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STATUTORY ADOPTION OF THE OBJECTIVE TEST FOR ENTRAPMENT AS A SOLUTION TO DUBIOUS TACTICS IN FEDERAL TERRORISM INVESTIGATIONS

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I. INTRODUCTION

On October 8, 2020, the FBI announced that it had arrested thirteen men who plotted to kidnap the Governor of Michigan, Gretchen Whitmer, at her

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vacation home on Mackinac Island.[2] After the planned kidnapping, she was to be subjected to a trial for her supposedly tyrannical actions amid the COVID-19 pandemic.[3] In preparation, the group held meetings, conducted surveillance, and discussed how they could manufacture the weapons necessary to accomplish their plan.[4] The group had even constructed a fake house out of PVC tubing to practice pushing inside buildings and clearing rooms.[5] In addition, one member of the group purchased an 800,000-volt taser which he planned to use to subdue the Governor.[6] Two other group members

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[2] *See* Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, THE NEW YORK TIMES (Apr. 12, 2021), https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html.

[3] *Id.*

[4] *See* Ken Bensinger & Jessica Garrison, *Watching the Watchmen*, BUZZFEED NEWS (July 20, 2021, 8:36 AM), https://www.buzzfeednews.com/article/kenbensinger/michigan-kidnapping-gretchen-whitmer-fbi-informant.

[5] *Id.*

[6] *See* Paul Egan & Tresa Baldas, *'Deeply Disturbing': Feds Charge Extremists in Domestic Terror Plot to Kidnap Michigan Gov. Gretchen Whitmer, Create Civil War*, DETROIT FREE PRESS (Oct. 8, 2020, 8:49 PM), https://www.freep.com/story/news/nation/2020/10/08/militia-members-charged-plot-against-michigan-gov-gretchen-whitmer/5923650002/.

even purchased explosives and detonated an improvised explosive device containing shrapnel to test its effectiveness against human targets.[7]

Following the arrests, many responded harshly to the plot to kidnap Governor Whitmer.[8] Mike Shirkey, the Michigan State Senate's Majority Leader, stated, "A threat against our Governor is a threat against us all. We condemn those who plotted against her and our government. They are not patriots. There is no honor in their actions. They are criminals and traitors, and they should be prosecuted to the fullest extent of the law."[9] Representative Elissa Slotkin of Michigan's 8th Congressional District claimed that the plot

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[7] *See* Sonia Moghe & Devan Cole*, 3 Men Charged in Plot to Kidnap Michigan Governor Now Face Weapon of Mass Destruction Charge*, CNN (Apr. 29, 2021, 8:27 PM), https://www.cnn.com/2021/04/28/politics/gretchen-whitmer-kidnap-plot-charges/index.html.

[8] *See* Christina Carrega, Veronica Stracqualursi & Josh Campbell, *13 Charged in Plot to Kidnap Michigan Gov. Gretchen Whitmer*, CNN (Oct. 8, 2020, 10:32 PM), https://www.cnn.com/2020/10/08/politics/fbi-plot-michigan-governor-gretchen-whitmer/index.html.

[9] Mike Shirkey (@SenMikeShirkey), TWITTER (Oct. 8, 2020, 12:27 PM), https://twitter.com/SenMikeShirkey/status/1314241108365455360?s=20.

represented the growing threat of domestic terror in the United States and called for federal leaders to respond accordingly.[10] Perhaps most significantly, Representative Slotkin stated, "I'm so thankful to federal, state, and local law enforcement for taking the threat seriously and getting to the perpetrators before they could act."[11] However, unbeknownst to State Senator Shirkey and Representative Slotkin, the fast response of law enforcement mainly resulted from their extensive use of informants who led much of the plot at the direction of federal investigators.[12]

In investigating the plot to kidnap Governor Whitmer, the government utilized at least twelve informants.[13] One informant from Wisconsin helped organize the group's meetings and even provided conspirators with hotel rooms to encourage their

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[10] Elissa Slotkin (@RepSlotkin), TWITTER (Oct. 8, 2020, 3:04 PM), https://twitter.com/RepSlotkin/status/1314280632923705348.
[11] Elissa Slotkin (@RepSlotkin), TWITTER (Oct. 8, 2020, 3:04 PM), https://twitter.com/RepSlotkin/status/1314280629492748294?s=20.
[12] *See* Bensinger & Garrison, *supra* note 4.
[13] *Id.*

attendance.[14] Another informant, Dan, an Iraq War veteran, was so deeply enmeshed with the group that he became the group's second-in-command.[15] Dan encouraged members of the plot to collaborate with other potential suspects, provided the group with firearms training, and even went as far as pressuring the group's leader to advance the kidnapping plot.[16] Dan was also provided with $54,793.95, a new phone, a new computer, and a new car in exchange for acting as an informant for a mere seven months.[17] As a result of the extensive government involvement in the plot, one of the defendants accused the government of entrapment.[18] Other defendants have stated that they plan to make similar claims when their cases go to trial.[19]

This paper suggests that the federal government frequently utilizes such tactics in terrorism

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

investigations and that the subjective test for entrapment utilized in federal courts is partially to blame. Part II of this paper will examine the history of federal terrorism investigations and entrapment as a defense in federal courts. Part III of this paper explores the case of James Cromitie, a particularly infamous terrorism prosecution. Finally, part IV will argue that to dissuade the federal government from utilizing such questionable tactics in terrorism investigations, the federal legislature should replace the subjective test for entrapment with the objective test as codified in the Model Penal Code.

II. THE HISTORY OF THE FEDERAL TERRORISM INVESTIGATIONS AND THE ENTRAPMENT DEFENSE

A. CHANGES TO FEDERAL LAW ENFORCEMENT FOLLOWING 9/11

On September 11, 2001, a terrorist attack on the World Trade Center in New York City killed

nearly 3,000 Americans and injured many more.[20] This attack changed American society forever and had an overwhelmingly transformative effect on federal law enforcement.[21] Terrorism investigations went from being a relatively fringe law enforcement specialization to the number one priority of the entire federal government.[22] Following 9/11, federal funding rapidly shifted towards terrorism investigations.[23] Congress even created an entirely new executive department to combat terrorism by passing the Homeland Security Act.[24]

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[20] *See September 11 Terror Attacks Fast Facts*, CNN (Sept. 3, 2021, 10:40 AM), https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/.

[21] *See The Global Impact of 9/11*, POLICE CHIEF MAGAZINE, https://www.policechiefmagazine.org/the-global-impact-of-9-11/ (last visited Oct. 7, 2021).

[22] *See* Douglas A. Brook & Cynthia L. King, *Civil Service Reform as National Security: The Homeland Security Act of 2002*, 67 PUB. ADMIN. REV. 399, 399 (2007).

[23] *See* Eric Lichtblau, David Johnston & Ron Nixon, *F.B.I. Struggles to Handle Financial Fraud Cases,* THE NEW YORK TIMES (Oct. 18, 2008), https://www.nytimes.com/2008/10/19/washington/19fbi.html.

[24] *See* Stuart Anderson, *Why Was The Homeland Security Department Created?*, FORBES (Apr. 12, 2019,12:13 AM), https://www.forbes.com/sites/stuartanderson/2019/04/12/why-was-the-homeland-security-department-created/?sh=369d9fcdad4b.

The FBI absorbed much of the blame for allowing the 9/11 terror attacks to happen.[25] Due to a communication failure, the FBI failed to track many of the 9/11 conspirators living in the United States.[26] Additionally, intelligence officials estimated that anywhere from 2,000 to 5,000 agents of Al-Qaeda were hiding and operating within the United States.[27] In response, the FBI shifted large numbers of personnel from organized crime and white-collar crime investigations to terrorism investigations.[28] Further, federal agents felt pressured to open more and more terrorism investigations.[29] Former FBI agent Michael German describes the dramatic shift as follows,

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[25] *See* Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 617 (2015).
[26] *See* Elaine Kamarck, *9/11 and the Reinvention of the US Intelligence Community*, THE BROOKINGS INSTITUTION (Aug. 27, 2021), https://www.brookings.edu/blog/fixgov/2021/08/27/9-11-and-the-reinvention-of-the-u-s-intelligence-community/.
[27] *See* Janet Reitman, *'I Helped Destroy People','* THE NEW YORK TIMES (Sept. 9, 2021), https://www.nytimes.com/2021/09/01/magazine/fbi-terrorism-terry-albury.html.
[28] *See* Lichtblaum et al., *supra* note 23.
[29] *See* Reitman, *supra* note 27.

> Prior to September 11, 2001, if an agent had suggested opening a terrorism case against someone who was not a member of a terrorist group, who had not attempted to acquire weapons, and who didn't have the means to obtain them, he would have been gently encouraged to look for a more serious threat. An agent who suggested giving such a person a stinger missile or a car full of military-grade plastic explosives would have been sent to counseling. Yet […] such techniques [have become] commonplace.[30]

In the years following 9/11, the government's terrorism-related fears have largely proved to have been unfounded.[31] Further investigation revealed that the supposed thousands of Al-Qaeda operatives in the United States did not exist.[32] In fact, there has also only been one case of a foreign terrorist organization directing or coordinating a deadly attack inside the United States since 9/11.[33] One study of the nearly 580

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[30] *See* Michael German, *Manufacturing Terrorists: How FBI Sting Operations Make Jihadists out of Hapless Malcontents*, REASON, https://reason.com/2013/03/15/manufacturing-terrorists/ (last visited Oct. 7, 2021).
[31] *See* Reitman, *supra* note 27.
[32] *Id.*
[33] *See* Peter Bergen & David Sterman, *What is the Threat to the United States Today?*, NEW AMERICA (Sept. 10, 2021), https://www.newamerica.org/international-security/reports/terrorism-in-america/what-is-the-threat-to-the-united-states-today.

terrorism cases since 9/11 estimated that only around 9% of terrorism defendants represented a genuine terror threat.[34]

B. THE EXTENT OF ENTRAPMENT TACTICS IN FEDERAL INVESTIGATIONS

Following the changes to federal terrorism investigations following 9/11, many critics have alleged that the government merely manufactures terrorists through entrapment.[35] Cases reveal that during terrorism investigations, government actors have badgered suspects into committing terror attacks, offered suspects financial incentives to commit terror attacks, and even threatened to kill the suspect if they do not commit a terror attack.[36] It is also not uncommon

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[34] *See* Norris & Grol-Prokopczyk, *supra* note 25, at 662-63 (explaining the researchers' opinion that only 31 of the jihadi defendants examined by the researchers seemed likely to actually carry out a terror attack based on factors such as the defendant having made concrete plans for an attack or having already acquired weapons prior to contact with the government).

[35] *See generally*, German, *supra* note 30.

[36] *See, e.g.,* United States v. Cromitie, 781 F. Supp. 2d 211, 217-20 (S.D.N.Y. 2011) (describing how informant repeatedly encouraged defendant to participate in terror plot and offered money in exchange for participation); United States v. Shareef, No. 10 C 7860, 2011 WL 4888877, at *5 (N.D. Ill. Oct. 11, 2011) (describing the informant's threats to kill the defendant).

in terrorism investigations for government actors to have substantial involvement in the formulation of such terror plots by suggesting targets or plans for an attack or even providing suspects with the means of carrying out said attack.[37]

Professors Jesse J. Norris and Hanna Grol-Prokopczyk evaluated the extent of the problem in their journal article titled "*Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*."[38] In their article, the professors identified six core indicators of entrapment: (1) the defendant's lack of previous terrorism offenses, (2) the plan having been proposed by the government, (3) the existence of informant pressure or persuasion, (4) a material incentive for participating in the plot, (5) reluctance by the defendant, and (6) a high level of government control over the criminal activity.[39] Of these entrapment indicators, the

[37] *See* Norris & Grol-Prokopczyk, *supra* note 25, at 618, 628.
[38] *Id.* at 610.
[39] *Id.* at 628-34.

defendant's lack of previous terrorism offenses, a government proposed plan, and a high level of government control over the criminal activity were present most frequently.[40] Of the more than 500 cases analyzed by the professors, three or more of the core indicators were present 50% of the time.[41]

C. THE FEDERAL FORMULATION OF THE ENTRAPMENT DEFENSE

Many of the issues surrounding the tactics utilized by federal law enforcement exist partly due to the federal formulation of the entrapment doctrine. To more accurately describe the problems with the federal entrapment defense and its relationship to government tactics in federal terrorism investigations, we must first discuss federal jurisprudence regarding entrapment.

1. WOO WAI V. UNITED STATES

[40] *Id.* at 656.
[41] *Id.*

Entrapment first emerged as a defense in federal courts in the Ninth Circuit case of *Woo Wai v. United States*.[42] *Woo Wai v. United States* involved a defendant who was asked by undercover immigration agents to illegally transport Chinese immigrants across the Mexican border into the United States.[43] The defendant initially declined the agents' offer but gave in after several months of repeated persuasion.[44] The defendant was subsequently indicted and convicted for his role in the conspiracy.[45] On appeal, the Ninth Circuit reversed the conviction and recognized entrapment as an affirmative defense stating that "it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case […] a sound public policy can be upheld only by denying the

[42] *See,* Stephen A. Gardbaum, "*The Government Made Me Do It": A Proposed Approach to Entrapment Under Jacobson v. United States*, 79 CORNELL L. REV. 995, 997 (1994).
[43] *See* Woo Wai v. United States, 223 F. 412, 413 (9th Cir. 1915).
[44] *Id*. at 413-14.
[45] *Id*. at 412.

criminality of those who are thus induced to commit [criminal] acts[.]"[46]

2. SORRELLS V. UNITED STATES

Seventeen years later, the Supreme Court followed the Ninth Circuit's recognition of entrapment as a defense in *Sorrells v. United States*.[47] *Sorrells* involved a case in which the lower court convicted the defendant of possessing and selling one-half gallon of whiskey in violation of the National Prohibition Act only after the repeated requests of an undercover prohibition agent.[48] The Court recognized the affirmative defense of entrapment on the basis that a defendant should not be held criminally liable when their "criminal design originates with the officials of the Government."[49] However, the majority, led by Justice Hughes, held that the Court's ability to recognize

[46] *Id*. at 415.
[47] *See* Sorrells v. United States, 287 U.S. 435, 448 (1932).
[48] *Id*. at 439-40.
[49] *Id*. at 442.

entrapment as a defense was only a result of the Court's ability to interpret statutes to prevent absurd results.[50] Engaging in a protracted exercise of statutory construction, the majority concluded that Congress did not intend for criminal statutes to apply to those who had no predisposition to commit the crime but were induced to do so by government officials.[51] Therefore, under the majority's test, one can only rely on the entrapment defense when they had no predisposition to commit the crime prior to government inducement.[52] This entrapment formulation has since become known as the subjective test.[53]

Concurring in the result and joined by Justices Brandeis and Stone, Justice Roberts took issue with the majority's formation of entrapment as a defense.[54] In Justice Roberts's opinion, rather than resting on a strained construction of statutory law, creating the

[50] *Id.* at 446.
[51] *Id.* at 448-50.
[52] *Id.* at 451.
[53] *See* Gardbaum, *supra* note 42, at 999.
[54] *See Sorrells*, 287 U.S. at 457 (Roberts, J., concurring).

entrapment defense was a matter of public policy.[55] Additionally, Justice Roberts believed that the judge should resolve the issue of entrapment rather than the jury.[56] Justice Roberts opined that "[i]t is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law."[57] Justice Roberts also believed that the defense of entrapment should focus on the conduct of the investigating officers rather than the innocent predisposition of the defendant.[58] To do otherwise would create trials which turned "not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment."[59] This entrapment formulation has since become known as the objective test.[60]

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[55] *Id.* (Roberts, J., concurring).
[56] *Id.* (Roberts, J., concurring).
[57] *Id.* (Roberts, J., concurring).
[58] *Id.* at 458 (Roberts, J., concurring).
[59] *Id.* at 459 (Roberts, J., concurring).
[60] *See* Gardbaum, *supra* note 42, at 999.

3. SHERMAN V. UNITED STATES

The Supreme Court revisited the issue of entrapment in *Sherman v. United States*.[61] In *Sherman*, the majority reaffirmed the subjective test created by the majority in *Sorrells*.[62] Further, it reiterated the essential nature of the defendant's prior innocent disposition in establishing entrapment as a defense, stating, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[63] The majority refused to refashion the entrapment defense as suggested by the *Sorrells* concurrence on the basis that neither of the parties raised the issue.[64] Nevertheless, despite refusing to reformulate the entrapment defense on procedural grounds, the majority opined that Roberts's formulation was unworkable because not allowing litigation on the issue of the defendant's predisposition would place the

[61] *See* Sherman v. United States, 356 U.S. 369, 370 (1958).
[62] *Id*. at 372.
[63] *Id*.
[64] *Id*. at 376.

prosecution at an impermissible disadvantage.[65] In support of their refusal to reformulate entrapment as a defense, the majority also cited many circuit court opinions which rejected Justice Roberts's proposition that a judge alone should decide the issue of entrapment.[66]

Concurring only in the result of *Sherman*, Justice Frankfurter disagreed with the majority's refusal to reexamine the federal entrapment standard stating, "[i]n a matter of this kind, the Court should not rest on the first attempt at an explanation for what sound instinct counsels."[67] Frankfurter rebuked the "sheer fiction" that recognition of the entrapment defense was based on a defendant's conduct being outside the scope of the statute and insisted that the defense was instead premised on a recognition that a conviction obtained through the morally dubious actions of government

[65] *Id.* at 376-77.
[66] *Id.* at 377.
[67] *Id.* at 379.

actors could not be sustained.[68] Frankfurter also reiterated Roberts's concern that allowing evidence of a defendant's reputation, criminal activities, and prior disposition lead to undue prejudice against the defendant.[69] As a result, Frankfurter argued, a defendant in an entrapment case is forced to choose between the lesser of two evils and either forgo the defense of entrapment or run the risk that they may face persecution for activities other than those alleged to be criminal.[70] In Frankfurter's opinion, the entrapment defense should shift away from consideration of a defendant's subjective record and predisposition and towards "the conduct of the police and the likelihood, *objectively* considered, that it would entrap only those ready and willing to commit crime."[71] Frankfurter also agreed with Justice Roberts's contention that the determination of entrapment is

[68] *Id*. at 379-80.
[69] *Id*. at 382.
[70] *Id*.
[71] *Id*. at 384 (emphasis added).

more appropriately vested in a judge rather than a jury.[72]

4. UNITED STATES V. RUSSELL

The Supreme Court once again visited the entrapment doctrine in *United States v. Russell*.[73] The case involved a federal agent who helped the defendant procure an essential ingredient for a methamphetamine manufacturing operation and even assisted in the process.[74] Unlike in *Sherman v. United States*, the defendant expressly requested that the Court reconsider the *Sorrells* and *Sherman* majorities' entrapment test.[75] The defendant also asked that the Court find that the government's participation in the commission of the crime was at such a high level that prosecuting the defendant for the crime would violate the fundamental principles of due process.[76] Rather

[72] *Id.* at 385.
[73] *See* United States v. Russell, 411 U.S. 423, 424-25 (1973).
[74] *Id.* at 426.
[75] *Id.* at 430.
[76] *Id.*

than reformulate the federal entrapment standard, the majority went on to strengthen the legitimacy of the subjective test for entrapment and reiterated the importance of the defendant's innocent predisposition stating, "the principal element in the defense of entrapment [is] the defendant's predisposition to commit the crime."[77] The five-person majority also refused to recognize the due process defense suggested in the case before it[78]. Still, it did hold that there was a possibility that there may be a case someday in which the conduct of a government agent is "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[79] This defense has come to be known as the outrageous government conduct defense.[80]

[77] *Id*. at 433.
[78] *Id.* at 431-32.
[79] *Id*.
[80] *See* Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171, 180 (2013).

In dissent, Justice Stewart, joined by Justices Brennan and Marshall, argued that the Court should adopt the objective test proposed by the *Sorrells* and *Sherman* concurrences stating, "the question [should be] whether -- regardless of the predisposition to crime of the particular defendant involved -- the governmental agents have acted in such a way as is likely to instigate or create a criminal offense."[81] In doing so, Justice Stewart reiterated many of the arguments against the subjective test originally put forth by the concurrence in *Sherman*.[82] Namely, that in deciding whether to invoke the entrapment defense, the defendant is forced into a choice of evils and that the introduction of evidence about the defendant's reputation and prior acts subjects them to persecution for things largely irrelevant to the crime charged.[83]

5. HAMPTON V. UNITED STATES

[81] United States v. Russell, 411 U.S. 423, 441 (1973).
[82] *Id.* at 443.
[83] *Id.*

The entrapment defense was once again revisited in *Hampton v. United States*.[84] This case involved a defendant who sold heroin to an undercover federal agent which he claimed was supplied by another undercover federal agent.[85] Despite the overwhelming involvement of government officials in the commission of the crime, the Court once again held there was no entrapment under the subjective test.[86] The plurality opinion, authored by Justice Rehnquist and joined by Chief Justice Burger and Justice White, almost entirely disregarded the issue of the government's involvement in the case and reiterated the importance of a defendant's innocent predisposition in relying on entrapment.[87] Justice Rehnquist even went so far as to state that the Court had "ruled out the possibility that the defense of entrapment could *ever* be based upon governmental misconduct in a case [. . .] where the

[84] *See generally* Hampton v. United States, 425 U.S. 484, 485 (1976).
[85] *Id.* at 486.
[86] *Id.* at 490.
[87] *Id.* at 488-89.

predisposition of the defendant to commit the crime was established."[88] The plurality also disregarded the defendant's argument that the conduct of the government was of such a degree that due process principles would be violated if the Court allowed the government to invoke judicial processes to obtain a conviction.[89] In fact, the plurality went so far as to say that a defense based on due process could not ever be invoked and that the subjective test was the sole remedy in cases involving entrapment.[90]

The concurring opinion agreed with Rehnquist's opinion as to the defendant's inability to rely on entrapment as a defense because of the existence of the defendant's predisposition to commit the crime.[91] However, the concurrence took issue with Rehnquist's foreclosure of due process grounds ever being a remedy

[88] *Id.* (emphasis added).
[89] *Id.* at 490.
[90] *Id.*
[91] *Id.* at 491-92 (Powell, J., concurring).

for one in a case of entrapment.[92] The concurrence wrote that they were "unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles."[93]

As in Sherman v. United States, the dissent was comprised of Justices Brennan, Stewart, and Marshall, which, again, opined that the Court should abandon the subjective test in favor of the objective test for entrapment.[94] Additionally, the dissent agreed with the concurrence's opinion that the Court should not close the door to possible future defenses in which the conduct of government officials is so outrageous that to allow a prosecution would violate due process.[95] Further, despite disagreeing with the Court's use of the subjective test for entrapment, the dissent argued that the Court should nonetheless carve out an exception under the test despite an individual's predisposition

[92] *Id.* at 492 (Powell, J., concurring).
[93] *Id.* at 493 (Powell, J., concurring).
[94] *Id.* at 497 (Brennan, J., dissenting).
[95] *Id.* (Brennan, J., dissenting).

when "[t]he Government [does] nothing less than [buy] contraband from itself through an intermediary and [jails] the intermediary."[96]

6. JACOBSON V. UNITED STATES

The most recent case from the Supreme Court discussing the entrapment defense is *Jacobson v. United States*.[97] Perhaps signaling the preeminence of the subjective test for entrapment in federal courts, the defendant's conduct was examined solely under the subjective test by both the majority and the dissent.[98] The case's holding primarily concerned the defendant's predisposition to receive child pornography before the government's involvement.[99] The majority opinion, authored by Justice White, held that "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act *prior to first*

[96] *Id.* at 498. (Brennan, J., dissenting).
[97] *See* Gardbaum, *supra* note 42, at 1013.
[98] *See* Jacobson v. United States, 503 U.S. 540 (1992).
[99] *Id.*

being approached by Government agents."[100] Further, the majority stated that a defendant's criminal predisposition is not established by having engaged in an activity before it was made illegal.[101] This is because, in the opinion of the majority, "there is a common understanding that most people obey the law even when they disapprove of it."[102]

The dissent, authored by Justice O'Connor, took issue with the majority's opinion of when a defendant's predisposition must be assessed.[103] O'Connor opined that the predisposition assessment should begin before the government agent first suggested criminal conduct rather than from before government agents ever approached the defendant.[104] The dissent worried that imposing the majority's new requirement would unduly hamper the government's ability to conduct sting operations because "every

[100] *Id.* at 548-49 (emphasis added).
[101] *Id.* at 551.
[102] *Id.*
[103] *Id.* at 556 (O'Connor, J., dissenting).
[104] *Id.* (O'Connor, J., dissenting).

defendant will claim that something the Government agent did before soliciting the crime 'created' a predisposition that was not there before."[105]

III. THE CASE OF JAMES CROMITIE

Perhaps the most infamous terrorism prosecution in recent history is that of James Cromitie. Cromitie's case drew the ire of numerous commentators and legal academics due to the egregious behavior of government actors during the investigation. The case of James Cromitie is particularly relevant to the topic of this paper because it highlights the investigatory practices in federal terrorism cases, which are so heavily criticized and highlights the ineffectiveness of the federal entrapment defense in dissuading such tactics.

Beginning in 2008, Shahed Hussain, a federal informant, took part in the undercover terrorism

[105] *Id.* at 557 (O'Connor, J., dissenting).

investigation of James Cromitie.[106] Hussain was a Pakistani national who was granted asylum because of supposed political persecution in Pakistan.[107] Hussain, who had previously been convicted of fraud, agreed to work as an informant for the FBI to avoid deportation.[108] Hussain worked as an informant in a driver's license fraud case, a heroin trafficking case, and later, an infamous terrorism case against Mohammed Hossain.[109] In that case, Hussain was accused of entrapment and was found to have routinely exaggerated and fabricated the words of the defendants.[110]

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[106] *See* United States v. Cromitie, 781 F. Supp. 2d 211, 215 (S.D.N.Y. 2011).
[107] *See* Andy Newman, Benjamin Weiser & William K. Rashbaum, *Limo Company Owner in Crash Revealed as F.B.I. Informant, Recruiter of Terrorists, Fraudster*, THE NEW YORK TIMES (Oct. 9, 2018), https://www.nytimes.com/2018/10/09/nyregion/limo-owner-fbi-informant-shahed-hussain.html.
[108] *See* Graham Rayman, *The Alarming Record of the F.B.I.'s Informant in the Bronx Bomb Plot*, THE VILLAGE VOICE (July 8, 2009), https://www.villagevoice.com/2009/07/08/the-alarming-record-of-the-f-b-i-s-informant-in-the-bronx-bomb-plot/.
[109] *Id.*
[110] *Id.*

Later, the FBI directed Hussain to attend services at a mosque in Newburgh with the stated goal of locating "disaffected Muslims who might be harboring terrorist designs on the United States."[111] To assist in his mission, Hussain was provided with a residence, referred to as the Shipp Street house, which was wired to make video and audio recordings of the living room.[112] Hussain presented himself at the mosque as a wealthy Pakistani businessman named Maqsood and frequently spoke of jihad and violence.[113]

On June 13, 2008, James Cromitie, who made less than $14,000 per year working at Walmart and supplemented his income making petty drug deals, approached Hussain in the Newburgh mosque's parking lot.[114] In an unrecorded conversation, Cromitie

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[111] United States v. Cromitie, 727 F.3d 194, 201-02 (2d Cir. 2013).
[112] *See* United States v. Cromitie, 781 F. Supp. 2d 211, 215 (S.D.N.Y. 2011).; *Cromitie*, 727 F.3d at 200.
[113] *See* Paul Goldenberg, *Newburgh Mosque Leaders: We Don't Preach Hate*, JEWISH TELEGRAPHIC AGENCY (May 25, 2009, 11:42 PM), https://www.jta.org/2009/05/25/united-states/newburgh-mosque-leaders-we-dont-preach-hate.
[114] *Cromitie*, 727 F.3d at 200.

told Hussain about himself and his family in which he falsely claimed that his father was from Afghanistan.[115] In addition, Cromitie, allegedly, told Hussain that he would be interested in traveling to Afghanistan and falsely stated that he had previously made three trips to Afghanistan on his own.[116] Most significantly, Cromitie allegedly told Hussain of his desire to die as a martyr and "do something to America."[117]

On June 23, 2008, Hussain and Cromitie met at the Shipp Street house; however, the meeting was not recorded.[118] According to Hussain, Cromitie told him of his hatred for Jews and expressed a desire to shoot President Bush 700 times.[119] Cromitie also told Hussain more about his family and his fictional criminal past.[120] Cromitie allegedly told Hussain that he had killed a rival drug dealer's son and had spent 15 years in prison

[115] *Cromitie*, 781 F. Supp. 2d at 215.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 216.

for the crime.[121] When Hussain asked what Cromitie planned to do with his life, Cromitie responded that he was trying to straighten himself out and, as a result, was working harder at his job and trying to be a more devout Muslim.[122]

On July 3, 2008, Hussain and Cromitie again met at the Shipp Street house, and again, the meeting was not recorded.[123] During this meeting, Hussain told Cromitie that he was an agent for a Pakistani terror group who was to recruit members to carry out a terror attack in America.[124] According to Hussain, Cromitie told him he had no issue with jihad and would be interested in participating.[125]

After the July third meeting, without establishing the veracity of Cromitie's claims of Afghani parentage, trips to Afghanistan, or violent criminal

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*

history, the FBI decided to open an investigation into James Cromitie.[126] As a result of this formal recognition of the investigation into James Cromitie, Hussain recorded his future meetings with Cromitie.[127]

On October 12, 2008, Hussain met with Cromitie in Suffern, New York.[128] While making anti-Semitic remarks of his own, Hussain successfully elicited similar opinions from Cromitie.[129] However, while discussing reports of non-believers killing Muslims in Pakistan, Hussain told Cromitie that the Quran requires Muslims to commit violence against infidels.[130] In response, Cromitie, curiously less zealous than in earlier conversations, stated that he did not believe further violence would solve violence against Muslims.[131] Cromitie responded similarly when Hussain stated that he believed an attack on the

[126] *Id.*
[127] *Id.* at 216-17.
[128] *Id.* at 217.
[129] *Id.*
[130] *Id.*
[131] *Id.*

Marriot Hotel in Pakistan would guarantee a Muslim a place in Paradise.[132]

Cromitie met with Hussain again on October 19.[133] In response to Cromitie's complaints of being mistreated by Jews, Hussain stated that, according to Mohammed, Jews were to be eliminated because they are the source of all evil in the world.[134] Cromitie expressed ambivalence towards Hussain's remarks.[135] When Hussain asked whether Cromitie would be interested in traveling to Afghanistan, Cromitie told Hussain that he was uninterested in traveling to a war-torn country.[136]

In the following two months, Cromitie continued to express anti-Semitic views to Hussain in their meetings.[137] However, when pressed by Hussain to act

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 217-18.

on his views by selecting a target for a terror attack, recruiting others to commit a terror attack, or purchasing weapons, Cromitie refused.[138] Hussain continued in his attempts to induce Cromitie by offering him money and even by offering Cromitie his BMW, but Cromitie repeatedly refused these offers.[139]

In December of 2008, Hussain left the country for two months on an extended trip to Pakistan and London.[140] During Hussain's absence, the investigating agent met with officials from Stewart Airport, a possible target mentioned in Hussain and Cromitie's conversations.[141] In assuring the officials of Stewart Airport's safety, the agent stated that he believed Cromitie was unlikely to commit a terror attack without the support of an FBI source.[142] When Hussain returned from his extended trip, Cromitie informed him that he had taken no steps towards the commission of a terror

[138] *Id.* at 218.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*

attack.[143] In subsequent meetings with Cromitie, Hussain continued to offer Cromitie financial incentives to carry out a terror attack and offered additional payments if Cromitie recruited others to participate in the plot.[144] On February 23, 2009, after an offer of $250,000, Cromitie finally assented to participating in a terror plot on Stewart Airport.[145]

However, despite having seemingly agreed to participate in a terror attack, Cromitie avoided seeing or even speaking to Hussain for six weeks following a surveillance drive around Stewart Airport on February 24.[146] The investigating agent encouraged Hussain to call Cromitie several times, but Cromitie failed to answer Hussain's calls.[147] This lack of communication

[143] *Id.*
[144] *Id.* at 219.
[145] *Id.*
[146] *Id.*
[147] *Id.* at 220.

with Cromitie led the FBI to conclude that the investigation had reached its end.[148]

It was not until April 5, 2009, when Cromitie had lost his job at Walmart and had become exceedingly desperate for money, that he reached out to Hussain.[149] Cromitie agreed to go forward with participating in a terror attack for money but, suggesting some reluctance, insisted that he did not want to martyr himself.[150] Nevertheless, Cromitie and Hussain ultimately formulated a plan to bomb the Riverdale Temple, a synagogue in the Bronx.[151]

Cromitie convinced three other men to join the plot in the following weeks: David Williams, Onta Williams, and Laguerre Payen.[152] Federal agents built fake bombs and a fake stinger missile which the conspirators had to drive to Connecticut to collect.[153]

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[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *See* United States v. Cromitie, 727 F.3d 194, 202 (2d Cir. 2013).
[152] *See Cromitie*, 781 F. Supp. 2d at 220.
[153] *Id.*

Following the receipt of their "ordinance," the conspirators decided that their planned attack on the Riverdale Temple would occur on May 20, 2009.[154] When the group arrived at the synagogue, Cromitie planted the fake bombs while David Williams, Onta Williams, and Laguerre Payen watched out.[155] When Cromitie finished, the four men returned to Hussain's car and were subsequently arrested by hundreds of law enforcement agents.[156]

At trial, Cromitie alleged that Hussain had entrapped him.[157] When Hussain testified at trial, his stories frequently contained inconsistencies, and he regularly contradicted stories he had told only a day prior.[158] In fact, Hussain's lies were so obvious that jurors rolled their eyes when he spoke while journalists

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[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *See* United States v. Cromitie, 09 Cr. 558 (CM), 2011 U.S. Dist. LEXIS 48201, at *2 (S.D.N.Y. May 2, 2011).
[158] *See* Laguardia, *supra* note 80, at 196.

seated in the courtroom laughed to themselves.[159] However, the jury also heard the recordings of Cromitie's virulently antisemitic statements.[160] The jury ultimately found Cromitie guilty of conspiring to commit a terror attack.[161] When interviewed following trial, three jurors stated that they would never have voted not guilty, seemingly due to a misunderstanding of predisposition.[162]

Cromitie appealed the judgment and sought to have the jury's rejection of his entrapment defense overturned.[163] Despite noting Cromitie's reluctance to participate in the attack and his perilous financial circumstances immediately prior to participation in the plot, the District Court ruled that Cromitie had failed to produce such overwhelming evidence that no

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[159] *Id.*
[160] *See Cromitie*, 2011 U.S. Dist. LEXIS 48201, at *12.
[161] *Id.* at *2.
[162] *See* Phil Hirschkorn, *The Newburgh Sting*, HUFFPOST (June 29, 2014, 4:01 PM), https://www.huffpost.com/entry/the-newburgh-sting_b_5234822 (explaining how jurors believed that Cromitie was not entrapped based solely on his ultimate participation in the plot).
[163] *See Cromitie*, 2011 U.S. Dist. LEXIS 48201, at *2.

reasonable jury could possibly find guilt beyond a reasonable doubt.[164] Similarly, the District Court rejected Cromitie's arguments that the Court should dismiss the case on the basis of outrageous government conduct.[165]

Cromitie appealed to the Second Circuit Court of Appeals, realleging entrapment as a matter of law and outrageous government conduct.[166] As to Cromitie's allegation of entrapment as a matter of law, the Court of Appeals echoed the sentiment of the District Court.[167] Although noting holes in Hussain's narrative and Cromitie's inability to carry out a terror attack without federal assistance, the Court held Cromitie had failed to overcome the lofty burden of reversing a jury's verdict.[168] Additionally, the Court rejected Cromitie's

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[164] *Id.* at *25.
[165] *See* United States v. Cromitie, 781 F. Supp. 2d 211, 227 (S.D.N.Y. 2011).
[166] *See* United States v. Cromitie, 727 F.3d 194, 199 (2d Cir. 2013).
[167] *Id.* at 215.
[168] *Id.*

argument that the verdict should be reversed on due process grounds and affirmed the District Court's ruling.[169]

a. RESOLVING THE ISSUES SURROUNDING FEDERAL TERRORISM INVESTIGATIONS THROUGH STATUTORY ADOPTION OF THE OBJECTIVE TEST

Given the tactics utilized by the government in investigating terror suspects, entrapment is a natural defense for defendants to assert. However, since the 9/11 terror attacks, not a single terrorism defendant has successfully utilized entrapment as a defense.[170] This complete lack of success, even in egregious cases such as Cromitie's, can largely be attributed to the weaknesses of the subjective test for entrapment.

One such weakness of the subjective entrapment standard is that it does not adequately dissuade government actors from utilizing questionable tactics. Under the subjective test, the behavior of government

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[169] *Id.* at 219-21.
[170] *See* Norris & Grol-Prokopczyk, *supra* note 25, at 612-13.

actors is completely disregarded so long as the defendant's predisposition is established.[171] The dismissal of charges based on the government's conduct is instead left to the "outrageous government conduct" defense established in *Russell*.[172] However, the outrageous government conduct defense is also largely ineffective at dissuading unscrupulous investigation tactics as convictions are frequently upheld despite government conduct which, on its face, seems outrageous.[173] As such, under the subjective test, federal terrorism investigators are largely free to utilize whatever tactic they please so long as predisposition is established.

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[171] *See* United States v. Russell, 411 U.S. 423, 436 (1973).
[172] *Id*. at 431-32.
[173] *See* United States v. Cromitie, 727 F.3d 194, 221 (2d Cir. 2013) (rejecting outrageous government conduct defense where impoverished defendant was repeatedly offered money to participate in a terror attack); *see also* United States v. Schmidt, 105 F.3d 82, 92 (2d Cir. 1997) (rejecting outrageous government conduct defense to attempted murder charge where federal agents staged a woman's escape from a prison's mental unit and posed as hired hitmen who had killed the guards); *see also* United States v. Black, 733 F.3d 294, 310 (9th Cir. 2013) (rejecting outrageous government conduct defense where informant solicited people in a low-income area at random to participate in the robbery of a fake stash house).

Another such weakness of the subjective entrapment standard is the permissive nature by which it allows the admission of evidence that is likely to unduly prejudice defendants. As noted by Justice Roberts in *Sorrells*, the subjective entrapment standard allows for evidence of a defendant's prior acts or reputation to be introduced by the prosecution to establish the defendant's criminal predisposition.[174] The introduction of such evidence is typically barred by the Federal Rules of Evidence specifically because of its tendency to prejudice defendants.[175] Such evidence is significantly damaging in terrorism cases because defendants are frequently mentally ill or proponents of fringe political or religious beliefs, which easily establish the defendant's disposition towards terrorism for a jury of ordinary citizens.[176]

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[174] *See* Sorrells v. United States, 287 U.S. 435, 448 (1932) (Roberts, J., concurring).
[175] *See* FED. R. EVID. 404 advisory committee's note.
[176] *See* Norris & Grol-Prokopczyk, *supra* note 25, at 625, 647, 653.

Another weakness of the subjective entrapment standard is that juries have difficulties properly applying entrapment as a defense, especially in terror cases. Jurors, plagued by anxieties surrounding terrorism, have difficulties determining that defendants were entrapped, even in cases where government conduct is egregious.[177] In addition, juries are generally unable to look past the catastrophic damage that would have resulted if the defendant had successfully committed a terror attack.[178] For example, in the case of Hamir Hayat, a particularly notorious terrorism case, only one of the jurors apparently believed that Hayat would have actually carried out a terror attack.[179] Despite this seemingly establishing Hayat's lack of predisposition, he was not acquitted of his charges.[180] After the trial, one juror admitted that

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[177] *Id*. at 625.
[178] *See* Laguardia, *supra* note 80, at 174.
[179] *See* Amy Waldman, *Prophetic Justice*, THE ATLANTIC (Oct. 2006), https://www.theatlantic.com/magazine/archive/2006/10/prophetic-justice/305234/.
[180] *Id*.

she believed Hayat had been entrapped but felt too intimidated by the other jurors to vote for acquittal.[181]

In response to the failures of the subjective test, an overwhelming number of legal commentators have proposed replacing it with the objective test proposed by Justice Roberts, Frankfurter, and Stewart.[182] Among the proponents of the objective test is the American Law Institute, codifying it in the Model Penal Code as follows:

> (1) A public law enforcement official or a person acting in co-operation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
>
> (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
>
> (b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.
>
> (2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment.

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[181] *Id.*

[182] *See* Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1069 (1993).

The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged, and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.[183]

Several states have acted upon this preference and have adopted the objective test by both supreme court decision and statute.[184]

The objective test differs from the subjective test primarily in that it does not consider a particular defendant's predisposition but rather whether the government's conduct created a substantial risk that an ordinary person would commit the given crime.[185] The defendant typically must make this showing by a

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[183] MODEL PENAL CODE § 2.13 (AM. L. INST. 1962).

[184] ALASKA STAT. § 11.81.450 (2021); HAW. REV. STAT. ANN. § 702-237 (2021); N.D. CENT. CODE § 12.1-05-11 (2021); 18 PA. CONS. STAT. § 313 (2021); UTAH CODE ANN. §76-2-303 (2021); State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974); People v. Turner, 210 N.W.2d 336, 342 (Mich. 1973); State v. Wilkins, 473 A.2d 295, 299 (Vt. 1983).

[185] State v. Yi, 85 P.3d 469, 472 (Alaska Ct. App. 2004); State v. Anderson, 572 P.2d 159, 162 (Haw. 1977); Commonwealth v. Zingarelli, 839 A.2d 1064, 1073 (Pa. Super. Ct. 2003); State v. Wright, 744 P.2d 315, 318 (Utah Ct. App. 1987); State v. Wilkins, 473 A.2d at 299; MODEL PENAL CODE § 2.13 explanatory note (AM. L. INST. 1962).

preponderance of the evidence.[186] This change would likely help solve some of the major problems with federal terrorism investigations that exist partially due to the subjective test's focus on the defendant's predisposition. Because a defendant's predisposition is not considered in determining whether they were entrapped under the objective test, the government would be less free to admit the prejudicial evidence they frequently rely on in establishing predisposition. Consequently, determinations of whether a defendant accused of terrorism was entrapped would be less likely to turn on their political views, religious views, or overall mental stability, and instead, would be decided based on the government's actions during the investigation.

The government is also unlikely to be significantly handicapped by this shift to the objective

[186] 18 PA. CONS. STAT. § 313 (2022); State v. Yi, 85 P.3d at 472; State v. Nakamura, 648 P.2d 183, 186 (Haw. 1982); State v. Wilkins, 473 A.2d at 299; MODEL PENAL CODE § 2.13 explanatory note (AM. L. INST. 1962).

test, especially in terrorism cases. The objective test focuses on how an *ordinary person* would respond to the government's conduct.[187] As such, because of the incredibly violent nature of terror attacks, the government's conduct would likely have to be particularly appalling for a court to conclude that it created a substantial risk that an ordinary person would engage in a terror attack and the government would be free to make arguments to this effect. Consequently, the objective test would likely only inhibit those investigatory tactics which are particularly problematic and would leave the government's ability to prevent terror attacks largely unconstrained.

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[187] ALASKA STAT. § 11.81.450 (2021) ("[I]t is an affirmative defense that [. . .] a public law enforcement official or a person working in cooperation with the official induced the defendant to commit the offense by persuasion or inducement as would be effective to persuade an *average person* [. . .] to commit the offense) (emphasis added); State v. Salmon, 612 P.2d 366, 368 (Utah 1980) ("[T]he objective test does not prohibit the police from affording a person an opportunity to commit crime; it only prohibits active inducements on the part of the government for the purpose of luring an 'average' person into the commission of an offense.").

The Model Penal Code and some states' formulation of the objective test also hold that the issue of entrapment is decided by the judge rather than by a jury.[188] This change is especially relevant in terrorism cases because, as previously discussed, juries largely have difficulty properly deciding that a terrorism defendant was entrapped because of the inflammatory nature of the crime they are accused of committing.[189] In contrast, judges are generally much less likely to be influenced by the emotional nature of a case and are more concerned with the technical details of the law.[190] As a result, terrorism defendants would be less likely to have their claim of entrapment rejected based purely on the provocative nature of the crime they are accused of

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[188] UTAH CODE ANN. §76-2-303 (2021) ("Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense."); McLaughlin v. State, 737 P.2d 1361, 1363 (Alaska Ct. App. 1987) ("Entrapment is an issue for the court, not the jury."); MODEL PENAL CODE § 2.13 explanatory note (AM. L. INST. 1962) ("[Subsection (2) provides] that the issue [of entrapment] is to be tried to the court and not the jury.").

[189] Norris & Grol-Prokopczyk, *supra* note 25, at 625.

[190] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 32 (2008).

committing and instead have it decided based on the merits of the case.

When applied to the case of James Cromitie, these changes make it much more likely that the government's conduct would have resulted in a finding of entrapment. During the government's investigation, Hussain cultivated a close friendship with Cromitie during which he consistently attempted to alter Cromitie's religious views into a more radical form of Islam.[191] Hussain repeatedly pressured Cromitie to participate in a terror plot over the course of several months, and even offered to pay Cromitie considerable amounts of money in exchange for his participation in the terror plot at a time when he was particularly destitute.[192] These facts, when taken together, almost certainly created a substantial risk that Cromitie would participate in the terror plot. Additionally, because the

[191] United States v. Cromitie, 781 F. Supp. 2d 211, 217-221 (S.D.N.Y. 2011).
[192] *Id.*

objective test does not consider the defendant's predisposition, the government would likely have been less able to admit the recordings of Cromitie's anti-Semitic rants and evidence of his prior criminal history which undoubtedly damaged his chances of acquittal at trial. Furthermore, the determination of whether Cromitie was entrapped would have been left with the District Court Judge, who was seemingly able to apply the law contrary to her own feelings about the case, rather than with jurors who stated that they would never have voted to acquit Cromitie due to their apparent misunderstanding of predisposition.[193]

Given this new likelihood that their tactics may result in acquittals on the basis of entrapment, federal investigators would have a reason to change the manner in which they conduct terrorism investigations. The government could improve its investigations by

[193] United States v. Cromitie, 727 F.3d 194, 216 (2d Cir. 2013) (noting that the District Court Judge ruled against Cromitie in spite of her statement that, "It is beyond question that the Government created the crime here"); Hirschkorn, *supra* note 164.

implementing any number of changes, such as leaving the creation of concrete plans to the suspect, discontinuing investigations when suspects like Cromitie voice disinterest in participating in a terror plot, more thoroughly vetting informants so that the brunt of the investigation is not left to habitual liars like Hussain, utilizing more audio-visual recording devices so that agents are not relying solely on the accounts of their informants, or by encouraging federal agents to consult with prosecuting attorneys more frequently so that they are more aware of when their investigations are crossing the line into entrapment. In fact, these changes would be wise even absent some change in the federal entrapment standard.

It currently seems unlikely that the Supreme Court will replace the subjective test for entrapment.[194] As Justice Brennan, a vocal proponent of the objective test, stated in *Mathews v. United States*:

[194] *See* Mathews v. United States, 485 U.S. 58, 67 (1988).

> Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the government's conduct. But I am not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to stare decisis[.][195]

Despite the Supreme Court's apparent reluctance to adopt the objective test, the legislature may decide to change the standard on its own.[196] In *United States v. Russell*, Justice Rehnquist stated, "Since [entrapment] is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable."[197] As such, given criticism of federal tactics of federal investigatory tactics by legislators both conservative and liberal,[198] statutory

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[195] *Id.* (Brennan, J., concurring).
[196] United States v. Russell, 411 U.S. 423, 433 (1973).
[197] *Id.*
[198] Carly Roman, *Gaetz Asks About Role of 'Federal Undercover Agents' in Capitol Riot*, THE WASHINGTON EXAMINER, https://www.washingtonexaminer.com/news/gaetz-asks-role-federal-undercover-agents-capitol-riot (updated June 16, 2021, 3:52PM); Noa Yachot, *Fears Grow That Efforts to Combat US Domestic Terrorism Can Hurt Minorities*, THE GUARDIAN (Jan. 26, 2021, 04:00 AM), https://www.theguardian.com/us-news/2021/jan/26/push-combat-us-domestic-terrorism-far-right-extremism.

adoption of parts (1) and (2) of the Model Penal Code's formulation of the objective test is a natural and logical solution.

IV. CONCLUSION

In conclusion, the level of control and encouragement from federal agents and their informants present in the investigation of the plot to kidnap Michigan's Governor is very common in terrorism investigations. Although the government's level of involvement in this case resembles entrapment, the defendants are very unlikely to successfully assert entrapment as a defense. This is because the subjective test for entrapment's focus on the defendant's predisposition and reliance on jurors will likely spell doom for the defendants' chances of acquittal, especially given their prior radical political beliefs, potential prior unrelated criminal charges, and the heinous nature of their plot. As argued in this paper, adoption of the objective test for entrapment, as codified by the Model

Penal Code, would help alleviate many of these problems because its focus on the government's conduct and its entrustment of the entrapment determination to judges, more neutral decision makers, increases the likelihood that such a high level of government encouragement or control would result in the dismissal of the defendants' charges. As a result, federal investigators would be encouraged to revise their playbook and focus their efforts on organic terror plots that may threaten the nation rather than plots of their own creation.