

PROACTIVE INVESTIGATIONS OF CORRUPTION: (UN)ETHICAL ASPECTS

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The paper is a part of a larger review of the most important ethical issues raised by the use of proactive methods to investigate corruption. In the literature, proactive investigations are widely agreed to be an effective method of law enforcement in general and anti-corruption in particular. However, their effectiveness is usually “counterbalanced” by their moral ambiguity. In the paper we address two ethical controversies associated with proactive investigations and try to understand whether it is justified to hold those who committed offences in sting operations morally responsible and subject to punishment.

Introduction

Limited observability of corruption offences is one of the widely recognized factors that substantially limit implementation of anti-corruption strategies in any country. Similar to other confrontationless crimes, corruption violations rarely become subject of complaints received by law-enforcement authorities. It happens due to a certain well known reasons (see e.g. Altman & Lee, 1983: 51-52). First, corruption relations frequently benefit all parties involved. In this case neither participant feels himself to be a victim, and consequently, nobody is interested to report the wrongdoing. Second, many types of corruption violations, such as embezzlement, have no individual victim: various categories of citizens or society in general are negatively affected that makes reporting a difficult task. Third, even when there are individual victims, e.g. in case of blackmail, they could be afraid to report, being aware of retaliative officials and thus choosing to follow the “rules of a game”. For all these reasons, it is questionable whether reactive investigations of corruption can be sufficiently effective. That is why law enforcement agencies need to pretend being a participant of corruption relations and to instigate would-be offenders to commit a crime, i.e. to use a method known as proactive investigation techniques.

There are many types of proactive investigations. In this paper we view proactive investigation as a process of creating a controllable and observable situation that provides a targeted official with an opportunity for improper or illegal conduct. Therefore, we analyze application of this technique not only by law enforcement agencies but also by private parties, e.g. journalists or NGOs. At the same time we do not discuss proactive investigations with respect to corporate employees. Such terms as proactive investigation techniques, sting operations, covert facilitation or undercover methods are herein used interchangeably.

In the literature, proactive investigations are widely agreed to be an effective method of law enforcement in general and anti-corruption in particular. It is believed that compared with traditional reactive methods sting operations provide better observability of corruption crimes, i.e. perform informational or investigatory function (Hay, 2005: 3). Undercover methods also help to deter similar crimes, by making would-be offenders think that an apparently attractive criminal opportunity could in fact be a trap, i.e. perform behavioral function. Additionally, sting

operations offer a possibility to achieve another goal, not often explicitly articulated, but nonetheless existing in reality. This goal is to hold a public official to punishment when he is known to be involved in criminal activity, but there is not enough factual information to support the case in court.

However, effectiveness of covert facilitation is “counterbalanced” by its moral ambiguity. It is largely due to ethical problems associated with sting operations that many national governments are reluctant to expand the use of proactive investigation techniques. For example, as Jacqueline E. Ross puts it, “the prevalence of undercover methods in the United States stands in stark contrast to the deeply ingrained distaste, even abhorrence, for such tactics in Western Europe (Ross, 2002:1504)”.

The ambiguous attitude towards proactive investigations is brightly manifested by the fact that many countries try to impose at least some constraints on covert police methods and to prevent entrapment - improper facilitation or inducement of an offence for the purpose of obtaining evidence for its prosecution (Colvin, 2002: 227). Bronitt (2004: 38) notes, that “entrapment is not a legal term of art”. Thus the definitions as well as specific remedies for entrapment could be rather different. As is well known, in the United States entrapment is a criminal defense implemented in accordance with either subjective or objective approach. Other nations do not recognize entrapment as a defense to criminal charges. However, they still try to restrict the use of illicit undercover techniques through the legislative regulation or, more frequently, through the judicial power to exclude the evidence illegally or improperly obtained or to stay the proceedings for abuse of process.

A growing body of literature is devoted to entrapment and especially to its legal issues. For the most part the authors base their research on legislation, including case law, that is in force in a country under review. Obviously, within such an approach ethical issues of proactive investigations are frequently touched upon, though usually not as a main theme but rather as philosophical background for those specific legal and procedural controversies that are of interest to an author.

We wish to offer a slightly different approach. We would like to return to the starting point and to look at the problem with the eyes of the hypothetical “initial legislator” who develops the proactive investigations policy “from scratch”, and who cannot rely on any tradition of entrapment regulation. For such an “initial legislator” it is important to know all significant ethical claims that can be lodged against proactive investigations, i.e. the fundamental reasons for limiting the use of all covert methods or at least some of them. This paper constitutes a part of a larger study in which we try to provide a consistent review of the most important ethical issues raised by the use of proactive investigation techniques.

The larger study tries to fulfill two main tasks. First, we look at those ethical issues that haunt all proactive investigations of corruption regardless of their specific features. Such fundamental issues are of great importance as they question eligibility of undercover method in general. At

the same time, as we will try to show, none of these problems has univocal and straightforward solution. When trying to solve these problems we find ourselves in a situation of moral uncertainty and have to make a choice between competing but incomparable values. Second, we discuss those ethical issues that appear if we deem covert tactics *generally* appropriate, but try to rank different types of proactive investigations from an ethical point of view. In other words we try to find out what characteristics a proactive investigation should have in order to spawn as few ethical problems as possible.

It is obvious that in order to develop consistent proactive investigation policy the “initial legislator” must not limit himself to the analysis of ethical aspects. He must as well pay attention to the other side of “effectiveness-ethics dichotomy”. He must understand if there is any evidence that proactive investigations are efficient to probe corruption offences and then rank different types of sting operations according to their efficiency (for such an economic analysis of entrapment doctrine see e.g. Hay, 2005; McAdams, 2005; Miceli, 2007). He must also take into consideration all possible ways to use the undercover technique for personal gain, including its abuse by law enforcement officials or other parties. Finally, he must take into account financial and managerial aspects of proactive investigations.

All these critical questions are outside the scope of our study, and therefore its conclusions cannot on their own serve as a basis for policy development in the field of proactive investigations. Moreover, the fact that we do not provide for any discussion of covert tactics effectiveness, also impacts analysis of ethical problems. As long as effectiveness is tied to utilitarianism, by not debating if proactive investigations are good for society, we address ethics rather from deontological point of view (for discussion of entrapment and utilitarianism see e.g. Dilof, 2004: 856-863).

In this paper, we address only two fundamental questions concerning ethical aspects of proactive investigations of corruption. Both of them ask, though from different standpoints, whether it is justified to hold those who committed offences in sting operations morally responsible and subject to punishment. In our opinion, the issue of blameworthiness is among the most important for making a decision on acceptability of undercover methods. We much agree with Seidman that “entrapment doctrine ... is ... representative of the adaptive mechanisms to which we have resorted in order to maintain a criminal justice system without an adequate theory of blame”.

Manufacturing a crime

Unlike the reactive investigations proactive techniques get law enforcement agencies or any other investigators involved in manufacturing a crime. It is true for any type of covert operations though the nature and extent of such involvement may vary. In general, there are four typical ways for undercover agents to engage in crime creation.

First, an investigator can implant the very idea of a crime in the mind of targeted official. From our point of view such instigation tactics are rather hypothetical, however in theory an undercover agent can “open the eyes” of a “naïve” public official, e.g. a rookie, to a systemic corruption in his department as well as to existing possibilities of private gain. It is noteworthy that both subjective and objective approaches to entrapment defense in the United States presume that the target of proactive investigation that yielded to temptation and committed an offence could have been unwary innocent when he had been approached by undercover investigators.

Second, an investigator can induce or encourage a targeted official who knows about corruption opportunities, but hesitates to seize them for any reason, e.g. due to specific character traits. As Hughes (2006: 222) puts it, “to be tempted is to desire that which one regards as in some sense wrong or inappropriate”. An undercover agent can use a wide array of inducements to overcome the cognitive dissonance of the targeted official and make him break the law.

Third, an investigator can advise a targeted individual on the best ways to commit a crime. It is possible that a public official who is ready and willing to engage in corruption does not proceed only because he lacks relevant experience and does not know how to gain maximum profit and not to get caught. In this case the undercover agent may become a teacher for a would-be offender and instruct him in corruption techniques.

Finally, an investigator can provide a victim with artificial conditions that favor committing a crime. For example, insufficient surveillance and lax control are among the most important objective factors for corruption. In a sting operation an investigator may make police or any other control body turn a blind eye to the targeted official, so that he would not be stopped before the instigated crime is committed. An investigator can take things a step further and create grounds for blackmail, e.g. intentionally violate the safety rules, so that a corrupt city inspector could help to “fix” the problem, as it was the case within the “Mirage” investigation. An undercover agent can also secure demand for illegal services since according to Altman & Lee (1983: 62): “If I am a government official predisposed to accept a bribe, the willingness of others to pay one is an objective condition without which it is impossible for me to perform the criminal act of taking a bribe”.

The former two methods of crime creation are based on manipulation with the intentions and desires. The latter two methods are concerned rather with technical assistance. In the literature, the subjective factors usually attract more attention. However, it is obvious that many crimes

never happen because potential law-breakers find themselves in situations inappropriate for committing crimes. Thus in our opinion creating environment convenient for improper acts is no less manufacturing a crime than influencing a mind of a would-be offender.

The fact that a crime is engineered, at least partly, not by an official himself, but by an undercover agent raises important ethical questions. If it is an investigator who implants targeted official with an idea of a crime, puts him under temptation and “helps” him to overcome the cognitive dissonance, informs him on the best ways to implement the criminal intent, and creates environment convenient for corruption, then what role does the official play in the crime he commits? Is it fair to hold an offender that “merely” fallen prey to temptation and an offender that designed and implemented a crime by himself equally blameworthy? And finally, should we attribute moral responsibility to a person, when a crime he committed was almost entirely manufactured by an investigator?

All those questions stem from intuitive assumption that a person should be hold blameworthy to the extent he participated in creation of an improper act. Or to put it otherwise: if those critically important conditions that having been absent would have render the crime impossible were secured not by an offender, then the offender’s contribution to the crime was not significant enough to hold him responsible for it. According to this approach the crime is fully intentional and a person who committed it is blameworthy only if he created the crime autonomously, i.e. his criminal intent was not implanted, he overcame the «volitional ambivalence” without interference of investigators, he by himself refused to accept any reasons for not committing a crime, etc. The more different the actual crime is from this perfectly autonomous model, the less blameworthy the offender is. We will call this argument against proactive investigations the “compromised autonomy” claim.

In order to analyze the validity of the “compromised autonomy” claim it is necessary to address fundamental issues of moral philosophy, e.g. on what grounds the moral responsibility is attributed or which exculpatory factors may be used by an offender. Obviously such discussion goes far beyond the scope of this paper. Thus here we would try only to sketch a possible line of argument.

According to Wallace (1994: 128), “the stance of holding someone to blame for an action is connected with a special class of demands, namely the moral obligations one accepts”. When someone acts in a way that violates the moral obligation we hold him to, we are subject to reactive emotions (e.g. resentment, indignation) that include a disposition to sanction improper behavior (ibid.: 72). However, it is not an improper act itself that invokes reactive emotions, but rather the belief that this act manifests a violation of a moral obligation.

A characteristic feature of moral obligations is that they are supported by reasons that may be expressed in the form of principles. This is not to say that, each time when we hold someone to moral obligation we analyze those moral principles that this obligation is grounded on.

Nevertheless, we believe that such a philosophical justification is available if necessary and that usually the acts we and others commit are based on some general principles.

The reasons expressed in moral principles are practical reasons, i.e. they are supposed to influence a choice between different possible actions. As Wallace (ibid.: 132) notes: “We make choices precisely on the basis of reasons we grasp and accept; it is only through the mediation of our choices that the reasons expressed in moral principles may influence <...> the bodily movements we make”. Thus, when a person is presented with various alternatives and decides to behave in a way that violates a moral obligation he is hold to, it is his choice that invokes resentment and is regarded as blameworthy. On the contrary, when someone behaves improperly in the absence of choice, we cannot say that he violated a moral obligation, but rather that his behavior is *similar to* that which manifests violation of a moral obligation. In this specific case, the belief that the improper act serves as evidence of a violation of the moral obligation is wrong, the reactive emotions are inappropriate and the person that committed the improper act should not be hold morally responsible.

It may be concluded from the Wallace’s line of argument, as we understand it, that the availability of a “relevant quality of choice” is the foremost criterion for attribution of moral responsibility. If this criterion is applied to an offence committed by a targeted official in a sting operation then the “compromised autonomy” claim appears to be invalid. It is so due to the fact that in most cases a targeted official has a real opportunity to make a final choice on whether to adhere to moral principles and fulfill his moral obligations or to yield to temptation and seize the corruption opportunity. The availability of such choice is by itself sufficient to hold the targeted official blameworthy.

When undercover agent instigates a crime he usually does nothing else than offer an illegal opportunity, i.e. he *creates* a situation of moral choice. An investigator can “infect” an official with criminal intent, but an official can always refuse to put it into practice. An investigator can manipulate the array of alternatives the targeted official has but he can hardly make the criminal alternative the only available. An investigator can increase the number and the strength of inducements but rarely can he make temptation irresistible. It is noteworthy that to support the “compromised autonomy” claim concepts as vague as “an irresistible temptation to accept a bribe” are sometimes being applied (Hughes, 2006: 224).

Weaknesses of “compromised autonomy” claim become even more obvious if we compare the instigation of an offence by an undercover agent with the solicitation of crime in real life. By such a comparison it is widely demonstrated in the literature that as for the methods of inducement as well as for its affects there is no significant difference between sting operation and criminal solicitation.

Indeed, most real crimes had temptation as a starting point. Moreover, many types of corruption crimes, such as bribery, are frequently preceded by a direct criminal offer. The methods of instigation a crime applied in real life are mostly similar to those four types of crime

manufacturing that we discussed earlier in this chapter. An accessory to the real crime may implant his target with a criminal intent; induce and encourage him to commit an offence, explain the most efficient ways to commit a crime and create necessary conditions for a crime attempt to be successful. A private entrapper is no less able than an undercover agent to approach a person that has not sought criminal opportunities before, or to use the specific vulnerabilities of his “target” to get what he wants from him (for detailed discussion of private entrapment see Hofmeyr, 2006; Yaffe, 2005).

However, in real life the fact that a crime was engineered by someone else does not exculpate the offender that fell prey to temptation and acted in an improper way. Lord Scarman provided a bright formula: “If a crime is brought about by the activities of someone who can be described as an agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty ... Incitement is no defence in law for the person incited to crime, even though the inciter is himself guilty of crime and may be far the more culpable. It would confuse the law and create unjust distinctions if incitement by a policeman or an official exculpated him whom they incited to commit a crime whereas incitement by others--perhaps exercising much greater influence--did not” (in Hofmeyr, 2006: 327).

This line of argument, from our point of view, invalidates the “compromised autonomy” claim. However, the nature of moral choice that an official makes being tempted and encouraged to commit a crime deserves further consideration for it contains certain specific characteristics that can still make attribution of moral responsibility problematic.

As long as we consider necessary to judge both targets of sting operations and those privately entrapped by the same criteria of blameworthiness, we should not only attribute the moral responsibility regardless of who the instigator of the crime is: an undercover agent or a private accessory to a crime. We should also recognize the same exculpatory factors to be in use for a real life offender and for an offender arrested in a sting operation.

Among the great mass of moral and legal excuses few seem to be appropriate for corruption offences. It is hardly possible to imagine that an official enters corruption relations instinctively, or being insane or for any other reason not giving account of his actions. However, there are still excuses that can be relevant for corruption cases. The characteristic feature of such excuses is that by applying them we admit that an offender acted intentionally and that he did something “that to all appearances violated the moral obligation” (Wallace, 1994: 144). Nevertheless we still do not hold him morally responsible.

One of possible arguments behind this excuse is based on specific nature of a choice a person makes being induced to commit a crime. Wallace (ibid.) describes it formally: “Moral obligations rule out doing actions of kind *x* as a result of the choice to do something of kind *x*. Excuses [being described] ... function by showing agent *s*’s doing *x* actually expressed a different kind of motive: not merely a choice to do *x*, but a choice to do *x*-rather-than-*y*, or *x*-in-

order-to-avoid- y ". We agree with Wallace that the situation of x -rather-than- y choice is typical of many crimes. Moreover as far as corruption offences are concerned, such a situation appears to be paradigmatic. Thus it is not the situation of x -rather-than- y choice by itself that the described excuses are grounded on, but rather the comparative "moral value" of x and y .

When some private interests are regarded by society to be so significant that to protect them it is allowed to violate moral obligations and even to bring harm to other publicly protected interests, then an excuse can be applied to those who sacrificed the less significant interests for the sake of more significant ones. For example, a public official may have private interests that are agreed to be more important than his official duties. Thus when he violates his official duties in order to protect the more important interests he should not be held to moral responsibility.

A typical example of such an excuse is a duress defense. In many cultures "threats of death or serious injury to the person encouraged to commit a crime or to his relatives are widely recognized as an excuse from legal or moral responsibility" (Dilof, 2004: 849). Obviously, duress defense may be relevant for corruption offences. Both in real life and in sting operations inducements are frequently mixed with threats. Thus in both cases a person forced to commit a crime is exculpated under the duress defense sending undercover agents a signal not to use threats of bodily harm as an inducement.

The duress defense may seem uncontroversial example of excuse. However, not in every culture and not under any circumstances threats of death or injury are acknowledged to be a reason for violation of official duties. This problem becomes even more evident when we try to decide whether it is only threats to life and personal health that can be basis for excuse or threats to other interests, at least some of them, may also be an exculpatory factor. Is it justified for example not to hold an official blameworthy when he commits a corruption offence under a threat to be dismissed? Or this risk is not significant enough?

It would be possible to answer this and similar questions if there were an agreement in society on hierarchy of publicly protected interests. For example, in this hierarchy it could be clearly stated that avoiding death threat and bodily harm is more significant while avoiding threats to economic and career interests is less significant than fulfilling official duties. The hierarchy would help to compare the moral value of different alternatives an official considers when making a choice whether to commit a crime or not. It is obvious however that a concept of interests' hierarchy is purely hypothetical. In the literature and even in the case law such terms as "significant offer" or "an offer average man is not able to resist" are sometimes used, but their definitions differ greatly.

Thus it is not due to the lack of autonomous choice that crime manufacturing, including sting operations, is a morally ambiguous method, but rather due to the nature of this choice and the moral uncertainty it precludes. If there were in real life a set of criteria to compare the value of competing interests an attribution of moral responsibility would become an easier task. A person choosing to protect the interest of greater value would behave in a way agreed within a society

and thus would not be held blameworthy. Consequently, undercover agents would be able to understand what interests a society regards as more significant than official duties and would not offer the inducements threatening those interests. However, as far as the interests' hierarchy is absent the answer to the question what inducements should be regarded as exculpatory factors appears to be not a result of moral choice, but rather a manifestation of personal attitudes and presuppositions.

Punishment for dangerousness

In the previous part of the paper we focused on how the fact that a crime is engineered by an investigator affects the blameworthiness of a targeted official. However, it is possible to look at the issue of moral responsibility from another point of view. In many cases, those arrested in sting operations are subject to some form of punishment. But what exactly do we punish a targeted official for?

The obvious answer to this question could be that the official caught up in the proactive investigation is punished for violating the standards of conduct prescribed by laws and regulations. According to this point of view the very fact that the official's behavior contradicts generally accepted principle of legality - the principle that orders the official to act in accordance with the law - is enough to punish him. This position is widely shared, e.g., according to Yaffe (2005: 14), "those defendants whose entrapment defenses are denied on the grounds that they were predisposed, by the standards of the Subjective Test, are not being convicted for what they might have done, but for what they did in fact do".

However, this explanation seems to be oversimplistic. In particular, it does not help to understand whether the improper act committed by an accused official in artificial and controlled environment of a sting operation can be equaled to the same improper act committed in real life. Or in other words: whether these two types of improper behavior share the characteristics that make both of them punishable to the same extent. In order to solve the problem of comparability one will have to touch upon the fundamental issues of legal philosophy, e.g. why moral responsibility is attributed to those who break or attempt to break the law. If public concerns that underpin the principle of legality are identified it can be further determined if those concerns are relevant for improper acts committed in sting operations.

One of the common viewpoints on why a breach of law is wrong and subject to moral responsibility is based on the assumption that if something is prohibited by law it is because it brings harm to the interests protected by society. For example, an inspector accepting a bribe from owners of a pharmaceutical plant and turning a blind eye to a breach of quality control rules brings harm to customers' health. But can we say that harmfulness is also a typical of wrongful acts performed during sting operations? Hardly so. According to Dillof (2004: 843), in situation of undercover operation "the government inevitably will step in to make the arrest before the

crime can be consummated. Thus, in contrast to cases of private entrapment, there is virtually no chance that any social interest will be harmed”.

It is especially true with respect to such widespread corruption offence as bribe-taking. In real life a corrupted official accepts a bribe or a promise of a bribe and then acts as expected by a bribe-giver. In such situation a bribe-taking is a crime in itself, however, the harm is inflicted not by acceptance of the bribe but by the actions that an official takes in exchange for a bribe. Unlike in a real life situation, in a sting operation a bribe-giver does not need actual harm to be brought for it is merely agreement to take a bribe, and not a harmful act, that will be enough to bring charges against an offender.

If we agree that harm that has been actually brought is a main criterion against which the propriety of an act is measured, then we can hardly attribute moral responsibility to the offenders in sting operations for their behavior brings no actual harm. However, it is obvious that we hold a person responsible not only for the harm he has brought to interests a society seeks to protect, but also for merely an attempt to bring such harm. It is evidenced by the widespread criminalization of attempted crimes. The fact that the attempt was unsuccessful may be recognized or not recognized as a mitigating factor, but for us the general principle is more important: it is not only an offender bringing actual harm that is subject to responsibility, but also an offender attempting to bring harm.

Shavell (1986: 435) gives a simple - yet operable - definition of a “criminal attempt” as a potentially harmful act that does not happen to result in harm. The harmlessness of an attempt is due to many reasons, such as a poor design of a crime or an influence of external factors beyond the offender’s control. There is a vast body of literature devoted to punishment of criminal attempts (e.g. Davis, 1986; Shavell, 1990; Adams, 1998). Unfortunately, this literature has been scarcely used in the analysis of anticorruption proactive investigations (see e.g. Carlon, 2007: 1098). Filling this methodological gap can yield interesting results for an improper act committed by a targeted official within a proactive investigation is in many important ways similar to a criminal attempt.

To be more precise, an improper act committed in a sting operation can be regarded as a specific type of criminal attempts, namely the impossible attempts. The characteristic feature of impossible attempts is that they not merely failed, but had no chances to succeed due to circumstances that were unknown to an offender when he committed an improper act (see e.g. Westen, 2008; Christie, 2009). For an official that committed an offence within a proactive investigation of corruption such a specific circumstance is that the situation he acted in was engineered and controlled by an investigator, that could stop operation before the actual harm would be brought. Thus, in order to understand why we hold an official arrested in a sting operation subject to punishment we need to clarify why a person can be punished for impossible attempt.

This question is really puzzling. A vast and growing body of literature is devoted to the issue of impossible attempts. The topic is widely recognized as highly complicated and lacking ready-to-use solutions. In what follows we will try to analyze one of possible answers to this question.

First and foremost, a person making an impossible criminal attempt, as well as a person committing a completed crime, does an improper act that manifests violation of moral obligation. Earlier in this paper we mentioned that such a violation invokes reactive emotions and makes us hold an offender to moral responsibility. However, a further question is still possible: why does a violation of moral obligation invoke reactive emotions? One of possible explanations is that we perceive a violation of moral obligation as wrongful, because we are likely to associate it with a *threat* of bringing harm to publicly protected interests. As Christie (2008: 159) puts it, “the accused has shown both his willingness to commit a harmful act, and that he had the potential to commit real harm, had the world turned according to his perceptions. Thus, the argument runs, it is necessary to punish him for his attempt because, if we do not, he will simply try harder next time, armed with the accurate knowledge he has gained in the process”.

A person that under certain circumstances violates a moral obligation either, in case of successful attempt, brings actual harm or, in case of unsuccessful attempt, proves his readiness to bring harm if those circumstances that stopped him are eliminated. And the more likely the impeding factors are to be absent, the more likely we are to hold an offender blameworthy and subject to punishment. According to Westen (2008: 525), “when we punish persons for attempt and for crimes of ulterior intent, we are fundamentally punishing them not—or, at least, not only—for what they have done, but for what we believe they would have done under counterfactual circumstances that we fear could have obtained”.

As far as corruption offences committed in sting operations are concerned, an offender by his improper act manifested readiness or even willingness to sacrifice the public interests for his private gain. In this case the impeding factor that rendered the harm impossible was that the circumstances of the crime were created and controlled by an undercover agent. Consequently, the counterfactual condition is obtained when the similar circumstances “naturally” occur without interference of investigators, i.e. these circumstances occur in real life. The more likely such circumstances are to occur in real life, the more likely the targeted official is to put his corruptibility into practice and infringe publicly protected interests. That is why he is held to moral responsibility. Thus when a person is punished for impossibility attempt, including the offence committed in sting operation, he is punished for violation of a moral obligation manifested in a wrongful act and threatening to infringe the interests protected by society.

It is worth noting however that justifiability of punishing for threat or dangerousness – e.g. for corruptibility – is still a matter of debate for many scholars (e.g. Braithwaite, 1987: 13-14). Here we would like to offer a somewhat new perspective on this old problem that can add to the existing discussion. From our point of view, justifiability of punishment for dangerousness depends to a certain extent on what approach to ethics management we adhere to.

In the modern administrative ethics one of the most popular concepts is the compliance-integrity continuum (see e.g. OECD, 1996; Maesshalck, 2005). This concept implies that the public service ethics reforms in different countries are attracted to either of the two types of ethics management: integrity-based approach or compliance-based approach. Within the integrity-based approach “the focus would be on what should be achieved rather than what behavior should be avoided”. On the contrary the compliance-based approach “focuses on strict compliance with administrative procedures and detailed rules (often codified in legislation) which define what public servants should do and how” (OECD, 1996: 59). The choice of management tools within each approach is grounded on certain philosophical assumptions about the human nature as well as on specific ideal of ethical organization.

The cornerstone of the integrity-based approach is the belief that not all human beings and not all public officials are inclined to break the ethical standards intentionally for the sake of self-interest. It is this denial of fundamental human fallibility that gives hopes to creation of ethical public service.

In the framework of the integrity-based approach an organization can be regarded as ethical only when every member of this organization is ethical. The ethical community of unethical individuals is held as an oxymoron. Thus, the ultimate goal of ethics management is to cultivate virtue, to bring up truly ethical individuals. Such a truly ethical individual always behaves in accordance with basic moral principles regardless of any external factors. A citation of Melvin Weinber – an undercover agent in “Abscam” – perfectly illustrates this approach: “A guy's either a crook or he isn't. If he ain't a crook, he ain't gonna do anything illegal no matter what I offer him or what I tell him to do”. Consequently, unethical officials - those ready and willing to get involved in corruption - are “rotten apples”. They should be detected and either rehabilitated or removed from the public service.

Within this approach undercover operations appear to be justified. They are used as a convenient method to detect corruptible officials without bringing actual harm to society. Punishment for corruptibility, at least in the form of dismissal of those who committed instigated crimes, is also consistent with the urge for integrity. Without removing “rotten apples” it would be impossible to create an ethical organization as far as we understand it as a community of ethical people.

Unlike the integrity based approach the compliance based approach presumes that public officials – at least most of them – are prone to corruption. They are likely to put their interests ahead of the public needs if certain conditions are met, in particular if a balance of possible gains and risks to be caught and punished seems promising to would-be offenders. The hardest version of this approach views «public officials, politicians, managers and rank-and-file personnel as seekers of corrupt opportunities. <...> Corruption is the norm and all public employees are suspect” (Anechiarico & Jacobs, 1996: 26).

Due to these fundamental deficiencies of human nature the compliance-based approach views the professional community of virtuous public servants as an ideal that cannot be put into practice.

However, it does not mean that all ethics reforms are doomed to failure. Though it seems unrealistic to make all public officials virtuous, it may be enough to secure their ethical behavior, regardless of whether they share the fundamental values and principles.

It can be done by manipulating the external factors that influence the official's decision whether to get involved in corrupt activity or not. It is important first to eliminate opportunities for corruption, and second, if such opportunities still occur, to impede improper conduct to the greatest possible extent. The objective factors that promote corruption are to be eliminated, while those that promote good conduct should be developed. Thus, the ultimate goal of the compliance-based ethics management is not to bring up the virtuous public servants, but rather to design the perfect environment that will make even unethical people behave as though they were ethical. It is worth noting that most modern anti-corruption tools - various surveillance technologies, detailed standards of conduct and administrative procedures, anti-corruption assessment of legislation, etc. - are based on compliance based approach.

For us it is particularly important that within the compliance based approach both proactive techniques and attribution of moral responsibility to those who demonstrated their corruptibility seem to be problematic. First, as long as sting operations include encouragement of misbehavior they come at odds with the basic strategy of compliance-based ethics management. While the basic strategy is focused on minimization of moral choice, an undercover agent deliberately offers improper conduct as an available and profitable alternative. While the basic strategy tries to put as many barriers as possible on the way of improper conduct, an undercover agent removes these barriers and creates comfortable conditions for committing a crime. While the basic strategy eliminates corruption opportunities and thus makes more likely that an official never meets circumstances convenient for corruption, an undercover agent intentionally provides for corruption opportunities and thus deprives targeted officials of their chances for moral luck. And finally, while the basic strategy taking into consideration that human nature is fundamentally fallible and corrupt tries to save an official from himself – tries to protect him from being tempted, yielding to temptation and being punished – an undercover agent exploit human corruptibility and thus invites an official “to a beheading”.

Within the compliance-based approach punishment for corruptibility also appears to be rather incoherent. In the integrity paradigm punishment for corruptibility is a useful tool for getting rid of the “rotten apples” and creating community of ethical public officials. However, in compliance paradigm corruptibility is presumed to be an inherent characteristic feature of most, if not all, public officials thus, the goal to create an ethical organization consisting of ethical members is regarded as an illusion and the strategy of eliminating corruptible officials means nothing less than getting rid of the entire public service.

Proactive investigation techniques and punishment for corruptibility can be justified only as another external factor impeding the improper conduct, i.e. as one of the wide array of manipulative techniques that make unethical individuals behave as though they were ethical. In

the introduction we mentioned that one of the most important functions of undercover operations is to deter crime by making would-be offenders think that an apparently attractive criminal opportunity could in fact be a trap. However, the use of punishment only for deterrence also brings about significant ethical controversies.

The deterrence function is characteristic of any punishment, but usually a deterrence element exists beside the retributivist element. In most cases we punish a person *for* something and *pari passu* for the sake of something. No doubt that within punishment for corruptibility a retributivist element can also be identified: as long as we consider corruptibility to be blameworthy the punishment for manifested corruptibility is obviously a retribution or desert. However, as far as compliance-based approach is concerned it is no less obvious that retributivism is not a main driving force behind the punishment for corruptibility.

If we strictly followed the necessity of desert principle we would have to put under temptation and then punish every corruptible official. Within the compliance paradigm it means that we would have to punish almost all public servants. The fact that we refuse to do it, but rather punish *selectively* signifies that we do not urge to detect and punish all would-be offenders for we are ready to tolerate the imperfect nature and corruptible mind. Given the fact that within compliance-based approach most officials deserve punishment for corruptibility the retribution turns to be not very significant and it is the manipulative potential of punishment that comes to the fore. Thus within the compliance paradigm punishment for corruptibility is “punishment-for-the-sake-of-smth” rather than “punishment-for-smth”. This fact relates proactive investigations and punishment for corruptibility to such a morally ambiguous practice as decimation. The question whether such techniques are acceptable is in our opinion another example of moral uncertainty and the answer to this question is largely a matter of personal choice between utilitarian and deontological approaches.

There are also other important ethical problems that stem from the abovementioned “selectivity” of proactive techniques and the use of punishment primarily for deterrence. When we punish separate members for those qualities, e.g. corruptibility, that are inherent in the general populace and justify it by the purpose of crime prevention, we do nothing less than sacrifice the few for the good of the many. Such an approach seems to be contradictory with a widely recognized principle of distributive justice “that, to the extent possible, the cost of an activity should be shared among all its beneficiaries” (Dillof, 2004: 831). Indeed, as long as we agree that proactive investigations deter public officials from crime and thus “protect” them from possible punishment costs of crime prevention should be distributed equally between all public officials but not be imposed on randomly selected “scapegoats”. Dillof (2004: 877 and further) analyzes at length violations of distributive justice principles in sting operations. He even regards the fundamental unfairness of selective approach as the main reason for entrapment defense.

Preliminary conclusions

Since this paper constitutes just a small part of the larger and more comprehensive research project any detailed conclusions would be premature. However, we still would like to draw attention to certain preliminary findings that may be useful for further study of ethical problems of proactive investigations.

First, for both ethical problems discussed here our analysis ended up with situations of moral uncertainty and precluded that to get out of ethical controversy a choice should be made between competing values and doctrines. It could be a choice between utilitarianism and deontology, or between integrity based and compliance based ethics management, or between different possible hierarchies of interests protected by society. In each case the choice can hardly be rationally proved and in the end appears to be merely a manifestation of personal will. Thus, in order to develop consistent proactive investigations policy a lawgiver will have to point out such moments of uncertainty and choose one of possible answers to “eternal” and rationally unsolvable questions.

Second, main tactical issues of sting operations - e.g. opportunity creation vs. offering a crime, target selection strategies, proper vs. improper inducements - are closely related to fundamental ethical problems of undercover techniques, including those discussed in this paper. The importance of these very issues for proactive investigations is better understood when more general ethical questions are analyzed. The choice of one specific tactical solution from wide array of alternatives is frequently explained by its ability to mitigate – at least partly - fundamental ethical problems. This finding may seem obvious – many authors when discussing tactical issues of sting operations analyze, sometimes at length, more general ethical controversies associated with undercover techniques. But in fact, rarely is it done on a systematic basis. As far as we know there have been no attempts in the literature to provide first a detailed review of the ethical problems that question the very acceptability of proactive investigations and then discuss the tactical issues that stem from them.

Third, the ethics of proactive investigations appears to be natural and promising topic for research within the administrative ethics field. However, for this research to be productive it is necessary to fill the gap that exists between administrative ethics and legal literature. Unfortunately, the highly relevant literature on legal and economic issues of entrapment as well as on more general problems of philosophy of law, e.g. on legal responsibility and criminal punishment, inchoate crimes, impossible attempts, has rarely been used by administrative ethics and anti-corruption scholars. In its turn the literature on criminal attempts usually neglects corruption offences: the examples and cases of attempted murder, theft or drugs smuggling have been employed much more often than the examples of attempted bribery. In our opinion, when discussing proactive investigations the convergence of administrative ethics and legal studies can yield interesting results both theoretical and practical.

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