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# THE DANGERS OF POLICE-CREATED CRIME

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September 2020



# EXECUTIVE SUMMARY

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Police-created crime is not a path to public safety. In most cases, undercover police stings target individuals who officers know nothing about, including whether they were already committing the targeted crime. Rather, these stings tend to ensnare the most vulnerable individuals, often by focusing on low-level drug crimes and poverty-induced offenses. Creating crime—in particular crime that is accompanied by enhanced or lengthy sentences—exact a high financial and ethical cost to our criminal legal system, but does not leave our communities safer.

## INTRODUCTION

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In 2013, an undercover agent with the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) approached three men—Randy Garmon, Arturo Cortez, and Rene Flores—with the opportunity to rob a “stash house,” a home holding 25 pounds of cocaine. The agents created the entire story like a movie; the connections, the plan, and the stash house were all invented. None of it was real. The agents approached men who did not have histories of armed robbery; one of them had been convicted only of a driving offense and drug possession. When the three men met with an undercover officer to discuss a plan for the imaginary robbery, the ATF caught it all on tape.

The evidence that the three men had agreed to participate in this wholly fictional robbery was clear; all three men pleaded guilty. Yet the judge, disturbed by the facts of the case, lambasted the government, saying that federal agents had “created the fictitious crime from whole cloth.”

“[T]he government had never had any reason to suspect any of these defendants in the drug business before targeting them to join their fictitious scheme,” the judge added. Unfortunately, due to mandatory sentencing laws and limited judicial discretion in sentencing, all three individuals were still sentenced to prison time.

When police invite people to break the law, it raises deeply troubling questions not only about the tactics employed but also the people targeted. Are police preventing future crimes by catching people already committing crimes? Or are police creating crime—and arresting individuals who would not be breaking the law had the police never approached them in the first place?

As sociologist Gary Marx stated, “[t]here is a profound difference between carrying out an investigation to determine whether a suspect is, in fact, breaking the law, and carrying it out to determine whether an individual can be induced to break the law.”

## UNDERCOVER POLICING RUN AMOK

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Undercover policing has a long history in the United States. Originally, undercover stings were created to catch people accused of crimes that were difficult to investigate using traditional police methods, such as public corruption crimes or those involving large-scale criminal enterprises. But today, the type of crimes and the individuals targeted by undercover stings have expanded

and now consume a significant amount of law enforcement resources as well as lead to an appreciable number of arrests.

In an undercover sting, undercover officers provide the opportunity for others to commit crimes. For example, an undercover officer may approach someone and ask to buy drugs or an officer may leave an item out in public and watch to see if someone steals it.

At first glance, these tactics seem straightforward. But the line between presenting someone with the opportunity to commit a crime and inducing them to commit a crime is not clear. Take, for instance, the first example of an undercover drug buy. What if the presumed drug dealer says no and the undercover officer asks again and offers to pay double the usual going rate, which causes the person, who may need money, to now say yes?

Who the undercover officer targets also matters. Sometimes the officer may have seen a suspect commit a prior drug sale. But what if the officer has not, and the person he approaches has no illegal substances, yet, in order to get the money, the individual decides to find some drugs? If the person participates in a drug sting and is later found guilty, has that really reduced the flow of illegal drugs? Or simply ensnared an easy target who was not otherwise planning to commit a crime?

In recent years, undercover policing has expanded to include ever-more-questionable tactics. Police have virtually unfettered discretion to set up undercover stings, and to create all the details of the sting, including the incentives offered, the words used to convince a suspect, and the fictional facts of the scheme itself. These choices matter a great deal because they substantially impact the defendant's potential sentence as a result of mandatory minimum sentencing schemes. Consider the following real cases:

- ▶ Undercover officers place a high-end bicycle on the street without a bike lock and leave it unattended for over 24 hours. When the suspect takes it, the individual is charged with a felony theft offense.
- ▶ Undercover officers approach drug users, not dealers, and ask them to help them buy drugs, ostensibly for themselves. These drug "users" are then arrested for felony drug sales.
- ▶ Undercover officers recruit a young man with brain damage and developmental delays to assist them in setting up gun and drug deals, paying him in cigarettes, personal items, and money. This man is then arrested and charged with firearm and drug offenses.

In all the above scenarios, the people involved are guilty of a crime. But more fundamental questions remain: What is their true criminal culpability? What should their punishment be?

And would they have committed a crime if there was no police sting in the first place?

The creation of crimes, particularly those that carry lengthy prison sentences, has both financial and ethical costs to our legal system. Due to mandatory sentencing schemes, judges are often not able to reduce a person's sentence even if they question the underlying police tactics. More critically, undercover stings that entice people to commit crimes, usually for financial reward, target the most vulnerable people. For example, leaving a bike unlocked and available for theft or offering a high price for illegal drugs entices people who need money, rather than those who are necessarily engaged in that crime ordinarily. In New Orleans, a few years after Hurricane Katrina, the police department set up an undercover operation that placed food, cigarettes, and alcohol in an unlocked vehicle with its windows rolled down across from

a homeless encampment. Individuals who entered the car were arrested and charged with felony burglary of a vehicle, a crime that carried up to 12 years in prison.

Today's undercover policing tactics are increasingly unmoored from their stated public safety purpose, leading to perverse results. In one case,<sup>1</sup> a city police department set up a drug sting in a school zone in order to catch and punish more harshly the suspect who was going to sell them drugs. At the day-time drug buy, violence broke out between the suspect and officers, thus resulting in violence directly across from a school, the very danger the legislature was trying to prevent when creating sentencing enhancements for selling drugs near a school. In another example, the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, over the course of several years, set up dozens of fake storefronts in cities across the country to uncover the sale of illegal firearms. These cities included Boston, Milwaukee, Pensacola, St. Louis, and Wichita. Despite the stated goal of targeting illegal traffickers, an Inspector General report in 2016 found that “none of the storefronts we reviewed gathered actionable intelligence on gun trafficking organizations.” Instead, the storefront stings encouraged the illegal gun trade by offering above-average prices and contributed to putting illegal firearms back into the community unmonitored.

ATF has also created an undercover policing tactic called the “stash house sting” that has now been adopted by other local police departments across the country. In the stash house sting, an informant working with the police finds an individual who may be interested in robbing a stash house—a place where drug dealers

allegedly keep money and drugs. This stash house is completely imaginary. There is no house, no money, no drugs. An undercover officer portrays a disgruntled drug dealer who convinces the suspect, and typically some acquaintances, to plan this imaginary robbery. The undercover officer creates all the details of the plan, including the amount of drugs and money stored and how potentially dangerous the robbery will be. To ensure the suspects agree and to maximize their potential sentence, the officer often downplays the potential for violence and chooses an amount of drugs that triggers a mandatory minimum prison sentence. After the undercover operation has recorded conversations planning the scheme, the suspects are arrested before the pretend robbery takes place. Suspects are charged with conspiracies to commit a robbery and to sell narcotics, and, as a result, face severe mandatory sentences of decades, and even life, in prison.

One court criticized the stash house sting for essentially casting “a wide net, trawling for crooks in seedy, poverty-ridden areas—all without an iota of suspicion that any particular person has committed similar conduct in the past” and stated that “[t]he government essentially targets people who are poor and have distorted moral compasses.” Significantly, in a study of 91 individuals arrested in stash house stings in the Chicago area, 91% were nonwhite men. Moreover, the majority of Black men targeted did not meet the police’s supposed “target criteria,” including a history of violent crimes, a suspected string of robberies, or actively committing crime more generally.

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1. Eldeib, Duaa & Jim Jawoski, *Carpentersville Police Sting Raises Questions of Public Safety*, The Chicago Tribune (Jan. 18, 2012).

# CHANGING POLICE PRACTICES

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Some people may think that the situations described above constitute government entrapment, which is already illegal. But the legal defense of entrapment is much narrower than our common understanding of the term. Generally, a person cannot argue the defense of entrapment if they were “predisposed” to committing the crime—that is, they were ready and willing to commit the crime at the time. For many suspects ensnared in these undercover stings, simply agreeing to the proposed crime sufficiently demonstrates their willingness. For others, the fact that the person has a criminal record (even if not for the same crime) means a judge will find that they were predisposed and, thus, not able to argue an entrapment defense.

The individuals ensnared in undercover stings do violate the law. But the question becomes: How culpable are they, how blameworthy? Should the fact that the police encouraged or coerced them be accounted for in their sentencing? Unfortunately, in the world of mandatory minimum sentencing schemes, judges often lack judicial discretion to reduce a sentence despite officers’ involvement and inducement.

With legal defenses not readily available, the question becomes one of policy. Creating crime is not the type of policing taxpayers should be paying for. It does not make our communities safer because these stings are not targeting individuals who were already committing these crimes. We must demand our police departments stop using undercover stings that are not narrowly focused on individuals who

law enforcement have credible evidence may be planning to commit a serious or violent crime imminently or who have already done so and are planning to do so again. Furthermore, we must eliminate stings that focus on low-level drug crimes and crimes induced by poverty.

## CONCLUSION

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The vast majority of undercover stings are not effective policing. With urgent community need for spending on mental health and social services, we should not be spending our tax dollars on stings that result in the lengthy imprisonment of individuals who were encouraged to commit crimes they may never have committed in the first place.

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