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Cops and Rebels: A Study of Provocation [Book Review]

Michael L. Perlin

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pressed reservation about talking because he was uncertain whether the alleged victim was alive or dead, and the sheriff who was present knew that the victim had died and said nothing, the suspect's confession was not rendered involuntary.

Said the court in this connection, "even in cases where actual deception has been made out, the resultant confession is not found to be involuntary." *People v. Solari*, 349 N.Y.S.2d 31 (App. Div. 3d Dep't 1973) [CLD § 1.00].

"I'm a man."

Prisoner's cry
in Attica courtyard.

Book Reviews

COPS AND REBELS: A STUDY OF PROVOCATION. By Paul Chevigny. Pantheon Books, Division of Random House, 201 E. 50th St., New York, N.Y. 10022. 1972. 332 pages. \$7.95.

The concept of a "political trial" has come to take on new meaning in post-Watts, post-Chicago, America. While once considered to encompass only those prosecutions based upon alleged violations of statutes charging specific political acts per se (sedition, treason, giving aid and comfort to the enemy), the concept has expanded to include not only a multitude of hybrid charges which include at least one political element (incitement to riot, destruction of government property, kidnapping), but also crimes which—on the surface, at least—might appear to be devoid of a political quantum (burglary, robbery, possession of weapons).¹ Of course, in each instance, the prosecution has the option of raising the political ante further by including a conspiracy above and beyond the substantive counts.²

One element of any political trial, practically a *fortiori*, is the special role of the government witness. This is especially so in the situation of the apparently nonpolitical crime (upon which prosecution scrutiny has now focused), in which the critical testimony comes from undercover agents who have at various times infiltrated a suspect organization, provoked the organization to illegal action, and even supplied organization members with contraband materiel.

In *Cops and Rebels*, Paul Chevigny, who is also author of *Police Power* and is staff attorney with the New York Civil Liberties Union, has attempted to place the political trial in perspective by presenting a case study of one trial in which he served as defense counsel for Alfred Cain, one of three Brooklyn Black Panthers charged in a multi-count indictment ranging from pos-

¹ Politics, needless to say, is in the eye of the beholder: Invariably, the prosecution will deny that any trial is political ("The defendant has simply violated a criminal statute"), whereas defense counsel will attempt to prove political *animus* for strategic legal reasons, e.g., to support either an equal protection or freedom of speech/association argument, as a basis for an affirmative entrapment defense, or, possibly, as a tactic by which to draw upon potential juror sympathy.

² Judge Learned Hand's wry observation that conspiracy is the "darling of the modern prosecutor's nursery," *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925), certainly is most apt in the political situation.

session of a lachrymating gas to attempted murder. He uses this trial—known popularly as the New Dunston Hotel case—as a paradigm of the “new” political trial, and focuses attention specifically on the issue of police provocation via the use of infiltrators and informants. Significantly, the book is subtitled, *A Study of Provocation*.

In addition to analyzing the specific trial in question, Chevigny recounts the circumstances of a prior (apparently unwarranted) misdemeanor conviction of his client, paints the man's family portrait, traces the ideological roots of the Black Panther Party, discusses the history of political banditry, presents a seminal history of political provocation in both Europe and the United States, theorizes on the true motivations of agents provocateur, and offers a host of both substantive and procedural legal reforms including, but not limited to, the law of constructive possession, the entrapment defense, need for an “infiltration warrant,” and scope of pretrial discovery. Although each section is important and intellectually absorbing (the case analysis of the New Dunston case is especially fascinating), the pastiche is, sadly, somewhat less than the sum of its parts.

Perhaps Chevigny has simply attempted a too-ambitious project for one volume. He states in the introduction that the book is “about how black people become revolutionaries, and how the police and the rest of society deal with them” (p. xv). Although this was his major thrust at the beginning and although it is the thread which ties the trial analysis with the family background and the political theory, however, by the book's conclusion it has been somewhat dissipated due to the crowding out of the major premises by the potpourri of history, sociology, and criminal procedure.

In the central case, Chevigny's client and two others were charged with conspiring to commit armed robberies to “obtain money to aid the Black Panther Party in accomplishing its objectives,” and with possession of many weapons. Chevigny's client was additionally charged with attempted murder. The full indictment, set out in Appendix B, is a dazzling *tour de force* of prosecutorial avarice, and belongs in an updated Criminal Procedure textbook.

The bulk of the state's case came from Wilbert Thomas, a member of the New York Police Department's Bureau of Special Services and a Panther infiltrator. Cross-examination of Thomas

clearly revealed that he alone was responsible for many of the overt acts charged in the conspiracy count.³ After one hung jury, the defendants were acquitted of the conspiracy charge and of some weapons charges, but all were convicted of possession of a shotgun. Two, including Cain, were additionally convicted of possession of a canister of red pepper spray. Cain was placed on five years' probation, whereas his codefendants received indeterminate jail terms of up to three and seven years, respectively.

Examining Thomas's role in this case, Chevigny posits what he perceives as the critical issue:

“whether provocative action typically originates at the top, from rulers or administrators and as an instrument of policy, or as a result of overzealousness on the part of the agent (without, or rather, regardless of) explicit directions from above.” [p. 224]

He immediately and emphatically resolves the question by stating that the provocateur's actions “MUST ultimately be rooted in policy” (emphasis in original, p. 225); even if the agent acts on his own, his zeal must be motivated by the conviction that he is telling his superiors what they want to hear because it harmonizes with policy.⁴ Beginning with the premise that provocation was originally a tool of international espionage, Chevigny analyzes French, British, Russian, American, and German history, and finds ample documented support for his theory. He further finds that the New Dunston case and Thomas's role is one additional step on this road; in political terms “a conflict between a force demanding change and a force resisting it by repression” (p. 306).

Chevigny goes beyond this basic argument, however, and it is perhaps the accumulation of unanswered questions, unconvincing arguments, and undeveloped (although always intriguing), theories which, to some extent, diminish the book's effectiveness. At the outset, even using solely the “substantial risk” entrapment test,⁵

³ The defense theory was startlingly risky and complex: a denial of any finished conspiracy (because of lack of specific plan), coupled with entrapment by Thomas as to the inchoate elements of the plan which might otherwise be proven.

⁴ Because of time of publication (early 1972), Chevigny could not have been aware that he was prestatating one of the critical issues of Watergate: Was the zeal of Dean, Haldeman, et al., purely their own, or was it in clear harmony with official policy? One suspects that Chevigny would opt for the latter explanation.

⁵ New York Penal Law § 40.05. Cf. *United States v. Russell*, 93 S. Ct. 1637 (1973), holding that the entrapment defense does not come within the due process clause.

Chevigny does not persuade as to his client's innocence on all counts.⁶ Although he is convinced that jury-justice is fairer than judge-justice, at least in New York City, his convictions are not equally applicable in a nonmetropolitan center where venire panels have few blacks, few youths, and few political radicals. Nor would his conviction be applicable in a jurisdiction in which all *voir dire* questioning is done by the court.⁷ Certainly, his post-trial explanation as to why he limited his objections to the district attorney's otherwise objectionable cross-examination of defense witnesses since he was sure the jury would "see and resent the political thrust of the question" (p. 187), is nothing less than astonishing. It is true that sophisticated juries are becoming more wary of the informer in the political trial vis-à-vis antiwar activity and draft board raids.⁸ However, to imply from this wariness a public acceptance, condonation, or even rationalization of black militancy seems pure overreach. The existence of deep-seeded covert and occasionally overt racism in the middle-class, middle-American juror has been demonstrated to criminal trial attorneys.

Chevigny briefly and incompletely theorizes on the psychological background of the provocateur. He paints a picture, using Thomas as the model, of a power-hungry, fantasy-laden neurotic whose self-image is the essential violence-oriented, woman-conquering male figure.⁹ Similarly, his analysis of the attitude of the Panthers towards sociopolitical banditry treats too briefly an important, often muddled issue.¹⁰

⁶ Although it has been argued elsewhere that the verdict resulted from "the good old American spirit of pragmatic compromise," Widmer, "Who Are the Criminal Conspirators," *Village Voice*, Vol. XVIII, no. 7, p. 20 (Feb. 15, 1973), and although the jury clearly was perplexed as to the judge's somewhat ambiguous charge, pp. 203-211, even from the state of the case as Chevigny presents it, the verdict does not appear either unreasonable or implausible.

⁷ Cf. *State v. Manley*, 54 N.J. 259, 255 A.2d 193 (Sup. Ct. 1969).

⁸ Both the Harrisburg Berrigan trial and the Camden Draft Board trial were completed after publication. As this is being written, the Gainesville VVAW jury is beginning its deliberations.

Editor's Note: The Gainesville trial resulted in an acquittal on all counts for all the defendants.

⁹ Cf. Jagger, *Sympathy for the Devil* (1971).

¹⁰ The whole issue of placing into perspective gratuitous street crime and socially oriented, politically planned, criminal acts has never been given its proper

The quarrel in these instances is not with Chevigny's conclusions but with his decision to merely brush over major issues which obscure the main thrust of his work. Each of these afterthoughts is worthy of lengthy, deep analysis. In this context they are somewhat lost and the impact of the central thesis is blunted. The book is necessary, sympathetic, and important; it is unfortunate that its ultimate power is lessened by its overambitious scope.

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due attention. Compare, e.g., Gilbert, *Ten Blocks from the White House* 176, 181-182 (1968) (attempting to place localized specific-store looting into the proper socioeconomic framework) with Grogan, *Ringolevia* 447 (1972) (referring to an attempt by San Francisco Panthers to disavow indiscriminate criminal activity by so-called Paper Panthers). The author's comments in this regard are not altogether convincing.

THE BASIC PROCESSES OF CRIMINAL JUSTICE. By James L. LeGrande. Glencoe Press, Division of Benziger Bruce & Glencoe, Inc., Beverly Hills, Cal. 90211. 1973. 199 pages. \$8.95.

READINGS IN CRIMINAL JUSTICE. By Edward Eldefonso. Glencoe Press. 1973. 530 pages. \$8.95.

JUSTICE IS THE CRIME. By Lewis Katz. The Press of Case Western Reserve University, Quail Building, Cleveland, Ohio 44106. 1972. 386 pages. \$6.95.

Here are three more books on the criminal justice system. The literature during the past decade has expanded enormously, the list is ever growing, but much of it adds nothing in ideas.

The literature falls into a number of categories. Many authors have published basic introductory texts for junior colleges and four-year programs in law enforcement, corrections, and criminal justice. A second type of publication is the in-depth examination of a technical problem, such as the use of helicopters for traffic control, or of voice prints for identification. Another category of publication is concerned with the nature and purpose of criminal law, the role of the police in a democratic society, and similar concepts. A number of books have been designed for use by law schools, and contain the text of judicial decisions. And finally, there is the research publication which reports a documented study