

# LIBERTIES

Civil Liberties

A Publication of the American Civil Liberties Union

**LIBERTIES UNION**

NUMBER 288 - JULY, 1972

Copyright © 1972 American Civil Liberties Union

## COPS & REBELS:

# Provoking Crime

By Eve Cary

Alfred Cain, Ricardo DeLeon and Jerome West, all members of the Black Panther Party, were arrested in August of 1969. The affidavit of the arresting officer stated that "[d]efendants, acting in concert, conspired and attempted to forcibly take a quantity of U.S. currency from the Dunston Hotel, of 142 West 131st Street, New York City. The defendants, acting in concert, were in possession of a loaded sawed-off shotgun, a loaded U.S. carbine M-1 rifle, and other dangerous instruments. The defendants, acting in concert, attempted to shoot Det. A. Halikias, #797, by pointing a loaded sawed-off shotgun at him."

The three Panthers were arrested as they drove off the West Side Highway at the 125th Street exit. There was a fourth man with them, the driver and owner of the car, Wilbert Thomas. Thomas was not arrested because he was a police undercover agent and had engineered the arrest and the events that led to it.

### Overt Act

Under New York State law, before anyone can be indicted for conspiracy to commit a crime, he must perform some overt act in furtherance of the crime. That is, mere talk does not make a conspiracy, rather there must be a specific plan plus some action toward carrying it out.

Cain, DeLeon and West admitted they had discussed with Wilbert Thomas the idea of committing robberies to support the Black Panther Party, but they denied that they had made a specific plan to rob the Dunston Hotel and that they were on their way to rob it the morning of their arrest. Further, they stated that any elements of a plan that did exist had been formed and promoted by Wilbert Thomas.

During the course of two long trials (the first ended in a hung jury) in which New York CLU Attorney Paul Chevigny represented Alfred Cain, defendants' contention was proved to be true. Reports that Thomas had made to his superiors under the code name "René" showed clearly the means Thomas had used to entrap the defendants. Thomas had manipulated the Panthers' revolutionary feelings to agitate them into committing a crime for which he could then arrest them.

Thomas was the binding force behind the "conspiracy." While the Panthers discussed the ideology of robbing from the rich to give to the poor, Thomas strove to turn rhetoric into reality.

### Agent's Role

It was Thomas who suggested that they rob the Dunston Hotel, and Thomas who drew a map of it for them. Thomas provided the car to drive to the hotel. Thomas bought the necessary weapons along with gloves so that no fingerprints would be left. Thomas hid the sawed-off shotgun in the car where the others would not notice it.

Finally, Thomas chose the date for the robbery, and when it arrived and the Panthers had other things they wanted to do instead, he convinced them to come along. They did go along, but not, they said, to commit a robbery. Rather, they

went to verify their suspicions that Thomas was an informer.

The defense was complex and risky: On one hand, it was argued there was no completed conspiracy to rob, and on the other that the completed elements of the crime (i.e., possession of weapons) were the responsibility of Thomas. In other words, the defendants had been entrapped. Without Thomas no crime would ever have been committed.

All of the defendants were acquitted of the charge of conspiracy to rob. All were convicted of possession of a loaded sawed-off shotgun. Cain was sentenced to five years' probation; West to one to three years in prison; DeLeon to seven years in

*Cont'd p. 5, col. 1*

Cont'd from page 1

prison. The convictions are now being appealed on the issue, among others, of whether the defendants could be convicted of possessing a shotgun that they didn't know was in the car and/or that had been planted by the police.

### Infiltrators

An *agent provocateur* such as Wilbert Thomas differs from an infiltrator in that an infiltrator gains the confidence of the members of an organization in order to spy on them and report on their criminal activity, while an *agent provocateur* infiltrates for the specific purpose of fomenting criminal activity among the members of the organization so he can then arrest them.

Provocation by government agents is relatively new in the United States, but it has a long and disreputable history in Europe, beginning with its use as an espionage tool in international politics — the faking of an incident in order to justify military aggression. One of the reasons provocation was particularly effective in international politics was, simply, xenophobia — the fact that people are prone to expect the worst from foreigners while they are more rational when it comes to judging the actions of their compatriots. Further, the citizens of most countries tend to be more concerned about due process at home than they are for alleged conspirators from abroad, and there are no effective tribunals in which international disputes involving conspiracy can be tried. As the idea that domestic radical organizations are controlled by foreign subversives has gained acceptance, the use of *agents provocateurs* at home has become more common.

Provocation has several purposes. Its most obvious purpose is the elimination of people known to be hostile to the government but who have not taken any concrete actions for which they can be arrested.

### Theory

The government's theory is that if an individual or individuals *want* to commit a crime, they are as guilty as if they had committed it. If the government agent does not provide them with the means of acting

on their desires, they will find some other means of carrying them out. Therefore, the agent is justified in provoking them into action. Provocation is a means of catching enemies before they become dangerous.

An example of this reasoning was the case of Shirley Sutherland and Donald Freed, who were arrested in Los Angeles in 1969 for violating a federal statute which forbids the transfer of hand grenades without having filled out a federal registration form. The grenades, however, had been delivered to Freed by a government agent, James Jarrett. U.S. District Judge Ferguson was disturbed by this fact and stated to the U.S. Attorney: "The only reason you gave him the hand grenades was so that Freed could be arrested and charged with a Federal offense."

The U.S. Attorney replied, "Or in a sense, your Honor, we only gave him what he wanted . . . . [T]he man did have a propensity to want to acquire them . . . . [W]e merely gave him the opportunity under a control situation, where we could minimize the danger to society and, we believe, bring the man to justice for the criminal activities that he desired to do."

The fact that he might not actually have done them was ignored by the government.



Wide World Photo

Tommy the Traveler

## Propaganda

Another purpose of provocation is the justification of further repression by the government against alleged subversives — in short, propaganda. As important as eliminating enemies is the manipulation of public opinion in favor of the government.

J. Edgar Hoover was a master of this use of provocation. For example, in 1940, just as a request for increased funds for the FBI was before Congress, Hoover announced that 17 members of a Christian Front Sports Club had been arrested in Brooklyn for conspiracy to overthrow the government, starting with plans to blow up bridges and power plants. At their trial a film was produced showing the defendants performing military maneuvers. On cross-examination, however, it was revealed that the ammunition used in the film had been provided by a government agent. The case was finally dismissed, but Congress granted the FBI a 33 per cent increase in appropriations so it could continue to combat subversion.

More recently Hoover, who had been under increasing attack for the FBI's surveillance of political dissidents, revealed "a plot to kidnap a high government official" in the Berrigan case. The case was entirely based upon the actions of Boyd Douglas, a government agent without whom it would have been impossible for Father Berrigan, who was in prison, to correspond with his "conspirators."

In both instances Hoover not only sought to eliminate subversives but also to convince Congress and the public to support the FBI in its repressive activities. In the case of Cain, DeLeon and West, Wilbert Thomas and his superiors sought to convince the public that the Panthers were simply dangerous criminals and not out to serve the people as they claimed to be.

## Framing

When the government is willing to go to such lengths to entrap its enemies, the question is raised if it would not be easier simply to manufacture evidence and frame them rather than lure them into actually committing crimes. There are several reasons why it is more effective for an agent to manipulate a real revolutionary impulse into action than for him to fake the entire case.

Most important is that in a situation where there is at least a pretense of a fair trial, it is difficult to manufacture a complicated conspiracy case that will be credible enough to stand up in court without some participation by the defendants. As long as the trial process retains an element of true inquiry, provocateurs are less risky than fakes.

An example of this was the trial in Cologne in 1852 of 11 Communists, including Karl Marx, on charges of conspiracy to overthrow the government based on faked records of conspiratorial meetings



Boyd Douglas

in England. The agent had made such a mess of the records that the dates conflicted and even initials of the members were wrong. The Communists were convicted, but the truth was published all over the world.

One question over which historians disagree is whether the *agent provocateur* is usually carrying out the explicit orders of his superiors or whether he is simply an over-zealous infiltrator. The two views are not totally contradictory, for in many cases the higher authorities will accept any story from an agent that fits the theory they wish to prove. Wilbert Thomas was directed from above, but at the same time he clearly tailored his René reports to reflect what he believed his superiors wanted to hear. Thus, an agent may be over-zealous; but since his superiors are aware of all of his actions, his zeal must fit into an existing policy.

## Tactics

There are a number of different kinds of provocation. One common variety is the production of "black propaganda," documents or incidents made to appear to emanate from the enemy but which in fact have been manufactured by the government precisely to make the enemy look bad. One of the most famous "black propaganda" documents was an alleged record of a Jewish plot to control the world which in fact had been written by the Russian secret police in the 1890's.

During the 19th century a device that was often used by the French was the staging of a fake riot or other violent act by supposed revolutionaries in order to frighten the bourgeoisie into supporting the government. Another common device is known as an "amalgam," that is, a plot involving real conspirators provoked by the police. One instance of an amalgam was a conspiracy to murder Napoleon which he himself arranged in order to arrest, in connection with the plot, a deputy who opposed him.

In the most common situation the agent turns real revolutionary sentiment into action. An early example of this occurred in England in 1817. Revolutionary committees had been formed in several towns. The groups had little contact with one another and were in search of leadership. The *agent provocateur* convinced each group that support was ready in London and that the other groups were strong and prepared to fight. Several uprisings then took place, and the rebels were surrounded and arrested by soldiers.

### Police Take-Over

One of the most complex uses of *agents provocateurs* was developed in imperial Russia, where police agents often held high positions in radical groups. The result was a

normative control of radical politics that came to be known as "police socialism," for finally the police had policy-making members in nearly all of the radical organizations. The co-optation of radical organizations has been common also in the United States, with the financing of various groups by the CIA. Otherwise most of the provocation that has gone on in this country has taken place on college campuses and in black communities, mainly in order to increase police surveillance of student and black militant groups.

By the means of long trials — an important aspect of provocation — the attempt has then been made to associate the defendants with violence in the mind of the public, thereby justifying increased repression.

The question ultimately raised by the government's use of *agents provocateurs* is why the government directs so much effort into provoking people to commit crimes so that they can be arrested instead of working to alleviate the conditions that have driven them to think of revolution as the only solution. This question was posed beautifully by Paul Chevigny in his summation at the end of Alfred Cain's trial. He said:

"Now, what was the job of the state under these conditions? Was it the job of this state under these conditions to go out to Brownsville and Bedford-Stuyvesant to try to better the conditions. Or was it the job of the state to send an ambitious young man, an ambitious young black man, out there and try to get these young men into jail, behind bars, so there wouldn't be any more Black Panther Party? So there wouldn't be any more protest out in Brownsville and Bedford-Stuyvesant? I ask you what was the proper job of the state? Was it to lead them on in this rotten scheme, to try to ruin their lives? Or was it to try to help them to realize their ideals? And when the state does this sort of thing, it says to the Black Panthers and it says to all the black people in America, and it says to you, ladies and gentlemen, if you want your rights too much, we're going to find some way to put you behind bars."

---

*Eve Cary is staff counsel for the New York CLU. This article is adapted from Paul Chevigny's Cops and Rebels, published in June by Pantheon Books.*

---