

TRANSNATIONAL AND COMPARATIVE UNDERCOVER POLICING

By:

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-Undercover policing is a criminal investigative technique that is used by all legal systems and that tends to spill over national borders, to follow the movements of crime and organized criminals.

-But undercover policing is far more controversial in Europe than in the United States.

-Consequently, it is regulated differently, in ways that make it difficult for law enforcement agencies from different countries to cooperate in transnational criminal investigations.

-To account for these differences, it is important to understand the cultural, political, and legal contexts that influence regulation

-I have made a comparative study of the regulation of covert policing in the United States and Germany.

-German concerns about undercover policing, unlike American concerns, center

- on the participation of undercover agents in the crimes they investigate

- on privacy concerns that American jurisprudence tends to discount

- on historically motivated concerns with maintaining a division between intelligence work and law enforcement

-on the expectation that all police powers must be legislatively authorized and the expectation of tight procedural controls on all "sensitive" police powers, such as covert policing

--German regulation of undercover policing differs from U.S. regulation in that Germany

-demands advance prosecutorial and/or judicial authorization

-distinguishes between deep cover and shallow cover policing

-generates criticism for its failure to regulate informants through legislation

-allows informants and undercover agents to testify indirectly, through their handlers, and thus avoids direct confrontation and cross-examination of covert operatives at trial

--National attitudes towards a particular police practice depend very much on the frame of reference, particularly the other practices and historical experiences with which such police powers are being compared

Undercover policing troubles Germany insofar as

-Germany, unlike the U.S., prohibits the use of deception during official questioning. Undercover policing looks like a way around this ban.

-Germany makes it easier than the U.S. to conduct electronic surveillance, and can therefore afford to disfavor the use of police infiltrators

-Germany worries that the police will become too much like the Agency for the Protection of the Constitution (“APC”), which monitors domestic threats to national security.

-Germany compares covert policing to less intrusive police tactics and maintains the expectation that even the monitoring of individuals in public spaces requires judicial approval in certain circumstances; accordingly, Germany demands more elaborate procedural controls on covert policing.

-proactive police tactics like undercover policing interfere with statutorily mandated reactive responsibilities of the police

-Germany, unlike the U.S., recognizes no clear demarcation between the rights that suspects enjoy before they are formally charged with a crime and the rights that “attach” afterwards.

-Pressures to harmonize regulation in order to facilitate international cooperation reinforce trend to increase procedural regulation of undercover policing (e.g. through advance approval requirements) at the expense of substantive limits on covert tactics.