A Short Summary of "Agent Provocateur"
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CHAPTER 1: THE PROBLEM.

The problem of the agent provocateur is ancient. Since the dawn of organized police forces, government temptation and inducement to commit crime have been recognized as a problem of ethical philosophy demanding special attention to the issues of culpability and liability.

In the days of royal absolutism, the method was employed as a means to suppress political opposition to the regime in power. This practice was highly responsible for the tarnished reputation as a totalitarian tool of suppression that undercover investigations traditionally have had, well-known from George Orwell's "1984" where O'Brian, a secret agent of the thought police, shrewdly indulged the growing dissatisfaction of Winston Smith and ultimately induced him to engage in unforgivable crimes against the State.

In Danish law, it is the severe drug crime of recent decades that has revitalized this method of undercover police investigation. Drug crime is a victimless crime. No individual victim steps forward and draws the attention of the authorities to the reality of the crime, and investigations often begin solely on the initiative of the police. Due to these reasons, the use of agents posing as buyers on the illicit drug market (for the purpose of exposing sellers and dealers) is a direct strategy to strike at the drug suppliers. While not solving the problem of drug abuse, this method may help discourage the drug incentive by reducing the supply.

This method, however, is not without problems. It leads directly to fundamental ethical notions created and refined down through centuries of our criminal law concepts of guilt and responsibility. Can a man be blamed for an act that he otherwise would not have committed had an agent not enticed him by scheme and device? Furthermore, how and under which criteria is it established that the offender would not have committed the crime were it not for the presence of the agent?

A broader problem has to do with the government deception embodied in this method. In western political philosophy, the general idea is for the authorities to conduct their business in the open and not deceive the public in the course of their duties. Openness in public administration is a vital ingredient in the very idea of a democratic society based on the rule of law. The absence of such openness is a characteristic of totalitarian regimes where the government does not share its secrets with the people, nor does it abstain from enforcing its laws and directives by using secret police and closed court proceedings.

A systematic use of the undercover method in certain selected areas will indubitably enhance the law enforcement effort dramatically since the method penetrates the strategic shield of victimless crime.

This may divert attention from some of the critical aspects of the method. In order to avoid negative ethics of this nature, the method should be equipped with countervailing guarantees. Deception in the investigation demands openness in the subsequent court proceedings, where the results of the deception serve as evidence in the criminal prosecution against the exposed offender.

CHAPTER TWO: LEGAL THEORY.

Since "Agent Provocateur" is the first Danish book on the issue of undercover police agents, it attempts to give the reader a complete picture of the scattered contributions to the problem that exists in current legal literature.

The chapter on legal theory offers a chronological exposition of the sources beginning with Ørsted who - in line with other earlier writers as Bornemann, Goos, and Lassen - only touches the issue as part of the doctrine of complicity. The early authors' examination of complicity is, however, often so penetrative and detailed that valuable suggestions can be found with regard to the problem of agent provocateur.

Torp probes the problem and splits it into two separate questions: Is the agent liable as an accomplice when he induces his target to engage in crime? Is the offender liable when his crime occurred in response to the agent's inducement? Torp solves the first question by the device of intent, whereas it is concluded for the second question that inducement to crime does not constitute a valid defense. The same opinion is adopted by Krabbe.

Hurwitz has a couple of short remarks to the effect that this method of undercover police inducement to crime is impermissible. It is not quite apparent from his comment if this judgment is addressed to the method as such or only covers the ethically dubious cases where the agent has instigated a criminally nondisposed person to engage in crime.

Extensive discussion of the problem in recent years can be found in a debate between Kallehauge, Nissen and Rothenborg in a series of articles in the Weekly Law Reports from 1976 to 1979. These articles deal with use of this method in drug crime and discusses a number of requirements to be imposed on the method to make it reconcilable with general principles of criminal law and procedure.

The most thorough analysis to be found in periodic literature is a 1984 paper, "Agent Controlleur," written by Dr. Hans Gammeltoft-Hansen. Dr. Gammeltoft-Hansen presents an elaborate conceptual model for fitting the problem of undercover agents into the framework of criminal procedure. This model was the foundation for the 1984 law proposal on undercover agents from the Minister of Justice.

In his paper, Dr. Gammeltoft-Hansen also distinguishes between ordinary investigations and undercover agent investigations. The latter is characterized by the fact that

the police allows an undercover agent to pose as a civilian during the criminal act.

A demarcation line between legal and illegal undercover investigation is also presented. The agent's activities become illegal if his conduct interferes with the constituents of the crime, the actus reus.

Is the use of undercover agents tantamount to an investigative intrusion into protected liberties, as is the case with wiretapping and search & seizure? In Gammeltoft-Hansen's opinion, it is not. The reason is to be found in the simple facts. Wiretapping and search & seizures on the part of the police comprise conduct that is unlawful without a legal warrant to the contrary. Conduct which is covered by a actus reus description in the penal code. Wiretapping is, objectively considered, an infringement of the privacy of communication. The searching of houses is, objectively considered, an infringement of the right to be secure in one's own home. The use of an agent provocateur does not constitute a similar conflict with a penal section. Generally, there is no shield provided by law that protects one from being intentionally enticed or tempted by an agent to commit a crime. As discussed at the conclusion of chapter two, the section on criminal complicity of the penal code does not offer any credible argument against this interpretation.

CHAPTER THREE: CASE LAW.

This chapter provides an overview of Danish case law on the issue of agent provocateur in the criminal investigation. The cases are few in number, but do contain some elucidating points. A selection of the cases are presented with points of interest commented on in the main text.

Furthermore, the chapter presents an exposition of more recent cases from the area of drug crime where agents have played a role in securing evidence for the prosecution.

Except for a single 1981 decision from the High Court for the East of Denmark, the material does not contain any examples of acquittals for crimes exposed by the intervention of an undercover agent.

CHAPTER FOUR: LEGISLATION.

This chapter examines the legislative steps taken on the issue of undercover agents, which started with the 1981 proposal from the party Venstresocialisterne. Under this proposal the police were not allowed under any circumstances to provoke or to participate in criminal acts. Although the proposal stirred much debate in Parliament, it was not adopted.

In February 1985, Ninn-Hansen, the Minister of Justice, put forward his own proposal on the use of police agents in the criminal investigation.

The proposal consisted of a handful of sections defining the concept of undercover police work, describing certain opening requirements for such work and setting a dividing line between legal and illegal police enticement - the so-called "provocation limits." Furthermore, the proposal has rules on

the status of the agent and on the subsequent court supervision with the legality of the operation.

The chapter examines in a concentrated form the contents and background motives of the proposed code and follows the proposal on its way through Parliament up to the end of the session in the summer of 1985.

CHAPTER FIVE: THE CONCEPT OF PROVOCATION.

In this and the following chapters, a renewed analysis and evaluation of the agent provocateur problem is developed. Police encouragement of crime, termed "agent provocation," is depicted as an instance of deceptive investigation.

Deceptive investigation is characterized by the fact that the police, by means of a strategic cover, brings the investigation close to target in order to monitor the evolvement of the crime, thereby securing evidence against the perpetrator. The concept of deceptive investigation is a type concept (i.e. a concept describing the essential features of a class of facts) embracing a number of various investigative models. Agent provocation is at the central core of this concept. The deceptive maneuver is brought about by the agent in his interaction with his target, the latter being deluded to believe that the agent is a criminal co-conspirator. Away from the central zone of the concept is the decoy operation. The deceptive element in the decoy operation depends on the offender's own interpretation of the artificial situation set up by the police so as to make him believe that it offers a genuine opportunity to commit a criminal act. The classic example of the decoy technique is a plainclothes policewoman posing as a potential victim in order to trap a habitual mugger. In the outskirts of the concept are a number of police actions where the deceptive element does not (as with agent provocation) derive from a direct playacting with the offender, or (as with decoys) arises out of a scam situation, but the fact that the police have established means of surveillance and control, thereby securing evidence against the potential transgressor in case he engages in criminal conduct. Examples are clandestine radar surveillance of a traffic road or automatic detection of the source of false emergency calls.

The primary ethical consideration in the use of police undercover agents turns on the possibility that the agent may seduce his target to commit a crime that the target would not otherwise have committed. In other words, the target is transformed from an honest and law abiding citizen into the perpetrator of a crime that he didn't previously intend to commit.

If this is so, the investigation has not detected a crime, but has created one. Such a wanton act of persuasion is possible with agent provocation because the agent is able to directly influence his target in favor of the criminal enterprise.

Decoy operations are different. The object of a criminal attack is exposed, but the initiative to attack must come from the perpetrator. The basic decision is his to make. The police have set up only the external scene of the crime

without exerting any framing influence on the actor's intent. The distinction between these two investigative models - both off the realm of deceptive investigation, but with distinct legal policy attributes - must derive its basis from the very connection established during the investigation between the agent and the offender. A distinguishing mark is proposed under the label "contact." Contact is established when the agent ventures into criminal negotiations with his selected target on a specific enterprise. The contact may be depicted as a scheme of crime advanced by or acceded to by both the agent and target. The contact in this specific sense comprises a direct interference with the offender's volitional and performative relationship to the crime. This is in contrast to a decoy operation where the arrangement only serves as a setting for a potential criminal act previously performed by the perpetrator.

On the basis of this distinction, a number of examples are described in order to elucidate the concept of agent provocation. Differences and similarities in comparison with the proposed code from the Minister of Justice are discussed.

CHAPTER SIX: DECOY OPERATIONS.

In Chapter five of the book the concept of agent provocation was depicted and its essential features expounded to mark the distinction to decoy operations. In Chapter six the analysis and reasoning are further elaborated by shifting the viewpoint directly to the decoy operation model. It is shown through a number of examples that the notion of contact signifies an essential difference between agent provocation on one hand and decoy operations on the other hand.

Gammeltoft-Hansen's view on the relationship between undercover agents and decoys is examined. It concludes that the "initiative criterion" developed by Gammeltoft-Hansen does not furnish any valid reason to conjoin the two investigative techniques in the same logical category.

It has been said that decoy operations in contrast to agent provocation are not covered by the actus reus description on complicity in the Danish penal code. In Report No. 1023/1984 on the use of undercover agents in the police investigation, this difference is regarded as an explanatory vehicle for the view that decoy operations should be exempted from the legislation proposed. The premise, however, cannot withstand further analysis. Sometimes decoy operations may compromise a police participation in the criminal event that properly must be said to be covered by the actus reus of complicity. This is the case, for example, if the police secure the cooperation of a courier to deliver a known drug item to an unidentified recipient in order to expose him when the item is collected (such as from a deposit box in a railway station). Decoy operations will only be outside the scope of complicity if the decoy poses as a victim. But decoy operations do not always have to have this character. By a number of examples it is illustrated that decoy operations may likewise be conducted with regard to crimes where the legislative aims have to do with the wider interests of society.

Not only can agent provocation and decoy operations suffice

for the actus reus requirement of complicity, but both investigative techniques may also be covered by the actus reus of specific crimes.

It is concluded, therefore, that no exact conceptual model for both investigative operations can be derived from the substantial notions of criminal law.

CHAPTER SEVEN: TECHNICALLY POSTPONED POLICE INTERVENTION.

Chapter seven focuses on the investigative strategy well known from the area of drug crime - the technically postponed police intervention. It occurs when the police, for the sake of the investigation, choose to postpone intervention into a criminal chain of events until reliable evidence against the main participants has been gathered.

Such operations raise questions of if and to what extent the police are allowed to rely on nonintervention, though intervention is fully justified, in order to promote the goals of the investigation.

The Act on Court Procedure takes the general position that police activity should begin when a crime has been committed. Although there is no explicit demand that such activity be in the form of an arrest, the general duty and responsibility of the police suggests that law enforcement should begin once the required basis is at hand.

Technically postponed police intervention, as exemplified in controlled delivery of intercepted drugs, is considered a permissible police strategy in most European countries. A similar view must be assumed under Danish law when the operation as a whole meets sound investigative requirements. If, however, the passivity of the police exposes a third party to danger and injury, the postponement cannot be held justifiable. In such cases, a general preventative view demands that intervention must be given priority over any investigative benefits there may be in a postponement.

CHAPTER EIGHT: QUASI-CONSENT.

In Chapter eight a special problem is addressed. In certain undercover operations a question may arise if, due to his collaboration with the police to catch the offender, the complaining party forfeits his right to bring charges against the offender. This may occur if, by his actions, he incurred a legally binding consent to all or part of the crime. If A entices B to steal his car, B may obviously object that A consented to the asportation so that B cannot be held liable for consummated larceny (but only for putative attempt under Danish law). If one adopts this reasoning, the idea must be termed "quasi-consent"- a consent derived by interpretation of A's contribution to the criminal act that has targeted himself to be the party endured.

The problem is examined from different angles. One view that is particularly probed is the traditional opinion that such a consent should not be binding in the criminal law context because it is but a pretension. It is concluded that the possibility cannot be dismissed that in certain cases it may be necessary to consent to a crime in a legally binding fashion in order to expose the perpetrator.

CHAPTER NINE: INFORMANTS AND INFILTRATORS.

Chapter nine addresses such investigative steps as the use of informants and infiltration. A more precise description of these measures is attempted and the question of their legality is discussed.

The use of informants can be regarded as lawful when the information passed on to the police by the informant does not infringe upon any obligation of confidentiality or constitute a false accusation.

The term infiltration is somewhat weak. It is suggested to regard infiltration as but a tactical maneuver placing an investigative source close to the persons targeted about whom intelligence is being sought. Infiltration means that a police actor has been placed in - or someone recruited from - the circle of persons under investigation. Whether the operation will come to embrace agent provocation, decoy tactics and obtaining of information depends on the subsequent steps taken by the police and the infiltrator. The situation is similar to that of "dormant moles" - foreign spies living a normal and inconspicuous life behind enemy lines and awaiting a signal to go into action.

There is nothing unlawful in infiltration as such. If, however, the infiltration is but the first step of government surveillance and control of activities within a protected area, (such as political activity) then the picture changes and the infiltration must be considered impermissible.

CHAPTER TEN: THE CRIMINAL LIABILITY OF THE AGENT.

A considerable part of the discussion on the agent provocateur issue has focused on the question of the criminal liability of the agent. This problem has come to the frontline because the issue of police provocation to commit crime has traditionally been rooted in the doctrine of complicity. In addition, the controversial character of the agent provocateur has contributed to drawing the problem into the limelight as a kind of touchdown for the legitimacy of the method of agent provocation. This is unfortunate, even if the agent does not technically become criminally liable, the method may be deemed undesirable in view of broader considerations on criminal procedure and public policy. Even if the agent does specifically become criminally liable, the method may still be desirable in view of various considerations on investigation and law enforcement. The fact that it is unlawful to deprive someone of his freedom evidently cannot determine if society should concede to the police the right to make arrests as part of the police work.

The chapter explores a distinct legal reasoning that has been offered in favor of divorcing completely the liability question from the issue on agent provocateur.

It is the idea that the agent cannot be criminally liable because his act is covered by the general restrictive principle of criminal law - the principle of substantial nontypicality - it is because of the special circumstances of the agent's act that it does not fall within the scope of actus reus.

The meager case law does not sustain this view. Although it must be conceded, of course, that the act of the agent is one of law enforcement, the purpose is to expose a criminal and not to commit a crime.

But the view is open to a most fundamental objection. If the very fact that the law enforcement purpose behind the agent's act should take it outside the purview of criminal law, the entire philosophy behind the traditional warrant requirements of police work would be swept aside or by the very same reasoning. If it is to be taken at face value, the idea that substantial nontypicality can exempt an agent from criminal liability must be as valid for the whole range of traditional police intrusions into protected areas (wiretapping, search & seizure, etc.). This inference is untenable and runs counter to prevailing doctrine.

Another objection arises from the fact that the method of agent provocation is a government measure. The doctrine of substantial nontypicality is a last resort for rare and unpredictable acts committed under circumstances of a rare and unpredictable nature. In contrast, the use of police undercover agents is a highly planned and calculable undertaking that clearly should not derive its juristic basis from a nebulous construction intended to serve as an ultimate escape clause in out-of-the-way exceptional cases where the infiltration of criminal liability is without support in common moral notions of fairness.

CHAPTER ELEVEN: ILLEGAL PROVOCATION.

The last chapter of the book is devoted to the question of legal and illegal provocation - the so-called provocation limits. It has been argued that a distinction between legal and illegal provocation is without interest because the method as such should be considered illegal in absence of a specific legislative basis. Be it conceded that the agent provocation does hold many critical aspects, the method cannot be categorized as an intrusion into a sphere of privacy protected by law, thus only to be performed pursuant to a warrant. It is a different matter that the method, being of controversial nature, should not be left with police discretion, but subjected to proper legislation setting workable provisions for its use.

Anyway, even without legislation a distinction between legal and illegal provocation must be assumed to exist-expressed in the well-known phrase that the agent must not induce his target to commit a crime he would not otherwise have committed.

The basic ethical issue behind this phrase - admittedly weak - is open to two different approaches. The act of provocation can be tried under an object standard according to which the act is unlawful if the conduct of the agent is of a nature generally likely to lead otherwise law abiding citizens into crime. Or, alternatively, the problem can be solved on a subjective model focusing exclusively on the offender involved - was he ready and willing to commit the crime prior to the contact with the agent?

The first view turns on the factual conduct of the agent,

objectively considered, whereas the second view concentrates on the subjective attitude of the offender towards the crime in question. The standards have different aims and may, as demonstrated in the book, lead to irreconcilable results. Because of this, it becomes important to choose which criterion to use for the test of legality. The criterion adopted by the proposal from the Minister of Justice clearly patterns a subjective approach.

The subjective criterion, as a guide for the legality of the provocation, cannot stand alone. It has to be sharpened so as to clarify its relationship to the general notions of criminal law. It is a delicate task, however, to describe exactly when the agent is targeting a person whose willingness and disposition to the criminal enterprise are so indisputable that the agent's participation serves but as a convenient opportunity for the would-be criminal to commit the crime.

In legal thinking, various devices have been suggested to cope with this problem. Was the violator a habitual offender usually engaged in this kind of crime? Was he in fact willing and able to perpetrate the crime? These considerations address the central notion that the method of provocation should be restricted to professional criminals only who are engaged in ongoing illegal activities - persons who do not lack either willingness, ability or experience in conducting the sort of illegal business that the agent is to expose in order to have the law enforced against the violators.

The doctrine that the agent is not to bring about any crime that would otherwise not have been committed has caused a number of misunderstandings. It has been maintained that it is unverifiable whether the offender would have committed the crime by himself and without the solicitation from the agent. This view is a fallacy. Hypothetical statements concerning a different outcome of a chain of human acts are neither deprived of logical meaning nor do they evade verification.

Ethics, law and numerous theories within social science rest on the simple and well-tested experience that it is possible to make valid assumptions as to how a person would have acted if some intervening factor had not disturbed his course of action.

The same principle holds for agent provocation. If a man habitually sells drugs, it is reasonable to assume that the batch he sold to the agent would have been sold to another customer if the agent had not posed as the buyer.

A similar fallacy of thought can be found in the assertion that the agent is a necessary cause or factor for the crime. Without the agent, no crime. Again, the proper interpretation is that the agent is not necessarily a determinative cause or factor impelling his target towards the crime.

Having disposed of these logical pitfalls of the agent provocateur problem, the attention is shifted to the proposed code on undercover agents.

An interpretation of the central sections is presented. It is discussed if the method should be linked to a requirement restricting its use to certain crimes. The code's notion of criminal attempt is examined. It is argued that attempts

that are not criminal as well as situational crimes should not warrant the use of agent provocation.

All the problems have to do with the description given of agent provocation in the code. The agent is defined through his activity. It is possible, therefore, that a private person loosely associated with the police embarks on activities that duly must be described as agent provocation. Under the subsequent prosecution against the exposed offender it may be on open question whether the activities of the private agent are attributable to the police or not. If they are, the activities performed must comply with the requirements of the code.

A final aspect is the effect of illegal provocation. The close connection between the investigation and the crime investigated - knit together by the contact between the agent and the offender - means that the issue of criminal liability cannot be dealt with separately without taking into account the legality of the agent provocation. Again, divergent avenues are open. One is to say that if the agent has overstepped the boundaries, basic notions of justice require that the indictment should be quashed because it rests on arbitrary and artificially manufactured evidence. This view is of a procedural nature.

A substantial view would be to hold that if the provocation is illegal, the accused party cannot be held liable under the standards of criminal law. The crime is a fabrication attributed to an actor basically unwilling to commit it. He must be acquitted. None of these legal solutions are exhausted. The commissional report behind the proposed legislation points to alternatives such as prosecutorial dismissal, mitigation or suspension of sentence.