet, Professor Moore insists it is premature to formulate general policies governing the use of undercover techniques, and that society should resist the temptation to regulate their use without sufficient and systematic experimentation, documentation, and analysis. He argues that policies and legal rules governing undercover activities should not be developed in the courts through "ambiguous constitutional principles" but, rather, in administrative agencies and "in the more ambiguous realm of social policy where diverse values compete without a clear hierarchy."[43] According to Professor Moore, the development of policies in this area should be considered primarily an administrative problem whose solution might have constitutional

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40. Sherman, *supra* note 37, at 125-29.

41. *See* Davis v. Mississippi, 394 U.S. 721, 728 (1969) (detention for interrogation and fingerprinting based on race violates the fourth amendment absent probable cause); Oyler v. Boles, 368.U.S. 448 (1962) (selective enforcement of statute enhancing punishment for habitual criminals does not violate equal protection as long as the selection is not deliberately based on an unjustifiable standard such as race or religion). One should note the increasing use of police "profiles" of suspected criminals as an investigatory tool, particularly in narcotics investigations. *See* United States v. Mendenhall, 446 U.S. 544, 564-65 (1980); Florida v. Royer, 103 S.Ct. 1319, 1322 (1983).

42. Moore, *Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement*, in ABSCAM ETHICS, *supra* note 10, at 17.

43. *Id.* at 18.

implications. The policy-making agency should represent broad social interests in civil liberties, fair law enforcement, and justice, and should be allowed to experiment "so that we can find out what is really at stake, and base our policies on experience."[44]

I am far less sanguine than Professor Moore that agencies such as the FBI and the Justice Department will be sufficiently sensitive to values of personal liberty. Nor do I believe that the development of rules for undercover operations realistically can or should take place outside the legal system, particularly if the consequences to those victimized by Professor Moore's "experiments" can be so draconian. Although empirical analysis might be able to demonstrate whether operations like ABSCAM really are effective in curbing corruption and are "cost-efficient," values like privacy and the ability to trust "normal appearances" are not as easily quantifiable. Society does not need more "experiments" to "find out what is at stake." Most Americans realize what is at stake; the question is whether society is willing to pay the price.[45]

Wayne A. Kerstetter, a former police official in New York and Illinois, and presently a professor of criminal justice at the University of Illinois at Chicago, offers his "administrative perspective" of undercover investigations.[46] It is superficial and banal. He asserts that an administrator must make tough decisions, balance competing social interests, look to potential costs, and proceed cautiously. Professor Kerstetter merely restates the obvious without providing any deeper understanding. His conclusion is equally unenlightening: "Ultimately the consequences of using deception must be balanced against the consequence of not using it."[47]

By contrast, Gary T. Marx, a professor of sociology at the Massachusetts Institute of Technology, provides a sensitive, provocative, and disturbing essay, discussing the social implications of the new police undercover work.[48] Issues raised by recent undercover adventures like ABSCAM, Professor Marx claims, go far beyond simply whether a particular official was predisposed to take a bribe. Rather, they relate to whether the vastly more intrusive undercover techniques used today signal the emergence of a "totalitarian fortress."[49] Professor Marx documents the upsurge in both the nature and scale of covert law-enforcement activities over the last fifteen years, the sharply increased funding for such operations, and related law-enforcement innovations such as strike forces and witness-protection

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44. *Id.* at 39.
45. *Id.*
46. Kerstetter, *Undercover Investigations: An Administrative Perspective,* in ABSCAM ETHICS, *supra* note 10, at 135.
47. *Id.* at 145.
48. Marx, *supra* note 10, at 65.
49. *Id.* at 96.

programs.[50] One of the principal reasons for this change, he suggests, is the constitutional restrictions on law-enforcement officers' ability to acquire evidence and the consequent development of imaginative methods to circumvent these restrictions through informants, government agents, infiltration, and electronic surveillance.[51]

There is good reason for the public and press to be pleased with these new police operations. The tactics have proved effective, conviction rates are high, street security may be increased through the knowledge that anyone may be a police officer, and the courts have endorsed the techniques. Yet, because secrecy surrounds these operations, the public's perception may be distorted. Little is known about the mistakes, abuses, and costs of these operations.[52] Professor Marx dissects the problematic aspects of undercover police work, observing that American police, in contrast to those in many European countries, are permitted broad latitude in generating conditions for crime, in fashioning integrity tests of public and political officials, and in undermining a target's free will through trickery, coercion, and seductive temptations. Professor Marx also comments on the adverse effects on the police undercover agents, detailing the severe social and psychological consequences that can result from "playing the crook."[53] He discusses the dangers of informants,"the weakest link in the undercover system," and the abuses stemming from their illegal, crime-provoking, and manipulating activities.[54] Professor Marx is most effective in describing the harm to innocent third parties from undercover operations. Although much of this harm may never be realized, a good deal is known about the crimes committed by informants, the trauma of victimization, the effects on small businesses of competition from proprietary fronts run by the police, harmful publicity, and the human suffering from misplaced trust.[55]

Moreover, how do we measure the effectiveness of undercover operations? Do such operations decrease crime? Or do they cause more crime than otherwise would be committed? Who is being arrested? Are they first-time offenders or habitual criminals? Are they incompetent offenders or experienced criminals? Research is limited, and

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50. *Id.* at 66. *See* ACLU Report, *supra* note 10, at 5-6.

51. Marx, *supra* note 10, at 68.

52. Undercover fiascos occasionally come to light. In "Operation Frontload," for example, the FBI investigated organized crime in the construction industry by using an insurance expert in an undercover role. In seeking his certification, the FBI represented him to the insurance company as a "straight arrow," when they knew full well that he had a criminal record and had agreed to become an informer to avoid serving a nine-year prison sentence. In the course of his work, he obtained over $300,000 in fees and issued worthless insurance "performance bonds" to construction companies, costing these companies and insurance brokers more than $60 million in business losses. No indictments resulted in this case. N. Y. Times, May 18, 1979, at A1, col. 1. In another fiasco, entitled "Operation Corkscrew," the FBI sought to investigate corruption by municipal court judges in Cleveland, Ohio. For this operation, the FBI enlisted one of the court bailiffs as an undercover agent. The bailiff, however, had other ideas. He induced some of his friends to pretend to be judges and to accept bribes. The bailiff pocketed $85,000 of the bribe money, until the FBI inadvertently became aware one year later that it had been "stung." Wall St. J., Oct. 28, 1983, at 1, col. 1.

53. Marx, *supra* note 10, at 78.

54. *Id.* at 80-83.

55. *Id.* at 83-86.

its conclusions are not very definitive. Professor Marx concludes that ABSCAM may be a portent of the subtle and perhaps irreversible changes in social control in this country. By secretly gathering information and facilitating crime under controlled conditions, the police, like the modern corporation, may be able to manipulate our demand for their services. Such a market, Professor Marx warns, is subject to exploitation and misuse by the indiscriminate use of undercover operations. American society is fragmented enough without the government adding new layers of repression, suspicion, and distrust. There is a need, Professor Marx says, for careful analysis and public debate as to whether these new methods of law enforcement are benign or malignant.[56]

III

ABSCAM Ethics does not contain any new or startling revelations about excesses in law-enforcement investigations. Society has known for some time of the increasing reliance by the FBI and other law-enforcement agencies on espionage, infiltration, and deceit. Society has also been made aware of the "dirty secret" of informants, of the inequitable targeting of potential criminals, of the modern developments in electronic eavesdropping and other forms of surveillance and information gathering, of the ability of law-enforcement agencies to create new crimes and spawn new criminals, and of the passivity of the courts in controlling law-enforcement excesses. But in addition to providing a useful and comprehensive restatement of these problems, the book provides some unusual ethical and social perspectives often missing from previous discussions, notably those found in the essays by Professors Levinson and Marx. And to the extent that *ABSCAM Ethics* demonstrates the absence of principled and meaningful norms to limit excesses of law-enforcement power, it can provide a catalyst to thoughtful discussions regarding the establishment of such norms. As a contribution to this dialogue, in order to provide a more coherent framework in which to analyze the central issues, I propose to outline what I perceive as an emerging common law to control undercover police behavior.

It should be emphasized at the outset that law-enforcement agencies already enjoy tremendous latitude and flexibility in investigating covert offenses without the need to resort to manufactured crimes or integrity tests. In investigating an offense that has been or is likely to be committed, law-enforcement agencies always can employ traditional investigative techniques which rely on witnesses, tangible proof, and visual surveillance for evidence. But if these methods are unavailable or ineffective, agencies have ample other means to inves-

56. *Id.* at 90-96.

tigate successfully. For example, they can eavesdrop electronically, admittedly necessitating a judicial warrant to wiretap or plant a "bug,"[57] but requiring no warrant to install pen registers;[58] beepers;[59] cameras, with one party's consent;[60] or to place a hidden microphone on an agent.[61] In addition, without the need for any warrant or probable cause, and over claims of privilege, agencies may obtain a vast array of personal and business records and documents;[62] they may use infiltration, spies, deceit, and informants without any factual showing whatsoever;[63] and may use utilize one of the most coercive law-enforcement tools — the investigating grand jury — to force the disclosure of protected information.[64] Furthermore, law-enforcement agencies have the authority to use coercive measures such as grants of immunity to compel testimony:[65] they may engage in other concededly illegal investigative tactics to obtain information[66] and may exploit new and far-reaching criminal laws like the Racketeer Influenced and Corrupt Organizations statute (RICO),[67] in addition

57. Katz v. United States, 389 U.S. 347, 354-56 (1967); Berger v. New York, 388 U.S. 41, 55-56 (1967).

58. Smith v. Maryland, 442 U.S. 735, 745-46 (1979).

59. United States v. Knotts, 103 S.Ct. 1081, 1087 (1983) (use of beeper to electronically track a moving vehicle not a fourth amendment search). *But see* United States v. Cassity, 631 F.2d 461, 464-65 (6th Cir. 1980) (warrantless use of beeper to track persons in their homes violated fourth amendment).

60. United States v. Alexandro, 675 F.2d 34, 37 n.11 (2d Cir.), *cert. denied,* 103 S.Ct. 78 (1982).

61. United States v. White, 401 U.S. 745 (1971).

62. United States v. Miller, 425 U.S. 435, 446 (1976) (examining financial records); Fisher v. United States, 425 U.S. 391, 396-98 (1976) (examining records in possession of attorney). In response to *Miller,* Congress enacted the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, 3697 (*codified at* 12 U.S.C. §§3401-3422 (1982)), which requires that the customer be notified of law enforcement's desire for the information and his right to challenge it in court, unless the government obtains a "protective order" by showing that such notice would seriously jeopardize the investigation.

63. Ample support for this proposition is provided by the famous 1966 trilogy of Hoffa v. United States, 385 U.S. 293, 311, Osborn v. United States 385 U.S. 323, 331-32, and Lewis v. United States, 385 U.S. 206, 208-11. *See* the ABSCAM decisions cited *supra* note 6.

64. The grand jury's vast inquisitory powers accord with the oft-stated principle that "the public has a right to every man's evidence." United States v. Nixon, 418 U.S. 683, 709 (1974) (quoting Branzburg v. Hayes, 408 U.S. 665, 668 (1972)). The powers of the grand jury to compel testimony, and the lack of constitutional safeguards to witnesses, have been emphasized repeatedly by the Supreme Court. *See* United States v. Washington, 431 U.S. 181, 188-90 (1977); United States v. Wong, 431 U.S. 174, 178-80 (1977); United States v. Mandujano, 425 U.S. 564, 571, 580-84 (1976). For a discussion of the use of the grand jury's broad investigatory powers to trap witnesses into perjury, *see* Gershman, *The Perjury Trap,* 129 U. PA. L. REV. 624 (1981).

65. United States v. Mandujano, 425 U.S. 564, 575 (1976). As to the scope of immunity conferred, *see* Kastigar v. United States, 406 U.S. 441, 448-58 (1972). For a discussion of immunity laws and procedures generally, see Gershman, *supra* note 64, at 648 n.91.

66. United States v. Payner, 447 U.S. 727 (1980) (government's deliberate violation of a third party's fourth amendment rights does not bar the use of illegally seized evidence against defendant); United States v. Janis, 428 U.S. 433 (1976) (government may use in IRS civil assessment proceeding evidence illegally seized from defendant); United States v. Calandra, 414 U.S. 338 (1974) (illegally seized evidence may be used before grand jury).

67. 18 U.S.C. § 1961-1968 (1976). Parts of this important chapter of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, have been favorably passed upon by the Supreme Court. *See* United States v. Turkette, 452 U.S. 576 (1981); Russello v. United States, 104 S. Ct. 296 (1983).

to the broad conspiracy doctrine.[68] These powerful weapons, though open to considerable abuse, have proved extremely effective, in investigating and prosecuting not only narcotics offenses and organized crime, but also white-collar crime and political corruption.[69]

Law-enforcement authorities have not, however, been completely satisfied with these techniques. To "prevent" crime before it occurs, law-enforcement agencies have entered into the crime business, establishing, supplying, and even directing a huge array of illegal enterprises, including the manufacture of bootleg whiskey,[70] drug manufacturing and distribution, [71] counterfeiting,[72] the operation of illegal bars and restaurants,[73] fencing stolen merchandise,[74] and selling fraudulent insurance.[75] They have committed crimes[76] and instigated others to commit crimes by using violence,[77] threats,[78] and intimidation and deceit.[79] They have lured into criminality persons who are weak and inexperienced,[80] as well as former offenders who have tried to reform.[81] In reviewing these tactics, the courts have only rarely intervened.

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68. 18 U.S.C. § 371 (1976). As Learned Hand observed in an oft-stated passage, conspiracy is "the darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). The awesome scope of the conspiracy doctrine was also noted by Justice Jackson, concurring in Krulewitch v. United States, 336 U.S. 440, 445-58 (1949).

69. The tremendous inroads made by law enforcement against organized crime have been recently reported. *See U.S. Officials Cite Key Successes in War Against Organized Crime,* N.Y. Times, Nov. 7, 1983, at A1, col. 1. Moreover, the government has been extremely successful in recent years in prosecuting public officials without having to resort to scams and integrity tests. These include high federal officials; state governors; federal and state legislators and local councilmen; and a wide assortment of other public and political officials. *Id.*

70. *See* Green v. United States, 454 F.2d 783, 784-86 (9th Cir. 1971).

71. *See* United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). *See also* United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), *cert. denied,* 457 U.S. 1108 (1982) (government operated chemical supply house for distribution to narcotics operations).

72. United States v. Gonzales, 539 F.2d 1238, 1239 (9th Cir. 1976); United States v. Reifsteck, 535 F.2d 1030, 1032 (8th Cir. 1976); United States v. McGrath, 468 F.2d 1027, 1027-28 (7th Cir. 1972), *rev'd,* 412 U.S. 936 (1973).

73. Chaney v. Department of Law Enforcement, 74 Ill. App. 3d 424, 393 N.E.2d 75 (1979), *aff'd,* 82 Ill. 2d 289, 412 N.E. 2d 497 (1980).

74. United States v. Borum, 584 F.2d 424, 426 (D.C. Cir. 1978). *See also* United States v. Sam Goody, Inc., 506 F. Supp. 380 (E.D.N.Y. 1981) (FBI established retail record store which purchased counterfeit records as part of an undercover investigation of such counterfeiting).

75. *See supra* note 52.

76. United States v. Brown, 635 F.2d 1207 (6th Cir. 1980) (commission of over forty burglaries); United States v. Archer, 486 F.2d 670 (2d Cir. 1973) (perjury, forgery, and filing false instruments); People *ex rel.* Difanis v. Boston, 92 Ill. App. 3d 962, 416 N.E.2d 333 (1981) (soliciting prostitution).

77. People v. Isaacson, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978).

78. United States v. Johnson, 565 F.2d 179 (1st Cir 1977), *cert. denied,* 434 U.S. 1075 (1981).

79. United States v. Hinkle, 637 F.2d 1154 (7th Cir. 1981).

80. United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), *cert. denied,* 457 U.S. 1108 (1982); United States v. Twigg, 558 F.2d 373 (3d Cir. 1978).

81. United States v. Ordner, 554 F.2d 24 (2d Cir 1977), *cert. denied,* 434 U.S. 824 (1977).

I have previously suggested several legal methods of controlling investigative excesses. One would be to require a warrant from a magistrate before certain types of undercover investigations could be conducted.[82] A second method would be to eliminate some of the vagaries in making due process determinations of undercover operations by providing a detailed set of criteria to serve as guideposts.[83] A third method would be to provide a broad entrapment statute that focuses not on the subjective predisposition of the defendant, but rather on law-enforcement officers' conduct, which would be evaluated in terms of its reasonableness, fairness, good faith, and resulting harm.[84]

All of these proposals advance the overriding public policies of protecting citizens against governmental misconduct and misuse of power.[85] They incorporate many of the ingredients for a common law to control undercover police investigations. I envision the shape of this common law of "investigative misconduct" as emerging from an amalgam of several distinct legal doctrines and equitable principles. These doctrines and principles not only are firmly based in jurisprudence, but also are supported by logic and morality. Such a proposal does not require any radical assertion of the balances of power between coordinate branches of government.[86] On the contrary, it necessitates only a modest *reassertion* of the status and independence of the judiciary — which the judiciary gradually has abdicated — to impose meaningful restraints on the law-enforcement activities of the Executive Branch. In this respect, ABSCAM, quite apart from its dramatic revelations of the power and effectiveness of undercover police work, has far greater significance because of its impact on our constitutional form of government.[87] Specifically, ABSCAM has affected the doctrines of entrapment, supervisory powers, due process, and of the fourth and fifth amendments. The equitable principles that interact with these doctrines are clean hands, judicial control of law-enforcement excesses, and freedom from governmental oppression.

Entrapment is easily one of the most controversial doctrines in criminal law because it reflects a deep-seated ambivalence over whether the defense should focus on the defendant's predisposition or on the government's investigative tactics.[88] All courts find it repugnant for law-enforcement officers to lure innocent persons into crime

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82. *See* Gershman, *supra* note 1, at 633-37.

83. *Id.* at 611-33.

84. *See* Gershman, *supra* note 5, at 1585-90.

85. Indeed, the roles of principle and public policy as legal forces justifying the departure from, or the reshaping of established rules, is a historical as well as a prudential fact. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 22-28 (1977).

86. By way of contrast, such a radical alteration would indeed result from recent proposals seeking to broaden the common law. *See, e.g.,* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

87. *See* Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment?,* 41 MOD. L. REV. 266 (1978). Mr. Barlow's analysis, while confined to the English criminal justice system, lends considerable force to my arguments.

88. See, in this connection, the majority and concurring opinions in Sorrells v. United States, 287 U.S. 435, 451 (1932); *cf. id.* at 458-59 (Roberts, J. concurring); Sherman v. United States, 356 U.S. 369, 376-77 (1958).

through trickery and temptation.[89] But some judges also find it repugnant for such officers to use unfair tactics to inveigle any person into crime, regardless of the person's culpability.[90] The clean-hands principle provides the equitable basis for an entrapment doctrine that focuses on the government's misconduct. It would bar from the court any party who has violated the law in connection with the transaction sought to be litigated.[91] Law-enforcement tactics that encourage a crime merely to secure a prosecution are improper, and the government should not be allowed to benefit from such conduct by gaining a conviction.

Focusing on the fairness of the government's conduct is also the principal concern of the supervisory-powers doctrine. This doctrine seeks to preserve the integrity of the administration of criminal justice and to prevent future abuses by providing meaningful standards on the proper use of law-enforcement power.[92] When law-enforcement officials engage in investigative misconduct, this doctrine authorizes the courts to review and remedy such misconduct, regardless of whether an explicit constitutional guarantee is implicated. The supervisory-powers doctrine is a modern expression of the equitable principle of judicial control of police improprieties, such as the use of tactics designed to instigate rather than investigate crime.[93] Several courts have applied this doctrine in censuring various types of law-enforcement excesses in conducting investigations.[94] Regrettably, the Supreme Court's admonition against the judiciary's broad use of a "chancellor's foot veto"[95] has not only silenced those courts willing to assume a broad supervisory role, but

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89. *See, e.g.,* Sorrells, 287 U.S. at 448.

90. *See* Hampton v. United States, 425 U.S. 484, 496 (1976) (Brennan, J. dissenting); United States v. Russell, 411 U.S. 423, 436-38 (1973) (Douglas, J. dissenting); United States v. Jannotti, 501 F. Supp. 1182, 1200 (E.D. Pa. 1980), *rev'd,* 673 F.2d 578 (3d Cir.), *cert. denied,* 457 U.S. 1106 (1982); United States v. Kelly, 539 F. Supp. 363, 376 (D.D.C. 1982), *rev'd,* 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 104 S. Ct. 264 (1983).

91. *See* Olmstead v. United States, 277 U.S. 438, 470 (1928) (Brandeis, J., dissenting).

92. In McNabb v. United States, 318 U.S. 332, 343 (1943), the Supreme Court provided the theoretical and practical bases for this doctrine:

> A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled us that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary.

93. *See* Barlow, *supra* note 87, at 281.

94. United States v. Russell, 459 F.2d 671, 673 (9th Cir. 1972), *rev'd,* 411 U.S. 423 (1973); United States v. Payner, 434 F. Supp. 113, 125 (E.D. Ohio 1977), *aff'd,* 590 F.2d 206 (6th Cir. 1979) (per curiam), *rev'd,* 447 U.S. 727 (1980); United States v. Hogan, 712 F.2d 757, (2d Cir. 1983).

95. United States v. Russell, 411 U.S. 423, 435 (1973).

also most likely has encouraged more creative and excessive investigative "experiments" by the government.

The due process clause, unlike the entrapment and supervisory-powers doctrines, is a dominant constitutional force to protect the moral values related to undercover police work, particularly the freedom and integrity of the individual's will from governmental intrusion and deception.[96] As such, the due process clause mirrors the equitable principle that courts will not tolerate governmental oppression, particularly oppression that seeks to undermine an individual's free will. The Supreme Court has referred to due process limitations on undercover police conduct[97] and has acknowledged the relationship between due process and unfair and deceptive government behavior that induces persons to commit crimes.[98] Due process would provide the central pillar in a common-law edifice governing undercover conduct. Investigative "fairness" would require examining many factors, including not only the government's need for the tactic, but whether the tactic was reasonably suited to the ends sought, and constituted a fair use of law-enforcement power. In addition, the kinds of social harms referred to by Professor Marx would be exceedingly relevant in assessing the permissibility of the tactic.

The fourth and fifth amendments represent the final components of this new doctrine. They hardly are foreign to the jurisprudence of undercover investigations, although they have never been interpreted to offer significant protection. The Supreme Court has suggested that undercover methods that entice persons into crime are as objectionable as coerced confessions and unlawful searches.[99] But this was in dictum, and apparently of fleeting significance. Clearly, the fourth and fifth amendments could offer extensive protection against certain kinds of undercover activities. The fourth amendment, as a safeguard against unreasonable intrusions, could be interpreted to provide an enlarged zone of privacy that law-enforcement officers would not be permitted to penetrate absent some factually articulable justifications.[100] The Court's treatment of undercover police cases totally obfuscates any rational understanding of notions of privacy and security. Because one assumes certain risks in ordinary social relationships, should the government be allowed to add to those risks? Is there any significant difference in terms of privacy between planting an electronic "bug" and planting a human spy? Should not both equally require a judicial warrant? The fifth amendment's privilege against self-incrimination could be construed to embrace incriminating statements induced by the police through subterfuge and deceit, as well as overt force.[101] Are deceit and physical force really that dif-

96. *See* Gershman, *supra* note 1, at 596-601.
97. Sherman v. United States, 356 U.S. 369, 373 (1958).
98. Raley v. Ohio, 360 U.S. 423, 437 (1959); Cox v. Louisiana, 379 U.S. 559, 571 (1965).
99. Sherman v. United States, 356 U.S. 369, 372 (1958).
100. Boyd v. United States, 116 U.S. 616, 630 (1886); Osborn v. United States, 385 U.S. 323, 340-54 (1966) (Douglas, J., dissenting). *See* Amsterdam *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 406-07 (1974).
101. The Supreme Court rejected this fifth amendment claim in Hoffa v. United States, 385 U.S. 293, 302-03 (1966). However, it might be argued that an undercover

ferent in their capacity to coerce people to act against their own will? Deceit is far more subtle, and for that reason is perhaps far more effective than force.[102]

But one should not construe these two great amendments separately, or as antagonists, as Professor Levinson does.[103] For by considering them as mutually protective and reinforcing, rather than in isolation, an entirely new doctrine emerges.[104] And if combined with the other important doctrines previously examined, this "penumbra" provides the principled basis for a new means to analyze covert investigative conduct. Under this new doctrine, law-enforcement authorities' use of deceit and surreptitious intrusion into an individual's privacy without a judicial warrant or any factual basis for believing that the target is engaging in crime, for the express purpose of extracting incriminating statements, or ensnaring the target into future criminal activity, should merit the same judicial censure as do illegal searches and confessions. Indeed, it is paradoxical that the Court has been so scrupulous in protecting fourth and fifth amendment rights even when the violation was largely technical and inadvertent,[105] and yet has so steadfastly upheld deliberate, intrusive, outrageous, and illegal investigative conduct when no right traditionally associated with the fourth or fifth amendment has been infringed.[106]

Applying this common law to undercover investigations would require the courts to weigh values such as rationality, fairness, good faith, and harm under objective standards. This is not to say, however, that artifice and deception cannot play a significant role in the investigation of crime or that covert operations cannot be imaginative and aggressive when directed at important, legitimate, and specific law-enforcement objectives. But distinctions and limitations must be made on the basis of reasonableness and fairness. Striking a true balance between governmental power and individual freedom hinges on such distinctions and limits. For example, establishing a hidden checkpoint to detect intoxicated drivers may be an acceptable law-

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agent's pressing persons to talk into a concealed microphone might constitute sufficient compulsion as to implicate this constitutional protection. *Cf.* United States v. Williams, 705 F.2d 603, 620 (2d Cir.), *cert. denied,* 104 S. Ct. 524 (1983) (although fifth amendment issue was not raised here, the court did indicate that government's informer had coached defendant as to what he should say at meetings with undercover agents).

102. S. Bok, Lying 18 (1978).

103. *See* supra notes 35-36 and accompanying text.

104. *See* Boyd v. United States, 116 U.S. 616, 630 (1886). (Court recognized that at times the fourth and fifth amendments "run almost into each other").

105. *See* Michigan v. Tucker, 417 U.S. 433, 445-46 (1974); Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971).

106. *See supra* note 66. *See also* Hampton v. United States, 425 U.S. 484, 490-91 (1976) (when defendant is predisposed to crime, his constitutional rights are not violated by the police engaging in illegal activity); United States v. Russell, 411 U.S. 423, 435-36 (1973) (when defendant is predisposed to crime, government's act of supplying essential ingredient for illegal narcotics does not constitute entrapment).

enforcement practice, whereas establishing a checkpoint to detect expired registrations may not be; having an undercover officer pose as a potential mugging victim may be an acceptable police tactic, though having that same officer sprawl out on the pavement with hundred-dollar bills protruding from his pocket may not be; the undercover purchase of narcotics often is permissible, but establishing elaborate drug manufacturing operations to attract new criminals or distributing narcotics into new channels of society is totally impermissible and irresponsible; and spying on persons engaged in, or about to commit, a crime may be acceptable, particularly when accompanied by judicial authorization, whereas spying on persons not engaged in present or future crime is not only unacceptable, but is the kind of insidious activity historically practiced by totalitarian regimes to maintain power.[107]

"The grand purpose of the law is to make business for itself," the narrator states in *Bleak House.*[108] Law-enforcement authorities have more than enough crime-fighting work to keep themselves busy and have a considerable arsenal of crime-fighting weapons with which to do this work, without needing to generate new business. While the press and public may be infatuated today with ABSCAM-like operations and ambitious law-enforcement officials continue to reap headlines through the use of this type of investigation, society must not become shortsighted about the implications of these techniques. Once these new undercover experiments take hold and the public becomes conditioned to accept them as legitimate, it will become increasingly more difficult to abolish them.[109] And by a process of gradual accretion, American society may be heading toward that "totalitarian fortress" about which Professor Marx warns. *ABSCAM Ethics* is an important contribution to the type of thoughtful discussion needed to avoid that result.

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107. *See* H. ARENDT, THE ORIGINS OF TOTALITARIANISM 430-31 (1973).

108. C. DICKENS, BLEAK HOUSE 416 (Riverside ed. 1956).

109. However, as this book review was going to press, a majority of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee attacked FBI undercover operations and called for legislation to require the bureau to detain judicial warrants before beginning them. N.Y. Times, May 2, 1984 at A23, col. 1.