

UNDERCOVER POLICING

Assumptions and Empirical Evidence

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This article describes and analyses the implementation and results of undercover operations in one country (the Netherlands). First, we examine and analyse the main assumptions underlying academic and legislative discourses relating both to the regulation and control of undercover operations and to the kind of results the operations may produce. Second, we analyse documentation and interviews relating to all 89 Dutch criminal investigations in 2004 in which undercover teams were consulted.

Keywords: undercover policing, covert policing, infiltration, criminal investigation

Introduction

Recent years have seen a shift from reactive to proactive policing (Roberts 2007: 99; Maguire and John 1996: 316–18). This shift, caused by the rise of organized crime and concerns about terrorism, has been accompanied by the use of increasingly invasive investigative techniques.¹ Examples are covert yet non-deceptive techniques such as telephone tapping and electronic surveillance, but also deceptive techniques such as undercover policing. Compared to other methods of criminal investigation, undercover operations are different not only because of their covert and deceptive nature, but also because the police participate in the very crimes they are investigating (Ross 2008: 239).

In many countries, the use of covert policing has been the subject of heated debate, sometimes as a result of outright (political) scandals (see section 3; see also Ross 2008: 240). The debates usually imply that undercover policing is a controversial investigative method: a necessary or unnecessary 'evil'. Commonly, however, these debates lack basic empirical evidence and are mainly based upon normative grounds and untested assumptions.

This article describes and analyses the implementation and results of undercover operations in one country (the Netherlands). First, we examine and analyse the main assumptions underlying academic and legislative discourses relating both to the regulation and control of undercover operations and to the kind of results the operations may produce. Second, we analyse documentation and interviews relating to all 89 Dutch criminal investigations in 2004 in which undercover teams were consulted.

We will address the following research questions: How often are undercover operations deployed? What different types of undercover operations exist? and What results have these operations produced? The empirical data consist of all covert policing operations in the Netherlands in 2004 and the available Dutch jurisprudence (over several years) regarding undercover operations. For a further discussion of these data sources, we refer to section 4.

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¹In section 2, we elaborate upon the growing importance of proactive policing.

In addressing these research questions, we briefly examine the history of undercover operations in Europe and the United States (section 2) and look into the academic and legislative debate regarding undercover operations (section 3). Furthermore, we introduce our empirical data (section 4), present empirical insight into the numbers, types, course and results of undercover operations in the Netherlands (section 5), and examine the Dutch courts' judgments regarding the legitimacy of undercover operations (section 6). Finally, we summarize the results and discuss the validity of the assumptions underlying the academic and legislative debate (section 7).

Undercover Operations: A Brief History

The use of spies and informants to gather information on rivals and subjects was described by the Romans (Gibbon 1831). However, the systematic use of undercover policing became possible only with the emergence of more or less modern police organizations (Marx 1988: 17). Such a police organization first came into being in Paris at the end of the seventeenth century. Its goal was to protect the political order of the city, yet it also targeted criminal matters. The notorious *bureau de sûreté* deployed undercover operations on a large scale (Fijnaut and Marx 1995a: 2–3). During the eighteenth century, the United Kingdom became acquainted with the *thief takers*: citizens who were part of the underworld and who recovered stolen property for a reward. Undercover methods were also used by what is often called London's first professional police force, the Bow Street Runners, set up in the mid eighteenth century by Henry Fielding. Modernization of the police system took place with the passage of the Metropolitan Police Improvement Act, in 1829. The traditional system of parish policing was replaced by the *new police* (Fijnaut and Marx 1995a: 7–8; Goddard 1957). To contrast the *new police* with the broadly feared continental, 'tyrannical' type of policing, Home Secretary Sir Robert Peel presented the model of *policing by consent*. It expressed the philosophy of preventive policing via a uniformed presence rather than a secret police presence (Roberts 2007: 97; Fijnaut and Marx 1995a: 7–9). However, because the system was not effective enough, in 1842, a team of plain-clothes detectives was formed. Threats to the political order during the last decades of the nineteenth century, such as the Fenian bombings, led to a expansion and specialisation of active forms of undercover policing (John and Maguire 2007: 200; Fijnaut and Marx 1995a: 8–9).

The United States shared the British fear of a continental police system and its associated informants and spies—a fear that was enhanced by its struggle for independence. It lacked federal investigation services of any size until the beginning of the twentieth century, when the Federal Bureau of Investigation (FBI) was formed. During the 1920s and 1930s, the FBI used undercover operations in the fight against espionage and sabotage committed by Communist and fascist groups (Fijnaut and Marx 1995a: 10–14).

During roughly the same period, the political use of undercover policing steeply increased in Europe as well. Yet, in post-war Europe, undercover methods were initially discredited, as a result of the intensive use the national-socialist Third Reich and the Communist Soviet Union had been making of government espionage against their own populations (Marx 1988: 22–32).

An increase in the use of undercover operations by the regular police (outside the sphere of state security) has occurred from the 1960s onwards, during a period when organized crime, primarily centred on drug trafficking, has been growing. Because of

the consensual nature of these crimes, reactive investigative methods are less adequate. Reactive policing, primarily instigated by victim reports and criminal events and focused on gathering evidence on past behaviour of offenders, is therefore increasingly replaced by proactive policing, which aims at gathering evidence on the current and future behaviour of offenders. In the United States, this has resulted in the large-scale use of undercover operations, mainly in the form of so-called buy-bust operations. These are operations in which the police create the opportunity for someone to commit a crime, such as by having an undercover agent pose as someone who wants to buy drugs. As part of its war on drugs, the American Drugs Enforcement Administration (DEA) exported the use of this investigative instrument to Western Europe. Because of the 'importation' of these operations, the use of undercover methods by the police has increased in Europe as well (Ross 2008: 241; Fijnaut and Marx 1995a: 15–16).

The use of undercover operations is not limited to investigations into drug crimes. In the United States, so-called anti-fencing sting operations are directed against property crimes (Marx 1988: 108–28). More recently, sting operations are brought into action on the internet, too, with American undercover agents posing as juveniles in order to catch online sex offenders (Mitchell *et al.* 2005: 251–6). Undercover operations against drug trading, just as those against fencing and online sex offenders, are usually proactive. Yet, undercover operations are also applied in reactive criminal investigations. Since the 1990s, they have been used to elicit confessions from suspects in investigations regarding, among other crimes, murder and missing people (e.g. Maguire and John 1996: 316–18; Choo and Mellors 1995; see also Smith *et al.* 2009). In these 'befriending' operations, an undercover agent befriends a suspect and tries to build up such a relationship with him (or her) that the suspect confides his guilt to his 'friend'.²

Academic and Legislative Debate: Theory and Assumptions

Academic debate

In the literature on this subject, Gary T. Marx's (1988) *Undercover: Police Surveillance in America* is still the standard work. In his exploratory study, Marx examines the different manifestations of undercover operations, the developments in their use, and their intended and unintended consequences. The author mostly uses interviews, literature and documents. The full scope of Marx's treatment of the subject is unique. Often, other authors only discuss a partial aspect of this investigative instrument.

Many studies focus on the deception or manipulation to which citizens caught up in undercover operations are assumed to be exposed. These studies often pursue the issue of entrapment in buy-bust and sting operations (Ross 2008: 242). The central question regarding entrapment is whether such operations actually tackle real criminals, or whether the police incite individuals to committing a crime who did not have any criminal intent to begin with (e.g. Ashworth 2002; Colquitt 2004).

While deception in a buy-bust operation takes place for the purpose of catching a person red-handed, in another type of operation, people are deceived in order to get them to confess to crimes already committed. This is the case in the aforementioned befriending operations. According to some, during those operations, the safeguards applying to the interrogation of a suspect are skirted.

²A notorious British example is the befriending operation that was deployed in the Rachel Nickell murder investigation in 1992.

Several authors have focused on the risks that may be involved in undercover operations for undercover agents. Such risks involve, among others, a compromised integrity (Girodo 1991) and psychological problems (e.g. Miller 2006; Macleod 1995). Ross (2004; 2007) and Fijnaut and Marx (1995*b*) have approached the subject from the point of view of the sociology of law; they describe the international differences in the field of undercover policing.

Many studies discuss the lack of control over undercover policing, in light of secrecy, deception and risks attached to the instrument (e.g. Den Boer 1997; Wagner 2007). A number of authors advocate a more strict regulation (e.g. Joh 2009: 195–6; Roberts 2000: 273; Maguire and John 1996: 320–1, 332–4; Choo and Mellors 1995).

An important part of the scientific literature looks upon undercover operations from a normative, critical point of view (Ross 2008: 240). These studies frequently problematize undercover operations as a *necessary evil* (Fijnaut and Marx 1995*a*: 1; Wachtel 1992: 145; Ross 2007: 493). They often chiefly examine the assumed negative aspects of undercover methods, paying less attention to the possible value of this means to criminal investigations, thus making undercover operations seem more of an *unnecessary evil*. Yet, what do we actually know about the practice of the execution of undercover operations and about the results they yield for criminal investigations? Not much. Little empirical research has been done on undercover operations (Marx 1988: 108–28; Brodeur 1992: 108; Langworthy 1989: 30; Smith *et al.* 2009; see also Grabosky 2010: 364), though some research has been done in the United States (Roberts 2000: 272). A number of very specific studies have been carried out, such as on the efficacy of police anti-fencing operations (e.g. Bowers and McCullough 1982; see also Langworthy 1989). These studies primarily focused on the output of these operations, namely the number of arrests and convictions and the amount of recovered property. Such studies also provided the foundation on which Marx based his discussion of the ‘intended consequences of undercover work’ (Marx 1988: 108–28). More recently, Webster *et al.* (2006: 228–9) have carried out a study into stings in the United States, the aim of which was to prevent the spread of firearms from the legal arms trade into the underworld. Furthermore, Mitchell *et al.* (2005: 251–6) have studied undercover operations in which American undercover agents posed as minors in chat sessions on the internet, in order to trace potential sex offenders (see also Fulda 2002). Thus, some studies provide information on the results of specific types of sting operations. Yet, almost no research exists that deals with the practice and results of undercover operations as an investigative instrument in general.³

Legislative debate

Legislation and guidelines regarding police powers are the most formal and direct means used to control police activities. Incidents and specific criminal cases play a key role in the development of regulation concerning police powers. In the United Kingdom, for example, the ideology of policing by consent was accompanied by a common law tradition of implicit police powers, namely police activity required no explicit legal authorization. Although this tradition still stands, policing methods are increasingly subjected to formal statutory regulation (Roberts 2007: 97). The judgment of

³Such research has been done once in the Netherlands (Kruissink *et al.* 1999).

the European Court of Human Rights in *Malone v. United Kingdom* (1985) led to the Interception of Communications Act 1985. Another case that played a significant role in the regulation of police powers is the case of *Khan*.⁴ In this case, the police mounted monitoring equipment to the outside wall of a house. The House of Lords criticized the lack of any legislation for such an invasive investigative method. *Khan* was one of the motivating factors behind the Police Act 1997. The most important statute today is the Regulation of Investigatory Powers Act (RIPA) 2000, which also regulates covert policing methods.

In the United States, the Abdul Scam (ABSCAM), which ran in the late 1970s, led to a controversy. In this operation, undercover agents, dressed as rich Arabs, approached members of Congress and offered them money in return for political favours. ABSCAM resulted in several convictions, but the use of this technique was criticized as well. In the aftermath of this operation, the Department of Justice issued The Attorney General Guidelines for FBI Undercover Operations (Gershman 1982: 1585–6).

In continental European jurisdictions, the exercise of police powers requires a formal basis in the national police law or code of criminal procedure (Roberts 2007: 96). However, until 2000, the Dutch code of criminal procedure lacked specific sections that covered intrusive investigative techniques such as undercover policing and surveillance. This legal vacuum was at the basis of the IRT affair, which defined the course of the Dutch legislative debate. In response to growing concerns about organized crime in the 1990s, interregional investigation squads (IRTs) were established. The sudden dismantling of the Amsterdam–Utrecht IRT in 1993 and internal disputes within the police resulted in a parliamentary inquiry committee. The IRTs had deployed new investigative methods and the committee concluded that some of them were unacceptable. Several tons of drugs had been imported under the supervision of the police, in the hope that particular informers would move to the top of criminal organizations. It was questioned, however, whether the authorities were running the informers or vice versa. Furthermore, the committee made a thorough inquiry into several criminal investigation methods, including undercover operations. Some of the major conclusions were that there was a legal vacuum concerning criminal investigation methods and that the command and control of criminal investigations should be improved. The report of the committee led to the Act on Special Investigative Police Powers (BOB Act). The BOB Act, effective as from 2000, regulated several investigative powers, enhanced central authority in criminal investigations, and required accountability at trial for the deployment of the investigative powers (Kleemans 2007: 164–5).

In regulating undercover operations, Parliament opted for a threefold division in powers in the BOB Act: systematic intelligence gathering; the purchase of illegal goods or substances or the rendering of illegal services (undercover buys); and infiltration. The deployment of infiltration is assumed to be more risky than the deployment of an undercover buy, which, in turn, is assumed to be more risky than systematic intelligence gathering. The underlying idea is that during systematic intelligence gathering, the undercover agent ‘just’ collects information; he is not committing any crimes, as he would be when purchasing illegal goods or substances, nor is he taking part in any criminal organization, as is the case with infiltration. The requirements for the deployment

⁴*R. v. Khan* (1996) 3 All ER 289.

of the undercover powers differ correspondingly. Infiltration is only allowed in investigations that target the most severe crimes (proportionality), whereby other investigative methods are ineffective (subsidiarity), and only after authorisation from the highest level within the Public Prosecution Service (the Council of Procurators General). By contrast, the other two undercover powers (undercover buys and systematic intelligence gathering) may be deployed against a (much) broader category of crimes, without an exhaustive exploration of alternative methods of investigation, and without authorisation of the Council of Procurators General.

Next to legislation and guidelines regarding police powers, the police administration, or, more precisely, the management of policing, is a second relevant factor where the control of police activities is concerned. This factor, too, has been the subject of important changes. Pollitt (1993), among others, has described the rise in most Western democracies of managerialism in the public sector. This New Public Management depicts the provision of various public services as a production process that can be run according to a uniform set of business principles. To this end, policy makers import management techniques from the private sector into the public sector. This paradigm has also permeated the criminal investigation services (Cockcroft and Beattie 2009; Butterfield *et al.* 2005). A more businesslike-run police force is assumed to improve the efficiency and effectiveness of criminal investigations. Performance management has become an important concept. In 2003, the Dutch government has drawn up performance contracts, wherein it has been laid down which 'production' the police force has to deliver. As a result of this, the fieldwork of both the Public Prosecution Service and the police has been increasingly subjugated to conditions regarding the deployment of their means, their accountability and results to be achieved. Preferably, it should be clear from the start of an investigation that results will be attained within an appointed period of time. In addition, periodically, account should be given in order to determine whether and how the investigation should proceed, based on the progress made so far. In this way, the importance of manageability has increased, with greater emphasis on measurable results, such as the number of arrested individuals or prosecutions (Ross 2007: 520–1).

Assumptions in Academic and Legislative Debate

In this article, we focus upon four assumptions from academic and legislative debate. The first assumption relates to the control of the course that undercover operations will take. An important underlying idea, or fear, is that the police, through deception, exert a manipulative influence on citizens while executing undercover operations. The assumption seems to be that the actual execution of an undercover operation, namely the interaction between undercover agent and subject, is completely determined by the undercover agent: 'the undercover agent leads the subject into a trap.' Thus, in the contact between both actors, a mainly active, directive role is attributed to the agent, while a more passively following part is attributed to the subject.

Second, in the existing literature, the results of undercover operations are discussed almost exclusively in terms of arrests, seizures and convictions.⁵ Almost no attention is paid to other possible yields. These are, for instance, the possible insight an undercover

⁵Sometimes, the possibly deterrent, preventive effect of undercover operations is discussed as well.

operation may provide into the composition and mode of operation of a criminal organization, or the evidence that someone has been under suspicion by mistake. The assumption entertained here is that undercover operations can only lead to proving someone's guilt. Hence, criminal investigation seems to be represented as a linear process, leading from suspicion to conviction.

The third assumption is the legislator's supposition that undercover operations can be clearly distinguished—such as in the Dutch BOB Act—into three different types of operations, and that growing risks are attached to them.

The fourth assumption relates to performance management. It is the assumption that drawing up performance contracts and management focused on output constitute a good way to improve the achievements of criminal investigation.

After presenting our empirical results in the next sections, we will confront our results with these four assumptions in the final section and discuss their validity.

Current Study

The empirical data we use in this article consist of two sources.⁶ In the Netherlands, most undercover operations are carried out by specialized undercover units. When a public prosecutor, who, under Dutch law, has the authority over a criminal investigation, considers the use of an undercover operation, he usually contacts the undercover unit. Our first data source covers all 89 Dutch criminal investigations in 2004 in which these specialized teams were consulted. This data source is unique, since information on undercover operations is generally not available to researchers, let alone to the broader public. The 89 operations include all 34 undercover operations that were deployed by those teams and all 55 undercover operations that were only considered as a possible method of investigation.^{7, 8} For every (deployed) undercover operation, we gathered information from the archives of the undercover unit and we interviewed the public prosecutor and/or the detective who was in charge of the criminal investigation. This produced insight into the sort of criminal investigations in which undercover operations are used, the length and intensity of these operations, their course and their results.⁹ Information regarding undercover operations that were considered but not actually carried out was also derived from the archives of the undercover units. This information mainly concerned the reason why the operation was not deployed.

The second data source consists of documents relating to judicial reasoning regarding the legitimacy of undercover operations. In the Netherlands, judicial sentences are stored in a public data base.¹⁰ In total, we have looked at the relevant documentary

⁶For more elaborate information, see Kruisbergen and De Jong (2010).

⁷In 52 criminal investigations, the decision was made not to make use of an undercover operation, while in three cases, a planned undercover operation was not actually deployed (see Figure 1).

⁸As mentioned before, the Dutch law distinguishes between three kinds of undercover powers. In 2004, all undercover operations consisted of the undercover powers of systematic intelligence gathering and/or undercover buys. In 2004, infiltration was not used. For cases in which infiltration was used, we gathered information over a longer period of time, from 2000 to 2005. During those six years, infiltration was deployed in 14 cases. In this article, we only use the 2004 data.

⁹In order to guarantee anonymity, examples of undercover operations that we present in this article are generalized and lack concrete details.

¹⁰Only a very small part of all sentences is entered into the database. We searched this database for the period 2000–August 2007 and expanded our results with rulings before and after this period that were brought to our attention by members of the Public Prosecution Service or the literature.

evidence relating to judicial reasoning in more than 60 cases that involved an undercover operation and in which a judge has passed judgment on the legitimacy of covert policing as an investigative instrument.

Undercover Operations in the Netherlands: Numbers, Types, Course and Results

Numbers

The archives of the undercover units show that, in 2004, the deployment of an undercover operation was considered in 89 criminal investigations (see Figure 1). In 52 cases, it was eventually decided that the use of this method was not possible or unnecessary. One reason was the lack of sufficient information on the suspect and his entourage, which made it impracticable to come up with an adequate approach plan. Another reason was the presence of factors that impeded the safe deployment of an undercover operation, such as a mentally unstable and therefore unpredictable suspect. In other cases, an undercover operation turned out to have become unnecessary because the aims of the investigation had already been attained by other means, such as through an unexpected tip-off from the underworld.

Thus, in 37 cases, it was decided to set up an undercover operation. In three of these cases, however, the operation was abandoned even before the start. This happened, for example, in an investigation into firearms trafficking. In this investigation, observations and telephone taps made clear where the weapons were stored, which resulted in the

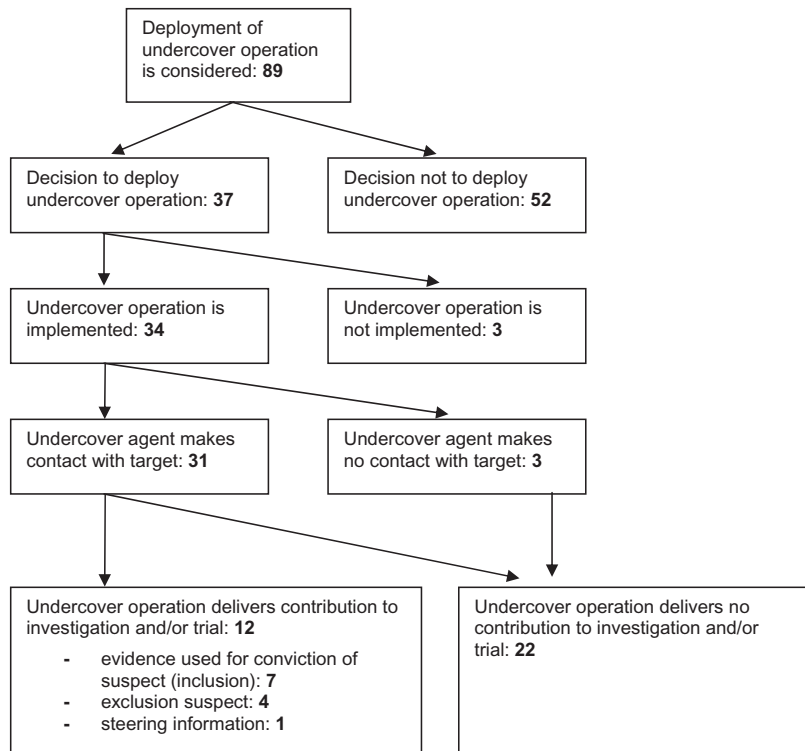


FIG. 1 Implementation and results of undercover operations in the Netherlands, 2004.

arrest of the suspect and seizure of the firearms. Ultimately, 34 undercover operations have actually been carried out. We may conclude that undercover operations are not used very often in the Netherlands. This becomes even more clear when we compare it to the use of telephone taps: in 2008, 26,425 Dutch telephone numbers have been tapped.¹¹

Types

In criminal investigation, we discern three types of undercover operation, which largely correspond with the three different undercover powers distinguished by Dutch legislation. The first category of undercover operations consists of cases involving systematic intelligence gathering: an undercover agent tries to gather information on the involvement of a suspect in, for instance, a seriously violent crime or sexual exploitation. An example of this is a case in which an undercover agent tried to find out, by befriending the suspect, whether the suspicion was correct that a man has been involved in a murder.

The second category of operations usually focuses on the trading of stolen property, drugs or weapons. During these undercover buys, the idea is that the undercover agent purchases such goods from a suspect to obtain direct proof that the suspect is indeed involved in these crimes. Several times, the cause for these cases has been that the police got notified of illegal or stolen goods being on offer on the internet. During the ensuing operation, an undercover agent then responded to the offer and tried to buy the goods concerned.

In the third category of operations, undercover buys are part of the undercover operation as well. The difference with the second category is that the undercover operation does not target individual suspects, but criminal organizations and, to a large extent, the large-scale drug or firearms trade. Furthermore, apart from the gathering of direct evidence, the aim of these operations is to gain insight into the composition and mode of operation of the criminal organization. Usually, these operations involve infiltration.

The different types of operation vary greatly with regard to their duration, intensity and the sort of contact between the undercover agent and the subject. Some undercover operations only take a day and consist of no more than a brief business contact with a suspect. One example is a case in which the police intercepted a drugs parcel sent by post; an undercover agent then posed as the postman delivering the parcel in order to arrest the recipient. An undercover operation may also last more than a year, however, and may encompass many meetings between undercover agent and suspect. In general, the application of systematic intelligence gathering and infiltration requires a longer period of time and more intensity than when an undercover buy is applied.

Between the different types of operation, the nature of the contacts varies as well. The contacts may be purely businesslike, such as in many investigations targeting drugs or weapons (undercover buys and infiltration). Yet, in cases in which an undercover agent befriends a suspect in order to get information about his involvement in a seriously violent crime (systematic intelligence gathering), as in the murder case mentioned above, the undercover agent sometimes has to establish a quite intensive personal and

¹¹Telephone tapping is the only method of investigation for which information on its use is available to the public.

emotional bond with the suspect. It is clear that this requires a very different ‘investment’ on the part of the undercover agent.

Measuring success and failure

What defines a successful undercover operation? Particularly with regard to operations that are not directed at specific suspects, but rather focus on a category of persons—so-called fishing expeditions or honey pot operations—it can be hard to determine indicators of success. Examples of these unfocused operations are the afore-mentioned anti-fencing stings in the United States. Yet, honey pots are also used to detect crimes such as corruption among politicians and civil servants. How many thieves must be caught or how many stolen goods must be seized during such an operation for it to be ranked as a success? And when a politician does not take the ‘bait’ of a corrupting offer posed to him by an undercover agent, does this mean that the operation has failed or that the official has been deterred by earlier undercover operations, or that he never intended to commit a crime in the first place (Marx 1988: 108–9)?

All Dutch undercover operations we studied were focused; specific targets (suspects) were identified in advance. According to Marx (1988: 108–9), the assessment of success for these kinds of operations is much simpler. And, indeed, when a sting operation is targeted at a single suspected drug trafficker, for example, and the suspect sells drugs to an undercover agent, resulting in the arrest of the suspect, assessing the success of the operation might seem straightforward.

However, not all targeted undercover operations are that simple, and even in the given example, one might argue about what indicates its success. Should we take the direct result into consideration, namely the successful undercover buy and possibly an arrest, or is the eventual conviction the only result that matters? And does it suffice solely to measure the success of an undercover operation by arrests and convictions?

In our study, we determined the success of an undercover operation by assessing the contribution an operation has made to the investigation and/or trial. To this end, we make a distinction between three kinds of contribution. The first of these is *inclusion*, which means that the undercover operation has generated evidence that is subsequently used to get a suspect convicted. In the literature on undercover operations, the presented indicators of success of an operation often only consist of convictions, arrests and seizures. However, undercover operations can produce other types of results as well. They can, for instance, yield the insight that a suspicion is probably untrue. A second kind of contribution is, therefore, *exclusion*. Third, there are operations that neither directly result in convictions nor lead to exclusion, but that do yield information that is useful for a criminal investigation in a more indirect manner. An example of this is information about the means of communication or the smuggling methods used by suspects. We call this kind of contribution *steering information*.

Figure 1 shows the implementation and results of Dutch undercover operations in 2004. An undercover operation was set up in 34 cases. What were the results of these operations? In 12 cases, the undercover operation has contributed to the investigation and/or trial. This means that the undercover operations did not make any contribution in the remaining 22 cases.

In seven cases, the operation yielded evidence that was used to convict the suspect(s). One example was an undercover operation set up when stolen goods worth hundreds of

thousands of Euros were put on offer in bulk on the internet. An undercover agent succeeded in buying these goods. This undercover buy was then used to convict the suspect and also led, through the apprehension of the receiver, to the arrest of the thief. Another example is a protracted undercover operation targeting illegal arms trade. The undercover agent managed to identify the suspect who, until then, had been unknown. He built up a contact with this man successfully and eventually bought a consignment of weapons from him. This undercover buy, too, played an important part in the suspect's conviction.

In four cases, a suspect could be excluded from the investigation based on the results of the undercover operation. Exclusion is a valuable result, because it enables the investigators to focus on other suspects or to abandon the investigation altogether. In one of these four cases, an undercover agent was put into action against a person suspected of being involved in a murder. The undercover agent befriended the suspect and gained his trust—the suspect stated in an intercepted telephone call that the undercover agent was one of only two persons he could trust. This strong bond and the candour with which the suspect confided in his 'friend' enabled the investigation team at one point to conclude that their suspicions against this man were probably incorrect. In another case, an investigation was started as a result of information that at a certain 'location', drugs were being traded and girls were being sexually exploited. After visits of an undercover agent to this location, it became clear that the initial information was not correct.

In one case, the undercover operation did not lead to evidence or exclusion, but 'only' generated steering information. In this investigation, the undercover operation provided a picture of the composition of the criminal organization, and of the means of transportation this organization used for its drug trafficking. A planned undercover buy, however, could not be effected.

Twenty-two of the 34 executed undercover operations have ended without generating results. In three of these cases, the investigators failed to come into contact with the target. In one such case, the team initially deemed the possibilities to make contact with the target to be favourable. Yet, suddenly, the catering establishments in which these contacts were planned to take place were no longer frequented by the target, among other reasons because he (the target) was refused admittance. In 19 cases, the undercover agent did actually succeed in establishing contact with the (initial) target, yet, in the end, the operations still failed to contribute to the investigation or trial concerned. There are various backgrounds to these failures. Sometimes, the undercover agent's assignment is to make contact, through the initial target, with the person who is the actual subject of the investigation, the main suspect. This plan can fall through because the assumed relation between the initial target and the actual subject no longer exists or has never existed. In the majority of the unsuccessful cases, however, contact between the undercover agent and the subject of the investigation has been established, but the meetings and conversations held and the observations made by the undercover agent failed to generate the decisive information needed to either confirm or negate a suspicion. In one investigation into terrorism, an undercover agent maintained fairly good relations with the suspect concerned, but the suspect did not talk about relevant topics during their meetings. Operations involving undercover buys also regularly fail to yield results.

The unpredictable criminal environment

The most remarkable characteristic of undercover operations we have studied is the unpredictability of how the meetings between the undercover agent and the suspect, and thus the entire operation, will work out. We have already mentioned the case in which an undercover agent could not establish contact with a suspect because the latter unexpectedly failed to show up in the establishments where the contact was meant to take place. Yet, unpredictability manifests itself most strongly during the phase in which contact has already been established and mainly during operations involving undercover buys, such as in many investigations into the drug trade, the illegal arms trade or the traffic in stolen goods. The unpredictability of those operations is caused to a large extent by the dangers of criminal entrepreneurship.

In undercover operations set up to combat profit-motivated crime, such as the drug trade, an undercover agent, in order to gather evidence against a suspect, often poses as a criminal entrepreneur. He uses the cover of a drug dealer, for instance, who is interested in buying drugs. Because the undercover agent plays the role of fellow criminal, operating on the criminal market, the risks involved in criminal entrepreneurship apply to him, too—a hazard that also looms over the success of the undercover operation.

There are three types of risk attached to criminal entrepreneurship (cf. Reuter 1983: 113–17). First, the environment in which criminal entrepreneurs operate is unregulated. There are no formal procedures to revert to, such as regarding drafting a contract, there is no mediating, judging authority that offers a solution when a disagreement occurs, and there is no possibility to insure oneself against unexpected setbacks. Second, criminal entrepreneurs run risks as a consequence of the activities of the police and the law. These risks consist of seizures, arrests and imposed punishment. Even when it is not the criminal himself who falls ‘victim’ to a criminal investigation, but a relation such as the foreign drug supplier, this may pose serious problems to the criminal’s own entrepreneurship. Third, partly because of the lack of regulation, the colleagues of a criminal entrepreneur, his fellow offenders, constitute an important risk factor. Fellow offenders may betray the criminal entrepreneur, may steel from him or may not keep to agreements in other ways. A business partner may also prove to be incompetent, such as because he turns out to be less well connected or have less financial means than he has made it appear. After all, there is no public quality assessment regarding criminal entrepreneurs. All in all, many things may go wrong. This is especially true for complex activities such as transnational criminal activities, whereby the chain of the criminal process involves many links. A European who wants to import and trade cocaine, for example, has to take care, either directly or indirectly, of the following links: its transportation from South America to Europe; its importation into Europe; its initial transportation and storage here; its further processing (adulteration); and its delivery at the next buyer’s. All these links harbour risks: the cocaine may not arrive (properly); it may ‘disappear’ during its importation or further transportation; it may get adulterated with the wrong substances or in the wrong proportion; or it may turn out that, in the end, there is no buyer. In addition, when something goes wrong, it is often unclear whether this is the result of ill intentions, incompetence or a misunderstanding—have the drugs indeed been seized through unsuspected police attention, or has the driver simply stolen the consignment, or has he got caught because of his stupid, amateurish behaviour? All in all, criminals have reason enough to distrust one another.

Because of these risks, criminal entrepreneurship is surrounded by great insecurity and unpredictability, and so are the undercover operations that target criminal entrepreneurs. As mentioned above, the unpredictability especially holds for undercover buys. Of the 34 undercover operations started in 2004, 15 focused (among other things) on bringing about one or more undercover buys. Of these 15 operations, ten did not work out according to plan. We present a taxonomy of undercover buys that passed off differently from expected:

- Either an undercover buy does not take place at all because:
 - the suspect in the end turned out to be unable to deliver, as happened in a case in which a concrete deal had been struck with the suspect, but on the day the actual buy should have taken place, the suspect turned out to be unable to supply the drugs;
 - the suspect in the end turned out to be unwilling to deliver, as in a case in which the subject initially seemed willing to do business, but in the end was too suspicious to go through with it;
 - the suspect repeatedly did not show up at arranged meetings;
 - the goods were found to be sold to another buyer;
 - the circumstances indicated that the suspect may have intended to close a *rip deal* instead of a *deal*, which means that the suspect did not actually intend to sell anything to the undercover agent, but intended to rob him.

- Or the undercover buy does take place, but:
 - the size of the undercover buy is smaller than originally expected because the subject is unable to live up to his promises—‘I can deliver a whole container, no problem’.

The fact that undercover buys often do not work out ‘as planned’ does not automatically mean that an undercover operation has failed entirely and has not contributed in any way to the investigation and/or trial. Of course, an undercover buy that does take place but not quite as expected can still generate evidence. Even an undercover buy that never actually takes place may nevertheless yield proof.¹² In general, however, unexpected developments do have a negative influence on undercover operations: they cause operations to last longer or to lack intended results. Because of the great frequency with which commitments are not kept, trade qualifications turn out to be false or undercover buys do not meet the expectations in other ways, it certainly is not easy to ‘do business’ with criminals efficiently.

Undercover Operations and the Court

In addition to the contributions made by undercover operations to investigations and trials, the ‘legal tenability’ of this investigative instrument might also be understood as

¹²In one case, for instance, a suspect has been convicted for preparing a drug delivery to an undercover agent, even though in the end, the delivery fell through because of logistic problems on the suspect’s side.

being a part of the ‘results’. During criminal trials, how do judges respond to the plea put forward by the defence regarding undercover operations?

To answer this question, we have examined Dutch jurisprudence. In total, we have studied more than 60 court decisions in cases involving an undercover operation. The two most important grounds of defence that lawyers have put up in these cases related to alleged entrapment (argued in 30 cases) and incompatibility with the principles of proportionality and subsidiarity (argued in 17 cases).¹³ The vast majority of pleas on these and other grounds have been dismissed by the judges. Transparency is of great importance in this context, namely the extent to which the police and the Public Prosecution Service provide information on the considerations that were decisive in the use of an undercover operation, the circumstances under which the operation has been carried out and the findings the operation has yielded.

When this transparency is present, the pleas put forward by the defence are not often judged to be valid. In the small number of cases in which a plea has been accepted, the reason has often been the inadequate reporting of and poor insight given into the undercover operation and consequently the judge’s inability to verify the operation’s legitimacy. In the great majority of the cases that we have studied, the judge’s opinion was that he had been presented with a good picture of the way in which the undercover operation had been carried out. In the same vein, earlier research has shown that Dutch judges are of the opinion that they have gained more insight into the application of the special powers of criminal investigation since the introduction of the BOB Act (Beijer *et al.* 2004: 282). This Act prescribes that the use of investigative instruments in a criminal case must be transparent and verifiable. Before the introduction of this act, judges often were not even informed about the simple fact that an undercover operation had been part of a particular criminal investigation (Van Traa 1997: 16).

Discussion

In this article, we have given an account of empirical research into undercover operations. We have made use of two data sources: (1) a unique insight into the execution and results of all undercover operations carried out in the Netherlands in 2004; and (2) the available Dutch jurisprudence regarding undercover operations. We will briefly summarize our most important findings. First, it has become clear how scarcely undercover operations are carried out in the Netherlands: 34 times in 2004. Thus, these operations represent a method of investigation that is not often applied. This may be caused by the fact that in the Netherlands, contrary to the United States (Ross 2007: 512–13, 562–3), especially the more controversial forms of undercover operation can only be used when other investigative instruments have failed, although legislation does not explicitly prescribe that undercover operations in general are only to be used as a last resort. It may be possible, of course, that there is simply no need for a more frequent use of undercover operations. Interviews with police and judicial practitioners have revealed that other factors play a role as well. One of these factors is the limited knowledge of and experience with undercover operations at the Public Prosecution Service and in the police force. Precisely because it is so rarely used, covert police operations are sometimes

¹³When the court permits such a plea, the court has discretionary power to choose one of the following remedies: mitigation of the sentence, exclusion of evidence, or dismissal of the case.

simply overlooked during criminal investigations. In addition, due to the IRT affair and its aftermath, some public prosecutors view undercover operations as a very invasive and drastic method of investigation that is only to be used as a last resort. Finally, some prosecutors fear that by opting for an undercover operation, they will lose control, because the deployment of this investigative method requires the authorisation of higher echelons within the Public Prosecution Service (and feedback on a regular basis).

Second, we have mapped out how many and what sort of results undercover operations generate. Of the 34 cases in 2004 in which an undercover operation was used, in seven cases, the operation provided evidence that has been used in convicting the suspect(s). In four cases, the undercover operation has resulted in exclusion, which means that the investigation team has grown convinced, based on the information gathered during the undercover operation, that the suspicion against someone was partly or completely untrue. In one case, the undercover operation has resulted neither in evidence nor in inclusion, but 'only' in steering information. In total, the undercover operation instrument has contributed to an investigation and/or trial in 12 cases, while it has failed to contribute anything in 22 cases.

Third, the course of undercover operations turns out to be very unpredictable. This unpredictability is worst during operations in which undercover buys play a role, such as in many investigations into the trading of drugs, weapons or stolen property. Because undercover agents often pose as fellow criminals in these operations, who are game for a good deal, they are confronted with the unreliable and unpredictable behaviour common to the criminal entrepreneurial market.

Fourth, readings of Dutch jurisprudence suggest that transparent reporting on an undercover operation is of crucial importance for the outcome of the legitimacy test that is carried out by Dutch judges. When both the Public Prosecution Service and the police provide sufficient insight into the background, the execution and the results of an undercover operation, the objections put forward by the defence against the use of this means are usually dismissed and the operation is judged to be legitimate. According to the assessment of Dutch judges, the stipulated condition of transparency for criminal cases has been fulfilled.

Fifth, we have examined several assumptions about covert police investigations that are inherent in legal and academic discourses, the first being the supposition that undercover agents have the power to completely determine their interactions with the subject. It is true that undercover operations involve an undercover agent who misleads the suspect. Yet, the idea that the undercover agent is the one who completely dominates the course of the operation passes over the fact that in many operations, the undercover agent himself is subjected to the unpredictability of criminals. Especially during operations focusing on suspects of the trade in drugs, firearms or stolen goods, the practical course taken by an operation is to a large extent determined by the unpredictable behaviour of the suspect(s).

A second assumption relates to the results of undercover operations. From the academic literature, it appears that these results are only made up of arrests, convictions and seizures. This idea is founded on a conception of an investigation as a linear process, leading from a suspicion to a conviction. Our research shows, however, that undercover operations may not only lead to the arrest of a suspect, but also to his or her exclusion from further investigation. Furthermore, an operation may also yield steering

information. Thus, the reality of criminal investigation is less linear and should preferably be viewed as a more open process focused on establishing the truth.

A third assumption is at the foundation of the Dutch legislation regarding undercover operations. It relates to the distinction made by the legislator between three different undercover powers: systematic intelligence gathering, undercover buys and infiltration. The legal conditions stipulated for infiltration are stricter than those stipulated for undercover buys, while the conditions for this latter power are stricter than those for systematic intelligence gathering. The underlying supposition is that systematic intelligence gathering, that 'only' entails the gathering of information, is less invasive and risky than infiltration, during which an undercover agent actually becomes part of a criminal organization. In the investigative practice, however, the application of systematic intelligence gathering has frequently proven to be more invasive than infiltration. The reason for this is that in some cases of systematic intelligence gathering, the undercover agent needs to get very close to a suspect, while during infiltration, the contact more often stays limited to a businesslike level. Infiltration is mainly used to investigate the drugs and arms trade. An undercover agent tries to infiltrate a group of suspects trading in those goods. The agent's assignment most often is to get a clear picture of the criminal organization and to attain a position within the group that is favourable for setting up the buy of a substantial batch of drugs or weapons. In order to achieve that, the suspects have to be convinced that the undercover agent is a capable business partner, namely someone who has something to offer, such as certain facilities that come in useful in the drug trade or simply a lot of capital to purchase drugs from the suspects. In order to do business with the undercover agent, the suspects also have to perceive him as reliable: will he meet his commitments, without cheating on them? Although it will certainly help if the suspects and undercover agent more or less like each other on a personal level, the main issues here, namely competence and reliability, relate to a more 'professional' level.

Systematic intelligence gathering, on the other hand, is often used to gather information about a suspect's involvement in crimes such as murder. When an undercover agent is deployed to find out whether a man has killed his wife, for instance, he must try to build up a totally different relation to the suspect than if he were involved in a drugs investigation. Often, the undercover agent has to see to it that the suspect trusts him personally, like a friend, in order to get him to talk. Building a friendly relationship and then betraying this 'friendship' by stating damaging information about this man can be much more psychologically taxing to an undercover agent than playing the role of a drug dealer in a drugs investigation. In this way, the execution of the type of undercover operation for which the legislator has stipulated the lightest conditions (systematic intelligence gathering) may have more dramatic consequences, for both undercover agent and suspect, than the execution of the legally most serious undercover operation (infiltration). Although this empirical result relates specifically to the Dutch legislation, it leads to a conclusion of broader relevance: rather detailed regulation and judicial distinctions may not be attuned to investigative practice.

The fourth assumption provides the foundation of the performance management that in several Western democracies has been applied to the police force; it is the idea that performance contracts and management focused on output will stimulate the achievements of investigation teams. The unpredictability that typifies the course of

undercover operations, however, relates badly to a type of management that is attached to predictability and aims for quick and measurable output.

Because of the complexity of the work and the contacts with citizens, police officers are street-level bureaucrats (Lipsky 1980: 3). Within the police force, this continuously causes a tension between managerial control on the one hand and the need for flexibility and improvisation motivated by the work's dynamic on the other. In the case of undercover operations, this tension is certainly not less severe. The unpredictable course of undercover operations collides with the increased need for controllability that goes with managerialism. Furthermore, management guided by output indicators may produce perverse effects. For the public sector as a whole, it has been described, for instance, how those executing a policy may get the inclination to work 'towards an indicator' (e.g. Van Thiel and Leeuw 2002). Another example is the occurrence of risk aversion, namely the inclination to avoid choices that may endanger a 'good score'. In criminal investigation, this risk aversion may hamper investigations that are expected to be lengthy or 'difficult', or the course and results of which are hard to predict. If one wants to furnish output in the short run, it may be wise not to devote the available capacity to such criminal investigations. This may give rise to a blockade of the use of, among other things, undercover operations, especially the lengthy operations aimed at the leading, intangible people within a criminal organization. This may enable some criminal organizations to keep out of range. The pressure for *output* draws attention away from the *outcome*, namely the reduction of crime (Ross 2007: 520–1; Garland 2002: 119–20; see also Cockcroft and Beattie 2009).

Thus, these four assumptions are not in line with our empirical results. The most important lesson to be drawn from this is that there is a need for more generally accessible information on this investigative instrument: how often is this means applied, for which crimes, in which forms (e.g. undercover buys, befriending operations), and how many and what sort of results do undercover operations yield? Not only scholars, but also policy makers, regulatory bodies and even the police themselves do not have this information, simply because aggregated information is non-existent. For the verifiability of undercover operations, however, it is essential to gain empirical insight into the matters we have mentioned. It would provide scholars with a foundation for critical perspectives and discussions. Most importantly of all, it would enable regulatory bodies to monitor the deployment of this method of investigation and, whenever necessary, make well informed decisions regarding legislation and guidelines. Thus, transparency may serve as an alternative for policy instruments arising from the understandable need to have control over the police, but that at the same time relate badly to the complex, unpredictable character of criminal investigations in general and undercover operations in particular.

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