Sting operations and entrapment defense in corruption behaviors

A systematic analysis between Italy, Europe, and the United States

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Abstract: The paper aims to provide an overview on sting operations facilitating crimes and entrapment defense, related to public corruption behaviors. A historiographic introduction will show how the U.S. system has managed corruption from the XVIII century; afterward, the focus will shift on the dogmatic profiles to clarify complications and practical functioning of entrapment defense as to the general theory of the offense. A reflection is also needed on whether or not the agent provocateur figure should be imported into European systems, displaying how case law from the Italian Supreme Court are inspired by the Grand Chamber of the European Court of Human Rights in Strasbourg: despite theoretical discrepancies, both these courts are in a constant, however silent, dialogue with the U.S. courts. The crucial issue is the analysis of legal principles pertinent to the agent provocateur and to the instigated individual in order to understand, from the European point of view, whether or not the former is indictable and, from the U.S. point of view, whether or not the latter is.

Keywords: Comparative criminal law; entrapment; agent provocateur; public corruption; extrema ratio principle.

1. *Introduction*

This paper aims to investigate the entrapment defense from the U.S. legal perspective, in relation to sting operations seeking to provoke conducts of corruption[1]. Afterwards, a reflection will lead to

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1. Related to bribery offenses see Stefano Fiore, Giuseppe Amarelli, *I delitti dei pubblici ufficiali contro la pubblica amministrazione* (Utet, Milan, 2018). In particular, about the Italian reforms: Sergio Seminara, *La riforma dei reati di corruzione e concussione come problema giuridico e culturale*, Dir. pen. proc. (2012); Roberto Garofoli, *La nuova disciplina dei reati contro la P.A.*, Dir. pen. cont. (2012); Gabriele Fornasari, *Il significato della riforma dei delitti di corruzione (e incidenze "minori" su altri delitti contro la P.A.)*, Giur. it. (2012).

See also: Marco Pelissero, *"Nuove" misure di contrasto alla corruzione?* Dir. pen. proc. (2015); Giovanni Domeniconi, *Alcune osservazioni in merito alle modifiche apportate dalla legge n. 69/2015 alla disciplina dei delitti dei pubblici ufficiali contro la pubblica amministrazione*, Dir. pen. cont. (2016); Vincenzo Mongillo, *Le riforme in materia di contrasto alla corruzione introdotte dalla legge n. 69 del 2015*, Dir. pen. cont. (2015); Tullio Padovani, *La spazzacorrotti. Riforma delle illusioni e illusioni della riforma*, 3 Arch. pen. (2018); Vincenzo Mongillo, *La legge "spazzacorrotti": ultimo approdo del diritto penale emergenziale nel cantiere permanente dell'anticorruzione*, 5 Dir. pen. cont. (2019). On the

exploring whether or not those legal solutions could apply to the Italian and European criminal systems[2].

One of the reasons this topic was selected, resides in a proposal supported by an Italian minor political movement in the XVII Italian Legislature, which suggested adopting the so-called "agent provocateur" as a tool for the prosecution of bribery: it inspired the legislator to draw bill n. 3 of 2019, in the following term.

In the U.S. criminal system, the character of agent provocateur has always played a crucial role in undercover operations, especially related to economic crimes; it would be otherwise hard to prove those kinds of conduct in court. Bribery is not the only crime in which agent provocateur and entrapment are critical: as a matter of fact, the U.S. legal system takes tremendous advantage of these legal instruments in different fields, such as drug-related offenses and organized crime.

This paper, however, will focus the reader's attention only on bribery. Firstly, due to the central role the agent provocateur has assumed in the Italian political debate, as a potential solution to corruptive behaviors. Although there is theoretically much to admire about this institution theoretically, as this paper will demonstrate, it is not a proper

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U.S. side, see: Kevin Abikoff, John Wood and Michael Huneke, *Anti-corruption law and compliance: guide to the FCPA and beyond* (Bloomberg BNA, Arlington, 2014); Neil J. Levine, *Bribery*, 26 American Criminal Law Review (1989); Ilissa B. Gold, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*, 36 Washington University Journal of Law & Policy (2011); Taylor Williams, *Criminal Law - A Formal Exercise of Governmental Corruption: Applying the Stream of Benefits Theory to the Federal Bribery Statute. McDonnell v. United States*, 40 UALR Law Review 161 (2017); Gregory M. Gilchrist, *Corruption Law After Mcdonnell: Not Dead Yet*, 165 Univ. Pa. Law Rev. Online 11 (2016); Patrick Fackrell, *The Uncertain Boundaries of Conspiracy under the Hobbs Act, 18 U.S.C. 1951 (a): Is Proof of an Overt Act Required*, 10 Idaho Critical Legal Studies Journal 34 (2017). Italian criminal literature on undercover operations and agents provocateurs has also been attentive, with references to manuals and various contributions. In particular, with regard to books, see: Enrico Califano, *L'agente provocatore* (Giuffrè, Milan, 1964); Cristina De Maglie, *L'agente provocatore: un'indagine dommatica e politico-criminale* (Giuffrè, Milan, 1991). On the other hand, on the U.S. side: Gary T. Marx, *Undercover: Police Surveillance In America*, (University of California Press, Berkeley, 1988); David C. Larson, *Undercover Operations: Law and Policy Guide* (LegalWorks, Eagan, 2014).

2. For a study of the U.S. criminal system from a comparative view see: Gabriele Fornasari, Antonia Menghini, *Percorsi europei di diritto penale* (Cedam, Padua, 2012).

way to pursue justice[3]. Furthermore, such behaviors also allow a clear understanding of entrapment defense and agent provocateur, legal arrangements that illustrate just how far the power of government to repress criminal conduct can extend. Ultimately, this analysis will consider how the U.S. legal system regulates the use of entrapment defense in bribery offenses. While it might be argued that general rules apply to different crimes, the truth is that bribery has a higher standard of triggering such defense and, consequently, it will be more difficult for those who are "entrapped" for bribery to benefit from it.

In the United States the invasive power of police forces in conducting sting operations is striking: there is a lack of regulation, and, in particular, there is a lack of willingness to overcome this legal vacuum. Agents can lead people to commit crimes under the name of public authority justification, and those actions have rarely brought them to trial.

As regards the structure of this paper, a legal-historical framework on corruption in the United States will be drawn. Starting with the years of independence from British colonialism and their dissolute morals, to *Citizens United* (2010), where freedom of expression ended up becoming a shield for "liberalized bribery" in financing political parties. This overview allows for contemplation on the vast difference in attitudes to corruption that the United States had at the beginning of their history as an independent country and in recent developments.

Afterwards, sting operations will be framed both from a dogmatic and functional perspective, paired with an analysis focusing on their impact on personal freedom.

Entrapment will be then scrutinized considering, on the one hand, the role of entrapment as to the general theory of the offense[4]; on the

3. On suggested ways to fight corruption, see the overview drawn by Andrea R. Castaldo, *La bellezza è negli occhi di chi guarda: diverse prospettive per combattere la corruzione* (Criminal Justice Network, 2020).

4. "General theory of the offense" here means an investigation connected to questions which are related to the analysis of the crime or to the crime in general. Franco Bricola, *Scritti di diritto penale* 542 edited by Stefano Canestrari, Alessandro Melchionda (Giuffrè, Milan, 1997) "we believe ... that the theory of the criminal offense, in order to be truly *general*, must try to identify those data that connote it in its globality with respect to the other types of offense".

other hand, it will explore the role of entrapment as to the general theory of the offense.

Finally, the essay will try to draw a few reflections on the potential applicability and consistency of the agent provocateur in the Italian and European legal systems: among others; the first thing to note is that, especially from a constitutional perspective, there are some limits that still appear hard to overcome.

2. *A summary of corruption's history in the United States: a legal perspective*

2.1. *The post-independence period*

It is necessary to begin with a historical framework showing how Americans have changed their cultural and legal approach to corruption from the eighteenth century to the present: from being considered a true *cultural anathema* in the post-colonial era, with *Citizens United* (2010) freedom of expression became a shield for corruption.

Pocock, a New Zealand historian regarded as one of the most prominent figures of contemporary thought, summarized the United States' independence from England as follows in a passage from a 1987 work: "legislative power exercised conjointly by kings, lords and commons is ... a reminder that the notion of separation of powers, though invented largely in England, could not be effective there and could be realized in the United States only after rejection of parliamentary government ..."[5]. Pocock reasons about the origins of common law and reflects on how the genesis of English history is strongly related to its law and politics.

The passage argues that the American Constitutional system is based on corruption and anti-corruption. Indeed, at the time of their declaration of independence from the Crown adopted in Philadelphia on July 4th 1776, Americans valued the English empire as corrupted. And it was conventional wisdom that an actual separation of powers could only be reached by rejecting the parliamentary form of

5. John Greville Agard Pocock, *Ancient constitution and the feudal law* 310, (Cambridge University Press, New York, 1987).

government[6]. As a matter of fact, the parliamentary principle was a source of corruption in England at the time. Someone fairly argued that American Revolution had not occurred in opposition to the English constitution but actually in favor of it[7].

The (newly) United States wanted to emphasize their detachment from Europe and England[8], and this remark is highlighted in Teachout's work, a masterpiece in the U.S. historical-legal literature on corruption. Teachout illustrates how, since the beginning, Americans have always been attentive to build their culture on anti-corruption values, by reevaluating what was considered lawful in Europe and importing those conducts to the U.S., labeling them as criminal[9]. At the time, western political traditions outside the U.S. were more concerned with concrete issues such as stability, anarchy, inequality, or violence, whereas the American political tradition has always been concerned with the virtues of love for the public and the dangers of unrestrained self-interest[10].

As a consequence, American culture has always rejected corrupted European customs. Indeed, from their point of view, those traditions used to be bounded with the governmental power's archetype more intent on individual self-interest rather than working for the common

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6. Ernst-Wolfgang Böckenförde, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita* at 148, edited by Geminello Preterossi (Laterza Rome-Bari 2010) "... Under a different constellation, but with similar result, came the creation of national identity in the United States. What prompted the citizens of the New England States to separate from the British crown and the Parliament in London and to proclaim their independence was, concretely and in their conscience, the assertion and defense of their rights and freedom, the foundation of which was seen in *common law* and *natural rights*".

7. Gordon Wood, *The creation of the American republic, 1776-1787*, at 10 (Omohundro Institute and University of North Carolina Press Chapel Hill 1969) "What made their revolution so unusual, for they revolted not against the English constitution but on behalf of it ...".

8. Zephyr Teachout, *Corruption in America. From Benjamin Franklin's Snuff Box to Citizens United* at 3 (Harvard University Press Cambridge 2014) "Disappointed with Britain and Europe, Americans felt the need to constitute a political society with civic virtue and a deep commitment to representative responsiveness at the core. They enlisted law to help them to do it, reclassifying noncorrupt, normal behaviors from Europe as corrupt behaviors in America. During the revolutionary period, the Americans not only created a new country but crafted a powerful political grammar".

9. *Ibid.*

10. *Id* at 4.

good. This is clearly referred to England firstly, because of the English colonialism and their powerful administration, but also to other continental countries, especially France, where power has always been associated with pomp.

To clarify the cultural aspect that has been entrenched in American society for a long time, the book reports an anecdote involving Benjamin Franklin (1706-1790). After years of diplomatic service, before leaving Paris in 1785, Louis XVI donated him a painting that represented himself, surrounded by 408 pure diamonds, set in two rows intertwined around the image, all scrupulously contained in a gold container. Even though Europeans were used to those expensive gifts when a diplomat reached the end of his career, from the U.S. perspective this custom was neither understandable nor acceptable: it appeared as a danger to democracy[11]. For this reason, Louis XVI's gift to Franklin was conditioned by Congress' approval under an anti-corruption law enacted at that time, which stated that every gift a diplomat received during his career was subjected to a parliamentary decision.

The Author explains how such high attention to corruption would have been the basis of every other democratic liberty since it would disrupt the social contract on which people delegate power to public officials[12].

11. *Id*. at 1-2 "Such a luxurious preset was perceived as having the potential to corrupt men like Franklin, and therefore it needed to be carefully managed. In Europe, in other words, the gift had positive associations of connection and graciousness; in the United States it had negative associations of inappropriate attachments and dependencies. The snuff box stood for friendship or old-world corruption, respect or bribery, depending on the perspective".

12. *Ibid*., "The argument of this book is that the gifts rule embodies a particularly demanding notion of corruption that survived through most of American legal history. This conception of corruption is at the foundation of the architecture of our freedoms".

2.2. *The impact of Citizens United on the 2000s*

Moving the attention to the early 2000s, the *Citizens United* case (2010)[13] describes the current cultural and political approach to corruption in the U.S.[14].

Citizens United is a conservative, nonprofit political organization, funded by donations from both private citizens and corporations. In 2008 – during the presidential campaign for the Democratic nomination, when New York Senator Hillary Clinton was running against Illinois Senator Barack Obama – Citizens United released a docufilm titled *Hillary: The Movie* and wanted to broadcast it on DirecTV to damage the image of the former First Lady who meant to run for the White House.

The issue was whether or not the act was legal since it would have entailed investing money to transmit the movie and advertise during its broadcasting for mere political reasons. It seemed to violate the Bipartisan Campaign Reform Act of 2002 (B.C.R.A.), specifically section §441(b). That section made it a felony[15] for any corporation to endorse the victory or defeat of a candidate or run a political campaign within thirty days before a local election or sixty days before a national election.

Nevertheless, Citizens United opposed the order to interrupt films and advertising the Federal Election Commission (also F.E.C.) had imposed. They considered section §441(b) unlawful because it violated the First Amendment, freedom of speech, whose interpretation and practical implications are related to article 21 of the Italian Constitution and article 10 of the European Convention on Human Rights.

In 2010 the Supreme Court was demanded to rule on that case, and the opinion recalled the whole First Amendment's history and its (very) few exceptions. To sum up, in a decision drafted by Justice

13. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

14. For an exemplary review on how the U.S. legal system approaches corruption, see: Gian Luigi Gatta, *La repressione della corruzione negli Stati Uniti: strategie politico-giudiziarie e crisi del principio di legalità*, 59 Riv. it. dir. proc. pen. 1287 ff. (2016).

15. Crimes in U.S. criminal law are divided into felonies, misdemeanors and infractions, unlike the Italian system where there is a bipartition between crimes and contraventions. On the subject, see Wayne R. LaFave, Austin W. Scott Jr., *Substantive Criminal Law* at 41 ff. (West Group, St. Paul 1986).

Kennedy, the Court overruled *Austin v. Michigan State Chamber of Commerce* (1990)[16], which had stated that the government could limit freedom of expression when there are "corrosive and distorting effects of immense aggregations of wealth"[17]. Thus, under the *stare decisis* theory[18], the Court reinstated the former judicial precedent *Bellotti v. Baird* (1979)[19]: the government was not allowed to set limits on freedom of expression, even for corporations.

The potential issue behind this ruling lies in the advantage big companies can take. It allows for a perverse mechanism in which, in order to obtain endorsements, politicians tend to promote legislative acts that benefit their benefactors, the companies. However, somebody reasonably stated "money isn't speech!"[20]. The answer to why should the First Amendment protect financial contributions to politics can be found in *Buckley v. Valeo* (1976)[21] where the Supreme Court ruled that investing money to express one's thoughts (including political positions) is equivalent to freely expressing ideas by speech and, therefore, the First Amendment applies. In this scenario, the Court comes up with a broad-spectrum or multi-purpose concept of freedom of speech: it means that every single human act linked to expressing opinions must be protected, falling under the First Amendment.

This argument suggests that even if the federal government did not restrict the right to practice whatever religion one chooses to follow but instead prohibited spending money to build churches, buy religious utensils, or pay clergy, religious freedom would still be irreparably restricted. Similarly, in politics, investing money to endorse a candidate aims to promote them, so the more you invest in a candidate, the more they have the chance to win, supporting one's political position[22].

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16. And partially also *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003).

17. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658-659 (1990).

18. On the doctrine of precedent in the United States, see Bryan A. Garner et al., *The Law of Judicial Precedent* (Thomson Reuters, St. Paul 2016); Christopher J. Peters, *Precedent in the United States Supreme Court* (Springer, Dordrecht, 2013).

19. *Bellotti v. Baird*, 443 U.S. 622 (1979).

20. Brad Smith, *Is Money Speech?* (2017), available at https://www.ifs.org/blog/is-money-speech/ (last visited November 11, 2022).

21. *Buckley v. Valeo*, 424 U.S. 1 (1976).

22. James Skelly Wright, *Politics And The Constitution: Is Money Speech*, 85 Yale Law Journal 1004 (1976) "Money does facilitate communication of political

As regards this judgment, the Republican Justice Stevens wrote the dissenting opinion, which was also backed by Democratic Justices Ginsburg, Sotomayor, and Breyer. Responding to Justice Scalia, who wrote the concurring opinion, Stevens argues that the B.C.R.A's scope was not only to prevent corruption, but also to avoid the negative impact the appearance of corruption would have had on the electorate and, generally, on the trust citizens place in the institutions of a liberal democratic country[23]. Stevens also considers that, since minority shareholders might disagree with the majority ones, their right to expression would be violated. Before a court where the judges' opinion was divided by 5 to 4 (a fairly rare event), Stevens tries to clarify that there is an ontological difference between people and people organized in companies when it comes to free expression within the political-electoral context.

In an article of December 2018 written by Edsall, the New York Times showed that, as a result of Citizen United's ruling, funding for elections increased from $203.9 million in 2010 to $1.48 billion in 2016[24]. As a result, freedom of expression had broadly spread, but it also represented a threat: acts of corruption were now covered by free speech, used as an excuse to justify huge money transfers to political candidates.

This decision draws a worrying picture of the lack of independence of politics from corporations, which can afford to finance electoral campaigns. In the article, Edsall reports the words of professor Robert C. Post, who strongly criticizes Kennedy, the Judge-Rapporteur, by accusing him of ὕβρις: "It is the height of hubris for the Court, by a vote of five justices on a bench of nine, simply to dismiss concerns for

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preferences and prejudices. It is also clear that money influences the outcome of elections. generally speaking, the more money spent in behalf of a candidate, the better the candidate's chances of winning ... money is the mother's milk of politics".

23. *Citizens United v. Federal Election Comm'n - Dissenting opinion of Justice Stevens*, 558 U.S. 310, 42-43 (2010) "It is enough to say that the Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed".

24. Thomas B. Edsall, *After Citizens United, A Vicious Cycle Of Corruption*, The New York Times (2018), available at https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html (last visited November 11, 2022).

electoral integrity on the ground that electoral integrity is a question of law rather than of social fact"[25].

3. *Sting operations*

3.1. *Framework and background*

After this general overview of bribery in the United States' legal history, the focus now shifts to the approach the U.S. legal system adopted to pursue such a crime.

Sting operations are intelligence activities in which, more often, a police officer enters a criminal channel establishing contacts and relations with subjects suspected to have committed or are committing crimes, with the aim of exposing them. The main scope of these operations is, indeed, uncovering and prosecuting crimes, especially as to corruption conducts.

As a matter of fact, corruption is known as a *diffuse* form of crime: it is a criminal offense (like drug dealing) in which those harmed by the crime, for instance, the public administration (or public health, in case of drug dealing), are kept unaware of the criminal conduct. On the contrary, in crimes harming the individual (i.e., manslaughter) or personal property (i.e., stealing), the victims of criminal conduct experience the damage firsthand and are directly hurt. This is the reason why it can be hard for prosecutors not only to prove bribery conducts in court, but to become aware of them in the first place.

Prudent academics[26] analyze undercover operations by distinguishing among operations of *surveillance*, *prevention*, and *facilitation* (or *provocation*). Surveillance operations assume an informative role by obtaining data on possible suspects and relative criminal conduct; the prevention operations show a more marked action since they seek to prevent crimes. Specifically, the difference between the first and the second type of operations resides in the fact of accepting

25. Robert C. Post, *Citizens Divided. Campaign Finance Reform and The Constitution*, 64 (Harvard University Press, Cambridge, 2014).

26. Elizabeth E. Joh, *Breaking the Law to Enforce it: Undercover Police Participation in Crime*, 62 Stanford Law Review 163,165 (2009).

(surveillance) or not (prevention) the risk that the crime may occur in order to provide immediate arrest or, in the second case, to do what is necessary to prevent it[27]. Whereas the scope of the third kind of operation (facilitation or provocation) is to instigate the crime, to expose highly offensive criminal conducts.

One of the most distinguished scholars proposed an alternative categorization based on the use of such operations prior to the commission of the crime, or when the crime has already been committed[28]. In particular, the present paper, as anticipated, will analyze the so-called "facilitating sting operations", raising top-notch criminal and constitutional issues.

Summarizing a case will give an idea of what we are discussing. In the first half of the '80s, an operation marked the history of undercover activities, a case that still maintains a great impact on doctrine nowadays: *United States v. Myers* (1982)[29].

3.2. *The leading case: United States v. Myers (1982)*

The investigations began in 1977, when the Federal Bureau of Investigation's Long Island (New York, NY) division relied on the collaboration of a professional crook named Melvin Weinberg, who had paid $1,000 per month instead of serving a prison sentence, to recover stolen pieces of art and uncover other frauds[30]. The undercover agents pretended to be two sheiks who owned a fake company called Abdul Enterprises Limited.

However, the operations evolved when the mayor of Camden (New Jersey), Angelo Errichetti, began checking over the sheiks: they were rich and without excessive inhibitions with respect to abiding by the law. The sheiks proposed to Errichetti to invest in new casinos

27. Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 Missouri Law Review 394,395 (2005).

28. Thus Gary T. Marx, *Undercover: Police Surveillance in America* at 61 (cited in note 1) "An important distinction is whether the intelligence investigation seeks to discover information about an offense that has occurred or one that might occur. This distinction permits further classification of undercover efforts as postliminary or anticipatory".

29. *United States v. Myers*, 692 F2d 823 (1982).

30. Matthew W. Kinskey, *American Hustle: Reflections on Abscam and the Entrapment Defense*, 41 American Journal of Criminal Law 235 (2014).

in his town and the mayor saw this as an opportunity for himself and the whole city[31].

During the meeting between the sheiks and the mayor, Errichetti gave a list of local policemen to the undercover agents who, according to him, could be easily "persuaded" and, therefore, were more suited to the needs of the rich guests who had just arrived in town and needed to obtain political asylum in the United States through privileged and quicker channels, since they were forced to leave their own country[32].

As stated in the facts of the ruling, there was a turning point: the mayor introduced the sheiks to some members of Congress he was in contact with and asked for $50,000 for each politician who would help the sheiks to obtain political asylum as a price of his mediation. What happened was recorded by undercover agents' hidden cameras that filmed the politicians accepting, discussing, and working out the details of those arrangements.

The defendants were found guilty of federal bribery under section §201, Title 18 of the U.S.C., and academics are still discussing those investigations. That operation (called ABSCAM[33]) is known as the most famous but also the most invasive sting operation ever performed in the United States.

3.3. *The defenses of entrapment and due process. First remarks*

Among the defendants, someone invoked the entrapment defense, claiming that, throughout undercover operations, the federal government had instigated the crime without proving the defendants showed any inclination to commit it. As it will further be explained *infra*, to invoke the entrapment defense, it is required for the government to instigate the commission of a crime and for the defendant not to be inclined to commit that crime. It is identified as *proactive entrapment* and it takes place when police officers use deception, in order to create an offense, being able to observe the situation: so, they procure

31. *Id.* at 236.

32. *Ibid.*

33. "AB" stands for the fictitious company *Abdul Enterprises Limited* and "SCAM" for its literal meaning of "scam", "deceit".

the criminal activity when actually, without such incitement, the instigated person would not have engaged in it[34].

Other defendants appealed to the defense of procedural due process, common to thwart sting operations[35]. They invoked the Fifth Amendment of the U.S. Constitution[36], which is considered a general defense belonging to the nonexculpatory category. The leading case on due process is *United States v. Russell* (1973) which stated that such defense can only be invoked when law enforcement's conduct "is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"[37].

This standard, based on the vague concept of *outrageous*, may be coming from a case ruled in 1960, *Kinsella v. United States*, when the court defined outrageous conduct as one violating "fundamental fairness, shocking to the universal sense of justice" and reckoning that "[*i*]t deals neither with power nor with jurisdiction, but with their exercise"[38]. While not clarifying what *outrageous* means, this standard turns out to be very narrow: in *Myers*, the court affirmed it was unable to grant this defense because, after *Russell*, there have been no more convictions overturned for due process[39].

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34. Gerald Dworkin, *The Serpent Beguiled me and I Did Eat: Entrapment and the Creation of Crime*, 4(1) Law and Philosophy 17, 21 (1985).

35. The reference is to *United States v. Williams*, 705 F2d 603 (1983).

36. United States Bill of Rights, 5th Amendment (1791) "Criminal actions, Provisions concerning, Due process of law and just compensation clauses: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

37. *United States v. Russell*, 411 U.S. 423, 431-2 (1973).

38. *Kinsella v. United States*, 361 U.S. 234, 246 (1960), referring to *Betts v. Brady*, 316 U.S. 455 (1942).

39. *United States v. Myers*, 692 F.2d 823, 837 (1982) "At the same time, we recognize that ... convictions have not been invalidated by federal appellate courts on grounds of excessive government involvement after the decisions of the Supreme Court in Russell and Hampton narrowed the availability of this defense".

This happened even though in the same judgment[40], the court acknowledged that using due process is the most appropriate and immediate way of defending when the state violates individuals' freedom, instigating the commission of crimes. As well, it is often invoked, but as often rejected[41]. Not only is it hard to define such a standard, but also to overcome the test adopted by the Court that, unlike the entrapment test[42], is *objective*: what matters, in order to apply or not to apply the due process defense, is understanding how the government exercised its investigative powers, exceeding them.

The concept of *outrageous* and the functioning of objective tests, can be better appreciated by mentioning an uncommon decision: *Greene v. United States* (1971). Here, due process was actually recognized as a defense in a case of undercover operations facilitating offenses. The opinion illustrates what governmental *outrageous activity* could possibly mean: police agents who have carried out criminal activities continuously, despite the purpose of combating them. Indeed, the Government does not have the right to exercise such penetrating and invasive role, also because its professional purpose lies in the fight against crime. Moreover, the Court takes a clear position about the due process defense: "we do not believe the Government may involve itself so directly and continuously over such a long period in the creation and maintenance of criminal operations, and yet prosecute its collaborators"[43].

It is extremely important to clarify that – even though sometimes they comprehend similar situations – entrapment and due process are independent and autonomous criminal defenses. The outrageous

40. *Ibid*. "In assessing this collection of claims, we acknowledge the intimations in decisions of the Supreme Court and this Court that the due process requirement of fundamental fairness may have a special pertinence when Government creates opportunities for criminal conduct in order to apprehend those willing to commit crimes".

41. *United States v. Dahl*, 2008 CCA 30, 31 (2008). Also, Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 Seton Hall Law Review 275 (2003), particularly footnote n. 142.

42. As will be stated by the following paragraphs, the entrapment test is based on two remarks: firstly, the incitement from the Government to commit the offense; secondly, the predisposition status, according to which the person was predisposed to engage in criminal activity.

43. *Greene v. United States*, 454 F.2d 783, 787 (1971).

conduct carried out by public officials may offer the defendant the due process defense even when the entrapment defense is unavailable due to the presence of predisposition[44]. It can only be explained because of the mutual dogmatic and procedural autonomy of the two defenses, based on the different standards the courts adopt to verify if the defenses apply. The due process defense requires an objective test, founded on the outrageous activity by the police officers, while the entrapment defense, given the importance of the negative counterfactual requirement, mainly calls for a subjective test.

3.4. *Critical issues in undercover operations. The public authority justification's extension*

In this section, a normative issue will be analyzed. Undercover operations are widely used even though there is a lack of empirical data on this topic[45] and a lack of comprehensive regulation, especially due to the absence of federal regulation. Law enforcement operations are covered by the public authority defense[46] which is a justification defense and can be compared to Art. 51 of the Italian criminal code (also "c.p." from now on) or, for extreme cases, under Art. 53 c.p.

This defense is usually associated with "actors specially authorized and usually specially trained to engage in conduct that would otherwise constitute an offense but is necessary to protect or further a social interest"[47]. It may refer to the use of force by police officers, but there is a broader meaning to take into consideration[48]. Generally speaking, public authority justification, relating to law enforcement

44. *United States v. Myers*, 692 F.2d 823, 837 (1982) "Although the defendants' predisposition, as evidenced by their past involvement in maintaining illegal stills, automatically denied them an entrapment defense, their predisposition did not prevent the court from recognizing a due process defense without expressly labeling it as such".

45. See Joh, *Breaking the Law to Enforce it* at 158 (cited in note 26).

46. *Ibid.* "In the vast majority of situations, the police are immune from prosecution, so long as their actions lie within the scope of their official undercover role. A legal justification called the "public authority defense" shields these activities...".

47. Paul H. Robinson, Shima B. Baughman and Michael T. Cahill, *Criminal Law: Case Studies and Controversies* at 587 (Wolters Kluwer, New York 2017).

48. United States Department of Justice Archives, *Criminal Resource Manual (2001-2099) – 2055. Public Authority Defense.*

conduct, refers to those acts performed by the police with a deep impact on citizens' personal freedom. Those acts are justified, and balanced, by other protected interests: for instance, prevention of crime commission; apprehension and detention of those who have committed the act; the credibility of law enforcement agencies[49].

To be lawful, those conducts require administrative authorization (a unique requirement in the category of justification defenses[50]), and secondly, they should be both necessary and proportional to the situation they are facing. These requirements are deeply discussed among academics. The necessity requirement indicates that "no less harmful means could have been used as effectively"[51]. However, it is often coupled with another dogmatic element, the *purpose*, which aims to partially subjectify the defense. As a consequence, especially in undercover operations, this criterion is often useful to increase the application of the defense[52]. By adding the *purpose*-element, it becomes a necessity that is usually extended in a longer term. Actors need to prove that they were pursuing the scope of further social interests: in this way, if the purpose is proved, even though they just *believed* their acts were necessary (even mistakenly), that will suffice for the public authority justification to come into play. This is a way to subjectivize the justification defenses[53], similar to Italian Art. 59 par. 4 c.p. There are doubts about how this requirement has been interpreted, especially when it applies to undercover operations aiming to instigate a crime.

Whereas *proportionality* is satisfied when the use of force does not exceed the relevance of the interest it aims to protect: "no matter how much force would be necessary to protect or further the interest at stake, no more force may be used than the relative importance of the interest warrants"[54]. These requirements present the common issue

49. Robinson, Baughman and Cahill, *Criminal Law* at 588 (cited in note 47).

50. *Ibid.*

51. *Id.* at 590.

52. *Ibid.* "Conduct motivated by the purpose to protect the relevant interest often will be necessary for that purpose, thus satisfying a necessity requirement. But a "purpose" requirement does give an actor somewhat greater latitude than would a pure 'necessity' requirement".

53. *Ibid.*

54. *Ibid.*

of defining which are their limits. Relating to entrapment, there is no significant case law to refer to. Indeed, it is rare for law enforcement officers to be prosecuted, as legal literature shows[55].

Therefore, the troublesome aspect appears to be, on the one hand, the extent of this defense that has just theoretical or textbook functional limits, lacking solid case law; on the other hand, the fact that "unlike defensive force justifications, the actor's authority under these provisions is not limited to defensive action"[56], but it is proactive as well.

3.5. *The manufacturing of criminal conducts*

As we approach the second critical issue linked to facilitating sting operations, this section faces the increased number of crimes incited by those who should prevent them in the first place. It is not by chance that American literature often referred to this phenomenon as "manufacturing criminal liability" where entrapment defense should constitute a "safeguard" against it[57].

Some examples may be helpful in understanding the nearly unlimited extension which characterizes investigative activities. Analyzing multiple operations, it emerges the police have printed false invoices (*United States v. Gonzales-Benitez*, 1976[58]), delivered heroin (*Hampton v. the United States*, 1976[59]), laundered money on behalf of Mexican cartels (in the well-known Operation Casablanca[60]), allowed drugs

55. See Joh, *Breaking the Law to Enforce It* at 158 (cited in note 26); see also Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 The American Journal of Comparative Law 584,585 (2017).

56. See Robinson, Baughman and Cahill, *Criminal Law* at 587 (cited in note 47).

57. John Braithwaite, Brent Fisse and Gilbert Geis, *Sting Facilitation and Crime: Restoring Balance to the Entrapment Debate*, 43(3) Journal of Social Issues 13 (1987); beforehand, John Griffiths, *The serpent beguiled me and I did eat: The constitutional status of the entrapment defense*, 74 Yale Law Journal 942, 955 (1965) "A fundamental objection to sting facilitation is that government agents should not be allowed to manufacture criminal liability by facilitating the commission of an offense that, but for the governmental action, would not have occurred".

58. *United States v. Gonzales-Benitez*, 537 F.2d 1051 (9th Cir. 1976).

59. *Hampton v. United States*, 425 U.S. 484 (1976).

60. About which, in a 1998 congressional resolution (adopted by 404 votes to 3), the participants in the operations were praised.

into prison (*United States v. Wiley*, 1986[61]), falsified documents[62] and stolen cars[63], sold food stamps and then claimed they had been stolen (*Shaw v. Winters*, 1986[64]), committed perjury (*United States v. Murphy*, 1985[65]).

Academics have questioned the limits within which police agents can commit crimes in terms of both authorization and scope. Hence, three types of crimes have been identified: constitutive, ancillary, and private purpose[66]. Both *constitutive* crimes (wrongdoing the police officer is sent to stop and may be committing along with the investigation) and *ancillary* crimes (wrongdoing instrumental to constitutive crimes committed by the undercover agent) can be committed under the public authority justification[67]. By contrast, *private-purpose* crimes cannot be committed without being prosecuted. This represents a complex issue in a system where the abuse of the police force is widely spread[68].

What was just described allows to understand the reason behind the interest academics have shown in sting operations, especially when they are analyzed compared to entrapment theory.

Criminal law and criminal procedure can be defined as a "democracy thermometer". Indeed, these two branches of law are critical in deciding *why* (substantive law) and *how* (procedural law) citizens' personal freedom can be restricted. In fact, for a long time, democracies have supported the argument that a country is safe when law enforcement has as much power as possible. This conclusion is grossly distorted, which is quite manifest because "a society that cares only

61. *United States v. Wiley*, 794 F.2d 514 (9th Cir. 1986).

62. See Ross, *Impediments to Transnational Cooperation in Undercover Policing* at 608 (cited in note 55).

63. See Marx, *Undercover* at 143 (cited in note 1).

64. *Shaw v. Winters*, 796 F.2d 1124 (9th Cir. 1986).

65. *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985).

66. See Ross, *Impediments to Transnational Cooperation in Undercover Policing* at 586 (cited in note 55).

67. *Id.* at 586 ff.

68. For in-depth studies on the problematic extension of law enforcement powers in the United States, we recommend reading an essay (exquisitely non-legal): Alex Vitale, *The End of Policing* (2017); or also: Jordan T. Camp, Christina Heatherton, *Policing the Planet: Why the Policing Crisis Led to Black Lives Matter* (2016).

about law enforcement has already lost most of what laws are necessary to protect"[69].

4. *The entrapment defense. Structure, analysis, problems*

4.1. *Introduction and presentation of general defenses*

We are going to analyze the central topic of the paper. The entrapment represents the link between public officials' corruption and sting operations conducted by law enforcement agencies. These kinds of operations are often adopted in bribery cases to provoke the crime commission and later arrest the suspect. Once the trial begins, the defendant can invoke the entrapment defense.

Even if it is difficult to precisely place it in time, we can assert that no courts granted the entrapment defense before 1870 and historically has three phases: when there was a private-law type of entrapment (founded on *Eggington's Case*, an English ruling from 1801); the defense's rise as a way to exonerate manufactured-criminals; finally, the academic efforts to deter government misconduct by developing an objective model of entrapment[70].

The institution of entrapment refers to a dogmatic subcategory of general defenses[71]. In American criminal law, general defenses are specified in justification defenses, excuse defenses and nonexculpatory defenses. About the first ones, even if a subject has satisfied the objective elements of a crime, the conduct is not only tolerated but sometimes encouraged[72] (an example is self-defense). The fact cannot

69. Ferdinand Shoeman, *Undercover Operations: Some Moral Questions about S.804*, 5(2) Criminal Justice Ethics 21 (1986).

70. Roiphe, *The Serpent Beguiled Me* at 271 (cited in note 41).

71. To deepen general *defenses* in the American legal literature, see: Paul H. Robinson, *Criminal Law Defenses* (West Publishing, St. Paul, 1984); more recently: Paul H. Robinson, Matthew Kussmaul, Camber Stoddard, Ilya Rudyak and Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 Journal of Legal Analysis 37 (2015).

72. See Robinson, Baughman and Cahill, *Criminal law* at 528 (cited in note 47) "That is, while an actor satisfies the elements of an offense, her offense is tolerated (or even encouraged) because its offsetting benefits in a particular situation are such that it does not cause a net societal harm".

be considered a crime and it is completely lawful, and accordingly, it is not subjected to criminal prosecution of any kind or any other type of sanction (administrative, disciplinary, tax, etc.). There are also excuse defenses, a category only referring to the person and not to the fact as the previous ones. They apply when the person committing a crime cannot be considered responsible and thus blameworthy for his actions[73] (for instance, insanity). In this particular case, the actor could not have been expected to abide by the law[74]. Lastly, the nonexculpatory defenses: in these cases, criminal conduct is not excused, but sanction are prevented from being applied (diplomatic immunity is an example) because it furthers important social or political interests[75].

4.2. *The entrapment defense as to the theory of the offense*.

It is useful to analyze the entrapment defense according to the general theory of the offense in order to fully understand it. In common law systems, the study clearly cannot entirely rely on written laws. This statement might appear to be inconsistent with distinguished academics' affirmation claiming that the theory of the offense resides in "positive law"[76]. However, when it comes to common law systems, it is important to remember judicial precedent is considered as positive law, that exact "*quid* that can be changed".

European scholars could have trouble understanding the entrapment defense. Indeed, European studies about agent provocateur are mainly focused on the issue if the instigating agent engaged in criminal conduct. Sometimes the objective contribution is not deemed

73. See *ibid*. "Excuses apply to actors who have caused a net societal harm or evil - and are thus not justified - but who cannot justly be held responsible for their conduct".

74. *Id*. at 19.

75. See *id*. at 529 "Even for actors whose criminal conduct is not justified and who are fully responsible for it (thus not excused), the law might prevent punishment through application of a nonexculpatory defense ... because each furthers important societal interests that are thought, in particular cases, to outweigh society's interest in just punishment of criminal offenders".

76. See Bricola, *Scritti di diritto penale* at 554 (cited in note 4) "The general theory of crime resides on positive law, understood, however, it is a definitive datum, but as a *quid that* can be changed and to whose structural modifications the jurist, without exceeding his limits of competence, must cooperate".

subsisting, some others the subjective element is excluded; in other cases, however rare, the instigator may be found guilty.

Yet, what about the role of the instigated individual? As it was previously explained, the agent provocateur's actions during undercover operations are covered by the agency's authorization and possibly the public authority justification. However, the entrapment defense has to be deepened regarding the position of the instigated person who committed the crime. The question, under U.S. law, is whether or not the instigated person should be legally prosecuted if the crime would not have been committed without instigation.

About the entrapment defense, the lack of criminal punishment of the instigated person committing the crime upon incitement by police officers is not pivoted on the lack of *mens rea* or subjective element, but on a criminal-political interest, linked neither to the offense (justification defenses) nor to the defendant (excuse defenses), but only to a political conclusion *stricto sensu*. In other terms, people who would have not engaged in criminal conduct, but still committed a crime upon incitement by law enforcement, may not be charged solely because the system does not want to encourage illicit police actions.

However, it is our opinion the foundation of entrapment could be dogmatic as well, as to the theory of criminal sanction. The defense could be based on one of the criminal punishment's functions: the social re-education of the offender. It can be argued that prosecuting an instigated person who has committed a crime (or an inchoate crime) in such circumstances, would reasonably contrast with this punishment's theory which aims to socially reinstate offenders after imprisonment. The person did not want to engage in criminal conduct in the first place but did so just upon incitement by law enforcement. Therefore, holding him accountable and sanctioning him would diverge from the scope of social re-education of the offender since the criminal penalty in such a case would fall beyond its own sphere. How can a person not willing to commit a crime be socially re-educated?

Apart from the underlying *ratio*, which can be both political and dogmatic, academics and courts have thoroughly discussed entrapment's dogmatic position[77]. As anticipated, among scholars, the most

77. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Columbia Law Review 236 ff. (1982).

distinguished sustain entrapment belongs to the third category, non-exculpatory defenses: "objective formulations of the entrapment defense ... clearly provide non-exculpatory defenses; they exist not as a reflection of the defendant's lack of blameworthiness, but as a means of deterring improper police conduct"[78].

Given the fact that the reason behind such exemption from criminal responsibility relies on the need to prevent police agents' unlawful conduct, this defense has nothing to do with the actor, conduct and event, or with the subjective element. Robinson keenly explained that, in this case, the absence of criminal sanction does not mean there is no blameworthiness; rather, it can be explained by the need to prevent and deter improper or, rather, criminal police conduct. The same reasoning can apply to due process defense which is also invoked in cases of sting operations.

According to other authors, the instigation to commit a crime can be justified by the duress theory[79], a type of defense similar to the Italian "state of necessity" *ex* Art. 54 c.p. However, the coefficient of coercion characterizing entrapment cases does not suffice to reach the duress defense[80].

Interestingly a data-based study conducted in the mid-1990s showed how U.S. citizens would prefer for entrapment to be considered as a mitigating circumstance (mitigation), rather than a defense that would completely eliminate the criminal liability of the subject who committed the crime[81] - as a matter of fact, in English criminal law it constitutes a mitigating circumstance and not a defense[82].

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78. Robinson, Baughman and Cahill, *Criminal Law* at 852 (cited in note 47).

79. On the relationship between duress and entrapment, see Paul H. Robinson and John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* 155 (Boulder, 1995) "Instead, they seemed to judge these cases using considerations similar to the ones they used in the duress cases, leading us to consider the possibility that the entrapment defense might properly disappear as a separate defense and be subsumed under the duress defense".

80. *Ibid*. "The "inducement" in entrapment may be analogous to the coercion that supports a duress defense. But a duress defense requires more than the existence of coercion, just as an insanity defense requires more than the existence of mental illness".

81. *Id*. at 154.

82. Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* at 134-5 (Oxford University Press, 2003) "It was established by the House of Lords in

Ultimately, the dogmatic placement of entrapment as to the general theory of the offense can indeed be found within the nonexculpatory defenses, meaning that such conducts are both unlawful and criminal and the actor just results not liable for it because the penalty is removed due to social urgencies.

4.3. *Requirements: (a) inducement*

This section seeks to analyze the requirements of entrapment: the objective content of inducement by public officials and the subjective content based on the inclination not to commit a crime.

In 1932, in *Sorrells v. United States*, the first case where the applicability of this defense was recognized, the Court stated there is inducement where: "... the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences"[83]. *Mathews v. United States* (1988)[84] reaffirmed the necessary concurrent presence of both these requirements and entrapment was invoked in a bribery case.

Jacobson v. United States (1992), another important Supreme Court ruling involving the requirement of inducement[85], regards a bill of 1984 banning children's pornography magazines from being published and purchased. Before 1984, Mr. Jacobson had bought a few of those magazines, and years after, when the bill was already enacted, some fake organizations supporting free sexuality between adults and minors called him in order to sell him some materials: he accepted and was arrested immediately after.

During the investigations, the prosecutor realized the only child pornography magazine in Jacobson's home was the one the agent provocateur had sold him. This is the reason why the Court granted the entrapment defense in favor of Jacobson: there was no evidence

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R v *Sang* almost three decades ago that there was no defence of entrapment in English criminal law, but that entrapment could be taken into account in mitigation of sentence".

83. *Sorrells v. United States*, 287 U.S. 435, 441 (1932).

84. *Mathews v. United States*, 485 U.S. 58 (1988).

85. *Jacobson v. United States*, 503 U.S. 540 (1992).

indeed that he would have committed the crime if he had not been provoked.

In *Sorrells* and *Jacobson*, Courts based their ruling on the principle that the government cannot instigate people who otherwise would not have committed any crime[86]. The courts clarified the concept of incitement, affirming that the mere opportunity or suggestion may not be considered as inducement for entrapment purposes[87]; at the same time, academics and jurisprudence consider inducement a necessary but insufficient requirement[88]. Thus, the predisposition of the instigated person aims to establish whether or not police officers participating in undercover operations have instigated an "undisposed person" to perpetrate a crime he would never have committed[89].

4.4. *Requirements: (b) predisposition, real and apparent*

The second requirement is the lack of inclination of the instigated person to commit a crime[90].

As shown by by *United States v. Viviano* (1971), once inducement is established, the prosecutor must prove, firstly, the predisposition by demonstrating the defendant was used to engage in such criminal conduct; secondly, that the defendant had already formed a pattern to realize the offense; and, finally, the willingness to commit the crime upon inducement by the police[91].

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86. *Sorrells v. United States*, 287 U.S. 435, 442 (1932) "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute".

87. *United States v. Simas*, 937 F.2d 459, 462 (1991) "Mere suggestions or the offering of an opportunity to commit a crime is not conduct amounting to inducement".

88. Douglas R. Young, *Entrapment in Federal Bribery and Corruption Cases*, Complex Crimes Journal 150 (1994).

89. *United States v. Kelly*, 748 F.2d 691, 697 (1984) "Inducement focuses on whether the government's conduct could have caused an undisposed person to commit a crime".

90. As regards the subjective element in *entrapment defense*, see the survey by Robinson and Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* at 147 ff. (cited in note 79).

91. *United States v. Viviano*, 437 F.2d 295, 299 (1971) "Once the defendant demonstrates inducement, the Government may prove propensity by showing (1) an existing course of criminal conduct similar to the crime for which the defendant is charged,

In *Russell* and *Hampton*[92], the Courts crystallized a subjective test[93]: in matters of evidence, how the government exercised its investigation power during undercover operations is less decisive than the predisposition the subject showed to commit the crime. Not by chance, predisposition is considered "the principal element in entrapment defense"[94]. In this case, the defendants' lawyers proposed the objective test, insisting on the incitement element; however, until today, except for some concurrence opinions, this test has been rejected.

Generally, some conditions have been selected to show whether or not the defendant's predisposition subsists[95] and since predisposition is a subjective characteristic, it needs to be proved by evidence[96]. Some of the conditions to be considered are the kind of behavior adopted towards the instigation, the person's mental health before the instigation, characteristics of the negotiation between the incited subject and the agent, and whether or not the subject has refused to commit similar offenses in the past. Some of these elements clearly aim to represent the predisposition requirement; others seem to be more related to Cesare Lombroso's theory on biological determinism rather than substantial criminal law[97].

Interestingly, the level of predisposition to invoke entrapment defense in favor of the defendant is way greater in bribery cases rather than in drug-related crimes, another offense in which undercover operations are common[98]. This is how the Court faced the issue: "... such officials are often intelligent, educated and worldly, it is unlikely that

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(2) an already formed pattern on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement".

92. Rulings mentioned before referring to the due process defense, often involved in entrapment cases.

93. Patrick M. Verrone, *The Abscam Investigation: Use and Abuse of Entrapment and Due Process Defenses*, 25(5) Boston College Law Review 356,357 (1984).

94. *United States v. Russell*, 411 U.S. 423, 433 (1973).

95. *United States v. Dion*, 762 F.2d 674, 687,688 (1985).

96. Young, *Entrapment in Federal Bribery and Corruption Cases* at 152 (cited in note 88).

97. Kevin Walby and Nicolas Carrier, *The rise of biocriminology: Capturing observable bodily economies of "criminal man"*, 10 Criminology and Criminal Justice 266 ff. (2010).

98. Young, *Entrapment in Federal Bribery and Corruption Cases* at 155 (cited in note 88).

they will accept money from those to whom they have not had "safe" introductions ... Since the ultimate factual determination is whether the defendant was "ready and willing to commit the crime if an opportunity should be presented", as distinguished from having been "corrupted by some overreaching or special inducement", the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented"[99]. However, this way of thinking is more criminological than juridical and is not persuasive for the following reasons.

The court finds it hard to recognize real predispositions for bribery conducts. Indeed, unlike other criminals, the so-called white-collar offenders are more intelligent, educated, and experienced. As a consequence, when a public official commits a crime after being instigated by an undercover agent, even if it is the first time occurring, the Court may affirm the predisposition requirement to be fulfilled.

Above all, according to the general theory of the offense, a requirement like predisposition cannot be interpreted arbitrarily only for the purposes of a non-exculpatory defense. Secondly, the Court's interpretation violates the equality principle[100]: a subject accused of drug-related crimes could invoke the entrapment defense easier than in bribery cases, taking advantage of a more real or effective interpretation of the predisposition requirement.

Therefore, this is why a person accused of bribery would experience difficulties in proving the absence of predisposition. As shown, even a single criminal conduct committed by the same person would be sufficient to show a predisposition. This constitutive element is apparent since it does not apply to bribery cases like others. In this scenario, the criterion of predisposition is, in fact, illusory: proving the absence of any inclination to commit a crime seems impossible when the commission of the only incited offense is enough to consider that individual prone to criminal conduct.

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99. *United States v. Jannotti*, 673 F.2d 578, 604 (1982).

100. The equality and non-discrimination principles are recognized by the 14th Amendment of the U.S. Constitution; Art. 14 of the European Convention on Human Rights (ECHR); Art. 2 of the Universal Declaration of Human Rights (UDHR); Art. 27 of the International Covenant on Civil and Political Rights (ICCPR); Art. 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

As a result, for the prosecution to indict the defendant in drug offenses, the subject has to be consistent in his criminal behavior; whereas referring to bribery, a single and isolated criminal conduct will be enough to prevent defendants from taking advantage of the entrapment defense. Assuming a procedural perspective, the direct and (il)logical consequence will be that a drug dealer will have way more benefits from the system versus a public official who committed bribery, even when the latter has no criminal records. Therefore, it can be declared that such conclusions are not based on substantial criminal law.

Eventually, it is important to also include that courts cannot arbitrarily decide to interpret the same constitutive element of the defense in such contrasting ways, basing its decision on the social position of the offender. As to the equality principle, it constitutes a serious violation considering that everybody should be treated the same way under the law.

4.5. *The problematic extension of police officers' power and the objective-element corrective*

The last issue is the extension of the police's powers in inducing a subject to commit a crime. Courts stretched the meaning of inducement, which now includes different conducts, such as persuasion, but also as threats or coercive tactics[101]. It is hard to consider persuasion, threats, and harassment at the same level when influencing the commission of a crime. There is no argument able to support that choice.

An objective-element corrective in order to make the subjective test less critical could be a possible solution[102]. It would help to link predisposition to the public official's inducement action.

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101. *United States v. Burkley*, 591 F.2d 903, 914 (1978) "... inducement that is, for a finding of persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, pleas based on need, sympathy, or friendship, or any other government conduct that would create a risk of causing an otherwise un-predisposed person to commit the crime charged.".

102. This view is supported by authors who "push for an objective model of entrapment designed to deter government misconduct", e.g., Roiphe, *The Serpent Beguiled Me* at 271 (cited in note 41).

Considering how broad police officers' conduct could be in discovering corruption, when that influence appeared particularly pervasive (i.e., threats), the subjective test to assess the predisposition of the incited person should be less strict. It is blatant that an insistent instigation is more likely to reduce margins for resistance to incitement.

Therefore, the subjective test should be used to assess predisposition but sharpened as hereby described. In this way, even a person accused of bribery could be able to prove the lack of predisposition by demonstrating the intense pressure they suffered. On the contrary, this defense would not apply in the case of simple agents' persuasive behavior when the incited person poorly resisted the instigated crime and promptly welcomed it. Without sharpened scrutiny, the same subjective test applied to different situations could raise grave theoretical discrepancies and constitutional inequalities.

In *United States v. Townsend* (1977), the court related to a similar principle even if it was placed in a footnote and was not part of the opinion where principles of law reside[103]. Therefore, it is easy to understand why the entrapment defense is so often denied: the scrutiny applied to assess the subjective test element is very hard to overcome by the defendant, and it is even harder for bribery cases, where the predisposition element plays an illusory role.

4.6. *The leading case: United States v. Barta (2015).*

Despite the problems of invoking the entrapment defense, the presentation of a rare[104] bribery case shows an opposite situation: *United States v. Barta* (2015)[105]. Paradoxically, the court decided entrapment's defense could apply since the prosecution recognized in the first place the lack of predisposition.

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103. *United States v. Townsend*, 555 F.2d 152, 145 (1977) "First, one considers the defendant's personal background to determine where he sits on the continuum between naive first offender and street-wise habitue. Second, one considers the degree of coercion present in the instigation law officers have contributed to the transaction. The stronger the inducement and the scantier defendant's background, the greater is the need to declare an entrapment".

104. As recently specified in Charles Doyle, *Attempt: An Overview of Federal Criminal Law* at 11 (Congressional Research Service 2020).

105. *United States v. Barta*, 776 F.3d 931, 937 (7th Cir., 2015).

In this case, the prosecutor aimed to show that the crime had not been instigated by police forces; therefore entrapment defense could not be invoked, lacking the first objective requirement. If a crime has never been instigated, there is no inducement, and accordingly, entrapment's applicability is logically excluded.

In the case at hand, Mr. Barta is convicted in the first proceeding because, while conducting an undercover operation, he and other co-defendants bribed a fake public official to draft a contract on behalf of the government in California. In court, even though the prosecution acknowledged that the defendant was contacted several times in order to lead him to commit the crime, they also argued that the specific number of contacts was lower compared to other cases where entrapment defense was not deemed conclusive[106], implying that there was no actual incitement by the police.

However, the court affirmed there are no "per se" rules and stated that "it is not just the number of contacts between Castro and Barta or the length of their relationship that amounted to inducement here. It was also the frequency of those contacts. And the fact that the emails and calls to Mr. Barta received no responses-even when they gave fake ultimatums"[107]. The Court deemed that behaviors held by the fake-California public official resulted in incitement and, as a consequence, must be considered in the decision for the entrapment defense purposes.

The analysis was focused on a qualitative element more than a quantitative one: the frequency and intensity[108] of contacts in a short while, pressuring Mr. Barta into the commission of the offense. The Court claimed that what matters is the way inducement took place in the short term rather than considering the number of individual encouragements and instigations to carry out the conduct. At that time, in *Barta*, the frequency and recurrence of police contacts led to a criminal inclination by the defendant that would never have happened without police's incitement.

106. *Id.* at 937.
107. *Id.* at 938.
108. It is to be translated here as "recurring" or "insistent".

4.7. *The Supreme Court and the logic asymmetry about predicate offense*

Lastly, a further issue about the predicate offense's function related to entrapment defense needs to be analyzed. As the Court ruled in *United States v. Russell* (1973), the commission of a crime is necessary to invoke the entrapment defense[109]: the problem is understanding whether the entrapment defense can take place even if the offense is not constituted in all its typical elements.

In this scenario, the Court affirmed that the defendant could not logically sustain the lack of constitutive elements of the offense and entrapment defense at the same time[110]: it is illogical to couple the nonexecution of a crime with entrapment defense. At first glance, the Supreme Court's ruling seems reasonable. However, there is an issue worthy of attention.

As a matter of fact, the U.S. criminal law system considers an attempted crime as "a perfect one" too[111]. It is an offense even if inchoate and despite the lack of one typical element: the naturalistic or normative event of the crime. As a consequence, if an instigated public official made a substantial step to commit a crime (we consider extortion as an example), but then changed his mind, he would be found guilty of the inchoate offense, while not being able to benefit from the entrapment defense anymore.

The committed crime would indeed not have all the required elements to be considered a crime for entrapment defense purposes. Thus, in order to invoke the entrapment defense, a "consummated crime" is essential.

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109. *United States v. Russell*, 411 U.S. 423, 435 (1973) "The entrapment defense is rooted ... in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government".

110. *Mathews v. United States*, 485 U.S. 58, 63 (1988) "The Government insists that a defendant should not be allowed both to deny the offense and to rely on the affirmative defense of entrapment. Because entrapment presupposes the commission of a crime, a jury could not logically conclude that the defendant had both failed to commit the elements of the offense and been entrapped".

111. For an in-depth discussion of attempted crime within the U.S. landscape, see Michael T. Cahill, *Inchoate Crimes*, in Markus D. Dubber and Tatjana Hörnle (ed.), *The Oxford Handbook of Criminal Law* (New York 2014).

This conclusion reveals some issues with sanctioning treatment. There is a paradoxical contradiction between a subject who committed a crime and could invoke the entrapment defense and a subject who only attempted to commit it. Indeed, in case of an attempt, the defendant would not be able to benefit from the nonexculpatory defense because of the lack of one constitutive element of the offense and, in this way, that attempted crime's penalty would apply.

5. *The "agent provocateur" in the Italian and European legal systems*

5.1. *Introduction*

In this paragraph, we will analyze whether or not the agent provocateur figure, and consequently, the entrapment defense, may apply to the Italian and European legal systems.

As previously stated, entrapment represents a nonexculpatory defense. Indeed, the subject who is instigated to commit a crime by police will not suffer any punishment when it is proved the fact would not have been committed without that incitement.

It is important to clarify the role entrapment defense assumes in the United States: it aims to balance a very invasive power by police officers, especially in white-collar crimes such as corruption cases, even if it does not succeed in such a purpose[112]. As some academics pointed out[113], European countries start from the opposite assumption,

112. John Braithwaite, Brent Fisse and Gilbert Geis, *Sting Facilitation and Crime: Restoring Balance to the Entrapment Debate*, 43(3) Journal of Social Issues 13 (1987). In the same sense also Roiphe, *The Serpent Beguiled Me* at 275 (cited in note 41).

113. Gabriella Micheli, *L'agente sotto copertura nei reati contro la pubblica amministrazione*, 12 Dir. pen. e proc. 1712 ff. (2019) "In fact, the Model Criminal Code of the United States provides that the induction to the crime (the so-called entrapment) by the public agent, can be utilized as a defensive argument to ask for acquittal if the defendant is able to demonstrate that, without the provocation, he would not have committed the crime. On the other hand, in the United States, where the undercover operations are widely utilized also for the counteraction of crimes against the public administration, the entrapment defense is an exception intended to counterbalance the very ample power that the forces of law and order have in the ambit of the undercover operations. Opposite is, however, the assumption from which European orders move in order to place a guarantee against the abuse of agents ...".

focusing more on the position of the agent provocateur than the instigated one.

Even though Italian Law No. 3 of 2019 does not include the agent provocateur figure, it introduced new defenses for undercover agents in bribery cases and, as a consequence, it is also clear this bill sourced from the assortment of U.S. legal remedies to combat public corruption. This is why it is critical to take into consideration the impact the introduction of covert operations facilitating crimes could imprint on the Italian and European legal systems: it could indeed represent the next remedy to emulate the United States in the fight against bribery.

The first critical aspect regards the theoretical foundation of these defenses, as to the general theory of the offense according to Italian principles on law enforcement incitement conducts; the second is connected to the European Court of Human Rights standing on sting operations facilitating crimes; finally, a general remark is brought into play: the *extrema ratio* principle, according to which criminal law has to be the last resort of the whole legal system.

In other words, if European scholars are still shy with respect to undercover operations, serious problems arise when we try to envision the agent provocateur figure within the Italian or European legal system.

5.2. *A. Italian principles on law enforcement incitement conduct*

It may be unclear if incitement conducts by law enforcement can be considered suitable for the Italian legal system.

Art. 55 of the Italian code of criminal procedure (also "c.p.p.") provides that the Judicial Police has the duty to "prevent crimes from being carried to further consequences, search for the perpetrators, carry out the necessary acts to secure evidence and collect whatever else may be useful under the law".

Someone could argue there is no room for the agent provocateur figure because it would clash with principles regulating preliminary investigations and the role of Judicial Police when it comes to "prevent crimes from being carried to further consequences", considering the provoking actions by police officers in entrapment cases. In other terms, Judicial Police could not instigate a crime without being considered guilty of participating in the offense for moral, more likely

than material, contribution[114] to the commission (or even the attempted commission) of a crime[115].

On the opposite, similarly to what courts stated in the past[116], the agent provocateur's consistency with the Italian system may be claimed by considering the justification defense of execution of a public duty under Art. 51 and 55 c.p.p. According to these articles in combined reading, a police officer can be covered by such justification defense because of the general duty of preventing criminal behaviors.

However, those arguments could also be used to oppose that conclusion: Judicial Police must also prevent crimes "from being carried to further consequences". For this reason, without reform, there is no room in Art. 55 c.p.p. to include "inciting to committing a crime" among public officials' functions, as, under Italian law, a duty to prevent further consequences stands and it forbids any kind of instigation conduct.

On the opposite, in the United States sting operations are covered by public authority justification, the complete defense for acting under a law enforcement duty, similar principle to Art. 51 c.p., but – as shown – much broader.

The agent provocateur's acts may be deemed criminal without a general defense to cover such conduct because, although distinguished Italian doctrine opposes this thesis[117], it does not seem convincing to argue the absence of intent in inducement conducted by law enforcement. Meaning there is no mental element since the agent provocateur does not want the crime to be committed but acts with the aim of bringing the guilty to justice.

The thesis is not satisfying for the simple reason that the agent provocateur, as to the psychological element, actually wants the instigated subject to carry out the criminal conduct precisely to expose

114. To deepen the criminal participation within a crime, see Marcello Gallo, *Lineamenti di una teoria sul concorso di persone nel reato* (Milan 1957); Sergio Seminara, *Tecniche normative e concorso di persone nel reato* (Milan 1987).

115. Considering that attempted criminal participation is not indictable, whereas a criminal participation to commit an attempted crime is.

116. Anna Paola Liguoro, *L'agente provocatore: cosa sancisce la Corte di Strasburgo e come si muove la giurisprudenza italiana sul tema*, Ius in Itinere 2 (2018), available at http://www.iusinitinere.it/ (November 11, 2022).

117. Among others De Maglie, *L'agente provocatore* at 399 (cited in note 1).

him. Otherwise, the instigated person could not be punished in the chance that he does not commit the crime.

The agent provocateur wants the crime to happen. However, this circumstance does not constitute his true purpose, which is the pursuit of justice as to the subject who engaged in criminal conduct when incited to do so: therefore, it seems to be specific intent and that is the mental element supporting the conduct by an actor who *incidentally* wants the commission of the offense, whereas actually has a further purpose[118]. Surely, if the agent provocateur does not want the crime to occur, he would not be able to achieve the goal of arresting the instigated person, since no criminal offense would have been then materialized.

5.3. *B. The European Courts of Human Rights' view on sting operations facilitating crimes*

The following paragraph will focus on whether the agent provocateur's role is consistent with due process principles under Article 6 of the European Convention on Human Rights[119].

The Grand Chamber of the European Court of Human Rights in Strasbourg clarified that, even though sting operations are generally accepted when certain guarantees are observed[120], an undercover agent is not only banned from instigating the commission of crimes but if

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118. Robinson, Baughman and Cahill, *Criminal Law* at 127 (cited in note 47). "The actor must have some further purpose or design in mind when doing so"*;* on mens rea in American criminal law see Francis B. Sayre, *The Present Significance of Mens Rea in the Criminal Law*, Harvard Legal Essays 399, 404 (1934).

119. About it, also Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* at 135 ff (cited in note 82); Francesco Vergine, *Poche luci e molte ombre nelle nuove norme introdotte dalla legge n. 3 del 2019*, 1 Il proc. 13,14 (2019) "For this purpose, it must also be underlined those undercover operations involve high risk of becoming undue instruments of instigation to the crime. In these terms, undercover agents cannot instigate or determine the subjects under investigation to carry out corruptive acts which, in the absence of the agent's action, would not have been carried out. In fact, the risk is a *non-pecuniary liability* under art. 323-ter c.p. and a ban from using evidence they collected during those undercover operations in trial".

120. *Khudobin v. Russia*, no. 59696/00, 26/10/2006, 27 "... The Court's case-law does not preclude reliance, at the investigation stage of criminal proceedings and where the nature of the offence so warrants, on evidence obtained as a result of an undercover police operation".

he were to hold these forbidden actions, any of the gathered evidence could never be used in the trial[121]. This ban is defined as "external" by recent doctrine because it regards the necessity not to manufacture brand-new criminal activity[122].

Without considering some concerning rulings[123], in the last years, the Italian Supreme Court has excluded undercover agents' blameworthiness when the conduct does not result in the instigation of the crime[124].

The European Court of Human Rights has played a crucial role in defining what is considered "criminal" as to sting facilitating operations. In one of its most important decisions, the Strasbourg Court, defining the difference between an undercover agent and a provocateur agent, stated that "police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offense that would otherwise not have been committed, in order to make it possible to establish the offense, that is, to provide evidence and institute a prosecution"[125].

Counterintuitively, in this passage, the Court bases its reasoning on the very same U.S. concepts of incitement and predisposition. Thus, even though this ruling seems to state the opposite, the Court here

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121. *Teixeira De Castro v. Portugal*, no. 44/1997/828/1034, 9/6/1998, 9 "Although the admissibility of evidence is primarily a matter for regulation by national law, the requirements of a fair criminal trial under Article 6 entail that the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement". In the same sense, see also *Edwards and Lewis v. The United Kingdom*, nos. 39647/98 and 40461/98, 27/10/2004.

122. Paolo Ielo, *L'agente sotto copertura per i reati di corruzione nel quadro delle tecniche speciali di investigazioni attive e passive*, Dir. pen. cont. (2019) "Both Court of Legitimacy and the ECHR place an external limit on the activity of the undercover agents, consisting of the need not to instigate or provoke criminal activity".

123. See, as an example: Cassazione penale, Sezione III, 10.1.2013, no. 254174 or also Cassazione penale, Sezione III, 3.7.2008, no. 240270.

124. Ex multis: Cassazione penale, Sezione VI, 17.4.2008, no. 16163; Cassazione penale, Sezione III, 7.4.2011, no. 17199; Cassazione penale, Sezione III, 9.5.2013, no. 37805; Cassazione penale, Sezione III, 7.2.2014, no. 20238; Cassazione penale, Sezione VI, 11.12.2014, no. 51678; Cassazione penale, Sezione III, 15.1.2016, no. 31415.

125. *Ramanauskas v. Lithuania*, no. 74420/01, 5/2/2008, 12.

explains that the provocateur agent is not completely unlawful under the Convention law, especially according to what Art. 6 provides. In fact, by saying "that would otherwise not have been committed", the Court seems to refer to that negative counterfactual requirement the U.S. system deems essential for the entrapment defense.

To be clear, the Grand Chamber based its reasoning on the undercover agent's causal contribution: the so-called *but-for* test of causation aimed to understand whether police facilitated the commission of the offense or, on the contrary, exercised definitive influence on a person who would not have engaged in criminal conducts[126].

All considered it is also true that the Court took into account the predisposition requirement in *Khudobin v. Russia* (inspired by Teixeira de Castro's ruling): "the Court has previously considered the use in criminal proceedings of evidence gained through entrapment by State agents. Thus, in the case of Teixeira de Castro the applicant was offered money by undercover police officers to supply them with heroin. Although having no previous criminal record, he had contacts for obtaining drugs. Tempted by the money, the applicant accepted the officers' request. He was subsequently charged and convicted of a drug offense"[127].

Thus, here is the question: what would the Court have observed if Mr. de Castro had a criminal record related to drug crimes? Had predisposition been present? As a matter of fact, on this topic, the U.S. influence shines through similar phrasing by the Court: the Grand

126. Beatrice Fragasso, *L'estensione delle operazioni sotto copertura ai delitti contro la pubblica amministrazione: dalla giurisprudenza della Corte EDU, e dalle corti americane, un freno allo sdoganamento della provocazione poliziesca*, Dir. pen. cont. (2019), available at https://archiviodpc.dirittopenaleuomo.org/d/6530-lestensione-delle-operazioni-sotto-copertura-ai-delitti-contro-la-pubblica-amministrazione-dalla-gi (last visited November 11, 2022). "[*If law enforcement*] have simply allowed the appellant to commit a crime which he would have committed anyway or whether they have exercised a decisive influence, instilling in the appellant's mind a criminal intention which have not existed before". In the same sense, with considerable analysis of the procedural elements, see also Antonio Vallini, *Agente infiltrato, agente provocatore e utilizzabilità delle prove: spunti dalla giurisprudenza della Corte EDU*, Dir. pen. cont. (2011), available at https://archiviodpc.dirittopenaleuomo.org/d/667-agente-infiltrato-agente-provocatore-e-utilizzabilita-delle-prove-spunti-dalla-giurisprudenza-della (last visited November 11, 2022).

127. *Khudobin v. Russia*, no. 59696/00, 26/10/2006, 27.

Chamber theoretically does not accept the agent provocateur's function since, in its rulings, it clearly brings out the differences between a legit sting operation and a forbidden facilitating operation. However, they are tempted to think within U.S. legal categories, and it is evident from the remark on Mr. de Castro's criminal record: it is reasonable to think that if he had had a drug-related criminal record, the Court could have argued for the presence of predisposition to engage in criminal conduct.

In other words, it seems that the Strasbourg Court, in order to acquit Mr. de Castro, states that the lack of predisposition is proved, so the defendant was entrapped, resulting in a violation of Art. 6 of the European Convention. Similarities with the American system are stunningly evident.

This is why we tend to affirm that, despite the theoretical discrepancies, the European Court of Human Rights – but also the Italian Supreme Court mentioned above – are in a constant, however silent, dialogue with the U.S. courts: still remain the concerns about the extension of law enforcement inducement actions within the American system.

5.4. *C. The extrema ratio principle*

Another aspect must be considered to understand why sting operations facilitating crimes cannot be admitted into European legal systems. In this paragraph we will argue that the principle of *extrema ratio* forbids undercover agents' incitement conduct[128].

Extrema ratio principle regulates the relationship between the usage of criminal law instruments (which conducts are deemed to be an offense and what punishment it deserves) and the democracy rate of a certain legal system: criminal law should, indeed, cover a minimalistic function in liberal democracies.

128. On *extrema ratio's* concept, German criminal law literature has deeply focused its interest: Bernd Hecker, *Das strafrechtliche Verbot geschäftsmäßiger Förderung der Selbsttötung* (§ 217 StGB), 163(7) Goltdammer's Archiv für Strafrecht 455-471 (2016); Albin Eser and Detlev Sternberg-Lieben, *§ 217* in Adolf Schönke and Horst Schröder (ed), *Strafgesetzbuch Kommentar* (C.H.Beck 30th ed, München, 2019); Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen, *§ 217*, in Adolf Schönke et. al., *Strafgesetzbuch, Vol. 2* (Nomos 5th ed, Baden-Baden, 2017).

It is known in U.S. legal literature as "last resort principle" or "ultima ratio principle" and has been deeply analyzed in works focused on limits of criminal law and overcriminalization problems[129]. As it will be shown, such principle is yet studied from opposite views: the U.S. one mainly focuses on overcriminalization and number of offenses (is it justified to have so many offenses in our criminal system?); whereas the European one focuses more on punishments (is it justified to impose a criminal penalty upon an individual for so many conducts?). Two different ways to sketch the same problem up: the first is more related to the legality principle; the latter more related to the harm principle[130].

In postmodernism, such principle was challenged[131] because of its origins backing to the Enlightenment period[132]. During those years, the main gnoseological approaches[133] were logical-deductive (Carte-

129. Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 The Annals of the American Academy of Political and Social Science 854 (1967); Douglas N. Husak, *Overcriminalization. The Limits of the Criminal Law* (Oxford University Press, New York, 2008); Douglas N. Husak, *Applying Ultima Ratio: A Skeptical Assessment*, 2 Ohio St. J. Crim. 535 (2005); Douglas N. Husak, *The Criminal Law as Last Resort*, 24 Oxford Journal of Legal Studies 207, 235 (2004).

130. On criminal law fundamental principles: Paul H. Robinson, *Criminal Law's Core Principles*, 14 Washington University Jurisprudence Review, 157 (2021).

131. Postmodernism is a cultural current which has developed since the second half of the twentieth century. It affected all disciplines: science (i.e., Einstein's theory of relativity or Heisenberg's uncertainty principle), literature (i.e., Calvino), philosophy (i.e., Freud or Nietzsche). This phenomenon is about the epistemological rupture of all the certainties related to the theory of knowledge known until then. To deepen the harm principle in this context, see Gabriele Fornasari, *Offensività e postmodernità. Un binomio inconciliabile?* 61(3) Riv. it. dir. proc. pen., (2018). On the concept of harm principle, see also: Domenico Pulitanò, *Offensività (principio di)*, Enc. dir., Annali, VIII (2015).

132. Alberto Gargani, *Il diritto penale quale extrema ratio tra postmodernità e utopia*, 61(3) Riv. it. dir. proc. pen., 1489, 1490 (2018) "Coupled with the canon of proportion, the principle of the extrema ratio was known in the Enlightenment-liberal thought, at the origins of modern legal culture ... . The theoretical value of this principle is widely shared both in civil law (for instance, the principle of Subsidiarität in the Germany and the minimum intervention criterion in Spain) and in common law systems (see, the Anglo-Saxon reference to the "minimalist approach" and to "criminalization as a last resort")".

133. "Gnoseology" in philosophical studies is the process through which the subject knows the object. It is the theory to understand how humans engage in the knowledge process.

sian) or empirical-inductive (Galilean). When postmodernism arose, and a new epistemological method was spread, these approaches were abandoned, and even the principle of *extrema ratio* became less decisive. However, scholars keep on stressing the importance in post-modernity of *extrema ratio* principle, not only as a theoretical benchmark but assuming a functional approach during criminal trials as well[134].

It is claimed that *extrema ratio* criminal approach's first scope is to set a limit on criminal sanctions in terms of general prevention and subsidiarity principle[135].

According to the subsidiary principle, criminal law must not be invoked when any other branch of the legal system may apply to solve an issue, referring to the minimalist function of criminal law[136]. However, suppose the instigated person cannot be prosecuted yet (since the crime has not been committed or evidence is not collected[137]): in that case, the question is how can we consider an undercover agent's conduct consistent with the principle of subsidiarity when the agent promotes himself the commission of crimes and claims the lawfulness of his own conduct?

It is important to point out that crimes usually object of instigation are connected to severe penalties (drugs, white-collar crimes, internet sex offenders, etc.), so it calls for both a complete and solid regulation of the matter and deep scrutiny by academics.

To better explain, according to subsidiarity and *extrema ratio*'s principles, under criminal law, a crime can be prosecuted only after the verification of a typical, wrongful, and blameworthy fact. And instead, one must refrain from using it when a need, merely tied to the investigations of law enforcement, arises. Furthermore, the process of constitutionalizing the principle of *extrema ratio* crosses the

134. Gargani *Il diritto penale quale extrema ratio tra postmodernità e utopia* at 1496 (cited in note 132) "In post-modernity, criminal law became crucial in social conflicts so that extrema ratio [principle] must apply to the criminal trial as a social control technique. It is not only the neutral and instrumental dimension to test whether or not a person is guilty, now it aims to perform complex functions".

135. *Id* at 1490.

136. On this topic, Mike C. Materni, *The 100-plus-Year Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law)* 18(3) New Crim. L. Rev. 331, 347 ff. (2015).

137. Paolo Scevi, *Riflessioni sul ricorso all'agente sotto copertura quale strumento di accertamento dei reati di corruzione*, 1 Arch. pen. 5 (2019).

(mediated or immediate) link with the Constitution as to the theory of legal goods protected by the criminal system[138], and it further thins out the margins of a constitutionally oriented instigating conduct.

To clarify, a great philosopher and criminalist stated: "criminal justice is necessary even if painful; if it exceeds the bounds of necessity, just the pain remains"[139]. Now, it is clear that in order to understand what *necessity* means, it is crucial to analyze law enforcement incitement to commit crimes since it reflects the fundamental limits of criminal law. It would be especially interesting to know whether the so-called "pragmatic logic of double effect" would apply to this situation: in a liberal democratic criminal law, "would an unlawful behavior be accepted when it aims to a right scope?"[140].

As anticipated, classically, *extrema ratio* theory limits criminal law action as to the general prevention[141]; however general deterrence is not enough to justify the role of the provocateur agent. We tend to believe the *ultima ratio* principle's aim does not only reside in the limitation of the *ius terribile* as general prevention[142], but also in a special-preventive perspective.

Under this view, it can also be argued that such principle limits the use of criminal punishment in facilitating undercover operations because the guarantees to which the criminal system must be subjected cannot be disregarded to ensure that a police officer inciting crimes is not criminally liable.

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138. Fornasari, *Offensività e postmodernità. Un binomio inconciliabile?* 61(3) Riv. it. dir. proc. pen. 23 (cited in note 131).

139. Claus Roxin, *Fragwürdige Tendenzen in der Strafrechtsreform*, 3 Radius 37 (1966).

140. Gabriele Fornasari, *Dilemma etico del male minore e «ticking bomb»* scenario. Riflessioni penalistiche (e non) sulle strategie di legittimazione della tortura at 233 (ESI, Naples 2020).

141. As to the theory of criminal punishment, general prevention is the general deterrence on people when a crime is followed by punishment. It is opposed to special prevention, which is, on the other hand, the specific deterrence on the very person who committed the crime. According to this view, the general prevention principle means that the criminal sanctioning system aims to prevent people from engaging in criminal conducts; whereas special prevention aims to prevent that person who just committed the crime from engaging in (more) criminal conducts.

142. Gargani, *Il diritto penale quale extrema ratio tra postmodernità e utopia* at 1489 (cited in note 132).

We will make the case of a subject who, according to the police, has engaged in bribery; however, the prosecutor has not collected enough evidence for the indictment. Would an undercover operation be legitimate to provoke that same person into committing another act of corruption? In such a case, it is reasonable to believe the *extrema ratio* principle limits the use of criminal sanction in special prevention terms: prosecuting that same person by gathering more evidence through incitement conduct by police officers violates the *extrema ratio* principle as to its special prevention function.

In other words, these remarks aim to clarify that the *extrema ratio* principle would be diminished and emptied if considered a limit to criminal intervention solely under the general-prevention perspective. As a matter of fact, in the cited example, it bars the inciting action by a police officer because of criminal punishment's special-prevention function. If that is the deterrence for a single person to reiterate the offense, it means that the *ultima ratio* principle prohibits the Judicial Police from instigating a crime on the suspicion the individual may have already engaged in criminal conducts in order to impose a sanction for the new incited conducts.

The deterrence cannot be limitless: sting operations, agent provocateur, and entrapment cases should be confined by the subsidiarity principle, the *general prevention* theory of punishment, as well as by the *special prevention* perspective theory of punishment. The former is the general dogmatic conception according to which, within a democratic society, the criminal sanction cannot be used to create public deterrence when inflicted as a result of incitement behaviors by law enforcement; the latter is the principle barring police enforcement from provoking acts when it is deemed necessary to nail someone who may (or may not) have realized crimes in the past.

6. *Concluding remarks*

The general scope of this paper is to clarify the discipline of the agent provocateur's role in sting operations – the most decisive and used to tackle corruption – in order to highlight its effectiveness, but also to show the results of invasive behaviors by law enforcement: the subjective test for an entrapment defense, especially in bribery cases,

is indeed nearly impossible to meet. On this topic, an apparent strong division could be noticed between the U.S. Supreme Court and the European Court of Human Rights. The discrepancies on whether or not to allow facilitating conducts by law enforcement tend to be solely theoretical, and European judges ape in their reasoning the American ones, referring to the same categories of entrapment (inducement and predisposition).

All things considered, the historical part of the essay is about the two faces bribery assumed in American legal history: from corruption as a cultural anathema after the independence past, to present days, when the Supreme Court does not have the courage and interest to face corruption in finance and politics, leading to qualifying bribery conducts only in clear – and very rare – *quid pro quo* scenarios. Consequently, the majority of cases, when conducts are more subtle and less manifest, turn out to be very insidious and still will not be considered criminal.

The central part of the work analyzes the position of the incited person. If the defendant's argument is founded on the fact that he engaged in criminal conduct at police officers' instigation, he must prove a negative-counterfactual-subjective element: he has to show that he would not have committed that crime if he had not been instigated to it. This nonexculpatory defense struggles to balance the invasive provocative acts by law enforcement when, upon invitation, the defendant would not have engaged in such conducts. As explained in the paper, the test is mainly subjective because the most important element is predisposition. So, not only entrapment defense is difficult to benefit from for the defendant, but in bribery cases, it is even harder to get because the predisposition requirement is peculiar in such cases and arduous to meet.

The last section of the study is focused on the role of the agent provocateur, crucial, as shown, to fight corruption. After outlining its dogmatic traits and functioning, the main issue is whether or not this figure could be implemented in the Italian and European legal systems. In the first place, such conduct cannot be covered by a general defense because the Italian public authority justification does not reach the American one's extension, and such behavior is supported by specific intent, as to the psychological element. Also, the rulings by the European Court of Human Rights in Strasbourg still show

that plain provocative conduct cannot be aligned with the European Convention provision on due process – even if sometimes (like in *de Castro*) its reasoning resembles the U.S. Supreme Court's. Finally, the *extrema ratio* principle should bar incitement conducted by officials from being legal because it would clash with the subsidiarity of criminal law and the scope of criminal punishment, both as to general and special deterrence.

In conclusion, from a comparative perspective, what stands out is that European and American academics' analyses on agent provocateur came to different results, focusing on different aspects. The European approach is all about the instigator's role (whether or not he can be criminally liable, since there was a contribution to the offense), while the U.S. one focuses on the entrapped person (whether or not the instigated subject should be punished since he committed the offense), barely considering the position of the instigator.

This research shows how civil law and common law models deal with the same legal issues approaching them in a fascinating reverse way. And if comparative law is not a science but rather a method (as it seems preferable), it sometimes may not be able to provide all the answers on a specific profile. Certainly, and perhaps this is an even more precious resource, it will be able to provide a starting point for problematizing a single question, linking others, and granting the jurist the best means for his investigation.