

The Cost of Virtue

By Gary T. Marx

CAMBRIDGE, Mass. — Much of the commentary on the recent wave of undercover law-enforcement activities, including Abscam, has raised legal and ethical issues. Were members of Congress and state and local officials entrapped? What happens to the trust that is central to an open society when the Government acts deceptively? These significant issues must be addressed. However, individuals critical of police actions, including some actions on a local level, must also attend to the broader context in which these have developed.

Critics must reflect on the fact that the undercover practices they now find distasteful have emerged partly in response to the very success of their earlier demands to limit police conduct and change police priorities. While rightfully focusing on continuing police abuses and some retreat from earlier gains, civil libertarians can note considerable progress in some areas of police reform. Both the legal environment in which the police must work and Federal Bureau of Investigation priorities have changed markedly. Supreme Court interpretations, Federal and state legislation, and policies of Federal, state and local law-enforcement agencies have on

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balance restricted the conditions under which the police can gather information, whether through search and seizure, electronic surveillance or coercive interrogation after arrest. The police must build stronger cases in order to arrest and convict, and there is less court tolerance of extra-legal techniques. The F.B.I., sensitive to criticism that it was ignoring the really tough problems, has downplayed the attention given bank robbery and the policing of politics and significantly increased attention to white-collar and organized crime.

Yet these positive changes have come about at a cost of complex undercover operations and increased reliance on informants. It's almost as if a hydraulic principle is at work: Restrict the police's use of coercion and their use of deception increases. Restrict police investigation after a crime occurs, and increased attention will be paid to anticipating crimes. Restrict the conditions under which the police can carry out searches and seizures and undercover activities, and they will make increased use of civilians (informants, professional witnesses, private detectives) who are

even less accountable and not subject to such limitations.

White-collar and organized crime generally are best combated systematically by having undercover agents become a party to the offense as conspirators or victims. However, this situation also tends to subvert reform.

Beyond the important ethical, legal and economic costs, in the new police undercover work there are unintended consequences that call to mind Sir Walter Scott's observation: "Oh, what a tangled web we weave, / When first we practice to deceive!" The secrecy, the presence of multiple enforcement agencies, and the nature of many undercover activities result in examples such as the following:

- Two young men learn that a local "fence" — in reality, a police "sting" operation — is buying stolen cars. So they steal a car, killing its owner in the process, and then sell the car to the "fence."

- An addict increases his stealing and his use of heroin because he finds a steady, high-paying police fencing operation to buy his stolen goods.

- An undercover agent posing as a drug dealer is shot during a heroin

transaction by vigilantes trying to rid their community of drugs.

- A policeman is killed in a shootout between undercover city and county officers unaware of each other's identities.

Undercover activities offer marvelous opportunities for blackmail, corruption and revenge. Another consequence appears to be an increase in non-uniformed impersonators of policemen. Impersonators' initial tales are made more credible by the public's knowledge that undercover work is common. According to one estimate, perhaps a quarter of the complaints filed against New York City police officers involve impersonators.

The irony of course is that efforts to avoid one set of problems lead directly to others. This conflict should not be taken as an argument against innovations in law enforcement, as a lack of appreciation for the skill and courage of those involved, or as a lack of support for the F.B.I.'s new priorities. But it does suggest the need for more careful analysis and public discussion of the complex issues involved.

An insightful observation by the sociologist Edward Shils would serve as a beginning hypothesis for any such discussion: "Civil politics requires an understanding of the complexity of virtue, that no virtue stands alone, that every virtuous act costs something in terms of other virtuous acts, that virtues are intertwined with evil."