The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany

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ABSTRACT

My study of undercover policing explores the ways in which democratic legal systems change when they legalize highly contested police practices that have long been quietly tolerated and accorded minimal scrutiny. Undercover policing is a prime of example of such a practice. It has long been subject to remarkably little legislative oversight and systematic regulation in the United States and Western Europe. It exists in a twilight of legality—a necessary evil, but one inviting anxieties about its legitimacy and consonance with the rule of law. Under pressure from the European Court of Human Rights, Germany (along with other Western European countries) has attempted to regulate covert operations in a more systematic fashion. The German experience examined in my article suggests how difficult it is to tame and legitimate a constantly changing and normatively contested practice such as undercover policing. The article contrasts German attempts to create an explicit legal basis for this power –and a comprehensive regulatory system – with American willingness to leave covert practices largely unregulated. The article focuses on the consequences of these divergent approaches for the legitimacy of covert practices. German legal and administrative reforms succeeded in improving legitimacy along some dimensions while undermining it along others, and, indeed, introducing new bases on which the legitimacy of undercover police work is subject to challenge. In the United States, by contrast, law enforcement agencies have succeeded in defusing a variety of reform initiatives through internal reforms, with little legislative or judicial supervision. As a result, many problems of legitimacy persist – with little visibility. American challenges to the legitimacy of covert tactics now focus less on criminal cases than on the use of such tactics in domestic intelligence investigation.

My analysis of German covert policing rests on 89 field interviews that I conducted between 2002 and 2004 with state and federal police officials, undercover agents, training and supervisory officials, control officers, prosecutors, and judges in fifteen of the sixteen German states. I also compared evidence from interviews with a variety of written sources, including ministry guidelines, training materials, prosecutors' memoranda, judicial opinions, scholarly criticism, and news stories. The open-ended, qualitative field interviews are at the heart of the project. They help to uncover the principles animating otherwise shadowy German covert operations. And they illustrate the dilemmas inherent in the practices; the obstacles to reform; and the different tradeoffs which the American and German regulatory systems have made in securing the legitimacy of these practices.

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> · In 2003, Germany moved to outlaw the extremist right wing National Democratic Party ("NDP") claiming that it was working to subvert the democratic constitutional order through its extreme and racist rhetoric. The Federal Constitutional Court dismissed the government's petition after it turned out that one of the party leaders, whose public rhetoric formed a centerpiece of the government's case, had in fact been an informant for most of his thirty years in the party. There were others. As it turned out, numerous of Germany's seventeen domestic intelligence agencies had been investigating the NDP simultaneously for decades, unbeknownst to each other. Almost fifteen percent of the leadership worked for one of the government's intelligence services. These infiltrators had participated in setting the party's agenda and publicizing its goals. A divided Federal Constitutional Court ultimately dismissed the government's petition because the dangers that the political organization posed without the influence of infiltrators proved almost impossible to determine.[2]

I: Introduction

In an age when threats to democracies spur governments to resort more freely to covert surveillance, it is worth asking how these extraordinary operations should be controlled and conceptualized. If the infiltration of terrorist and criminal organizations has become indispensable, how ubiquitous should such tactics become, and how should regulatory systems respond to their increased importance? Which legal and institutional features mark covert tactics as exceptional, and which render them routine? What are the challenges of taming the constantly changing and highly contested practices of undercover policing, which stubbornly resist oversight? Legal systems differ in their concerns about undercover surveillance and in their willingness to deploy covert agents and informants against a spectrum of perceived threats ranging from national security dangers like terrorism or political and religious extremism to organized crime, drug trafficking, and more ordinary forms of criminality. In most democracies, political elites, legal actors, and critics agree that undercover investigations are in some sense a necessary evil. But national legal systems vary in what they mean by that. They have disparate conceptions of what makes covert investigations troublesome; of the proper goals of infiltration; and of the mechanisms by which undercover tactics should be legitimated and controlled. In

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[2] BVerfGE 107, 339-395 (2003).

short, legal systems forge different regulatory compromises and accord different degrees of legitimacy to the "necessary evil" of covert operations.

Under pressure from the European Court of Human Rights to integrate covert practices with other criminal procedures and thus control them better, European legal systems, including Germany,[3] France[4] and Italy[5] have legislated systematically about undercover policing since the late 1980s. They have had to spell out the terms on which covert tactics can be made consonant with the rule of law. Among these initiatives, Germany's represents perhaps the most sustained and self-conscious effort to control and legitimate undercover policing. The German project of taming previously unregulated covert practices can tell us a great deal about the different senses in which a twilight practice may be legitimated as a "necessary evil" and about the historical, legal, and institutional factors on which the legitimacy of this practice depends.

My essay examines German undercover policing as both a topic in its own right and as a contrast case that helps identify distinctive features of the American system of covert operations. The systems under comparison can, in Clifford Geertz's words, "form a kind of commentary on the other's character."[6] Each can suggest what is important and troubling about the other. Each can highlight features of the other that would seem less noteworthy if examined in isolation, without the benefit of comparison.

The value of the contrast between German and American approaches emerges in part from the inherently problematic nature of undercover policing, which each system must confront. The NDP scandal displayed in microcosm many of the intrinsic dilemmas of undercover operations for societies committed to the separation of powers, federalism, protection of individual liberties, and the rule of law. Informants and covert agents invade privacy, sow mistrust, and disrupt privileged communications between reporters and sources, lawyers and clients, doctors and patients and husbands and wives. For the sake of gathering evidence covertly, governments at least temporarily tolerate and even encourage crimes that they ultimately hope to suppress. Because infiltrators sometimes become participants in the illegal activities they investigate, undercover operations compromise the state while to some extent shaping or contaminating the phenomena under study. The close relationship between covert agents and targets creates the risk that the state will lose control of its personnel in the field. And as the NDP proceedings revealed so dramatically, covert tactics also create special institutional problems of communication and coordination when overlapping investigative agencies function autonomously in a decentralized federal structure. Though these dilemmas and dynamics are intrinsic to undercover tactics, the ways in which they play themselves out vary with the legal, institutional, and historical context in which covert policing takes place.

My study of German covert policing rests on 89 field interviews that I conducted between 2002 and 2004 with state and federal police officials, undercover agents, training and supervisory officials, control officers, prosecutors, and judges in fifteen of the sixteen German

[3] St PO 110.
[4] "Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité"
[5] Legge di giugno, 1990 n. 162, Art. 25(1), Art. 97; legge di dicembre, 1992, n. 356, Art. 12 quater; 1998, n. 269(1), Art. 14.
[6] Clifford Geertz, Islam Observed: Religious Development in Morocco and Indonesia (Princeton, 1971), 4.

states.[7] My sources did not, of course, provide unbiased information. I arranged the interviews in order to cross-check statements and perspectives. I compared claims made by sources against information provided by: (a) colleagues in their own agency; (b) counterparts in other states; and (c) personnel in other parts of the legal system (checking variations in accounts by police officers, prosecutors, and judges).[8] I also compared evidence from interviews with a variety of written sources, including ministry guidelines, training materials, prosecutors' memoranda, judicial opinions, scholarly criticism, and news stories, including a confessional narrative published by a former undercover agent.[9]

My essay proceeds as follows. Section II will describe the principles and norms that simultaneously restrain covert powers in Germany and raise troubling questions about their legitimacy. This section will also delineate the legislative and institutional reforms by which Germany sought to reducible these problems of legitimacy. "Legitimacy" is a term with many meanings. In section III, I offer a particular account of legitimacy useful for studying undercover policing and for comparing the legitimacy of covert practices in the United States and Germany. My account of legitimacy will tacitly inform later sections of the paper. I will return to a sustained evaluation of legitimacy in the final section on undercover policing as a necessary evil.

In comparing the covert policing systems of the United States and Germany, I will address both those concerns about infiltration that are unique to Germany and those dilemmas—inherent to covert practices—which every regulatory system must confront. Section IV will examine some of the historical reasons for German wariness about undercover policing and contrast the American and German regulatory approaches. Section V will explore the reasons why some of Germany's fears about undercover policing have no real counterpart in the United States and will discuss the extent to which Germany's regulatory system succeeded in addressing these concerns.

Section VI will examine the persistence of "legitimacy deficits" that stem from troubling dilammas *inherent* in covert operations—which both the United States and Germany must confront. Agents should not commit crimes but must do so to fit in with their targets. Operatives should not encourage their targets to violate the law, yet they must facilitate criminal activity in ways that allow it to be proved. Agents must document and describe what they observe, yet in doing so they help shape the criteria by which their efforts are judged. These features are common to covert policing everywhere. Section VI will contrast German and American regulatory approaches to these shared dilemmas. The compromises that each system adopts give rise to distinctive problems of legitimacy and thus to different national

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[7] For reasons of security, I have not provided the names of my respondents. I have, however, included footnotes identifying the official position of the speaker and the dates on which the interview took place.

[8] Using what social scientists call "open-ended, semi-structured" field interviews, I sought to ascertain how rules, regulations, and a variety of normative constraints influence the design and execution of undercover investigations. My interviews focused on the personal experiences of those who participate in, supervise, and evaluate undercover operations. There are a number of options for gathering this kind of data. *See* Yvonna S. Lincoln & Egon Guba, *Naturalistic Inquiry,* (1985); Gary King, Robert O. Keohane & Sidney Verba, *Designing Social Inquiry,* (1994); Michael Quinn Patton, *Qualitative Evaluation and Research Methods,* 2nd ed. (1980); David Flinders & Geoffrey E. Mills, *Theory and Concepts in Qualitative Research,* (1993).

[9] Koriath, Kriminalistik 1992, 727.

understandings of what makes undercover policing a "necessary evil." The essay concludes by examining the influence of German Reunification – and ensuing debates about divided loyalties -- on the controversy surrounding undercover policing.

II. The Troubled Legitimacy of Undercover Policing in Germany

In Germany, much more than in the United States, undercover police investigations have long occupied a legally ambiguous position. German undercover operations are the province not only of the police but also of the country's seventeen domestic intelligence agencies (the Federal Agency for the Protection of the Constitution (APC) and its counterpart agencies within each of the sixteen German states.) Strictly separated from the police since its creation in 1949, the APCs were given no powers of arrest or interrogation and were therefore also exempted from the so-called principle of legality, which requires law enforcement authorities to investigate and prosecute all crimes on a non discretionary basis. (The police, in turn, were prohibited from gathering intelligence.)[10] The APCs' exemption from the principle of legality meant that they could countenance a certain degree of law breaking by their own operatives and by those whom they investigated without being forced to take action. In a very real sense, then, the APCs' infiltrators did not have to "play by the rules" of the criminal law that applied to the rest of society. When undercover techniques began to filter into the Federal Republic's police practices in the 1970s and 80s, it remained an open question for many whether covert tactics could be reconciled with the principle of legality, and indeed with the rule of law —despite the fact that this technique was now being used against drug traffickers and other ordinary criminals.[11]

Scholars and judges gave voice to these doubts by cataloging a wide array of faults. Among these was a concern that undercover policing violated the principle of separation between police and intelligence agencies by permitting the police to use undercover operations as a form of domestic espionage.[12] This was a particularly sensitive point for Germany, because the principle had been introduced in 1949 as a means of avoiding dangerous concentrations of powers like those possessed by the Gestapo.[13] Coercive law enforcement powers, including arrest powers, were withheld from intelligence agencies and the police were prohibited from gathering intelligence. Critics feared that undercover policing would erode the functional distinction between police work and intelligence gathering by allowing the police to collect intelligence in the guise of gathering evidence.[14] The association of undercover policing with the work of domestic intelligence agencies was a particular concern because of occasional scandals about APC infiltrators steering right-wing extremist groups and because the APC is not bound by the principle of legality (which prohibits the police from tolerating law-breaking.) The more

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[10] The principle of separation is not written into the Constitution; it derives from an Allied directive issued by letter on April 4, 1949, in which the Allied military governors indicated that they could approved the FRG's Basic Law only subject to the requirement that the functions of police powers and intelligence agencies be strictly separated. *See e.g.* Roewer, DVerwBl. 1986 (205)..

[11] *See e.g.* Karl Luederssen, *V-Leute: Die Falle im Rechtsstaat* (1985)(an anthology of essays on undercover policing in which many contributors gave voice to such doubts.)

[12] Roewer, DVerwBl 205 (1986); Hetzer, ZRP 19 (1999); Riegel, ZRP 216 (1999); Schaefer, NJW 2572 (1999); Gusy, ZRP 45 (1987); Lisken, NJW 1482 (1982); Gusy, GA 319 (1999); Roewer, DVBl 666 (1988); Kutscha, ZRP 194 (1986); Lisken, ZRP 264 (1994) .

[13] See note 12 above.

[14] *Id.*

covert practices seemed to resemble the work of intelligence agencies, the more doubts were raised about undercover policing's compatibility with the principles of legality and separation. Critics did not want the police to have the discretion to pursue some crimes and tolerate others in the fashion of intelligence agencies.

But commentators worried about undercover policing for many other reasons. Germany distinguishes police work designed to prevent crimes that have not yet happened ("preventive operations") from attempts to solve crimes that have already occurred ("repressive operations.") State laws govern the former; federal law governs the latter. The police may conduct undercover investigations in either capacity. This gives rise to concerns that the police may disguise one kind of operation as another to shop for a more favorable regulatory context. Critics of covert policing also take infiltration to task for its tendency to involve undercover agents and informants in the commission of crimes.[15] Moreover, undercover policing seemed to expose suspects to undue pressures and temptations that were inconsistent with the prohibition on entrapment.[16]

Police infiltration also seemed to violate constitutional protections of privacy and autonomy—so-called "rights of personality," which protect "the freedom to realize one's potential as an individual," or "freedom in the creation of the self**.**"[17] These worries intensified after Germany's Constitutional High Court held that the government's collection and processing of census data had to respect a newly recognized constitutional right of "informational self-determination," that is, a right of every citizen to know what information the government has collected about her and to control the use, storage, and transmission of the data.[18] The new legal construct was a hybrid of dignity and of privacy interests protected by the "law of personality." It can be understood as an expression of what James Whitman has described as a continental conception of "privacy as an aspect of [personal] dignity," as distinct from the U.S. conception of privacy as "an aspect of liberty."[19] Whitman traces continental and particularly French and German conceptions of privacy to a concern with protecting personal dignity and honor by safeguarding the "capacity to control presentation of self," that is, the face one presents to others.[20]

The German legal system diverges from U.S. Supreme Court doctrine by assuming that people do not completely surrender privacy expectations when they impart information to

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[15] Patric Makrutzki, *Verdeckte Ermittlungen im Strafprozess,* (1999); Otto, JuS 1982; Sk-StGB, at Section 26 n.3; Holger Nitz, *Einsatzbedingte Straftaten Verdeckter Ermittler* (1997); Koriath, Kriminalistik 1992, 727; Hilger, NstZ 1992, 525; Krey, *Rechtsprobleme des strafprozessualen Einsatzes Verdeckter Ermittler,* 1993; Hund, NStZ 1993, 572; Amelung, JuS 1986, 333; Rogall JuS 1992, 558; Erfurth, *Verdeckte Ermittlungen,* 1996, Schwarzburg NStZ 1995,470; Stuemper, Kriminalistik, 1994, 192.

[16] Karl Luederssen, *V-Leute: Die Falle im Rechtsstaat* (1985); Kempf, StV 1999, 128; Weiler, GA 1994, 561, Bruns, NStZ 1983, 49; Sommer, NStZ 1999, 48, Kinzig, StV 1999, 288, Stock/Kreuzer, *Drogen und Polizei*, 1996, Franzheim, NJW 1979, 2015; Seier/Schlehofer, JuS 1983, 52, Taschke, StV 1984, 178.

[17] Duttge, JZ 1996, 556; Markus Deutsch, *Die heimliche Erhebung von Informationen und deren Aufbewahrung durch die Polizei,* 1992; Lammer, *Verdeckte Ermittlungen im Strafprozess,* 1992; Creutz, ZRP 1988, 415; Busch, DOeV 1984, 161; Degenhart, JuS 1992, 361; Kunig, JURA 1993, 595; Hund, StV 1993, 379; Fezer JZ 1995, 972.

[18] BVerfGE 65, 1, NJW 1984, 419.

[19] James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty,* 113 Yale L. J. 1151 (2004).

[20] Id. .

others.[21] Nor do people necessarily forfeit their privacy interests by "exposing" themselves to the public. They enjoy privacy protections even when appearing naked in public. As Whitman points out, naked sunbathers in German parks have the right to suppress the publication of nude photographs of themselves taken in public.[22] Indeed, German law requires advance judicial authorization of long-term visual surveillance even when conducted entirely in public areas.[23] Such surveillance may infringe "informational self-determination" rights by allowing the government to construct a comprehensive record of a person's doings and habits.

What matters to the privacy inquiry in Germany is the personal nature and extensiveness of the information the government collects, not where observation takes place. Accordingly, undercover investigations may infringe rights to determine what information one wishes to impart to the world—unless the government has afforded targets adequate protection by regulating the conditions of surveillance.[24] Covert operations enable the government to chart a person's intimate associations and infringe dignity by deceiving him into building relationships of trust on false pretenses. Such concerns explain why Germany, unlike the United States, eventually reformed its system to provide at least as much protection against intrusive, long-term undercover investigations as it does against wiretaps. Once protections for dignity and personal relationships are factored into the analysis, undercover policing is arguably the more intrusive of the two modes of investigation, since it injects infiltrators into the target's personal realm.

By contrast, American law affords much less protection to "informational privacy." It concentrates on upholding "physical privacy" in the home and "decisional privacy," such as the right to be free from government interference when deciding about birth control and abortion.[25] Consistent with American downplaying of "informational privacy" and emphasis on "decisional privacy," American regulation of undercover policing places heavy emphasis on entrapment doctrine, which may be viewed as restraining the government from interfering with a target's autonomy through undue inducements or pressure.[26]

Undercover policing raises less alarm in the United States than in Germany. This is not only because of different attitudes toward privacy, but also because of the special evidentiary

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[21] Indeed, there are other areas in which German law protects the "unfolding" of personality through intimate associations, for example by extending testimonial privileges so that not only fiancés but even aunts and cousins do not have to testify against relatives in criminal proceedings. "Sedlmayr case," BVerfG, JR 2000, 333. By contrast, the U.S. Supreme Court holds that offenders assume the risk of betrayal by their associates, including the danger that such associates will turn out to be informants or undercover agents. Hoffa v.United States, 385 U.S. 293, 302 (1966); Lewis v. United States, 385 U.S. 206 (1966); Illinois v. Perkins, 496 U.S. 292, 300 (1990).

[22] *See* Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty,* note 23 above.

[23] St PO 163f.

[24] These regulations include restrictions on the kinds of crimes that warrant invasive tactics of this sort, the need to explain why less intrusive tactics will not suffice, and procedural requirements such as the need to obtain advance prosecutorial and sometimes judicial authorization, and to notify targets of the intrusion after the fact (when this is feasible.)

[25] *See* Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty,* note 23 above. For the distinction between "informational," "decisional," and "physical" privacy, see William A. Edmundsen, *Privacy,* in *Blackwell's Guide to the Philosophy of Law and Legal Theory,* Martin P. Golding and William A. Edmundson, eds. (1988).

[26] *Sorrells v. United States*, 287 U.S. 435, 448 (1932) (defining entrapment as "the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."); *Sherman v. United States*, 356 U.S. 369 (1958)(same).

advantages that covert operations provide in an adversarial criminal process. "Undercover operations permit us to prove our cases with direct, as opposed to circumstantial, evidence. Instead of having to rely on…testimony of unsavory criminals and confidence men…credible law enforcement agents, often augmented by unimpeachable video and oral taps…[make it possible to] avoid[ ] issues of mistaken identity or perjurious efforts by a witness to implicate an innocent person."[27] And while regular policing strategies disproportionately catch the poorest and least sophisticated criminals, infiltration provides access to the misdeeds of well-insulated elites. During one famous undercover investigation, Operation Greylord, "undercover agents were able to record hundreds of incriminating conversations with judges and attorneys which revealed that judges routinely accepted bribes to dismiss cases and received kickbacks from attorneys for assigning cases to them."[28]

American undercover operations ultimately produce evidence introduced at trial through the testimony of covert agents. This testimony is often supported by video and audio recordings. In Germany, however, there is no cathartic courtroom confrontation between undercover agents and defendants; no valorization of infiltrator's exploits before a rapt jury; and no prospect that cross-examination will require agents to confront and explain dubious conduct on their part. German undercover agents do not testify. Agents transmit information through the testimony of their control officers. Because the agents' identity and role must remain secret for much of their career, they are more hesitant to record their meetings with targets. Thus German trials do not provide the same ringside seat to criminal activities as the American sound-and-light show, in which live witnesses dramatize encounters with "bad guys" on video and audio, and in court. German undercover agents do, of course, obtain "inside access" and "inside information." But how they obtained it, and how they affected the events they observed, remains obscure, and therefore, to some extent, suspect.[29]

To be sure, covert operations in the United States are hardly unproblematic. "Even when used by law enforcement officials with the most honorable motives and the greatest integrity, the undercover technique may on occasion create crime where none would otherwise have existed."[30] The FBI Guidelines themselves acknowledge that "these techniques inherently involve an element of deception and may require cooperation with persons whose motivation and conduct are open to question."[31] But the American undercover policing system rests on the assumption that the heterogeneous harms which undercover policing imposes may be traded off against sufficient investigative gains. Despite misgivings about the compromises involved, the U.S. allows undercover operations to be authorized without legislative action; without advance judicial approval; without probable cause (or even reasonable suspicion); and without a finding that less intrusive tactics were inadequate.

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[27] House Judiciary Committee Hearing on FBI Undercover Guidelines (1981) (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division, Department of Justice).
[28] OIG Report at 139.
[29] The denial of confrontation rights gave rise to challenges to covert practices as inconsistent with the trial rights of criminal defendants, not only under the Germany constitution but under the European Convention on Human Rights, creating conflict with the jurisprudence of the European Court of Human Rights, which strongly disapproved of the use of secret evidence and anonymous witnesses.
[30] OIG Report at 140-141.
[31] OIG Report at 140.

These accommodations indicate that, however intrinsically troubling it may be, undercover policing simply does not pose the same challenges to the values and norms of the United States legal system as it does to those of Germany. The United States recognizes no principle of legality; no comparable separation between the pursuit of evidence and domestic intelligence; no categorical prohibition on agents or informants committing crimes undercover; and no important legal distinction between preventive and crime-solving stings. Accordingly, covert policing encounters very different problems of legitimacy in Germany and the United States. The contrast between these systems' background values and demands shape what they mean, and how they differ, in regarding undercover policing as a necessary evil.

Undercover policing, then, required a unique set of compromises in Germany, and the Bundestag effectuated these in 1992, through a sweeping set of legal and institutional reforms. Before this point, covert policing had been relatively unbounded. There had been far less regulation of undercover operations than of overt, coercive policing. Undercover operations had been regulated, in part, through what I will term "substantive norms." These norms prohibited undercover agents and informants from committing crimes or excessively encouraging others to do so.[32] These prohibitions were backed up by the principle of legality, which made criminal prosecution mandatory in most cases, even when the police violated the law for investigative purposes. The principle of legality also constrained covert tactics by prohibiting the police from tolerating law-breaking by targets.[33] And undercover policing was regulated through guidelines issued jointly by state ministries of justice and the interior.[34] The guidelines imposed few limits on the types of crimes that agents could target and offered little guidance for how covert operations should be conducted.

These various models of regulating undercover policing seemed inadequate. The secrecy surrounding both the practice and regulation of covert operations, along with the eruption of occasional scandals, made it difficult to defend against claims that undercover policing required tighter and more public controls. Without checks and balances on the initiation of undercover investigations, decisions about whom to target, for what reasons, and how, were largely entrusted to the police. Given the scant outside supervision of undercover operations, and given their secrecy, it was difficult to ensure consistency in police practices and to correct mistakes.

The centrality of legislation to reform is not surprising, given that German judges and scholars associated the rule of law with the enactment of rules that formally regulated and circumscribed the powers of government officials, particularly the police.[35] Legislation held the promise of resting covert operations on a more democratic foundation, controlling police discretion, and establishing clean boundaries for permitted practices. Calls for legislative action

[32] These norms have been elaborated through judicial decisions and scholarly commentary. Kempf, StV 1999, 128; Weiler, GA 1994, 561, Bruns, NStZ 1983, 49; Sommer, NStZ 1999, 48, Kinzig, StV 1999, 288, Stock/Kreuzer, *Drogen und Polizei*, 1996, Franzheim, NJW 1979, 2015; Seier/Schlehofer, JuS 1983, 52, Taschke, StV 1984, 178.
[33] St PO 152; 163.
[34] Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Laender ueber die Inanspruchnahme von Informanten sowie ueber den Einsatz von Vertrauenspersonen (V-Personen) und Verdeckten Ermittlern im Rahmen der Strafverfolgung, 15 RiStBV Anl. D (first issued in 1985 and amended in 1993 and 1994 to accord with the 1992 statute.)
[35] *See e.g.* Karl Luederssen, *V-Leute: Die Falle im Rechtsstaat* (1985); Bruns, NStZ 1983, 49; Franzheim, NJW 1979, 2015; Seier/Schlehofer, JuS 1983, 52, Taschke, StV 1984, 17.

also drew support from the European Court of Human Rights.[36] It had begun to treat abuses of undercover policing as violations of the fair trial guarantee written into the European Convention on Human Rights.[37]

Criticism from within the ranks of the German legal elite created a further need to legitimate undercover practices to the state's own personnel. The constituencies that pressed for reform included legal academics and judges, particularly the federal Supreme Court, which promoted fundamental rights by calling for legislation rather than by crafting standards of its own.[38] Indeed, the ministries of the interior and justice, and the police themselves called for change in the undercover policing system. But they concentrated particularly on the need to augment covert powers in order to deal with rising crime rates and, in particular, with organized crime. Transnational crime increased with the integration of the European Union, the opening of borders, the reunification of Germany, and the ensuing dislocations. Organized crime, particularly in its transnational dimension, became a focus of public attention, beginning in the 1980s and continuing into the 1990s. German police responded by championing covert methods as a useful counter-measure.[39] They viewed undercover policing as essential for illuminating the hierarchical relationships, infrastructure, and division of labor that prevail in criminal organizations.[40]

In 1992, the German Bundestag enacted legislation which sought both to legitimate undercover operations by addressing mounting constitutional concerns and to institutionalize such investigations as an indispensable weapon against organized crime. The statute increased the range of the government's covert powers, including telephone tapping and ambient electronic surveillance. The statute also authorized undercover operations. But it did so for the investigation only of serious crimes (such as drug and arms trafficking, counterfeiting, and the forgery of official documents) or offenses committed by career criminals or gangs. The police could resort to undercover investigations only when it was very difficult to obtain evidence through other means. The statute required advance prosecutorial approval if the investigation had not yet focused on particular suspects and advance judicial approval—a warrant—for any undercover operation that targeted specific persons or that required entry into private homes.[41] While imposing new constraints, however, the 1992 law also expanded and institutionalized covert policing by authorizing deep cover investigations in which agents lived undercover long term. The reforms left intact the principle of legality and the "substantive norms" (against law-breaking and entrapment.) In sum, Germany responded piecemeal to the various anxieties about covert practices. It melded disparate substantive and procedural norms rather than

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[36] *See* note 4, *supra.*
[37] *Id.*
[38] Bernhard Schlink, *German Constitutional Culture in Transition,* in *Constitutionalism, Identity, Difference, and Legitimacy,* Michel Rosenfeld, ed. (1994).
[39] See *e.g.* Volker Krey, *Rechtsprobleme des strafprozessualen Einsatzes verdeckter Ermittler,* (1993).
[40] Schaefer, Kriminalistik 1997, 23; BT-Dr 12/989, Sieber, JZ 1995, 758; Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Laender ueber die Zusammenarbeit von Staatsanwaltschaft und Polizei bei der Verfolgng der Organisierten Kriminalitaet, Kleinknecht/Meyer-Gossner, 15 RiStBV Anl. E, Lisken, ZRP 1994, 264.
[41] That the owner voluntarily admitted an undercover agent into his home did not relieve agents of the obligation to obtain judicial approval in advance, assuming that the need for meeting in a private apartment could be anticipated.. BGH 1997, NStZ 1997. 448; Roxin, StV 1998, 43.

comprehensively addressing all controversial facets of undercover policing. The interaction among these different legal norms would prove problematic.

III. Assessing the Legitimacy of Undercover Policing in Germany: A Model of Legitimacy-as-Fit

Germany's reform of undercover policing was in part motivated by a desire to increase the legitimacy of covert operations. What sense(s) of legitimacy were at stake in this endeavor? What sense(s) of legitimacy can be used to evaluate the post-1992 German system?

Legitimacy, of course, has many meanings. At the outset, I will lay out two senses of the concept that are popular in the scholarly literature but not valuable for understanding undercover policing. Then I will sketch out the approach I will use. First, legitimacy can refer to citizens' belief that the orders of authorities deserve their obedience, as manifested by a disposition to submit to commands independently of sanctions and rewards.[42] Critics of this approach—often termed the "sociological conception" of legitimacy—note that it is difficult to disentangle compliance with a legal order because of its perceived legitimacy from compliance based on habit and self-interest.[43] More particularly, the sociological conception of legitimacy has little utility analyzing undercover policing, which employs subterfuge and makes no demands on the obedience of the deceived.

Second, legitimacy could refer to public acceptance of undercover policing, or of the laws that regulate it, or of the overall legal system in which such practices are embedded.[44] There are reasons to be skeptical of such an approach. To begin with, it centers on the beliefs of the general public. Debates about the legitimacy of the covert policing system have largely been conducted among the legal elites (who have pressed for reform) and among Interior Ministry and police officials (who seek the security of clear-cut rules and warrants to bless their efforts in advance.) The public's beliefs about the legitimacy of the undercover policing system may lack much content when the average person knows relatively little about the overall legal system or the powers and doings of undercover agents.[45]

To evaluate the German undercover policing system, I will employ a particular understanding of legitimacy that I will term "legitimacy-as-fit." This understanding is rooted in David Beetham's model of legitimacy, but then is augmented and adapted to be useful in my particular context of undercover policing.[46] Section III will first explain Beetham's model, then

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[42] This approach was famously articulated by Max Weber; *see e.g.* 1 M. Weber, Economy and Society: An Outline of Interpretive Sociology 31 (G. Roth & C. Wittich eds. 1968). *See also* Joseph Raz, *The Morality of Freedom,* 40, 1986 ("an authority is accepted as legitimate if its instructions are accepted as a reason for conforming action").

[43] *See* Alan Hyde, *supra,* note __; Rodney Barker, *Political Legitimacy and the State,* (1990); Roger Cotterell, *Law's Community,* (1995).

[44] This variant of the sociological conception discussed above distinguishes "order legitimation" from "norm legitimation." For a critique of both, *see* Hyde, *supra,*note 48.

[45] For a discussion of the difficulties involved in using public attitudes to gage the legitimacy of institutions, *see* Richard H. Fallon, *Legitimacy and the Constitution,* 118 *Harv. L. Rev*. 1787 (2005); Alan Hyde, *The Concept of Legitimation in the Sociology of Law,* 1983 *Wisconsin L. Rev.* 379.

[46] David Beetham, *The Legitimation of Power* (1991).

set forth my concept of "legitimacy-as-fit," and, finally, explore how my understanding of legitimacy helps assess the peculiar practices and challenges of covert policing.

Beetham's definition of legitimacy blends normative and descriptive approaches to the concept.[47] For Beetham, institutions, laws, or legal orders are legitimate to the extent (1) power is obtained and exercised in accordance with the legal rules for doing so; (2) laws and institutions are consistent with society's higher-order values, interests, and normative expectations; and (3) there is meaningful evidence of consent derived not merely from acquiescence but from affirmative expressions of agreement (such as the vote of a legislature in a democracy.)[48]

The three prongs of Beetham's model suggest some of the ways a policing system may *not* be legitimate. The first prong usefully captures doubts about whether police, prosecutors and judges actually "play by the rules" of the system and whether the system adequately constrains their discretion. The second prong of the definition highlights fears about the consistency of undercover policing with constitutional protections for privacy, trial rights, proscriptions on deceptive interrogation, the principle of legality, and prohibitions on entrapment and law-breaking by undercover agents. The third dimension of legitimacy captures concerns about the absence of democratically enacted enabling legislation authorizing and regulating particular police practices.

Beetham's concept of legitimacy is descriptive in that it depends on empirical inquiry into the values that participants in the criminal justice system expect that system to accommodate. It tests the system against higher-level norms that it derives from the legal and political culture particular to a given society rather than from political or moral theory in the abstract. But it also has an evaluative component. It does not ask merely whether law enforcement personnel *believe* that the criminal justice system conforms to society's higher-level values. It asks whether the system in fact does. What critics and defenders believe can of course provide powerful evidence that the system conforms to society's values and expectations. But legitimacy is not primarily about public relations.

I will set out a number of criteria that may assist in evaluating the legitimacy of German undercover policing along the first two of Beetham's three dimensions (namely, legal validity and norm congruence.) I will term this augmented version of Beetham's model, as applied to the particular challenges of German undercover policing, "legitimacy-as-fit." For the sake of expository clarity, I will organize my discussion according to the prongs of Beetham's model introduced earlier, focusing particularly on:

(a) Legal Validity

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[47] For a discussion of the distinction between varieties of descriptive and normative conceptions of legitimacy, *see* John H. Schaar, *Legitimacy in the Modern State,* in *Legitimacy and the State,* William Connolly, ed. (1984); Richard H. Fallon, *Legitimacy and the Constitution,* 118 *Harv. L. Rev.* 1787 (2005). For a critical survey of varieties of political (normative) theories of legitimacy, *see* Richard Warner, *Adjudication and Legal Reasoning,* in *The Blackwell Guide to the Philosophy of Law and Legal Theory,* Martin P. Golding and William A. Edmundsen, eds. (1988).

[48] David Beetham, *The Legitimation of Power* (1991).

What features of a legal system encourage compliance with the system's rules? First, actors in the system have to know their obligations. The system has to spell out the difference between permissible and forbidden conduct in a coherent fashion.[49] Actors must be reasonably able to behave according to the rules of the system. In this way, a regulatory system can, ideally, assess legitimacy according to technical criteria, including the degree of adherence to proper procedures (e.g. did the agent get a warrant?)[50] Second, a legal system must limit discretionary power, institute checks and balances, and respect the separation of powers, e.g. between police and intelligence agencies.[51]

(b) Congruence with Norms

Beetham argues that a legal system enjoys greater legitimacy the more it tracks a society's higher-order values and norms. The German undercover policing system's consistency with higher-order values depends in part on the adequacy of procedural safeguards for privacy and other fundamental rights. It also depends on the way in which the regulatory regime implements the principle of legality and on the extent to which it promotes adherence to substantive norms prohibiting entrapment and law-breaking. Legitimacy diminishes to the extent to which the system as implemented requires police, prosecutors, and judges to reduce the force of these constraints, transform their meaning, or limit their scope. As I shall argue, the undercover policing system not only permits but depends on these accommodations. Finally, congruence with norms also requires the regulated practices to serve the ends for which they were legitimated—such as fighting organized crime—as judged by criteria not "wholly in the control" of interested parties (such as the police.)[52]

My account of legitimacy-as-fit suggests different ways in which undercover policing meets or fails to meet the demands placed upon it by the wider legal system and by society. This model makes it possible to classify problems of legitimacy according to the dimension along which the system falls short. The participants in the German debate about undercover policing do not themselves use the theory of "legitimacy as fit" that I have developed above. Depending on their institutional position and interests, they draw on selected concerns about legitimacy that are components of the legitimacy-as-fit model. Their perspective is not alien to the model, but partial. I will tack back and forth between the theory of legitimacy-as-fit and the various (contested) understandings of legitimacy that actors in Germany's legal system deploy. From time to time, I will also contrast German and American undercover policing in order to explore why the American regulatory approach is so much less self-conscious and contested and why the countries legitimate covert practices so differently.

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[49] John Finnis, *Natural Law and Natural Rights* (1980); Robert Grafstein, *The Legitimacy of Political Institutions,*14 Polity 51 (1981); *see also* Roger Cotterell's discussion of legal closure in *Law's Community,* at 91-110.

[50] For a discussion of legal closure as an element of legitimacy, *see* Roger Cotterell, *Law's Community,* (1995).

[51] James O. Freedman, Crisis and Legitimacy: The Administrative process and American government (1978). Beethem himself emphasizes checks and balances and separation of powers as vital for compliance with rules. Beetham, *The Legitimatino of Power, supra,* at 123.

[52] Willard Hurst, *The Leigitmacy of the Business Corporation,* 1970)(emphasizing the importance of independent performance measures to the legitimacy of institutions.)

IV. Reform and the New Respectability of Undercover Policing

The 1992 statute's procedural controls legitimated the evidence that deep cover agents produced as having been obtained in a properly authorized way. The judicial approval requirements made admissibility relatively unproblematic once the trial court had answered handful of straightforward questions. Had the government's application for approval set forth one of the enumerated predicate offenses? Had it explained why conventional (non covert) investigative tactics would not yield equivalent results? Precisely by making the criteria for approval largely formal, the statute made it easy for courts to decide whether undercover investigations were lawful. The trial judge might not know whether an undercover agent had exerted improper pressure on his target. But the judge could easily determine whether the crime being investigated was a predicate offense.

By promoting the routine acceptance of evidence obtained undercover, the reforms also legitimated the already established trial practice of using hearsay evidence as a substitute for the live testimony of undercover agents.[53] (This of course limits the opportunities for testing the reliability of undercover agents' testimony.) Once courts recognized deep cover operations as legitimate, they also accepted the need to protect deep cover agents' elaborately constructed false identities by preventing defendants from tracing the source of the evidence presented at trial.[54] The agent "testifies" through his control officer, who relates the agent's observations and conversations with targets, or through the admission of written answers to questions posed to the agent by his control officer, the court, or defense counsel.[55]

Gary Marx has argued that "undercover work is ethical when the decision to use it has been publicly announced."[56] The enactment of the statutory reforms legitimated covert investigations—suggesting "democratic consent," along the third axis of Beetham's model of legitimacy--by publicly settling their legal status, and giving fair notice of the circumstances under which they could be authorized. But the 1992 reform not only authorized existing covert practices but laid the groundwork for expanding the use of deep cover operations. It provided that undercover agents could operate under assumed identities long–term, use forged documents like birth certificates and passports, and enter into apartment and auto leases, cell-phone contracts, employment relationships and other legal arrangements in their undercover capacity.[57] The 1992 statute transformed covert investigations from what they had been in the heyday of U.S.-German cooperation in the "war against drugs" (in the 1980's)—an engine of "buy-busts" and quick "stats"[58]—into a sophisticated tool for unveiling the structures, hierarchies, assets, client relationships, and transport routes of organized crime. Since covert powers were now a creature of statute, this expansion of covert practices gained legitimacy from democratic authorization.

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[53] Annette von Stetten, *Beweisverwertung beim Einsatz Verdeckter Ermittler* (2000).
[54] St PO 96.
[55] BVerfG NJS 1981, 1719. St PO 251 II.
[56] Gary T. Marx, *Undercover: Police Surveillance in America,* 95 (1988).
[57] The contractual powers of undercover agents are never questioned in the United States, which imposes fewer constraints on the use of aliases even by private citizens.
[58] For an account of DEA influence on covert policing in Europe during the height of American and European cooperation against drug traffickers, in the 1980s *see* Ethan Nadelmann, *The DEA in Europe,* in *Undercover: Police Surveillance in Comparative Perspective*, Cyrille Fijnaut and Gary T. Marx, eds. (Kluwer, 1995).

The 1992 reforms also justified these new powers by establishing protection for fundamental rights, including the right to control the government's access to personal information, and the right to privacy in the home.[59] (This made deep cover practices more consonant with constitutional privacy norms, along the second axis of legitimacy-as-fit.) The statute protected fundamental rights through its warrant procedure; by restricting deep cover operations to serious offenses; and by requiring a showing of necessity. Notification requirements and suppression remedies provided targets some protection after an investigation concluded. These statute imposed thus imposed procedural controls that paralleled the requirements for telephone wiretaps—and the parallelism with an accepted investigative method helped to legitimate undercover policing.

Moreover, the procedural requirements of the 1992 statute satisfied many of the formal criteria laid out in the legitimacy-as-fit test. They were prospective and clear, and relatively simple to apply, and they provided the police, prosecutors and judges with guidance as to what was expected.[60] The statute made it possible to present the undercover policing system as internally coherent and capable of reconciling fairness with crime control.

The new system also sought to disarm claims that deep cover operations usurp the prerogatives of intelligence agencies in violation of the constitutional mandate to separate law-enforcement from intelligence functions—another problem for congruence with higher-order norms. Deep cover investigations are intrinsically vulnerable to the charge that they blur the line between collecting intelligence and gathering evidence for use in a criminal prosecution. They aim to uncover structures, hierarchies, and power relationships within criminal organizations—information with uncertain evidentiary payoff, particularly in Germany, where the criminal law provides few options for charging organized crime as such.[61]

The German system now clearly distinguishes between, on one hand, undercover operations designed to gather evidence against particular targets ("repressive" investigations) and, on the other hand, operations designed to maintain order in the community ("preventive" investigations). German police can conduct undercover investigations in either their preventive or repressive capacities.[62] One way the new system has legitimated undercover operations is by protecting undercover investigations that collect evidence for a criminal prosecution from the charge of being too much like preventive undercover investigations, which have long been criticized as eroding the principle of separation between preventive and repressive policing, and between intelligence and police work.[63] The 1992 authorized deep cover repressive operations

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[59] Duttge, JZ 1996, 556.

[60] John Finnis, *Natural Law and Natural Rights* (1980); Robert Grafstein, *The Legitimacy of Political Institutions,* 14 Polity 51 (1981); *see also* Roger Cotterell's discussion of legal closure in *Law's Community,* at 91-110.

[61] "Criminal association," defined by St GB 129, remains the only official organized crime offense, though the 1992 statute enacted aggravating factors to boost the penalties for other, more ordinary crimes.

[62] Indeed, the U.S. legal system folds much of this concern with "public threats" and order-maintenance into its administration of the criminal laws; *see* Markus Dirk Dubber, *Policing Possession: The War on Crime and the end of Criminal Law,* 91 J. Crim. Law and Criminology 829 (2001).

[63] *See* Heiner Busch and Albrecht Funk, *Undercover Tactics as an Element of Preventive Crime Fighting in the Federal Republic of Germany,* in Police Surveillance in Comparative Perspective Gary T. Marx & Cyrille Fijnaut

as sources of evidence. This sharpened the demarcation from preventive undercover operations and protected repressive investigations from the taint of "merely gathering intelligence."[64]

American criminal procedure does not require that the police request arrest warrants, search warrants, or wiretap orders as soon as probable cause can be established. If German courts scrutinized the factual basis for the application to authorize an undercover operation as closely as American trial judges (are supposed to) scrutinize probable cause, they would put the police and prosecutors in a difficult position. On the one hand, the police would want to put off the request until the application was sufficiently airtight to survive later scrutiny for its factual adequacy. On the other hand, if a court found that they had waited too long to apply for judicial authorization—that they had not sought authorization at the earliest possible moment--the court would usually have to suppress the evidence.[65] The point of the German preapproval requirement was not to keep the police from conducting undercover investigations per se, since the police could do so in their preventive capacities. Rather, the preapproval requirement was intended to encourage the police to turn preventive into repressive undercover probes (and to seek judicial approval) as soon as police suspicion had focused on particular targets.

And police and prosecutors suggested that the statute has had this desired effect. Police officials claim that they much prefer to conduct undercover probes repressively, or to move from the preventive to the repressive phase as soon as possible.[66] They understand that by waiting too long to ask for judicial approval, they risk a judicial finding that they circumvented the requirements of the repressive statute, which would lead to suppression of the evidence. "Judicial approval is almost never denied; and once you have it, you know that you're safe; the evidence is coming in. And for most preventive operations, our ultimate aim is repressive. So why not protect the fruit of your labors?"[67] Judges agreed with this: "The police love this statute. It tells them what is necessary to get the approval, and then it shifts all the responsibility to us."[68] "If there's a judicial order, the evidence from the sting is almost always usable, barring some glaring illegality."[69]

The 1992 reforms also gained credibility from the contrast with what Germans viewed as largely unfettered American practices.[70] Numerous German police officers and prosecutors asserted that "our covert agents are not undercover agents in the American sense. American undercover agents have to live in the criminal milieu, and stay there indefinitely, and sell drugs and take part in thefts."[71] A German police official who worked with American operatives in Europe throughout the 1980s stated: "Those were the days of the Wild West. We bought drugs

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eds. (1995)*; see also* note 14 above. Unlike Germany's intelligence agencies, the police enjoy no exemption from the principle of legality when they operate in their preventive guise.

[64] The undercover policing provisions became Section 110 of the St PO, the federal Code of Criminal Procedure, and thus legitimated undercover operations specifically as a tool for the acquisition of evidence for criminal prosecution.

[65] Maul StraFo 1997, 40; Nitz JR 1998, 213; Meyer-Gossner, *St PO Kommentar*, 110b 11.

[66] Interview with supervisor of German covert policing unit, May 19, 2003.

[67] Interview with German prosecutor, May 21, 2003.

[68] Interview of judges who review applications for undercover investigations, May 27, 2003.

[69] *Id.*

[70] Meyer-Gossner, *St PO Kommentar,* 110a 4; Krey VE 12; Kreuzer Schreiber-GS 225.

[71] Interview of German police official (former undercover agent), May 14, 2004.

in enormous quantities. We didn't worry about meeting with targets in their homes. We operated like an intelligence service. And entrapment? Who cared about that? In those days we all went over a little to the other side. It went so far that when they passed the new law, they had to rename us. We weren't undercover agents anymore, which is what we had always called ourselves before, using the American term. Now we became covert agents."[72]

Germany combined legal with administrative reforms in the German police. These changes improved legitimacy by institutionalizing infiltration as a craft and establishing separate, professional identities for covert units and their operatives. Since the new German system explicitly permitted long-term deployment of deep cover operatives with false identities, police agencies have created new units specifically devoted to managing covert personnel. The police aimed to legitimate undercover work by professionalizing and thus better controlling covert agents. Germany improved recruitment and training of agents who were selected for deep cover assignments and of the control officers who were responsible for deep cover agents and informants. German undercover agents had to commit to undercover policing as a long-term (seven to ten-year) career path. Because covert units have been separated from investigative divisions, they are freer to examine critically the assumptions of investigative agents about the seriousness of a crime and the depths of the targets' involvement in the suspected criminal activities.

Differentiating the functions of undercover agents, control officers, and informant handlers may also permit members of covert policing units to act as a check on each other. Professionalizing recruitment and training improves the likelihood that covert operatives will comply with the rules that govern their behavior, thereby promoting the legal validity and rule-boundedness of the system, along the first dimension of legitimacy-as-fit. At the same time, however, professional autonomy creates new barriers to oversight that may pose hazards of their own.

These institutional reforms were made possible by statutory controls which regularized deep cover investigations and set out the legal prerequisites for their validity. And statutory regulation occurs in a venue where the diffuse harms of undercover policing—particularly third party harms—can receive due consideration. By contrast, such harms may escape notice in the American regulatory system, which focuses largely on the blameworthiness of individual targets and depends on legal challenges brought mainly by those who succumb to the government's temptations.

American regulation of undercover policing has been less attentive than Germany to the diffuse harms which such investigations can impose, largely because the United States does not regulate undercover policing through statutory controls. To be sure, in the United States, undercover operations have periodically generated Congressional scrutiny and have occasionally called attention to the wider social impact of covert practices. In 1982, the Senate established the Select Committee to Study Undercover Activities, in the wake of the controversy surrounding ABSCAM, an FBI corruption probe in which agents and informants disguised as wealthy Arabs attempted to bribe members of Congress without any prior indication that the targeted politicians were corrupt. In its Final Report of 1982, the Senate Select Committee warned that "the

[72] *Id.*

undercover technique creates serious risks to citizens' property, privacy, and civil liberties … and may on occasion create crime where none would otherwise have existedDuring 1983 and 1984, Congress considered the Undercover Operations Act, which would have subjected federal undercover operations to congressional supervision, requiring a factual predicate of "reasonable suspicion" or "probable cause" for all undercover investigations.[73]

But the bill was never brought to a vote. Instead, the Department of Justice enacted guidelines that govern the undercover operations of the DEA and FBI. (Many police departments have adopted guidelines of their own.)[74] Thus the United States now regulates covert practices through a combination of internal agency regulations; ethical rules for prosecutors (forbidding undercover contacts with represented defendants); and, most importantly, through defendants' recourse to the entrapment defense. (In extreme cases, involving "outrageous government conduct" that "shocks the conscience" of the court, defendants may also raise a constitutional objection under the Due Process Clause.)

Department of Justice guidelines are not blind to the different ways in which undercover investigations may do harm. The guidelines require the FBI to consider whether operations do "damage to public institutions through interference with political or administrative processes," or pose risks to third parties, "such as financial loss or criminal victimization."[75] But because undercover operations are not treated as Fourth Amendment searches or seizures, American consideration of these larger societal costs is entrusted to the members of the executive, rather than to Congress or the judiciary (in contrast to electronic surveillance, which is regulated by Congressional statute and requires advance judicial authorization and a showing of probable cause.) Unlike Germany, the United States does not circumscribe the types of offenses which may be investigated by intrusive, long-term infiltration, or require the government to notify targets of the investigation once it has been completed. Nor do American regulations demand any showing of necessity (except insofar as investigators must satisfy the pragmatic concerns of the centralized review committee, which evaluates the cost-effectiveness of individual undercover operations in light of available alternatives.) And in contrast to violations of Germany's warrant procedure, an American agency's failure to abide by governing regulations does not entitle targets to demand the suppression of evidence.

Thus there is little outside check on the executive's assessment of whether the societal costs of infiltration are high enough to preclude a covert investigation. The only outside approval which investigative agencies must obtain is the approval of the United States Attorney for the relevant district, who must certify that the investigation involves "an appropriate use of the undercover technique, and that the potential benefits in detecting, preventing, or prosecuting criminal activity outweigh any direct costs or risks of other harm."[76] Concerns about privacy and fairness may enter into the cost-benefit calculus. But the dominant framework for approving undercover tactics remains largely utilitarian and pragmatic. (It is worth noting, however, that there are some ex-post controls on the system. The FBI is subject to record-keeping and

[73] See Undercover Operations Act" Hearing Before the Senate Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 98th Cong. 8 (1984).
[74] Hamilton and Smykla, *Undercover Guidelines,* 11 Justice Quarterlly No. 1, March 1994.
[75] *Id.*
[76] Undercover Guidelines Section IV F.2.b.

reporting requirements, and the Justice Department Office of the Inspector General conducts periodic audits of the FBI's compliance with DOJ regulations. The results of these internal assessments are publicly available and include detailed discussions of systemic strengths and weaknesses along with analyses of investigations that went awry.)[77]

Accordingly, American regulation of undercover policing relies heavily on several mechanisms that restrain covert operations on a case-by-case basis without providing a system-wide perspective. First, consider the American entrapment doctrine. Entrapment claims are only raised by targets interested in themselves and who have already "taken the bait"—which weakens their rhetorical, moral, and legal position (though it gives them "standing" to complain.) Second, American law provides third parties with remedies for torts arising from undercover activity.[78] But these too depend on a fairly restrictive understanding of harm—not least because such lawsuits require identified victims (who must, moreover, know enough to trace their harm to its source.) By contrast, Germany's legislative approach requires lawmakers to address larger questions about the permissible scope of police powers in a democratic society and to consider the interests of targets and bystanders subject to undercover surveillance but never charged with an offense. In particular, the German system required policymakers to consider the impact of deep cover investigations *in general,* and to create procedural protections for the entire category of such investigations. The American mandate to take account of diffuse harms to third parties and lawful institutions applies to agency decisions about *individual* investigative proposals, on a case-by-case basis—not to the evaluation of undercover investigations as a whole, or to deep cover investigations as a subgroup.

V. The Limits of Regulation: Why Dilemmas of Legitimacy Persist

Section IV examined the ways in which covert policing reforms appeared to succeed in "taming" and thus legitimating undercover policing. Section V challenges and complicates this "best case" scenario by examining ways in which the system, as implemented, conflicted with its legitimating norms.

The 1992 statute and institutional reforms succeeded in meeting some of the objections to undercover policing *per se,* such as concerns about invasions of privacy or the use of deception**.** The reforms that followed in its wake also made covert policing more acceptable to the legal establishment by making it more professional, establishing better mechanisms for supervision and oversight, and defining its objectives – the pursuit of evidence – in ways that seemed to distinguish covert policing from the work of intelligence agencies.

But the reforms also perpetuated and intensified some of the old concerns about the legitimacy of covert tactics, while giving rise to new worries. The reach of the statute was incomplete. Some covert practices eluded it. To critics, these looked like attempts to circumvent the law. Criticisms previously leveled against undercover policing in general were redirected to

[77] *See e.g.* 2005 OIG Audit, *supra.*

[78] Possible causes of action include lawsuits brought under the Federal Tort Claims Act, 28 U.S.C. 2401 and 2675 (for damage to third parties and their property), and under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)(for constitutional violations, such as illegal searches and seizures, which undercover agents commit when they intrude into private areas in ways that exceed the scope of their targets' consent.)

these relatively unregulated operations.[79] Nor could the system really separate the pursuit of intelligence from the collection of evidence. Evidence-gathering operations could shelter the search for intelligence. Deep cover operations also invited uncomfortable parallels with the work of the state and federal APCs, Germany's domestic intelligence agencies.

A. The Incompleteness of Statutory Reform: Shallow Cover Agents and Informants

The German statutory reforms are highly selective in the undercover operations they regulate. As a result, they legitimate only a subset of covert investigations. I will focus on three gaps in coverage. First, the post-1992 system regulated undercover investigations run by the police, not those directed by the APCs. (The APCs are responsible for investigating and infiltrating domestic (and more recently foreign) extremist organizations that threaten national security.[80])

Second, the statute does not reach *all* covert operations of the police. It addresses only those undercover investigations that the police undertake in their "repressive," crime-solving capacity and that are designed to gather evidence of ongoing or past offenses. Operations that the police undertake preventively to stop future crimes escape regulation under the 1992 statute. Accordingly, preventive operations could already be under way well before the police seek judicial approval to turn such investigations into (repressive) evidence-gathering stings. Instead, the 1992 statute regulated the procedure by which police would be permitted to transform relatively unfocused, preventive undercover investigations into to repressive operations aimed at gathering evidence against particular targets for use in criminal prosecutions. By making little explicit provision for the evidentiary use of such information, the federal law created disincentives for continuing undercover operations as preventive investigations once suspicion had focused on particular targets. Thus the statute could be said not to limit what sorts of undercover investigations the police could conduct—only what sorts of undercover investigations they could expect to mine for evidence in a criminal proceeding.

There is a third way in which the system proved limited. The German system regulates only those undercover operations that deploy deep cover agents for long-term investigations. The warrant requirement of the 1992 statute does not apply to undercover investigations using only informants or shallow cover agents.[81] The application of the statute, and the need for judicial approval, depends to a large extent on whether the police decide to staff undercover investigations with unregulated shallow-cover agents in place of deep cover operatives. This makes it possible for many covert operations to escape regulation under the statute.

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[79] Duttge, JZ 1996, 556; Eschelbach, StV 2000, 390; Herrmann, Polizei-heute 2001, 151; Hetzer, KR 2001, 690; Kraushaar, KR 1995, 186; Lesch, JA 2000, 725; Roxin, StV 1998, 43; Krey, JR 1998,1; Meyer, KR 1999, 49; Nitz, JA 1999, 418; Schmidt, KR 2000, 162.

[80] *See* Marco Koenig, *Trennung und Zusammenarbeit von Polizei und Nachrichtendiensten,* (2005).

[81] These are called "non-overtly investigating agents" to distinguish them from "covert agents," whom the statute is designed to regulate. However, whether the statute applies to the activities of an undercover agent does not primarily depend on the choice of designation; rather, it depends on how many contacts the undercover agent has with his target, how deeply he delves into a criminal organization, the complexity and duration of the investigation, the number and intensity of contacts with third parties, and the extent to which it becomes necessary to conduct meetings in private residences, among other factors.

Distinguishing shallow- from deep-cover agents is no easy task, which further complicates regulation. A federal appellate court has created a multi-factor test for determining when a shallow cover operative is the "functional equivalent" of a deep cover agent.[82] The key factors include: the number of undercover meetings, the complexity of investigative tasks, whether it could be anticipated that the agent would have to enter private homes, the length of time for which he is used, the number of people whom he must deceive about his identity, and whether the police expected him to testify. No individual factor is dispositive.[83] "Whether and when these [shallow cover agents] need judicial approval remains extremely unclear," a police official complained.[84] Some jurisdictions permitted two or three contacts; others up to ten or 15.[85]

It is precisely this perceived fungibility of undercover personnel that leads critics to argue that they should all be similarly constrained--shallow cover operatives, deep cover agents, and informants alike.[86] Indeed, judges, lawyers, and politicians worry even more about informants than shallow cover agents. Why, they ask, may informants be deployed to investigate crimes which are not serious enough to justify the use of deep cover agents? Are informants not more in need of supervision? Prompted by the post-1992 regulation of deep cover agents, these questions raised doubts about the legitimacy of using shallow cover agents and informants without equivalent statutory regulation. It is significant, however, that these concerns have not led critics to question the nature of the statutory controls or the legitimacy of permitting deep cover operations at all. Thus the post-1992 reforms have succeeded in diverting criticism away from the foundational assumptions of the system. Instead, critics tend to call for an expansion of existing controls.

B. Undercover Policing as a Source of Intelligence, Not Just Evidence

1. Intelligence-Gathering Before Judicial Authorization of Repressive Undercover Operations

The greatest vulnerability of the post-1992 German regulatory system, however, is not its incomplete reach. The greater challenge to the legitimacy of the system emerges from an internal tension. On one hand, it tries to tame deep-cover investigations as evidence-gathering tactics; and on the other hand, it pushes undercover agents back into more shadowy intelligence-gathering functions, that is, into gathering information not geared towards presentation in court.

One reason for dynamic is that the search for evidence depends on the quality of advance intelligence. Undercover investigations can only secure evidence if they have targeted the right suspects and identified their vulnerabilities and logistical needs (which an undercover agent can then offer to satisfy.) These tasks require collecting intelligence through preventive undercover

[82] BGH, NJW 1996, 2100; BT-Dr 12/989; BGH 1 StR 527/96.
[83] BGH, NJW 1996, 2100; BT-Dr 12/989; BGH 1 StR 527/96.
[84] Interview with German chief of covert policing unit, June 2, 2003.
[85] Interviews with German prosecutor, May 10, 2004, March 12, 2004, May 13, 2004, and interview with German control officer of undercover agents, June 2, 2003.
[86] Duttge, JZ 1996 , 556; Eschelbach, StV 2000, 390; Hermann, Polizei 2001, 151; Hetzer, Kriminalistik 2001, 691; Roxin, StV 98 , 43; Bernsmann/Jansen StV 98, 230; Fezer JZ 95, 972; Hund StV93, 380; Lagodny StV 96, 172.

operations.[87] "We know, for example, that there's lots of extortion in the red light district. Motorcycle gangs compete to control security at nightclubs; they battle each other for turf. We send someone in to discover who's who. Our guy could be the bouncer. He tells us who the leaders are, and we build a repressive investigation around them."[88] The statute thus made preventive, intelligence-gathering operations more important than ever, even as it sought to legitimate undercover operations in contradistinction to such investigations.

The way in which the statute was implemented facilitated the expansion of preventive operations. Specialized covert policing units were skilled in devising intricate false documents and elaborate cover stories for deep cover agents, who could be deployed preventively, to gather intelligence, as well as repressively, to collect evidence. The creation of the new units also multiplied the personnel available to staff preventive exploratory investigations. And the new covert policing units could supply preventive operations with informants, control officers, and logistical support.

Collecting intelligence through preventive undercover operations is necessary not only to target and guide repressive operations but also to build the cover stories of deep cover agents. Undercover agents have to devote significant time to infiltrating the setting in which they must establish their cover. Creating one's cover story is akin to a preventive undercover operation (and escapes regulation under the statute which governs repressive operations.) In the process of building his cover, the undercover agent investigates particular starting points for evidence-gathering probes. "For example, he may listen around and learn that there's a grouping that imports drugs in shipments of bananas. He learns their ports, their stopping places, the routes, the participants, and then he helps us figure out whether it's worth entering this business."[89] While accrediting himself, the deep cover agent becomes a well-placed source of intelligence.

However, courts are unlikely to learn about undercover activity that preceded the prosecutor's application for judicial approval to conduct repressive operations. As one judge reported (and others confirmed), "preventive undercover operations are never mentioned when the police seek approval for some evidence-gathering sting. These preventive operations should really be in the application, to provide factual support for the request; but in fact, they never are."[90] Accordingly, cover-building operations may generate intelligence without judicial or even prosecutorial scrutiny.

2. Intelligence-Gathering After Judicial Approval of Repressive Undercover Operations

But the police also gather intelligence in their "repressive," evidence-gathering capacity. There are two reasons for this. First, obtaining statutory authorization for repressive operations sometimes allows the police to avoid constraints on gathering intelligence in the preventive

[87] A 1990 regulation envisaged just this sort of covert activity, by directing the police to undertake early-stage "proactive investigations" to collect the intelligence necessary to target specific milieus or individuals for repressive (evidence-gathering) stings. RiStBV Anl. E (1990).
[88] Interview with German chief of covert policing unit, May 26, 2003
[89] Innnt3erview with German prosecutor, May 22, 2003.
[90] Interview of German judge, May 27, 2003.

phase. The federal authorities lack statutory authorization to conduct preventive undercover probes, and some states also disallow them. When state law limits what the police can do preventively, the power to conduct repressive investigations shelters the search for intelligence, which the police could not otherwise have pursued through (preventive) undercover methods. According to a police official from one such jurisdiction, the police often conduct nominally repressive investigations in such ways that "we don't make buys. We simply gather information about foreign offender groups. … Once we spent three years on a foreign offender group, working with several undercover agents. We got to know them socially, made ourselves interesting to them by offering things they needed--partners in German businesses, contacts, transportation, access to airports. And in this way we got lots of information, that was the aim. But somewhere down the road [this being a repressive investigation] there will have to be seizures and arrests."[91]

Authorities who could not collect intelligence preventively described other ways of doing so in the guise of gathering evidence. One division reported using shallow cover agents to investigate drug dealing. When the agents purchased drugs undercover, they usually testified (or were prepared to do so.) But these evidence-gathering operations also allowed the police to "send guys in to build up a network of contacts, learn where the stuff gets sold, and in what quantities. These guys move around in that community, visit bars, department stores, and people get to know them, and we start to know what the targets are up to. What we learn from these operations never comes before a court…. It's background for our investigative divisions."[92] That shallow cover agents also purchased drugs undercover gave them a legitimate evidentiary reason for existing as an organizational unit. But at least part of their function was to gather intelligence in a nominally repressive capacity (lacking statutory authorization for doing so preventively.)

There is a second reason why the police may emphasize the collection of intelligence over the pursuit of evidence when conducting repressive undercover operations. They need to protect the government's investment in deep cover agents with elaborate false identities. Allowing the insights of undercover agents to be offered into evidence even indirectly, through the testimony of their control officers, jeopardizes the agents' cover. To avoid "burning" deep cover agents or their long-term cover stories, the police found ways to use them as sources of intelligence rather than evidence.

Thus the police have powerful incentives to gather intelligence rather than evidence even when they investigate crimes in their repressive capacities. They employ a number of covert tactics that permit them to do so. One of these tactics, which one might term "strategic insulation," is to separate the deep cover agent from the target whenever the police gather information that they expect to use as evidence in court. The police avoid using deep cover officers in ways that will make them direct witnesses to the crimes the government hopes to prove. "We use the undercover agent's information in such a way that its source remains hidden; we won't even use the hearsay testimony of his handler."[93] Thus the police often assign deep cover agents supporting roles in criminal investigations in order to keep their activities out of

[91] Interview with supervisor in German covert policing unit, June 3, 2003.
[92] Interview with supervisor of shallow cover agents, May 12, 2004. .
[93] Interview with supervisor of German covet policing unit, May 17, 2004.

court. "The undercover agent is part of a larger mosaic, along with telephone tapping, visual surveillance of targets, financial investigations, etc."[94] The police also use what one might describe as a "bait and switch" tactic, in which the deep cover agent introduces the shallow cover agent and then disappears. "We tend to use deep and shallow cover agents in tandem, so we can keep the deep cover agent out of the case."[95]

The use of shallow cover agents to insulate deep cover agent is only one among a series of what I shall call "nesting mechanisms." These make it possible to build criminal cases out of undercover investigations while concealing the vast foundation of information acquired to support the bits of evidence used at trial. For example, just as shallow cover agents can protect deep cover agents from detection, informants who are newcomers may come to shield more deeply embedded informants. "Often our informant is very close to the target. Then we introduce a informant from outside the milieu; he in turn introduces an undercover agent, who makes the undercover buy."[96] In other investigations, "the informant will buy small samples and then introduce the shallow cover agent for the main transaction."[97] Accordingly, a deeply embedded informant may hand off the target to a more distant informant, who may in turn pass the target along to the deep cover agent. The deep cover agent may introduce the target to a shallow cover agent. This process screens three layers of intelligence from discovery—and possibly a fourth, if only the shallow cover agent's handler openly testifies. Conceivably, not even that may be necessary, if the agent's information leads to searches, seizures and possession charges which obviate the need to prove the target's past dealings with the agent. In this way, much of what undercover investigations yield will remain in the realm of intelligence.

The capacity of deep cover investigations to encourage collection of intelligence alongside evidence reinforces concerns about the overlap between preventive and repressive operations and, more significantly, about the functional resemblance of the work of undercover police and domestic intelligence agencies. These dynamics put pressure on the legitimacy of undercover policing, given how readily covert operations undermine the principle of separation. This problem of legitimacy distinguishes Germany from the United States, which does not recognize the principle of separation. The FBI has always conducted counter-intelligence investigations alongside its law enforcement operations. Since the September 11 attacks, the FBI has emphasized intelligence gathering and has acquired greater powers to investigate domestic political organizations.

3. The Blurring of Roles Between "Hunters" and "Gatherers:" The Police and the APC

The German legal system differentiated undercover policing from the covert responsibilities of Germany's domestic intelligence agencies not only by directing the police to gather evidence, as distinct from intelligence. In addition, Germany enforced institutional separation between the police and intelligence agencies by differentiating the subject matters which they were authorized to investigate. State and federal Agencies for the Protection of the Constitution (APCs) pursued threats to national security. Covert police work focused on crime,

[94] Interview with supervisor of German covert policing unit, June 2, 2004.
[95] Interview with German control officer, May 14, 2004.
[96] Interview with German prosecutor, May 19, 2004.
[97] Interview with German prosecutor, March 9, 2004.

particularly organized crime. Like the functional division between the pursuit of intelligence and the collection of evidence, these subject matter distinctions have become blurred, reinforcing critics' concerns that undercover policing threatens the principle of separation between police and intelligence agencies. Starting in the 1990's, the states and the federal government authorized their APCs to investigate organized crime in response to highly publicized claims that it had become a threat to national security.[98]

Bringing the investigation of organized crime within the purview of the APCs proved highly controversial. Many critics argued that this development violated the foundational principle separating the powers and prerogatives of intelligence agencies from those of the police. Indeed, some APC officials themselves used this argument to propose that undercover investigations of organized crime be entrusted exclusively to them.[99]

After the 9/11 attacks, the covert responsibilities of police and intelligence agencies converged even more. The campaign against organized crime in the 1990s had led intelligence agencies to assert jurisdiction over offenses that had once been the exclusive domain of the police; after 9/11, the police became more deeply involved in investigating terrorist crimes and threats to national security—tasks once entrusted primarily to the APCs. The police revamped their dormant "state security" divisions, which had once been repositories of espionage cases and hate crimes that the APC had investigated covertly and had then turned over to the police for the overt, public phase of investigation. The new state security divisions could now initiate undercover investigations of their own to pursue terrorists and other threats to national security.

Germany has drawn upon the police to investigate terrorism in part because the APC lacks formal coercive powers entitling them to arrest and interrogate suspects.[100] For this, the state must call upon the police. The impetus to expand covert police powers against terrorism also derives from the distrust between police and intelligence agencies. "Since the police are responsible for crime prevention, and since the APCs have been pretty unforthcoming with intelligence, we must conduct our own covert terrorism investigations," a police official explained.[101] "Our work with the APC is highly problematic. The APCs put the protection of their sources above all else. But the state protection division has to actually prove these crimes. So we and they really have to weigh very different considerations."[102] "They gather intelligence and figure out later what they want to do with it. We investigate crimes. Our investigations are much more directed towards specific, law-enforcement goals. We are the hunters; they are the gatherers. They have a much more passive role. They allow things to happen and watch; we have to be active, to get things to happen, so we can prove them afterwards."[103]

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[98] *See e.g.* Art. 3 I 1 Nr. 4 BayVSG.

[99] Albert, ZRP 1995, 103 (in which the director of the Saarland APC suggests assigning all deep cover operations of organized crime to the state and federal APCs, out of respect for the principle of separation and because deep cover operatives should have the power to commit crimes, which the police currently lack.)

[100] Marco Koenig, *Trennung und Zusammenarbeit von Polizei und Nachrichtendiensten,* (2005).

[101] Interview with German control officer, May 12, 2004.

[102] Interview with chief of German covert policing unit, March 10, 2004.

[103] Interview with chief of German covert policing unit, March 8, 2004.

Thus convergence on shared subject matters requires the police and the APCs to cooperate even as it brings out differences between the rules that govern their practices and the gulf between their institutional cultures. The police, unlike the intelligence services, are bound by the principle of legality. This principle limits the extent to which undercover agents may lie low while infiltrating criminal settings. At some point during or after the investigation, they must intervene to arrest and prosecute those who have committed crimes. Releasing the intelligence services from this obligation makes sense because they lack arrest powers and because it may be useful to allow some class of operatives to observe subversive conspiracies without risking their cover. But without the principle of legality to constrain them, the APCs can tolerate crimes not only by their targets but by their own personnel, without having to intervene. And because they do not have to worry about building a case against their targets, they do not have to worry about entrapment.

Once infiltration became an accepted police tactic and the APCs and the police began to share jurisdiction over organized crime and terrorism, these differences in the prerogatives and institutional cultures of the police and the APCs posed huge obstacles to the ever more urgent task of cooperation. The APCs had to fear that the police would compromise their operatives by intervening too soon or would inadvertently target them, not knowing who they were. The police had to fear that APC agents and informants would work at cross-purposes with the police. They also worried that APC informants would influence the crimes the police were investigating, thereby jeopardizing criminal prosecution by supporting claims of entrapment. But the shared jurisdiction of the APC and the police meant that they had to work together while playing by different rules. Thus, even as undercover policing seeks legitimacy by differentiating itself from the work of the APCs, police and APCs have increasingly come to converge on similar tasks. These resulting overlap in responsibilities required a degree of inter-agency cooperation that sharpened the conflict between their respective governing norms, to some extent challenging the viability of the rules and values that set police infiltration apart.

Though the United States does not prohibit law enforcement agencies from gathering intelligence, it does distinguish between law enforcement investigations targeting suspected criminals and intelligence operations, which seek out threats to national security. In the United States, however, this distinction has very different implications for the legitimacy of covet tactics.

4. The Contested Legitimacy of Domestic Intelligence Investigations in the United States

Americans and Germans alike worry about undercover policing but direct their strongest anxieties at different features of covert operations. Americans have not been particularly concerned about the generation of intelligence through criminal investigations, or about the demarcation of those investigations from domestic intelligence operations. (The FBI functions as both a law enforcement and intelligence agency.) Instead, Americans have primarily worried about the use of covert powers o manipulate, disrupt, or radicalize political organizations; to retaliate against political dissidents; or to interfere with religious observance through the infiltration of churches and mosques. In addition, we are concerned that intelligence operations

have a tendency to expand too far beyond their original scope. (We are less worried about criminal investigations broadening their mandate.)

Why is the United States so concerned about undercover policing interfering with civil and political liberties and the exercise of First Amendment rights? A series of high-profile Congressional hearings in the 1970s and 1980s highlighted persistent abuses of domestic intelligence investigations against "wholly lawful forms of political expression." From 1973 to 1976, a Senate committee (known as the Church Commission) explored covert operations through which the FBI attempted to discredit the antiwar, civil rights, and Women's Liberation of the 1960s and early 1970s.[104] Among other tactics, the FBI "falsely and anonymously label[ed] as Government informants members of groups known to be violent, thereby exposing the falsely labeled member to expulsion or physical attack" and "provoked target groups into rivalries that might result in deaths." The FBI illegally wiretapped Dr. Martin Luther King, Jr., on the grounds that he could prove dangerous if he abandoned his adherence to nonviolence, and then "threaten[ed] to release tape recordings [from the illegal wiretaps] unless Dr. King committed suicide." In its Final Report of 1976, the Commission condemned as the government's covert tactics as "unworthy of a democracy" and "occasionally reminiscent of the tactics of totalitarian regimes."

Controversy about domestic intelligence investigations also centered on their tendency to generate too much information and to expand beyond the original objectives that induced and legitimated such operations. The United States and Germany are both concerned about this tendency—but the U.S. primarily worries about intelligence operations; Germany about *criminal* investigations. The Church Commission complained about "a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to [function as] 'vacuum cleaners,' sweeping in information about lawful activities of American citizens." As an example, the Commission cited the FBI's twenty-five year investigation of the NAACP to investigate the possible influence of Communists, which continued even though "nothing was found to rebut a report during the first year of the investigation that the NAACP had a 'strong tendency' to steer clear of Communist activities." Indeed, such concerns resurfaced resurfaced in the early 1980s, after it became public that the FBI had conducted what an independent inquiry described as an overbroad investigation of the Committee in Solidarity with the People of El Salvador, or "CISPES," based on information that did not meet the evidentiary threshold mandated by the agency's own guidelines. In 1988, the Senate Select committee on Intelligence concluded that the FBI's investigation of CISPES had "resulted in the investigation of domestic political activities protected by the First Amendment that should not have come under governmental scrutiny."[105]

As a result of the Church Committee findings of 1976, Congress considered enacting charter legislation that would set the ground rules for domestic intelligence operations and protect First Amendment rights of free speech and free association. Attorney General Edward

[104] During the late 1960s and early 197os, the FBI conducted a counterintelligence program known as "COINTELPRO" which sought to "disrupt" groups and "neutralize" individuals who, the FBI believed, posed threats to domestic security. Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (United States Senate).
[105] Senate Select Committee on Intelligence, 101st Cong., *The FBI and CISPES* at 3, 103.

Levi forestalled the passage of the statute by enacting new, restrictive guidelines for "domestic security investigations."[106] He testified before Congress that his reforms "proceed from the proposition that government monitoring of individuals and groups because they hold unpopular or controversial political views is intolerable in our society."[107] These reforms restricted the scope of domestic intelligence investigations. At the same time, he addressed concerns about covert tactics by enacting separate guidelines for the FBI use of informants.[108]

What is striking about the controversy surrounding domestic security investigations is that our concern with civil and political liberties and First Amendment rights plays very much the role in the United States that Germany's dignitary conception of privacy has come to play in Germany's legal and political discourse. The Church Commission's scathing criticism of government tactics designed to "'enhance paranoia'" of political dissidents and to "'get the point across [that] there is an FBI agent behind every mailbox" are reminiscent of German concerns with safeguarding a zone of privacy within which targets of *criminal* investigations can be free from government surveillance. Both Germany and the United States fear the inhibiting effects that invasive and overbroad tactics may have on society in general and the freedom of individuals—though, in the United States, the liberties which critics like the Church Commission have worried about were more explicitly political in nature. In both Germany and the United States, these comparable concerns produced demands for codification—though the Levi reforms headed off the enactment of statutory controls in the U.S.

Precisely because American fears about overt operations center largely on domestic *intelligence* investigations rather than *criminal* probes, the Levi Guidelines turned to undercover *criminal* investigations as the model of legitimate covert activity and as the source of standards for domestic intelligence operations. Under the Levi Guidelines, the FBI were to restrict domestic intelligence operations to the investigation of individuals or groups who not only violate civil rights or seek to interfere with or overthrow the government, but who do so through activities that "involve or will involve the violation of federal law" as well as "the use of force or violence." Thus the standard for proper covert operations in the intelligence arena became the criminal standard—requiring some indication that criminal offenses were in the offing. Subsequent administrations gradually relaxed the demand for evidence of impending criminal wrongdoing before a domestic security investigation could be initiated. his trend accelerated after the Oklahoma City bombing of 1995, when the FBI stopped interpreting the Guidelines as requiring evidence of an imminent violation of federal law and instead interpreted it to permit the investigation of domestic group that advocate violence and possess the ability to carry out violent acts.[109] After the September 11 attacks, Attorney General John Ashcroft further expanded the use of undercover techniques in terrorism investigations by authorizing FBI agents to "attend public

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[106] **Federal Bureau of Investigation Compliance with the Attorney General's Investigative Guidelines, Special Report, September 2005 at III.A. .**

[107] *FBI Oversight:* Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong. 257 (1976).

[108] These guidelines were intended "not only to minimize [use of informants] but also to ensure that individual rights [were] not infringed and that the government itself did not become a violator of the law." 1982 Final Report of the Senate Select Committee to Study Undercover Activities, at 531 (Levi Informant Guidelines, Introduction).

[109] *Advice to Field Offices Regarding Domestic Security/Terrorism Investigations and Preliminary Investigations Under theAttorney General's Guidelines on General Crimes, Racketeering and Domestic Security/Terrorism Investigations,* November 1, 1995.

events … for the purpose of detecting or preventing terrorist activities, without the predication required to investigate leads or conduct a preliminary inquiry or full investigation."[110] Undercover agents may now visit churches or mosques without any allegation that that congregants are involved in unlawful activity. But the current administration has not repealed those parts of the Levi Guidelines which provide that domestic security investigations cannot be based solely on an individual's exercise of First Amendment rights.[111] The debate triggered by the relaxation of the criminal standard still proceeds from the assumption that undercover operations are most legitimate when they pursue evidence of a criminal offense—and least legitimate when they target lawful political and religious activity.

The United States assumes that covert tactics enjoy greater legitimacy in criminal investigations than in domestic intelligence operations –which is a reason why we use the former as a model for the latter. By contrast, German fears coalesce around the use of covert tactics in criminal investigations. By why? It is certainly not the case that APC intelligence investigations enjoy uncontested legitimacy. There has been recurrent controversy about the participation of APC informants in crimes and about their infiltration of extremist organizations such as the NDP. But the use of covert intelligence is to some extent a legal given, in part because the APCs are exempt from the principle of legality. More importantly, however, their undercover assignment is an artifact of the Cold War and the division of Germany after World War Two, as the Allies sought to suppress Communism as well as the resurgence of Nazi and neo-Nazi sentiment. The postwar constitutional architecture of the Federal Republic required the APCs to infiltrate threatening political movements and monitor even lawful political expression in ways that have no exact counterpart in the United States. Moreover, APC investigations cannot be tethered to the criminal standard because the principle of separation mandates their segregation from the police and deprives them of coercive prerogatives, including arrest powers. The APCs are supposed to investigate precisely those incipient threats to domestic security that have not ripened into offenses, or even into preparation for criminal activity. And conversely, police infiltration is supposed to yield evidence for criminal prosecution, not intelligence. The tendency of covert investigations to generate intelligence makes undercover policing appear as an unwarranted usurpation of the powers and tactics entrusted to the APCs. In the face of these constraints on the police, coupled with the APCs' built-in constitutional mandate, German critics who fear the spread of a "culture of surveillance" have little hope of challenging the covert operations of intelligence agencies head-on, except when these go too far. Accordingly, academics and legal reformers have instead attempted to quarantine the covert powers within the APCs and to challenge the adoption of covert tactics by the police.

These problems of legitimacy arise to some extent from the particularities of the German system analyzed in Section V. Some of these difficulties are closely related to features of the covert system that are specific to Germany—such as the separation of the prerogatives of intelligence agencies from those of the police and the distinction between federally regulated repressive powers and state-governed preventive policing. But the attempt to legitimate undercover policing also has to confront problems that are intrinsic to undercover work. These include the necessity of permitting undercover agents to take part in the crimes they investigate

[110] OIG Report at 19.

[111] General Crimes Guidelines, Section I (General Principles.) The possibility of infiltrating public gatherings without the opening of an official investigation has weakened this principle.

(even if only in circumscribed capacities); the danger of entrapment; and the ability of undercover operations to influence the criteria by which their performance is judged. These dilemmas challenge the policing systems of Germany, Western Europe, and the United States all must address, though the national context influences their configuration and the degree to which they matter to legal actors or the public. How these intrinsic difficulties of undercover policing challenge its legitimacy, and how the German system has responded, is the theme of Section VI.

VI. Mediating the Inherent Dilemmas of Undercover Policing: The Problems of Lawbreaking, Entrapment, and Retrofitting Criteria of Success

Germany's 1992 Organized Crime Act tacitly legitimated undercover policing by requiring prosecutorial or judicial oversight in advance of covert operations and by limiting those operations to the most serious crimes and then only as a last resort. German jurists reassure themselves about the propriety of undercover policing by likening it to electronic surveillance, which is similarly regulated by a system of advance approvals and limitation to specific crimes.[112] Yet the analogy is far from complete. Covert operatives have a special ability to influence the criminal milieu they investigate and to be shaped, in turn, by the targets they associate with. Such reciprocal influences are, of course, not unique to undercover operations.[113] But the influences of covert operatives may be particularly subtle and hard to detect or to trace to the government. As a special case of this interaction effect, undercover policing poses a number of dangers. First, agents may encourage their targets' propensity towards wrongdoing. Second, agents may themselves become tainted if they participate too actively in the crimes they investigate, or if they permit crimes to occur and allow third parties to be harmed. Third, the covert policing system tends to generate the criteria by which it is judged to match what agents find in the field. I shall call these risks the "interaction dangers" of undercover policing. The legitimacy of undercover operations depends on the ability of the regulatory system to contain these interaction dangers. It also depends on the degree to which undercover policing promotes the ends, such as reduction of organized crime, which justify covert powers.

The 1992 statute did not expressly address itself to the interaction dangers of undercover policing. Both before and after the act, the substantive limits on covert tactics came from elsewhere. Before the 1992 Act, the German system relied heavily on two substantive norms. First, undercover agents could not commit crimes. The principle of legality required them to take action against those who did (including both targets and government operatives.)[114] Second, the doctrine of entrapment prohibited agents from excessively encouraging targets to commit crimes. [115] These are the substantive norms of undercover operations. They guard against the first two of the three interaction dangers. The third danger—that covert operatives could manipulate the criteria of success—has not received the same attention.

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[112] St PO 100c.
[113] Gary T. Marx, *Ironies of Social Control: Authorities as Contributors to Deviance Through Escalation, Nonenforcement and Covert Facilitation,* in R. Merton (ed.) *Unanticipated Consequences of Social Action: Variations on a Sociological Theme.* (1978).
[114] St PO 152; 163.
[115] *See* note 33 above.

The regime that grew up after the 1992 Act did not supersede the substantive norms restraining undercover policing.[116] Nor did the statute entrust the enforcement of the substantive norms to the judges who pre-authorize deep cover operations. When judges approve investigations, they do not decide what the police can and cannot do. The police design the tactics of covert operations, though prosecutors provide them with guidance. The statute did establish the prima facie legal validity of undercover investigations that received advance judicial approval, so long as the formal requirements (such as listing a qualifying predicate offense, and meeting a minimal evidentiary standard for suspicion) had been satisfied.[117] By premising the legal validity of covert operations on compliance with procedural requirements, the statute shifted the focus of reviewing courts away from whether undercover tactics complied with substantive norms—a key determinant of lawfulness before the procedural controls came along—and towards the more easily answered question of whether the proper procedural steps had been followed in obtaining approval in advance. In demonstrating that they had properly obtained advance authorization, the police did *not* have to demonstrate compliance with the substantive norms. Courts could assume compliance unless contrary evidence emerged.

The statute did not provide any new guidance on how police should answer the difficult questions raised by the substantive norms: where does the law draw the line between (impermissibly) committing a crime and (permissibly) *pretending* to commit one? What pressures or enticements may agents employ? At what point should the legal system decide these questions—before, during, or after a covert investigation? And who should make these decisions?

Section VI explores the ways in which the covert policing system grapples with the dilemmas of regulating these interaction effects. The Section does not provide the German "answer" to these problems, still less its "resolution" of them. There can be no fully satisfying resolution, insofar as these dilemmas are inherent in covert practices. Undercover operations cannot work unless the police, in the name of public safety and crime control, occasionally commit crimes and encourage targets to do so. The German system—like the regulatory regimes of other Western European countries and the United States—mediates these dilemmas and limits their manifestations. Section VI has two aims: first, to explore on their own terms German approaches to the interaction effects of undercover policing**;** and second, in so doing, to bring out a set of problems and a repertoire of justifications, distinctions, evasions, and compromises that can be used in pursuing comparisons with the regulatory regimes of other countries.

A. Infiltrators May Not Commit Crimes: But What Does it Mean to Commit a Crime?

1. Changing Institutional Contexts of Criminal Liability: From Individual to Shared Responsibility

[116] Legislators rejected a proposal to permit undercover agents to commit crimes that were necessary to win the confidence of targets. BDrS 74/90. Stenographische Protokolle des Rechtsausschusses des Deutschen Bundestages Nr 31 und 36, 1992; Hilger NStZ 1992, 525. *See also* Albert, ZRP 1995, 103.

[117] The factual basis had to establish "Anfangsverdacht"—"initial suspicion"-- a minimal evidentiary threshold akin to "reasonable suspicion." "Initial suspicion lies well below the standard of "dringender Tatverdacht" which is Germany's counterpart to "probable cause" and is needed to justify arrest.

Any undercover policing system must worry about law-breaking by covert agents. It must distinguish between permissible and impermissible criminal conduct. But unlike the United states, Germany officially prohibits all law-breaking outright. It backs this up with a principle of compulsory prosecution. Since Germany forbids covert agents from committing crimes, police and prosecutors must constantly confront the question: what does it mean to commit a crime?

The question does not pose itself with the same urgency in the United States, which pragmatically accepts that undercover agents may sometimes violate the letter of the law in order to catch criminals.[118] The United States protects agents from criminal liability when they have obtained the necessary approvals from their supervisors.[119] The blanket immunity for authorized acts of law-breaking is further backed up by prosecutorial discretion in deciding whether to bring charges. Indeed, the FBI's internal guidelines expressly permit undercover agents to engage in "otherwise criminal conduct." To be sure, recent amendments to the Guidelines have "clarif[ied] that felony activity by an FBI undercover employee [like the risk of civil lawsuits] is a sensitive circumstance requiring approval" from a centralized committee.[120] Nor may an undercover agent obstruct justice or commit an act of violence (except in self-defense.)[121] But in the United States, criminal penalties are generally reserved for rogue agents who commit crimes on their own account.

By contrast, German police and prosecutors may not authorize violations of the criminal laws. Accordingly, they confront the delicate task of distinguishing conduct that seems criminal. How do they do this? The pre-1992 system treated violations of substantive norms by police officers as individual failures. The officer needed to conform his behavior to the norms and, if he did not, the responsibility was his. The post-1992 regime emphasizes institutional as well as individual responsibility for compliance with substantive norms. Prosecutors supervise undercover police and advise them on the implications of the substantive norms in covert operations. They are keenly aware that their role in shaping undercover investigations exposes prosecutors themselves to the risk of incurring criminal liability. The police have created specialized covert units containing deep cover and shallow cover agents, control officers, informant handlers, surveillance teams, and logistical personnel who obtain the apartments, vehicles, and documents needed to support elaborate cover stories. Together they work out the ground level meaning of the substantive norms. This means they also share responsibility for deviations from substantive norms. Within covert policing units, there is no sharp division between undercover agents and the colleagues who supported their efforts. "All of us in the office are really living undercover; our office is a front, made to look like some regular business."[122] "The undercover agent isn't a lone wolf; the whole pack of us, the whole team, all of us are on the line with him."[123]

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[118] See *Brogan v. United States*, 522 U.S. 398 (1998); Wayne R. LaFave, 2 SUBSTANTIVE CRIMINAL LAW, Section 10.7 (2d ed. 1986)

[119] *United States v. Achter*, 52 F.3d 753, 755 (8th Cir. 1995); *United States v. Burrows*, 36 F.3d 875, 891 (9th Cir. 1994); 2 P. Robinson, Criminal Law Defenses, Section 142(a), p. 121 (1984).

[120] This is the Criminal Undercover Operations Review Committee. *See* OIG Report at 149.

[121] Guidelines Section III C.1.b.

[122] Interview of German control officer, May 19, 2004.

[123] *Id.*

The shared responsibility of police and prosecutors in conducting undercover operations should conform covert tactics to the demands of the substantive norms. And to some extent it appears to do so. Prosecutors and police officials alike emphasized that it was their responsibility to design undercover tactics in ways that avoided involving agents too directly in the crimes they investigate. They also tried to reduce the risk of undercover agents having to accredit themselves through what I have elsewhere termed "ancillary" crimes.[124] These are offenses distinct from those which the police are investigating but which protect the infiltrator's cover and make him believable in his role. Avoiding criminal liability was not simply a matter of making sure the agent "stuck to his script." It depended crucially on how that script was written. "We use the deep cover agent in several investigations at once. We have him play multiple roles. Otherwise, if we send him exclusively to one place, he will eventually have to take part in whatever everyone else is doing there; he would eventually have to commit crimes."[125] "The agent always has to be at the periphery of the targeted group; otherwise, if he's right smack in the middle, they hold the reins and he has to do what they ask, and then we'd have to pull him out early."[126]

Prosecutors and police are less concerned that agents might have to commit ancillary crimes to accredit themselves than that agents might need to take part in the very crimes they are supposed to investigate. Police officials and prosecutors prohibit covert operatives from taking too active a part in crimes that produce excessive social harm, even if an agent believes that his participation will yield evidence against a target. Supervisors do not allow undercover operatives to drive convoys of illegal immigrants—a practice that is too risky and that makes the agent not a peripheral figure but the very instrument of alien smuggling.[127] Undercover agents cannot work as pimps or in other capacities that require them to use violence[128] (though, as discussed below, there are conditions under which some violence might be tolerated.). Nor**,** in theory**,** can they take part in robberies or burglaries (though they can help with preparations), or release drugs or guns into the market.[129]

But the close involvement of prosecutors in covert police operations does not always ensure compliance with the substantive norms. Prosecutors' expertise in legal interpretation—in casuistry—can justify covert investigations that strain against the spirit of the substantive norms without violating the letter of the norms. Prosecutors and police officials who specialize in covert operations increasingly see themselves as responsible for providing a legal framework that allows undercover agents to obtain evidence**.** In part, this means permitting borderline practices while imposing constraints that would conform them, more or less, to legal requirements. And in part this means reinterpreting the law to lift legal constraints (or finding that they did not apply in the first place). When neither of these strategies is promising, prosecutors and police officials sometimes quietly subordinate the substantive norms to other institutional goals, such as preventing crime and protecting undercover operatives. Since undercover investigations often produce not evidence but intelligence (which does not get into court), judges have little

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[124] Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy,* 52 Am. J. Comp. L. 569-624 (2004).
[125] Chief of covert policing unit, March 10, 2004.
[126] Interview with supervisor in German covert policing unit, May 19, 2003.
[127] Interview with German control officer, May 26, 2003.
[128] Interview with supervisor in German covert policing unit, May 27, 2003.
[129] Interview with German prosecutors, May 21 and may 22, 2003.

opportunity to curtail the "creative" interpretations of prosecutors. As one judge put it, "undercover agents don't testify; if they or the informants break the law, we have no way of knowing it."[130]

2. The Conflicting Role Obligations of Undercover Agents

The post 1992 undercover policing system has provided German police supervisors and prosecutors with more effective mechanisms for making ground level covert operations conform to the demands of the substantive norms. But in this work, how do they interpret the substantive norms? In practice, how do they mediate between, on one hand, the pragmatic objectives of obtaining evidence and catching criminals and, on the other hand, the substantive norms? How do they import pragmatic justifications of undercover policing into their interpretation of the substantive norms? And under what circumstances does this process of importation and justification break down? When it does break down, are unlawful practices tolerated anyway—or banned and rejected outright?

Conversations with prosecutors and police officials revealed that the reciprocal adaptations of practice and doctrine take many different forms. An agent may buy stolen goods or contraband because he does not intend to use or distribute the drugs.[131] This is obvious. But it is a harder question whether an agent could return samples or kick back part of the contraband to a middleman. Some prosecutors opined that agents could not do this, even if refusing to return a sample meant having to forego a larger purchase from the same source.[132] Other police officials and prosecutors believed that returning a portion of the sample might be justified on grounds of necessity in unforeseen emergencies.[133] And still others explained that the decision depended on a weighing of law enforcement interests. "An undercover agent got hold of a high-denomination counterfeit note and the organization wanted it back. This was really a gray zone, because it's illegal to put counterfeit notes into circulation. But you can still return contraband, depending on how much you're giving back, what it will accomplish, and whether there's some proportionality here" (that is, whether the offense the agent commits is less serious than the crime he hopes to prove).[134]

Minimizing the causal role of agents in criminal activities is a critical objective of the German undercover policing system, and one to which it has given much thought. But the meaning of "minimization" is itself flexible and context-specific. Playing a subordinate role becomes particularly important if the agent knows in advance that he must allow the crime to succeed. Thus, agent cannot work as a mechanic for a car theft ring if he has to fix up stolen vehicles and then let the criminals remove them.[135] If an agent does play a central role in an unfolding crime, he cannot let it succeed. If, for example, he alters license plates on a stolen vehicle, then he has to make sure the police seize it later.[136] And if he himself helps steal a car,

[130] Interview with German judge, May __, 2004.
[131] Interview with supervisor of German covert policing unit, March 8, 2004.
[132] Interview with former German prosecutor, June, 2002.
[133] Interview with German prosecutor, May 22, 2003; Interview with German prosecutor, March 8, 2004; Interview with supervisor in German covert policing unit, May 19, 2003.
[134] Interview with chief of German covert policing unit, March 10, 2004.
[135] *Id.*
[136] Interview with supervisor of German covert policing unit, May 27, 2003.

he has to ensure that the police recover more than just the stolen vehicle—for instance, that they seize the whole workshop where vehicles are retooled.[137]

Usually prosecutors and police adapt practice to respect limitations imposed by the substantive norms while interpreting the norms to accommodate useful practices. But in some instances, the dialectical relationship between practice and norms breaks down. In that case, prosecutors and police sometimes suspend the substantive norms in limited instances in the pursuit of other goals (such as crime-control or protection of agents).[138] They deploy this power to excuse a variety of crimes by agents, some trivial and some not. "With the permission of the prosecutor, we can let our infiltrators transport stolen goods," one official explained. "It's a matter of weighing the seriousness of the crimes they commit against the seriousness of the crimes they're investigating."[139] On the other hand, a police official opined that a "deep cover agent can take part in ordinary, commercial burglaries, if risks to third parties can be managed."[140] "Throwing a Molotov cocktail into a shed is no big deal, if it only damages property," a prosecutor stated.[141] And when prosecutors could not approve certain crimes in advance, they could often avoid charging an agent who "slides into crime inadvertently" by resorting to the power to shelve cases for "minimal blameworthiness."[142] It was informally taken for granted that participating in criminal activity was to some extent unavoidable despite the formal prohibition. "If an undercover agent does find himself in a position where he has to commit a crime to avoid losing his cover, it's our job to . . . protect him from liability."[143] Once you suspend the substantive norms in the name of larger law enforcement interests, where do you stop?

Even prosecutors and police who sometimes find ways to avoid the substantive norms insist on their necessity. Participants in the German undercover policing system do not wish to formally exempt agents from criminal liability. "The debate, years ago," recalled one prosecutor, "was whether to give undercover agents more maneuver room through a more powerful necessity doctrine which would allow them to commit crimes when the interest in clearing up one crime clearly outweighed the interest in not committing a lesser crime."[144] Such an exemption would have eroded prosecutors' supervisory role and therefore the value of their expertise in distinguishing permissible from impermissible practices and excusable from serious misconduct. Prosecutors worried that agents enjoying an exemption from criminal liability would commit different and worse abuses than those that prosecutors were willing to tolerate. "The necessity defense is enough protection from liability," a prosecutor stated. "And you don't want to immunize the agent for other, genuine crimes. If he commits a crime, it may be alright if there are other, greater crimes he's preventing. But that's a completely post hoc justification. You can never permit that in advance."[145] And according to another prosecutor, who was willing even to countenance a limited use of violence under some circumstances, "It's one thing for an

[137] Interview with German prosecutor, May 13, 2004.
[138] Police officials reported that they typically checked with prosecutors first.
[139] Interview with German prosecutor, May 10, 2004.
[140] Interview with supervisor of German covert policing unit, May 10, 2004.
[141] Interview with German prosecutor, March 9, 2004.
[142] Interview with supervisor of German covert policing unit, March 8, 2004
[143] Interview with German prosecutor, March 10, 2004.
[144] Interview with German prosecutor, March 10, 2004.
[145] Interview with German prosecutor, May 22, 2003.

agent to have to beat up a prostitute because otherwise he'd be in danger himself. It's another thing to hire him out as a henchman whose *job* it is to discipline prostitutes."[146]

Prosecutors and police accept the desirability of the substantive norms not only because they restrain abuses, but because they allow sufficient maneuver room for covert operations to proceed effectively. The mutual accommodation of undercover practices and the substantive norms, as detailed above, provides one form of maneuver room. Additional maneuver room comes from a tacit assumption in the 1992 statute legitimating undercover policing: namely, that there is nothing inherently criminal about an agent offering a target the opportunity to commit a crime by posing as an accomplice. Acting like an accomplice and facilitating a crime cannot be inherently criminal (a violation of the substantive norms) if undercover policing is legal. This premise of the statute carved out a safe zone within which the prohibitions of the substantive norms lost much of their relevance for undercover policing. If covert policing was inherently about facilitating crimes, then doing so could not be illegal.

In accordance with the logic of the statute, most evidence-gathering stings cast undercover agents in supporting roles in which they facilitated their targets' illegal ventures. Agents provide useful services such as transport, storage, and financing, or referrals to tax advisers, lawyers, and landlords.[147] If passing along child pornography remained risky for police, posing as the administrator of a computer system and offering one's technical know-how was much less so.[148] Undercover police could run security agencies providing body guards, book travel, rent out warehouses, offer law enforcement "contacts" in the Customs Service, pose as interpreters or local guides, broker real estate, set up bank accounts, or provide trucks and ships with secret containers.[149] The possibilities were almost endless. To avoid charges of entrapment, it was best if the targets already had customers waiting for their business.

Strictly speaking, the logic of the statute itself does not provide maneuver room for agents. But it dovetails with, and legitimates, a pre-existing reading of criminal law doctrine that shielded agents from liability. Under substantive criminal law, an accomplice derives her liability, in large part, from her unlawful purpose of willing the principal's success.[150] The undercover agents' law enforcement purpose serves as their shield from criminal liability since they intend the principal (the target) to fail.[151] To be sure, doubts may remain about whether the agent did not, after all, intend the crime to succeed. An undercover agent who plans to seize an imported drug shipment can be said to intend her targets success, if this means simply that she wants her targets to import cocaine. But here, too, German criminal law has obliged with a distinction between willing the accomplishment of a crime and willing its success. Commentators reason that undercover agents wish their targets to accomplish their offense without willing their targets to succeed in distributing the drugs to other dealers or users.[152]

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[146] Interview with supervisor of German covert policing unit, June 2, 2003.
[147] *Id* and Interview with German deep cover agent, May 12, 2004.
[148] Interview with chief of German covert policing unit, March 10, 2004.
[149] Interviews with chiefs, supervisors, and former supervisor of German covert policing units, May 19, May 22, and June 3, 2003; Interview with chief of German covert policing unit, March 8, 2004; Interview with German prosecutor, May 22, 2003; Interview with former German prosecutor, June, 2002.
[150] Claus Roxin, *Taetershcaft und Tatherrschaft,* 6th ed. ( ).
[151] Jescheck, Lehrbuch des Strafrechts, Allgemeiner Teil, 4a 2d. 465 (1988).
[152] *Id.*

B. Entrapment: Bringing to Light Pressures Exerted in the Dark

Concerns about entrapment are closely related to worries about government law-breaking. They are two sides of the same coin. By facilitating a crime, an agent makes herself an (excused) "criminal" and encourages the target to become a real criminal. When an agent assists a target's criminal plans, the German doctrine of entrapment usually reduces the penalty that the target receives for the offense, even if the target was predisposed to commit the crime and eagerly participated. In Germany, entrapment (known as "Tatprovokation," or "deed provocation") serves as a mitigating factor at sentencing.[153] It is based on a different logic than its American counterpart. Subjective variants of the American entrapment defense ask whether the infiltrator's actions "implanted the criminal design" in the mind of a person not otherwise predisposed to commit such a crime.[154] Objective variants ask whether the infiltrator's conduct would have implanted such idea in a hypothetical law-abiding person (even if the actual defendant was herself predisposed.)[155] Most American jurisdictions apply a subjective or hydrid test, evaluating the infiltrator's conduct from an objective standpoint but refusing to afford a defense to a defendant who was subjectively predisposed to commit the offense, even if the governments actions would have sufficed to corrupt an otherwise law-abiding target.[156] And the American entrapment doctrine is a bi-modal, all or nothing affair: it is either a complete defense (which leads to acquittal) or none at all.[157]

The German counterpart to our entrapment doctrine is a not a defense but a sentencing factor. It is a more scalar concept since it correlates sentencing reductions to degrees of government influence. Such influences can be negligible—for instance, when the infiltrator observes events and becomes a human alternative to a tape recorder or bugging device. It can be greater when the covert operative facilitates crimes by providing logistical support or purchasing illegal wares. Government influence becomes paramount when an agent supplies essential ingredients or know-how; when she forges connections between otherwise unaffiliated offender groups; or when she supplies opportunities that offenders might not have encountered on their own. Even minimal forms of encouragement, pressure, or aid entitle targets to some sentencing

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[153] BGHSt 32, 345; BGH NStZ 1992, 488; BGH StV 1995, 363; Beulke/Rogat JR 1996, 517; Detter NStZ 1995, 488; Roxin, *Strafverfahrensrecht,* 24th ed. (1995); I. Roxin, *DieRechtsfolgen schwerwiegender Rechtsstaatsverstoesse in der Rechtspflege,* 2nd. Ed. 1995; Makrutzki, *Verdeckte Ermittlungen im Strafprozess,* (1999); von Stetten, *Beweisverwertung beim Einsatz Verdeckter Ermittler,* (1997).

[154] *United States v. Russell*, 411 U.S. 423, 436 (1973). "Under a subjective test…the outcome varies with each individual defendant's state of mind; no general standards governing the permissibility of police conduct are set." *Bailey v. The People*, 630 P.2d 1062, n. 5 (Colo.1981).

[155] Decisions adopting an objective approach include *People v. Barraza*, 591 P.2d 947 (California, 1979); *Pascu v. State*, 577 P.2d 1064, 1064 (Alaska, 1978) . The Model Penal Code has also adopted an objective test of entrapment. (M.P.C. Section 2.13 (Proposed Official Draft, 1962.)

[156] Joseph A. Colquitt, *Rethinking Entrapment,* 41 Am. Crim. L. Rev. 1389, 1411 (2004).

[157] There is a federal doctrine of sentencing entrapment in the United States, but courts rarely apply it. *See generally* Daniel L. Abelson, Comment, *Sentencing Entrapment: An Overview and Analysis,* 86 Marq. L. Rev. 773 (2003); Jeff LaBine, Note, *Sentencing Entrapment Under the Federal Sentencing Guidelines: Activism or Interpretation?* 44 Wayne L. Rev. 1519 (1998); Joan Malmud, Comment, *Defending a Sentence: The Judicial Establishment of Sentencing Entrapment and SentencingManipulation Defenses,* 1*45* U.Pa. L. Rev. 1359 (1997); *see also* United States Sentencing Commission, Guidelines Manual Section 2D1.1, app. N. 14 (permitting downward departures for some forms of undercover manipulation affecting volume of drug sales.)

discount.[158] Why is this? First, the government's involvement reduced the risk of the crime inflicting actual harms. The participation of agents often implies that the government had the target under surveillance so that bystanders at the crime scene could be protected and weapons and contraband seized. Second, the German system gives sentencing discounts to targets who are less culpable and less dangerous to society because they required prompting, and perhaps assistance, to commit an offense.[159]

Entrapment doctrine encourages undercover agents to minimize their facilitation of targets' crimes. Unduly active participation could trigger sentencing breaks for defendants so sizeable as to undercut the value of a covert operation. Entrapment functions as a deterrent to the sorts of steering and influence that makes it difficult to distinguish mopes from mobsters. The scalar nature of German entrapment, which calibrates sentencing discounts to variations in the degree of infiltrators' influence on targets, affects the design of undercover operations. Undercover agents could purchase contraband but not "place an order."[160] "You have to act just like you would if you were a normal buyer," an agent stated, "so you have to be careful not to offer too much money."[161] "We have to be very careful, because someone who's already predisposed can still be entrapped."[162] "If the guy is selling small amounts of hash, I can't put him up to selling me larger quantities."[163]

In distinguishing degrees of influence, the German entrapment doctrine makes it possible for sentencing courts to factor government law-breaking into its penalties for targets. Agents who participate in the crimes they investigate not only break the law; they also influence the course of events. The more actively infiltrators take part in the crime, the less defendants need to do to make them happen. This raises questions about the extent to which undercover law-breaking shapes or distorts the crimes in which agents participate. Factoring these contributions into the penalties for targets to some extent compensates for the willingness of police and prosecutors to license some conduct by infiltrators that would subject others to criminal liability.

There are reasons to speculate that Germany's scalar system restrains police influence on targets more than its American counterpart. The American entrapment defense is an all-or-nothing affair: a judge or jury accepts the defendant's claim of entrapment and acquits him, or rejects the claim. Police inducements and pressures just short of full-fledged entrapment will not expose the government to adverse consequences, while maximizing the likelihood of proving the crime. By contrast, German entrapment creates a scalar system. The more the police manipulate the target, the greater the sentence reduction. German police have an incentive to minimize inducements and pressures. American police do not, so long as they respect the boundary that separates permissible influence from entrapment (a rarely successful defense).

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[158] BGHSt32, 345, BGHStV 1989, 528; BGHStV 1994.
[159] Schaefer, *Praxis der Strafzumessung, 2nd* ed. (1995); von Stetten, *Beweisverwertung beim Einsatz Verdeckter Ermittler,* (1997).
[160] Interviews with German prosecutors, May 13, 18, and 19, 2004; Interview with supervisor in German covert policing unit, June 3, 2003.
[161] Interview with German deep cover agent, May 20, 2004.
[162] Interviews with German prosecutors, March 10 and May 13, 2004.
[163] Interview with German control officer, March 12, 2004.

The ability of entrapment doctrine to deliver on its promise—and the thus the legitimacy of covert practices, as measured by their congruence with norms against entrapment- depends on whether judges can learn about police influence on targets. To what extend do the various encouragements offered and pressures exerted by agents reveal themselves in the criminal process? The post-1992 system has unintentionally made it easier for police to keep their encouragements and pressures hidden. The value of entrapment as a restraint on police has correspondingly diminished.

Intelligence gathering investigations and the use of short-term operatives as adjuncts to deep cover agents have together shielded government influences from discovery. As described above, the post-1992 system has devoted more attention to obtaining intelligence (as opposed to evidence for use in criminal proceedings). If an investigation does not result in the prosecution of a target, the judiciary has little opportunity to learn what deep cover agents and informants did. Even if it does yield a prosecution, the secrecy surrounding deep cover agents and informants, along with the difficulty of using intelligence as evidence, minimizes what judges can find out about operations in the field. The inducements offered and threats made by agents and informants will remain unknown. In addition, the police have developed strategies for using shallow cover agents to shield the tactics of deep cover agents and informants from judicial scrutiny. Without judicial knowledge of covert practices, the entrapment doctrine loses some of its effectiveness as a tool for disciplining undercover tactics.

C. Retrofitting the Criteria of Success: Making the Crime Fit the Investigation

The substantive norms rest upon an implicit model of proper policing. Ideally, police should observe, prevent, or prosecute crimes whose existence does not depend in any way on their involvement. On this view, crimes should arise independently. The police should not pressure or induce targets to participate in crimes and certainly should not commit crimes themselves. The ambiguities about what it means for agents to commit a "crime" or to induce targets to do so pose a challenge to this model of policing. But there is another challenge. Undercover agents have a unique ability to define the central characteristics of the criminal organization they investigate; and to explain why they infiltrated it based on what they learn once they are there. The organization whose crimes ultimately justifies the deployment of undercover operatives is not one operating "independently" from the police; for that is largely hidden from the legal system. The one that legitimates the use of covert methods is the one observed—and influenced—by agents and informants. They do not merely react to criminal organizations; they shape them, or at least shape how the organizations are described. As a result, undercover policing has a unique ability to retrofit criteria of success. After agents manipulate targets and events, and the *description* of targets and events, they can define the threat that needed to be solved with infiltration. They can make the crime fit the investigation. Judges and politicians commonly lack an independent picture of the criminal organization under investigation that can allow them to assess the effectiveness and accomplishments of undercover policing. This creates a legitimation problem for covert policing as a practice, even though—indeed, because—it can find ways to justify each investigation.

German investigations of organized crime illustrate these general observations. The German undercover policing system expanded and took its recent form in reaction to a perceived

upsurge of organized crime in the 1980s and early 1990s. The 1992 statute did not define organized crime. Prosecutors and police have adopted one from a 1990 regulation promulgated to facilitate cooperation in the investigation of organized crime.[164] The regulation styles "organized" crime as "the planned commission of offenses of considerable significance, for profit or power, by two or more participants working together, dividing their labors and using guild- or business-like structures, or resorting to violence or other intimidation…or exerting influence on politics, media, public administration, justice, or the economy."[165] The criteria defining "organized crime" were manifold, including "structured, hierarchical organizations, often supported by ethnic solidarity, language, custom, social and family connections," and a catalogue of more than a dozen different areas of criminal activity included narcotics trafficking, arms dealing, prostitution, gambling, alien smuggling, counterfeiting, and burglary, theft, and fencing rings.[166] The regulation did not insist that an "organized" criminal gang fit all of these criteria. The gang only needed to match some of the many different possibilities.

Aside from the 1990 regulation, German law offered one other resource for defining organized criminal organizations. The criminal code defined an offense called "criminal association."[167] Yet few criminal organizations could qualify since the code demanded high levels of complexity and permanency. "What makes it so difficult to prove is that the association has to have a hierarchy with multiple people at the top; a pyramid doesn't qualify."[168] "A criminal association has to have a permanent command structure, and an established process of decisionmaking for the organization as a whole. It really only applies to already recognized entities like the Cosa Nostra and Nhdragheta."[169] For that reason, "although criminal association is our only organized crime offense, it's almost never used. Mostly, we charge it only for terrorism offenses. When we do use that section of the code, it's mostly to get approval for telephone tapping and other covert tactics; but that's pretty controversial, because everyone knows we won't actually charge the offense."[170]

Given the strict requirements of the criminal code, prosecutors typically rely on the more elastic 1990 regulation. Many criminal organizations fit some, but not all, of the criteria laid out in the 1990 regulation. As a result, the police have great discretion in defining which criminal gangs are "organized," and which not.[171] "Organized crime can be anything. Once I

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[164] Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Laender ueber die Zusammenarbeit von Staatsanwaltschaft und Polizei bei der Verfolgung der Organisierten Kriminalitaet; 15 RiStBV Anl. E.; *See also* Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Laender ueber die Inanspruchnahme von Informanten sowie ueber den Einsatz von Vertrauenspersonen (V-Personen) und Verdeckten Ermittlern im Rahmen der Strafverfolgung, 15 RiStBV Anl. D (1985, amended 1993 and 1994).

[165] *Id.*

[166] The 1990 regulation laid the groundwork for an expansion of undercover policing, and for an emphasis on intelligence-gathering, by calling for the of the sixteen states to conduct and work together on "proactive investigations" of organized crime in the preventive realm of police activity, for the purpose of "collecting information" that would spur more targeted probes.

[167] StGB 129.

[168] Interview with German prosecutor, March 12, 2004.

[169] Interview with German prosecutor, March 10, 2004.

[170] Interview with German prosecutor, May 19, 2004.

[171] The 1992 statute built the legitimacy of undercover policing around its usefulness in investigating organized crime. Thus it essentially entrusted the definition of the problem to the police.

investigated a gang of students who regularly used public transportation without paying the fare. This, too, was organized crime, because they had developed a system for insuring their members against fines; everyone paid some amount into a common pot, and if they got caught, the organization would pay the fine."[172]

This control over the concept of "organized crime" also allows investigators to circumvent constraints imposed by the 1992 statute. The statute tried to legitimate undercover operations by limiting them to a list of enumerated crimes and to a residual category, the "serious crime." The police can justify a covert investigation by styling the target as an "organized" entity, which suggest that its crimes are sufficiently "serious" to qualify under the statute. A prosecutor explained that "cigarette smuggling is not actually a predicate offense of deep cover operations. But you can still get approval if you can show that the smuggling operation is an organized endeavor, with some of the characteristics listed in the regulation."[173] In deciding whether a criminal venture qualifies as "organized," the police can emphasize those characteristics of organized crime that covert operations are well-equipped to detect. "There may be one guy falsifying vehicle documents, another guy repainting the cars, and a third guy driving them across the border. You get an undercover agent to offer logistical services. He rents them a hall, or a vehicle with false compartments. He offers to drive the vehicles, offers to provide some couriers, offers to get them the phone and a bunch of false documents, bribe the Customs officials, and now we know how they operate**."**[174]

Police not only interpret the definition of organized crime to justify their covert investigations. Occasionally they also manipulate the targets so that their activities look more like those of "organized" criminals. One indicator of organized crime is its ability to forge links to lawful realms of society. Undercover agents sometimes supply those links. "The criminals come to see you as their connection to that normal, outside world. Now you can make yourself useful to them, offer them services."[175] Deep cover agents could make themselves interesting to targets by pretending to have friends inside the Customs Service who could help people avoid border controls.[176] Others offered referrals to banks, lawyers, tax consultants, foreign contacts, and special airport access.[177] One official described an investigation in which the police had established a German distribution network for a Latin American cocaine organization that was seeking to gain a foothold in Germany. "The investigators in that case founded a whole front business for the group, transported the drugs for them, and even solicited customers."[178] Another official described an operation in which he provided a foreign gang with a combination of office space, banking connections, credit cards, transport, and storage space—in effect supplying many of the links between the legal and illegal realms that the 1990 regulation views as characteristic of organized crime and without which the gang might not have been successful in bringing their

[172] Interview with supervisor of German covert policing unit, May 26, 2003.
[173] Interview with German prosecutor, March 11, 2004.
[174] Interview with supervisor of German covert policing unit, June 2, 2003.
[175] Interview with German control officer and former deep cover agent, May 13, 2004.
[176] Interview with supervisor of German covert policing unit, May 27, 2003.
[177] Interview with German deep cover agent, May 12, 2004; Interview with supervisor in covert policing unit, June 2, 2003.
[178] Interview with German prosecutor, May 21, 2004.

business to Germany.[179] The link between gangs and lawful society that suggests "organized" criminal capacity can sometimes be an artifact of the investigation.

Another way in which undercover investigations can construct features characteristic of organized crime is by linking different gangs. A number of prosecutors and police officials described how covert agents or informants forged connections between different gangs and thereby turned their joint activities into more complex, organized crimes. "We once looked at some guys in Yugoslavia who had guns and wanted drugs. The covert agent was part of a drug organization in England that was looking for guns. The agent organized a meeting; but otherwise, really, these guys would never have met."[180] In another case, "an informant had met a Colombian in jail. We wanted to have the informant make arrangements to buy some drugs from the guy in Colombia, once they both got out. But the prosecutor balked and wouldn't finance the deal. So without money, we did something else. The informant had some contacts with a ring of Polish car thieves. The informant hooked the Polish car thieves up with the Colombian drug dealers, and in no time, the Poles sent cars to Colombia and got loads of cocaine in exchange. Everyone was happy."[181] From the perspective of the police, forging connections between gangs or between gangs and lawful society helped undercover operatives avoid direct participation in the crimes they investigated. But these links help create the organizational complexity that the investigation was designed to prove and that justified the operation.

The role of the police in forging (as well as discovering) organizational complexity may not always come out at trial. By using short-term shallow cover agents in the final stages of an investigation, the police may shield from discovery the role that deep cover agents played in forging links between targets and between targets and lawful society. Deep cover investigations provide the police with specific and comprehensive inside knowledge—but at the cost of necessitating a degree of secrecy about sources that makes much of that information unavailable to the trier of fact. Courts reconstruct the context of defendants' actions from highly selective evidence that omits much background information about how the police came to focus on particular targets, what was known about them in advance, how the government steered or assisted them, and which features of their crimes reflect the targets' own capabilities (as opposed the government's influence).

Given that police, at their discretion, can broadly interpret the definition of organized crime and can manipulate targets to better resemble "organized" criminals—what follows? If the government can shape the phenomena, and the description of the phenomena, to justify their investigations, what does this implications does this have for the way in which the police operate? To begin with, it means that undercover operations do not confine themselves to criminal milieus. They bring within their ambit both lawful society and criminal networks. Deep cover agents (and informants) are permanent fixtures in cafes, bars, restaurants, hotels, and other ordinary establishments, particularly those frequented by immigrants, where they rub

[179] Interview with supervisor of covert policing unit on May 27, 2003.
[180] Interview with former chief of covert policing unit, June 3, 2003.
[181] Interview with German control officer, May 27, 2003. Other police officials and one prosecutor also mentioned cases in which undercover operatives had connected groups of sellers with buyers or with providers of logistical services.

shoulders with law-abiding citizens along with the assorted mopes, hangers-on, occasional offenders, and committed criminals whom they collectively designate as "targets."

The government's power to shape the description of organized crime has exacerbated the gap between the goals that legitimate undercover work and the day-to-day practice of it. The 1992 statute authorized undercover policing in order to turn it into an effective tool against organized crime. The government's ability to creatively describe organized crime, to direct operations against targets they are good at detecting, and to retrofit definitions of success in order to accord with what investigation turn up have hidden costs. Police shy away from hard-to-penetrate organized crime networks while arresting easy-to-find small fish for the sake of impressive "stats." A police official saw the criminal code and the culture of prosecutors as two of the culprits. "Organized crime involves complicated structures; but the criminal code ties us to the elements of individual crimes. Sure we look at international connections and money flows. But we focus too much on individual offenders; and prosecutors aim too exclusively at the individual offense. We [covert agents] are essentially a service provider and are therefore dependent on others to come to us with requests for assistance. For example, I could imagine planting someone in a grouping of con-artists, maybe having him defraud another undercover agent to find out the channels through which they operate. But probing deeply into criminal structures is hard, and the prosecutors want immediate results. One can demonstrate profit motives and find loose groupings of criminals. We can't sell prosecutors on longer, more in-depth kinds of investigation."[182]

This development is reminiscent of the tendency David Garland observes in *The Culture of Control*.[183] Garland argued that American and British police agencies have responded to their inability to combat rising crime rates by revising performance measures from outcomes to outputs. In Garland's account, the police focus on seizures and arrests in place of lowered crime rates (which are harder to produce and control). German covert policing units are moving farther into the realm of controllable performance measures by shifting emphasis from the goal imagined by the 1992 statute (less organized crime in society) to the sorts of easily quantifiable outputs which transactional sting operations are reliably able to produce.

The pressure for "stats" and quick results encouraged police to charge discrete, easily provable offenses. But undercover investigations often yield far more information about criminal organizations then the government needs to prove these mundane, relatively unsophisticated offenses at trial. What becomes of this intelligence? The specialized divisions within federal and state prosecutors' offices and police agencies dedicated to investigating organized crime use it to create "Lagebilder" (descriptions of criminal organizations and their goings-on based upon intelligence gathered in a variety of reports).[184] The stated purpose of the "Lagebilder" is to create a fund of knowledge useful in supporting prosecutions and thereby reducing organized crime. But to some extent, the drive to make "Lagebilder" more capacious,

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[182] Interview with chief of German covert policing unit, March 10, 2004.
[183] David Garland, *The Culture of Control* (2001).
[184] Interview with German prosecutor, March 10, 2004. Which organizations do the police target when assembling a Lagebild? "We look for established, ongoing criminal structures which display a strong profit motive and will to power, a sophisticated division of labor, organized like a business, perhaps with influence on politics, the legal system, or the economy." *Id.*

subtle, and precise takes on a life of its own. Thus the structure of the German undercover policing system supports the accumulation of knowledge at some remove from the prosecution of criminals.

That there is a gap between the day-to-day practices of an institution and the goals that justified its creation is not, in itself, surprising. What is interesting about undercover policing is the significant empirical and conceptual difficulties of assessing the relationship between what the covert system does and what it is supposed to do (reduce entrenched organized crime). As I have argued, the power of police and prosecutors to interpret the definition of organized crime, to steer targets, and to characterize the information obtained by agents means that the undercover policing system commonly makes what it discovers look like what it set out to find. By retrofitting criteria of success, the system minimizes its rate of "failure." It further protects its aura of accomplishment by valorizing "craft skills" (such as analysis of intelligence and dexterity in infiltration) when outcomes are disappointing.

What the system does not see also preserves its aura. Police supervisors speak ruefully of complex organized crime networks that have not been infiltrated because of difficulty or the pressure for "stats." [185] Without an agent in place to assess the extent and destructiveness of these networks, their existence does not impinge as much as it might on the system's assessment of its success. Criminal networks that the police do not succeed in infiltrating may escape the system's notice as a problem it needs to address. Thus a prosecutor explained that, from his perspective, "there's no organized crime without an undercover agent."[186] The way that covert policing measures and creates knowledge about crime makes it difficult for judges, legislators, and the public to determine to what extent undercover operations address the organized crime problem that justified those operations in the first place. How can outsiders test claims about the pervasiveness of organized crime and the success of covert methods that have been made to justify the expansion of undercover policing? This is of particular concern because legitimacy is cast into doubt whenever an institution controls the criteria by which the utility of its powers is judged. The manipulation of performance measures is a problem for the legitimation of undercover policing in other legal system as well. But it is a special problem in Germany, insofar as Germany, unlike the United States, has sought to limit deep cover operations to only the most serious offenses, while giving the police considerable discretion in identifying such offenses. The police can subtly fit ends to means. They can describe what they are looking for (say, organized crime) in ways that match what they are best at finding.

VII. Conclusion, Part I: Four Senses of Covert Surveillance as a "Necessary Evil"

Germany and the United States both regard undercover policing as a necessary evil. But they mean different things by this. Let us consider four senses in which Germany views undercover policing as a necessary evil—and contrast these to American conceptions of the moral and legal compromises that covert policing entails. The first two senses capture the conflict of covert policing with entrenched constitutional values. These conceptions of covert policing treat it as problematic because it compromises the rights of targets and erodes several constitutionally mandated walls between different powers of the executive. The other two

[185] Interview with chief of German covert policing unit, March 10, 2004.
[186] Interview with German prosecutor, March 10, 2004.

senses in which infiltration constitutes a necessary evil depend on viewing it as intrinsically in tension with German conceptions of the rule of law and constraints on the exercise of government power. Under these two conceptions, undercover policing undermines compliance with the duties or role obligations of government actors and jeopardizes the integrity of the police. By contrast, the American regulatory system does not view covert operations as intrinsically problematic but as dangerous only when abused. Along with the misuse of infiltration to entrap the innocent, problems of control and accountability are the main objects of American concern.

To understand the distinctive dilemmas that undercover policing poses for Germany, it is necessary to appreciate the way in which the intelligence operations of Germany's APCs shape and color German fears about infiltration when used as a law enforcement tactic. The revelations about intelligence infiltration of the NDP and the resulting failure of the government's attempts to outlaw the party dramatically illustrated the risks to the state of entangling government agents with extremist organizations (or, by extension, with organized crime.) The scandal highlighted, first and foremost, the problem of government influence, whose counterpart in criminal investigations is the danger of entrapment. The problem with the NDP investigation was not, of course, that it corrupted the innocent. But the APCs' extensive infiltration of the party leadership raised the larger question: to what extent was the extremist character of the NDP the product of a symbiosis between government informants and "genuine" neo-Nazis? Did it makes things better or worse for the government that several of its informants in the party's top echelons had been terminated as informants because the eluded control by their handlers? Since the renegades were "genuine racists and anti-semites," could their words and deeds fairly be credited to the party which they helped lead?

That informants had drafted some of the rhetoric cited in the government's petition against the party raised related concerns about the official involvement in the core of the party's most objectionable activities—that is, about law-breaking by government actors. This was more than a scruple about the state dirtying its hands; the authorship of newspapers and pamphlets went directly to the question of who was responsible for what the party did. The ensuing scandal seemed to incorporate all the elements that make infiltration troublesome, in both the intelligence and law enforcement context. It highlighted not only the problems of influence on and undue involvement in prohibited activity. It also illuminated the dangers of losing control over operatives in the field. And it revealed the difficulties of coordinating parallel intelligence investigations in a decentralized system of political surveillance, since, the participating APCs had not known the identity of each other's informants and had mistaken them for genuine exponents of the party line. (That's how the informants' published sayings found their way into the government's petition.) Indeed, though the party was not prosecuted under the criminal laws, the scandal even highlighted risks to constitutionally protected trial rights. For the state did not deactivate its informants after filing its petition to ban the NDP; this gave infiltrators access to the party's strategy in defending against the petition (though the APC denied seeking such information.)

But perhaps what was most troubling about the scandal—and what makes infiltration a "necessary evil"—is that it was not at all clear, even after the fact, what the APCs could have done differently, given their responsibility for monitoring groups like the NDP. The APCs

discouraged informants from seeking high leadership positions in the NDP; when the informants did so anyway, the APCs deactivated them (though they did maintain contact with them afterwards.) Nor could the APCs easily have recruited informants from outside the neo-Nazi milieu to work within the party long-term—which of course entailed a risk that their operatives would go astray or would participate too actively and enthusiastically in the party's activities. And the problems of coordination and overlap by different APCs arose directly from the decentralized structure of German intelligence agencies—a conscious choice in the post-war attempt to avoid dangerous concentrations of power.

There were other reasons why it was to some extent unavoidable that the use of infiltrators would infect the legal proceedings against the party. Once the intelligence services' informants were in place, it would have been difficult to extricate them from the party after the government filed its formal petition to ban the NDP. Not only would this have been impossible with those former informants who had become renegades; but withdrawing informants from the NDP would have allowed the party to identify the turncoats. Withdrawing APC informants would also have deprived the APCs of their ability to monitor what the party was doing, and to prevent acts of violence, during the pendency of the proceedings. It also was not possible for the government to identify the informants to the court without telling the NDP—such an ex parte proceeding would have violated their right to represent themselves and respond to the government's petition. As one APC official complained bitterly, "there seems to be a conflict between surveilling [the party] and banning it," since each made the other virtually impossible.[187] The popular press did not fail to notice that the government's extensive infiltration--and the failure of its petition to ban the party—led to unprecedented electoral gains for this and other extreme right-wing parties in subsequent elections to state legislatures.[188]

These dilemmas were not lost on critics of undercover policing. But while German undercover policing suffers from the comparison to the work of intelligence agencies, American intelligence work benefits from the comparison to police work, and, indeed, derives its legitimacy from adherence to the "criminal standard." Such a standard is unavailable to Germany, which prohibits its intelligence agencies from enforcing the criminal laws. Germany gives its intelligence agencies wider scope to investigate inchoate threats and to infiltrate political organizations. But the resulting dilemmas and occasional scandals have shaped the problems of legitimacy for infiltration as a police tactic and have given content to these four different senses of the practice as a necessary evil.

Each of the four senses in which undercover policing is a "necessary evil" reflects distinct concerns and compromises, and each of these dilemmas has a counterpart in Germany's experience with infiltration as an intelligence tactic. Different though the "evils" of undercover tactics may be, the sense of necessity is common to all four conceptions. What is meant is *not* that undercover policing is necessary (e.g. as a tool against organized crime), but that the darker aspects of this practice—the "evils" or social costs they impose—are to some extent inescapable if the system is to use such tactics at all. To understand why the compromises on which covert policing rests create special problems of legitimacy in Germany, it is important to appreciate the shape which necessary evils take in the realm of political policing. Discerning the different ways

[187] Spiegel, 20/2002.
[188] Spiegel, 20/2002; 5/2002; "Nazis with a bouncing tent," Spiegel 40/04 at 44;

in which undercover policing may be thought of as a necessary evil also helps explain why the United States is much more apt to celebrate the exploits of undercover agents and why the legitimacy of undercover policing remains more elusive in Germany.

A. Adverse Impact on Privacy and Other Constitutional Rights

In Germany, undercover policing is a necessary evil in that it harms targets by invading their constitutionally protected right to privacy, along with other fundamental rights. Such privacy concerns were particularly salient when political groups were infiltrated, because informants of the APCs and of the police "state security" units were sometimes criticized as indiscriminate in their targeting of left-wing student groups.[189] One German magazine explicitly linked undercover policing to political infiltration, claiming that "the police will in the future use secret service methods to pursue drug dealers—but other, innocent people will also be affected."[190] German law responds to these concerns through legislation that carves out special limitations on the most intrusive covert tactics, namely long-term deep cover operations. Viewing covert policing as an invasion of privacy assimilates it to other police powers, like searches and seizures. While these tactics burden civil liberties, they do so permissibly, through police compliance with procedural constraints such as warrant requirements. Because civil liberties may lawfully be compromised in the name of security, thinking of covert surveillance as invasions of privacy allows the legal system to justify the burdens that covert policing imposes on rights. This regulatory approach also entails the use of procedural constraints on how covert tactics may be authorized, alongside substantive limits on what undercover operatives may do.

German privacy law protects dignitary interests, while American conceptions of privacy emphasize physical privacy in the home along with decisional privacy or autonomy. Germany's concern with individual dignity is part of the German Constitution's concern with safeguarding the "free development of personality," in direct reaction to the totalitarian oppression and violations of personal dignity under the Nazi regime. Invasions of privacy also have special salience for residents of the five new eastern states who remember the encompassing surveillance practiced more recently in the GDR. Given these concerns, police infiltration is deeply problematic. It interferes with the rights of all persons to control the face they present to the world; to reveal too much about the intimate details of a person's life; and to disrupt personal relationships. Giving constitutional status to these harms means that the government must satisfy certain requirements before inflicting them. Constitutional protection entails a warrant procedure, a showing of need, and statutory limits on the crimes that the government may target in this way.

By contrast, the United States legal system does not treat undercover policing as an *intrinsic* invasion of privacy rights. Undercover policing is not recognized as a search or seizure under the Fourth Amendment.[191] Because they have no Fourth Amendment significance, undercover investigations require no warrant and no showing of probable cause or even

[189] "Undercover student," Spiegel 30/03 at 41; "Undercover agents recalled; surveillance of left-wing groups halted," FAZ August 5, 1992, at 4; ; "Spaetzle-Stasi," Spiegel 35/92 at 86.
[190] Spiegel 24/90 at 32.
[191] The weighing of costs and benefits is entrusted entirely to the executive and remains judicially unreviewable.

reasonable suspicion as a matter of constitutional law.[192] Absent a legally recognized impact on constitutional rights, American undercover tactics need not be reserved for a subset of serious crimes, or for those categories of cases in which conventional tactics would not work. Indeed, in the United States, the use of covert tactics is sometimes celebrated for their leveling effects on the pursuit of elite and non-elite offenders. Privacy protections, of course, disproportionately benefit those offenders who are able to interpose lawyers between themselves and the coercive apparatus of government. Like other covert alternatives to coercion, police infiltration can level the playing field.

Germany's distinctive concern about rights gives rise to special problems of legitimacy. Since Germany protects privacy by limiting deep cover operations, critics have a foundation for mounting new legal challenges to undercover policing. These include challenges to less regulated undercover tactics, like the deployment of informants or "shallow-cover" agents, whose use also burdens privacy, or to the inadequacy of confrontation rights for criminal defendants. Thus, once the legal system recognizes undercover policing as a problem for fundamental rights, and provides protections for some of these, new conflicts with higher-order norms may emerge, as other rights are invoked. This in turn imperils the legitimacy of undercover investigations along the second dimension of "legitimacy as fit;" the congruence of the practice with other basic norms.

Subject matter constraints give rise to different concerns about deep cover investigations. Because Germany treats undercover policing as intrusions on privacy, it permits such operations only against the most serious offenses, particularly organized crime. Ordinary offenses are simply not sufficiently dangerous to warrant such invasive tactics. But this justification allows for skepticism about whether the networks against which deep cover operations are deployed really fit the description of "organized crime." What makes the success of undercover investigations so difficult to assess is that infiltrators influence the organizations they infiltrate, and possess power to define what constitutes organized crime and thus to fit what they find to what they were looking for. Lawmakers therefore lack a truly independent yardstick for measuring the accomplishments of undercover stings. Under the model of legitimacy-as-fit, the legitimacy of a regulated practice depends on the extent to which it serves the ends—such as fighting organized crime—in whose name the practice was authorized. The possibility of evaluating the success of covert policing in fighting organized crime therefore depends on the possibility of evaluating the results of undercover stings – the crimes uncovered—according to some criteria not wholly in the control of the police.[193]

These kinds of challenges are largely missing from the American scene. In part, of course, this is due to the fact that American undercover agents are expected to testify. But few other constitutional claims have been vindicated. In theory, defendants may invoke substantive due process rights to challenge undercover tactics that "shock the conscience" and violate "fundamental fairness." And after the government brings formal charges, a target's Sixth Amendment right to counsel ensure his protection against undercover questioning, at least about the crimes with which he is charged. But this leaves the government significant leeway, even

[192] However, the police may need evidence of "predisposition" to rebut a claim of entrapment.
[193] Willard Hurst, *The Legitimacy of the Business Corporation,* 1970)(emphasizing the importance of independent performance measures to the legitimacy of institutions.)

after indictment, and even in prison. And absent egregious misconduct, constitutional claims against undercover tactics rarely succeed. In the United States, the language of rights has rarely provided a salient or successful model for challenging undercover stings.

B. Systemic Effects: Undercover Policing and the Separation of Powers

There is a second sense in which Germany sees undercover policing as a necessary evil. Covert operations erode distinctions between "preventive" and "repressive" powers of the police, and between the collection of evidence and pursuit of intelligence. This parallel system of regulation means that the police can conduct undercover investigations in either their exploratory, danger-preventing capacity or in their crime-solving mode, depending on whether they have developed enough specifics about a planned offense to launch a regular criminal investigation. But when the police infiltrate organizations for crime prevention purposes, they may not gather evidence. When they do conduct covert operations in their law enforcement capacity, they may *only* gather evidence--as opposed to intelligence about risks that have not yet matured. Problems arise because the nominal pursuit of evidence can spur the pursuit of intelligence—particularly with the advent of the reforms that authorized deep cover units and created specialized covert units.

Concerns that preventive undercover investigations may become too much like intelligence operations embody fears that the preventive investigations may be tempt the police, like the APCs, to forego taking action against lawbreakers for the sake of keeping their operatives in place. The popular press has repeatedly published exposes alleging that the APCs have protected well-placed informants by allowing neo-Nazi groups to produce soundtracks and operate unimpeded.[194] One such story claimed that the APCs had failed to pass along evidence of a murder committed by a neo-Nazi group, though their informant had obtained the murder weapon from and had obtained incriminating admissions from those who committed it.[195] Undercover policing could lend itself to similar abuses once its object became intelligence, rather than evidence.

The confluence between covert police work and intelligence gathering has generated a great deal of controversy about the whether covert methods violate the principle of separation between the intelligence and law enforcement prerogatives; about the constitutional status of the principle of separation; and about its continuing vitality as a constraint on executive power. Memories of the ways in which the Stasi used its covert powers in the former GDR only increased unease about the potential misuse of deep cover investigations as a method of social control. But there are no ready means of reconciling covert tactics with the requirements of federalism or the principle of separation of intelligence and police agencies. While constitutional rights may be traded off against law enforcement imperatives, there is no analogous repertoire of interest-balancing justifications and warrant procedures for compromising these functional divisions of government. If the regulatory system permits seventeen domestic intelligence agencies to infiltrate criminal and terrorist networks parallel to similar efforts by seventeen state police forces and the federal BKA, it must accept redundancy and functional overlap. It must tolerate some confluence of preventive and repressive operations. And it must derogate from

[194] **"**Professional Rambos,"Spiegel 33/02.
[195] "The Victory of the Informant," Spiegel 19/02 at 50.

the principle of separation between intelligence services and police, or else reinterpret that requirement.

To accept undercover policing as a necessary evil in this second sense is to confront not only concrete harms to the constitutional rights of identified targets but also diffuse harms through the dilution of principles that structure government. Under the theory of legitimacy-as-fit, this "necessary evil" embodies a problematic mismatch between undercover policing and the fundamental demands that Germany's legal system places on the organization and differentiation of executive powers. This tension is unavoidable to the extent that undercover investigations intrinsically blur the line between preventing future crimes and proving past ones and resists neat distinctions between evidence and intelligence. This erosion of boundaries is most severe for deep cover operations.

That undercover policing generates intelligence along with evidence is of less concern in the United States, which requires the FBI to investigate domestic security threats alongside its law enforcement mission. Controversies about the FBI's role in infiltrating religious and political organizations domestically have focused on the misuse of that power against peaceful organizations; on the effect of such surveillance on the exercise of First Amendment rights; and the instigation of crimes by agents provocateurs. This was less a concern about the relationship between the law enforcement and intelligence responsibilities of the FBI than a direct critique of the way in which the FBI carried the latter of these missions. The Department of Justice curtailed these abuses through the Levi Guidelines of 1976, which limited the FBI's domestic security investigations by permitting the FBI to target only those organizations that pursued a violent agenda. By contrast, Germany's domestic intelligence agencies have enjoyed a wider authority to infiltrate extremist organizations, without needing to demonstrate a link to violent criminal activity.[196] Germany's greater willingness to deploy intelligence agencies domestically arose partly from the desire to catch future Nazis in the Beer Hall stage and partly in reaction to the Cold War and the Federal Republic's tense relationship with the GDR.

As we have seen in Section V.B.4, American concerns about the undercover operations focus less on the proper demarcation between law enforcement and intelligence investigations than on the question of what the proper ambit of domestic intelligence investigations should be. Thus, American concerns about the legitimacy of such operations focus largely on First Amendment concerns, as a counterpart to Germany's solicitude for individual privacy. American domestic security investigations become less legitimate – more intrusive on First Amendment rights -- to the extent they stray from the criminal standard and the law enforcement model and set their sights on political or religious organizations that have not yet manifested involvement in criminal activity. To the extent the United States has worried about the relationship between intelligence gathering and law enforcement, it has focused on the interaction between the FBI's law enforcement mission, on the one hand, and its *foreign* intelligence and *foreign* counterintelligence responsibilities on the other. Through the Gorelick memorandum, the United States formalized the long-standing practice of walling foreign intelligence and counterintelligence investigations off from law enforcement probes. But this separation had

[196] However, scandals like those surrounding the investigation of the NDP have raised challenges to the use of infiltrators as agents provocateurs, to the saturation of leadership positions with infiltrators, and to the lack of coordination between Germany's seventeen domestic intelligence agencies.

more to do with the regulation of electronic surveillance than with undercover investigations per se (and has, like the Levi limits on domestic infiltration, been repudiated, in the wake of the September 11 attacks.)[197] In the United States, the last remaining "wall" is that between the domestic intelligence community and the military because the Posse Comitatus Act prohibits the domestic deployment of the armed forces. But this has few implications for the use of undercover tactics by American law enforcement agencies. The resemblance of Germany's deep cover policing tactics to the methods of German domestic intelligence agencies poses a fundamental and continuing challenge to the legitimacy of covert operations--one which has no real counterpart in the American legal context.[198]

C. The Impact on the Duties and Roles of Government Officials

Undercover policing not only challenges constitutional values, including individual rights and separation of powers. It also stands in tension with Germany's conception of the rule of law and what this requires of government actors. The third and fourth senses in which undercover policing is a "necessary evil" for Germany flow from this conflict. Mindful of Nazi crimes, the German understanding of the rule of law prohibits covert operatives from committing offenses, even when they do so for investigative purposes. Yet undercover agents and informants must act like "criminals." Likewise, covert operations require the police to remain passive while targets commit crimes in order to gather evidence and to avoid terminating the investigation prematurely. Yet the principle of legality may require investigators to intervene. Undercover stings require operatives to offer their targets opportunities and enticements. Yet Germany prohibits entrapment, while treating all undercover investigations as involving some degree of it. The principle of legality and the substantive norms derive from Germany conceptions of the rule of law and what it requires of the police. The legal system defines departures from the principle of legality and the substantive norms as improper—as derogating from the duties and acceptable roles of government officials—even as the system commits itself to a tactic that necessarily requires departures. Undercover policing may be viewed as a necessary evil to the extent that its success requires and depends on deviation from these norms.

Germany's uncompromising norms help legitimate undercover policing by distinguishing it from the work of Germany's intelligence agencies. The APCS, which are exempt from the principle of legality tolerating illegal activity and allowing informants to participate actively in crimes, have been criticized, and not only during the NDP scandal, for tolerating illegal activity

[197] The "wall" was motivated by the Justice Department's concern that information obtained through FISA warrants would not be usable as evidence, and might taint the FBI's law enforcement mission, if courts determined that the FBI had used FISA procedure to circumvent the federal warrant procedure that governed law enforcement wiretaps. Since undercover policing required no warrant, there was no analogous concern that the use of covert operatives in intelligence operations could be used to circumvent constraints on the use of infiltrators in criminal investigations. Of course, if infiltrators who worked on foreign intelligence investigations were expected to remain secret, using their insights in criminal investigations created a risk that their identity might become known.

[198] Indeed, American critics have complained that the FBI's counterintelligence program has been too heavily influenced by its law enforcement ethos, focusing too much on gathering evidence of past assaults and too little on the prevention of future ones. Whatever problems this may pose for domestic intelligence work, it does little to undermine the legitimacy of infiltration as police work. Thus, while Germany worries about the police becoming too much like its domestic intelligence agencies, the U.S. has the opposite worry, namely a concern that the FBI's intelligence operations being too influenced by its law enforcement mission.

and for allowing their informants to participate actively in crimes-—for example by producing and distributing neo-Nazi soundtracks and song collections, writing racist tracts (and, as one article claimed, allowing an informant to assist in the murder of a suspected turncoat.)[199] More problematically, the NDP scandal highlighted the ways in which infiltration can create or at least exacerbate what it seeks to expose. Thus Germany's experience with political infiltration may have reinforced legislators' unwillingness to provide operatives with leeway to commit or tolerate crimes. And to the extent Germany draws its conception of undercover policing from the activities of its intelligence agencies, its expansive notions of entrapment in the criminal law may owe something to long-standing concerns about political infiltration and its diffuse and distorting effects.

In practice, police, prosecutors, and judges work together to mediate the conflicting demands of, on the one hand, the rule of law (as expressed through the principle of legality and the substantive norms) and, on the other hand, what undercover agents and informants must do for the sake of access and efficiency. But the contrary demands placed on covert personnel can never be fully reconciled because there is a contradiction between what the system prohibits and what it not only tolerates but requires. Judges, prosecutors and police invoke criminal law doctrines of intent, causation, duress, and necessity to distinguish the pretense of crime from the reality and thus to protect undercover agents from criminal liability. They selectively suspend the pretense of complying with the substantive norms when the investigative stakes are high enough. Insofar as the covert policing system depends on police, prosecutors and judges making such accommodations, the regulatory framework can be said to institutionalize ambivalence about the compromises intrinsic to covert policing—at once prohibiting compromises and depending on them. Worse, the invisible nature of these accommodations rests on the unofficial exercise of discretion of prosecutors, undercover agents, and other police officials in setting the limits of what they will tolerate. Such discretion is itself deeply problematic for a legal system committed to the principle of legality.

The tension between the rule of law and covert policing poses problems for undercover operations in the United States – but less than in Germany. FBI regulations allow undercover agents and informants to engage in "otherwise criminal activity" that has been properly authorized in advance. The public authority defense bolsters this acceptance of what would otherwise be illegal conduct by giving police and informants alike a complete defense against criminal charges. In the United States there is thus no case-by-case assessment of what undercover conduct is "really" criminal, in the manner that Koerner invoked. Nor is there a principle of legality requiring the police to pursue all criminal cases. Police and prosecutors have discretion in preferring charges and selecting whom to prosecute. The entrapment doctrine applies only to the most egregious pressures or temptations. There is therefore less tension in the United States between the official rules that govern covert policing and the practice on the ground, and therefore less of a concern about the legitimacy of these practices.[200] American

[199] E. g. "Professional Rambo," Spiegel 33/02 at 49; "Victory of an Informant," see above.

[200] Nonetheless, even in the United States, there are limits to the leeway given to undercover agents and informants, and to prosecutors' willingness to tolerate otherwise criminal conduct, moral hazards to operatives, and harms to third parties. Likewise, substantive due process and the entrapment doctrine set outer limits on permissible degrees of government involvement in criminal activity and on acceptable incentives, opportunities, and assistance to the targets of government stings.

courts and commentators do not find it inherently troubling that undercover agents and informants can dangle temptations, or participate in some criminal activity, or allow crimes to go forward unimpeded so long as harm is prevented. It is not the practice but the abuse of undercover tactics that generates concern.

One might say that the United States applies a largely utilitarian calculus in deciding whether to tolerate otherwise criminal activity by its agents, informants, or its targets—subject, however, to a deontological override for some serious crimes that will not be allowed even if there is a net benefit to permitting them. By contrast, Germany's default rule is a deontological prohibition of criminal conduct. Practitioners can manipulate that default rule using criminal law categories. If those do not help, they can invoke a utilitarian override when the crimes being pursued are serious enough and the offenses being committed are relatively slight. Both Germany and the United States compromise between the benefits of (selectively) permitting wrongdoing and the duty to limit wrongdoing. But Germany's uncompromising default rule makes the management of this conflict central to covert policing, and not merely an issue at the outer margins. Moral compromise is at the heart of German practices. This is true even though Germany permits less "criminal" activity by agents and informants than the United States because the substantive norms establish the default rule against which covert practices are judged. The notion that covert operations bear an inevitable taint is central to Germany's sense of undercover policing as a necessary evil. The unavoidable clash of covert policing with normative expectations creates a problem for the legitimacy of undercover operations. The theory of legitimacy-as-fit identifies a legitimacy deficit whenever a police practice depends for its success on the creative reinterpretation and partial suspension of the ground rules of the criminal justice system.

D. Risks of Abuse and Problems of Control

Both Germany and the United States view undercover policing as a necessary evil in an "actuarial" sense in that some significant probability of agents going astray must be factored into the social costs of the practice. The risk of rogue agents is more significant, and the difficulties of guarding against it greater, for covert operations than for conventional policing. There is, then, a pronounced tension between covert tactics and the rule of law because of the inherent tendency of undercover policing to elude oversight and control and corrupt its practitioners.

The "actuarial" risk derives from the close contacts between agents, informants, and targets. Immersion in criminal milieus exposes agents to disorienting uncertainties about how to inhabit a role that requires them to become like their targets and makes it difficult for agents to distinguish between the person they are and the person they pretend to be. Such confusions and conflicts of loyalties are even more severe for informants, whose identification with law enforcement objectives is both temporary and incomplete—subordinate, perhaps, to the aim of securing a lower sentence, earning a bounty, or putting rival offenders out of commission. These moral hazards are important both to Germany and the United States.[201]

[201] Both legal systems address these concerns through improved means of selecting and training undercover agents. In the United States, reforms have centralized oversight of undercover investigations, made the FBI accountable to Congress for the successes and failures of their undercover operations, and sought to ensure that agents obtain proper authorization for otherwise criminal activity and for the ways in which they interact with informants.

Once again, however, the inherent difficulties of oversight have a special dimension in Germany. First, it may be more difficult in Germany to determine what constitutes an abuse. In responding to Koriath's "confession," Koerner justified the ban on undercover law-breaking by listing a variety of past abuses whose recurrence the substantive norm is intended to deter. Some of these were straightforward cases of financial corruption and complicity in drug-dealing; but in others, the police had purchased drugs from a target and then offered part of the seized quantity for sale to the target's suppliers, for the purpose of building a case against them. The officers' law enforcement purpose did not shield them from liability, as it would their American counterparts. Defining and identifying abuses becomes difficult when the legal system criminalizes investigative behavior that is not classically corrupt and when the distinction between permissible and impermissible participation in criminal activity is a subtle one. (At the same time, however, Germany's ban on committing crimes undercover may deter more abuses than a sweeping exemption from criminal liability, which invites American undercover operatives, particularly informants, to invoke fictitious law enforcement purposes in justifying seemingly criminal behavior.)

There is a second reason why the "actuarial risks" of undercover policing pose special problems in Germany, beyond those which inhere in the practice *per se*. The ways in which Germany has institutionalized undercover investigations have created new challenges to control and have therefore heightened anxieties about the legitimacy of such operations. Statutory reforms legitimated the use of elaborate and costly cover stories for deep cover agents and led to the creation of separate covert policing units staffed by specialized personnel. These units deploy deep cover agents for long-term assignments, requiring them to live undercover for up to seven or ten years. By contrast, undercover policing is not defined as a separate career path in the United States. American undercover agents are deployed for much shorter periods of time, even on deep cover assignments, and are reintegrated into their agency and reassigned to regular investigative duties in-between assignments.

In Germany, turning covert policing into a specialized long-term career path has professionalized covert agents and has helped recoup the system's investment in training and infrastructure. But this long-term use of covert personnel intensifies contacts between undercover agents or informants and the targets they investigate. This increases the likelihood that covert operatives will witness crimes, participate in the crimes, or simply lose their bearings and go astray. And once they win targets' confidence and enter into longer-term relationships with them, agents also become more likely to influence the crimes they investigate or to alter the course of events through their presence, even without overt provocation or entrapment. The danger here is not just the familiar concern that undercover agents will deviate from the demands of the substantive norms. In addition, Germany worries that agents will deviate in ways that go beyond what police supervisors and prosecutors will accept or even know about. That deep cover units maintain close contacts with agents' families and sometimes send other operatives to monitor agents' doings is some indication of how seriously the police themselves take these risks. At the same time, the secrecy surrounding deep-cover operations, and the likelihood that covert agents will never have to testify, decrease the likelihood that abuses will be exposed and corrected.

In the United States, covert policing periodically produces scandals like that which erupted only recently, when a single Texan undercover agent sent hundreds of residents of a single town to jail on fabricated claims that they had sold him narcotics. But deep cover policing has not, by and large, become a separate long-term career path for police officers. A system of rotating undercover agents out of deep cover roles and reintegrating them into regular investigative units reduces the pressures that lead to abuse. When they do occur, scandals like that in Texas result from a lack of supervision and professionalism—not, as in Germany, from a hypotrophy of the laudable impulse to make covert policing more professional through specialization and the long-term commitment of trained personnel. Ironically, then, it is the best, not the worst impulses of the German system that create the conditions for abuse.

Conclusion Part II: Implications of German Reunification for the Legitimacy of Covert Policing

Both Germany and the United States treat undercover policing as a necessary evil – and in a variety of senses. But each system has its own understanding of what makes covert policing a necessary evil. These understandings reflect disparate compromises; and they produce very different deficits in legitimacy. In Germany, covert policing inevitably confronts constraints imposed by Germany's interpretation of constitutional rights, its differentiation among the powers of the executive, and its conception of the rule of law. In the United States, by contrast, undercover policing confronts fewer threshold objections to its legality. American entrapment law and internal agency regulations invoke similar concerns about the corrupting influence of infiltrators and the risks to their own integrity. But these concerns are simply factored in as costs of the undercover methods or as outside limits on what is permissible. They do not undermine the legitimacy of the practice *per se* because they do not call into question its compatibility with constitutional values and the rule of law itself.

German anxieties about undercover policing may well reflect the larger fears and uncertainties of a country redefining itself in the wake of Reunification. Germany first codified the rules for undercover policing in 1992, shortly after absorbing the five new states that arose in the territory of the former GDR.[202] Reunification brought with it new crime problems and an increase of right-wing extremism in the eastern states, requiring a rethinking of crime control strategies and renewed vigilance by the domestic intelligence services. This in turn gave greater impetus to the use of undercover tactics by law enforcement as well as the APCs. But the incorporation of a new population from a radically different regime also confronted Germany with difficult questions about the nature of the reconstituted whole. How would he state be altered by the territories, peoples and problems it had absorbed?

One worry which Reunification presented was the growth of right-wing extremist parties like the NDP in the eastern states. This presented serious challenges to the deployment of undercover agents—particularly the risk of detection (or counter-surveillance) by targets. There was also a possibility that the undercover agents would be required to commit crimes. Scandals about APC informants producing neo-Nazi soundtracks and drafting neo-Nazi tracts intensified these fears. But there was also the risk that covert operatives would not only pretend to be right-

[202] I am making no claim, however, that Reunification was causal; other European nations, too, enacted legislation about undercover policing in the early 1990s.

wing extremists but switch their allegiances. Thus there were scandals about APC informants warning targets about upcoming police raids, so that the targets could hide incriminating publications.[203]

The anxiety, then, was that undercover agents might lose their identity and become like those whom they infiltrated. This fear resonated with other concerns that preoccupied German legal and political culture from the early 1990s onward. After Reunification, the west German popular press and government were concerned with questions of loyalty and individual responsibility for repression in the GDR. Who was compromised by service to the East German regime, and who was not? Could the police of the Federal Republic accept police officials from the former GDR? Could it accept those who had cooperated with the Stasi? Some officials from the Ministry of the Interior rejected that possibility out of hand, because "these guys would have to arrest themselves!"[204] An individualized assessment was eventually worked out. In a case-by-case evaluation, officials from the Federal Republic would examine the nature and extent of an east German officer's cooperation with the Stasi. Had an officer simply provided generalized assessments ("Stimmungsberichte") or contributed to the oppression of particular individuals? Had he maintained an "inner distance" from what the Stasi required him to do?[205]

But even those east German officers who were accepted into the ranks of the police confronted western suspicions about their innermost loyalties. As Andreas Glaeser demonstrated in his monograph about the reunification of the Berlin police,[206] west German police responded with scorn or distrust if east Germans had positive things to say about even unpolitical aspects of life in the former GDR. Thus the system held out to eastern officers (as it sometimes did to undercover agents) the possibility of being redeemed by inner distance from wrongful conduct, that is, from what they had to do to fit into their surroundings. But it also suspected inner distance and recalcitrance in converts to the new regime and insincerity in those too eager to discard their old identity. If undercover agents confronted skepticism about whether they would remain loyal to state or "go over" to their targets, the issue confronting the easterners, from the standpoint of the western press and of government agencies was the inverse; whether the easterners secretly remained loyal to (and compromised by) the values of the old system or had successfully transferred their allegiances to the new. If concerns about undercover agents focused on what they would become, fears about easterners centered on what they had been. The form which these suspicions took was different. But in calling into doubt the loyalties and the very identities of those whom western media or employers regarded as "tainted" they were the same.

All this fed a climate of obsessive speculation in the west German popular press about what people from the east might have secretly done; what they had become after Reunification; where their loyalties lay; and whether they were who they appeared to be. Western skeptics cast many East Germans (particularly former Stasi officers or informants) quasi as undercover agents from a totalitarian past infiltrating the democratic institutions of the west. In the years after Reunification, west German newspapers and magazines reported that "about 500 ex-agents [of

[203] "Treason in Taka-Tuka Land," Spiegel 24/03 at 50.
[204] "They'd have to arrest themselves," Spiegel 39/90 at 18.
[205] FAZ Feb 12, 1993, 5-6.
[206] Andreas Glaeser, Divided in Unity: Identity, Germany, and the Berlin Police (Chicago, 2000).

the Stasi] are believed to mingle, unrecognized, in high and highest positions in the service of the state and in the economy"[207] and that former Stasi agents were becoming teachers and indoctrinating the young;[208] A public debate raged about whether to amnesty Stasi informants.[209] The debate essentially centered on the definition of treason. Foreign espionage seemed to lack the element of betrayal that figured in spying on one's own compatriots and one's state. But where did this leave undercover policing? The media sometimes portrayed infiltration of criminal organizations a form of honorable espionage into a closed-off entity foreign to lawful society; but at other times, journalists critical of the practice described it more as a trap for fellow citizens whom informants implicated for personal gain.[210]

But western fears of infiltration from the east extended beyond concerns about former Stasi agents to easterners with no Stasi past. Thus, a Spiegel reporter asked Heinz Eggert, then Saxon Minister of the Interior, "The status of civil servant presupposes a special allegiance to our state. Can one really expect such loyalty from police officers who for many years supported a system of oppression?" Eggert responded, "..What can one do? There weren't seventeen million resistance fighters in the GDR."[211] Implications of collective opportunism—of having been a nation of informants and collaborators with injustice—were galling to eastern Germans who had participated in overthrowing the GDR regime and had not only supported but demanded Reunification with the west. Given the disappearance of the east German government, intimations of their divided loyalties were puzzling; there was no regime left to command their allegiance.

Eastern anger at western distrust had implications for the legitimacy of undercover policing. Surveillance by police and APCs—who were at first largely staffed by westerners—was received as a kind of colonial imposition, and worse, as a resurgence of tactics and forms of social control that they associated with the Stasi. Thus informants and undercover tactics *per se* were highly discredited, posing new dilemmas for police and intelligence agencies alike. The Spiegel magazine reported in 1991 that western APCs met with great resistance in their attempts to establish APC bureaus in the east.[212] The Spiegel reported that the APCs had been largely unsuccessful in trying to convince locals that "the APCs is as different from the Stasi as a church from a bordello."[213] To easterners, the Spiegel reported, "It's a new company, but the same old business." To easterners the purpose of covert tactics was unclear. Were they to be protected from criminals? Were easterners to be protected from themselves? Or was the west being protected from the east? Matters were further complicated by the fact that the APCs report to parliamentary committees which, in many eastern states, might include representatives of the PDS, that is, the continuation of the GDR's communist party. Western officials claimed this

[207] "Oath and Honor," Spiegel 8/91 at 36.
[208] "Pure insanity," Spiegel 12/90 at 92; *see also* "Stasi-Collaborators taken on," FAZ September 6, 1990 at 2
[209] "They have to arrest themselves," Spiegel 39/90; "Federal Council rejects proposed law on Amnesty for Spies," FAZ September 8, 1990; "Historic Compromise," Spiegel 26/90 at 30.
[210] Insert Spiegel cites.
[211] "Taking People as They Are," Spiegel 51/91 at 55.
[212] "Without a Trenchcoat," Spiegel 19/91 at 111 (he German term is "leathercoat," which is connotes the Stasi in much the way trenchcoats connote intelligence services in general)
[213] Id.

would undermine the ability of the APCs to function[214]—confirming eastern fears of western mistrust.

And in the wake of Reunification, even west German critics of covert tactics took up the east German analogy. One Socialist minister from Bonn described efforts to legalize undercover tactics as "an attempt to establish a police state in a democracy."[215] "Secret investigations, secret proceedings, secret police, secret agents—they are all hallmarks of an informant-and surveillance state," he argued.[216]

Such fears help account for the pervasive sense, in Germany, that undercover policing was a "dirty business," and, at best, a necessary evil, and necessarily compromising to the state, in all the ways explored above. The turmoil surrounding Reunification may also help explain—if only in part—why it became essential to the legitimacy of undercover police investigations to prohibit undercover agents from committing or participating in or tolerating crimes. To be sure, even APC agents have no legal right to engage in criminal behavior. But the police cling to the principle of legality as setting them apart from the APCs and as making it, if not impossible, at least harder for them to turn a blind eye to unlawful conduct by targets and agents alike. That undercover policing was promoted as a tool against organized crime also made sense in a political climate where the implicit and often explicit accusation against surveillance tactics was that they were being turned on society as a whole. Organized crime—which was characterized as hermetic, and thus safely sealed off from society—formed a safe target for such highly contested tactics. Judicial and prosecutorial supervision, disclosure requirements, and professionalization of covert operatives were needed to legitimate undercover tactics in a political climate in which the police found themselves shadowboxing not only with its past under the Nazis but with the fearsome public images of domestic intelligence services from west and east alike. Western anxieties about being infected by chaos from the east may have contributed the decision to legalize and expand undercover policing—as a necessary evil, that is, a kind of inoculation with a safe dose of the poison from which it seeks to protect society. But the legitimacy of the newly legalized powers remains bedeviled by eastern reactions to western mistrust and by western fears about reinventing Stasi-like surveillance institutions or of reproducing the recurrent aberrations of its own APCs.

Ultimately, the legitimacy of a practice depends not only on the skill with which a legal system crafts exceptions to higher-order norms with which the practice seems to conflict. These exceptions themselves reflect on the viability of the system's ideals. Germany's fears about the extent to which covert policing compromises these norms lend undercover operations an unresolvable moral and legal ambiguity which may be Germany's greatest protection against complacency about the powers of the police and the greatest obstacle to the rescuing these practices from the twilight in which they continue to languish.

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[214] Id.
[215] "Lies and Deceit," Spiegel 27/90 at 68.
[216] Id.