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

In the wake of the September 11 attacks, undercover policing has become an increasingly important law enforcement tool in the United States and in Europe. More frequent deployment of covert tactics has confronted democratic governments with difficult questions about how these extraordinary operations should be controlled and conceptualized. How ubiquitous should covert tactics become, and how should regulatory systems respond to their increased importance? 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 short, legal systems forge different regulatory compromises and accord

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different degrees of legitimacy to the “necessary evil” of covert operations.

Much of the scholarship about undercover policing in Europe has focused on doctrine. My study examines undercover policing empirically, through 89 qualitative, open-ended field interviews that I conducted with state and federal police officials, undercover agents, training and supervisory officials, control officers, prosecutors, and judges in 15 of the 16 German states. Through these interviews, I examined the ground-level strategies and practices of those who conduct, supervise, and evaluate covert operations.

I organize my comparison of the United States and Germany around four dimensions of conflict with fundamental norms, including tensions with (1) privacy and trial rights such as the right to cross-examine witnesses; (2) the mandate to separate intelligence-gathering from law-enforcement functions; (3) norms against improper interactions between undercover agents and their target environment; and (4) values of accountability and oversight. This article identifies national differences between the degrees to which undercover policing conflicts with higher-order values along the four dimensions of comparison. The article links these tensions with a number of “legitimacy deficits” peculiar to each system. Differences between the degree of conflict with higher-order norms help explain why the legitimacy of Germany’s covert policing system remains considerably more contested than its American counterpart—even as Germany imposes much more significant regulatory constraints on the initiation and conduct of undercover operations.

I: INTRODUCTION

- Instruction given to Assistant U.S. attorneys during training:
“Before you subpoena documents; before you call witnesses to the grand jury; before you consider conventional sources of evidence; make sure to exhaust all undercover options first. This should become your mantra.”¹
- Precept voiced by German prosecutors:
“Undercover investigation should always be considered a tactic of last resort.”²
- In 2003, Germany moved to outlaw the extremist right wing National Democratic Party (NDP) claiming that it was working to subvert the democratic constitutional or-

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2. German prosecutor, May 10, 2004.

der 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 30 years in the party. There were others. As it turned out, many of Germany's 17 domestic intelligence agencies had been investigating the NDP simultaneously for decades, unbeknownst to each other. Almost 15 percent of the leadership worked for one of the government's intelligence services. None of these agencies had known of the others' involvement. Many of the leaders they investigated turned out to have been working for rival services. These infiltrators had participated in setting the party's agenda and publicizing its goals. Eventually, the government was reduced to arguing that its operatives' actions could properly be credited to the party because many of these plants (who had been recruited from the ranks of the party) had become double agents or renegades whom the intelligence agencies had cut loose. Because these informants were *genuine* racists and anti-semites, the government argued, their rhetoric should be charged to the party's account.³ 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.

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

3. BVerfGE 107, 339-95 (2003).

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 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,⁴ France,⁵ and Italy⁶ 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. I organize my comparison of the United States and Germany around four dimensions of conflict with fundamental norms. Each dimension corresponds to a point of tension with higher-order values, including fundamental rights like privacy and confrontation of witnesses at trial; separation of powers; role obligations of government officials; and the avoidance of abuse (or maintenance of control over undercover operatives). Each such tension creates distinctive problems for the legitimacy of undercover policing. This essay identifies national differences between the degrees to which undercover policing conflicts with higher values along the four dimensions of comparison. At the same time, I link these tensions with a number of “legitimacy deficits” peculiar to each system. Differences between the degree of conflict with higher-order norms help explain why the legitimacy of Germany’s covert policing system remains considerably more contested than its American counterpart—even as Germany imposes much more significant regulatory constraints on the initiation and conduct of undercover operations. Thus the systems under comparison can, in Clifford Geertz’s words, “form a

4. *Strafprozessordnung* (StPO) §110.

5. “Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité.”

6. *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. *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.

kind of commentary on the other's character."⁷ 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 15 of the 16 German states.⁸ 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).⁹ I also compared evidence from interviews with a variety of

7. CLIFFORD GEERTZ, *ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA*, 4 (1971).

8. 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.

9. Using what social scientists call "open-ended, semi-structured" field interviews, I sought to ascertain how rules, regulations and a variety of normative con-

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.¹⁰

My essay proceeds as follows. In section II, 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. Section III describes the principles and norms that simultaneously restrain covert powers in both legal systems *and* raise troubling questions about the legitimacy of these practices. This section will also delineate the legislative and institutional reforms by which Germany sought to reduce these problems of legitimacy and contrasts the resulting regulatory system with the values and guidelines that animate the less constricting American framework for undercover policing.

My account of legitimacy tacitly informs Sections IV, V, and VI. These set out four different senses in which Germany constructs undercover policing as a "necessary evil." Each section explores the ways in which German regulatory reforms simultaneously ameliorate, perpetuate, and sometimes exacerbate conflicts between undercover policing and fundamental norms. Section IV identifies problems of legitimacy that stem both from incursions on privacy and from regulatory efforts to protect privacy by confining deep cover investigations to the highly malleable category of "organized crime." Section V focuses on the ways in which undercover policing erodes distinctions between the prerogatives of intelligence agencies and

straints 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. I asked my subjects to discuss their working relationships with each other and how they distinguish undercover policing from the work of Germany's domestic intelligence agencies. These interviews took place with advance approval from the ministries of justice and the interior in jurisdictions in which my respondents worked. Each state has a compact covert policing unit, which works closely with specialized investigative divisions in designing and supervising undercover investigations. I interviewed the directors of these units as well as control officers, informant handlers, present and former undercover agents, surveillance officers, supervisors, and logistics personnel (who rent apartments or cars for undercover agents and forge official documents to support deep cover identities). I also spoke to judges who supervise wiretaps and undercover investigations, as well as prosecutors and members of specialized investigative divisions, including organized crime, state security and drug units, who work closely with covert units. By posing similar questions to everyone, I could check for differences ascribable to the subject's professional role, correct for bias and cross-check responses for accuracy. I did not tape-record these interviews but took detailed notes and transcribed them afterwards. Not taping these interviews was a condition of access (and was necessary for the security of undercover operatives). To view my online appendix regarding research methodology, click the appendix link at <http://www.law.uiuc.edu/faculty/directoryresult.asp?Name=ross,+Jacqueline>.

10. Gerold Koriath, *Straftaten bei verdeckten Ermittlungen: Ein Geständnis*, KRIMINALISTIK 1992, 370.

those of the police. Section VI develops the final two senses of undercover policing as a “necessary evil,” both of which stem from features *inherent* in covert operations. Undercover policing creates special risks of abuse and problems of control common to all legal systems. In this actuarial sense, recognizing the inevitability of abuse or misconduct in some percentage of cases, undercover policing is a “necessary evil” everywhere. But even when undercover agents play by the rules, they must participate in crimes and facilitate in crimes to some extent. This makes undercover policing a “necessary evil” in Germany, which has had to creatively reinterpret and partially suspend a series of ground rules that nominally prohibit the police from assisting or participating in crimes and that require prosecutors to pursue all deviations from the nominal ground rules for undercover conduct. American police and prosecutors experience no comparable conflict with their pre-defined role obligations.

Each section thus looks at one or more of the unavoidable legal compromises on which covert policing rests and refracts these accommodations through a comparative lens, by exploring the extent to which American regulation of undercover policing confronts comparable dilemmas and by examining the reasons why many conflicts with higher-order norms have less salience in the American context. Section VII summarizes the problems of legitimacy that stem from the four different senses in which undercover policing may be described as a “necessary evil,” distinguishing deficits peculiar to the German context from distinctively American concerns. Section VIII argues that the legal debate about the role obligations and loyalties of undercover agents resonates with larger fears about infiltration and national identity in the wake of German Reunification.

II. 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 the citizens’ belief that the orders of authorities deserve their obedience, as manifested by a disposition to submit to commands independently of sanctions and rewards.¹¹ Critics of this approach—

11. This approach was famously articulated by Max Weber; *see e.g.*, 1 M. WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31 (Guenther Roth & Claus Wittich eds., 1968). *See also* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 40

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.¹² 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.¹³ 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.¹⁴

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.¹⁵ Section III will first explain Beetham’s model, then 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.¹⁶ 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

(1986) (“an authority is accepted as legitimate if its instructions are accepted as a reason for conforming action”).

12. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379; RODNEY BARKER, *POLITICAL LEGITIMACY AND THE STATE* (1990); ROGER COTTERELL, *LAW’S COMMUNITY* (1995).

13. This variant of the sociological conception discussed above distinguishes “order legitimation” from “norm legitimation.” For a critique of both, see Hyde, *supra* note 12.

14. For a discussion of the difficulties involved in using public attitudes to gauge the legitimacy of institutions, see Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); Hyde, *supra* note 12.

15. DAVID BEETHAM, *THE LEGITIMATION OF POWER* (1991).

16. 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 & William A. Edmundsen eds., 1988).

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).¹⁷

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 lack of democratic approval for controversial 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*

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

17. BEETHAM, *supra* note 15.

and forbidden conduct in a coherent fashion.¹⁸ 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?).¹⁹ 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.²⁰

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).²¹

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. I will use this framework to identify problems of legitimacy associated with the various senses in which undercover policing can be said to function as a “necessary evil.”

18. 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*, 91-110 (1995).

19. For a discussion of legal closure as an element of legitimacy, see Cotterell, *supra* note 18.

20. JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978). Beetham himself emphasizes checks and balances and separation of powers as vital for compliance with rules. BEETHAM, *supra* note 15, at 123.

21. WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION* (1970) (emphasizing the importance of independent performance measures to the legitimacy of institutions).

III. TWO NATIONAL APPROACHES TO COVERT POLICING

A. *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 17 domestic intelligence agencies (the Federal Agency for the Protection of the Constitution (APC) and its counterpart agencies within each of the 16 German states). Scholars and judges worry that undercover policing violates the principle of separation between police and intelligence agencies by permitting the police to use undercover operations as a form of domestic espionage.²² This is 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.²³ 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.²⁴ 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 covert practices seemed to resemble the work of intelligence agencies, the more doubts were raised about undercover

22. Helmut Roewer, *Trennung von Polizei und Verfassungsschutzbehörden*, DEUTSCHES VERWALTUNGSBLATT 1986, 205; Wolfgang Hetzer, *Polizei und Geheimdienste zwischen Strafverfolgung und Staatsschutz*, ZEITSCHRIFT FÜR RECHTSPOLITIK 1999, 19; Reinhard Riegel, *Zur Suche nach Rechtsgrundlagen für die Fernmeldeaufklärung oder strategische Rasterfahndung durch den Bundesnachrichtendienst*, ZEITSCHRIFT FÜR RECHTSPOLITIK 1993, 468; Hans Christoph Schäfer, *Strafverfolgung und Verfassungsschutz*, NEUE JURISTISCHE WOCHENSCHRIFT 1999, 2572; Christoph Gusy, *Das verfassungsrechtliche Gebot der Trennung von Polizei und Nachrichtendiensten*, ZEITSCHRIFT FÜR RECHTSPOLITIK 1987, 45; Hans Liskén, *Polizei und Verfassungsschutz*, NEUE JURISTISCHE WOCHENSCHRIFT 1982, 1482; Christoph Gusy, *Organisierte Kriminalität zwischen Polizei und Verfassungsschutz*, GOLDHAMMER'S ARCHIV FÜR STRAFRECHT 1999, 319; Helmut Roewer, *Geschichtlicher Nachtrag zur Kontroverse um die Trennung von Polizei und Verfassungsschutzbehörden*, DEUTSCHES VERWALTUNGSBLATT 1988, 666; Martin Kutscha, *Die Aktualität des Trennungsgebots für Polizei und Verfassungsschutz*, ZEITSCHRIFT FÜR RECHTSPOLITIK 1986, 194; Hans Liskén, *Vorfelddingriffe im Bereich der "Organisierten Kriminalität": Gemeinsame Aufgabe von Verfassungsschutz und Polizei?*, ZEITSCHRIFT FÜR RECHTSPOLITIK 1994, 264.

23. The principle of separation is not written into the Constitution; it derives from an Allied directive issued by letter on Apr. 4, 1949, in which the Allied military governors indicated that they could approve 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., Helmut Roewer, *Trennung von Polizei und Verfassungsschutzbehörden*, DEUTSCHES VERWALTUNGSBLATT 1986, 205.

24. *Id.*

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.²⁵ Moreover, undercover policing seemed to expose suspects to undue pressures and temptations that were inconsistent with the prohibition on entrapment.²⁶ And it appeared to undermine defendants' trial rights, particularly their confrontation rights, by obscuring the source of covertly gathered evidence and by making covert operatives unavailable for trial. This criticism gained force from the fact that German undercover agents (unlike their American coun-

25. PATRIC MAKRUTZKI, VERDECKTE ERMITTLUNGEN IM STRAFPROZESS (1999); Harro Otto, *Anstiftung und Beihilfe*, JURISTISCHE SCHULUNG 1982, 557; HOLGER NITZ, EINSATZBEDINGTE STRAFTATEN VERDECKTER ERMITTLER (1997); Koriath, *supra* note 10; Hans Hilger, *Neues Strafverfahrensrecht durch das OrgKG*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 1992, 525; Horst Hund, *Beteiligung verdeckter Ermittler am unerlaubten Glücksspiel*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 1993, 571; Knut Amelung, *Die Rechtfertigung von Polizeibeamten*, JURISTISCHE SCHULUNG 1986, 333; Klaus Rogall, *Das Notwehrrecht des Polizeibeamten*, JURISTISCHE SCHULUNG 1992, 558; CHRISTINA ERFURTH, VERDECKTE ERMITTLUNGEN (1996); Peter Schwarzburg, NEUE ZEITSCHRIFT FÜR STRAFRECHT 1995, 470; Alfred Stümper, *Das OrgKG - Ein Gesetz mit Schwächen*, KRIMINALISTIK 1994, 192; *but see*, VOLKER KREY, RECHTSPROBLEME DES STRAFPROZESSUALEN EINSATZES VERDECKTER ERMITTLER, 219-20 (1993) (taking the position that undercover agents are not legally prohibited from taking part in some offenses).

26. KLAUS LÜDERSSEN, V-LEUTE: DIE FALLE IM RECHTSSTAAT (1985); Eberhard Kempf, *Agent provocateur und faires Verfahren; Anmerkungen zum Urteil des Europäischen Gerichtshofs für Menschenrechte (EuGHMR) vom 09.06.1998*, STRAFVERTEIDIGER 1999, 128; Edgar Weiler, *Irreparable Verletzung des Rechts des Beschuldigten auf ein faires rechtsstaatliches Strafverfahren als Verfahrenshindernis*, GOLDHAMMER'S ARCHIV FÜR STRAFRECHT 1994, 561, Hans-Jürgen Bruns, "Widerspruchsvolles" Verhalten des Staates als neuartiges Strafverfolgungsverbot und Verfahrenshindernis, NEUE ZEITSCHRIFT FÜR STRAFRECHT 1983, 49; Ulrich Sommer, *EGMR: Verurteilung nach Einsatz eines polizeilichen Lockspitzels*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 1999, 48; Jörg Kinzig, *Bewegung in der Lockspitzelproblematik nach der Entscheidung des EGMR: Muss die Rechtsprechung ihre strikte Strafzumessungssösung verabschieden?*, STRAFVERTEIDIGER 1999, 288, JÜRGEN STOCK & ARTHUR KREUZER, DROGEN UND POLIZEI, 1996; Horst Franzheim, *Der Einsatz von Agents provocateurs zur Ermittlung von Straftätern*, NEUE JURISTISCHE WOCHENSCHRIFT 1979, 2014; Jürgen Seier & Horst Schlehofer, *Zur Übung: Strafrecht*, JURISTISCHE SCHULUNG 1983, 52, Jürgen Taschke, *Verfahrenshindernis bei Anstiftung durch einen Lockspitzel*, STRAFVERTEIDIGER 1984, 178.

terparts) have been shielded from testifying at trial.²⁷ The admissibility of hearsay evidence made it possible for their observations to be credited even when the agents (or informants) could not be questioned by defense counsel.

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.”²⁸ 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 him and to limit the government’s use, storage, and transmission of the data.²⁹ 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.”³⁰

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 others.³¹ Nor do people necessarily forfeit their privacy interests by “exposing” themselves to the public. Indeed, German law requires advance judicial authorization of long-term visual surveillance even when conducted

27. Meyer Goessner, *StPO-KOMMENTAR* § 110b n.8; Knut Amelung, *Zur strafprozessualen Verwertbarkeit von Videoaufzeichnungen ohne spezialgesetzliche Ermächtigung*, *JURISTISCHE SCHULUNG* 1993, 196; KREY, *supra* note 25, pp. 214-16; LÜDERSSEN, *supra* note 26.

28. Gunnar Duttge, *Strafprozessualer Einsatz von V-Personen und Vorbehalt des Gesetzes*, *JURISTENZEITUNG* 1996, 556; MARKUS DEUTSCH, *DIE HEIMLICHE ERHEBUNG VON INFORMATIONEN UND DEREN AUFBEWAHRUNG DURCH DIE POLIZEI* (1992); DIRK LAMMER, *VERDECKTE ERMITTLUNGEN IM STRAFPROZESS* (1992); Marcus Creutz, *Verfassungsrechtliche Probleme des Lockspitzeinsatzes*, *ZEITSCHRIFT FÜR RECHTSPOLITIK* 1988, 415; Hans Schneider, *Anmerkungen zu BVerfG Urt. V. 15.12.1983*, *DIE ÖFFENTLICHE VERWALTUNG* 1984, 156; Christoph Degenhart, *Das Allgemeine Persönlichkeitsrecht, art. 2 I i.V. mit art. 1 I GG*, *JURISTISCHE SCHULUNG* 1992, 361; Philip Kunig, *Der Grundsatz informationeller Selbstbestimmung*, *JURA: JURISTISCHE AUSBILDUNG* 1993, 595; Horst Hund, *Verdeckte Ermittlungen: ein gelöstes Problem?*, *STRAFVERTEIDIGER* 1993, 379; Gerhard Fezer, *Strafprozessrecht: Zum Einsatz Verdeckter Ermittler*, *JURISTENZEITUNG* 1995, 972.

29. BVerfGE 65, 1, *NEUE JURISTISCHE WOCHENSCHRIFT* 1984, 419.

30. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L. J.* 1151 (2004).

31. Indeed, there are other areas in which German law protects the “unfolding” of personality through intimate associations, for example by extending testimonial privileges to family members of suspects. StPO §52. 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).

entirely in public areas.³² 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.

The secrecy surrounding German undercover investigations adds to concerns about their legitimacy. American undercover operations ultimately produce evidence introduced at trial through the testimony of covert agents. 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. Their identity and even their role in the investigation remain secret. Instead, their observations enter the court indirectly, through written reports, written answers to questions delivered to them in advance, or the testimony of their control officers. 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.

Undercover policing, then, required a unique set of compromises in Germany. 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.³³ 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

32. StPO §163f.

33. These norms have been elaborated through judicial decisions and scholarly commentary. Kempf, *supra* note 26; Weiler, *supra* note 26; Bruns, *supra* note 26; Sommer, *supra* note 26; Kinzig, *supra* note 26; STOCK & KREUZER, *DROGEN UND POLIZEI* (1996); Franzheim, *supra* note 26; Seier & Schlehofer, *supra* note 26; Taschke, *supra* note 26.

targets.³⁴ Aside from enforcement of the principle of legality and the substantive norms, undercover policing was regulated through guidelines issued jointly by state ministries of justice and the interior.³⁵ 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. In addition, the police laws of the different German states regulated a special category of infiltration called “preventive” operations. These were aimed at forestalling future offenses rather than solving ongoing or past crimes.

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 *Rechtsstaatlichkeit* (or the rule of law) with the enactment of laws that formally regulated and circumscribed the competencies and discretion of government officials, particularly the police.³⁶ 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 also drew support from the European Court of Human Rights. 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

34. StPO §§ 152; 163.

35. Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Inanspruchnahme von Informanten sowie über den Einsatz von Vertrauenspersonen (V-Personen) und Verdeckten Ermittlern im Rahmen der Strafverfolgung, in RICHTLINIEN FÜR DAS STRAFVERFAHREN UND DAS BUßGELDVERFAHREN, ANLAGE D, p. 15 (first issued in 1985 and amended in 1993 and 1994 to accord with the 1992 statute).

36. See e.g., LÜDERSEN, *supra* note 26; Bruns, *supra* note 26; Franzheim, *supra* note 26; SEIER & SCHLEHOFER, *supra* note 26, Taschke, *supra* note 26.

37. Luedi v. Switzerland, 238 Eur. Ct. H.R. (ser. A) at 20-21 (1992); Kostovski v. Netherlands, 166 ECHR (ser. A); (1989); Underpertinger v. Austria, 110 ECHR (ser. A) (1986); X. v. Belgium, 16 Eur. Comm’n H.R. 2050 (1979); Windisch v. Austria, 186 ECHR (ser. A) (1990); Delta v. France, 191 ECHR (ser. A) (1990).

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 in the wake of European integration, 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 Legislation held the promise of regularizing, facilitating, and expanding undercover investigations, while at the same time allaying persistent anxieties about their legitimacy.

In 1992, the German Bundestag enacted legislation that sought both to legitimate undercover operations by addressing mounting constitutional concerns and to institutionalize such investigations as an indispensable weapon against organized crime.⁴⁰ The 1992 statute increased penalties for a number of offenses associated with organized crime; facilitated plea deals with cooperating defendants; and 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 not possible (or 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

The statute's procedural controls legitimated the evidence that deep cover agents produced as having been obtained in a properly authorized way. Compliance with the statute's approval requirements helped ensure that trial judges would validate deep cover operations by admitting the evidence they produced. The judicial approval requirements made admissibility relatively unproblematic

38. Bernhard Schlink, *German Constitutional Culture in Transition*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY (Michel Rosenfeld ed., 1994) at 211.

39. See e.g., KREY, *supra* note 25, 36-38.

40. Gesetz zur Bekämpfung der Organisierten Kriminalität (Law to Fight Organized Crime), subseq. StPO § 110a.

41. That the owner voluntarily admits an undercover agent into his home does not relieve the police of the obligation to obtain judicial approval in advance, assuming that the need for meeting in a private apartment could be anticipated. See BGH NEUE ZEITSCHRIFT FÜR STRAFRECHT 1997, 448; Claus Roxin, *Zum Einschleichen polizeilicher Scheinaufkäufer in Privatwohnungen*, STRAFVERTEIDIGER 1998, 43.

once the trial court had answered a 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.

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, clear, and relatively simple to apply, and they provided the police, prosecutors, and judges with guidance as to what was expected.⁴² The statute made it possible to present the undercover policing system as internally coherent and capable of reconciling fairness with crime control.

The 1992 reforms also gained credibility from the contrast with what Germans viewed as largely unfettered American practices.⁴³ Numerous German police officers and prosecutors asserted "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."⁴⁴ 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 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."⁴⁵

The German covert policing system improved its legitimacy not only through comparisons to U.S. policing, but through administrative reforms in the German police. These changes improved legiti-

42. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); Robert Grafstein, *The Legitimacy of Political Institutions*, 14 *POLITY* 51 (1981); see also COTTERELL, *supra* note 18, at 91-110.

43. Lutz Meyer-Gossner, *Strafprozessordnung- § 110a n.4*; KREY, *supra* note 25, 12; Arthur Kreuzer, *Die Lockspitzelfalle*, IN: *FESTSCHRIFT FÜR HANS-LUDWIG SCHEIBER*, 225 (2003).

44. German police official (former undercover agent), May 14, 2004.

45. "Verdeckte Ermittler" *id.*

macy along the first dimension of legitimacy-as-fit, namely, legal validity, by seeking to improve compliance with the system's rules through increased professionalism and specialization. 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. Germany also 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. Professionalizing recruitment and training makes it more likely that covert operatives will comply with rules that govern their behavior, thereby promoting the legal validity and rule-boundedness of the system. Differentiating the functions of undercover agents, control officers, and informant handlers also permits members of covert policing units to act as a check on each other. Because covert units are no longer part of investigative divisions, they are also freer to examine critically the assumptions of investigative agents about the seriousness of a crime and the depths of the target's involvement in suspected criminal activities. The covert units' professional detachment, which acts as a check on investigative units, is reinforced by their ability to pick and choose among assignments and to decide which are most deserving of their resources. At the same time, however, professional autonomy creates new barriers to oversight that may pose hazards of their own.

B. The United States

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 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.⁴⁶

Undercover investigations substitute stealth for highly contested and/or regulated tactics, like police interrogation. If regular policing strategies disproportionately catch the poorest and least sophisticated criminals, infiltration provides access to the misdeeds of well-insulated elites.

46. *FBI Undercover Guidelines: Hearing before the H. Judiciary Comm.* (1981) (statement of Philip B. Heymann, Assistant Att'y Gen., Criminal Division, Department of Justice).

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 that took place from 1978-1980. During this investigation, 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 undercover technique creates serious risks to citizens’ property, privacy, and civil liberties . . . and may on occasion create crime where none would otherwise have existed.”⁴⁷ The Committee has also criticized the FBI’s informant guidelines for failing to delineate the circumstances that justified “the use of violence, commission of a crime, or interference with a privileged relationship.”⁴⁸ During 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.⁴⁹

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.)⁵⁰ Thus the United States now regulates covert practices through a combination of internal agency guidelines; 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 administra-

47. *Id.* at 140-41.

48. 1982 Final Report of the Senate Select Committee to Study Undercover Activities, at 55.

49. See *Undercover Operations Act: Hearing Before the S. Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 98th Cong. 8 (1984).

50. Henry Hamilton & John Smykla, *Undercover Guidelines*, 11 JUSTICE QUARTERLY, 1, Mar., 1994.

tive processes,” or pose risks to third parties, “such as financial loss or criminal victimization.”⁵¹ The regulations create centralized oversight through an internal review committee for “sensitive” undercover operations, which are defined to include investigations of “public officials in matters involving systemic corruption” or of members of the news media, governmental, political or religious organizations; as well as undercover tactics “with a significant effect on the legitimate operation of federal, state or local government entities.”⁵² Covert investigations also trigger special scrutiny when they interfere with privileged communications between targets and attorneys, physicians, or members of the clergy, or “present a significant risk of violence or of significant claims against the United States.”⁵³ Targets and innocent bystanders alike may vindicate these interests through Bivens claims for due process violations and claims under the Federal Tort Claims Act.⁵⁴

Since 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). American constitutional doctrine does not share Germany’s focus on “informational privacy,” instead emphasizing “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.⁵⁵ Consistent with American emphasis on “decisional privacy,” American regulation of undercover policing places heavy emphasis on the entrapment defense, which may be viewed as restraining the government from interfering with a target’s autonomy through undue inducements or pressure.⁵⁶

Lacking comparable concerns with informational privacy, the United States does not circumscribe the types of offenses which may

51. *Id.*

52. *Id.* at 145.

53. *Id.* at 146.

54. 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).

55. See Whitman, *supra* note 30. 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 & William A. Edmundson eds. 1988).

56. *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).

be investigated by intrusive, long-term infiltration. 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). In contrast to violations of Germany's warrant procedure, an American agency's failure to abide by governing regulations also does not entitle targets to demand the suppression of evidence.

Thus 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.

IV. WHY UNDERCOVER POLICING REMAINS IN TENSION WITH GERMAN PROTECTIONS FOR PRIVACY

In Germany, the 1992 statute and institutional reforms succeeded in addressing threshold concerns about privacy by requiring advance judicial approval for the most intrusive sort of undercover investigation, namely, long-term deep cover operations, and by restricting such investigations to offenses associated with organized crime. These constraints seemingly improved legitimacy along the second axis of "legitimacy-as-fit," by improving consonance with fundamental rights. But these reforms also created new problems for the legitimacy of infiltration. First, the reach of the statute was incomplete. Some covert practices eluded it. Criticisms previously leveled at undercover policing in general were redirected to these relatively unregulated operations.⁵⁷ Second, the effort to limit deep

57. Duttge, *supra* note 28; Ralf Eschelbach, *Rechtsfragen zum Einsatz von V-Leuten*, STRAFVERTEIDIGER 2000, 390; Ronald Herrmann, *Kriminalität: V-Mann-Einsatz als verfassungswidriges Instrument der OK-Bekämpfung*, POLIZEI-HEUTE 2001, 151; Wolfgang Hetzer, *V-Mann-Einsatz im Niemandsland?*, KRIMINALISTIK 2001, 691; Horst Kraushaar, KR 1995, 186; Heiko Lesch, *Zu den Rechtsgrundlagen des V-Mann-Einsatzes und der Observation im Strafverfahren*, JURISTISCHE ARBEITSBLÄTTER 2000, 725; Roxin, *Zum Einschleichen polizeilicher Scheinaufkäufer in Privatwohnungen*, STRAFVERTEIDIGER 1998, 43; Krey, *Rechtsprobleme beim Einsatz Verdeckter Ermittler einschließlich der elektronischen Überwachung (Lauschangriff) zu ihrem Schutz und als Instrument der Strafverfolgung in Deutschland*, JURISTISCHE RUNDSCHAU 1998, 1; Jes Meyer, *Verdeckte Ermittlungen: Zulässigkeit und rechtliche Grundlagen des Einsatzes nicht offen operierender Polizeibeamter*, KRIMINALISTIK 1999, 49; Holger Nitz, *Verdeckte Ermittlung als polizeitaktische Maßnahme bei der Strafverfolgung*, JURIS-

cover investigations to organized crime was hampered by the breadth and malleability of that concept, which police and prosecutors were left to define for themselves. Investigators' control over the concept made it difficult to evaluate the success of covert operations in fighting organized crime, even as the invasiveness of deep cover operations made their effectiveness against organized crime essential to their legitimacy. Undercover policing thus remains a "necessary evil" to the extent that privacy protections remain incomplete and that burdens on privacy remain insufficiently justified by the effectiveness of the practice that imposes them and insufficiently limited to organized crime.

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

German statutory reforms are highly selective in the undercover operations they regulate. As a result, they legitimate only a subset of covert investigations. 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.⁵⁸)

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, the federal system of warrants, which the statutory reforms inaugurated, does not regulate when the police can *undertake* undercover investigations. 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 repressive operations aimed at gathering evidence against particular targets for use in criminal prosecutions.

There is a third way in which the system proves 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

TISCHE ARBEITSBLÄTTER 1999, 418; Volker Schmidt, *Der nicht offen operierende Polizeibeamte*, KRIMINALISTIK 2000, 162.

58. See MARCO König, *Trennung und Zusammenarbeit von Polizei und Nachrichtendiensten*, (2005).

investigations using only informants or shallow cover agents.⁵⁹ The application of the statute, and the need for judicial approval, depends on a large extent as to 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.

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.⁶⁰ The key factors include: number of undercover meetings, complexity of investigative tasks, whether it can be anticipated that the agent will have to enter private homes, length of time for which he is in use, number of people whom he must deceive about his identity, and whether the police expect him to testify. No individual factor is dispositive.⁶¹ “Whether and when these [shallow cover agents] need judicial approval remains extremely unclear,” a police official complained.⁶² Some jurisdictions permitted two or three contacts; others up to ten or fifteen.⁶³ Indeed, shallow cover agents could sometimes be used as substitutes for deep cover agents when a long-term undercover investigation led to an undercover contact (such as the purchase of contraband) which the police wanted to document and charge without revealing the involvement of a deep cover agent.⁶⁴

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.⁶⁵ 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 in more need of supervision? Prompted by the post-1992 regula-

59. These are called “non-overtly investigating agents” to distinguish them from “covert agents,” whom the statute is designed to regulate.

60. BGH, NEUE JURISTISCHE WOCHENSCHRIFT 1996, 2100; Bundestag-Drucksache 12/989; BGHR StR 527/96.

61. *Id.*

62. German chief of covert policing unit, June 2, 2003.

63. German prosecutor, May 10, 2004, Mar. 12, 2004, May 13, 2004, and interview with German control officer of undercover agents, June 2, 2003.

64. See discussion of the “bait and switch” tactic for insulating deep cover agents, *infra* pp. NUMBER.

65. Duttge, *supra* note 28; Ralf Eschelbach, *Rechtsfragen zum Einsatz von V-Leuten*, STRAFVERTEIDIGER 2000, 390; HERMANN, note 57, *supra*; Wolfgang Hetzer, *V-Mann-Einsatz im Niemandsland?*, KRIMINALISTIK 2001, 691; Roxin, *supra* note 41; Klaus Bernsmann & Kirsten Jansen, *Heimliche Ermittlungsmethoden und ihre Kontrolle: Ein systematischer Überblick*, STRAFVERTEIDIGER 1998, 230; Fezer, *supra* note 28; Hund, *supra* note 28; Otto Lagodny, *Verdeckte Ermittler und V-Leute im Der Spiegel von § 136a StPO als “angewandtem Verfassungsrecht,”* STRAFVERTEIDIGER 1996, 167.

tion of deep cover agents, these questions raised doubts about the legitimacy of using shallow cover agents and informants without equivalent statutory regulation.

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

Efforts to limit deep cover investigations to the pursuit of organized crime are essential to the legitimacy of this highly invasive tactic. Yet the malleability of the concept of "organized crime" undermines such efforts. Constraints on the crimes the police may target for deep cover investigations lose some of their power because undercover agents possess 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. Covert agents do not merely react to criminal organizations; they shape them, or at least shape how the organizations are described. In this way, agents can define the threat that needed to be solved with infiltration. They can make the crime fit the investigation. This not only makes it difficult for judges and politicians to assess the effectiveness and accomplishments of undercover policing. It also diminishes the extent to which deep cover operations can be confined to the investigation of organized crime.

Germany's definition of organized crime heightens these problems. 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.⁶⁶ The regulation styles "organized" crime broadly 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."⁶⁷ The criteria defining "organized crime" were manifold, including "structured, hierarchical organizations, often supported by ethnic solidarity, language, custom, social and family connections,"

66. Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Zusammenarbeit von Staatsanwaltschaft und Polizei bei der Verfolgung der Organisierten Kriminalität; in RICHTLINIEN FÜR DAS STRAFVERFAHREN UND DAS BUßGELDVERFAHREN, ANLAGE D, p. 15; See also Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Inanspruchnahme von Informanten sowie über den Einsatz von Vertrauenspersonen (V-Personen) und verdeckten Ermittlern im Rahmen der Strafverfolgung, Richtlinien für das Strafverfahren und das Bußgeldverfahren, Anlage D (1985, amended 1993 and 1994).

67. *Id.*

encompassing a catalogue of more than a dozen different areas of criminal activity.⁶⁸

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.”⁶⁹ 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.”⁷⁰ “A criminal association has to have a permanent command structure, and an established process of decision-making for the organization as a whole. It really only applies to already recognized entities like the Cosa Nostra and Ndragheta.”⁷¹ For that reason:

[A]lthough 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.⁷²

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 are not.⁷³

Organized crime can be anything. Once I 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.⁷⁴

68. The 1990 regulation laid the groundwork for an expansion of undercover policing, and for an emphasis on intelligence-gathering, by calling for the 16 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.

69. *Strafgesetzbuch* (StGB) § 129.

70. German prosecutor, Mar. 12, 2004.

71. German prosecutor, Mar. 10, 2004.

72. German prosecutor, May 19, 2004.

73. 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.

74. Supervisor of German covert policing unit, May 26, 2003.

The 1990 regulation envisioned organized crime was as a “parallel society” run by sophisticated multinational enterprises that threatened the democratic state at its roots by infiltrating its media, economy, and government institutions. But the regulation’s broad definition of organized crime included a variety of indicia that could describe many of the more mundane smuggling, burglary, fencing, and prostitution rings that covert police and prosecutors habitually target.

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.”⁷⁵

Police not only interpret the definition of organized crime to justify their covert investigations but occasionally 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 solid citizens, they help you make yourself [the agent] useful to people in the scene. 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.”⁷⁶ 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.⁷⁷ Others offered referrals to banks, lawyers, tax consultants, foreign contacts, and special airport access.⁷⁸ One 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 business to Germany.⁷⁹ The link between gangs and lawful society that suggests “organized” criminal capacity can sometimes be an artifact of the investigation.

75. German prosecutor, Mar. 11, 2004.

76. German control officer and former deep cover agent, May 13, 2004.

77. Supervisor of German covert policing unit, May 27, 2003.

78. German deep cover agent, May 12, 2004; interview with supervisor in covert policing unit, June 2, 2003.

79. Supervisor of covert policing unit on May 27, 2003.

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.”⁸⁰ In another case:

[A]n 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.⁸¹

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 police shape organized crime not only to justify covert operations under the 1992 statute, but to match their investigative strengths. Because organized crime potentially includes so many phenomena, the police can target those that they are best able to detect. Covert units are trained to infiltrate red light districts and so “discover” much organized crime there (including illegal use of guns and drugs, smuggling of aliens, prostitution, counterfeiting, and extortion). By playing to their strengths, they can selectively ignore their weaknesses.

We have a rash of cases where people from Eastern Europe get E.U. credits to start a business and then misuse the funds. They systematically bribe the offices in charge of the loans. But without organizational data, and knowledge of whether it's the same people doing this, we can't show it's organized crime.⁸²

80. Former chief of covert policing unit, June 3, 2003.

81. 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.

82. German prosecutor, May 13, 2004.

The police were simply not experienced at obtaining this information from inside the organization.

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 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 shoulders with law-abiding citizens along with the assorted mopes, hangers-on, occasional offenders, and committed criminals whom they collectively designate as “targets.” The inclusion of many low-grade offenses in the category of “organized crime” necessitates the creation of an infrastructure of surveillance networks much more comprehensive and integrated into lawful civil society than one would infer from rhetoric about targeting “tightly knit” criminal organizations “closed off” from mainstream communities.

This development is reminiscent of the tendency David Garland observes in his path-breaking work, *The Culture of Control*.⁸³ 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 than the government needs to prove these mundane, relatively unsophisticated offenses at trial. If covert agents and informants identify the structure of a criminal organization that fails to qualify as a “criminal association,” they need not, and may not, be able to present a complete picture of these findings in a criminal prosecution. Accordingly, criminal prosecutions were often a byproduct of covert operations whose main accomplishment was the gathering of

83. DAVID GARLAND, *THE CULTURE OF CONTROL* (2001).

intelligence.⁸⁴ The very simplicity of these prosecutions keeps out of court much of the intelligence laboriously collected by deep cover agents.

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).⁸⁵ 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, subtle, and precise takes on a life of its own. Thus the German undercover policing system supports the accumulation of knowledge at some remove from the prosecution of criminals.

To be sure, the manipulation of performance measures is a problem for the legitimation of undercover policing in other legal systems as well. But it is a special problem in Germany, insofar as Germany, unlike the United States, has sought to limit and justify deep cover operations as a tool against organized crime.

V. SEPARATION OF POWERS: UNDERCOVER POLICING AS A SOURCE OF INTELLIGENCE, NOT JUST EVIDENCE

A very different sense in which undercover policing may be described as a "necessary evil" emerges from the tendency of such investigations to blur the distinction between the "preventive" and the "repressive" functions of police work, and, beyond that, between the pursuit of intelligence and the collection of intelligence. While the distinction between preventive and repressive policing predates the establishment of the Federal Republic, the mandate to separate police work from domestic espionage has its origins in the post-war decentralization of executive powers.

The distinction between preventive and repressive police powers is by no means unique to the covert realm. The so-called repressive code is the uniform national Code of Criminal Procedure; the preven-

84. Prosecutors reported that they often charge "organized crime" as aggravated forms of ordinary offenses, thus permitting a more complex portrait of the organization to emerge at trial. This was to some extent facilitated by the 1992 statute reforms, in that the Law on Control of Drug Trafficking and Other Forms of Organized Crime (*Gesetz zur Bekämpfung der Betäubungsmittelkriminalität und anderer Formen organisierter Kriminalität*) provided new sanctions and added new aggravating circumstances to violent crimes as well as drug and property offences that were committed by "criminal networks" or "gangs."

85. German prosecutor, Mar. 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.*

tive codes are individual police laws that vary significantly among the 16 federated states. German police can conduct undercover investigations in either their preventive or repressive capacities.⁸⁶ The new system sought to legitimate undercover operations 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.⁸⁷ The 1992 law required that preventive operations transform themselves into repressive (evidence-gathering) investigations, supervised by prosecutors and/or judges, as soon as the preventive operation yields concrete indications that a particular crime had been or was being committed. The statute thus sharpened the demarcation between repressive and preventive undercover operations in ways that protected repressive investigations from the taint of “merely gathering intelligence.”⁸⁸

Nonetheless, the new system of covert policing also institutionalized and expanded deep cover investigations in ways that threatened the viability of the functional demarcations that are essential not only to the separation of powers between intelligence and police communities but to the maintenance of a meaningful distinction between federally regulated repressive powers and the states’ preventive prerogatives. Evidence-gathering operations spurred the pursuit of intelligence in the preventive realm of police work and sheltered the search for intelligence during so-called “repressive” operations. Deep cover operations also invited uncomfortable parallels with the work of the state and federal APCs. The blurring of lines between police work and domestic spying proved particularly troubling in the five new states of the former East Germany, where covert tactics were associated with the east German State Security (“Staatssicherheit,” known as “Stasi”). In contrast to these structural concerns, American anxieties about undercover operations focus much less on the separation between domestic intelligence operations and criminal investigations than on the scope and intrusiveness of intelligence operations

86. 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).

87. See Heiner Busch & Albrecht Funk, *Undercover Tactics as an Element of Preventive Crime Fighting in the Federal Republic of Germany*, in UNDERCOVER POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE 56 (Cyrille Fijnaut & Gary T. Marx eds., 1995). Unlike Germany’s intelligence agencies, the police enjoy no exemption from the principle of legality when they operate in their preventive guise.

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

per se, given their potential impact on First Amendment rights of free speech, free press, and free association.

A. *Intelligence-Gathering Before Judicial Authorization of Repressive Undercover Operations*

The greatest vulnerability of the post-1992 German regulatory system emerges from an internal tension. On one hand, the reforms tried to tame deep-cover investigations as evidence-gathering tactics; and on the other hand, the system, as implemented, pushes undercover agents back into more shadowy pursuit of 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 operations.⁸⁹

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.⁹⁰

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. To guide repressive operations, preventive operations expanded their agenda from concrete dangers (the businessman seeking to burn down his warehouse, or the husband hiring a contract killer to murder his wife) to more diffuse threats and criminogenic settings in which "something illegal was going on." And the repressive phase in turn generates intelligence for new preventive operations.

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

89. 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, RICHTLINIEN FÜR DAS STRAFVERFAHREN UND DAS BUß GELDVERFAHREN, ANLAGE E (1990).

90. German chief of covert policing unit, May 26, 2003.

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 only). 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."⁹¹ 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."⁹² Accordingly, cover-building operations may generate intelligence without judicial or even prosecutorial scrutiny.

B. Intelligence-Gathering after Judicial Approval of Repressive Undercover Operations

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 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:

91. German prosecutor, May 22, 2003.

92. German judge, May 27, 2003.

[W]e 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.⁹³

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.⁹⁴

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).

The second reason why the police may emphasize the collection of intelligence over the pursuit of evidence when conducting repressive undercover operations is the 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. The police expect deep cover agents to remain undercover through successive prosecutions and, if possible, to continue using the same cover story. 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 re-

93. Supervisor in German covert policing unit, June 3, 2003.

94. Supervisor of German shallow cover agents, May 12, 2004.

pressive 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.”⁹⁵ Thus the police often assign deep cover agents supporting roles in criminal investigations in order to keep their activities out of court. “The undercover agent is part of a larger mosaic, along with telephone tapping, visual surveillance of targets, financial investigations, etc.”⁹⁶ 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.”⁹⁷

The use of shallow cover agents to insulate deep cover agents 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 an informant from outside the milieu; he in turn introduces an undercover agent, who makes the undercover buy.”⁹⁸ In other investigations, “the informant will buy small samples and then introduce the shallow cover agent for the main transaction.”⁹⁹ 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 over-

95. Supervisor of German covert policing unit, May 17, 2004.

96. Supervisor of German covert policing unit, June 2, 2004.

97. German control officer, May 14, 2004.

98. German prosecutor, May 19, 2004.

99. German prosecutor, Mar. 9, 2004.

lap 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.

C. *The Blurring of Roles between “Hunters” and “Gatherers”: The Police and the APCs*

The German legal system differentiated undercover policing from the covert responsibilities of Germany’s domestic intelligence agencies by directing the police to gather evidence, as distinct from intelligence. Germany reinforced this functional division of labor by differentiating the subject matters which police and intelligence agencies were authorized to investigate. APCs pursued threats to national security. Covert police work focused on crime, 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 1990s, some states authorized their APCs to investigate organized crime in response to highly publicized claims that it had become a threat to national security.¹⁰⁰

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.¹⁰¹

After the September 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 do-

100. See e.g., art. 3 I 1 Nr. 4 BayVSG.

101. Helmut Albert, *Das “Trennungsgebot”: ein für die Polizei und Verfassungsschutz überholtes Entwicklungskonzept?*, ZEITSCHRIFT FÜR RECHTSPOLITIK 1995, 105 (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).

main of the police; after September 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 collaborate with the APC in covert operations and 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.¹⁰² 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.¹⁰³ “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.”¹⁰⁴

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.¹⁰⁵

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

102. MARCO König, *TRENNUNG UND ZUSAMMENARBEIT VON POLIZEI UND NACHRICHTENDIENSTEN* (2005).

103. German control officer, May 12, 2004.

104. Chief of German covert policing unit, Mar. 10, 2004.

105. Chief of German covert policing unit, Mar. 8, 2004.

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 feared that the police would compromise their operatives by intervening too soon or would inadvertently target them, not knowing who they were. The police feared 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.

The 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.

D. Covert Operations in the Former German Democratic Republic (GDR): Resonances from the Past

In Germany, part of the difficulty of legitimating covert policing as a law enforcement tool stems from its association with the dense network of surveillance and political repression in the former GDR, where undercover investigations were a favored tactic of the secret police. The association of covert policing with the “Stasi” has made it difficult to re-introduce undercover operations as a legitimate law enforcement procedure in the five new states that formerly comprised the GDR. Indeed, the State Supreme Court of Saxony (a new state from the former GDR) held the Saxon police law authorizing preventive undercover investigations to be unconstitutional (under the Saxon Constitution).¹⁰⁶ A covert policing chief in one of these states stated that, in East Germany, infiltration had been the province of the Stasi, rather than the police. “The GDR didn’t have undercover agents within the police,” he stated. “Undercover policing is a completely new phenomenon for people here, at least as a police tac-

106. SächsVerfGH, LANDES- UND KOMMUNALVERWALTUNG 1996, 272.

tic.”¹⁰⁷ (In discussing the undercover practices of the Stasi, western police officials in the former GDR did not consider whether the Stasi itself used such operations to investigate crime, as distinct from political dissent.) “Given the political history of infiltration in this part of Germany,” another official from the new states reported, “we have a relatively small covert policing unit here. People are very nervous about it. The population has to first learn to accept it as something lawful and clean.”¹⁰⁸

From the perspective of the (western) police officials who established covert policing units in the five new states, the legacy of the Stasi could be minimized by staffing undercover units with agents from the western states and the *Bundeskriminalamt* (Federal Criminal Bureau), who were not compromised by past association with the Stasi. “We absolutely did not want to use people from the former GDR, who had done this kind of work before 1989.”¹⁰⁹ Similar practices extended to the recruitment of informants.

We had to use informants, but if we learned that someone had already been an informant in the GDR, we were very critical. Whether we could continue to use him depended on whether he’d worked with the police or the Stasi. At first, it was a complete disqualification if we’d learned he’d worked with the Stasi. Now, it’s a case-by-case determination.¹¹⁰

From the perspective of easterners, however, the assumption that only westerners could be trusted with sensitive undercover assignments did little to legitimate covert tactics. In his work on the reunification of the Berlin police, Andreas Gläser identified one of the chief sources of mistrust between easterners and westerners as the “synechdocal mischief” by which western police officials generalized from the part (e.g., individual officers who collaborated with the Stasi) to the whole (the entire police bureaucracy). If staffing precautions alleviated some concerns about perceived continuities with the GDR’s past, they also fed eastern fears about western paternalism. The novelty of undercover tactics as a police method created the risk that such tactics would be viewed as filling a void left by the disappearance of the Stasi. Easterners could wonder if undercover policing would substitute for the social control which the Stasi once exerted through its own mechanisms of covert infiltration. That covert operatives were initially only westerners reinforced such concerns by suggesting that westerners were needed to “keep an eye” on the newly integrated east German population.

107. Chief of German covert policing unit, May 19, 2004.

108. *Id.*

109. German control officer, May 14, 2004.

110. Chief of German covert policing unit, May 19, 2004.

Using only western personnel was not a workable long-term solution given the difficulties western undercover agents faced in infiltrating eastern offender groups. With the passage of time since German reunification, “we’re just now starting to recruit deep cover agents from here (the east). Folks who have the right accent.”¹¹¹ But one indicator that undercover policing lacks legitimacy for easterners is that the police report difficulty finding east German police officers willing to work undercover—and even more trouble recruiting informants. “Our informant base has mostly died out. You can’t recruit them at all.”¹¹² Another official attributed these recruitment troubles to the difficulties Stasi informants encountered after reunification. “Remember, these informants already got burned once. After reunification, all the Stasi files were opened up; there was enormous turmoil. And now, the prospect that informants might have to testify [through new videoconferencing technology], even if masked, revives those old fears of becoming known.”¹¹³ “When we do sign up informants, they tend to be pretty desperate people, who have some highly charged, elemental, existential interest in informing.”¹¹⁴ These difficulties of recruitment indicate the degree to which covert practices conflict with prevalent norms. The need to recruit informants from the most desperate members of society weakens legitimacy further by reducing the reliability of information.

Part of the difficulty of legitimating undercover policing in the five former states of the GDR derives from the radical transformations that have taken place there. Undercover policing depends on the infiltrator’s ability to accredit himself in some established milieu and to forge connections to informants on the inside. “But what makes it even harder [to establish such links] is that everything here has changed. All the old factories and social structures are gone.”¹¹⁵ And crime itself has changed. “There didn’t use to be drugs here or guns, or very little. And the [East German police force’s] success in clearing up crimes was very high. And there was a lot less violence. Suddenly, organized crime has established itself here, and the whole nature of the crime problem has changed.”¹¹⁶ “Influence on media, the economy, politics [which are indicators of organized crime]—that’s all new. And anyway, back in the GDR, how would they have even spent their profits?”¹¹⁷ Thus, given the deterioration of social networks in which undercover operatives can establish themselves and given the newness of organized crime, undercover tactics have

111. Supervisor of German covert policing unit, May 17, 2004.

112. Chief of German covert policing unit, May 19, 2004.

113. Chief of German covert policing unit, May 17, 2004.

114. *Id.*

115. Chief of German covert policing unit, May 19, 2004.

116. *Id.*

117. *Id.*

not yet established their effectiveness and won acceptance. The fact that many undercover agents still come from the west, combined with the rapid pace of change and dislocation, make it difficult for infiltrators to make sense of so unfamiliar and unstable a social environment; to assess risks accurately; and to distinguish opportunistic offenders from nodal figures in criminal networks.

Having had to start covert policing units from scratch, import western personnel, recruit easterners, and operate amid distrust and uncertainty about the applicable rules, it is perhaps not surprising that undercover policing units have encountered setbacks. Covert policing chiefs from two of the five new states reported that all of their deep cover agents who had been withdrawn from the field had left on bad terms—there had been problems in supervising them and they had gone astray in one way or another.¹¹⁸ The difficulties of conducting undercover operations in conditions of such contested legitimacy and heightened suspicion must factor into an analysis of these problems.

Local suspicions and practical obstacles compound problems of legitimacy that derive from the resemblance between undercover policing and the methods of intelligence agencies. In the territories of the former GDR, the police must contend not only with concerns about the separation of powers and the imperative to avoid a confluence of executive powers associated with the Nazi regime but also must confront fears generated by a more recent German experience with dictatorship. Both histories cast a long shadow over covert policing in the five new states. But there is also a difference between the ways these experiences affect the legitimacy of police infiltration. For the largely western agents who created and staffed the new undercover units, comparisons to the Stasi are mainly a problem of *perceived* legitimacy. Though the east German public might regard undercover policing as an illegitimate form of social control, the police themselves view comparisons with the Stasi primarily as a public relations challenge requiring them to communicate the differences between their own methods and those of the Stasi. At the same time, the police regard the affinities between intelligence gathering and police infiltration as very real threats to their legitimacy. In almost every interview, the police described ways in which they designed undercover operations to differ from those of Germany's domestic intelligence agencies (the APCs). While the police aimed not to *act* like intelligence agencies, they merely sought not to be *misperceived* as resembling the Stasi. In their view, the practices of the Stasi should not taint the new covert units, though locals may be confused by an appearance of continuity. Unlike the Nazi past, which gives the prin-

118. Chiefs of German covert policing units, May 19, 2004 and May 14, 2004.

principle of separation its salience, the Stasi and its abuses could be dismissed as the history of a different country.

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

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 covert tactics. 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 to manipulate, disrupt, or radicalize political organizations; to retaliate against political dissidents; or to interfere with religious observance through the infiltration of churches and mosques.¹¹⁹ In addition, Americans are concerned that intelligence operations have a tendency to expand too far beyond their original scope. They 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 Rights movements of the 1960s and early 1970s.¹²⁰ 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

119. For a discussion of the ways in which government information gathering conflicts with First Amendment values, see Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007).

120. During the late 1960s and early 1970s, 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 (1976).

the illegal wiretaps] unless Dr. King committed suicide.” In its Final Report of 1976, the Commission condemned the government’s covert tactics as “unworthy of a democracy” and “occasionally reminiscent of the tactics of totalitarian regimes.”¹²¹

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 25 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 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.”¹²²

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 Levi forestalled the passage of the statute by enacting new, restrictive guidelines for “domestic security investigations.”¹²³ 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

121. Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (1976).

122. Senate Select Committee on Intelligence, 101st Cong., *The FBI and CISPES* at 3, 103.

123. *Federal Bureau of Investigation Compliance with the Att’y General’s Investigative Guidelines*, Special Report, Sept. 2005, at III.A.

our society.”¹²⁴ 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.¹²⁵

What is striking about the controversy surrounding domestic security investigations is that the 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 covert 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.¹²⁶ Subsequent administrations gradually relaxed the demand for evidence of impending criminal wrongdoing

124. *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 257 (1976).

125. 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).

126. Levi Guidelines for Domestic Security Investigations, Section II.I.

before a domestic security investigation could be initiated.¹²⁷ 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 events [such as meetings at mosques or churches] . . . for the purpose of detecting or preventing terrorist activities, without the predication required to investigate leads or conduct a preliminary inquiry or full investigation.”¹²⁸ 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.¹²⁹ 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 Americans use the former as a model for the latter. By contrast, German fears coalesce around the use of covert tactics in criminal investigations. But 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. The APCs are 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. By the same token, the principle of separation prohibits the police from function-

127. *Advice to Field Offices Regarding Domestic Security/Terrorism Investigations and Preliminary Investigations Under the Attorney General’s Guidelines on General Crimes, Racketeering and Domestic Security/Terrorism Investigations*, Nov. 1, 1995.

128. *Federal Bureau of Investigation’s Compliance with the Att’y General’s Investigative Guidelines (Redacted)*, Special Report, Office of Inspector General (Sept. 2005), at 19.

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

ing as intelligence agencies. In the face of these constraints on the police, and the APCs' built-in 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.

VI. CONFLICTS WITH SUBSTANTIVE NORMS AND ROLE OBLIGATIONS OF LEGAL ACTORS

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 on targeted crimes.¹³⁰ Yet covert policing presents special dangers that go beyond the privacy concerns underlying the regulation of electronic surveillance. In Germany, no less than the United States, covert operatives have a special ability to influence the criminal milieu they investigate and to be shaped, in turn, by the targets with whom they associate. Such reciprocal influences are not entirely unique to undercover operations.¹³¹ But the influences of covert operatives may be particularly subtle and difficult to detect. As a special case of this interaction effect, undercover policing poses a number of dangers. First, agents may become tainted with criminal wrongdoing if they participate too actively in the crimes they investigate. Second, they may violate their obligation to prevent harm to third parties if they permit crimes to occur. Third, they may encourage their targets' propensity towards wrongdoing. I shall call these risks the "interaction dangers" of undercover policing. The legitimacy of undercover operations depends at least partly on the ability of the regulatory system to contain these risks.

Like the United States, Germany mitigates these hazards through a number of "substantive norms" that limit the degree to which agents may involve themselves in the crimes they investigate and the extent of criminal conduct the police may tolerate before intervening with seizures or arrests. Germany, like the United States, also prohibits entrapment, defined as excessive government influence on the criminal designs or inclinations of suspects.

130. StPO §100c.

131. Conventional tactics of uniformed police may also interact with their environments. Targets may speak or behave differently if they think they are being overheard. As Gary Marx has demonstrated, strategic non-enforcement may permit law-breaking; riot control strategies may escalate violence; and stepped-up enforcement may shift drug traffic to "more highly skilled . . . better organized criminal groups" and increase profits, which may in turn corrupt the police. Gary T. Marx, *Ironies of Social Control: Authorities as Contributors to Deviance through Escalation, Nonenforcement and Covert Facilitation*, in UNANTICIPATED CONSEQUENCES OF SOCIAL ACTION: VARIATIONS ON A SOCIOLOGICAL THEME (Robert Merton ed., 1978).

Yet infiltration strains against these norms. Undercover agents must act like criminals to gain the trust of their targets; must tolerate some degree of preparation and lawbreaking by their targets until the planned offense has proceeded far enough to permit seizures and arrests; and must offer sufficient opportunities and assistance to facilitate the crimes they wish to prove. As a result, covert operations not only increase risks of abuse and problems of control (what I shall term the “actuarial risks” of operatives going astray); the undercover technique also requires the various legal actors who conduct and supervise undercover operations to adapt the substantive norms to the needs of undercover operations, which necessitate reciprocal influences between government actors and targets, even as police and prosecutors impose some constraints on covert practices in deference to the substantive norms. Thus undercover policing can be said to constitute a “necessary evil” in two distinct senses, both of which flow from the interaction effects of infiltration: first, covert policing creates the actuarial certainty that some percentage of undercover agents or informants will go beyond what prosecutors and supervisors will tolerate; and second, an institutional commitment to using such tactics subtly alters the role obligations of police, prosecutors, and trial judges who validate the evidence produced by undercover investigations. It became the collective task of these officials to ensure the success of undercover investigations and thus to facilitate, justify, or simply avoid inquiring too deeply into investigative conduct that conflicted with prohibitions against excessively participating in, influencing, or tolerating crime (which I refer to, collectively, as “substantive norms”). Undercover policing may be seen as a necessary evil in this second sense in that it requires police, prosecutors and judges to countenance departures from the nominal rules of the game. Yet the legitimacy of infiltration suffers to the extent the covert policing system as implemented requires tacit derogations from the legal system’s substantive norms.

Though increased risks of misconduct and conflicts with system values are common to covert policing everywhere, the second of these “necessary evils” has a special salience in Germany, both because Germany’s official rules for undercover operations are far less forgiving than their American counterparts, and because the enactment of procedural constraints have pushed rules governing permissible undercover conduct into the background, reducing the scrutiny accorded to compliance with these norms. By premising the legal validity of covert operations on the satisfaction of procedural requirements, the statute shifted the focus of reviewing courts away from whether undercover tactics respected substantive limits on what undercover agents may do—a key determinant of lawfulness before the approval requirements were enacted—and towards the more easily answered question of whether the proper procedural steps had been followed in

obtaining advance authorization for undercover operations. At the same time, the statute laid the legal basis for an expansion of covert policing that intensified interactions between police and suspects. The reformed system assigned new supervisory responsibilities to police, prosecutors and judges, in effect vesting them in the success of covert operations. In so doing, the reforms enlisted supervisory officials in the task of informally reinterpreting or departing from legal requirements to accommodate the needs of longer, more complex operations.

In the United States, the clash between substantive norms and operational necessity is less pronounced because American rules for undercover operations have a largely instrumental focus that incorporates some recognition of the need to tolerate, influence, and participate in criminal conduct. Thus the public authority defense protects undercover agents from criminal liability for crimes they commit undercover. In the United States, the police also have discretion to decide when and whether to intervene, just as prosecutors have discretion not to bring charges. In the United States, the entrapment defense, too, is a concern only at the outer margins of a wide range of permissible undercover enticements; its focus on the predisposition of defendants, along with its all-or-nothing character and the role of the jury in deciding whether entrapment occurred mean that the entrapment defense will matter to the outcome of criminal cases only in the most extreme and unusual cases. But in Germany, entrapment is a mitigating factor at sentencing, not a defense. It is also a scalar concept, that is, a matter of degree; infiltration always produces a sentencing discount for criminal defendants, depending on the extent of government prompting. In Germany, accordingly, undercover tactics are always compromised to some extent by the influences exerted on targets.

Thus one may think of American infiltration rules as proceeding from a utilitarian baseline permitting many undercover practices that would conflict with Germany's deontological prohibitions. If the United States subjects these utilitarian principles to a deontological override when the police go too far in committing, tolerating, or facilitating crime, Germany prohibits less troublesome entanglements between undercover operatives and informants, subject to informal utilitarian accommodations for covert practices whose benefits sufficiently outweigh the costs they inflict. Accordingly, in the United States, undercover policing embodies a necessary evil primarily in the first of the two senses defined above. American concern with the interaction dangers of infiltration is primarily a fear of abuse or misconduct by undercover operatives who go too far—not an anxiety about undercover policing as practiced in the ordinary run of cases. In Germany, by contrast, infiltration is also compromised by its dis-

tance from the deontological baseline and therefore tainted in ways that have no American counterpart—even as German police and prosecutors place more significant practical limits on the covert tactics they will tolerate.

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

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.¹³² 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.¹³³ The United States protects agents from criminal liability when they have obtained the necessary approvals from their supervisors.¹³⁴ 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.¹³⁵ Nor may an undercover agent obstruct justice or commit an act of violence (except in self-defense).¹³⁶ 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 drawing the line between (impermissibly) committing a crime and (permissibly) *pretending* to offend. How do they do this?

132. StPO §§152, 163.

133. See *Brogan v. United States*, 522 U.S. 398 (1998); WAYNE R. LAFAYE, 2 SUBSTANTIVE CRIMINAL LAW, § 10.7 (2d ed. 1986).

134. *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 PAUL ROBINSON, CRIMINAL LAW DEFENSES: A SYSTEMATIC ANALYSIS, § 142(a), p. 121 (1984).

135. This is the Criminal Undercover Operations Review Committee. See *OIG Report*, *supra* note 128, at 149.

136. Undercover Guidelines § III C.1.b.

The pre-1992 system treated violations of substantive norms as individual failures of undercover agents. The post-1992 regime emphasizes institutional as well as individual responsibility for compliance with covert policing rules. Prosecutors supervise undercover police and advise them on the ways in which deontological prohibitions apply to 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. In their various capacities, they all participate in designing and carrying out covert operations. Together they work out the ground level meaning of system values. This means they also share responsibility for deviations from these 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."¹³⁷ "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."¹³⁸

The shared responsibility of police and prosecutors in conducting undercover operations should conform covert tactics to the demands of the substantive norms. To some extent it actually 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.¹³⁹ 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."¹⁴⁰ "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

137. German control officer, May 19, 2004.

138. *Id.*

139. 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).

140. Chief of covert policing unit, Mar. 10, 2004.

we'd have to pull him out early."¹⁴¹ These strategies focused on limiting the agents' exposure to situations in which they might be asked to participate in crimes. To reduce the risk of ancillary (or instrumental) law-breaking, the police thought up other ways in which agents could accredit themselves with targets. According to one prosecutor, "We sometimes use multiple deep cover agents, so the main guy can show that he has other guys working for him, and business associates, and friends."¹⁴² But most importantly, officials stated, "You have to place yourself high enough in the hierarchy to be able to say no when they test you. You don't have the agent work his way up into the organization from the bottom, because then you're setting him up so he has to prove himself."¹⁴³ Operations could be designed to "pre-qualify" agents as veteran criminals who had already paid their dues. One former undercover agent spoke of the disbelief he encountered when he spoke to trainees of his own experiences:

The key, I told them, is to become so well-established in that setting that you can afford to say no. It's a matter of the position you're able to acquire. None of these kids [whom he trains] can believe it when I tell them that in 22 years as an undercover agent, I never had to ingest anything; I've never even had to get drunk.¹⁴⁴

Police sometimes use an alternative strategy whereby an agent accredits himself through carefully staged, feigned criminal conduct:

Once, we rented an apartment from our targets. We put in our cocaine press, our cutting powder; and then we didn't pay the rent. Of course, the targets came in and confiscated our stuff. And we just walked in there nonchalantly and demanded it back. Now we'd established what we were, without ever having to commit any crime; and now they were primed to sell to us.¹⁴⁵

Another official reported, "We once had an undercover agent pretend to shoot another undercover agent after a loud fight, just to impress the target."¹⁴⁶ Given these strategies, most prosecutors and covert policing officials believe that the so-called "chastity test"—where targets probe the agent's willingness to commit a crime—was "mostly a theoretical problem."¹⁴⁷

141. Supervisor in German covert policing unit, May 19, 2003.

142. *Id.* "Once we invited the target to a birthday party for the deep cover agent. Everybody there was undercover too. It was 30 cops. And one target." *Id.*

143. German control officer, May 12, 2004.

144. Former deep cover agent (Germany), May 14, 2004.

145. Supervisor in German covert policing unit, May 27, 2003.

146. Supervisor in German covert policing unit, May 12, 2004.

147. *E.g.*, prosecutors and supervisors in German covert policing unit, Mar. 11, 2004.

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.¹⁴⁸ Undercover agents cannot work as pimps or in other capacities that require them to use violence¹⁴⁹ (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.¹⁵⁰

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. 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. Prosecutors have become adept at suggesting ways for covert agents to pursue favored tactics without running any realistic risk of criminal liability. Since undercover investigations often produce not evidence but intelligence (which does not get into court), judges have little opportunity to curtail the “creative” interpretations of prosecutors. As one judge put it, “undercover agents don't testify; if they break the law, we have no way of knowing it.”¹⁵¹

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

148. German control officer, May 26, 2003.

149. Supervisor in German covert policing unit, May 27, 2003.

150. German prosecutors, May 21 and May 22, 2003.

151. German judge, Mar. 9, 2004.

for making ground level covert operations conform to the demands of the substantive norms. But in this work, how do they interpret such rules? 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 prohibitions on improperly interacting with the target environment? How do they import pragmatic justifications of undercover policing into their interpretation of the rules of engagement for undercover stings? 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?

Undercover practices that police and prosecutors normally regard as criminal are sometimes permitted when the prohibition on participating in an offense is trumped by an agent's obligations (as a police officer) to prevent even more serious offenses and protect people from harm. "An undercover agent is out with some targets who decide to break into a warehouse. If he goes inside with them, he's committing a crime; but if he's worried that they'll bump off the security guard, he has to go along to prevent that."¹⁵² "Sometimes it's hard to avoid participating in the crime," another police official stated. "The target says, let's kill this guy, and the agent says 'no, no, just beat him up.'"¹⁵³ The obligation to comply with the criminal law applies to the agent as an ordinary citizen, not as a police officer. But the duty to stop the assault on the security guard or to minimize harm by instigating a lesser offense in place of a more serious one is specific to his role as a police officer. In the eyes of prosecutors and police, the agent's role-specific duty overcomes his generic obligation to obey the law, at least in those instances in which the harm he prevents exceeds the harm that he causes.

Conversations with prosecutors and police officials revealed that the reciprocal adaptations of practice and doctrine take many different forms. Though an agent may buy drugs, 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.¹⁵⁴ Other police officials and prosecutors believed that returning a portion of the sample might be justified on grounds of necessity in unforeseen emergencies.¹⁵⁵ And still others explained that the decision depended on a weighing of law enforcement interests.

152. Supervisor of German covert policing unit, May 17, 2004.

153. Chief of German covert policing unit, June 2, 2003.

154. Former German prosecutor, June 2002.

155. German prosecutor, May 22, 2003; German prosecutor, Mar. 8, 2004; supervisor in German covert policing unit, May 19, 2003.

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).¹⁵⁶ Along similar lines, a prosecutor stated, "when you get a drug sample, you have to see how pure it is. If it's too pure, you don't give it back."¹⁵⁷

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. A police official recalled: "We're thinking about sending deep cover agents into a telemarketing ring. Maybe we could have him work there; but he can't be making the phone call himself; then he would himself be involved in their crimes."¹⁵⁸ Playing a subordinate role becomes particularly important if the agent knows in advance that he must allow the crime to succeed. Thus, if a target forges official documents, the agent cannot provide him with the necessary implements.¹⁵⁹ The 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.¹⁶⁰ 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.¹⁶¹ And if he himself helps steal a car, 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.¹⁶² He can help outfit a drug lab, so long as he never relinquishes control of the final product.¹⁶³ Even this prohibition could be stretched through creative interpretation. A prosecutor related:

We once had to deal with a target who was manufacturing ecstasy. We were posing as suppliers of the ingredients. But before we could buy the ecstasy from him, we had to sell him a sample of the chemical. So we decided to exchange the

156. Chief of German covert policing unit, Mar. 10, 2004.

157. German deep cover agent, Mar. 11, 2004.

158. Supervisor of German covert policing unit, May 27, 2003.

159. *Id.*

160. *Id.*

161. Supervisor of German covert policing unit, May 27, 2003.

162. German prosecutor, May 13, 2004.

163. German control officer, June 3, 2003. But since absolute control may not be a realistic expectation, prosecutors who approve such operations may have to tolerate some degree of risk.

chemical for an amount of ecstasy roughly equivalent to what he could have made out of the quantity we gave him.¹⁶⁴

If such accommodations stretched the substantive norms that constrained undercover policing to their breaking point (given that the crimes detailed above would send ordinary citizens to prison), the substantive norms did not disappear from view. They remained an important if receding ideal that imposed outer limits on what necessity or crime-control could justify (for instance, prohibiting outright release of guns and drugs into the market).

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. Prosecutors and police then respond in one of two ways. First, they can aggressively interpret the norms to permit favored practices without reciprocal constraints on the practices. The norm against agents committing crimes prohibits them from gambling. Yet prosecutors have issued formal opinions that permit agents to gamble in the course of protecting the community against the harms of illegal gambling by others.¹⁶⁵

Second, prosecutors and police can explicitly suspend the substantive norms in limited instances in the pursuit of other goals (such as crime-control or protection of agents).¹⁶⁶ 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," another official explained. "It's a matter of weighing the seriousness of the crimes they commit against the seriousness of the crimes they're investigating."¹⁶⁷ 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."¹⁶⁸ "Throwing a Molotov cocktail into a shed is no big deal, if it only damages property," a prosecutor stated.¹⁶⁹ 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."¹⁷⁰ 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

164. German prosecutor, May 20, 2003.

165. German prosecutors, May 21, June 2, 2003.

166. Police officials reported that they typically checked with prosecutors first.

167. German prosecutor, May 10, 2004.

168. Supervisor of German covert policing unit, May 10, 2004.

169. German prosecutor, Mar. 9, 2004.

170. Supervisor of German covert policing unit, Mar. 8, 2004.

where he has to commit a crime to avoid losing his cover, it's our job to . . . protect him from liability."¹⁷¹

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."¹⁷² 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. "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."¹⁷³ According to another prosecutor, who was willing even to countenance a limited use of violence under some circumstances, "It's one thing for an 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."¹⁷⁴

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: acting like an accomplice and facilitating a crime cannot be inherently criminal (a violation of the substantive norms) if undercover policing is legal. Accordingly, 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.¹⁷⁵ 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.¹⁷⁶ When prosecutors do worry about the lawfulness of providing targets with useful goods or services, they can eas-

171. German prosecutor, Mar. 10, 2004.

172. German prosecutor, Mar. 10, 2004.

173. German prosecutor, May 22, 2003.

174. Supervisor of German covert policing unit, June 2, 2003.

175. *Id.* and German deep cover agent, May 12, 2004.

176. Chief of German covert policing unit, Mar. 10, 2004.

ily protect agents from criminal liability by distributing responsibilities among several operatives so that guilty knowledge would not coincide with guilty acts. A police official related that “it’s alright for the undercover agent to rent out a warehouse, so long as the agent doesn’t know what’s going on there. You use your informant to find that out.”¹⁷⁷

3. The Principle of Legality: The Tensions between Reactive and Proactive Policing

Although prosecutors and police have found ways to conduct vigorous undercover operations within the restraints of the substantive norms, they continue to worry about the “principle of legality.” Under German law, the police have an affirmative duty to initiate criminal proceedings whenever they acquire evidence of wrongdoing and, concomitantly, to prevent crimes that they witness *in flagrante delicto*.¹⁷⁸ Undercover agents continually watch their targets commit crimes without stopping them, let alone arresting them. Indeed, deep cover agents could hardly avoid witnessing crimes if they mingled with criminals for long enough. But what were they to do?

The agent and the target are talking. And the target shows off his gun. Now he or we have to act. Maybe the agent will buy the gun. But this gets tricky when the guy doesn’t want to sell it. In one case, we had to get special permission from the prosecutor to let the guy keep the gun, on the promise that we would get it later. But in another case we didn’t have that option. The guy didn’t just show the gun, he started shooting it. So now we had to find a way to seize it.¹⁷⁹

Why are agents who do not intervene not sanctioned for violating the principle of legality? Did they not commit a crime (specifically, dereliction of duty)? The German undercover policing system has various ways of squaring the exigencies of covert work with the principle of legality. Covert agents in the field can suspend their obligation to prevent crimes and postpone the arrest of wrongdoers when an immediate intervention would jeopardize an ongoing investigation. Whether the police can justify standing by passively depends on the nature of the harm that may ensue and the possibility of avoiding or at least reducing the harm. According to one police official:

If the crime you happen to witness is a drug crime, you have to find a way to get the drugs. But if some guy is just dealing

177. Supervisor of German covert policing unit, May 17, 2004.

178. StPO §163.

179. Chief of German covert policing unit, May 19, 2004.

in stolen goods, it's up to the prosecutor to decide whether to let things run their course. Certainly you can't permit anything dangerous; and you certainly can't stand by when there's violence.¹⁸⁰

In the opinion of other officials, the possibility of undoing harm is sufficient. From their perspective, thefts can be tolerated if there is a reasonable prospect of recovering the stolen property after the theft or the conclusion of the investigation.¹⁸¹ When harms cannot be minimized or undone, the police sometimes seek the consent of the owner before allowing his property to be stolen.¹⁸² (Whether this makes the theft lawful is a separate question.)¹⁸³

Since agents felt that they could not stand by in cases of serious crime, they found ways of manipulating the targets or environment to reduce the grade of the offense and therefore avoid having to intervene prematurely. "Do you let the targets steal five cars from a courtyard? That depends on whether it's an ordinary or aggravated theft. If the door to the courtyard is closed, then it's aggravated and you have to break things off early. So you make sure that door remains open. If you need to, you open it yourself. Now it's just an ordinary theft, and you can let things take their course. Then later, you make use of some other aggravating factor to bump the crime back up to its earlier status."¹⁸⁴ In this situation, the crime the defendants committed became the product of their (unwitting) interaction with law enforcement. For the agent to allow auto theft, he had to become an accomplice. To minimize the crimes of others enough to justify non-intervention (and respect the principle of legality), the agent needed to participate in crime.

Thus, undercover policing coexists uneasily with the principle of legality. The more an agent succeeds in infiltrating a gang, the greater the likelihood that he will witness crimes and face a conflict between upholding the principle of legality and maintaining his cover. Minimizing harm from a crime, postponing charges, or using proportionality arguments to justify inaction are only partial solutions. Time constraints or the nature of an offense in progress do not always permit such interventions or delays. When the principle of legality trumps proactive undercover interests—when the police response may be rationed or postponed—is continually renegotiated between police officials and prosecutors.

180. Supervisor of German covert policing unit, May 19, 2004.

181. German prosecutor, May 20, 2003.

182. *Id.*

183. Agents sometimes deal with this problem by securing advance consent from an insurance agency without specifying which vehicle the thieves will take. *Id.*

184. German prosecutor, May 22, 2003.

4. Informants: Heightened Difficulties of Distinguishing Feigned from Real Crime

The use of informants as undercover operatives presents fewer problems of legitimacy for the American legal system than for its German counterpart because American regulation of informants takes as its starting point that informants, like undercover agents, may engage in activities that would be criminal if committed by others. Indeed, this is the characteristic that distinguishes them from other civilian auxiliaries, like "sources of information." FBI regulations provide that a source must provide information "in a manner consistent with the applicable law." American law enforcement agencies may also recruit as informants those who are "charged with serious crimes and cooperate with law enforcement officials in return for the hope or promise of leniency."¹⁸⁵

In the United States, informants, like undercover agents, are shielded from criminal liability by the "public authority" defense. Informants' "illegal" activities must be properly authorized by agents. In the United States, therefore, unlike in Germany, the criminal liability of informants does not turn on ordinary doctrines of justification, such as self-defense or necessity. Nor does it depend on whether informants possessed the *mens rea* required for an offense or had made a sufficient causal contribution to some prohibited result. What matters instead is whether their conduct has been properly authorized. The agency's decision to authorize "otherwise criminal conduct" does not turn on whether the conduct too closely mimics criminal activity. The key question is whether it is necessary for an informant to engage in otherwise illegal activity in order to "obtain information or evidence essential to the success of an investigation" or to "prevent death, serious bodily injury, or significant damage to property"; and whether, more generally, the "benefits . . . outweigh the risks."¹⁸⁶ The FBI Guidelines also "sanction[] criminal conduct on the part of informants where necessary 'to establish and maintain credibility or cover with persons associated with the criminal activity under investigation'" but supervisors must assess "the line between the value of an informer and the unreasonable risk of encouraging serious criminal activity."¹⁸⁷ A great deal of "otherwise criminal activity" can be justified so long as the necessary approvals are in place, though supervisors must take account of a mix of other instrumental (and ethical) criteria, such as potential harms to third parties, the government's exposure to tort liability, the reliability and usefulness of the informant, and his relationship to the target (since the Guide-

185. OIG Report, *supra* note 128, at 68.

186. FBI Confidential Informant Guidelines § III.C.a. at B-26

187. *Orena v. United States*, 956 F. Supp. 1071, 1102 (E.D.N.Y. 1997).

lines disfavor using crime bosses against lower-level criminals).¹⁸⁸ Deontological prohibitions operate only at the outer limits of permissible law-breaking.

In some ways, American willingness to allow covert operatives to commit crimes makes life easier both for regulators and for agents in the field. That informants and undercover agents have to commit crimes undercover does not conflict with any of the legitimating premises of the covert policing system, as it does in Germany, which withholds authority for what it considers government law-breaking. American law enforcement agencies can be (more) open about what they permit their operatives to do. Instrumental justifications may be acknowledged and may take center stage. If undercover agents or informants do go too far inadvertently, prosecutors have the discretion not to charge them. In deciding whether the actions of undercover agents and informants are covered by the “public authority” defense (or whether an agency is properly supervising its personnel), prosecutors, judges, and other supervisory officials can avoid difficult moral questions about whether certain conduct *should* have been authorized and confine themselves to asking whether it *was*.

The American approach makes it difficult to hold agents or informants responsible when they veer too far off course. When an informant is prosecuted for unauthorized criminal conduct, he may either claim that he was in fact authorized to commit the crimes with which he is charged or may raise the defense of “entrapment by estoppel,” arguing that the individual agents had misled him into thinking he was lawfully permitted to engage in certain activities. If it is difficult to distinguish authorized crimes from unauthorized offenses, it is even more difficult to establish an informant’s liability for offenses authorized by (or committed in concert with) a renegade agent.

Germany’s unwillingness to exempt informants from the criminal laws requires German police to confront seemingly contradictory demands. To gain access to useful intelligence, informants, like undercover agents, must have some criminal association with their targets and must help plan offenses or assist in attempting them. Yet in the German legal system, adherence to the rule of law, and to the principle that the criminal laws apply to the police along with everyone else, seems to prohibit informants from doing what is essential to their role.

As they do with undercover agents, police and prosecutors find ways of allowing informants to participate in some crimes while ruling others out of bounds. There are a number of ways in which the absolute nature of Germany’s prohibition runs counter both to the

188. OIG Report, *supra* note 128, at 93.

actual practices of informants and to the informal accommodations of police and prosecutors. Informants may decide to purchase guns or drugs for the police without clearing this in advance with their handlers. If they do, they incur criminal liability, despite their law enforcement purpose. But prosecutors may be able to suspend criminal charges. "Once an informant stole a kilo and plopped it down on the police officer's desk. That was a crime, but we could shelve the proceedings due to the informant's minimal blameworthiness," a prosecutor related.¹⁸⁹ As with undercover agents, prosecutors were willing to protect informants from criminal liability if they inadvertently went too far (for example, by passing contraband along to a target).¹⁹⁰

Informants may commit crimes not only to "help" the police. They may also steal and sell drugs on their own initiative. Yet even an informant who commits crimes with no law enforcement purpose may well receive a break. A police official related that an informant who "buys some drugs for himself, on his own account, might not be prosecuted, in recompense for his other services."¹⁹¹ Though constrained to some extent by the principle of legality, police and prosecutors drew distinctions between crimes they could tolerate and crimes they felt compelled to pursue. "If it's clear that the informant is continuing to commit crimes, he can no longer continue as an informant. On the other hand, it's only by continuing to commit crimes that he can continue to be useful. So the informant typically continues what he's been doing, but on the sly."¹⁹² "We take it for granted that informants often continue doing [illegal] deals on the side. That's par for the course. But once an informant arrived at a meeting with the police, driving a stolen vehicle. That was too much. We confiscated the car. And then we had to think something up to make the case go away."¹⁹³ "We don't ask too much about whether the informant has himself done business with this or that target, because then, if he tells us he has, we won't be able to work with him."¹⁹⁴

Particularly troubling is an informant who takes part in the crimes *he is investigating* and does so secretly, so that he cannot claim to be aiding the government.

If we learn about some minor break-ins the informant committed on his own, we can drop the charges because of his

189. German prosecutor, May 22, 2003.

190. German prosecutor, May 11, 2004. But even with such protections, an informant who is implicated in a crime would, in theory, become unusable, because he would forfeit his right to have his identity kept secret, a guarantee known as the "promise of confidentiality."

191. German police official assigned to drug unit, May 25, 2003.

192. German police official assigned to drug unit, May 25, 2003.

193. Supervisor of German covert policing unit, May 26, 2003.

194. German control officer for informants, May 12, 2004.

other services to us. But this will not be possible if the crime he's taken part in is the one that we're investigating. That would be a problem. Then we'd have to stop using him.¹⁹⁵

Once, an informant was dealing with a group that was smuggling drugs into Germany. He gave us the names of all the dealers except the one who turned out to be his own supplier. Later, when he somehow gave us that guy too, it all came out that the informant had secretly been a customer, and had been secretly reselling the drugs while he was working for us. For that, he obviously got prosecuted.¹⁹⁶

An informant who is secretly involved in the crimes being investigated undercuts his value to the police because he jeopardizes prosecution of the targets by lending force to claims of entrapment.

Informants may be most useful when they already belong to the targeted organization at the time they are recruited. But taking part in the crimes that their organization commits will subject them to criminal liability even if they are doing so at the behest of the police. Indeed, German law views informants who continue to work with their old associates as simply continuing their former illegal activities, not as engaging in an investigative activity. One might say that the distinction between “really” committing a crime and pretending to commit a crime erodes when the informant is a criminal back among his old associates in his old organization. Unlike an agent, who pretends to be a criminal, the informant is not playing a role: he is being himself. “If we have an informant who belongs to a gang of burglars, we can't tell him to just continue what he's been doing, because his actions would be criminal and we would become his accomplices.”¹⁹⁷

Since informants face the greatest risk of criminal liability when deployed against their own associates, police and prosecutors attempt to use them against targets outside the informants' own organizations. “Typically, the informant is a criminal too. But we don't use him as an informant in his own case.”¹⁹⁸ “We might try to use him against his rivals instead.”¹⁹⁹ Other police and prosecutors worried that deploying informants against rivals created perverse incentives. An informant might want to entrap rivals while staying in business himself. “Then the informant becomes king of the red light district.”²⁰⁰ Some prosecutors and police, by contrast, do use informants

195. German police official assigned to drug unit, May 25, 2003.

196. German prosecutor, May 30, 2003.

197. German prosecutor, Mar. 10, 2004.

198. German prosecutor, May 10, 2004.

199. Supervisor of German covert policing unit, June 2, 2003.

200. German prosecutor, May 17, 2004, “*Rotlichtskönig*.”

against their own organizations. But they insist that informants investigate crimes they had never participated in—meaning, effectively, that they could investigate new offenses rather than ongoing crimes. The significance of this restriction depended on how broadly police and prosecutors construed the crime in which the informant was implicated. “If the informant committed a car theft, he can’t be deployed to investigate the role of others in that particular theft. But he can continue to help us investigate subsequent car thefts [by the same group],” a prosecutor related.²⁰¹

Despite the prohibition against letting informants continue to engage in criminal activities in which they were already involved, many German prosecutors and police officials were willing to tolerate some degree of continued participation, though with varying degrees of hesitation. “If someone inside the organization wants to give you information, he can probably continue to do things like work in the chop shop altering cars and changing license plates, with the approval of a prosecutor,” one police official stated.²⁰² Others were even more permissive.

There are hot and cold informants. The cold informants are taken out of their normal setting and deployed somewhere else. They get false papers, a whole cover. But the hot ones are part of the gang you’re investigating. And you can still use them. With a hot informant who has some important role in the organization, you have to assume that they’re going to continue with what they’ve been doing. You just get them a lower sentence at the end. So if they continue to sell what they’ve been selling, they can do so for a while, or maybe even continue as a courier transporting relatively small quantities. With a burglar, so long as he lets the police know what he’s doing, he won’t be held accountable.²⁰³

In the opinion of one control officer, “less than 20 percent of informants are cold informants. Most informants are hot informants, sitting right smack in the middle of the targeted offender group, though we use undercover agents to avoid having to make evidentiary use of these guys.”²⁰⁴

The implicit assumption behind this regulatory system—that undercover policing need not involve law-breaking—is foundational to the legitimacy of covert policing in Germany. Public commitment to this optimistic view can co-exist with practice because Germany obscures the extent to which undercover agents are permitted to en-

201. Supervisor of German covert policing unit, May 27, 2004.

202. Supervisor of German covert policing unit, May 28, 2003.

203. Supervisor of German covert policing unit, May 26, 2003.

204. German control officer for informants, June 3, 2003.

gage in conduct that would be criminal if done by others. Maintaining a reassuring image increases apparent legitimacy. Concern about law-breaking also imposes real constraints on undercover practices.

But the way in which officials circumvent the apparent meaning of the substantive norms also poses problems of legitimacy. First, my model of legitimacy-as-fit suggests that legitimacy in part depends on the extent to which an institution succeeds in imposing role obligations that effectively define permissible conduct. The creative and highly variable interpretations used by German police and prosecutors make it difficult to draw stable lines between permissible and impermissible conduct in covert operations. Second, if the system as it actually works diverges significantly enough from the way it presents itself, this is itself a legitimacy deficit. The system's dependence on legal interpretations that it only applies to undercover personnel creates tensions with societal norms—in this case, the demand that police and informants respect the criminal laws that apply to ordinary citizens.

Ironically, then, covert policing in Germany may be both more restrained and more problematic in its legitimacy than American undercover practices. A system's legitimacy is determined in relation to the expectations that the legal system places on the exercise of power. Germany's emphasis on agents' adherence to the substantive norms ensures a gap between ideal and practice, even as Germany imposes greater constraints than the United States on what undercover agents may do to accredit themselves and on the extent to which they may participate in the crimes they investigate.

So far, we have considered the problems raised by the substantive norm prohibiting law enforcement personnel from committing crimes. The substantive norms also forbid agents from encouraging targets to participate in a crime. Herein lies another unavoidable disjunction between the aspirations and practice of infiltration.

B. *Entrapment: The Inevitability of Influence*

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 himself an (excused) "criminal" and encourages the target to become a real one. 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.²⁰⁵ 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.²⁰⁶ 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 himself predisposed).²⁰⁷ Most American jurisdictions apply a subjective or hybrid 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 government’s actions would have sufficed to corrupt an otherwise law-abiding target.²⁰⁸ Also, 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.²⁰⁹

The German counterpart to our entrapment doctrine is not a defense but a sentencing factor. Unlike the American all-or-nothing defense, Germany’s notion of “provocation” makes it a scalar concept that correlates the severity of punishment with the degree of government influence. Such intervention into the course of events 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 provid-

205. BGHSt 32, 345; BGH NEUE ZEITSCHRIFT FÜR STRAFRECHT 1992, 488; BGH STRAFVERTEIDIGER 1995, 363; Werner Beulke & Stefan Rogat, *Anmerkungen zu BGHSt 41, 64*, JURISTISCHE RUNDschau 1996, 517; Klaus Detter, *Zum Strafzumessungs- und Maßregelrecht*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 1995, 488; CLAU ROXIN, STRAFVERFAHRENSRECHT, (24TH ED. 1995); IMME ROXIN, DIE RECHTSFOLGEN SCHWERWIEGENDER RECHTSSTAATSVERSTÖßE IN DER RECHTSPFLEGE, 2D. ED. (1995); MAKRUZKI, *supra* note 25; ANNETTE VON STETTEN, BEWEISVERWERTUNG BEIM EINSATZ VERDECKTER ERMITTLER (1997).

206. *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; not general standards governing the permissibility of police conduct are set.” *Bailey v. The People*, 630 P.2d 1062, n.5 (Colo.1981).

207. 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).)

208. Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1411 (2004).

209. 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 Sentencing Manipulation Defenses*, 145 U.P.A. 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).

ing 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 discount.²¹⁰ 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.²¹¹

Entrapment doctrine encourages undercover agents to minimize their facilitation of targets' crimes. Undercover agents could purchase contraband but not "place an order."²¹² "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."²¹³ "We have to be very careful, because someone who's already predisposed can still be entrapped."²¹⁴ "If the guy is selling small amounts of hash, I can't put him up to selling me larger quantities."²¹⁵

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. The more actively infiltrators take part in the crime, the less defendants need to do to make them happen. Factoring government 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.

The effectiveness of entrapment as a constraint on covert practices depends on the ability of judges to uncover police influence on targets. The post-1992 system has unintentionally made it easier for police to keep their encouragements and pressures hidden. In addition, the police have sometimes interpreted the warrant procedure as authorizing the use of heightened pressures or inducements when prosecutors approved an undercover operation in advance.²¹⁶ Prosecutors themselves interpreted their authorization as permitting no

210. BGHSt32, 345, BGHStV 1989, 528; BGHStV 1994.

211. GERHARD SCHÄFER, *PRAXIS DER STRAFZUMESSUNG* (2d ed. 1995); ANNETTE VON STETTEN, *BEWEISVERWERTUNG BEIM EINSATZ VERDECKTER ERMITTLER* (1997).

212. German prosecutors, May 13, 18, and 19, 2004; Supervisor in German covert policing unit, June 3, 2003.

213. German deep cover agent, May 20, 2004.

214. German prosecutors, Mar. 10 and May 13, 2004.

215. German control officer, Mar. 12, 2004.

216. German covert policing officials, Mar. 12, 2004.

more than the deployment of undercover agents in their normal capacity as the purveyors of ordinary criminal opportunities.²¹⁷ Unlike prosecutors, however, certain police officials interpreted the availability of a warrant as signaling the permissibility of “massive” pressure or inducements on targets who had shown themselves willing and able to offend.²¹⁸ 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. 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 learn of the government’s contribution to the charged offense.

VII. 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 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,

217. German prosecutors, Mar. 12, 2004. Even before 1992, one state’s Ministry of the Interior promulgated “Guidelines for the Use of an Agent Provocateur in the Context of a Criminal Investigation.” Regulation of Nov. 20, 1989; updated Mar. 13, 1997. (I omit the name of the state to protect my respondents’ anonymity.) The regulation simply authorizes the deployment of an undercover agent or informant “to work his influence upon a target so as to steer the target’s conduct in ways that make it possible to establish his commission of a crime.”

218. German covert policing officials, Mar. 12, 2004.

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 NPD investigation was not, of course, that it corrupted the innocent. But the APCs' extensive infiltration of the party leadership raised larger questions: To what extent was the extremist character of the NPD the product of a symbiosis between government informants and "genuine" neo-Nazi? Did it make things better or worse for the government that several of its informants in the party's top echelons had been terminated as informants because they 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 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, but 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 NPD; this gave infiltrators access to

the party's strategy in defending against the petition (though the APC denied seeking such information).

What was perhaps 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 NPD. The APCs discouraged informants from seeking high leadership positions in the NPD; 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. Note that 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 NPD—such an *ex parte* proceeding would have violated the party's right to represent itself and respond to the government's petition. Even an official explanation for why the government could not safely identify certain sources risked giving the party clues to the turncoats' identity. Indeed, had the petition to ban the party excluded the doings and sayings of prominent party members who were also informants, this might well have alerted the party to likelihood that the omitted persons were working for the government. 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.²¹⁹ 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

219. “The government's misery in the abolition proceedings against the NPD,” *Der Spiegel*, 20/2002, at 34.

this and other extreme right-wing parties in subsequent elections to state legislatures.²²⁰

These dilemmas were not lost on critics of undercover policing. In the Federal Republic of Germany, unlike the United States, infiltration has a much longer history in the intelligence services than it does in the police. Scandals about the about APCs tolerating neo-Nazi crimes, allowing informants to participate in them, or infiltrating left-wing student groups proliferated both before and after the NPD scandal. But while German undercover policing suffers from 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 the 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. Yet each of these four types of compromises carries with it distinctive problems of legitimacy. 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 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, be-

220. *Operation Pants Down*, Der Spiegel, 20/2002, at 34; *Disgraced to the Very Core*, 5/2002, 22 “Nazis with a bouncing tent,” Der Spiegel 40/04, at 44.

cause informants of the APCs and of the police “state security” units were sometimes criticized as indiscriminate in their targeting of left-wing student groups.²²¹ 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.”²²² 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; it reveals too much about the intimate details of a person’s life; and it disrupts 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.²²³ Because they have no Fourth Amendment signifi-

221. “Undercover student,” *Der Spiegel* 30/03, at 41; “Undercover agents recalled; surveillance of left-wing groups halted,” *Frankfurter Allgemeine Zeitung (FAZ)* Aug. 5, 1992, at 4; “Spätzle-Stasi,” *Der Spiegel* 35/92, at 86.

222. *Der Spiegel* 24/90, at 32.

223. The weighing of costs and benefits is entrusted entirely to the executive and remains judicially unreviewable.

cance, undercover investigations require no warrant and no showing of probable cause or even reasonable suspicion as a matter of constitutional law.²²⁴ 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. 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

224. However, the police may need evidence of "predisposition" to rebut a claim of entrapment.

crimes uncovered—according to some criteria not wholly in the control of the police.²²⁵

Conceiving of covert policing as a threat to privacy creates other problems for the legitimacy of these tactics. Framing the discourse in terms of constitutional rights (like the right to privacy) invites critics to identify other constitutional rights that may be at risk. Accordingly, German courts (unlike their American counterparts) have accepted defense arguments that the use of jailhouse informers to squeeze admissions out of prisoners infringes on prisoners' autonomy, by taking advantage of targets' "psychological compulsion to unburden themselves."²²⁶ Critics also raise special objections to those sting operations by which undercover agents befriend and wring confessions from persons suspected of long-ago, unsolved crimes, arguing that these undercover contacts unfairly circumvent suspects' rights to counsel and their right not to incriminate themselves. More significantly, because German undercover agents do not testify, defendants argue that the use of hearsay in lieu of live testimony undermines their constitutional right to confront and question witnesses against them. Increasingly, German courts are considering limits on the use of hearsay, such as the use of disguised witnesses or video conferencing.

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." After the government brings formal charges, a target's Sixth Amendment right to counsel ensures his protection from undercover questioning, at least about those crimes with which he is charged. But this leaves the government significant leeway, even after indictment, and even in prison. 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

225. WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION* (1970) (emphasizing the importance of independent performance measures to the legitimacy of institutions).

226. BGH St 34, 362.

collection of evidence and pursuit of intelligence. Yet, when the police infiltrate organizations for crime prevention purposes, they may not gather evidence. When the police 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. These functions converge 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.

That deep cover investigations require and generate a great deal of intelligence may seem a virtue, not a vice, to the extent that it makes policing more effective. But for Germany's constitutional order, this tendency is as profoundly disturbing as it is unavoidable. In reaction to the concentration of power in the Gestapo, Germany's post-war constitutional order decentralized law enforcement by devolving most police functions to the states and denying preventive powers to the federal police. For just the same reason, the Allies insisted on a clear separation between the powers and prerogatives of the police, on the one hand, and intelligence services, on the other. Germany's domestic and foreign intelligence services could collect information through a network of informants; but they had no coercive prerogatives, and therefore no powers of arrest. The police, in turn, could enforce the criminal laws and address immediate dangers to public safety but had no right to investigate people who posed no concrete or immediate threat. Deep cover operations not only blur the division between the law enforcement and order-maintenance capacities of the police. Because of their tendency to generate intelligence not used for criminal prosecutions, such investigations also threatened the principle of separation between intelligence-gathering and police work. The covert work of the police began to bear an uncomfortable resemblance to the methods of Germany's domestic intelligence agencies, which have broad authority to infiltrate "subversive" milieus. That intelligence agencies acquired the authority to investigate organized crime, just as the police began to infiltrate terrorists, only compounded a functional resemblance with an overlap in the subject matter of their respective responsibilities.

Concerns that preventive undercover investigations may become too much like intelligence operations embody fears that the preventive investigations may tempt the police, like the APCs, to forego taking action against lawbreakers for the sake of keeping their operatives in place. (Critics of such operations point out that preventive undercover probes are not tethered to an active criminal investigation; and they are typically unsupervised by prosecutors.) 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.²²⁷ 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 and incriminating admissions from those who committed it.²²⁸ 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 are no analogous repertoire of interest-balancing justifications and warrant procedures for compromising these functional divisions of government. Yet if the regulatory system permits 17 domestic intelligence agencies to infiltrate criminal and terrorist networks parallel to similar efforts by 17 state police forces and the *Bundeskriminalamt* (Federal Criminal Bureau), it must accept redundancy and functional overlap. Thus it must derogate from 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. The United States requires the FBI to investigate domestic security threats alongside its

227. “Professional Rambo,” *Der Spiegel* 33/02, at 49.

228. “The Victory of the Informant,” *Der Spiegel* 19/02, at 50.

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 out 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.²²⁹ 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 discussed in Section V.E., 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 more to do with the regulation of electronic surveillance than with undercover investigations, per se (and it has, like the Levi limits on domestic infiltration, been repudiated, in the wake of

229. 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 17 domestic intelligence agencies.

the September 11 attacks).²³⁰ In the United States, the last remaining “wall” is that between the domestic intelligence community and the military because the Posse Comitatus Act²³¹ prohibits the domestic deployment of the armed forces. But this has few implications for the use of undercover tactics by American law enforcement agencies. Thus, 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.²³²

C. *The Impact on 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, which requires legal actors to enforce legal rules from which they must also permit the police to deviate to ensure the success of undercover operations. 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. Nonetheless, the principle of legality may require investigators to intervene. Undercover stings require operatives to offer their targets opportunities and enticements. At the same time, Germany prohibits entrapment, while treating all undercover investigations as involving some degree of it. The principle of legality and the substantive norms derive from German conceptions of the rule of law and what it requires

230. 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.

231. Act of June 18, 1878, ch. 263, 20 Stat. 145.

232. 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.

of the police. The legal system upholds prohibitions on encouraging, tolerating, or participating in crimes—even as the system commits itself to a tactic that necessarily requires departures from these norms. Undercover policing may be viewed as a necessary evil to the extent that its success requires and depends on deviation from basic system values.

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 have been criticized, and not only during the NPD scandal, for tolerating illegal activity 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).²³³ More problematically, the NPD 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. Also, 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.

Germany's adherence to nominally unbending substantive norms necessitates informal compromises—"evils" if compared to the system's ideals, albeit unavoidable, necessary ills, if undercover policing is to succeed in catching criminals. The dilemma which the system's nominal rules pose in practice can be gleaned from an article which a former undercover agent published in a German law journal in 1992, when undercover policing was first codified. The police officer, Gerold Koriath, "confessed" to having committed between 100 and 200 trespasses—by which he meant entries into targets' homes, with their consent, but under false pretenses.²³⁴ He also reported having offended by allowing targets to drive drunk (since he could not very well arrest them while he was undercover). He viewed this as a dereliction of duty—itself a criminal offense. Koriath also described himself as complicit in drug trafficking, in that he had accompanied targets to a meeting at which they purchased a kilogram of heroin; he had refrained from intervening in the transaction or arresting them afterwards because he was negotiating a future drug deal with their supplier. To prove his bona fides as a criminal, he had delivered a

233. *E.g.*, "Professional Rambo," *supra* note 227; "Victory of an Informant," *supra* note 228.

234. Koriath, *supra* note 10.

shipment of stolen jeans to his targets' associates, thereby incurring accomplice liability. Koriath decried the "hypocrisy" of the rules that prohibited him from engaging in these acts, arguing that no system of undercover policing can function effectively without these and similar transgressions.

But were Koriath's actions really crimes? Not according to Harald Hans Koerner, the Frankfurt prosecutor who responded to Koriath in print.²³⁵ Entering a target's home under false pretenses is no trespass, Koerner argued, if the undercover agent does not invoke his official status to gain entry. Nor is an undercover agent required to intervene personally and immediately effectuate an arrest—e.g., of the drunk target—so long as the crime he is investigating is more serious than that which he observes along the way and he subsequently prepares a written report about the infraction he witnessed. Likewise, Koriath did not become an accomplice simply by witnessing a drug transaction during the course of his negotiations with a dealer, particularly if he could not realistically have broken his cover to intervene. Again, Koerner argued, Koriath would have adequately satisfied his obligations as a police officer by notifying his supervisor and the prosecutor of the drug deal he witnesses, even if he did so after the fact. Koerner sidestepped the question of whether Koriath incurred accomplice liability by transporting the shipment of stolen jeans, arguing that, once again, Koriath's actions could have been justified if he had made the target's involvement with stolen property the subject of a subsequent criminal investigation. Thus he contended that Koriath's failings, such as they were, were primarily procedural, not substantive. Koriath should have cleared his actions with supervisors and prosecutors afterwards, if he could not have done so in advance.

Yet Koerner's article did not really describe what seemingly criminal actions could be cleared as non-criminal by supervising police and prosecutors. 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. Still, 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 substan-

235. Harald Hans Körner, *Verdeckte Ermittlungen ohne Straftaten*, KRIMINALISTIK 1992, 604.

tive 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. 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.

From time to time, lawmakers have crafted reform proposals that would have reduced the need for quiet accommodation by officially drawing the line between permissible and impermissible undercover activities (for both police and APC operatives); the idea was to simply authorize undercover operatives to commit certain “milieu-typical” offenses to maintain credibility with targets.²³⁶ But which crimes were to be authorized? An APC informant should not be held liable for saying “Heil Hitler” at a neo-Nazi rally, according to one state official.²³⁷ What should judges do, however, with an APC informant who supplied a weapon to neo-Nazis who planned to use it against left-wing demonstrators?²³⁸ While one lawmaker proposed that the government write a catalogue of permitted infractions, another pointed out that targets could still identify informants by asking them to commit some crime that was not on the list.²³⁹

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.²⁴⁰ American courts and commenta-

236. “Rules for the gray zone,” *Der Spiegel* 48/02, at 38.

237. *Id.*

238. *Id.*

239. *Id.*

240. Nonetheless, even in the United States, there are limits to the leeway given to undercover agents and informants, and to prosecutors’ willingness to tolerate other-

tors 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 by 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 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 to corrupt its practitioners.

wise 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.

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.²⁴¹

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.²⁴² 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.

241. 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.

242. Körner, *supra* note 235.

These units deploy deep cover agents for long-term assignments, requiring them to live undercover for up to seven or ten years.

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. Once they win the 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, critics in Germany worry 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 46 residents of a single town to jail on fabricated claims that they had sold him narcotics.²⁴³ 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.

243. NATE BLAKESLEE, *TULIA: RACE COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN* (2005).

VIII. CONCLUSION: IMPLICATIONS OF GERMAN REUNIFICATION FOR THE LEGITIMACY OF COVERT POLICING

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.²⁴⁴ 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 the 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 NPD 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. There was also the risk that covert operatives would not only pretend to be right-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.²⁴⁵

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!”²⁴⁶ An individualized assessment was eventually worked out. In a case-by-case evaluation, officials

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

245. “Treason in Taka-Tuka Land,” *Der Spiegel* 24/03, at 50.

246. “They’d have to arrest themselves,” *Der Spiegel* 39/90, at 18.

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?²⁴⁷

But even those east German officers who were accepted into the ranks of the police confronted western suspicions about their innermost loyalties. As Andreas Gläser demonstrated in his monograph about the reunification of the Berlin police,²⁴⁸ 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. Yet west German officers also had little regard for the "150 percenters," that is, those east German officers who turned too quickly and completely against their former regime. 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 the state or "go over" to their targets, the question 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 a series of articles published in the years after Reunification, west German newspapers and magazines reported that east German police forces had

247. FAZ Feb 12, 1993, 5-6.

248. ANDREAS GLÄSER, *DIVIDED IN UNITY: IDENTITY, GERMANY, AND THE BERLIN POLICE* (2000).

hired former Stasi agents;²⁴⁹ that “about 500 ex-agents [of the Stasi] are believed to mingle, unrecognized, in high and highest positions in the service of the state and in the economy”;²⁵⁰ that former Stasi units had secretly gained entry into the police as surveillance officers and undercover agents;²⁵¹ that former Stasi officers working in the unified police of the new eastern states were sabotaging police files;²⁵² and that former Stasi agents were becoming teachers and indoctrinating the young.²⁵³ A public debate raged about whether to amnesty Stasi informants.²⁵⁴ 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? Media coverage (and law journal articles) sometimes portrayed infiltration of criminal organizations as a form of honorable espionage into a closed-off entity foreign to lawful society; at other times, journalists critical of the practice described it more as a trap for fellow citizens whom informants implicated for personal gain.²⁵⁵

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, “If opportunism follows the state, sure. But what can one do? There weren’t 17 million resistance fighters in the GDR.”²⁵⁶ 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.

249. “Police in Potsdam district hire 41 former Stasi Agents,” FAZ Aug. 6, 1990.

250. “Oath and Honor,” *Der Spiegel* 8/91, at 36.

251. “Help through Code 609000,” *Der Spiegel* 29/91 at 28; “Into the Nest,” *Der Spiegel* 51/91, at 50.

252. “Traces in the Garbage: How police loyal to the SED [the GDR’s Communist party] are sabotaging the work of the unified criminal police in the eastern states,” *Der Spiegel* 49/90, at 108.

253. “Pure insanity,” *Spiegel* 12/90 at 92; *see also* “Stasi-Collaborators taken on,” FAZ Sept. 6, 1990, at 2.

254. “They have to arrest themselves,” *Der Spiegel* 39/90; “Federal Council rejects proposed law on Amnesty for Spies,” FAZ Sept. 8, 1990; “Historic Compromise,” *Der Spiegel* 26/90, at 30.

255. “Between the front lines,” *Der Spiegel-Online* Nov. 11, 2002; “They covered up for me,” *Der Spiegel* 40/02, at 109.

256. “Taking People as They Are,” *Der Spiegel* 51/91, at 55.

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.²⁵⁷ The *Spiegel* reported that the APCs had been largely unsuccessful in trying to convince locals that “the APC is as different from the Stasi as a church from a bordello.”²⁵⁸ A civil libertarian activist from the eastern town of Erfurt charged that the secretive nature of APC surveillance was a threat to democratic values.²⁵⁹ To easterners, the *Spiegel* reported, “[i]t’s a new company, but the same old business.” The *Spiegel* described easterners as reacting “like children who have once been burned” in rejecting methods that they equated with the Stasi—regardless of which government agency was involved.²⁶⁰ 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 Party of Democratic Socialism (PDS), that is, the continuation of the former GDR’s communist party. Western officials claimed this would undermine the ability of the APCs to function²⁶¹—confirming eastern fears of western mistrust.

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.”²⁶² “Secret investigations, secret proceedings, secret police, secret agents—they are all hallmarks of an informant- and surveillance-state,” he argued.²⁶³

Such fears help in part account for the pervasive sense, in Germany, that undercover policing was a “dirty business,” and, at best, a necessary evil that inevitable compromises 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 legiti-

257. “Without a Trenchcoat,” *Der Spiegel* 19/91, at 111 (the German term is “leathercoat,” which connotes the Stasi in much the way trenchcoats connote intelligence services in general).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. “Lies and Deceit,” *Der Spiegel* 27/90, at 68.

263. *Id.*

macy 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 against 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 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 be-deviled 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 as well as the greatest obstacle to rescuing these practices from the twilight in which they continue to languish.

