LICENSING CRIMINALS: POLICE AND INFORMANTS

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INTRODUCTION

The police have always had effective discretion in administering the law. That is, they have been forced, by limitations in resources as well as by political concerns, to make choices concerning which offenses will generate action on their part. It is only in the last 15 years though that there has come to be a public recognition of the need for this discretion on the part of the police and an understanding of the complex consequences of it. This has led to occasional demands for formal articulation by police agencies of the guidelines which lower level officers, who actually exercise the discretion, must follow in making their decisions to invoke the law. Police executives have been notably and understandably reluctant to provide such formal guidelines.

Their reluctance is understandable because there is in fact no basis in law for their use of discretion. Goldstein (1960) has shown that the statutes of the various states make no provision for the police to decide which violations are worthy of action and which should be ignored. They must, by law, act against all statutory violations. It is clear that they do not and that, if they are to function effectively, they cannot. Yet the formal statement of guidelines, stating for example that possession of less than one ounce of marijuana is not grounds for arrest, involves challenge to the legislature and courts. Yet, absent the articulation of such guidelines, the police must always remain subject to the charge of selective and discriminatory enforcement.
The problem becomes particularly acute in police dealings with informants. The public has certain expectations of police performance that can only be met if the police enter into long-term cooperative relationships with criminals. For example, drug dealers who invest a great deal of effort in insulating themselves from dealings with strangers can only be apprehended in many instances if the police enlist the assistance of their confederates. Similarly, the demand that the police be able to solve major cases promptly requires that they be able to tap into the network of information held by criminals. In order to carry out these, as well as some other tasks, the police must issue what in effect are licenses to certain criminals. We may protest that when we allowed that the police must have discretion, we did not propose that they enter into the business of licensing criminals. Nonetheless, that is merely discretion writ large.

This paper has four objectives. First, I shall provide some substantiation of my claim that police, broadly defined, do frequently issue licenses to criminals. That is, individual officers make decisions to permit certain criminals to continue some criminal activities without interference, in exchange for the provision of information about other criminals. The relations between informant and officer need not be corrupt, though the transaction is difficult to monitor.

Second, I shall argue that there is no alternative to this if the police are to meet the demands placed on them in some areas of crime control. Some criminals can be arrested and convicted only with the assistance of informants whose useful cooperation in turn can be obtained only by the issuance of a partial license.
Third, the licensing process is not one which agencies are readily able to control. Police and informants both mistrust any effort to formalize the relationship and to require recording of their transactions. The informant is concerned with possible betrayal while the officer does not want to lose control of the information he garners. Efforts to formalize and control will lead either to evasion or less effective policing.

Finally, I shall argue that the problem is insoluble. That is, police agencies cannot devise usable guidelines to cover the kinds of licenses that the police may offer informants. Such guidelines not only would directly flout the legislative process but they must be at so high a level of generality as to be of no help to the individual officer or they will fail to command consensus. Either we must accept the tensions created by the ill-monitored licensing or we must lower our demands upon the police for the apprehension of certain classes of criminals.

One terminological matter should be dealt with before getting to the body of the argument. The term police is used here to cover criminal investigative agencies generally. In particular, the FBI and the Drug Enforcement Administration (DEA) will provide much of the illustrative material. The demands placed on these agencies force them into the licensing process, while their general stature enables them to offer more effective protection for their licensees.

CRIMINAL LICENSES: SOME EXAMPLES

It is useful to begin our discussion by looking at the small, rather distinguished, academic literature on police-informant dealings. For the three major studies all deny that police agencies do in fact
issue broad licenses. While acknowledging that the best informants are not those who work for money but rather those who are "working off" charges, each writer claims that the police he studied do not knowingly overlook the criminal activities of their informants, except where it falls outside their investigative interest.

Skolnick (1966) dealt with relations between detectives and informants in a western city. He noted that detective squads were narrowly concerned with specific activities and would ignore other activities of their informants. Narcotics detectives overlooked thefts by their informants, while the robbery squad would ignore narcotics use by its informants. Nonetheless, he argued that the police offered only the most restrictive licenses to their informants; anytime a police officer could obtain hard evidence against an informant he would use it to increase the pressure on the informant to help make additional cases.

Manning (1980) also reported on narcotic unit relations with informants. He observed that while informants were expected to continue drug use (why otherwise would they be able to provide information about drug dealers?) they were not permitted to act as dealers. "A final indication that the snitch ( informant ) may be manipulating an agent is evidence that he may be dealing drugs while working for the police department. This means that he is using his status as an informant to carry on a business and that he may be informing to the police to reduce his competition" (p. 162).

The third major study is that of Wilson (1978), which provides the only detailed account of federal agency dealings with informants. This study of the FBI and DEA provides a description which is consistent
with that of Manning: informants are most useful when they are providing information in exchange for reduced charges but the DEA and FBI do not admit to permitting their informants to continued criminal dealings. Indeed, the Attorney General in 1976 required, following the revelations of COINTELPRO, the promulgation of strict guidelines concerning informant behavior. "Informants are not to commit acts of violence, use unlawful methods to gain information, initiate a plan to commit a criminal act or participate in a criminal act except insofar as the FBI determines that such participation is necessary to obtain information needed for the purposes of a federal prosecution" (p. 84). Nonetheless, Wilson notes that there is some allowance for the use of discretion, particularly with respect to the seriousness of the violation by the informant.

Each of these studies is based on extensive fieldwork. Manning and Skolnick spent months as participant observers in the detective units they studied. Wilson had access to numerous files in FBI and DEA field offices and spent many hours in unstructured interviews with agents in those offices. These claims about the restrictions on informants are not to be treated lightly as the result of duped academics with insufficient knowledge of their subject.

Nonetheless, once one moves away from the scholarly literature, which is police focused, a very different picture emerges. There are credible accounts of honest police agents providing quite broad licenses to their regular informants. There are also materials filed in court proceedings that strongly suggest licensing. Here I present a few examples, leaving to later the issue of agency management of the licenses.
Let me begin with the instance of an informant that I had regular contact with in the course of a study of illegal markets in New York (Reuter, 1983). The informant, Joe, was a bookmaker with almost 20 years of experience. He had been imprisoned once and arrested numerous times. For some time, he had run an undercover bookmaking operation for a local law enforcement agency. That occurred after the agency had arrested him and convinced him that he was likely to go to prison if he did not cooperate. During the period that he ran the bookmaking operation under surveillance, he had earned a considerable sum, probably more than $100,000 in a year; the operation had led to the arrest and conviction of perhaps a dozen bookmakers and their associates.

At the time I had dealings with Joe, the undercover operation had ended. Joe had, however, gone back into the bookmaking business on his own, working with a number of the better known bookmakers in New York. He continued to provide information to a number of law enforcement agencies, including both federal and local agencies.

During the period of our contact, Joe was arrested at least three times on bookmaking charges. The third time he was arrested by an agency which he had never dealt with before and in a jurisdiction whose prosecutors and judges were known to be tough on gambling offenses. He asked his contacts in various other agencies to make calls on his behalf, which they eventually did. The result was that he was placed on probation. At least two of the agencies who called on his behalf knew of his dealings in the
bookmaking business at that time. Indeed, one of them, according to Joe, had initially approached him by saying that they had no interest in his own bookmaking but wanted to get information about the people with whom he dealt.

I mention the case of Joe in part to qualify myself as informed enough to make some judgment as to the credibility of other accounts of police-informant dealings. Vilano (1977) provides some interesting details about his dealings with criminal informants during a 20 year career as an FBI agent, specializing in organized crime investigations in New York. While there is some bravura in the book, there is also considerable detail which accords with my own knowledge of the Mafia in New York.

Vilano describes himself as particularly successful in recruiting Mafia members as informants. In most cases, the informants were embittered and unsuccessful members; nonetheless, they participated in a variety of activities which many of us would take as fairly serious criminal offenses, while under Vilano's supervision. "Of my first three member sources, only Micky Flowers continued to be an active criminal. Jackie Gucci stuck to a genteel (sic) kind of loansharking, while Rico Conte limited his muscle to pushing around vending machines" (p. 96). Clearly, agent attitudes are relaxed about criminal activities. At another stage, Vilano placed a bet with a bookmaker through one of his informants, simply because he didn't have access to a bookmaker himself (p. 116).

Vilano is also explicit about the moral dilemma presented by licensing informants. "The most troublesome aspect ... was the worry that I handed out a license to steal. Billeti (an informant) realized
how valuable he was to me, and he knew I would try to protect him if he was caught. I had to take the position of never wanting to know anything that he was going to do ahead of time unless it was for the benefit of the Bureau" (p. 112). "I knew that I was perpetuating the career of a criminal, but I believed that the information Billeti gave us was worth much more than what he managed to steal" (p. 116).

Less explicit but quite compelling evidence is provided in documents routinely filed in court proceedings. Consider, for example, the following description of an informant taken from a wiretap application by the FBI in Kansas City. 8 "Confidential Informant Number 10 (CI #10) has provided agents of the FBI with information on a confidential basis in excess of six years, which information has proven reliable based upon reports of other confidential informants and by independent investigation. CI #10 has furnished information in approximately 15 investigations, such information and other information having been obtained through personal contact, conversation with and observation of conversations between numerous individuals involved with the Kansas City 'Outfit'" (p. 77). It is hardly plausible that this describes anyone other than a member or close associate of the "Outfit" (which is apparently the Kansas City term for Mafia) involved in their activities in a fairly substantial way. Such descriptions of informants, varying somewhat in explicitness, are frequently provided in wiretap applications.

We should note also the existence of an FBI informant effort called the Top Echelon program. This program, whose existence was not acknowledged for some years, 9 consists of efforts to recruit high level members of organized crime, mostly the Mafia, to provide information on a
regular basis. One suspects that "CI #10" referred to in the previous paragraph is a Top Echelon informant. But it is certainly implausible that the TEs, as they are called, engage in criminal activities only for the purposes of providing information to the FBI. More plausibly, they gain a certain amount of protection in return for the information, much of which they may use for strategic advantage, informing against their rivals within the family.

All these examples have referred to the FBI. The potential licensing powers of the FBI are unique for at least two reasons. First, its prestige enables it to coerce local agencies into protection of FBI informants, without offering reciprocal service. Indeed, the standard complaint in the local agencies with which I am familiar is precisely that the FBI always demands and never reciprocates. The FBI's long cherished belief in its own unique integrity and the probable corruption of all other law enforcement agencies provides its rationale for this behavior. Whatever the reason, the result is that the FBI is better able to protect any informants it chooses to license than are other agencies.

More fundamental, though, is the difference in investigative focus. Local agencies devote most of their resources to activities other than the solving of crimes or the control of illegal markets. Patrol activities, the processing of arrests, community relations, etc., take up most of their time. Even when dealing with organized crime and with drug markets, the local agencies are likely to focus their efforts on the lowest and most visible level of activity. They simply have less need for the kind of informant who must be given a long leash in order to
provide information that the agency needs to make the desired kinds of cases. Certainly one explanation for the findings of Manning and Skolnick concerning the narcotics units they observed is that these units simply did not try to make cases much above the retail level. Regular users were sufficient for making such cases. Any dealer was a desirable catch for the narcotics unit.

One local unit which did attempt to make more ambitious cases was the Special Investigations Unit (SIU) of the New York Police Department. The SIU's mission was to make major conspiracy cases against heroin and cocaine dealers in the city which was seen as the national center for these groups. Its members were given great freedom from supervision and made many spectacular cases, as recounted in Daley (1978). However, it also turned out to be an extremely corrupt unit, whose members made substantial sums of money at the same time as they were making successful cases against major dealers.

The central figure in revealing the corruption of the SIU was Robert Leuci, one of the more successful members of the unit. Exemplifying the problem of making cases in this area were his relationships with his best informant, the Baron. "About twice a year the Baron gets arrested by other (narcotics) teams. Each time Leuci rushes to court, speaks to the district attorney and judge, the Baron gets out on parole, they go back to work" (Daley, 1978, p. 243). What is interesting here is the ease with which Leuci was apparently able to obtain the Baron's release. The Baron was not a major dealer, but certainly sold at least one or usually two steps above the retail level in the market. Yet Leuci was able to get his release on a number of occasions, though dealing with different agencies. Corruption of these agencies was not necessary; such transactions were apparently quite accepted.
THE NECESSITY OF LICENSES

It is no mystery as to why the police become issuers of criminal licenses. The adage "to catch a thief, use a thief" summarizes it straightforwardly enough. Detective novels notwithstanding, it is difficult for the police to solve many cases without the cooperation of criminal colleagues of the person who committed it. The agencies argue that they are able to obtain cooperation from criminals without condoning the informants' continued participation in criminal activities. I shall suggest that this is not so, that we place demands on the police which can only be satisfied if the police enter into long-term cooperative relationships with a number of criminals.

For the purposes of this discussion, it is useful to employ a distinction between two classes of police activity suggested by Wilson (1978, pp. 21-3). He distinguishes between investigation, where the police seek to obtain information leading to the arrest of a person associated with a specific crime that has already occurred, and instigation, for which the police suspect that a certain individual is involved in a continuing pattern of criminal activity and seek to place an agent (informant or undercover agent) in a position which enables them to observe the commission of a criminal act. Drug dealing provides the most significant focus of instigative activity.

Police require a coterie of active criminal informants for both purposes. Consider, as an example of investigation, a major robbery. If the perpetrators are not arrested or identified within hours of the incident, the police have small prospect of solving the case (Greenwood et al., 1975). Their most effective source of information is an
immediate checking with all the informants they have in the world of thieves and fences. Those who carried out the robbery are likely to have involved other confederates in the planning or to need some assistance in disposing of its fruits. Various pieces of information about the crime are likely to be floating around the network of people involved, in that city, in theft and fencing.

It is scarcely plausible that these informants consist solely of persons working off charges. The police need for information is immediate. They must have a pool of potential sources available at all times. If these sources are to be of value, they must be active criminals. They will provide information in the reasonable expectation that the agency will help them when next they get into trouble. The detective who cracks a major robbery case with the help of an informant will certainly be the first person the informant calls when he is next arrested. If it is a homicide, or an offense which is much more substantial than his usual one, the officer may not attempt, or be able, to help him. But he will certainly make an effort for offenses which he knows the criminal routinely commits.

This is not to say that the informant regularly tells his cooperating officer about all his activities, to ask his permission. That would serve the interest of neither, though Vilano says that one of his informants would occasionally ask Vilano's advice as to whether he should get into a particular criminal deal, usually one which he was hesitant about and wanted Vilano to dissuade him from. But there is likely to be an informal understanding about the nature of the license, the set of activities for which the informant will get assistance when caught.
Instigation is the more complex and ambiguous activity for the police. Their own agents must get involved in the workings of the criminal world. An introduction is necessary and only criminal informants can provide that. I shall focus on heroin enforcement because that is where the problem is most acute.

One model of heroin enforcement using informants would not require any licensing of the form I have been discussing. This is a variant of "buy and bust," where the agent arranges to buy a certain amount of heroin from a dealer, then arrests the dealer immediately after the sale. The dealer is given the option of introducing the agent to his supplier or facing significant prison time. The undercover agent is then able to move up the chain from retail to major distributor, without providing anyone with a license to deal. Each introduction merely gets the dealer out of the immediate charge and confers no future privilege.

Undoubtedly, much narcotics work is like that. However, narcotics agencies are also involved in the collection of intelligence. They cannot start each investigation with a low level buy and proceed up the distribution chain. Instead, they are required to make targeting choices, based on a continuing evaluation of the significance of particular dealers. This requires that agents be able to talk to dealers about the "scene." Moreover, middle level dealers who are willing to arrange introductions to higher level dealers, with the promise that the agent will act so as to ensure that the dealer arranging the introduction is not readily identified as an informant, will provide a far more efficient method of reaching the targeted dealer than will starting on the long and uncertain chain from retail level.
Thus, instigative agencies are also strongly motivated to issue licenses to informants. An ounce dealer who regularly turns in useful leads on quarter pound dealers can expect to be left alone by the agency if he continues at the ounce level and to get some help if affected by some other agency. The earlier example of Leuci, in his dealings with his major dealer-informant, the Baron, illustrated this point. The extent of this licensing is a function of the level of market that the agency is aiming at. It is not surprising that the DEA, which has prime responsibility for making high level cases, is suspected of issuing the broadest licenses.\textsuperscript{13} Like the FBI, DEA also has great capacity for providing assistance when dealing with local agencies, which are often dependent on it for provision of training and equipment as well as intelligence for the rare major case that the local agency attempts.

There is, though, a major difference in relations with the two classes of informants. Instigative informants are likely to be much more intimately involved in the activities of the unit with whom they work. They will often determine the targeting of the unit (cf. Williams \textit{et al.}, 1979, Chapter V) and, because they are involved in almost daily criminal offenses, are much more likely to have need for active intervention by the unit. In contrast, relations between other kinds of detectives and their "snitches" are much more attenuated, with contacts initiated by the detective seeking assistance for a particular case and with the criminal only rarely needing to invoke the aid of the detective.
MANAGING THE LICENSING PROCESS

It is, of course, difficult to describe how agencies manage programs whose existence they barely acknowledge. Indeed, calls to various police agencies in the Washington area yielded only one explicit set of guidelines covering agent-informant relationships, namely that of the FBI. DEA said that these guidelines were confidential, while two well respected police departments (the Metropolitan Police Department of Washington, D.C. and that of Montgomery County, Maryland) said, after some initial confusion, that no such guidelines existed. Let us begin by examining the FBI guidelines. 14

These were first promulgated in 1976, as part of Attorney General Edward Levi's brief effort to bring the FBI more firmly under the control of the Department of Justice. The version reviewed here is a revision that went into effect in December 1980, after ABSCAM had broken. Though the guidelines refer to the problems of criminal license, they do not more than vaguely address the extent to which such license should be limited. Extensive quotation from the relevant section of the guidelines makes the point clearly enough:

Informants who are in a position to have useful knowledge of criminal activities often are themselves involved in a criminal livelihood. It is recognized that in the course of using an informant or confidential source, the FBI may receive limited information concerning a variety of criminal activities by the informant or confidential source and that in regard to less serious participation in criminal activities unconnected to an FBI assignment, it may be necessary to forego any further investigative or enforcement action in order to retain the source of information. However, whenever a Special Agent learns of the commission of a serious crime by an informant or confidential source he shall notify a field office supervisor. The supervisor shall make a determination whether to notify appropriate state or local
law enforcement or prosecutive authorities of any violation of law. . . (p. 8) (emphasis added).

In determining whether to notify appropriate state or local law enforcement or prosecutive authorities of criminal activity by FBI informants and confidential sources, the FBI shall consider:
(a) whether the crime is completed, imminent or inchoate (sic);
(b) the seriousness of the crime in terms of danger to life and property; . . . (p. 9)

Clearly, this leaves a great deal of discretion to both the individual Special Agent, as to whether he should report a particular activity of an informant to his supervisor, and to the supervisor as to whether he should pass this information on to any other agency. The stress on danger to "life and property" suggests that a great deal of latitude is intended. Certainly a bookmaker or, as Vilano put it, "genteel" loanshark may be left undisturbed.

How is this discretion used? This, of course, is a matter about which the FBI is understandably very sensitive. Efforts by the General Accounting Office (GAO) to review the compliance of the FBI informant program with the guidelines have been notably unsuccessful. The Bureau maintained that any audit of informant files by GAO would compromise the integrity of the program; it is instructive that this claim has not been successfully challenged, despite GAO's intimate involvement in many sensitive areas of national security policy.

Having beaten off GAO, the FBI nonetheless felt an obligation to carry out its own audit of the program to determine compliance with the Attorney General's guidelines. The FBI staff reviewed all active informant files and a sample of closed files. It declared that only a trivial number of instances of minor non-compliance were found. Those
instances of non-compliance included only one failure of an agent to report a criminal violation on the part of an informant. But the report was, as one might expect, silent on the general issue of criminal violations by informants. We certainly learn nothing about the nature of the license issued by individual agents.

Congress then asked GAO to review the FBI audit. That review, in its dry bureaucratic way, permitted the GAO to vent its ire concerning the usurpation of its own audit function. Two observations in the GAO report are of particular interest here. First, the FBI audit did not include any interviews with informants or agents. Instead, agents were asked to respond to a questionnaire, without any promise of confidentiality, and the inspectors looked at what was recorded in the files. As GAO commented, "To accept file data as accurate, or to accept the lack of it as proof that everything was handled properly, assumes that agents who had deviated from FBI and Attorney General regulations would have recorded that fact in the files" (p. 4). That does indeed seem an unlikely behavior.

The second fact that is of some interest is that the FBI claims to have, in 1979, only 2,847 active informants. When one considers that approximately 2,000 Special Agents are involved in organized crime investigations alone, with another almost 3,000 dealing with white collar crime, this seems an implausibly small number. I conjecture, and certainly I cannot document this, that numerous informants (obviously not including ones who receive authorized payments from the Bureau) are not in fact included in the files. The Justice Department, in commenting on this issue when raised by GAO, said, "The Department believes that no
reasonable audit procedures will insure the detection of improprieties, especially if collusion is involved" (p. 23). Again this seems a reasonable assumption, if a damning one.

The FBI is not the only agency to respond to scandal by the promulgation of informant controls. The New York Police Department (NYPD) was spurred by the findings of the Knapp Commission and the revelations of corruption in their elite narcotics squad, described in Daley (1978), to also formalize its informant program and to control agent dealings with criminals. Each informant must now be registered with the Department and payments to the informant subject to scrutiny.

Considerable skepticism has been expressed on the efficacy of the system. Kleinman (1980) gathered a number of comments by former and current members of the NYPD. Many doubted that officers or informants had sufficient confidence in the integrity of the system to accept registration. He cited one narcotics detective as saying, "When you register someone, they clam up right away . . . . The only time I'd register someone is if I had to pay him a lot of money;" (p. 40). A former high ranking member of the NYPD said, "I don't think it works there . . . . They probably have a tiny file that nobody uses" (p. 9).

The skepticism of these officers suggests the truth of their statements, for the opportunity to evade the registration requirements is always there. Informants can be rewarded without money formally provided by the Department. Indeed, my own contacts with informants in New York suggested that the amounts that the Department was willing to authorize were so pitifully small, no more than $25 for many purposes, that they made little difference to the informant. The officer could as easily fiddle with various expense accounts to cover disbursements
of this size. Officers are surely right that informants are likely to be very uneasy about being registered. If the officers are also reluctant to do so, then we must assume that many in fact evade the registration requirement. Given the secretive nature of police work involving informants, it is clearly difficult to prevent the recruitment of unreported informants.

If agents are to be prevented from licensing their informants, then it is necessary to formalize the relationship and the payments. That involves the agent in recording the information provided by the informant, so as to permit supervising officers to evaluate the consideration provided the informant, either in terms of money or reduced charges. That goes against very deeply ingrained customs of the police, who disdain paperwork (and who face more than enough of that when they have to process an arrest) and seek to control the information they collect in order to be able to gain the full reward from it. The tighter the requirement of formal control, the more likely the agent is to avoid registering his informant.

The problem of formalizing agent-informant relations, in order to restrict the criminal activities of the informant, is imbedded in the larger problems of information recording, informant "ownership" and information dissemination. Rubinstein (1973), dealing mostly with patrol and low level vice officers, noted their reluctance to provide any information even to their immediate supervisor, except when they were in a position to make use of it themselves. On the other hand, Williams et al. (1979) found that most narcotics units made serious efforts to prevent agents from acquiring restrictive control of an informant by requiring that other agents be introduced to the informant. My own contact with
police intelligence activities suggests that the problem is a fundamental one. Police officers are rewarded for making cases, not for placing information in files where it can be used by others without crediting him. Files contain only a small amount of the information police officers collect.

LIMITS OF REFORM

It seems to me that there is little that we can do to change the current situation. As just suggested, efforts to control informant-agent dealings will be counterproductive; they may force the agent to conceal even more of his information and to find illegal ways of rewarding the informant. Setting guidelines as to the nature of the licenses that the agent can issue to the informant involve agencies in making policy statements about two very troubling activities. First, the agencies must clearly violate the law by stating that they will not arrest all criminals against whom they have information adequate to justify an arrest. Second, they must state a series of trade-offs which are certain to be contentious. Can a dealer who regularly makes one ounce sales of heroin continue to operate if he provides good quality information against at least one four ounce dealer every month? There is no correct answer to this question.

Moreover, any guidelines will open a new avenue of defense. Defendants may argue that they have been denied their opportunity to become licensed agents of the police. If a one ounce dealer is prosecuted, while the guidelines read as above, he may argue that this is discriminatory. Possibly he may demand to see whether there is adequate representation of black or minority one ounce dealers; are they given the same opportunities to work off charges as are white dealers? Due process requirements would surely be only a short step behind such guidelines. The judicial supervision of such requirements poses
an enormous threat to the autonomy of police agencies in a very sensitive area of their work.

The enforceability of such guidelines, even outside of their due process implications, is also in question. The guidelines, in order to command public support, would probably specify fairly stringent requirements for the informant. For the agent, the informant may be worth protecting even if he is less productive than the guidelines require. Given the ability of law enforcement agents to make informal deals, even across agencies, it may be difficult to ensure that only informants who meet the stringent requirements of the guidelines are in fact given license.

Does this imply that we have no alternative to unbridled discretion in the licensing of informants by police agencies and their individual agents? While I am skeptical of the efficacy of formal controls, I think we should not exaggerate the problem. It is probably only potentially serious for federal agencies, simply because they have so much greater ability to protect their informants and are subject to so much greater pressure to make the kind of case that requires informants with broad criminal license. The local police are neither motivated to issue broad licenses nor credible providers of such. The fragmentation of law enforcement in the U.S. over the last two decades has ensured this.

Moreover, there are characteristics of the FBI and, to a lesser extent, the DEA, which also suggest that the problem may not be too serious, i.e., that only occasionally are informants given very broad licenses, the nature of which would create public outcry if revealed. Unlike local police departments, the federal agencies are very much controlled by the flow of paper. FBI agents are forced to account for their time in much more detail than their local counterparts. Their supervisors are heavily involved in investigative decisions. The use of wiretaps in many major federal investigations also brings other
agents into dealings with informants. None of these factors ensure that agent dealings with informants can be fully monitored, as Vilano's account suggests, but they do make it unlikely that many agents can enter into unmonitored arrangements with informants that involve the issuance of licenses much broader than the agency rules permit. In turn, agency executives are unlikely to willingly issue very broad licenses without promise of substantial returns, if only because of the risk that the agency runs from the runaway informant. Melvin Weinberg's behavior after the completion of the ABSCAM investigation provides a salutary example if one was needed.

Informants are perhaps the dirty secret of policing. Well meaning efforts to impose tight controls on police dealings with informants are only likely to make for more secrecy and less effective control within the agencies. But policing is itself a dirty business, particularly in a nation which has chosen to prohibit the legal provision of so much that the public enjoys and to regulate the provision of so much else. If we wish to much reduce the police licensing of criminals, we must lower our expectations of what the police can do or change the legislation which permits criminals to profit so heavily from crimes without plaintiffs.
NOTES

1. The most notable early official statement of the significance of police discretion is the President's Commission on Law Enforcement and the Administration of Justice (1967, p. 104).

2. The most precise statement is contained in David (1969, Chapter III).

3. However, Davis (1975, Chapter 4) argues that there is a legal foundation for such discretion if it is made openly. Though legislatures have passed full enforcement statutes, other, later, statutes clearly reflect an expectation of selective enforcement, as does the budgetary appropriation process.

4. An instance of this problem is provided in Goldstein (1977).

5. The implications of this are discussed in Wilson (1968).

6. A similar claim is made in Gould et al. (1974, p. 72).

7. "COINTELPRO, or the counterintelligence program, was a policy of disruption and harassment aimed at certain organizations deemed subversive, violent or extremist. Usually, it involved FBI agents sending false and anonymous letters to organization members or to employers and newspapers designed to discredit a leader or his organization or to stimulate factional quarreling" (Wilson, 1978, p. 83).

8. The wiretap application is listed as document number 79-0006/4-01/29-h of the United States District Court for the Western District of Missouri, Western Division. The case involved is discussed in Organized Crime and the Use of Violence, Hearings of the Permanent Subcommittee of Investigation of the Senate Government Operations Committee, April 30, 1980.
9. I base this statement on conversations with a former federal prosecutor who said that the FBI was quite concerned when he referred to the Top Echelon program by name in the early 1970s. The program is mentioned in Ungar (1975).

10. Ungar (1975, p. 431) refers to the FBI's attitude that only its members can be trusted with confidential information. These beliefs were reflected in the passage of the Organized Crime Control Act of 1970, which took as its premise that illegal gambling flourished only because of the corruption of local police. Giving the FBI jurisdiction would at last lead to honest enforcement in gambling. See "Remarks" of Senator Hruska, 115 Congressional Record 10736 (1969). The FBI has, however, been generally unwilling to investigate police corruption. See Beigel and Beigel (1977).

11. The FBI is also able to perform favors for individual police officers. Ungar (1975, pp. 429-430) describes how the Bureau has used access to its training program to reward local officers it favors.

12. For example, Manning presents figures on the amount spent on buys for various drugs (p. 247). It appears that no more than three or four cases involved purchases of more than $1,000 worth of drugs. The average expenditure per arrest was only $61.45.


15. This is discussed in GAO (1980).

16. "FBI officials do not believe a confidential questionnaire would have provided more reliable data. They note that few agents would respond differently to such a questionnaire because they would not believe their responses would be kept confidential" (GAO, 1980, p. 6).

REFERENCES


