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Policing the Police

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When "We, the People of the United States," adopted a Constitution in 1788, our goal was liberty—the freedom to develop our talents, to become most fully ourselves. Toward that end, in federal and state constitutions we allocated power among three coordinate branches: an executive, a legislature, and a judiciary. The legislature would enact laws—general rules ordinarily reflecting the will of the majority that must not run counter to fundamental rights. The courts would expound on and apply these laws to do justice. But primarily the executive, including police and prosecutors, would ensure that the legislature's general rules were faithfully translated into reality. We depend upon the executive principally to maintain order and punish crimes so that we may cooperate and compete within limits, striving for scarce rewards according to posted rules. Still, from our infancy as a nation we have understood that public officials are human beings. "Ambition must be made to counteract ambition," declared Madison (*51st Federalist*); each branch would help check the others from expanding individual power at the cost of the People's liberty. Lest we become a police state, the executive must be kept in check, and policing the police includes restraining them from overzealousness.

The Founders feared not only that the executive would seize power, but also that they would sell it. Powerful public cheats corrode our constitutional core, for the Plan works only as long as most citizens believe that legal commands mostly translate into facts of life, that by and large public officials honestly enforce laws and carry out orders.

When the people lose this faith; as we catch on that official cheating pays; when we come to believe that really two systems of rules operate—one on the books for ordinary citizens and another, more favorable code, for the powerful—we become cynical and calculating, clawing in a world of hypocrites, doing whatever we can get away with. When corruption becomes rampant, we may pledge, but we feel no allegiance.

CORING THE ROTTEN APPLE: CORRUPTION IN NEW YORK CITY

"The policeman is convinced that he lives and works in the middle of a corrupt society, that everybody is getting theirs and why shouldn't *he*, and that if somebody cared about corruption, something would have been done about it a long time ago," Officer David Durk concluded in his publicly televised Knapp Commission testimony. Through the efforts of Durk's partner, Officer Frank Serpico, as well as Robert Leuci, a narcotics detective who voluntarily confessed his own corruption and agreed to document that of his former friends and associates, a dismal portrait emerged of a widely fixed New York City criminal justice system.

During the investigative stage, prior to arrest, cases were sold out, corrupt cops warning targets of wiretaps and warrants. At the *time of arrest*, defendants would pay to be released on the spot. Or evidence could be altered later, especially in narcotics cases with confiscated contraband resold. Arresting officers could write open-ended complaints enabling them to testify consistently with the facts, even while making the arrest appear to violate constitutional guarantees. Those cases were then thrown out. *After arrest*, awaiting trial, defendants, often through their lawyers, paid assistant district attorneys—ADAs—to reduce the bail, or register their clients as informants, crediting them with cases they never made. Because of the defendant's reported "cooperation," charges would be reduced or dismissed.

After indictment cases were fixed through court clerks who moved them before the "right" judges, who decided motions improperly, accepted reduced pleas, or dispensed light sentences.

The local criminal justice system was a mess. Everyone knew it. The only citizens who complained, however, were those who couldn't prove it. Certainly not all judges, prosecutors, or police officers were corrupt—far from it. But when corruption is at every level of the system, we have been cheated on the basic promise we have made to ourselves. When the criminal justice system itself is corrupt, the Republic exists only on paper. How do we attack a *system* that is fixed? Who will police the executive when it will not police itself?

In this instance the federal government investigated New York City. United States Attorneys sent DEA Agent Sante Bario undercover to pose as Salvatore Barone, an out-of-town mob hit man arrested with two unlicensed guns, looking to fix his gun possession case. Initially "arrested" by a cooperating New York City police officer, "defendant Barone" was processed through the system. False papers were filed, unsuspecting judges were deceived, and eventually, under orders, but under oath, a *federal* agent lied to an unsuspecting *state* grand jury.

By adopting our federal republic in 1788, we partitioned power between a single central federal government and several states. State sovereignty essentially includes each state's internal police power—a power to define, detect, prosecute, and punish crime. With very few constitutional prohibitions (such as against cruel and unusual punishment) each state is free to define crimes and mete out punishments as it sees fit. This task falls to local legislatures, courts, and executives—local prosecutors, local police.

Yet here, the federal government had manipulated the state's criminal justice system. Federal law enforcement power has greatly expanded since the adoption of the United States Constitution. Under expansive definitions of "interstate commerce," mail fraud, and other areas of national interest, the federal executive, supported by the federal courts, have policed many areas traditionally reserved to the states. But policing the state's own police? A small but growing chorus who reject overexpansive federal power nevertheless find support for this in a little-used provision of the Constitution: Article IV, section 4 which "guarantees" the people of every state republican government. When state legislators secretly sell their votes to special interests, the people are not fully, fairly, or equally represented. If the essence of representative government is free elections, that is, occasions for meaningful choices, then undetected corruption seriously undercuts our ability to assess candidates. Undetected corruption denies us truly representative government. When the police, district attorneys, and judges routinely fix cases, the will of the people, as expressed in the legislatively adopted penal law, is not translated into actual fact. Under such conditions, there is no true republic.

In the end, this federal probe was prematurely exposed but still revealed that the Grand Jury Bureau Chief of the Queens District Attorney's Office accepted part of a $15,000 bribe (paid by Bario to his defense attorney) to steer the phony gun-possession case before a pliable grand jury who, after the corrupt prosecutor's presentation, would decide not to indict. At the time of this federal intrusion, the only office with jurisdiction to investigate and prosecute corruption in the Queens County District Attorney's Office was, in fact, the Queens County District Attorney's Office. Yet, when the investigation prematurely became front-page news, the questions of who was corrupt were dwarfed by questions of who was to police the police, and how?

POLICING WITHOUT ENTRAPMENT

Experience shows that to expose corruption best is to simulate it, to send undercover agents into the system to monitor and participate in it. In short, the most effective way to police the police and the rest of the executive is to sting them. Simulate the environment, offer the bait, and someone will bite!

Stings and scams have always worked. In Shakespeare's *Measure for Measure* the Duke efficiently tested the faithfulness of his deputy by going undercover. Long before him, Odysseus went undercover to see who had remained faithful in his absence. Earlier, in Eden, Eve, pressured repeatedly by the serpent, had yielded. But the Garden was wired. And when God confronted Adam, he instantly gave up Eve, who in turn replied: "The Serpent beguiled me and I did eat." This, the first recorded entrapment defense, failed, although the case reporter doesn't tell us exactly why. Perhaps the snake was on its own mission.

Future defendants fared little better before the United States Supreme Court until another prohibition agent, posing as a tourist, had dropped in on an unsuspecting veteran—Sorrels—swapping old war stories, asking repeatedly for booze. Finally, Sorrels yielded, was prosecuted, and convicted. A unanimous Supreme Court reversed the conviction but divided as to why.

Thirty years later Sherman, a narcotics addict under treatment, was befriended at the doctor's office by a government informant who begged for narcotics. Sherman avoided the issue but his new "friend," the informant, pressed. Finally, Sherman yielded, abandoning his attempt to go straight and purchased narcotics for both of them. A federal appellate court affirmed his ten-year prison sentence, but again the United States Supreme Court unanimously reversed, finding entrapment. Once again, however, the court was split 5–4 as to why.

A bare majority, per Chief Justice Warren, focused upon Sherman's mental state: "When the criminal design originates with government investigators and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute . . . then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search" (*Sherman v. United States*). The fact that government agents "merely afforded opportunities or facilities for the commission of the offense" did not constitute entrapment, which occurred only when the criminal conduct was "the product of the creative activity" of law enforcement officials.

The key question for these "subjectivists" was the defendant's "predisposition." Was the defendant otherwise "ready and willing"? The government could not "play on the weaknesses of an innocent party

and beguile him into committing crimes which he otherwise would n have attempted," said Chief Justice Warren. "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." Was the defendant, although induced, *predisposed* to commit that crime, and therefore not innocent? This, the key question, rarely allows a simple yes or no. Predisposition lies on a continuum, as Judge Fullam observed in an ABSCAM opinion:

> At one extreme is the defendant who customarily engages in this type of criminal activity as a way of life, and who enthusiastically embraces any additional opportunities for such activities. At the other extreme is the resolute individual who would not commit a crime of this type under any circumstances. In between are many gradations: the person who occasionally commits crimes of this type, and would be willing to do so again only if a particularly favorable opportunity should present itself; the person who has previously succumbed to temptation, but is making a sincere and concerted effort to resist such temptations; the previously innocent person who is weak and easily influenced. (*United States v. Jannotti*)

If few of us are corrupt, most of us are corruptible. In a moment of need, most of us are predisposed to some degree to violate some rules, especially when no one gets hurt, the chances of detection are small, and the rewards are great. If everyone has their price, the essence of honesty might consist of pricing yourself out of the corruption marketplace. But to avoid entrapment by ensuring that a particular target *is* predisposed, the executive need merely make an offer so tempting that almost everyone, including the target, would be predisposed to accept it.

For the concurring minority of the Supreme Court in *Sorrels* and *Sherman*, the stakes were larger than a particular defendant's guilt or innocence: "The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers" (*Sherman v. United States*). For these objectivists like Justice Frankfurter, the proper focus is not whether this particular defendant was predisposed but whether an average law-abiding citizen would succumb to the type of pressure exerted. An entrapment defense should protect the purity of the criminal justice process. By threatening to release an otherwise guilty defendant, it should check prosecutorial overzealousness. So conceived, this defense of entrapment would help police the police.

This objective standard, too, has its flaws. Who is a "normally law-

abiding citizen"? A wealthy, very cautious public official, thoroughly predisposed to corruption but only through intermediaries, is almost certain to decline all but the most substantial bribes. Government agents can reveal this corruption only by offering inducements sufficient to cause other, less well positioned citizens to violate the law.

Independent of an entrapment defense—however conceived—conduct of law enforcement agents may be "so outrageous that due-process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction." First enunciated by Justice Rehnquist in 1973 (*United States v. Russell*), this doctrine continues to command the support of a bare majority of the United States Supreme Court if not of Rehnquist himself. The problem, of course, is to determine just what is sufficiently "outrageous" to violate due process.

In 1976, the United States Supreme Court refused to find it "outrageous" that government undercover agents supplied *and* purchased the very heroin that the defendant was convicted of selling. "There is certainly a constitutional limit to allowing government involvement in crime," the court declared in affirming Hampton's conviction. "It would be unthinkable, for example, to permit government agents to instigate robberies and beatings" (*United States v. Hampton*).

Would it necessarily be unconstitutional for government agents while penetrating the mob to participate in robberies and beatings? Would it be a violation of due process to inject phony crimes into a criminal justice system, and to institute bribe attempts? How far is too far? Where does effective policing end, and overzealous policing begin? It's a nagging question.

Many who seek to specify limits on proper investigatory techniques look to Justice Brandeis' classic, stirring call:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. (*United States v. Olmstead*)

Government shall commit no crimes: This sounds appealing but actually begs the question. While investigating narcotics, gambling, and other "victimless" crimes, government agents routinely engage in generally forbidden transactions, yet are held to commit no crimes. And

...ough Bario, the federal undercover agent, and Murano, the coop...ing New York City police officer who "arrested" him, did inten...ally lie under oath, they did not thereby commit the crime of perjury. The New York Penal Law declares under its "justification" provision ...t "conduct which would otherwise constitute an offense is justifiable ...d *not criminal when* . . . performed by a public servant in the *reasonable* ...ercise of his official powers, duties and functions." Acts which would ...criminal when done by a private citizen are justifiable and *not criminal* ...hen done by a government agent in the reasonable exercise of law ...nforcement power. We can't know, then, whether the government ...ommits crimes unless we first determine whether the conduct of un...dercover agents is a reasonable exercise of police power.

Some critics of undercover operations seek other bright line tests to ...onstrain the executive. But in covert activities, domestic and foreign, it is probably impossible to erect in advance a workable, comprehensive ...et of rigid rules to constrain police power. Judge Bryant offered one ...such rule in an ABSCAM opinion: "If after an illegal offer is made, the ...subject rejects it in any fashion, the government cannot press on" (*United States v. Kelly*). Judge Pratt anticipated the flaw in this rule:

> It would provide a corrupt politician easy insurance against any undercover investigation, for when the suggestion of improper conduct was raised, all the subject would have to do would be to invoke the magic incantation, "I desire to act within the law" and then plunge into his nefarious activities. Such a per...se rule would soon frustrate virtually all undercover law enforcement (*United States v. Myers*).

Other critics have drawn an active/passive bright line test and urge that government stay on the passive side: Like an undercover agent posing as an elderly citizen on a park bench, waiting to be attacked by muggers, government agents should offer only passive opportunities but not make the initial approach. Of course, active/passive is less a dichotomy than a continuum. More active than the park bench mugging victim, the government establishes a legitimate business, awaiting demands for protection money and payoffs. More active is an *illegitimate* business awaiting those approaches. Government is more total when its undercover operation is a fully fashioned world, in which people unwittingly play their parts, relationships are formed, targets are initially contacted and actively enticed with inducements.

The point is that no point is obviously out of bounds always. Passive stings won't uncover judges and D.A.s fixing cases. Rarely will those public officials make the first approach. If we are committed to cleaning up corrupt criminal justice systems, we cannot be passive.

On the other hand, some advocates of unrestricted undercover operations criticize any restraint on the police and prosecutors. Investigate fully and vigorously, they urge. Conversations secretly taped, and the intrusion of an undercover operation can be judged afterwards on a case-by-case basis. An entrapment defense, supplemented with due-process protections, will check the executive. "The tapes will speak for themselves," they insist.

As linguist Roger Shuy demonstrated before a House Oversight Committee investigating ABSCAM abuses, that assumption, that "the tapes speak for themselves" is too facile. "In normal everyday conversation, the listener is expected to give feedback to the person who is talking. . . The most commonly used signals for such feedback are what linguists call 'lax token.' The positive lax tokens usually take the form of 'uh-huh,' 'all right,' 'yeah,' or 'OK.' Since the function of the lax taken is to provide feedback to the speaker, its meaning cannot be taken as agreement. Yet prosecutors, courts, and juries often mistake these as agreement. If an indictment is made on the basis of a presumed agreement when, in fact, the response meant 'I hear you, keep talking,' a false indictment has been made" (Subcommittee on Civil and Constitutional Rights).

Securing the appearance of agreement was only the first of seven distinct FBI strategies that Shuy identified—strategies that agents used to manipulate their targets, strategies of which the agents themselves were not always conscious. Taken together, they challenge the idea that the tapes speak for themselves.

But suppose at trial we could review each case and determine from testimony and tape the predisposition of each defendant, and whether the government's inducement threatened the average law-abiding citizen with overwhelming temptation. Suppose we could prevent undercover agents from needlessly engaging in otherwise prohibited acts. If we freed every subjectively or objectively entrapped defendant, and made certain each defendant's due-process rights were protected, wouldn't we then sufficiently police the police?

No! Perhaps the most troubling aspect of undercover operations is that they work so well in combating crime. Barely a week goes by now without some new revelation of a successful undercover operation. We snicker when, during the 1987 Constitutional Bicentennial, United States Attorney Rudolph Giuliani announces that an FBI agent posing as a salesman of steel products had offered bribes to municipal officials 106 times and "on 105 of these occasions the public official accepted the bribe. And on the other occasion he turned it down because he didn't think the amount was enough" (*New York Times*, 1987). We chuckle at the supermarket scam in which the government printed coupons for non-existent items that stores fraudulently submitted for repayment. We

applaud the headline in the newspaper next to pictures of eagle, elk, big horn sheep, and grizzly bears: "Wildlife Agents Shift Tactics to Trap Poachers" and the accompanying story of how agents are posing as out-of-town commercial hunters. We cheer the ingenuity of undercover agents posing as Asian businessmen to trap taxicab drivers who overcharge foreigners. Would we also chuckle at undercover agents as taxicab drivers picking up conversations of their unsuspecting passengers? Perhaps we applaud undercover agents sent into school systems to pose as janitors, to reveal drug-dealing among students. But what message do we convey to our children if undercover agents in their schools include teachers and fellow students? Stings and scams have proliferated wildly these past fifteen years, as vigorous, honest police and prosecutors have come to appreciate their power. But however effective at attacking crime, including executive corruption, however justifiable individually, collectively they are taking a hidden toll—perhaps irreversibly polluting our most precious national resource—a free, open society.

Twenty-four hundred years ago, Aristotle observed that the tyrant must "endeavor to keep himself aware of everything that is said or done among his subjects." Aristotle listed "tyranny's three aims in relation to its subjects, namely that they shall: 1) have no minds of their own, 2) have no trust in each other, and 3) have no means of carrying out anything." George Orwell's *Nineteen Eighty-Four* updated Aristotle's vision. Big Brother was everywhere, and a person lived from birth to death under the eye of the police. Everywhere agents were testing morality, testing thought itself, testing predisposition for crime. Every aspect of a person's life was subject to inspection, every relationship suspect. But at least Winston Smith, Orwell's protagonist who rebelled, saw the telescreens and other signs that reminded him that Big Brother was watching. At least he knew the game.

We, the People of the United States, may be threatened more subtly but no less seriously. We watched 1984 come and go with a certain relief that we were immune. At the office, the gym, we feel at liberty to talk openly, act openly, express and expose ourselves. We trust that persons are who they seem. In private, we quickly open up to new friends whose acquaintance we "chance" to make.

"In totalitarian countries, undergoing liberalization, a major demand is the abolition of secret police and secret police tactics. Subterfuge, infiltration, secret and intrusive surveillance, and reality creation are not generally associated with United States law enforcement," sociologist Gary Marx warned in his ABSCAM testimony. "However, we may be taking small, but steady steps toward the paranoia and suspiciousness that characterize many totalitarian countries" (Subcommittee on Civil and Constitutional Rights, 1982).

The "critical question," testified law professor Geoffrey Stone, is

"whether and to what extent law-abiding citizens in a free society should be entitled confidently to assume that their supposed friends, confidants, lawyers, and other associates are in fact what they appear to be, and are not in reality clandestine agents of government secretly reporting their activities and conservations to the authorities" (Subcommittee on Civil and Constitutional Rights, 1982).

The debate continues beyond 1984 while undercover operations spread, occasionally to surface and splash corruption into view. Are we steadily but unwarily embracing totalitarianism to rid ourselves of anarchy?

In private, We, the People, should be able to feel free and secure, but in a healthy republic, public officials entrusted with public power must always feel somewhat insecure. How then can we achieve honest government, government-tested, government-monitored, while maintaining a free society? If the dangers of using and not using undercover operations are so great, what are we to do?

Maintaining the quality of life in the United States may require double standards—double standards that promote a vigorous attack on public corruption while safeguarding privacy. Double standards have a bad ring; "equal protection under law" seems their very antithesis. We reject an unfair society where the rich and powerful live more or less by their own private set of rules, while the ordinary citizen is subject to the rules on the books, or worse, to arbitrary targeting by individual law enforcement agents because of race, sex, poverty, politics, or whim. But achieving honest republican government may require multiple standards: special protection of *private* citizens acting in a *private* capacity.

To apprehend a vicious mugger, a decoy cop should pose as a helpless elderly citizen. But if a garrulous stranger should share the park bench and make conversation, the agent must not establish a "friendship" nor ever record how the retiree illegally supplements social security, nor how his successful daughter doesn't report all her income. However, an undercover agent posing as a fellow crooked cop or ADA, should encourage free-ranging conversations about other abuses of the public trust.

Suppose those conversations lead to an invitation to dinner. Is it proper for an undercover agent to begin an intimate relationship with the target's child? How much of the private life of targeted police is out of bounds?

After the North Muskegon Police Department dismissed a police officer for violating an adultery statute by cohabiting with a married woman not his wife, a federal district court in western Michigan rejected the city's argument that the officer's off-duty conduct at least potentially affected his job performance. In doing so, the court rejected the town's

claim that as a condition of their employment law enforcement officers can be required to be totally law-abiding citizens (*Briggs v. North Muskegon Police Department*). On the other hand, we do have a right to know whether officials entrusted with national secrets are subject to blackmail for sexual misconduct or gambling habits. The public/private distinction is further complicated when private citizens for private gain corruptly contract with public officials: some lawyers do pay for favorable rulings, some businesses do routinely bribe inspectors. In thousands of ways we private citizens seek personal benefits from public officials. Are we all subject to stings and scams? Per se rules are not obvious, and finer distinctions between public and private await collective wisdom, but in the end we may be forced to adopt variable standards.

Here we are today in the United States, powerful abroad, free at home, celebrating a constitutional system based upon the Founders' bleak view of human nature which experience seems only to confirm: Power unchecked encroaches on liberty; liberty unchecked degenerates into anarchy. Government cannot be trusted to police others, and no one can be trusted to police themselves (*51st Federalist*). Yet, We the People look to legislators for rules and exceptions by which they too will be governed, to judges to judge their own jurisdiction, and ultimately to executive investigators and "special" prosecutors to investigate and prosecute the executive. We are mired in paradox. Simulated criminality—the most effective technique against corruption itself corrupts. It corrupts the undercover agents whose sense of self, of right and wrong, erode as they become their roles. It corrupts the prosecutors who look with mixed distaste and bemusement at the folly of trusting creatures scurrying about in a manufactured world. And most important, it corrupts the citizenry who must approach each other with suspicion.

To promote trust we must be suspicious; to promote freedom we need control; to preserve genuine self-government, we must inject the phony; to attack hypocrisy, we need double standards. Contrary to what we know of human nature—that people cannot be fair judges in their own cases—suppose in a moment of trust, We the People nevertheless declare that henceforth the police shall police all and only those who do not police themselves. Who, then, would police the police?

When this Republic was founded, Madison said it best: "Provision for defense must in this, as in all other cases, be made to counteract ambition. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself" (*51st Federalist*).

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