ABSTRACT. This paper examines the legitimacy of pro-active law enforce-
ment techniques, i.e. the use of deception to produce the performance of a
criminal act in circumstances where it can be observed by law enforcement
officials. It argues that law enforcement officials should only be allowed to
create the intent to commit a crime in individuals who they have probable
cause to suppose are already engaged or intending to engage in criminal
activity of a similar nature.

In the past few years a number of criminal prosecutions have
brought to public attention the issue of entrapment: Abscam, the
DeLorean cocaine trial, Operation Greylord, various sting fencing
operations. The investigative techniques used in, say, Abscam
while highly elaborate, expensive and ingenious are only one
example of the range of investigative techniques with which I
shall be concerned in this essay. What these techniques have in
common is the use of deception to produce the performance of a
criminal act under circumstances in which it can be observed by
law enforcement officials. I shall use the term “pro-active en-
forcement” to cover such techniques and the question I shall be
discussing is under what circumstances, if any, is the use of such
measures legitimate.

Let me begin by saying something more about the nature of pro-
active law enforcement and also by giving a fairly extensive sample
of the use of such techniques. The sample will not only make
clearer the nature of such operations but also provide a range of
cases for testing judgments about the acceptability of such tech-
niques.

Traditionally, law enforcement in our society has left most of
the burden of reporting criminal offenses to private citizens. It is left to individuals, usually victims, to come forward with a complaint of criminal action and to provide much of the evidence in identifying and prosecuting the criminal. Government’s role has been limited to various patrol activities and to reaction to complaint. Hence, the traditional notion of reactive law enforcement.

Recently the existence of “invisible offenses” has posed challenges to reactive law enforcement. Invisible offenses include not only the so-called victimless crimes, i.e. those crimes in which there are no complaints because all parties to the transaction are willing (drugs, vice, gambling) but also a variety of cases in which the victims are not aware of any criminal act. The patrons of a hotel are not aware of code violations whose existence is protected by the bribery of a building inspector. The purchasers of General Electric products were not aware of the fact that the price of the products they bought was affected by a price-fixing agreement. The customers of a bank are not aware of the loss of funds due to the embezzlement of a teller. There is another class of offenses which produces knowing victims but where, for a variety of reasons, the victims are not prepared to complain — blackmail, extortion, sexual harassment. We know from crime surveys that many victims of robbery and theft do not report these crimes either because of fear of harassment or because they believe it to be a waste of time.

Faced with the failure of the traditional modes of notification and investigative aid, law enforcement officials have turned to modes of investigation in which the reporting, observation and testimony can be done by the officials themselves. Detection of crime and investigation of crime proceed simultaneously. This is the arena of pro-active law enforcement. Originally used mainly in drug and vice investigations such techniques are now being used increasingly for many other kinds of crime. I shall enumerate a list of such techniques.