Probing corruption: Elite perceptions of sting operations

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Probing corruption: Elite perceptions of sting operations

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University of Nevada, Las Vegas, 1993
PROBING CORRUPTION: ELITE PERCEPTIONS OF STING OPERATIONS

by

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A thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts in Political Science

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ABSTRACT

This thesis examines whether a governmental elite consensus exists that the nature of public corruption in the Las Vegas Valley justifies the use of federal law enforcement undercover operations. Using the elite interviewing method, the writer obtained the perceptions of twenty-four sworn public officials from the cities of Henderson, Las Vegas and North Las Vegas regarding their views of public corruption and undercover operations. The writer contends that in accordance with social contract theoretical principles, federal undercover operations are justified if a consensus of seventy-five percent of the respondents agree to their use. The research demonstrated that an ninety-six percent of the respondents agree such operations should be used to investigated allegations of public corruption in the Las Vegas area.
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I offer a special thanks to my wife, Felicia, who has endured this past two years without leaving me or worse.
CHAPTER 1

Introduction

This is a study of police undercover operations (UCOs) within a framework of social contract theory. It inquires into the opinions of local governmental elites regarding the use of such operations in coping with one specific crime in one specific locality: public corruption in the Las Vegas Valley.

I proposed the following hypothesis: A governmental elite consensus exists that the nature of public corruption in the Las Vegas Valley justifies the use of federal undercover operations.

Defining and Operationalizing Key Concepts

In this paper, the scope of public official was limited to officials who swear an oath prior to taking office. In general, these are authoritative leaders charged with making and/or executing public policy which is enforced by law.

An undercover agent is defined as a police officer who, in an undercover capacity, infiltrates a group and/or conspiracy for the purpose of obtaining information about a crime (i.e. public corruption).

Corruption (of public officials) is that behavior proscribed by law (e.g. accepting bribes, kickbacks,
extortion, etc.). While the scope could easily be expanded to include any instance where there is an apparent conflict of interest or where an official uses his office in some manner for personal (at the expense of public) gain, not all such cases could be investigated under criminal law.

Justifying UCOs lies at the heart of this paper. UCOs are replete with actions that go against conventional norms of respectable behavior. These must be reconciled with other values of our community. One way of justifying such operations is to show there is a consensus in Las Vegas that UCOs should be used in public corruption matters.

The level of agreement necessary to establish a consensus I set at seventy-five percent. A simple majority did not seem adequate to demonstrate strong support for undercover work. Therefore, my hypothesis withstands falsification if three-fourths of the respondents agree that federal law enforcement agencies should be using UCOs to investigate allegations of public corruption.

Research Design and Method

Inasmuch as political corruption is generally a consensual crime (where the direct victim is a willing participant) carried on in secret (as are undercover
operations) away from the view of potential witnesses, obtaining empirical data is a problem. My purpose was to explore in depth the perceptions of local government elites currently in office regarding this topic. At the same time, I had no ability to manipulate the variables of my hypothesis. Accordingly, a nonexperimental research design best facilitated gathering and analyzing relevant data.

The most appropriate method for obtaining relevant data regarding this topic was elite interviewing. Elite interviewing did not necessarily preclude quantifying the data as in a survey questionnaire. But to have actually limited my research to a standard questionnaire would not have provided the kind of in-depth information I was seeking.

By the term elite in this case, I am referring to groups of people who by virtue of their position may possess some special knowledge or expertise regarding public corruption in the greater Las Vegas area; and the impact of undercover operations on the political process. In general, I was interested in the opinions of two groups who have substantial impact on law enforcement priorities and policy: sworn elected office-holders and senior law enforcement officials.
This is not to say these groups are more familiar with the topic than say academics, the media, citizen watchdog organizations or other groups. However, these two in particular play a prominent and intertwining role prior, during and after corruption and undercover investigations are exposed. They receive complaints of corruption and police misbehavior directly from the citizenry and are charged with doing something about them. While other elites or groups may exert some influence on law enforcement practices and priorities, it is a reasonable presumption that they do so through one or more of these two groups.

The sworn elected officials in my research population included Clark County judges and commissioners; the mayors and city council members of Las Vegas, North Las Vegas, and Henderson; and the Clark County District Attorney. Police investigators included local officials of those cities as well as the FBI and the State of Nevada; and the U.S. Attorney.

The potential importance of the opinions of the pool from which I had to draw is significant. Several officials had held political posts for more than ten years. Others had plans to seek higher political offices. Two respondents are planning to run for the Las Vegas Metropolitan Police Department (LVMPD)
sheriff's office. But perhaps most striking, one judge was only a few votes short of becoming a justice on the state supreme court.

In order to obtain a diversity of opinion I used a stratified sampling technique. I assumed a degree of homogeneity among elected officials and law enforcement personnel. Therefore, fewer interviews were required in order to obtain sufficient data to make tentative suggestions and comparisons. Due to constraints on my time and resources, I decided that the number of people I wished to interview was 25.

City councilman, county commissioners and judges were chosen randomly by lot. Law enforcement officials were chosen based on their positions as supervisors/investigators of public corruption matters.

I allocated six interviews to various levels of law enforcement agencies to ensure that I received the broadest, albeit minimal, description of law enforcement opinion regarding public corruption and UCOs. The interviews were broken down as follows:

U.S. Attorney (1)
Henderson Police Department (1)
Las Vegas Metropolitan Police Department (1)
North Las Vegas Police Department (1)
Nevada state police (1)
I divided elected officials into four sub-groups: 32 judges (16 district, eight municipal and eight justices of the peace); 12 city council members; seven county commissioners; three mayors; and the Clark County District Attorney. These sub-groups total 54 persons and were randomly sampled according to their percentage of that figure. However, North Las Vegas and Henderson each have only one municipal judge and justice of the peace. In the interest of obtaining a sample of each category from each city, I interviewed a disproportionate number (one) of each of those two groups in those cities. Therefore, the interviews were allocated as follows:

Judges (10)
   District (4)
   Municipal (3): one from each city
   Justice of Peace (3): one from each city

City Council (3)
   One from each city

County Commission (2)

Mayor (3)

Clark County District Attorney (1)

Choosing exactly which individuals should be interviewed depended on two factors: first, whether
their numbers came up when my four-year-old daughter rolled the dice; second, whether they were available for interviewing. Asking a public official to sit down for a 45-60 minute interview was asking for no small sacrifice for many of my respondents.

My thesis advisor, Professor Steven Parker, expressed concern that some judges may decline the interview because they may one day have to preside over an undercover public corruption matter in court. In the event that a selected official declined to respond, my intended method of choosing respondents was to randomly draw names until the required number was met or all were exhausted. This proved to be far too time consuming when it came to selecting district court judges. I found myself in a position of waiting two and three days for a judge’s secretary to find out whether the particular judge was willing and available for an interview. Ultimately I called all sixteen and took the only four available.

I conducted 24 of 25 interviews. Eight of the respondents were women. The number of women in local government surprised me. I was under the impression Las Vegas was characterized by a "good-old-boy network." Indeed, according to one female respondent, "the good-old-boy network is alive and well and still excludes
women." At least two respondents felt this was a contributing factor to public corruption, particularly among the judiciary. But the fact remains that two of three mayors, three of seven county commissioners and a number of judges and law enforcement investigators are women.

Two of the original district judges randomly selected agreed to the interview. Others declined either because they lacked the time, were not interested in the topic, had nothing to contribute, did not give interviews or I was unable to reach anyone at their office at the times I tried to call.

I was not able to interview others I had intended. The original Las Vegas justice of the peace I had selected cancelled the interview the day prior to the date it had been scheduled due to the lack of time. I then selected an alternative based on this judge's suggestion. The mayor of Las Vegas also had no time to be interviewed; however, her secretary advised me that if I mailed in my questions the mayor would find the time to dictate answers to them and send them to me. I have yet to receive a response.

Although I did talk to the head of the Nevada Division of Investigation and an investigator for the state attorney general's office, I was advised that the
state did not use undercover operations in public corruption investigations. Moreover, neither agency had investigated an allegation of public corruption in southern Nevada in at least thirteen and five years, respectively. They would do so if and only if such matter had been referred to them from another agency or direction from higher authority; not as a result of citizen complaints or other sources. Due to the small number of state investigators, I will reveal neither the person nor his/her agency for fear of causing him/her problems in the future.

For reasons unknown to me, I was not able to interview the U.S. Attorney. Instead, I was referred to the an assistant U.S. Attorney knowledgeable about public corruption matters.

I arranged all but five interviews myself and I am grateful to those who introduced me or allowed me to use their names. In introducing myself, I had to consider my status as a law enforcement agent and graduate student as well as the political sensitivity of the topic. Professor Mehran Tamadonfar pointed out that if respondents were aware of my occupation there may be a reactivity problem to my questions. My initial inclination was not to reveal what I did for a living unless asked.
However, as was pointed out to me by a colleague, if I did not disclose my occupation prior to each interview, the officials later may find out anyway. Some would undoubtedly question my motivations and even officially protest to my employers, the university or the press. I could well find myself the topic a news story entitled "Lawman Masquerades as Student in Corruption Probe." The thought gave me nightmares. Also in the back of my mind was the knowledge that more than one law enforcement officer thought this was a perfect undercover role to gain information. While I disagree strongly, if these individuals could think so, then so could others in the media and elsewhere.

On the other hand, my status as a law enforcement officer could probably have opened doors with any respondent if I revealed it at the time I requested the interview. This idea made me uncomfortable for at least two reasons. First, I didn’t think it would be appropriate; second, it probably would have made the respondents feel I was on official business.

Therefore, when I telephoned my request for an interview, I introduced myself (usually to a secretary) as a graduate student of political science at UNLV working on a master’s thesis. This helped ensure that I did not have access to public officials which any other
graduate student would not ordinarily have. In most cases I was not even asked to describe the nature of the topic. Only with law enforcement officials did I discuss in detail who I was and what I was doing; I did so because my name may have been familiar to them and I wanted to ensure they knew the interviews were not intended for official business.

At the beginning of each interview, I described the nature of the topic and went over definitions. I also revealed my occupation and made certain the respondents were aware I was not on official business; my project was intended solely for academic purposes and was not sponsored by the agency for which I worked.

In general the respondents were forthright and willing to help me with my project. All were very generous with their time. The average interview lasted about 56 minutes.

The interviews were all friendly and took place in the respondents' public/business offices during normal working hours. This meant I had to arrange my schedule accordingly and use quite a bit of vacation time. The write-ups took about as long as the interviews themselves.

I would like to say that my occupation did not prejudice the answers, but I am not certain that would
be an accurate statement. As I left one interviewee's office (who had known my occupation before the interview), I overheard him telling someone "When the government calls, make yourself available." I was also concerned when a couple respondents said such things as "I support the police."

At other times, I felt a few of the respondents may have been a little guarded. One official asked for a copy of my notes so he could forward them to the FBI which he was certain kept a file on him. Nevertheless, all of the respondents warmed up after the first couple of questions.

My occupation probably helped with the law enforcement interviews. At least one such person told me information he/she would not have told an ordinary graduate student. Several thought pursuing a masters degree was worthwhile and wanted to help.

I fear another factor also affected the interviews: my concern that I not appear to be on official business. As a law enforcement officer, I am a pretty thorough interviewer and normally ask follow up questions until a particular point is exhausted. But as a graduate student, I was afraid that to interview in the same manner, pressing for specifics, would give the impression I was on official business. Therefore, it is
possible other graduate students may have been more aggressive in a few instances. I also did not wish to put words into the mouths of my respondents.

A couple of other interesting points could be made about the interviews. Four of the respondents requested that I not attribute statements or quotes directly to them. In one case, the respondent is prohibited from discussing such matters by policy. In another case, the official was concerned such attribution may jeopardize his/her re-election. The other two were afraid candid responses might jeopardize their jobs.

I also learned some respondents thought other respondents were themselves corrupt. But what I found most interesting was when the aide of one respondent asked the respondent if I should be frisked for a recording device. This happened before I described the nature of the topic or revealed my occupation.

Three events occurred which may have influenced the answers I received from some of the respondents. First, four North Las Vegas (NLV) police officers were arrested on charges of drug distribution. Two of my NLV respondents mentioned the incident which occurred just prior to the interviews.

Second, the media was reporting an on-going story alleging judicial corruption (ticket-fixing) in the Las
Vegas municipal court system. Two of the respondents mentioned this incident.

Finally, the media was also conducting extensive coverage of a LVMPD investigation of individuals close to casino magnate Steve Wynn. One specific article appearing in a *Las Vegas Review-Journal* article on April 11, 1993, was mentioned by one of the respondents. The article was entitled "Most wiretaps are dangerous," and claimed LVMPD was abusing its power and wasting government resources in a vendetta against associates of Wynn. It further implied spending large sums of money on long-term investigations had better yield high crimes or there would be serious consequences.

The respondent found the article persuasive in suggesting police engage in vendetta's against "public people" even though in this instance the persons involved were not public officials. Another respondent indicated that for several weeks, this particular investigation had been the talk of the legal community of Las Vegas.

If I had it to do over again, I would change a few things. I would like to expand the pool of respondents to include members of the media, state legislators and lobbyists. A course on Nevada politics dealing with
which persons exercise power and influence would have been extremely helpful.

I would also develop more questions dealing with an FBI undercover operation called "YOBO." As I began the interviews I had largely ignored this investigation because it occurred more than ten years ago and was therefore old news. I did not think many public officials would remember much about it, but was wrong. Some officials were in political office at the time of the investigation and remember it as if it were yesterday. Others were and remain friends/acquaintances of the convicted targets of that investigation. Some supported the investigation, others opposed it; some of the latter were people who supported UCOs in such investigations, but not this particular one as it unfolded.

In developing and testing my questionnaire (see Appendix), I originally began with nine general questions and one empirical statement. I tested them on my wife and a colleague. They were also reviewed by my thesis advisor. Several of the questions were reworded in order to consolidate, clarify meaning or eliminate bias. After advising my employer of what I was doing (in the event he should receive phone calls about it),
he suggested I reword certain questions so that they did not refer to any specific law enforcement agency.

After a few interviews, I made other changes as well. I dropped the question about whether there is a difference between beating and tricking someone out of information. From the responses I received, it seemed the only person who sees no difference is the person who wrote the article from which I drew the question.

In its place I asked a question about policy goals of enforcement based on one respondent’s position that law enforcement agencies should not pursue a policy of "zero tolerance," but should instead investigate those matters where there is harm to the public and the public cares. Given the position and experience of this official, I found his/her example fascinating. To paraphrase:

A bill is pending which provides 200 gallons of water per minute. A developer wants a particular legislator to support a bill for 300 gallons of water per minute and offers to contribute $5,000 to the official’s campaign if he supports such a bill. The official agrees and accepts the money. While this is a bribe, there is no real harm done to the public. Moreover, the public doesn’t give a damn if the official took the money or not in this instance because there is no harm. Therefore, this is not the sort of matter which should be investigated by law enforcement agencies.

Other questions had to be explained. Asking someone to describe his/her perception of public corruption was too broad often leaving the respondent no
where to begin. The question of environmental effects and free choice frequently had to be repeated twice and clarified. I also had to stress that I was interested in the public official's perceptions and what he/she thought it was important for me to know in order to avoid the response "I don't know."

One could argue that the final quantitative question was influenced by the preceding discussion in the interview. That is probably true. However, I wanted a thoughtful response, not a snap judgment, and that was another reason for avoiding a survey questionnaire. I believe my method contributed to that goal. I am confident that if I had mailed out a questionnaire, I either would have received snap judgments or no response at all (as happened with the mayor of Las Vegas).

If I had advised my respondents of the questions beforehand, I may have received different answers to some of the questions. It would have allowed them to think about the issue, perhaps even do some research. However, I do not think research was likely given the busy schedules of the interviewees.

An alternative method which could yield greater consensus would have been to either gather the respondents for a group discussion or conduct follow-up
interviews with feedback from other respondents. Yet this would be extremely time consuming for people with busy schedules and probably not worth the commitment of resources.

I found this project to be an interesting and worthwhile learning exercise. I certainly learned there is no such thing as unanimous agreement even on issues I thought were black and white. In the end, I am left with more questions about UCOs than when I began.
CHAPTER 2

Literature Review

It is interesting that the political significance of law enforcement receives so little attention in political science. In that field, much study is directed towards those factors which are believed to influence the process of formulating regulation and law, but not whether and how these rules are enforced. The study of policing is dominated by sociology, particularly that specialized sub-field of criminal justice, and various law journals. Yet, as Morgan (1980, 12) has suggested, "people commit crimes for political reasons, and people justify crimes with political rhetoric."

The increasing use of UCOs have caused some to think that America is on an Orwellian course to a police state; one where fear, suspicion and distrust characterize the way our citizens look at one another; one where government lawlessness terrorizes the land, invades privacy and restricts constitutional liberties.

In this literature review, I want to address the broad issue of police UCOs. UCOs raise a host of political, ethical and social concerns similar to those associated with covert action in foreign policy (Johnston, 1992; Beitz, 1989; Johnson, 1989; M. Smith, ...
Beginning in the early 1980s, UCOs gained a great deal of publicity in the wake of the Watergate, Abscam and Marion Barry scandals, but for the most part received no rigorous ongoing reflection. Quantitative studies are almost nonexistent as far as I can determine.

Most of the so-called empirically grounded work is based on case studies or anecdotal evidence and it is not at all clear whether these are representative of UCOs as a whole. Critical pieces are therefore highly impressionistic: the conclusions of many authors that this behavior leads to that abomination are little more than logical assertions.

Even defining what we mean by undercover operation is problematic. Gary Marx is probably the most prolific academic writer on the subject. He suggests that undercover work involves the use of covert and deceptive means by government agencies (Marx, 1988). He sees no distinction between informants and sworn agents.

According to an earlier author with whom Marx might agree, there are four types of government agents: the informant who "rats" on his fellow conspirators in order to mitigate his own legal problems; the police spy who enters the conspiracy to observe and obtain information; the "stool pigeon" who lures others into a trap; and
the infamous agent provocateur who joins the group in order to destroy it (Donnelly, 1951). Under this view, undercover work is clearly an "evil" (Marx 1988) means by the monolithic state to repress its people. The scope of the definition is so broad that the any use of informants makes the investigation a UCO.

When no distinction is made between sworn agent and informant, it is easier to argue that they should both be held to the same standards. More importantly, it wrongly implies that law enforcement agencies can and should be able to exercise the same degree of control over their respective activities.

I argue that there is a clear and necessary distinction between government agents and government informants. If we cannot distinguish sworn agents from informants (as Marx and Donnelly believe), then we are not likely to be able to distinguish an informant from an ordinary citizen. "Informants" (citizens who provide information of interest and whose identities are protected) have motivations other than saving their own hides: some are good citizens (or whistleblowers) who for reasons of their own do not "wanna be involved," but expect law enforcement agencies to take action; others want money, revenge, excitement, respect or just some sense of meaning to their lives not found elsewhere.
Generally informants spend little time assisting law enforcement. They are not confined to a particular class or occupation, but have other lives to lead and greater priorities. According to one respondent, informants in public corruption investigations are likely to be fellow officials whom the target has asked to participate or support a particular corrupt act. Informants may provide information about one specific matter for a short period of time or they may provide information applicable to a variety of investigations over several years. Their veracity also varies from one to another.

Informants are not used strictly by law enforcement. Indeed, the media and academia often rely on the information that only informants can provide. Their rationales (people’s right to know and search for knowledge) can be no less damaging than police informants, but their use is largely unquestioned. In fact, one could argue that the four respondents who asked me not to use their names are "informants." Yet I am certain they would take offense to being called "rats" or "stool pigeons." 1

Miller limits the definition of undercover work to "instances when a sworn officer, for organizationally approved investigative purposes, adopts an encompassing
but fictitious civic identity and maintains it as a total identity over a defined and considerable period of time." (Miller 1987, 28). He finds it more useful to distinguish undercover operations by the extent to which a sworn officer's private life is merged with his undercover role. Thus, light undercover has minimal impact and duration; deep cover is a long-term total submersion into the role.

I would agree with Sherman (1978) that UCOs are activities which involve the use of covert agent to obtain information without the subject becoming aware of the presence of government agents. Like Miller, I would also limit the scope of undercover agent to include only sworn officers, but I would not go so far as to assert that they must be in undercover role for "a considerable period of time."

UCOs can be proactive or reactive (regarding the timing of the crime) (Marx 1988). They seek evidence of a crime or intelligence; they may be short-term (one-time encounter) or of long duration (years); passive (surveillance) or active (government intervention); they may be targeted at specific groups (political, criminal, etc.), individuals, or activities; and they may be directed at a specific crime or a more general fishing expedition (such as an anti-fencing sting)
(Miller 1987). In this paper I am only concerned with UCOs directed at obtaining evidence of a specific crime: public corruption.

**Dramaturgical Analysis**

Some have approached the study of UCOs through dramaturgical analysis of how an undercover agent is able to assume and maintain his deceptive "self" while interacting with the targets of investigation. This approach brings an element of theater to understanding the nature of undercover work. Undercover deception thus requires extensive knowledge of the role an agent must play, rehearsal, setting the stage, appearance manipulation, verbal diversion and physical diversion (Jacobs 1992, Nixdorf 1982). The studies I looked at used elite interviewing of one police department as their methodology. In dramaturgical analysis, the emphasis is on the "how to" aspect of undercover work. Questions of morality, legality and policy are not asked. However, most of the scholarly literature surrounding the UCO issue addresses these questions.

**Constitutional Approach**

Morgan's analysis (1989) of historical documents provides some examples suggesting the Founding Fathers, particularly the Federalists, supported undercover
operations. In that time of political instability, demonstrated by Shays' Rebellion, many supported covert federal intervention into situations which either spilled across state lines or were beyond the means of a single state. Their rationale was to preserve order, protect life and property.

Objections to UCOs have been primarily made with regards to their constitutionality. Many oppose UCOs because such operations violate the Constitution. They strongly disagree with the Supreme Court's majority rulings which for 60 years have held UCOs to be both constitutional and legal. Opponents often attack the logic behind court decisions favoring UCOs or reveal some latent right protecting citizens against such activities. For example, UCOs involving government intervention for purposes of prosecution violate individual autonomy and the accused's "fundamental right" to choose whether he wants to violate the law or not (Stavsky 1985).

According to this argument, if the government had not induced the crime, this particular crime never would have occurred. It rejects the "ready and willing" doctrine used by courts (the former saying that a jury should only convict if it finds beyond reasonable doubt that the defendant was ready and willing to commit the
"type" of offense charged whenever a propitious moment arose) (Park 1976, 244-45). However, Green (1988) makes a strong case that autonomy and choice are separate issues. I will deal more with this matter in the chapter on social contract theory.

First Amendment

The First Amendment is considered to be the most important and fundamental under the constitution (Bothwell 1990). Freedom of speech, the press, religion and association are sacred values. Government efforts at social control which are perceived to encroach upon these rights attract a great deal of attention. Under this amendment, UCOs generally come under attack for their "chilling" effect on political expression and dissent.

Free speech and association can be lessened by police surveillance. Lundy (1969) further argues the more recent "right" to anonymity prohibits the government from obtaining information if its divulgence will have a chilling effect on the exercise of any first amendment rights. These are particular concerns for radical political dissidents, religious cults and other minority groups.
Fourth Amendment
Some see UCOs as an effort on the part of the government to achieve secretly what it cannot obtain openly and legally (Shoeman 1985). Ordinarily police cannot enter a home without probable cause and a warrant. Unlike traditional searches, the Supreme Court’s "invited informer" doctrine allows UCAs and informants to be used in a limited fashion against targets in the absence of probable cause or suspicion. The invited informer doctrine holds that a UCA may enter a suspect’s home by invitation, but only for the purposes contemplated by the suspect (Cook 1983). The courts have said a person willingly assumes the inherent risks of being deceived in confiding in someone else who is not what he claims to be (misplaced trust). There are no restrictions on time and place (Iverson 1967).

The complaint here is that police are required to obtain a search warrant unless, in an undercover capacity, they can trick their way into a private area and gain information.

Fifth Amendment
Miranda v. Arizona established the right to be silent so that a suspect need not incriminate himself through coercive police interrogation. Yet UCOs employ similar deceptions and psychological manipulation
condemned by the courts in the interrogation room and for that reason some feel they should be prohibited. Incriminating statements obtained by secret agents through trickery are no different in effect at trial than are forced confessions (or any confessions). According to this position, "(i)f the privilege is to be preserved by demanding 'the knowing and intelligent waiver required to relinquish constitutional rights,' the requirement should logically encompass the entire investigatory process." (Iverson 1967, 1005).

The courts have held that police may not obtain information by deception from a suspect who is either under arrest or indictment, but that he may only give up his right against self-incrimination knowingly, intelligently and voluntarily. Shoeman (1985) asks why then do they not apply this same standard to people not suspected of wrongdoing?

Central to the issue is the concern that government agents are associating with and behaving like criminals. Why can government agents lie, deceive and break the law in order to catch someone else doing the same? Why can an undercover agent encourage, even induce, a citizen to commit a crime and take part in the conspiracy himself? Is the primary role of police to prevent crime or to
punish it? Should the behavior of government agents be a living example to other citizens?

UCOs must be governed by more than law, but also the values of society (Shoeman 1985). Police use of secrecy and deception must therefore be justified on moral values and I will attempt to do this later in my thesis. While I advocate undercover operations, I do not believe they should be used without thought and reflection.

**Utilitarian Approach**

Some would justify UCOs on utilitarian grounds. Undercover work seems to be an effective method for achieving crime control objectives given the sheer number and wide variety of crimes prosecuted (Girodo 1985). Studies are mixed, but some have shown that UCOs snare sophisticated career criminals who have been able to thwart traditional investigative methods. For certain crimes, particularly drugs, UCOs are the most economical, effective (and now most routine) means of investigation. Given the extremely high conviction rate and greater penalties associated with undercover work, many believe UCOs help keep these professional criminals off the streets for longer periods of time (Weiner 1984).
Moreover, the possibility that one may be dealing with a UCA has a profound deterrent effect on would-be criminals. Altogether then, UCOs produce the greatest amount of good (protection from certain harmful activities) for the greatest number of people.

In the context of American political culture, the utilitarian approach fails to reconcile our need for UCOs with other values we hold in high esteem. It sets no limits on the permissible so long as it is good for the majority of citizens. The mere fact that there are limits (determined by guidelines, legal doctrines, etc.) protecting the individual or minority from government undercover operations suggests that some values are more important than what is best for the majority.

**Lies or Truth Approach**

Those who claim to stand above the fray and hold the ring impartially for truth either lie or deceive themselves. (Bell and Whaley 1991, 66-67)

Critics of UCOs seem to agree that operations characterized by secrecy and deception are contrary to open, honest and democratic government (Bok 1989, Brown 1989, Marx 1988, Treverton 1987, Iverson 1967). Deception is wrong, unfair, un-American and contrary to the will of the Founding Fathers. When law enforcement agencies engage in secret and deceptive practices, we are somehow on the slippery slope to a police state.
Trust is the foundation for many of our most precious relationships (e.g. love, friendship, etc.) and some of these relationships are protected by law from law enforcement (such as communications between doctor/patient, husband/wife, attorney/client and cleric/penitent). Some writers argue the lies, deception and betrayals inherent in UCOs break down the bonds of trust among individuals and groups, thereby endangering all of society (Marx 1988, 1992; Bok 1989).

One congressional committee in its study of UCOs thought undercover work, directed at political corruption, also undermined the public's trust in political institutions (U.S. House of Representatives Subcommittee on Civil and Constitutional Rights 1984, hereafter House). Others have pointed out that lies and deceit demean the police profession and erode the public's perception of the distinction between the good guys (cops) and the bad (criminals) because they are engaged in similar behavior (Marx 1988). Still others have criticized UCOs as the "creation" of crime (for institutional purposes) aimed at prosecuting the innocent while the "real" criminals get away. Prohibiting police deception would eliminate all these concerns.
Some have argued UCAs are potentially able to manufacture the guilt of innocent targets through manipulation and ambiguity. This is particularly the case when the UCO is combined with the use of electronic surveillance (House 1984). When the UCA meets with a person involved in the crime, their conversation is often coded. If the UCA were to say, "This is bribe money," the other participant would in all likelihood believe he either was talking to an undercover cop or that his conversation was being recorded.

But the avoidance of specificity allows room for misinterpretation which may not be obvious to a jury charged with determining whether a defendant has been entrapped. Moreover, the skilled UCA may deliberately manipulate the target so that he makes incriminating statements on tape. Under such circumstances an innocent party could conceivably be indicted and convicted (House 1984).

Bell and Whaley (1991) point out that deception is sometimes used not to achieve power, but justice. Where the stakes are high, resort to deceit is more likely because the consequences of failure are more severe, but with the goal of achieving a higher truth. Deception is thus a strategy used in war, in politics and, yes, in law enforcement.
One problem with the "truth or nothing" approach is that secrecy (sometimes called privacy) and deception are both endemic and necessary to human nature and law enforcement. Those who study these topics find that the two permeate all social interaction (Bell and Whaley 1991, Bok 1989, Wilshire 1982, Goffman 1959, 1974). They are indeed often necessary to provide power for institutions (including law enforcement) to maintain social order (Bailey 1991).

Deception is a source of power available to the strong and the weak: it is used by those who govern public affairs, often as an alternative to coercion (Bell and Whaley 1991). In fact, the use of deception by police agencies has increased due to the virtual extinction of police brutality in the 1960s (Skolnick and Leo 1992, Bok 1989, Marx 1988).

**Equality**

When I speak of equality, I mean equal treatment for all citizens under the law. All types of crime should be investigated and prosecuted; if government is not willing to enforce certain laws, they should be removed from the list of criminal statutes.

Traditional methods work well enough for murder and bank robbery, but they are inadequate to identify and prosecute invisible, coercive or consensual crimes such
as price-fixing, drugs, prostitution, public corruption and extortion (Stavsky 1985). Violation of these statutes is deemed a wrong against society as a whole and (with the exception of extortion) is generally unattended with any particular harm to a definite person. These offenses are carried on in secret and the violators resort to many devices and subterfuges to evade detection. It is rare for any member of the public, whatever his attitude may be in principle towards these offenses, to be willing to assist in the enforcement of the law. It is necessary, therefore, that government in detecting and punishing violations of these statues rely, not upon the voluntary action of aggrieved individuals, but upon the diligence of its own officials. This means that the police must be present at the time the offenses are committed either in an undercover capacity or through spies and stool pigeons. (Donnelly 1951, 1094)

When citizen witnesses are unable or unwilling to provide information and the uniform drives information underground, government agents either must go undercover or ignore the offense (Miller 1987). Only an undercover agent could obtain the necessary evidence for successful prosecution of the crimes described above (Marx 1988). If UCOs were made illegal, some groups of criminals would walk the streets with impunity. UCOs are thus often justified on moral grounds of equality in the sense of justice for all.

**Judicial Approach**

The courts have taken the lead in tackling the issue of UCOs. Yet many consider them incapable of the
task. The following section traces the evolution of judicial thinking regarding undercover work.

A hundred years ago the courts were not particularly sympathetic to the accused caught in the government's snare. One 19th Century New York Supreme Court justice summed up the prevailing sentiment nicely:

Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment we pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian ethics, it never will. (Marcus 1986, 9)

Not everyone agreed, of course. In 1878, Justice Cooley of the Michigan Supreme Court became irate when a police officer allowed and assisted an attorney to go forward with a burglary so that he could be prosecuted. Cooley reasoned that the officer had a duty to prevent crime and take steps which would elevate and improve the character of the would-be criminal. "Human nature is frail enough at best, and requires no encouragement in wrong-doing." (Marcus 1986, 10-11)

Supreme Court Justice Brandeis argued in 1928 that no government agent "has the power to authorize the violation of an Act of Congress and no conduct of an
officer can excuse the violation." (U.S. v. Casey) The idea of government encouraging or participating in a conspiracy to violate one of its own laws cuts to the heart of the philosophical debate.

Four years later the Supreme Court took a different stand. In the landmark U.S. v. Sorrells (1932), the majority of the Supreme Court first recognized the legality of UCOs and established the doctrine and theoretical basis of entrapment. The courts noted that the literal interpretation of statutes could potentially produce unfair and unjust results as a result of UCOs. Under such circumstances, Congress could not have intended "that its processes of detection and enforcement should be abused by 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." (U.S. v. Sorrells, 448). The majority court has consistently maintained this position for decades (e.g. in U.S. v. Jacobson 1992).

The court reasoned that an entrapped person is innocent of the crime (a question for the jury); and that an entrapped person is one not "predisposed" to commit the offense (Marcus 1986). Nondisposed persons are believed to be less culpable and dangerous to
society than those predisposed. Hence, they should be exonerated (Park 1976).

The focus of the entrapment doctrine is on the defendant's predisposition demonstrated by his actions and statements, not the conduct of government agents (Kukura 1993). Critics argue that the logic of the predisposition doctrine requires entrapment to include situations where the tempter is a private individual. Yet exempting individuals "entrapped" by private (as opposed to government) persons would stimulate collusion, false claims and other contrived defenses. Conspirators would then be free to lay the blame on a fall guy or fugitive co-conspirator (Park 1976).

Predisposition has been criticized for requiring a "crypto-Calvinistic" view of human nature where people are born with a tendency toward guilt or innocence (Gerschman 1982). These critics do not believe the government should pursue the former any more than the latter, even where the former has a criminal track record.

Yet perhaps it is these people against whom the public demands protection from the government. One writer argues that there is no 'fundamental principle of equality under law' which requires that past offenders be treated exactly the same as persons with clean records...the "ameliorative hopes of modern penology" have not
lived up to expectations. Prison rehabilitation efforts have rarely succeeded. If agents do pursue past offenders with special zeal, this practice may actually deter crime by increasing the risk of detection. (Park 260)

The court majority rejected the minority view that courts have the power to grant immunity to the guilty (the function of the executive branch) for objectionable conduct on the part of government officials (U.S. v. Sorrells) except where there are grossly repeated efforts to induce crime (Cook 1983).

The minority of the Court rejected legislative intent, defendant's guilt or predisposition. For the minority, the real concern was the protection of the courts and government from the "prostitution of the criminal law" (U.S. v. Sorrells, 457) by government agents manufacturing crime (U.S. v. Russell 1973).

Russell had the further distinction of establishing the doctrine of "outrageous government conduct," a due process defense replete with constitutional ramifications (Nichols 1984). According to Russell, outrageous government conduct is decided by the judge as a matter of law, not by a jury, based on the totality of the circumstances. Essentially this doctrine holds that the ends do not justify the means. The court offered no example of such behavior, only that it must be shocking to the universal sense of fairness and justice (U.S. v. Russell). Some lower courts have since held that the
conduct in question is limited to police brutality, physical or psychological coercion against the defendant (U.S. v. Bogart). According to Majeske (1985), the defense is rarely successful.

Courts have traditionally chosen to use the Fourth Amendment to control police behavior because its language is flexible (bars only unreasonable searches and seizures) and provides judicial supervision (via warrant requirements) (Lundy 1969). However, judicial control is limited and awkward because of the difficulty of applying constitutional protection to 'intangibles' under the fourth amendment...the theory of 'consent' or 'assumption of risk' as applied to the undercover agent situation...and the idea that scientific or technological investigative methods (electronic surveillance) pose a greater threat to privacy than do those which depend on deception, disguise or deceit. (Lundy 1969, 652)

The Court's majority has consistently maintained that entrapment is a limited defense, without constitutional dimensions, that is not intended as a judicial veto of overzealous police practices deemed unsavory by judges.

The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. (U.S. v. Russell, 423)

To illustrate how far some courts are willing to allow an undercover operative to go, the 9th Circuit
(U.S. v. Simpson) held that the deceptive creation and exploitation of an intimate (sexual) relationship is a permissible UCO tactic because an informer must have considerable latitude in establishing a relationship with a suspect. The Court found that government agents may use methods which are neither savory nor moral (by abstract standards of decency) in their quest for information. The Court further reasoned that it was not a suitable forum for determining universal standards of intimacy beyond which government agents could not go without violating the due process clause (Gundred 1988). It is therefore up to the executive and legislative branches to set those standards.

It is interesting that in investigations of judicial case-fixing, some courts have found no legal or constitutional problem when undercover agents lie under oath in order to obtain evidence of bribery (this without the knowledge of the presiding judge and target of investigation) (Majeske 1985).

Skolnick and Leo (1992) have determined that the acceptability of police deception by the courts varies inversely with the criminal process. Where there is little or no suspicion of wrongdoing, agents are free to routinely deceive those from whom they want information or evidence, regardless of whether the agents are
undercover. However, as the investigation reaches more serious stages (such as courtroom or grand jury testimony), police are prohibited from lies and deceit.

There is no constitutional threshold requirement for mounting a UCO against a target (Gerschman 1982), although the courts have indicated one could be statutorily imposed (Cook 1983). For many, then, the constitutional safeguards developed by the Supreme Court are not adequate to control secret investigative methods. Courts have been reluctant to restrain use of clandestine techniques less they prohibit them altogether (Lundy 1969).

The basic defense against the secret agent remains the doctrine of "entrapment". However, entrapment only helps "control government solicitation of crimes and does not reach passive undercover activities such as spying or subverting friends." (Iverson 1967, 994-995). Furthermore, police use UCOs to achieve other goals such as the collection of intelligence and the preservation of order. The courts are limited to reviewing those cases aimed only at prosecution.

The Court's minority has always been concerned with controlling police behavior and would make that behavior the central question when the issue of entrapment is raised. In *U.S. v. Sherman* (1928), the Court expressed
concern that by allowing juries to decide the issue of entrapment, the courts would be unable to set standards of appropriate police/informer conduct in undercover operations (Gundred 1988).

Some scholars suggest that people are ignorant about UCOs and the dangers they pose against citizens (Lundy 1969); that people are easily manipulated by a skillful prosecutor and a persuasive undercover agent. Accordingly, juries are unqualified to determine whether the undercover technique is legal and necessary in a given case. For these critics, the only acceptable solution would be court authorization prior to conducting a UCO as is the case with electronic surveillance.

While federal and some state statutes require a court order for wiretaps, it would be a mistake to overemphasize the similarities between undercover and electronic investigative techniques. Both involve issues of privacy, secrecy and occasionally violating the law (e.g. breaking and entering to install a microphone). Yet an agent passively monitoring conversations from a remote location has far greater control over his situation and safety than a UCA interacting with his co-conspirators.
The circumstances in which a monitoring agent finds himself are predictable allowing a judge to set requirements over a considerable period of time. A judge can simply direct an agent to listen to this type of conversation, not to that. On the other hand, the circumstances for a UCA are unpredictable even in the short run. Judicial controls would entail a judge being involved in the investigation frequently, if not on a daily basis.

Thus, judicial approval of UCOs would have the same limitation as other judicial remedies. Its advocates base their hopes on the unlikely assumption that courts have the ability to anticipate and control the various unpredictable circumstances which occur when the UCA (agent or informer) interacts with the target (Park 1976).

**Legislative Approach**

Congress did not really pay much attention to undercover operations per se until charges were brought in the Abscam investigation. The U.S. House of Representatives Subcommittee on Civil and Constitutional Rights and the U.S. Senate Select Committee to Study Undercover activities of Components of the Department of Justice (hereafter Senate 1983) focused their research
primarily on the FBI and particularly those cases involving political corruption.

The congressional approach to the study of undercover operations was to solicit testimony from experts across the spectrum including law enforcement agencies, targets, civil libertarians and third party victims. These hearings produced a wealth of comprehensive information, but little quantitative data.

The cases Congress looked at were not so much representative of typical UCOs as they were the scope of these activities and their consequences. Their reports, highly critical of UCOs, generated intense pressure for the Attorney General to revamp internal guidelines (particularly restricting UCOs where the subjects are public officials), but did not result in the passage of any legislation.

In my research I was surprised to learn that Abscam did not generate legislation controlling UCOs. Instead, Congress limited its efforts to those involving political corruption. It seems that it was one thing to use the technique against drug dealers and prostitutes, and quite another to apply it to respected leaders of the community.
Opponents often approach undercover work because they disagree with the targets of those operations. This is the case for those who see UCOs primarily as a tool of political repression. There are numerous accounts of FBI intelligence operations unlawfully conducted in order to "disrupt and neutralize" domestic political groups (Summers 1993, Poveda 1990, Churchill and Vander Hall 1988, Theoharis 1978) which resulted in scandal and reform.

Summers (1993) authored the latest scathing attack on J. Edgar Hoover and the FBI. He charges that Hoover used the FBI to illegally collect sensitive, private, derogatory or criminal information about political opponents, particularly leftists and members of the U.S. Congress, in order to smear, discredit and undermine individuals and groups against whom Hoover was opposed. Page after page alleges that Hoover himself was corrupt; that he was guilty of extorting presidents, receiving bribes, associating with organized crime figures and defrauding the government. Summers further implies that Hoover authorized political murders and was himself assassinated by his political enemies. Prior to his death, Hoover controlled politicians, university staffs, local police departments, the national media and
ultimately the nation's political process with a "swollen" force of 4,000 agents.

It is important to note that according to Summers, Hoover obtained this information primarily through electronic surveillance and the use of informants. Both are "police state" tactics. Hoover also used FBI agents to intimidate political opponents through overt interviews. Yet fewer than ten of more than 400 pages of text referred to UCOs.

Churchill and Vander Wall (1988) allege that the FBI destroyed the American Indian Movement through UCOs and other tactics. But they go one (extreme) step further by suggesting that this was part of a wider conspiracy in which the members of all three branches of government deliberately use the FBI to systematically destroy political opposition.

Specifically, we argue that the Bureau was founded, maintained and steadily expanded as a mechanism to forestall, curtail and repress the expression of political diversity within the United States to preserve the status quo...regardless of its "abuses," even at the moment when it was conclusively demonstrated to have so far exceeded its authority as to have temporarily threatened the stability of the status quo itself (12-13).

Other accounts (Gelbspan 1991, Berlet 1991, Donner 1990) describe conspiracies in one form or another where the FBI and other intelligence/police agencies continue to hunt down and destroy agents for social change.
Langworthy and LeBeau (1992) raise a more interesting concern regarding UCO targeting. Their study indicated that the location of a "sting" site is of critical importance because a sting normally draws local clientele. Police are somewhat constrained in their choices in that the UCO must appear "natural" if it is to deceive a potential criminal. Thus, the potential for selective and discriminatory enforcement is great in that police could target one locality over another on the basis of ethnicity, politics, etc.

These accounts, particularly Summers book, are significant in two ways for the purposes of this study. First, they point out that any investigative tool (whether an interview, search warrant or UCO) can be abused. To oppose UCOs on the basis of past targeting or that they might potentially be abused is not so much an indictment of the technique itself as it is the purpose for which it is used. Yet many equate and confuse the two. Targeting is certainly a legitimate question in any investigation, but it is only one aspect of UCOs.

Second, Summers work also gives some insight to the effect of corruption on the political process. Let's assume for a moment that all of his allegations regarding Hoover's abuses are true; that he was able to
control and manipulate public officials at the highest levels of government for illegal or immoral purposes because of what he maintained on them in his secret files. I have to ask myself, what information could he have on presidents and congressman that would prevent them from executing the sworn duties of their political office? Wasn’t this the age of all-powerful committee chairmen? In other courses, haven’t I heard of the "imperial presidency" and the concentration of powers into the hands of the Chief Executive? Hoover and his senior aides should have been prosecuted and sent to prison if what Summers says is true.

Yet Summers points out that Hoover knew Truman owed his political success to organized crime boss Tom Pendergast. Kennedy, whose father was closely associated with organized crime, exchanged white envelopes with Chicago crime boss Sam Giancana through a mutual lover. His brother may have murdered Marilyn Monroe to keep her from exposing a love affair with the Kennedy brothers. Johnson made his start political start by ballot-rigging. And Nixon authorized illegal break-ins. All this is to say nothing about congressman and justices of the Supreme Court. I have to ask myself, was corruption so prevalent and systemic that a crooked law enforcement chief could not even be fired,
let alone prosecuted? And if so, how much better is it today?

**Police Discretion and the Slippery Slope**

One other approach is to look at how UCOs are controlled. UCOs of the FBI are largely controlled through internal guidelines, some of which were adopted in the wake of Abscam and the congressional investigations and revelations of the 1970s. These include the Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations, Guidelines on Use of FBI Informants and Confidential Sources, and Guidelines for FBI Undercover Activities (Senate 1983). These guidelines are not enforceable in court (Elliff 1984), but are grounds for declining prosecution.

When the aim of a UCO is intelligence rather than evidence, the UCO escapes nearly all controls outside the agency itself. Use of information covertly obtained is not subject to judicial or legislative review except insofar as laws are broken or public outcry is heard. Critics object to placing so much discretion and self-regulation in the hands of a law enforcement agency.

From Klockars' (1985) work, one might say that what bothers us most about UCOs (and police work in general)
is this enormous discretion granted to police regarding which crimes to enforce and the means of enforcing them. The uncertain potential for abuse and arbitrary enforcement is almost maddening. For writers critical of UCOs, it has led to a presumption that we are on the slippery slope to a police state and an obsession with accountability and external controls.

In his comparative study of police systems, Bayley (1985) argues that this mistrust is a part of a broader cultural orientation. He finds that in contractual societies such as ours (see Chapter 3), there is a preference for external controls over group activities.

Americans do not trust the police to regulate themselves. In order to assure conformity to community wishes, Americans put their faith in external scrutiny and correction by politicians, civil service boards, ad hoc commissions, courts, complaints committees, and private organizations such as the American Civil Liberties Union and the National Association for the Advancement of Colored People. (Bayley 1985, 182)

Japan, a communitarian society positively affected to the state, prefers internal mechanisms of group control such as professional dedication and personal responsibility. The Japanese are more trusting of their police and bureaucracy in general. They perceive themselves as having a higher capacity for self-regulation.
Gaps and Social Contract Theory

The focus on the legality and control has left gaps in our understanding of UCOs in terms of whether such operations are good policy. Ultimately, we find a consensus among scholars that UCOs are necessary, but no general agreement about when and how they can be used with justification. Discussion has taken place among legal scholars, academics, undercover agents and a few moral philosophers, but no quantitative or qualitative research has been directed towards ascertaining public opinion of elites or rank and file citizens in a local community.

In my thesis I hope to accomplish two things: first, to show how UCOs can be justified as a means to investigate a specific category of crime according to social contract principles; second, to capture elite perceptions reflecting a consensus supporting undercover work in the greater Las Vegas area.
Chapter Notes

1. The historical Western hatred for informants goes back at least 2,000 years. The New Testament describes a fugitive (Jesus) wanted by the Roman authorities who had orders from a magistrate (Pontius Pilate). For a few dollars, the Romans were able to recruit an informant (Judas) whose information led to the successful capture of a wanted man. Since that time, Westerners have taken a dim view of anonymous citizens cooperating with law enforcement authorities.

2. Although popular in American culture, problems arise with conspiracy theories. The presumption that agencies (and even the entire state) behave as a monolithic entity is difficult to support empirically. If the state is not monolithic, then UCOs could conceivably be used to purge dissent within the status quo (thereby undermining the status quo and the argument posed by Churchill and Vander Hall). Another problem is that American police/intelligence agencies simply do not possess the resources and capabilities to exercise the type of control described by proponents of conspiracy theories. In fact, the resources allocated towards domestic intelligence falls far behind other investigative efforts and priorities (Poveda 1990).
CHAPTER 3

Some Background

Undercover operations (UCOs) conducted by law enforcement agencies represent one of the more controversial issues in American law and society. According to congressional investigations and academic studies, covert investigative methods by police threaten first, fourth, fifth, sixth and ninth amendment liberties and protections and may constitute an abuse of legitimate government power.

UCOs have been around for more than a hundred years in America, yet it wasn't until the mid-Twentieth Century when they really started to come into their own. Their scope has expanded from property and victimless crimes to virtually the entire range of criminal statutes, and some areas that are not criminal. The proliferating number of agencies using the UCOs and their growing budgets reflect a dramatic increase in the use of the undercover technique (Girodo 1991).

The use of undercover work in policing originated in the private sector (Marx 1988), eventually was adopted by government police agencies, and is now enjoying a resurgence within private police agencies (Johnston 1992). Anyone who watches television or reads newspapers can see the media too now frequently goes
undercover to expose corruption in industry and low levels of government. In this chapter I will address the historical rationales giving rise to federal UCOs and briefly discuss an FBI undercover investigation code-named "YOBO."

The spread of totalitarianism in the 1930s led President Roosevelt to order the FBI to investigate "subversive" groups in the United States. With the outbreak of WWII, he further expanded the FBI’s jurisdiction and directed that these investigations be conducted through covert means to gather information and evidence of political, economic, financial, or industrial threats of subversion (Senate 1983).

The traditional role of police was to deter crime through the visible presence of a uniform. As social and technological conditions changed, new sophisticated types of crime and criminal organizations emerged and the traditional role had less effect (Marx 1982).

While this was occurring, Americans’ view of their role as citizens in policing society was changing. They became less reliant on themselves and demanded more protection from government. In time, they came to believe police work is a function of government. Moreover, studies have indicated that Americans fear
rising crime levels far more than abuses of police power and granted more powers accordingly (Marx 1988).

Since the 1960s changes in crime patterns have been accompanied by changes in law enforcement priorities. Organized crime, domestic terrorism and civil disorders, political assassins, drug cartels, increasing violent crimes all were perceived as gripping the nation. These problems were exacerbated by political scandals of the 1970s such as Watergate. It seemed corruption and crime plagued government from the smallest locality to the highest political office in the land.

At the same time, the public began to demand criminal accountability for white collar crimes (Marx 1988). It seemed patently unfair to prosecute a car thief for a thousand dollar crime and not go after the attorneys, bankers, brokers, public officials and others engaged in multimillion dollar crimes.

Perhaps the greatest crime stimulant for UCOs in recent history has been drugs. Drugs remain a top priority for every level of law enforcement. Moreover, it seems that every agency wants to be involved because of the money that pours into the agency’s budget. The Bureau of Land Management; Parks and Recreation; Alcohol, Tobacco and Firearms; Immigration and Naturalization Service; and everyone else is tripping
over one another to get into the action. The laws are harsh, the work is prolific, relatively easy and highly supported by the general public. And the best way to work a drug case is through some sort of undercover technique.

Traditional methods were inadequate to identify and prosecute consensual crimes such as price-fixing, bid-rigging, political payoffs, extortion. In many of these crimes, the victims are the public at large, corporations, consumers and taxpayers. White collar criminals who were once handled in civil courts can now be held criminally liable if the government is able to show criminal intent. For many such crimes, only an undercover agent could obtain the necessary evidence for prosecution.

Technological changes occurring in wire communications, transportation and the like facilitated interstate crimes on an order never before seen in history. Telephones allow persons to coordinate and direct criminal activities in different locales within minutes whereas previous efforts were delayed due to the need for messengers, mail service or face-to-face meetings.

These new technologies also created opportunities for new crimes (e.g. environmental crimes and money
laundering) (Marx 1988) as well as new investigative tools facilitating undercover work. For example, electronic surveillance and recording devices substantially improved the credibility of witness sworn testimony in court. This has had a decisive impact on public corruption cases. For the first time, a jury is in a position to witness what was said and done in certain meetings and telephone conversations. Juries can thus determine whether a defendant was eager or reluctant to commit a crime; whether a UCA was coercive and harassing or merely offering the opportunity; and whether the government's inducement was reasonable under the circumstances. The effect has been to weaken the defendant's claim he was entrapped by overzealous or politically motivated law enforcement agents out to smear his name. In this study, one respondent said the only aspect he can remember of the Marion Barry trial was the videotape of him smoking cocaine.

Meanwhile there were changes in organizations. J. Edgar Hoover was dead (he opposed the undercover technique) and Congress demanded that the FBI use its considerable resources for more complex investigations (Senate 1983). The Drug Enforcement Agency (DEA) was created as well as the Public Integrity Section of the Department of Justice.
Marx (1988) has argued that Supreme Court decisions such as *Miranda v. Arizona* indirectly encouraged UCOs by restricting traditional investigative techniques.

Problems with the rules of evidence, the search for a suspect, interrogation, suspect's rights, guilt, and testimony are less likely to occur if an undercover officer has been a direct party to the offense, and it has been electronically recorded.

Courts directly supported UCOs by finding them legal and necessary; by accepting guilty pleas in camera; by authorizing consensual electronic recordings; and by not applying stringent fourth amendment standards to the "invited informant" situations (Marx 1988).

Furthermore, the courts have found UCAs do not possess the criminal "intent" required to be prosecuted for crimes they commit in furtherance of the investigation. Many state legislatures, in fact, have enacted "justification" statutes authorizing such operations (Majeske 1985).

Congress encouraged UCOs by broadening the scope of federal crime, demanding the prosecution of more complex crimes, and perhaps most importantly, by not legislating severe restrictions on UCOs (Marx 1988). The Racketeer Influenced Corrupt Organizations Act (RICO), Hobbs Act, Interstate Transportation in Aid of Racketeering and other broad statutes have not only expanded the reach of
the law, but also placed a heavy emphasis on getting all members of the conspiracy or enterprise.

UCOs also came to be seen as having the dual purpose of protecting while obtaining evidence of wrongdoing. The government substitutes agents for citizen victims in many types of crimes allowing the apprehension of offenders under "controlled" circumstances (Marx 1988).

In summary, the Twentieth Century brought tremendous changes in technology, political institutions, crime and the citizens role in police work. The trend has been to grant more powers to public law enforcement agencies who now are charged with greater responsibilities for policing society.

**Yobo**

In the early 1980s, the Las Vegas division of the FBI conducted an undercover investigation into allegations of public corruption in the state of Nevada. The operation was code-named "YOBO" and lasted approximately 18 months. At the very end of my research I had the opportunity to have lunch with the two agents most intimately involved in the investigation. Together they provided much of the information described below.

"YOBO" began as a "spin-off" from a public corruption investigation conducted in the Phoenix
division of the FBI. A UCA in that case became acquainted with a Phoenix chiropractor. The chiropractor advised he wanted to invest in Nevada and had said as much to Gene Echols, a Nevada state senator. Echols claimed to have the political connections necessary to get the necessary approvals by key Nevada public officials, but that it would cost the chiropractor money. The chiropractor then passed this information on to the Phoenix agent.

During the sting, Steve Rybar, using the pseudonym Steve Reilly, posed as the representative of a group of 25 chiropractors located in Phoenix, Arizona. The physicians owned a company called "Doctors Fiduciary Trust" and were interested in investing in various projects throughout Nevada. These projects required zoning changes as well as various approvals and voting support from Nevada lawmakers. To obtain political support and favors, Reilly was willing to pay bribes to public officials.

In reality, of course, "Doctors Fiduciary Trust" was an FBI front. The Phoenix chiropractor agreed to introduce a UCA to Echols, the only individual targeted by the government. Echols met Rybar as well as another UCA who subsequently was transferred from the Las Vegas office. Echols and the UCA drafted a written contract
where Echols pledged to use his political office on the UCA's behalf in exchange for a monthly "consulting" fee. The bribe arrangement was so blatant that the prosecuting attorney sent Rybar back to ensure Echols knew exactly what he was doing. Echols had no problem with the arrangement.

Echols, after satisfying himself the UCA was what he represented himself to be, then introduced the UCA to other officials some of whom he claimed were willing to offer the public services for money. These in turn put the UCA in contact with still other public officials. In this way, the targets of the case were "self-selecting." Rybar and other agents came up with project ideas; Echols and other targets told Rybar who would help for money and who would not. According to the two interviewees, the investigation was not a fishing expedition, but directed only at those they believed to be corrupt based on specific and credible information from the targets themselves as well as other informants.

Prior to meeting with a target, the UCA and case agent normally met with the prosecuting attorney and went over what was likely to happen. As much as possible, the meeting was scripted so that (1) no target would be entrapped and (2) the meeting would yield clear evidence of the violation and intent on the part of the
subject. Supervisors at FBI headquarters were frequently (almost daily) apprised of the facts of the case and were requested to approve major events (e.g. authorizing a particular payoff). At the time, "YOBO" was considered one of the top ten investigations in the FBI. Interestingly, the special agent in charge (SAC) of the Las Vegas division knew little about the investigation after it was launched. Immediately after the UCO became public, the Sun reported the SAC had a vendetta against Nevada politicians.

During meetings with several officials, many of which were audio and/or video recorded, the UCA offered bribes in exchange for political favors. Some officials took the money; others turned it down. No one reported bribe attempts to law enforcement authorities or anyone else. The sting was reported in the media prior to indictments being handed down by a federal grand jury. According to the interviewees, the UCO surfaced as a result of several coordinated FBI interviews of various targets approached throughout the investigation.

In the end, "YOBO" resulted in the indictment and conviction of state senators Gene Echols and Floyd Lamb; Clark County commissioners Woodrow Wilson and Jack Pettiti; and one city councilman, Joe McClelland, of Reno. All defendants denied wrongdoing stating they had
been entrapped by the UCA. However, the entrapment plea was rejected by the jury in every trial and the convictions were upheld on appeal.

Lamb was the most significant of the targets given his powerful position and influence in the Nevada legislature. One piece of evidence which helped convict him was when Lamb tried to stuff a cash payoff inside his shirt. While the scene was not videotaped, the audio recording demonstrated Lamb was trying to hide the money. In fact, the UCA warned Lamb the money was visible through his shirt and the two men laughed about it. Lamb was also recorded demanding additional payoffs from Rybar if the latter wanted Lamb’s services to continue.

Jack Pettiti demonstrated to the jury’s satisfaction his willingness to accept a bribe. On one occasion, Pettiti received a cash payoff in an elevator over the span of eight seconds. Pettiti then left the building and took the money directly to a safety deposit box. It was clear from this and other evidence that this was Pettiti’s routine behavior.

The eighteen month operation cost the taxpayers about $160,000 in expenses excluding agents’ salaries. This was less than the interest earned on the "show money" deposited in a local bank which convinced Lamb
the UCA was "real." The two agents believe the investigation was good for the community. It is still talked about today by public officials who warn others to watch out who they talk to. They regret that one public official in particular was not indicted because he was the worst of the offenders. That individual has since gone on to higher political office.

The interviewees believe corruption still exists and is a problem in Las Vegas, but that is less today than twelve years ago. However, they also believe corrupt public officials today are much more sophisticated and careful in their illegal dealings.

The two interviewees believed the good-old-boy network was much stronger twelve years ago than it is today. It is still together and influential, but many outsiders have come into the area and taken public offices. The good-old-boy network probably persuaded the Nevada Bar Association to allow convicted former judge Harry Claiborne to continue his law practice in the state of Nevada.

Local newspaper reporting of the operation could not have been more different. The *Las Vegas Review-Journal* (hereafter *R-J*) was positively disposed toward the investigation. On May 5, 1982, *R-J* columnist Ned Day had this to say:
For the honest public officials who refused to take the bait and for the average citizen who's the real victim of public corruption, it's a time of pure, unadulterated joy (Day 1982, 11B).

He warned readers to expect a "public relations blitz" depicting the FBI as the real villain because they used UCOS to catch bribe-takers.

Still, despite any public relations blitz, it would be hard to swallow the idea that FBI agents are bad guys because they want to put corrupt public officials in jail (Day, 11B).

In a May 7, 1982, editorial, the R-J stated "Abscam-type probes have been upheld repeatedly in the courts. They have great value in identifying the crooked and discouraging the possibly crooked." The editors further did not believe the local FBI office had a vendetta against Nevada public officials.

The Las Vegas Sun (hereafter Sun) denounced the sting. In an editorial appearing on May 5, 1982, Hank Greenspun strongly criticized the FBI for wasting government resources on a fishing expedition designed to entrap Nevada public officials with business ties. Those resources should have been spent investigating espionage and organized crime. He was concerned the names of the innocent would be dragged through "public scrutiny." (Greenspun 1982, 1-2)

Over the course of a few days, the Sun's journalists reported the FBI spent two million dollars of taxpayers money and caught no one. Two headlines on
May 6, 1982, were as follows: "Ex-U.S. Prosecutor charges deceit FBI agents lied," and "Investigate the FBI." In the former, Jeffrey M. German pointed out in the small print that the former prosecutor now represented one of the key targets of the investigation.

In the latter article, Greenspun stated the UCAs should be prosecuted for violating Nevada statutes by offering bribes to public officials. Moreover, as a result of the sting, public officials would now have to look after themselves by investigating every constituent visitor.

The Nevada legislature retaliated by prohibiting state agencies from issuing undercover identification to federal law enforcement agents. It also made it illegal for businesses to use the word "trust" unless such businesses are supervised by the superintendent of banks or commissioners of savings associations. At the time, Senator Alan Glover stated the measure would prevent the FBI from using "trust" in any undercover operations it may have in Nevada.

"YOBO" made quite an impression on public officials more than a decade after the last trial was completed. Yet was the undercover investigation justified? As I shall discuss in the next chapter, it certainly was if
we use the principles of social contract theory as the basis for evaluation.
CHAPTER 4

Social Contract and Public Corruption

If men know not their duty, what is there that can force them to obey the laws? An army you will say. But what shall force the army? (Hobbes in Lloyd 1992)

In the 17th and 18th Centuries, contract theory reached the height of its influence on ethical thinking in Western culture. This was the period of our nation's founding. From the time of the Puritans, elements of social contract theory have left an indelible imprint on our political values which remains to this day (Gough 1957).

Social contract theory has played a prominent role in America's struggle for liberty, religious freedom and justice and is the underpinning for our Constitution and the rule of law (Cohen and Feldberg 1991, Barker 1967). It is more consistent with our political culture than other theories and can lead to a better understanding of our criminal justice system. Accordingly, contract theory provides a suitable framework for analyzing the role of police in the United States.

Traditionally, the theory has been used to analyze and justify the proper structure of institutions (Buchanan 1977, Replogle 1989). It is my contention that social contract theory can yield guiding principles for
evaluating policy choices with regard to police undercover investigations. These principles serve two functions: first, they establish theoretical limits on the circumstances which justify the use of UCOs; second, they suggest certain areas where these operations should be directed. Other writers on the topic of UCOs, such as Gary Marx, have been preoccupied with establishing judicial and statutory controls aimed at reducing the use of such operations. My concern is to provide theoretical criteria for justifying the investigative method.

As a moral ideal, the social contract does not tell us why we behave (in a certain manner), but how we should behave; that is, we in government and society ought to behave as if there were a social contract (McCormick 1987).

I will incorporate aspects of various arguments put forward by different contractarians in order to develop a suitable model. To begin, I should point out that I am not looking at contract theory as a historical explanation of the origin of government (or UCOs). Rather, I seek to use the hypothetical contract to explain the ideal relationship between law enforcement agencies and the communities in which they serve; and how UCOs may be justified in an open and free society.
Social contract theory relies to some extent on self-interest and fear as motivating factors encouraging social cooperation; more importantly, I think, it also relies on conscience. It suggests there is a moral obligation to keep one's promises, to fulfill one's end of the bargain, thereby recognizing and respecting the rights of others (Lessnoff 1986).

The Individual and Equality

Social contract theory is deeply influenced by Christianity. According to this religion, all people are created equally in God's own image; God endows each person with the capacity for free thought and action. He can thus hold them individually accountable for keeping His Commandments (Locke 1966, Replogle 1989).

Contractarians place this idea of individuality (the idea of isolated, rational and autonomous persons existing prior to state and society) at the heart of their argument (Hampton 1986). They strip the individual of any advantage or disadvantage he may possess in the empirical world in order to arrive at the concept of the generic human being, also called rational man (McCormick 1987). For the contractarian, all individuals are basically equal in mental and physical abilities in the state of nature (Hobbes 1991).
The assumption of human equality leads to two other assumptions regarding human nature: First, leaders must be chosen and government must be formed through cooperation since no one individual is naturally superior to another (Hampton 1986). Second, all individuals have equal moral value in the state of nature (Gough 1957) and thus deserve equal consideration and treatment (Replogle 1989).

Hobbes (1991) argued if persons share the same basic ingredients and attributes, they nevertheless develop different sets of concerns in the real world. Differences over fundamental interests occur as a result of poor reasoning or defects of the mind (Lloyd 1992); people simply do not see where their "true" interests lie.

This is not to suggest rational people should agree on every matter; only that they agree on a minimum number of certain shared interests necessary for cooperative living. Individuals are responsible for overcoming their ignorance through education and reflection so that they can recognize their true interests (Lloyd 1992).

**Free Will and Consent**

The concept of "free will" is at the core of social contract theory. Like the concepts of human
individuality and equality, the idea of "will" was strongly influenced by Christian thinkers. According to St. Augustine, if men did not possess a free will then it would be unjust to punish or reward them for their behavior. In fact, the idea of right and wrongful behavior would be nonsensical (Riley 1982).

For most contractarians, will is a choosing faculty informed by reason that enables us to control ourselves and follow rules:

the will becomes a faculty that binds us when we freely choose something...that is not caused. One must assume the possibility of a free action that is binding for the reason that morality depends in part on undetermined choice...in the sense that we are free to accept or reject the reason (for such willing), thereby earning justifiable praise or blame...(Riley 1982)

Will is therefore not an appetite (as it would be in theories of determinism, causality and necessity) nor a product of human environment (Hampton 1986). Here I may be at odds with Hobbes who in fact did describe will as "the last appetite in deliberating" (Smith 1989, 63).

The social contract's appeal to rationalism further presupposes that choices will be made according to certain criteria. This may seem contrary to the notion of free will (Lessnoff 1986). However, as Pinkard (1987) points out, respecting the capacity for choice and the actual choice are different matters. The concept of the generic rational man implies a capacity
to discover, through reason and science, moral
principles for guiding behavior. "Will" enables us to
follow these principles which, as McCormick (1987)
argues, the rational man will find compelling and in his
best interest. In this way, we have the capacity to be
self-determining, to affect what happens to us (Van
Gunsteren 1978).

In general, contractarians believe that a person's
will cannot be manipulated in any meaningful sense.
"Being influenced or persuaded by reasons would not
count as being determined by causes (e.g. coercion),
precisely because making up one's mind is 'an act of
one's own,' whereas falling or being pushed is not."
(Riley 1982, 12).

Using one's capacity to choose, then,

involves a certain critical reflection and
evaluation of those values...independent of
external elements... an autonomous choice could not
be a manipulated choice. (Pinkard 1987)

**State of Nature and Need for Government**

If we recognize that each human being possesses a
free will which he uses to determine his actions, it
follows that the causes of conflict must be attributable
to the private beliefs and actions of men; furthermore,
it is only men who can resolve them (Lloyd 1992).
For the contractarian, the state of nature is inevitably characterized by competition, conflict and corruption. To quote Hobbes, the state of nature is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short (Tuck 1991, 89).

The state of nature is a condition where each individual pursues his own separate interests, acts as his own judge and enforces his own private judgments (Barker 1967, Nurmi 1978). In the state of nature, everyone is less secure in life, liberty and property and seeks a way to escape this condition.

Social contract theory holds that individuals have certain fundamental, equal and inalienable private rights in the state of nature (Replogle 1989). Liberty and justice are to name but two. Persons do not give up these rights when they enter society. If we enter into some cooperative interaction with one another, it is only because we believe it to be somehow instrumental in furthering our own interests (Hampton 1986) and preserving our natural rights (Duncan 1978). Protection from harm caused by other individuals is foremost among those interests (Duncan 1978).

The Nature of Government

The source of government power, authority and legitimacy sharply distinguishes social contract theory
from other theories of government. For contractarians, power and legitimacy are derived from the consent of the people; not from God, customary obedience (Gough 1957), coercion, practical necessity, rule of the wise, patriarchy, theocracy, natural superiority, convenience, historical evolution (Steiner 1978, Riley 1982) or transcendental norms of economic efficiency and natural law (Buchanan 1977).

Social contract theory is traditionally more concerned with the protective role of governing bodies and the basis for their legitimacy. Government is best conceptualized as an agency hired by people (Hampton 1986); it is created for the purpose of maintaining order necessary to secure liberty and justice for the contracting parties. For the contractarian, government is a means to an end (Hampton 1986).

To escape the horrid state of nature, men choose from among themselves those who will serve as impartial referees and enforcers. These chosen few form government. People lend that government powers sufficient to ascertain the facts; and to make and enforce decisions according to rules on which they all agree (Barker 1967). Government is formed to protect natural rights (by resolving disputes authoritatively), maintain order and preserve liberty (Hampton 1986).
Government is therefore created voluntarily and deliberately by rational individuals who agree to its constitution (Barker 1967). In this way, each person secures his "vital interests" (Replogle 1989), those of such importance that attacks on them would jeopardize cooperation (Pinkard 1987). It follows that the interests of the government are those of the citizens and not the self-interests of those occupying political office (Hampton 1986). Rulers should neither govern nor make policies contrary to will of the people.

Logically, the agreement between contracting parties must be reached unanimously and benefit all. It makes no sense for persons of equality to unite voluntarily for the benefit of some at the expense of others (Gough 1957). The result of the agreement (i.e. government) must treat all participants equally under the laws on which they agreed.

If unanimity is required, it follows that there are few interests which could meet this criteria. These are called variously fundamental interests, natural rights, etc. Essentially, they are the minimum standards on which all can be presumed to agree for the purpose of promoting and preserving security, liberty and justice (Reiman 1979).
Contractarians envisage government as an external party to conflict between individuals with competing claims. It functions as a neutral umpire deciding who has a right to what according to the rules on which all citizens have agreed (Lehning 1978). It then protects that right with the power and authority granted by the contracting parties (Cohen and Feldberg 1991).

**Principles of Social Contract Theory**

Foremost among the principles of social contract theory is liberty. Social contract theory is a way of expressing "the value of Liberty, or the idea that will, not force, is the basis of government..." (Barker 1967, viii).

There are two kinds of liberty in social contract theory. First, we have an inalienable right to positive liberty. Positive liberty consists of those conditions which allow each of us to reach our full potential, to be free from the arbitrary harm caused by others (Green 1988, Berg 1978). The end of law enforcement is to protect and expand positive liberty, not to subdue and restrain the individual (Locke 1966). Nevertheless, positive liberty is closely associated with order and stability. These conditions make it possible to act with more freedom (Van Gunsteren 1978).
The second kind of liberty, called negative liberty, is the absence of restraints on an individual's actions; we are all free to do and grab whatever we can get away with. "Cherished negative liberties, like freedom of speech, religion and association, are internal to the political process of representative democracy..." (Replogle 1989, 194), but are not higher-order goods in social contract theory. The point here is not that the freedoms described above are unimportant. Indeed they are sacred to us and should not be restricted without reason. However, such freedoms can and have been necessarily traded away for more positive liberty (Replogle 1989, Decker 1979).

Social contract is a way of expressing "the value of Justice, or the idea that right, not might, is the basis of all political society." (Barker 1967, viii). The tacit or expressed consent of each and every citizen (generic man) in the hypothetical contract is what morally justifies the power of the state to regulate men's lives. A citizen is more likely to tolerate restrictions on his natural liberty if he perceives them as emerging from a process in which he participated; one where his interests were taken into account and the results of which he imposes on himself (Berg 1978, Buchanan 1977, Pinkard 1987, Gough 1957).
To test whether a particular law or practice is just, contractarians ask: If every informed person (hypothetically) could agree to the matter in question, it is just; if consent cannot possibly be unanimous, then it is unjust (Lessnoff 1986, Replogle 1989). Therefore, justice should be seen as a process which yields governing principles, not the principles themselves (Ball 1979).

It is important that the process of justice yield principles and not strict rules (Decker 1979). Principles are flexible standards. Unlike rules which are rigid and uncompromising, two principles may conflict with each other without either one of them being false (Pinkard 1987).

Principles...are generally invoked to mitigate the harshness of a regime of pure rules; where the strong, who are capable of manipulating the rules to their own advantage (or can find or purchase the services of someone who can) manage the system of rules to triumph over the weak, principles are employed to show that this was not, for example, the point of the law. (Pinkard 1987, 101)

A rational individual will find the principles derived from social contract theory compelling because with them he can make his life better and more secure. A rational person should accept these principles in the same way a patient accepts medicine; they should be administered accordingly (Hampton 1986).
A contract involves at least two parties and an impartial judge (Minogue 1978). In the deliberate negotiation, there is mutual give and take between the contracting parties so that everyone's interest is taken into account. The contracting parties reconcile their conflicts of interest and determine rights and obligations for themselves (Lessnoff 1986). Out of respect for the other contracting parties, participants are obligated to comply with and support the enforcement of the terms of their agreement (Gough 1957, McCormick 1987).

Negotiation and reconciliation requires compromise, a double-edged sword. In one sense, compromise is conducive to diversity, tolerance, mutual respect and empathy. A successful compromise can minimize the need to manipulate or coerce fellow citizens.

Successful compromise depends, above all, on the commitment, skill, and integrity of the politicians exercising power and pursuing goals. The act of compromising tends to corrode every aspect of these assumptions (Dobel 1990, 140).

When a group leader compromises he can gain new supporters, more power, and more allies. At some point, compromising to acquire and retain more power can take precedence over achieving the original goal. This is the other side of compromise, the side associated with weakness and lack of conviction. "Once politicians feel
no qualms about compromise, they often have lost part of their moral compass." (Dobel 1990, 145). The result is public corruption.

Social contract thus does not eliminate the causes of competition and conflict of interests; it only reconciles them and is thus consistent with a pluralist society (Lively 1978). Why, then, must there be a promise to do one’s duty? Rational individuals should fulfill their obligations for reasons of self-interest; if they fail their obligations, they alienate themselves and endanger their survival. David Hume was one who thought self-interest alone would bind men to their commitments without recourse to a contract. He worried that if men were bound by conscience (i.e. a promise), they would submit to tyranny rather than cease obedience (Hampton 1986).

Hume’s point is well-taken. Yet social contract theory recognizes self-interest alone is often not sufficient motivation for persons to behave appropriately. The analogy of a contract provides a moral incentive for individuals to cooperate (Green 1988).

**Hegel's Critique**

Hegel among others criticized social contract theory on a number of fronts. However, his main point
was that empiricism's method (deduction) is not adequate to show that human beings have permanent "rights" to certain necessities under "natural law." The method, drawing on cultural experience and tradition, is incapable of determining the necessary from what is merely desirable. Instead, it is a circular argument based on loaded assumptions (and the social conditions of the period) leading to a presupposed outcome (S. Smith 1989).

Hegel offers a powerful criticism. Still, I think it is reasonable to rely on certain assumptions regardless of whether they are culturally inspired so long as one makes no claim to universality of the "rights," rules and obligations developed from the deductive process.

Americans' affinity for the rule of law, justice as process and a preoccupation with "rights" and legalism is part of who we are and is compatible with social contract theory. All I seek to accomplish in this thesis is to give a reasonable explanation of why public officials should behave as if there were a social contract; what I see as the logical outcome of that agreement; and how UCOs can be justifiably employed in public corruption matters. I make an assumption that public corruption would be far worse in the absence of
UCOs and that such a "state of nature" is not in the interests of this community.

**Public Office**

A promise, in the form of an oath of political office, serves as a higher obligation in much the same way as religion and codes of honor have done in the past and still do today. It imposes a moral obligation that helps bind us to our commitments. In those instances when we have abandoned our reason, a promise appeals to our emotional and spiritual side in order that we may do the right thing.

An oath of office also puts the promisor on notice that he has made a moral commitment to others thereby formally subjecting himself to a higher standard and closer public scrutiny than ordinary citizens. This holds true for police officers as well as members of city councils, county commission, judges, etc. When public officials swear their oaths of office, they swear to execute their duties on behalf of all citizens impartially and without arbitrary benefit of one over another. While they may benefit from taking office, public officials cannot do so contrary to the purpose of their office or at the expense of those they have agreed to serve. The public retains the right to judge their official’s performance and they obtain this information
in part from investigative agencies they have created and empowered.

Public Corruption

Let me now say a few words about public corruption. Benjamin Franklin warned, "There is no kind of dishonesty into which otherwise good people fall, than that of defrauding the government." (Miller 1992, x). Indeed, corruption of public officials has plagued this nation from its founding to the present day.

Public corruption involves the "intentional misperformance or neglect of a recognized duty, or with the unwarranted exercise of power, with the motive of gaining some advantage more or less directly personal (Brooks 1970, 58). Here I have limited this definition to actions proscribed by law. They include political bribery, extortion, kickbacks and fraud.

In his history of American corruption, Nathan Miller (1992) suggests Americans have always had a love/hate relationship with public graft. "We demand upright government but have sneaking contempt for the priggishness of reformers and a relish for scalawags" (ix-x). Given our ambivalence, the question in my mind is, should federal law enforcement agencies try to do something to reduce corruption in our community?
Certainly corruption has its supporters. Robert Klitgaard, in *Controlling Corruption* (1988), suggested that certain specific acts of corruption might have economic, political or organizational benefits. Economically, corruption introduces a market mechanism to allocate resources to those most willing and able to pay for them, rather than on a basis of merit, random selection or first come, first served.

Politically, corruption has the advantage of developing linkages among elites of various groups which can serve to stabilize and unify. Finally, corruption within a government agency can allow employees to supplement low incomes and get around ridiculous policies.

Yet Klitgaard’s work is about controlling, not promoting, corruption. He argues corruption is generally harmful benefiting the rich or powerful at the expense of the poor and noninfluential. Economically, it wastes resources as public officials expect, seek and demand bribes or political favors for carrying out their duties. By creating exclusive political "linkages" (elsewhere called the "old-boy-network"), corruption breaks down public trust and confidence; alienates citizens from their officials; breeds cynicism leading to corruption by the general population; results in
safety and environmental problems; and discourages meritocracy.

There is some evidence that Hobbes thought public corruption was inexcusable:

And of those defects in Reasoning, there is none that can Excuse...a Crime, in any man, that pretendeth to the administration of his own private business; much lesse in them that undertake a publique charge... (Hobbes 204)

And again:

The same Fact done against the Law, if it proceed from Presumption of strength, riches, or friends to resist those that are to execute the Law, is a greater Crime, than if it proceed from hope of not being discovered, or of escape by flight: For Presumption of impunity by force, is a Root, from whence springeth, at all times, and upon all temptations, a contempt of all Lawes... (Hobbes, 209)

For the contractarian, public corruption is among the worst of all crimes. When public officials accept bribes for favors or extort citizens, they breach their public trust and make the matter worse by having their crime enforced by law; they abrogate their role as an impartial judge and decision-maker which is essential to the reconciliation process (Lively 1978).

Corruption benefits a few at the expense of others. Given the scope of government's authority over its citizens, corruption is the ultimate betrayal. Individuals in a state of nature would not consent to such activity. A corrupt official believes
that all of them but one (himself) should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think that men are so foolish that they take care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay think it safely, to be devoured by lions. (Locke, in Lessnoff 62-63)

Justifying Undercover Operations

To summarize, social contract theory holds that every individual, who by virtue of being a person possessing the capacity to reason and reflect, is further endowed with a free will to make choices in his life. His capacity for choice cannot be manipulated in any meaningful sense, but in fact is subject to his own volition. Since he is responsible for his own actions, he can be held accountable.

From these assumptions, it will become clear that incriminating information obtained from an undercover operation involving deception is vastly different from that obtained from coercion, a distinction critics of UCOs are slow to recognize.

The most important aspect of designing a UCO, from a practical point of view, is that the circumstances must appear "natural" to the person(s) involved in the criminal activity. Anything in the environment which seems somehow out of place will alert the person that something is wrong. Whether the undercover agent (UCA)
is posing as a hitman, a wealthy lobbyist, or a drug dealer, he/she must appear "real" to the person involved in criminal activity.

Since the subject is operating in what he perceives to be a natural environment, he has the opportunity to reflect on his situation and make his own choice. He chooses his course of action based on his own values and judgments. The rest of us do not have to agree with him and support his choice. Although the government may have injected itself into another's reality, the person is not being "pushed" into committing a crime: the choice is his. A UCO thus respects a person's capacity to choose despite the actual choice made.

On the other hand, coercion does not allow for choice except in the most perverse sense of the term. Coercion compels a person to incriminate himself in order to stop the coercion. Herein lies the difference between information obtained through the use of coercion and deception: to yield to force is an act motivated by the need to ease one's suffering (Hobbes 1991); to yield to the temptation offered in undercover work is motivated by one's own will. The former is dependent on others while the latter is dependent on oneself.

Perhaps at this point I should discuss the entrapment doctrine. It is my contention subjective
entrapment cannot be reconciled with social contract theory's concept of free will. Entrapment holds a person not predisposed to commit a crime can be manipulated by government agents into committing such a crime. The person really has no choice, but is compelled by the circumstances to commit a criminal act he would not otherwise. According to this view, "will" must be considered an appetite, not a faculty of choice.

Here I am in agreement with the judge in the serpent case above. The identity of the tempter should make no difference whether the person commits the proscribed act or not.

This does not mean UCOs cannot be attacked on other grounds. For example, we may find such operations morally repugnant, regardless of the good intentions behind them, because UCAs lie, deceive, betray and break laws; UCOs may not be economically feasible; they may destroy the trust between individuals in society; or we may not like fishing expeditions. For all of these reasons and more, one could proscribe government agents from engaging in UCOs or certain acts. But the weakest argument is that a person presumably possessing his good mental health did not choose whether he should commit the act or not; that instead he behaved like a sheep.
I have established that UCOs cannot be unjust if we were to use freedom to choose as the criteria for justice. However, respecting the capacity for choice is not enough. Contractarians also require that citizens should voluntarily agree on the use of the technique. Governments can only use those means on which the citizens have agreed or else it is abusing, not protecting, their interests (Steiner 1978).

This criterion is more problematic. Nevertheless, we should remember that in the social contract framework outlined above, we are concerned with what rational persons ought to agree to in the ideal contract. When we agree on the rules of the game, it is with the expectation that we are all equally accountable for our actions. Each of these individuals consents to be punished if he breaks the law (Primoratz 1989).

No rational person would agree that he should be held accountable while others are not. At the same time, a rational person would agree to the use of UCOs only if they made him better off. This is why our assumptions about the state of nature, or what conditions would be like in the absence of UCOs, are crucial.

As indicated above, certain criminals in the past were exempt from investigation and prosecution because
their crimes were undetectable by conventional means prior to the introduction of UCOs as an enforcement technique. Public corruption requires not only secrecy, but minimal documentation and camouflage.

In nearly every instance of alleged graft the accused has an explanation differing from the interpretation offered by the prosecutor. The meanest sort of "steal" is sometimes transformed by the graft artist into a great deed for the promotion of the public welfare or at least a bit of harmless pillaging of the rich for the benefit of the poor (Key 1970, 49).

Corruption also requires close protective relationships among corrupt officials. Unlike other targets of UCOs such as prostitutes and drug-dealers, public officials are respected community leaders whose words carry a great deal of credibility and influence. Corrupt public officials can protect themselves by creating a network or support group which excludes non-trusted members. By coming to the defense of one another, they may effectively thwart prosecution of any one of their group.

If UCOs were made illegal, some politically powerful groups of criminals and organizations, among them corrupt public officials, would walk the streets with impunity. Justice as equal treatment under the law would have little meaning. As a result, citizens would suffer a loss of positive liberty. A rational person could not possibly agree to allow such activities to
occur at the expense of his own interests. A rational person must agree to the use of UCOs which protect him from harm caused by others, particularly if this harm is at the hand of corrupt public officials. A government which tolerated the criminal activity by failing to use UCOs would be acting unjustly.

In a democratic republic, people express a quasi-consent through their elected representatives. Several points suggest the people have not only granted their consent to, but have demanded the use of UCOs. First, juries almost never find that a defendant was entrapped by government agents (Lundy 1969). Second, Congress demanded in the 1970s that the FBI start using its resources (which included UCOs) to combat the crimes described above (Senate Report 1983). Third, the Courts have found UCOs to be necessary and legal. The final point has to do with the absence of legal restraints on UCOs. The silence of the law allows behavior not proscribed by the sovereign (which here is the people expressed through their elected representatives). Thus, consent for UCOs is expressed through silence on the part of Congress with respect to passing legislation controlling UCOs.

It follows that the people, through their elected representatives, created federal law enforcement
agencies for the purpose of protecting them from harm caused by others. The agencies are entrusted with certain limited powers and techniques (including UCOs) which are necessary to carry out their mission. Rational persons would demand that federal agencies use these tools to fulfill their obligation.

Controls

Hobbes (1991) thought people were obliged to obey a ruler possessing the power to maintain order and attached no other conditions. It seems likely that he would approve of the use of UCOs under any circumstances deemed appropriate by the government in power.

One of the key aspects of Lockean social contract is that it justifies and limits the powers of government through the doctrine of inalienable natural rights and consent of the governed (Lessnoff 1986). Unlike Hobbes, who believed people surrendered their power to an absolute sovereign, Locke considered government an agency hired by the people who lend the sovereign part of their power in order to perform certain tasks (Hampton 1986) which will protect citizens from each other. Yet like Hobbes, Locke saw no grounds for rebellion.

Some modern contractarians have returned to the social contract model existing prior to Hobbes and
Locke. That is, the emphasis of complying with the contract is on the government, not the citizen. Here, the public retains the right to judge whether the government is furthering or endangering their interests (Hampton 1986).

Under the theory of trusteeship, the people could take these powers away anytime for any reason. However, according to more recent contractarians, these powers can only be taken away or restricted under certain conditions (i.e. when the agency fails to meet its contractual obligations to the public, whether it be through abuse, neglect or incompetence [Gough 1957]). When a government agency such as the FBI fails in its protective role, citizens have a duty to demand it meet its obligations or replace it with one that will (Cohen and Feldberg 1991).

The principles derived from social contract theory morally limit how the FBI and other law enforcement agencies can use UCOs in a way that utilitarian arguments cannot. It calls for some reflection regarding the purpose of the law and not merely blind enforcement (Cohen and Feldberg 1991). UCOs are justified when they protect positive liberty (protection from harm caused by others); further the process of justice (equal treatment under the law); and when they
are perceived as benefiting each and every person. This precludes UCOs undertaken for the benefit of the agency’s self-interests at the expense of the public’s (Green 1988) or to promote the values of one group over another.

The question citizens and agents should ask themselves regarding whether a particular UCO is justified is this: Under relevant circumstances, is it possible that reflective and autonomous citizens could agree on the use of the technique? This line of inquiry, with its emphasis on protection and consensus, should be inculcated in law enforcement training. Such training would probably be more useful in controlling the use of UCOs than the hopeless task of devising a bunch of rules governing all occasions.

Yet the purpose of social contract theoretical principles is not so much to restrict as to guide men’s actions (Lasslett 1966). They obligate federal agencies to enforce the law to the extent of their ability and means. The question I posed in the preceding paragraph may even suggest UCOs be expanded in certain areas. At a minimum, it suggests federal agencies should concentrate their undercover efforts on those criminal activities most harmful and unjust: public corruption.
Contract Revisited

Why do we need a social contract? A social contract, like a constitution but broader in scope, is an idea by which we can evaluate policies, derive principles, maintain continuity and educate people regarding their own particular role.

Social contract theory offers an explanation to the questions, Why was government created and what are the obligations to which the parties (citizens and government) have agreed? The concept of agency reminds us of who the boss is; that the people hired the agency to promote certain interests and can fire it if its policies and practices, by design or incompetence, are contrary to the reasons that justified its empowerment (Hampton 1986).

But more importantly, a social contract, which today we see in the form of elections and political appointments consummated by the oath of public office, provides a moral incentive for sworn officials to keep their obligations. It allows the public to hold these individuals to a higher standard and subject them to closer scrutiny. The principles of liberty, justice as equal treatment, and consensus justify the use of UCOs, particularly those aimed at public corruption. Depending on the nature of that corruption, they might even require increased use of undercover work.
CHAPTER 5

Elite Perceptions

The data in my study of governmental elite perceptions can only render tentative conclusions and suggest additional hypotheses for further study. Nevertheless, despite its small size, I think the study contributes to our understanding of public corruption and police undercover operations in Clark County. I caution the reader that what follows are the perceptions of various public officials. The substance of what they say may or not be true, and can be used as a possible guide for further inquiry.

This chapter compares and discusses the responses of the public officials interviewed based on sex, age, political party, years in public office, and type of public office held. I have also included the responses of ethnic minorities because they made up a substantial share of the interviewees.

Nature of Corruption

Table 1 reveals most respondents believe public corruption, defined as illegal conduct, to be a relatively small problem in our community. However, not all agreed. Five of the respondents believed corruption to be a systemic problem. Significantly, two
of these were at the federal level. One federal respondent went so far as to describe public corruption locally as today's organized crime; it is worse than bank robberies because it harms every citizen. From this and other remarks in the interviews, my impression is that federal agencies perceive corruption in Las Vegas to be a much greater problem than local public officials.

Table 1. Nature of Public Corruption in Greater Las Vegas

<table>
<thead>
<tr>
<th>Respondents</th>
<th>Big Problem</th>
<th>Small Problem</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>4</td>
<td>12</td>
<td>16</td>
</tr>
<tr>
<td>Female</td>
<td>1</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>Age 47 or less</td>
<td>4</td>
<td>8</td>
<td>12</td>
</tr>
<tr>
<td>Age 48 or more</td>
<td>1</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td>Democrat</td>
<td>1</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>Republican</td>
<td>3</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>Nonpartisan</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Minority</td>
<td>1</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>16(-) years service</td>
<td>4</td>
<td>8</td>
<td>12</td>
</tr>
<tr>
<td>18(+) years service</td>
<td>1</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td>Judges</td>
<td>1</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>Commissioner/ Councilman/ Mayor</td>
<td>1</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>Prosecutor/ Law Enforcement</td>
<td>3</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>26</td>
<td>99</td>
<td>125</td>
</tr>
</tbody>
</table>
Good-Old-Boy Network

Four women as well as one man (the latter was not a native of Nevada) cited the "good-old-boy" network as a contributing factor in public corruption. According to three of the respondents, "good-old-boys" use their influence and positions of power to take care of their friends; to protect them from investigation. Two other respondents complained that everyone knows who is corrupt, but no one will do anything about them because of their connections. The other respondent has seen the network used to see friends get certain jobs, political appointments, even avoid prosecution for certain misdeeds.2

According to one judge, police take too long to do something about corruption. They allow corruption to go on for years without stopping it because of political pressures and influence. A law enforcement official has observed that some judges are not prosecuted for criminal misconduct, but are allowed to resign so they can retain good standing in the bar. Both commissioners have seen cases swept under the carpet by the district attorney because of political ties.

The Environment

Other factors relate to the private sector.

Table 2 shows that more than half of the respondents
believe environmental circumstances determine or influence the choices of public officials in our community. The following is how some of the respondents described the local environment in which politics are conducted.

Nevada is essentially a "company" state dominated by two industries: gaming (formerly called gambling,

<table>
<thead>
<tr>
<th>Respondents</th>
<th>Environment</th>
<th>Varies</th>
<th>Choice</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>1</td>
<td>7</td>
<td>8</td>
<td>16</td>
</tr>
<tr>
<td>Female</td>
<td>0</td>
<td>5</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Age 47 or less</td>
<td>1</td>
<td>5</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>Age 48 or more</td>
<td>0</td>
<td>7</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td>Democrat</td>
<td>1</td>
<td>7</td>
<td>6</td>
<td>14</td>
</tr>
<tr>
<td>Republican</td>
<td>0</td>
<td>4</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Nonpartisan</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Minority</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>16(−) years service</td>
<td>1</td>
<td>6</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td>18(+) years service</td>
<td>0</td>
<td>6</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>Judges</td>
<td>0</td>
<td>6</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Commissioner/Councilman/Mayor</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Prosecutor/Law Enforcement</td>
<td>0</td>
<td>2</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>5</td>
<td>63</td>
<td>57</td>
<td>125</td>
</tr>
</tbody>
</table>
soon to be called entertainment) and telemarketing (many of which are boiler-room operations). Therefore there are only two wells from which to draw campaign contributions. The lack of diversity within industry fosters closer relationships among public and business officials resulting in greater corruption than in other states which have a more diversified industrial base.

This argument suggests some ongoing relevance of the Federalist Papers. In "The Federalist No. 10," James Madison addressed the danger of too little competition among powerful groups. He warned that in a democracy, the majority group would be able "to sacrifice to its...interest, both the public good and the rights of other citizens." (Kammen 1986, 148). Indeed, Madison could have been describing Nevada when he wrote:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. (Kammen, 151).

Oppression is probably too strong of word to describe the nature of corruption in Las Vegas. But Madison's point is well-taken.
A couple of respondents suggested corruption is no more prevalent in the public sector than in the private; it is merely more visible. The gaming industry, with its extensive cash environment as well as complimentary meals, rooms, shows, etc., and emphasis on paying money (or "juice") for better service, seats, jobs and so forth, breeds a public tolerance for corruption not found elsewhere in other cities. Federal respondents also believed the public and local media are more tolerant of corruption than their counterparts elsewhere.

On the other hand, another judge believes the private sector takes its cue from public officials. If the latter are perceived to be corrupt (as they are today), people will think corruption is okay for themselves thereby undermining societal mores.

Still another judge thought public corruption is a constant problem everywhere because people are by nature greedy. It isn’t always money that corrupts. It’s also power, prestige and position. Greater Las Vegas only differs from other areas because here corruption is more blatant.

Another contributing factor in corruption is the fact that honest elected officials must gain the support of corrupt colleagues if they are to get their own
legislation approved. As one judge put it to me, "You have to go along to get along." The same judge thought public corruption lies on a continuum which cannot be divorced from other behavior considered legitimate. Consequently there is a gray area open to interpretation. Others disagreed pointing out that while ethical problems may lie in a gray area, public corruption is clearly identifiable and illegal.

According to one local law enforcement official, another reason corruption is a problem is that UCOs are not conducted often enough to have a deterrent effect. Another local officer was of the opinion that greed would outweigh the deterrent value of UCOs. UCOs merely cause a corrupt public official to be more careful with whom he commits corrupt acts. (But isn't this a deterrent of sorts?). This sentiment was echoed by an elected official who thought the level of corruption was the same now as ten years ago, but then you could get away with it.

Two councilmen thought part of the corruption problem stems from the fact that state legislators pass legislation proscribing certain conduct, but exempt themselves. According to one of the councilman, such exemption recently occurred at the local level in the
city of Las Vegas. Laws were changed so that actions which used to be corrupt would not be any longer.

**Witnesses**

Finding witnesses in Las Vegas willing to testify against a public official is a problem for several reasons, according to one city councilman. People refuse to testify against public corrupt officials either for fear the investigation will spill-over onto themselves or that retaliatory measures will be taken against them by corrupt officials and their allies.

Whistleblowing carries substantial risks. One respondent cited a recent media account of judicial ticket-fixing. The judge who reported the matter is under attack by the chief judge. Not only has he refused to support her; he has accused her of ruining a good man's reputation.

**Education and Life Experiences**

Education, training or other experience may be major factors in corruption. One judge told me there was substantial disagreement over what is and is not corrupt behavior. As a result, citizens test each and every municipal judge to see what is acceptable. In this case, a judge had been approached to "fix" tickets because other judges do it.
The judge speculated the difference in ethical standards may be a generational thing. Many public officials entering office today for the first time have been taught ethical thinking; they are accustomed to codes of conduct, canons of behavior, rules of ethics and so forth. New officials simply do not think the same way as someone who entered office two or three decades ago because they have different training and experiences.

Closely associated with age is time in public office. It has been the experience of one investigator that an official takes at least two years in office before he/she is comfortable enough to commit a corrupt act. Young, newly elected officials talk about ridding corruption more than second and third-term incumbents.

More than a few respondents indicated corruption takes time; that a corrupt public official isn’t corrupt when he/she enters office. But over time, the process of political compromise can change a public official’s thinking; crimes he/she once thought intolerable become gray areas, eventually legitimate practices. They no longer see right from wrong in the same manner as ordinary citizens, so they break the law.
Obstacles and Barriers to Investigation and Prosecution

Obstacles to investigating public corruption include time and resources. Local police departments spend most of them on service calls and reactive felony crimes. The state attorney general's office has but one general investigator for all state crimes in southern Nevada except for insurance fraud.

Institutional barriers are also a problem in investigation. Public corruption matters have less appeal for judges, district and U.S. attorneys. Prosecutors can and do arbitrarily decline cases based on a lack of "jury and prosecutive appeal." While public officials may be said to be held to a higher standard, one respondent indicated a much higher standard of proof (beyond all doubt) is required before prosecutors will go forward with a case of public corruption.

The same respondent strongly feels that local politics effects the federal as much as the local prosecutors office. Even though the United States Attorney is an appointed position, the appointment usually a member of the political community. According to the respondent, a recent case involving an close friend of a Nevada U.S. senator is an example of
political pressures thwarting investigation at the federal as well as local levels.

Judges and legislators too have discouraged investigations of public corruption. Judges often recuse themselves not out of conflict of interest, but because they are afraid of the political consequences if they authorize nontraditional means (i.e. wiretaps) if a public official or high profile individual is involved.

Legislators in Nevada prohibit local and state law enforcement agencies from using wiretaps to investigate public corruption. In fact, Nevada is one of only a handful of states which prohibits one-party consensually monitored telephone conversations.

More recently, in the wake of FBI stings in Arizona and California, one Nevada state legislator is said to have warned a group of incoming freshmen to watch out from whom they took money. He stressed not that corruption was illegal, but implied freshmen should avoid getting caught.

According to one councilman, reelection concerns, such as attracting campaign contributions and voting blocks, can lead to corruption justified under the rubric of "being responsible to the voters."

The same official described campaign disclosure forms as a joke. Not only do they fail to provide
detailed and verifiable information, no agency reviews them to ensure they are accurate. The only hazard an office-holder has to fear is not turning in the forms on time. Consequently, elected public officials do not keep records of campaign contributions.

Another problem with campaign contributions is that a public official is not required to declare them until the election race begins even if that does not occur for years. In the meantime, the official is free to vote on issues affecting their contributors. Moreover, elected officials are free to do whatever they wish with the money they receive. In short, Nevada campaign contribution laws facilitate and encourage bribery.

A final contributing factor to corruption may be an abundance laws proscribing certain conduct. People have not changed their behavior; it is just that what used to be a legitimate practice is now illegal. If the new laws were removed, corruption would be less of a problem because the particular behavior would once again be legitimate.

Conflicting Policy Goals

Unfortunately I did not develop a question on what the policy goal of enforcement should be until after I had already completed some of my initial interviews.
Yet it is clear there is no unanimous agreement indicating whether zero tolerance should be the goal.

Of the 19 persons I put the question to, only 13 believed the policy goal of enforcement should be zero tolerance. Many of these respondents were adamant that public officials should be "squeaky clean" avoiding the very appearance of impropriety. "You can't be a little bit pregnant." Others did not think law enforcement agencies should be in the business of deciding what crimes it wants to enforce. For them, a violation is a violation; laws reflect community standards. If those standards are outdated, they should be changed by the legislature, not ignored by authorities. Furthermore, right and wrong are important regardless of whether the public cares about the conduct in question.

In the same vein, public officials swear to uphold the law, not just part of it, and are bound by their promise. Still others worried that allowing public officials to get away with little corruptions leads to the erosion of principles over time.

Finally, three respondents arguing for zero tolerance pointed out that all citizens should be treated equally by the law as required by the due process and equal protection clauses of the
constitution. Whatever inhibits equal access/protection results in poor government and public cynicism.

**Drawing the Line**

Those who argued against zero tolerance were asked how law enforcement should draw the line as to what ought to be investigated. Two of the judges thought it should depend in part on whether the overall performance of the public official in question was good for the community. If it is, people overlook the "bad stuff."

Another judge and one law enforcement officer thought if the conduct is not harmful or offensive to the public, taxpayers' money should not be wasted on it. According to the officer, the public doesn't care about one-time bribes. The federal respondents (and Attorney General Guidelines) also supported this view when they indicated the target must have a documented track record before initiating a UCO.

A district court judge gave the current ticket-fixing scandal as an example of judicial corruption which would not be worth investigative resources. Instead, voters ought to be allowed to determine whether the behavior is appropriate conduct in the next election.

Another district court judge also believed the question of investigation depended on the nature of the
office. Public officials elected on a partisan bases are supposed to look after the interests of those constituents who elected them. While this behavior is proper for a state legislator, it should be inappropriate for a judge.

Still another judge thought investigation should depend on what is in the mind of the public official in question. If he/she intends to break the law, he should be investigated. But if he accepts money in appreciation for his support on a particular issue, even before the event, there is no crime.

Why Corruption is a Small Problem

Most of the respondents believe public corruption in Las Vegas is a relatively small problem, particularly when compared with cities back East or in the South. One reason apparently has to do with size. Some of the interviewees suggested local public officials are closer to their constituents' watchful scrutiny because this area is still a small community. In larger, less closely-knit areas in the East, people are in their fourth generation of corruption which has become a way of life.

Several respondents credited "YOBO" and other such operations carried out across the country for decreasing (deterring) the level of corruption among elected public
officials in greater Las Vegas. One official said the thought that she may be set up in a UCO by a political opponent was always in the back of her mind. To illustrate the deterrent effect, this respondent cited the Bob Stupak/Frank Hawkins incident even though Stupak was not acting with law enforcement. The point is he could have been.

Other reasons for a decrease in the level of public corruption over the past two decades include greater public awareness and less tolerance; greater media investigative reporting of public officials and their families; increased professionalization and training of elected officials and appointees; reporting laws for campaign contributions; and cable television's coverage of legislatures such as CSPAN and channel 31 which (ostensibly) allow people to see the inner workings of government.

Where is Corruption?

The growth of gaming, real estate development and other aspects of the economy was also described as fostering increased corruption. Several respondents believe corruption will be centered around large money issues riding on the decisions of a particular public official. Thus, zoning officials, building inspectors and the like are more prone to corruption. Following
the same logic, another public official thought corruption was more likely at higher levels of government such as the county commission and state legislature where the dollar amounts are higher.

One mayor, councilman and law enforcement officer thought judges were more likely to be corrupt. To paraphrase the mayor, judges have god-like power in the courtroom with no checks and balances, no accountability. For example, there is a local judge who continually abuses his discretionary authority. The judge routinely dismisses cases where traffic officers have issued citations for failure to have driving insurance. The judge does not believe in the law because insurance companies make too much money so he refuses to enforce it. He also dismisses citations issued to persons over the age of 62 because he does not believe officers should be citing senior citizens.

Yet the judge goes even further. He regularly dismisses cases against persons cited for driving under the influence of intoxicants (DUIs) if they give a donation to various charities such as Mothers Against Drunk Driving (MADD). When election time rolls around, this judge has an army of charity organizers pounding the streets in his support.
One respondent also revealed a local judge uses his/her marshals to collect campaign contributions in the area. Moreover, he/she threatened the wife of a local leader of the Black community with arrest unless she allowed one of his/her reelection signs to be placed in her yard.

Two judges thought it more likely law enforcement agencies would be prone to corruption. One judge referred to a cop-mentality in which some police officers refuse to apply the laws to themselves. A law enforcement respondent reinforced this view saying police are naturally skeptical of others, but when it comes to their own they sometimes cannot see corruption for what it is.

The second judge thought the potential monetary gain in "ripping-off" drug dealers made police corruption inevitable (note that four North Las Vegas Police officers had just been arrested on drug related charges). In each situation, the respondents felt these office-holders were accountable to no one.

On the issue of police corruption, one North Las Vegas respondent pointed out that the local police union is very strong. Not only does it make substantial campaign contributions; through it, the police chief
and his assistant are able to manipulate the mayor and city council for their own political ends.

Moreover, the two are able to protect their political friends and supporters. For example, one councilman beat his wife and girlfriend. In the ensuing investigation, the police deliberately lost the paperwork and evidence so that the councilman could get away with the abuse. Another councilman was allowed to regularly extort campaign contributions from local businesses.

One judge charged that the FBI and district attorney used clandestine investigative techniques to obtain harmful information which they use to blackmail local public officials. He/she has observed the district attorney use such information to prevent persons from running for political office.

A county commissioner, together with a city councilman, believe corruption in the Las Vegas area to be most likely at the bureaucratic level. In the first case, the respondent indicated this was because commissioners are only part-time officials making them heavily reliant on the research and recommendations of their staffs.

The second respondent believed elected officials in a small community were subject to closer voter scrutiny.
The larger the community, the greater opportunity for corruption on the part of elected officials who are not as close to their constituents.

**The Media**

Table 3 describes the responses regarding the media's treatment of public corruption. It shows many

<table>
<thead>
<tr>
<th>Table 3. Media Coverage of Public Corruption in Las Vegas</th>
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</thead>
<tbody>
<tr>
<td>Respondents</td>
</tr>
<tr>
<td>---------------------------------------------------------</td>
</tr>
<tr>
<td>Male</td>
</tr>
<tr>
<td>Female</td>
</tr>
<tr>
<td>Age 47 or less</td>
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</tr>
<tr>
<td>Prosecutor/Law Enforcement</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Note: Two of the respondents had no opinion regarding media coverage of public corruption.
respondents, particularly men and Democrats, are highly critical of the media. It should be noted that two respondents had no perception of how the media treated corruption.

The majority of respondents believe the media is a competitive business with its own political agenda; it is not impartial and has a preoccupation with reporting bad news for the sake of selling newspapers and air time.

Eight public officials said outright the general media overplays corruption. Additionally, five others thought the media based its decision to overplay or underplay on its relationship with the alleged corrupt official. If a particular relationship is friendly or involves business (i.e. advertising or source information), the press tends to play down questionable ethics or outright corruption.

For example, one elected respondent had serious problems with the way in which the media deals with Mayor Jan Laverty Jones' trips out of town to promote the image of Las Vegas. Jones approaches various businesses (notably Steve Wynn) in the community to obtain travel funds for herself. She justifies soliciting the money on the ground that the city cannot afford to send her to all of the places she wants to go.
At least two problems arise when a seated public official asks for money from the private sector for official business. A private business may fear that if it fails to deliver the money, it will suffer the wrath of the person in office. Citizens rightly or wrongly believe public officials have enormous retaliatory power they can bring to bear to the detriment of an individual. Alternatively, a company may expect favorable treatment the next time one of its issues is up for a vote.

This particular official believes Jones' conduct is not only unethical, but should be made illegal. If it were any public servant but Jones, the media would crucify him. But Fletcher Jones is the number one advertiser in the Las Vegas Valley. Media businesses do not want to lose that advertising money so they hold their tongues.

Another example given was the case of a municipal judge widely suspected of being corrupt. The Sun will not report the alleged corruption because Brian Greenspun is an alternate judge for that court.

The Sun was criticized from another quarter. According to this person, organized crime figure Benjamin "Bugsy" Sigel had the newspaper established with a generous loan from the Mafia-dominated Teamsters
Union. Its primary task was to improve Sigel’s image through a public relations campaign. The newspaper’s original connection to criminal elements made a permanent impact on its reporting.

Several respondents indicated the media makes some actions appear corrupt when they are nothing of the sort. The media makes accusations and innuendos without proof and will not retract them when they are shown to be untrue. It misrepresents or exaggerates these situations either to sell newspapers or to influence voter attitudes against a public official. According to two respondents, the land "scam" involving Ron Lurie and Ashley Hall is a case in point. The media made the "secret" land deal appear corrupt when it was neither secret, illegal nor unethical.

One respondent used himself as an example of media bias. During his first bid for county commissioner, the R-J ran a series of false reports alleging the official’s conduct was corrupt in order to ensure that another candidate would get the job. It was bad enough the first time; however, after it became known the official was considering running for the office a second time, he received warnings such stories would be ran again.
Television media seeks sound-bytes which do not give the whole story. These bytes of information are often taken out of context to convey whatever story they want their audience to believe. Television journalists will not cover a story unless they can get film footage. Moreover, they will not play it hard unless they are granted exclusive access.

Newspapers often are neither more detailed nor more accurate. One judge indicated he/she frequently reads of cases tried in his/her court and wonders whether they are the same ones. Telling the whole story doesn’t sell newspapers, so they report only those parts which sell. Other respondents as well complained the press is too lazy to get the true facts prior to publicizing a story. They merely accept information given to them.

Nevertheless, the respondents were not unanimous in their opinions of the media. Two officials thought the media was doing a pretty fair job of reporting public corruption matters. Others thought the media had a role in exposing and coping with public corruption in our community.

In the post-Watergate era, there has been a tendency for every journalist to want to be an investigative reporter. The effect has been to greatly enhance the exposure of public corruption. One judge
was adamant that the media’s investigation of public corruption was more efficient and vital than federal law enforcement because of the latter’s bureaucracy.8

The vast majority of respondents abhorred leaks to the media regarding investigations. Some faulted the media for encouraging and publishing such revelations regardless of its accuracy. Others faulted law enforcement agencies, grand juries and the courts saying the media should publish whatever information it deems accurate regardless of the source.9

The Oath

Regrettably, the oath of office appears to have little meaning, impact or significance for public officials and the general public. Table 4 breaks down the officials’ views. Interestingly, this is one instance where women differed markedly from men. Seven of the eight women thought the oath either impacted all public officials or that the impact varied among them. Those who thought the impact varied often compared it with marital vows saying some people stick by them, some do not. Democrats too were more likely to find the oath significant than Republicans.

For those who thought the oath had an impact, some thought it created a promise either to themselves or the public which helped build their characters. Two
believed the oath symbolically reinforced the importance of what sworn officials do and why they are in office. Two others thought the oath set standards of conduct for public officials to avoid even the appearance of impropriety, let alone illegality. More than one said the oath should be emphasized more often and suggested the media could play a role here.

<table>
<thead>
<tr>
<th>Table 4. Impact of Oath of Office on Local Public Officials</th>
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<tbody>
<tr>
<td>Respondents</td>
</tr>
<tr>
<td>Male</td>
</tr>
<tr>
<td>Female</td>
</tr>
<tr>
<td>Age 47 or less</td>
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<tr>
<td>Age 48 or more</td>
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<tr>
<td>Democrat</td>
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<tr>
<td>Republican</td>
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<tr>
<td>Nonpartisan</td>
</tr>
<tr>
<td>Minority</td>
</tr>
<tr>
<td>16(-) years service</td>
</tr>
<tr>
<td>18(+) years service</td>
</tr>
<tr>
<td>Judges</td>
</tr>
<tr>
<td>Commissioner/ Councilman/ Mayor</td>
</tr>
<tr>
<td>Prosecutor/ Law Enforcement</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>
Half of the respondents believe the oath is taken strictly for reasons of tradition; it is part of the theater and pomp or a requirement a public official must meet in order to get the job; it is a condition of doing business; it makes the oath-taker feel good when he says the words. A councilman, who keeps the oath on his/her wall, speculated the vast majority of public officials know nothing of the oath beyond the words "Repeat after me."

To illustrate its lack of significance, one respondent complained that in the recent inaugural festivities, Hillary Rodham-Clinton’s clothing drew more media coverage than the oath. Another pointed out that no public official locally has ever been tried under perjury statutes for violating the oath of office even though he could be.

Only a handful of respondents thought the oath had any significance to the public. When it did, it was usually after some event when a constituent would point out "you’re sworn to do this." Most officials believe the public is unaware and unconcerned with who takes an oath prior to entering office. As an example, the son of one respondent recently became mayor of a small community. Not one citizen showed up for the swearing-in ceremonies.
Distinguishing the Good from the Bad

I was interested in finding out whether any officials thought that breaking one law to enforce another eroded the distinction in their minds between the good guys and bad. Table 5 reveals the views of the persons interviewed. Three respondents see no difference between a UCA who offers a bribe (or buys

| Table 5. Breaking Laws to Enforce Laws Erodes Distinction Between Police and Criminals |
|---|---|---|
| Respondents | Yes | No | Total |
| Male | 1 | 15 | 16 |
| Female | 2 | 6 | 8 |
| Age 47 or less | 3 | 9 | 12 |
| Age 48 or more | 0 | 12 | 12 |
| Democrat | 2 | 12 | 14 |
| Republican | 0 | 9 | 9 |
| Nonpartisan | 1 | 0 | 1 |
| Minority | 2 | 3 | 5 |
| 16(−) years service | 3 | 9 | 12 |
| 18(+) years service | 0 | 12 | 12 |
| Judges | 1 | 9 | 10 |
| Commissioner/ Councilman/ Mayor | 2 | 5 | 7 |
| Prosecutor/ Law Enforcement | 0 | 7 | 7 |
| Total | 17 | 108 | 125 |
drugs) or any other citizen. For these individuals, UCAs are committing crimes even though their motivations are different. One thought the government should lead by example. Interestingly, only one of these individuals thought UCOs should not be used.

Yet none of these respondents went on to suggest UCAs should be prosecuted. Moreover, one of the three agreed federal authorities should be using UCOs in public corruption investigations. And the one who disagreed with their use nevertheless thought "YOBO" was good for the community!

Others saw a distinction so long as the UCA abided by guidelines, the advice of the prosecuting attorney and did not become the criminal character he portrayed. The vast majority believed the public supports undercover officers even when they break the law so long as they perceive the behavior as a reasonable means to an end. As one judge indicated, Dirty Harry often breaks the rules, but he's very popular. UCOs are seen as "a legitimate means to a legitimate end."

Purposes of Undercover Operations

For most of the respondents, the purpose of undercover investigations of public corruption is to expose such corruption to the public, obtain evidence of the crime by the only sufficient means possible, and
restore integrity and confidence to political institutions. Others claim UCOs demonstrate to the citizenry that public officials are not above the law and can be held accountable for their criminal misdeeds. Still others believe UCOs deter would-be violators. One official put it this way: if a public official can't be honest for the right reasons, he can be compelled out of fear he will be caught should he decide to commit a crime.

The federal prosecutor, who has conducted considerable research into public corruption investigations, claimed it is not possible to obtain sufficient evidence to prosecute an historical case with traditional investigative techniques. A jury will not be persuaded of corruption unless its members can see, hear and judge for themselves the behavior in question. Even in the unlikely event witnesses were available and willing to testify, a jury would not accept their testimony. At the time he conducted his research, every single Hobbes Act (extortion under the color of official right) conviction was obtained via UCOs.

For some offices (such as judges), UCOs are the only check on government power according to one respondent. Another reason given is that such operations protect the public from harm caused by
corrupt public officials which, unlike most crimes, affect each and every citizen.

Dangers of Undercover Operations

Entrapping the innocent and naive, as well as overzealousness on the part of law enforcement agents, were the two main dangers of UCOs described by the respondents. Some are concerned investigating agents may have an irrational preconceived notion that a particular official is corrupt which is not supported by the evidence. They gave the examples described below.

One respondent described former commissioner Woodrow Wilson, a "YOBO" target, as a politically naive public servant looking out for the interests of his constituents. Two other officials thought "YOBO" target Jack Pettiti, a former county commissioner, also was not corrupt. Additionally, one of the latter two thought "YOBO" target Eugene Echols was not corrupt, but entrapped. All three of these respondents were in public office at the time of the investigation.

The next most cited danger was leaks to the press which damage a public official’s reputation regardless of whether corruption is ever proven in a court of law. Law enforcement agencies, prosecutors, grand juries and the courts justify the leaks because they believe a target is corrupt, but just cannot prove it.
Alternatively, they leak information intending to ruin a target politically; to bolster their own political futures; or because they want to give the "scoop" to their friends in the media. Sometimes information is inadvertently leaked when one person says something to his/her spouse who then passes it on.

Other concerns included overhearing/disclosing non-criminal personal information; insufficient investigation into gray areas prior to bringing forth public allegations; and creating crime where none had been demonstrated before. The latter was not viewed so much as entrapment as inappropriate government behavior (i.e. there’s enough crime out there already).

Most believe the targets of UCOs have been those public officials who have abused their power and committed criminal acts. One respondent observed targets in YOBO appeared to be long-term office holders who have had greater opportunities to commit corrupt acts.

Yet another official had no idea what targeting criteria was used by law enforcement agencies other than directing such operations against political opponents. According to this judge, there would be less abuse of UCOs by federal agencies if the targeting criteria were better known and subject to public input.
The issue of UCOs as political weapons was one I asked respondents to address specifically. With one exception, respondents did not feel UCOs were directed at any political group, party or issues. That person thought UCOs were unfairly targeted at African-American political leaders during the Reagan/Bush years.

Nevertheless, as Table 6 reveals, six respondents thought UCOs in Las Vegas have been targeted at

<table>
<thead>
<tr>
<th>Table 6. Undercover Operations Used As Political Weapons</th>
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<tbody>
<tr>
<td>Respondents</td>
</tr>
<tr>
<td>Male</td>
</tr>
<tr>
<td>Female</td>
</tr>
<tr>
<td>Age 47 or less</td>
</tr>
<tr>
<td>Age 48 or more</td>
</tr>
<tr>
<td>Democrat</td>
</tr>
<tr>
<td>Republican</td>
</tr>
<tr>
<td>Nonpartisan</td>
</tr>
<tr>
<td>Minority</td>
</tr>
<tr>
<td>16(-) years service</td>
</tr>
<tr>
<td>18(+) years service</td>
</tr>
<tr>
<td>Judges</td>
</tr>
<tr>
<td>Commissioner/ Councilman/ Mayor</td>
</tr>
<tr>
<td>Prosecutor/ Law Enforcement</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>
political opponents and nine more believed such targeting was possible. The table suggests two things of note: Democrats are more likely to see such operations as political weapons; and half of the law enforcement respondents think using UCOs as political weapons in Las Vegas is possible.

A commissioner believed former commissioner Manny Cortez was the political target of the FBI. A judge was absolutely convinced the FBI investigated former federal judge Harry Claiborne not because he was corrupt, but because he spoke out against the Organized Crime Strike Force of Las Vegas. Another judge is of the opinion law enforcement and prosecutors at all levels will try to smear attorney Oscar Goodman’s campaign should he decide to run for the office of Lieutenant Governor.

Surprisingly, there was no unanimous agreement as to whether law enforcement agencies should be arbitrarily testing the integrity of public officials. Two of the respondents, both judges, thought law enforcement agencies should be testing the integrity of public officials. Neither thought there was any harm in asking an official to take a bribe pointing out that merely asking a person to commit a crime is not entrapment. A policy of testing would keep public officials on notice their behavior is possibly being
scrutinized making them think twice before committing a crime.

Yet the rest of the respondents opposed testing for several reasons. A UCA should have some reasonable grounds for breaking one law to enforce another; UCOs are expensive; UCOs can undermine political careers and public confidence; testing is also likely to cause a feud between law enforcement agencies and other public officials which is not in the interest of the public; finally, such testing is characteristic of police states.

Who Should Conduct Undercover Operations?

Table 7 describes the level of government which ought to conduct undercover investigations of public corruption. Ten respondents thought public corruption undercover investigations should be conducted exclusively by federal agencies. The remainder would include other levels of police.

Respondents put forward the following arguments for why UCOs should be conducted by all three law enforcement levels: to give each level the opportunity to clean its own house; to share intelligence and resources; and to allow federal agencies to oversee local public corruption investigations in a task force setting.
Several thought public corruption investigations should be conducted by the same level of government against which they are targeted. In other words, local police agencies should investigate local corruption; state agencies should investigate the state; federal agencies should investigate federal matters involving

Table 7. Which Law Enforcement Agencies Should Conduct Undercover Operations

<table>
<thead>
<tr>
<th>Respondents</th>
<th>Federal Agencies Only</th>
<th>All Levels of Government</th>
<th>Total</th>
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</thead>
<tbody>
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<td>10</td>
<td>16</td>
</tr>
<tr>
<td>Female</td>
<td>4</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Age 47 or less</td>
<td>4</td>
<td>8</td>
<td>12</td>
</tr>
<tr>
<td>Age 48 or more</td>
<td>6</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>Democrat</td>
<td>7</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Republican</td>
<td>3</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>Nonpartisan</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Minority</td>
<td>0</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>16(-) years service</td>
<td>5</td>
<td>7</td>
<td>12</td>
</tr>
<tr>
<td>18(+) years service</td>
<td>5</td>
<td>7</td>
<td>12</td>
</tr>
<tr>
<td>Judges</td>
<td>3</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>Commissioner/Councilman/Mayor</td>
<td>4</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Prosecutor/Law Enforcement</td>
<td>3</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>50</td>
<td>75</td>
<td>125</td>
</tr>
</tbody>
</table>
interstate corruption, federal targets, matters of national interest, and, according to one respondent, corruption within state and local police departments; and/or only when corruption is widespread beyond the resources or willingness of local and state authorities to do something about it.

Nevertheless, the overwhelming majority of respondents agree or strongly agree federal agencies should be using UCOs in investigating allegations of public corruption. One official outright disagrees with the use of UCOs. Two other persons, including one law enforcement officer, would limit such investigations to matters involving federal targets.

Several arguments were given for allowing only federal agencies to investigate public corruption matters. Several respondents, including the district attorney, hold that federal agencies are not as susceptible to local political pressures or electoral concerns. The district attorney’s office and LVMPD come under heavy fire for wasting resources if they dedicate them to long-term investigations. If those investigations fail to produce substantial results, the heads of those agencies lose their bids for re-election.

One respondent cited the local Wynn-Mushkin investigation as an abuse of police power and waste of
resources targeted at "public people." The threat of voter retribution is an interesting question. According to the federal prosecutor, adverse campaign publicity is not an issue at the federal level.

Another concern often expressed is that local and state investigators/prosecutors have close friendships with other local/state public officials because they grew up here. These close relationships can prevent investigators/prosecutors from looking objectively at a questionable situation.

Close relationships also mean there is greater risk the investigation will be leaked or biased. One judge believes local police and other public officials try to cover up for their friends if the investigation is conducted by state or local agencies. But they are afraid to intervene in an FBI investigation. According to this judge, there would be no justice if investigations were left to state and local agencies.

Another elected respondent has seen this firsthand. He/she brought evidence of corruption to the district attorney which was subsequently "swept under the carpet" because of political friendships and ties. He/she then turned to the FBI which was ready to investigate the matter. Still another respondent was confident that if he/she were the target of an investigation, he/she
should would be alerted by friends in law enforcement within minutes.

Several people also pointed out the sheriff, being an elected official, has close political ties to other local and state politicians. This ties LVMPD to the wishes and futures of certain local officials and political allies. According to two law enforcement respondents, any undercover officer who damaged the sheriff’s political connections would jeopardize his future assignments.

Another official advised some police officers in LVMPD’s intelligence division (charged with investigating public corruption) to make substantial campaign contributions to the winner of the sheriff’s race (even if they have to borrow the money from a bank) in order to ensure they keep their plain clothes jobs and overtime. They are indebted to the sheriff for their positions and subject to his direction which may be politically motivated.

Even if the police chief is an appointed position, as in Henderson and North Las Vegas, some respondents believe it is neither wise nor fair to ask police to investigate their employers. Fear of reprisal is a very real concern, even at the state level. One official pointed out that the Georgia Attorney General’s office
did not receive a pay raise for several years because of a public corruption investigation it had conducted of the state legislature.

There are other problems associated with local police UCOs in public corruption matters. An undercover police officer is likely to be recognized by targeted public officials in communities as small as the three cities making it impossible to maintain his cover. Even the state agencies would have this problem. The federal agencies, on the other hand, have a much larger pool to draw from across the country.

Finally some of the respondents were concerned that state and local police agencies do not operate under the same stringent guidelines as federal agencies nor do they have the training and supervision. For example, local/state police do not have to obtain headquarters approval for practically every action in a public corruption investigation as does the local FBI office.

**Controls**

Table 8 shows that public officials solidly reject external controls over police undercover investigations. Given the number of respondents concerned with UCOs as political weapons, this finding surprised me. One of the five favoring external controls, a law enforcement officer, believed the only outside supervising official
should be the prosecuting attorney to ensure the operation remains legal and avoids entrapment. All other law enforcement officers rejected judicial or citizens committee approval of law enforcement investigations. Others opposed external controls because they entail more people being aware of the investigation and thus a greater chance information will be leaked to the press.

Table 6. External Controls Should Be Used For Undercover Operations

<table>
<thead>
<tr>
<th>Respondents</th>
<th>Yes</th>
<th>No</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>2</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td>Female</td>
<td>3</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>Age 47 or less</td>
<td>2</td>
<td>10</td>
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</tr>
<tr>
<td>Age 48 or more</td>
<td>3</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>Democrat</td>
<td>3</td>
<td>11</td>
<td>14</td>
</tr>
<tr>
<td>Republican</td>
<td>2</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>Nonpartisan</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Minority</td>
<td>2</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>16(-) years service</td>
<td>2</td>
<td>10</td>
<td>12</td>
</tr>
<tr>
<td>18(+) years service</td>
<td>3</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>Judges</td>
<td>2</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>Commissioner/Councilman/Mayor</td>
<td>2</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Prosecutor/Law Enforcement</td>
<td>1</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>27</td>
<td>98</td>
<td>125</td>
</tr>
</tbody>
</table>
Two advocates of external controls argued an independent panel of people possessing diverse backgrounds, such as a grand jury or citizens committee, could ensure the investigation was properly motivated and predicated on facts. This would obviate the problem of political manipulation and vendetta. It would also provide a check on the use of government power. As indicated earlier, one particular respondent gave LVMPD's recent Mushkin case as an example of an investigation taken for illegitimate political reasons.

Another public official thought that if legislators had oversight responsibilities, they could prove helpful in conducting the investigation. The same official, however, worried this situation might also lead to leaks and tip-offs.

Those opposing judicial approval/direction of UCOs suggested the proper role of the judiciary is to review the investigation, not participate in it. The latter would have the effect of eroding the separation of powers between branches of government. Moreover, if judges were involved in an investigation, it is likely to prejudice the subsequent judicial review process.

Most of those adverse to external controls didn't like citizens committees at all. Citizens committees, like the judiciary, lack the time, resources and
competence to either participate in or oversee traditional police investigations, let alone complex undercover investigations of public corruption. One respondent thought the citizens committee was better suited for investigating and reviewing allegations of police misconduct. Another thought the media provides a sufficient external check on UCOs.

Public officials made several recommendations to ensure UCOs were not used as political weapons. First, a target should have a documented history of predisposition, based on credible sources of information, which suggests an ongoing pattern of violating public corruption statutes. There should be no "trolling" or "fishing expeditions" for corrupt public officials because such officials are not readily identifiable. Unlike prostitutes and drug dealers, corrupt public officials do not exhibit profile characteristics which can easily be targeted.

Second, the nature of the temptation should be reasonable and commensurate with the crime. One investigator told me the general rule of thumb is that the UCA shouldn't appear to be more of a criminal than the target. Accordingly, he should avoid unnecessary criminal activity and outrageous enticements.
Third, UCOs should be conducted according to written standard operating procedures and guidelines. They should further meet the stated goals of a law enforcement agency’s elected political head. As one respondent said, the head of a law enforcement agency independent of all political controls is close to being king and this is not desirable.

Fourth, care should be taken that the public is not unduly harmed or at risk. Fifth, the investigation should be narrowly focused on specific violations. Ambiguous phrasing of questions subject to interpretation allows the government to frame public officials and should be avoided to the maximum extent possible.

Sixth, some respondents believe UCOs should only be used when traditional investigative means have exhausted and failed to obtain evidence sufficient for prosecution. Others prefer UCOs at the outset because they are less likely to be leaked to the media and therefore less likely to cause scandal unsupported by facts.

Seventh, a UCO should yield evidence of an ongoing pattern of corruption. This accomplishes two things: one, it clarifies intent on the part of the target
public official; two, it denies the defense attorney the claim of a one-time sin.

Eighth, several respondents were concerned law enforcement agents, particularly federal agents, may overzealously pursue a particular individual just because they think he's corrupt. As a general rule of thumb, UCAs should take their best shot at the target and stop; if corruption isn't there, then it isn't; don't endlessly pursue the matter.

Other suggestions were as follows: UCAs should be the brightest, most well-trained officers of the law. The UCA's chain of command should be briefed daily on what is going on in the UCO. UCAs and their supervisors should be held liable for their conduct in criminal and civil court. A UCA should not be left in his role so long he is at risk of assimilating the character he portrays. UCAs should be careful to abide by the law, guidelines and constitutional requirements; since UCOs are likely to involve violation of certain laws, there should be some compelling reason for the government to break the law. Finally, UCOs should be revealed only through public indictments (no leaks to the press).
Chapter Notes

1. Other respondents thought while there is little corruption, there is quite a bit of questionable ethics.

2. Interestingly, this respondent saw the latter as an ethical problem more than the crime of obstruction of justice.

3. This may be true of Las Vegas. However, other industries such as mining contribute substantially more money to campaigns at the state level than telemarketing.

4. Ironically, many times informants in public corruption cases are colleagues whom the target has approached for assistance.

5. Chapter 179.460 Nevada Revised Statutes (1992) reveals wiretaps are authorized in bribery and extortion matters. However, according to a local deputy district attorney, the statute is interpreted narrowly to exclude instances where the person offering the bribe is a UCA.

6. One-party consensual calls are those in which one of the participants in the telephone conversation willingly allows the call to be recorded.

7. According to one judge, this situation is made worse at the federal level where law enforcement agencies have unlimited resources.

8. Another judge thought local media had limited resources for investigative reporting, but instead relied on informants within law enforcement agencies, prosecutors offices and the courts.

9. Interestingly, one official thought by leaking information to the press, law enforcement agencies were merely providing valuable information to the public. Such disclosure he argued is good for the community because it further deters would-be violators.

10. Only one of the comparison criteria indicated whether a public official will believe such operations should be conducted exclusively by federal agencies; all five minorities thought such operations should be conducted by all three levels of law enforcement agencies.
CHAPTER 6

Conclusion

A clean city...requires at least two things--active law enforcement and elected officials who oppose organized crime (Gardiner 1970, 172).

Social contract theory requires substantial consensus on moral values, the state of nature and the proper role of government (Kammen 1986). In order to be justified, seventy-five percent of the respondents had to agree that federal agencies should use UCOs to investigate public corruption allegations. My research demonstrated that an overwhelming ninety-six percent of the respondents believe such investigations ought to be conducted in public corruption matters under certain conditions outlined in Chapter 5. Eighty percent of the respondents believe the federal agencies should direct those operations at the state and local levels of government.

Several questions were raised in this study which are worthy of further inquiry. For example, Democrats seem to be more likely to believe UCOs are used as political weapons. This issue would lend itself to comparative analysis.

Federal respondents perceived corruption to be a far greater problem than other officials. It would be interesting to see if this were a trend among various
levels of public officials across the country. This could be studied through a survey questionnaire.

Other questions include who have been the targets of public corruption probes? Are they long-term officeholders as one respondent suggested? Are new, young officials less likely to be corrupt than older incumbents? If so, does this result from education, training, position or experience? Are federal agencies as divorced from local politics as some respondents think them to be? Where state and local law enforcement agencies have conducted undercover investigations of public corruption, did voters retaliate for cases yielding no indictments or resulting in unsuccessful prosecutions? Did the legislatures, judiciary or media retaliate by changing laws, reducing budgets or publicly attacking investigative agencies? Do all four groups react similarly across the nation?

Here in Nevada, it would be an interesting endeavor just to try to identify the good-old-boy network. This may not be so difficult as it seems. One could use Thomas Dye's (1990) criteria for identifying the local and institutional elite structure today and compare it with a generation ago. One might also do some research as to whether the narrow industry base of Nevada fosters
greater corruption than areas with diversified industries.

Local respondents made an argument that corruption in Las Vegas today is substantially less than it was ten or twenty years ago. I would add one other indicator in support of this view. Some studies have shown public corruption to be positively correlated to organized crime when the latter is present (Gardiner 1970). If those are true, it should be noted that the influence of organized crime in Las Vegas has diminished appreciably over the past decade.

If public corruption has decreased, it nevertheless is still present in our community, according to many of the respondents. In a sense, the lack of consensus on the nature of corruption disturbs me. It seems public officials, particularly judges, not only disagree on what conduct is corrupt, but what illegal corruption is worthy of investigation by any law enforcement agency, let alone at the federal level.

Varying perceptions among public officials of what behavior is corrupt opens the door for arbitrary treatment throughout the criminal justice process. It is clearly possible that the same corrupt act will be treated differently by various agencies, prosecutors and courts. The result would be, perhaps is, unequal
treatment under the law which goes against the grain of social contract theory as I understand it.

If I could fall back onto Hobbes, perhaps the lack of consensus may be explained by suggesting that some of my respondents do not know what is in the true interests of themselves and our community. I am not presumptuous enough to claim I know the answers or to tell another official his/her duties. However, it seems to me there is a need for discussion, debate and education on the nature of corruption in our community and what ought to be done about it if only so that we can ensure every person is treated in the same manner. If there had been such a discussion among my respondents, I am confident that in the end, all of them would have supported the use of federal UCOs in public corruption matters.

Perhaps a policy of zero tolerance is neither feasible nor desirable. Trying to eradicate all public corruption would require an enormous police/regulatory bureaucracy which would itself become corrupt and cumbersome. In fact, much of government red tape today derives from previous efforts to thwart public corruption (Klitgaard 1988).

Yet it is difficult for me to accept public officials overlooking corrupt acts if the particular offender is otherwise good for the community; or that
they should arbitrarily decide what laws should and should not be enforced. When a law enforcement officer tells me a $5,000 bribe is sometimes okay; or when a judge suggests he/she is willing to go to prison for money, it shakes my faith in government, even humanity.
Appendix

Interview Questionnaire

At the beginning of the interview, I will state the general purpose of my questions and go over the definitions described below so that we are on the same sheet of music. I will also obtain the following biographical data:

- Race
- Sex
- Age
- Occupation
- Education--institution and degree obtained
- Party affiliation
- Class

The scope of public official is limited to officials who swear an oath before taking office and would therefore include law enforcement officers.

An undercover agent is defined as a police officer who, in an undercover capacity, infiltrates a group and/or conspiracy for the purpose of obtaining information about a crime (i.e. public corruption); it is not an informant.

Corruption (of public officials) is that behavior proscribed by law (e.g. accepting bribes, kickbacks, extortion, etc.). While the scope could easily be
expanded to include any instance where there is an apparent conflict of interest or ethical problem, not all such cases could or should be investigated under criminal law.

1. Law enforcement agencies have conducted several highly publicized undercover investigations of public corruption, the most notable of which was probably ABSCAM. In your opinion, what has been the purposes of these undercover investigations? Do these purposes conform with what citizens expect law enforcement agencies to be doing? Why or why not?

2. In your opinion, should the enforcement goal regarding public corruption be "zero tolerance" or are there corrupt acts which do not warrant the expenditure of investigative resources, meet community standards, etc.? Why or why not?

3. The nature and extent of public corruption is indicated by such things as the number of citizen complaints, the amount of media reports and the resources dedicated to coping with the problem. Based on your perception, how would you describe public corruption in our community?

4. Undercover operations (UCOs) in investigations of public corruption have stimulated substantial legal, moral and political debate. What do you see as the potential dangers involved when UCOs are used to investigate allegations of public corruption?

5. Does the fact that an undercover agent (UCA) breaks a law to enforce another erode distinction you see between the agent and the bad guy? e.g. the UCA violates the law when he offers a bribe to a public official.

6. Relatively few public servants are required to swear an oath prior to accepting a position in government. From your perspective, what is the significance and impact of the oath of office on public officials? Does it effect the way citizens view those officials?

7. Explain whether you believe undercover investigations of public corruption should be conducted
by state, local or federal law enforcement agencies or all three.

8. Allegations and investigations of any type substantially impact the careers of public officials and the attitudes of citizens toward their government. Please compare traditional investigative techniques (e.g. interviews, subpoenas, search warrants, etc.) with undercover methods. Which type of investigation is likely to be more harmful to the public official? The political process?

9. Police inevitably have substantial discretion in the conduct of their investigations. From your perspective, what kinds of constraints and limitations should be placed on undercover work to ensure it promotes the public good?

10. Should UCOs be controlled within the agency or be subject to external controls such as approval by judiciary or citizen committee?

11. Some argue that there is no difference between police beating information out of a subject and tricking him out of it using an undercover operation. In terms of enforcing the law, what differences, if any, do you see between beating and tricking?

12. Some have argued that a public official’s behavior is determined largely by environmental factors (e.g. special interest groups or a skillful, a manipulative undercover agent). Others argue that as human beings, public officials have the innate capacity to control their own behavior and freely choose whether or not to commit a corrupt act. Which view in your mind more accurately describes the nature of public officials in our community and what are its ramifications for undercover work?

13. Federal agencies should be using undercover operations in investigating matters of alleged public corruption in the greater Las Vegas area.

Strongly Disagree Disagree Agree Strongly Agree
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