Resuscitating the Entrapment Defense: A Statutory Approach

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The entrapment defense has existed in American criminal law since the early twentieth century and remains relevant today. As the evolution of technology has enhanced the ability of the police to monitor and engage with potential criminals, sting operations by police have become increasingly commonplace in the investigation (or manufacture) of terrorism, drug, and sex crimes. Consequently, targets of sting operations are often placed in situations in which there is a risk of improper government inducement to commit criminal acts. Despite the increased complexity and frequency of sting operations, however, claims of entrapment by defendants based on the traditional theoretical formulations of the defense are nearly always unsuccessful when raised, and, in many appropriate cases, defendants do not raise entrapment claims at all.

This Note proposes a statutory resuscitation of the entrapment defense to make the defense more suitable to the modern policing system. Part I examines the traditional variants of the entrapment defense as it developed in the common law of the United States as either a subjective test of the predisposition of the defendant or an objective test of the government's conduct. Part II interrogates the stated purposes of the subjective and objective approaches. Part III explores why the entrapment defense so often fails in situations in which factors suggesting entrapment are present and demonstrates that the entrapment defense today does not serve its foundational purposes. Part IV argues that the underlying rationales of both formulations of the entrapment defense militate in favor of reformulating the defense as a set of statutory rights against certain police behaviors.

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INTRODUCTION

The entrapment defense does not fulfill its foundational purpose of providing a meaningful defense to participation in government-manufactured crimes. The defense is rarely raised in appropriate cases[1] and, in the rare instances in which the defense is raised, juries and judges almost uniformly reject it.[2]

The entrapment defense occupies a conceptually and morally complicated twilight between guilt and innocence in which the law accepts that a defendant committed a crime but nevertheless excuses the defendant because he or she was unfairly induced to commit that crime by the government. The facts of prosecutions suggesting entrapment are typically distasteful because the police sensibly seek to ferret out only the most heinous types of criminal acts through the use of aggressive and resource-intensive sting operations. For this reason, many cases in which an entrapment defense could reasonably be raised involve defendants who knowingly committed or conspired to commit acts of terrorism, sex crimes, or drug crimes. Natural sympathy toward such defendants is often in short supply among juries who are rightly repulsed by the defendants' behavior.

For a case highlighting the failings of the entrapment defense in the terrorism context, consider the facts of *United States v. Cromitie*.[3] James Cromitie was, by the court's description, a

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1. *See* Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J. L. & PUB. POL'Y 1, 31–36 (2005) (explaining that defendants use the entrapment defense as a "second-best defense" or "backup plan" and that, as a result, one-third to one-half of all entrapment claims are raised for the first time after conviction).

2. *See, e.g.*, United States v. Cromitie, 2011 WL 1842219, at *23–24 (S.D.N.Y. May 10, 2011) (refusing to overturn a jury's rejection of certain defendants' entrapment defense in an F.B.I. counterterrorism sting despite finding it "beyond question that the Government created the crime here" and finding no evidence of predisposition to commit the crimes other than the circumstantial evidence of the length of time between the suggestion of the conspiracy and those defendants' entry into the conspiracy), *aff'd*, 727 F.3d 194 (2d Cir. 2013); *see also* Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 652–58 (2015) (analyzing 317 terrorism prosecutions involving government informants after 2001 for indicators of potential entrapment and finding entrapment indicators common in such cases). Admittedly, one possible explanation for the rarity of successful entrapment defenses at trial could be that genuine entrapment issues are resolved by prosecutors' decisions not to bring charges against defendants likely to assert such defenses. The character of many cases in which entrapment claims are unavailing (such as in *Cromitie* or the terrorism cases described in Norris & Grol-Prokopczyk), however, suggests that prosecutorial discretion cannot entirely account for the dearth of successful entrapment defenses.

3. *See Cromitie*, 2011 WL 1842219, at *1–3.

"desperately poor" "petty drug dealer and grifter from the impoverished community of Newburgh, New York."[4] Cromitie met a government informant at his mosque in June 2008 and eventually entered into a conspiracy to bomb a Bronx synagogue and destroy military aircraft in May 2009.[5] While Cromitie "talked the talk of a terrorist during the long courtship between him and [the government informant],"[6] he consistently balked whenever the informant encouraged concrete action, even when the informant offered "a BMW . . . and as much as $250,000 . . . to organize a jihadist venture."[7] Cromitie "repeatedly backed away from his violent statements when it came time to act on them," once going so far as to avoid the informant's repeated calls for six weeks while falsely claiming to be in North Carolina.[8] After losing his job at Walmart in April 2009, however, Cromitie reinitiated contact with the informant, saying that "he was broke and needed to make some money."[9] In the period following this reconnection, Cromitie recruited three new participants to his nebulous plans with the informant.[10] Soon thereafter, "the FBI created phony improvised explosive devices . . . and even a fake Stinger missile"[11] for the conspirators to use in supposed attacks on a synagogue in the Bronx and a National Guard Air Base in Newburgh.[12] Finally, on May 20, 2009, the informant drove the conspirators to the Bronx synagogue where they planted the phony explosives and were then arrested.[13]

The jury rejected all four defendants' entrapment defenses.[14] The court stated plainly that "[i]t is beyond question that the Government created the crime here"[15] but nevertheless refused Cromitie's motion to set aside the jury's verdict because it found sufficient evidence that Cromitie had been predisposed to commit

4. *Id.* at *2.
5. *Id.* at *2–3.
6. *Id.* at *2. The court references numerous recordings of "hate-filled rants against Jews and the United States military." *Id.*
7. *Id.*
8. *Id.* at *2.
9. *Cromitie*, 2011 WL 1842219, at *3.
10. *Id.*
11. *Id.* at *3. The FBI placed these phony weapons in an empty warehouse across state lines in Connecticut. *Id.* The informant drove Cromitie and the other defendants to this out-of-state warehouse in order to federalize the otherwise local crime. *Id.*
12. *Id.* at *1–3.
13. *Id.* at *3.
14. *Id.* at *1.
15. *Cromitie*, 2011 WL 1842219, at *23.

the crime based on the recorded conversations between Cromitie and the government informant.[16] The court also found that the jury could properly infer predisposition in the other defendants based solely on the "post-recruitment conduct" of their "ready response to inducement," despite the fact that they had "never before expressed any interest in jihad."[17] The Second Circuit affirmed.[18]

Much of the academic literature surrounding the entrapment defense presumes its existence as a matter of course and focuses on the superiority of one theoretical formulation of the defense over the other.[19] Typically, academic discussions favor the "objective" formulation of entrapment that provides a defense in cases of objectively unreasonable government conduct over the "subjective" formulation that provides a defense only to those defendants who the government cannot show were "predisposed" to commit the crime charged.[20] This debate is useful as a logical exercise but often fails to consider the practical reality that, regardless of which theoretical framing of the defense is employed in a certain jurisdiction, the entrapment defense almost uniformly fails to provide any meaningful protection to defendants induced to commit government-manufactured crimes.[21] Even when the

16. *Id.* at *8–9.

17. *Id.* at *23. The trial judge emphasized the paucity of predisposition evidence for the defendants other than Cromitie: "[L]iterally the only thing that could support a finding of predisposition is circumstantial evidence that only a brief period passed between the time these [defendants] were initially approached (on a date that cannot be definitively established) and the time they began to participate (with evident gusto) in the [informant]/Cromitie venture. . . . I state this plainly, because I want to be sure that the issue is squarely framed for the Court of Appeals." *Id.*

18. United States v. Cromitie, 727 F.3d 194, 199 (2d Cir. 2013).

19. *See, e.g.*, Fred Warren Bennett, *From* Sorrells *to* Jacobson: *Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 WAKE FOREST L. REV. 829, 864–68 (1992) (discussing the merits of the subjective approach); Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 413–420 (1999) (discussing the shortcomings of the subjective formulation, arguing that "predisposition" does not exist, and offering an alternative test based on defendants' reaction to "market-level" inducements to criminal acts).

20. *See, e.g.*, Roger C. Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 167 n.13 (1976) (citing a vast body of academic support for the objective approach over the subjective approach); United States v. Russell, 411 U.S. 423, 445 n.3 (1973) (Stewart, J., dissenting) (noting that "the objective approach is the one favored by a majority of commentators" and citing the Model Penal Code and several academic articles); MODEL PENAL CODE § 2.13 (AM. L. INST., Proposed Official Draft 2020) (adopting objective standard for entrapment).

21. For discussion of the unavailability of a viable entrapment defense generally, see discussion *infra* Part III.A. The unavailability of a viable entrapment defense is especially apparent in the context of terrorism prosecutions, in which there has not been a single

scholarship bemoans the lack of success of entrapment defenses and proposes new factors to consider in a reformed doctrine to expand the theoretical applicability of the entrapment defense, there is often little consideration of whether a change in the technical doctrine would effect any change in juries' or judges' receptivity to the defense.[22] Moreover, academic treatment of the defense, in particular of the subjective formulation, often fails to evaluate the success of the defense on its own terms and instead incorporates independent ideas of what the goals of the entrapment defense should be.[23]

This Note sets out to understand why the current theoretical formulations of the entrapment defense are so feeble in practice and argues that, if any of the goals underlying the existence of an entrapment defense are valid, the defense should be resuscitated by statute to actualize the purposes of the defense. This disconnect between the rationales underpinning the entrapment defense in the first place and the practical unavailability of the defense to defendants under both the subjective and objective formulations demands a rethinking of the entrapment defense and the role of the judge and jury in entrapment entirely, not merely a paean to the logical coherence of one theoretical formulation as superior to the other.

Part I traces the evolution of the entrapment defense in federal and state courts. Part II analyzes the normative justifications for the existence of the entrapment defense and examines the different goals served by the subjective and objective approaches.

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successful assertion of the entrapment defense since 9/11. *See* Norris & Grol-Prokopczyk, *supra* note 2, at 612–13; *see also* Richard Bernstein, *A Defense That Could Be Obsolete*, N.Y. TIMES (Dec. 1, 2010), https://www.nytimes.com/2010/12/02/us/02iht-letter.html [https://perma.cc/AUX9-4ZG8]; Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departures as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171 (2013) (arguing for downward departure in sentencing in cases indicative of entrapment due to juries' uniform rejection of the entrapment defense in terrorism cases).

22. *See, e.g.*, Allen et al., *supra* note 19, at 430–31 (noting different theoretical cases based on the authors' proposed test but failing to consider juries' or judges' receptivity to entrapment claims); Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1096–1108 (1987) (arguing for a strict *actus reus* requirement to prosecute defendants but neglecting to consider fact finders' receptivity to this requirement).

23. *See, e.g.*, Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1390 (2004) (purporting "not [to] take a position in the debate over the subjective versus the objective test" yet incorporating the objective formulation's goal of checking police misconduct when determining that a chief flaw of current entrapment doctrine "is that it provides no effective disincentive to prevent law enforcement from using entrapment techniques").

Part III examines whether there is any difference in the availability of a successful entrapment defense based on which theoretical formulation is employed and concludes that there is no meaningful difference between the two approaches. Part III also considers the functioning of each formulation in relation to its stated purposes and finds that both formulations fail to accomplish their foundational purposes due to their practical unavailability to appropriate defendants. Part IV argues that, assuming the soundness of the any of the normative justifications underlying the entrapment defense in either a subjective or objective formulation, the present desuetude of the entrapment defense demands reform. Part IV then argues that the most practical and impactful way to reimagine the entrapment defense is as a set of statutory rights against certain law enforcement behaviors in the hope of providing a more effective entrapment defense in appropriate cases.

I. HISTORY AND THE TWO VARIANTS OF THE ENTRAPMENT DEFENSE

As one former Alabama circuit court judge has written, "There is no consensus on entrapment, save that we are better off with it than without it."[24] Nearly every jurisdiction in the United States recognizes some form of entrapment as a defense to criminal prosecution,[25] but there is significant variation as to what constitutes entrapment in different jurisdictions.[26] Though in many states the entrapment defense is now defined by statute, the entrapment defense was largely the creation of common law judges, who read such a defense into statutes out of discomfort with prosecutions of people who had been induced to commit crimes by the government.[27]

Caselaw and statutory definitions provide two competing formulations of the entrapment defense. The majority formulation, followed by the federal courts and most states, is a subjective approach that allows an entrapment defense only if a defendant can prove that he or she was not predisposed to commit the crime at issue and that the crime was of the government's,

24. *Id.*
25. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 209(a) (2021).
26. *See infra* Part I.C.
27. *See, e.g.*, Sorrells v. United States, 287 U.S. 435, 448–49 (1932) (reading the entrapment defense into a statute based on presumptive legislative intent).

rather than the defendant's, inspiration. The minority formulation, followed by some states and articulated most clearly in non-majority opinions from several Justices of the Supreme Court, is an objective approach that allows an entrapment defense in cases of objectively unreasonable inducement by the police without regard for the predisposition of the defendant. Part I.A will discuss the subjective formulation as developed in the federal courts; Part I.B will discuss the objective formulation rejected in federal courts but followed in a minority of states; Part I.C will briefly explore the variety of approaches employed in the state systems.

A. ADOPTION OF THE SUBJECTIVE FORMULATION IN THE FEDERAL COURTS

By the early 1930s, every federal circuit court except the Tenth recognized entrapment as a valid defense to criminal prosecution.[28] Two illustrative early cases, *Woo Wai v. United States*[29] and *Butts v. United States*,[30] typify the rationale of the circuit courts in reading the entrapment defense into criminal statutes.

In *Woo Wai*, the defendants were prosecuted for illegally bringing Chinese immigrants into the United States at the urging of a federal immigration agent who hoped to use the crimes as leverage to extract information from the defendants.[31] In finding that the trial judge had erred by instructing the jury that entrapment was no defense even if the facts alleged by the defendants were true, the Ninth Circuit wrote that "it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case" because "a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes."[32] The court distinguished cases in which "the criminal intention to commit the offense had its origin in the mind

28. *See id.* at 443 (noting the near-uniform acceptance of the entrapment defense at the circuit level).

29. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). *Woo Wai* was the first case in which a federal court sustained the entrapment defense. *See* Sherman v. United States, 287 U.S. 369, 378 (1958) (Frankfurter, J., concurring in the result).

30. Butts v. United States, 273 F. 35 (8th Cir. 1921).

31. *Woo Wai*, 223 F. at 413–15.

32. *Id.* at 415.

of the defendant" from the unsavory conduct of government officers in "the case at bar, [in which] the suggestion of the criminal act came from the officers of the government [and t]he whole scheme originated with them."[33] In support of this determination, the court cited a broad survey of state court decisions finding that entrapment nullified the commission of a crime that was "artificially propagated"[34] or manufactured by the government in order to enable a prosecution rather than to prevent crime.[35]

In *Butts*, similarly, the Eighth Circuit read the entrapment defense into a federal statute and found that the trial court had erred by refusing to instruct the jury regarding the defendant's entrapment defense concerning a scheme by government investigators to induce the defendant to acquire and then illegally resell morphine.[36] The court noted at the outset that "where the criminal intent originates in the mind of the defendant, the fact that the officers of the government used decoys or truthful statements to furnish opportunity for or to aid the accused in the commission of a crime, in order successfully to prosecute him therefor, constitutes no defense."[37] The court distinguished such a case from a situation "when the accused has never committed such an offense as that charged against him prior to the time when he is charged with the offense prosecuted, and never conceived any intention of committing the offense prosecuted, or any such offense, and had not the means to do so."[38] In these lines, it is

33. *Id.*

34. *Id.* at 416 (quoting Commonwealth v. Bickings, 28 Pa.C.C. 271, 272 (1903)).

35. The Ninth Circuit favorably quoted state court cases such as: *Bickings*, 28 Pa.C.C. at 272 ("No state, therefore, can safely adopt a policy by which crime is to be artificially propagated. . . . This is virtually the case of a detective who, by promising to perpetrate a crime, lures an innocent man to aid and abet him, the object being, not the perpetration of the crime, but the luring of the abettor."); Commonwealth v. Wasson, 42 Pa. Super. 38, 57 (1910) ("In considering the question of public policy the clear distinction, founded on principle as well as authority, is to be observed between measures used to entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and artifice used to detect persons suspected of being engaged in criminal practices, particularly if such criminal practices vitally affect the public welfare rather than individuals."); Saunders v. People, 38 Mich. 218, 222 (1878) (Marston, J., concurring) ("Some courts have gone a great way in giving encouragement to detectives, in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing.").

36. Butts v. United States, 273 F. 35, 38 (8th Cir. 1921).

37. *Id.* at 37.

38. *Id.* at 38.

apparent that the court focused on the defendant's predisposition (or, rather, his lack of any predisposition) to commit the crime prior to the government's encouragement. In *Butts*, however, the Eighth Circuit did not limit its inquiry solely to the subjective traits of the defendant but also discussed the problem of entrapment with an objective eye to the duties and behavior of the police: "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."[39] The court summed up its rationale for reading an entrapment defense into the statute:

> [I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.[40]

The reasoning of the Courts of Appeals in *Woo Wai* and *Butts* was largely followed by the Supreme Court when it formally recognized the entrapment defense in *Sorrells v. United States* in 1932.[41] *Sorrells* involved a defendant who was induced to buy and resell illegal liquor after repeated requests from a government prohibition agent and sham appeals to shared military service during World War I.[42] The *Sorrells* Court held that not all government-enabled crime is entrapment; indeed, government officers may "afford opportunities or facilities for the commission" of a crime so as to "reveal," "expose," or "disclose" a preexisting criminal design in "would-be violators of the law."[43] The Court contrasted such permissible government action from investigations in which "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."[44] In such a case, the Court declared that "common justice" requires that the

39. *Id.*
40. *Id.*
41. Sorrells v. United States, 287 U.S. 435 (1932).
42. *Id.* at 439.
43. *Id.* at 441–42.
44. *Id.* at 442.

defendant be allowed to prove entrapment by showing that, absent the government's inducement, he or she would not have committed the crime.[45] The *Sorrells* Court articulated a subjective, defendant-specific standard for finding entrapment and emphasized that "[t]he predisposition and criminal design of the defendant are relevant."[46] The Court stated that the "controlling question [is] whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."[47]

Entrapment, as defined in *Sorrells*, requires the defendant to prove that the government induced him or her, an otherwise-law abiding citizen, to commit a crime toward which the defendant had no predisposition. In the years following this decision, the Supreme Court has upheld its commitment to the subjective standard and reaffirmed that an entrapment defense is available only to defendants who were not predisposed to commit the crime at issue,[48] regardless of any condemnable tactics employed by the government to induce the person to commit the crime.[49]

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45. *Id.* at 451. The Court noted, however, that the burden of proof of entrapment is on the defendant, who cannot "complain of an appropriate and searching inquiry into his own conduct and predisposition" relative to crime because "he has brought [such disadvantage] upon himself by reason of the nature of the defense." *Id.* at 451–52.

46. *Id.* at 451.

47. *Sorrells*, 287 U.S. at 451. It is also important to note that the *Sorrells* Court did not find that the Constitution or a substantive rule of some federal common law of crimes compelled the availability of the entrapment defense; instead, the Court based its conclusion on a (seemingly tenuous) determination of legislative intent. *Id.* at 448. The Court presumed that Congress intended to allow an entrapment defense because the Court could not conclude "that it was the intention of Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.*

48. *See, e.g.*, Sherman v. United States, 356 U.S. 369, 376 (1958) ("Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this."); United States v. Russell, 411 U.S. 423, 435–36 (1973) ("Nor will the mere fact of deceit defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." (citation omitted)); Jacobson v. United States, 503 U.S. 540, 548–49 (1992) ("Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.").

49. *See, e.g.*, United States v. Hampton, 425 U.S. 484, 488–89 (1976) ("[T]he entrapment defense 'focus[es] on the intent or predisposition of the defendant to commit the crime,' rather than on the conduct of the Government's agents. We rule[] out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case

B. THE PATH NOT TAKEN: AN OBJECTIVE FORMULATION OF ENTRAPMENT

While the majority of the Supreme Court has consistently upheld the subjective formulation of the entrapment defense as the law in the federal system, a countervailing objective approach has appeared in dissents and concurrences since the earliest discussion of the entrapment defense in the Supreme Court. The development of this alternative formulation is instructive both to elucidate the goals of the majority subjective approach and to outline a possible alternative form of the entrapment defense.

In his dissent in *Casey v. United States* in 1928 (which predated *Sorrells*), Justice Brandeis considered both subjective and objective elements of the entrapment defense.[50] The facts of *Casey* involved a scheme by prison guards to entice an attorney to bring illegal narcotics into a prison for sale to an inmate.[51] The Court, in an opinion by Justice Holmes, upheld the conviction of the attorney and refused to consider any question of potential entrapment because the issue was not considered at trial.[52] Justice Brandeis dissented and provided two independent rationales for reversing the conviction based on a theory of entrapment, one defendant-specific and one focused on systematic restraints on government misconduct.

Brandeis placed the most weight on subjective considerations of the defendant's lack of predisposition: "The government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."[53] Brandeis emphasized that the crime was manufactured by the government rather than the defendant and noted the lack of any evidence that the defendant was predisposed to commit the crime. Brandeis wrote that "[t]he obstacle to the prosecution lies in the fact that the alleged crime was instigated by the officers of the government; that the act for which the government seeks to punish the defendant is

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. . . where the predisposition of the defendant to commit the crime was established." (quoting *Russell*, 411 U.S. at 429)).

50. Casey v. United States, 276 U.S. 413, 421–25 (1928) (Brandeis, J., dissenting). Brandeis' dissent in *Casey* was the first mention of the entrapment defense by a member of the Supreme Court. John D. Lombardo, Comment, *Causation and "Objective" Entrapment: Toward a Culpability-Centered Approach*, 43 UCLA L. REV. 209, 225 (1995).

51. *Casey*, 276 U.S. at 421–23 (Brandeis, J., dissenting).

52. *Id.* at 418–20 (majority opinion).

53. *Id.* at 423 (Brandeis, J., dissenting).

the fruit of their criminal conspiracy to induce its commission."[54] Brandeis's emphasis on the defendant's predisposition to commit the crime accords with the Court's decision four years later in *Sorrells*, which established the subjective approach to entrapment.[55]

Brandies did not limit his argument to the defendant's blamelessness, however; he also raised the systemic dangers of allowing government agents to manufacture crime.[56] While Brandeis was cognizant of what he saw as the injustice done to the particular defendant in *Casey*, he added that "[t]his prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the government . . . from the conduct of its officers [and t]o preserve the purity of its courts."[57] This reasoning reemerges in later arguments about the fundamental purpose of the entrapment defense as either a protector of otherwise-innocent defendants who were induced from their law-abiding ways to commit a government-manufactured crime or as a systemic prophylactic aimed at serving a broader purpose than protecting an individual defendant in a particular case.

Justice Owen Roberts's concurrence in *Sorrells* develops the second point of Justice Brandeis's *Casey* dissent. While Justice Roberts readily agreed that a government agent who entices an otherwise non-predisposed person to the commission of a crime entraps that person, he stated that "the true foundation of the doctrine [of entrapment]" is not in the right of the individual defendant but in "the public policy which protects the purity of the government and its processes."[58] The doctrine of entrapment is a way to ensure that the process of the courts is not used "to consummate a wrong" and is based on the "fundamental rule of public policy" that the court must protect its own functions and "the purity of its own temple" from the scourge of entrapment, which is "prostitution of the criminal law."[59] Roberts sharply criticized the subjective predisposition test articulated by the majority: "To say that [inducement] by an official of government is condoned and rendered innocuous by the fact that the defendant

54. *Id.*
55. *See* Sorrells v. United States, 287 U.S. 435, 451 (1932).
56. *Casey*, 276 U.S. at 425 (Brandeis, J., dissenting).
57. *Id.*
58. *Sorrells*, 287 U.S. at 455 (Roberts, J., concurring).
59. *Id.* at 455–57.

had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction."[60] To Roberts, the doctrine of entrapment exists because "courts must be closed to the trial of a crime instigated by the government's own agents," regardless of the reputation or predisposition of the defendant.[61]

The final unsuccessful push for an adoption of the objective formulation at the Supreme Court came in Justice Frankfurter's concurrence in *Sherman v. United States*.[62] *Sherman* involved a prosecution for sale of illegal narcotics after repeated requests and appeals to the sympathies of the defendant by a government informant.[63] The *Sherman* majority elected to reaffirm the *Sorrells* formulation of entrapment in which a defendant's predisposition is the key to the factual inquiry.[64] The Court rejected the opportunity to adopt the standard proposed by Justice Roberts in *Sorrells*, apparently believing that the "handicap . . . placed on the prosecution" by an objective standard for entrapment that governed police behavior would be too restrictive to provide law enforcement with the tools to detect crimes carried out in secret between willing participants.[65]

Justice Frankfurter criticized the majority's adherence to the idea that the entrapment defense can be divined from statutory

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60. *Id.* at 459.

61. *Id.* Justice Roberts also asserted that this public policy cannot be found in a strained statutory interpretation based on a fictitious legislative intent, but should be based on the Court's inherent responsibility to maintain the sanctity of its legal and equitable processes. *Id.* at 456–57.

62. Sherman v. United States, 356 U.S. 369, 378–385 (1958) (Frankfurter, J., concurring in the result).

63. *Id.* at 371 (majority opinion).

64. *Id.* at 372. The government informant in this case met the defendant while both were being treated for narcotics addiction. *Id.* at 371. The Court found that the facts of this case established entrapment as a matter of law and focused on the fact that the government's informant actually enticed the defendant to relapse in his narcotics addiction in addition to encouraging the defendant to procure drugs for the informant. *Id.* at 373–74.

65. *Id.* at 376–77. The Court cited Judge Learned Hand in support of this proposition: "Indeed, it would seem probably that, if there were no reply (to the claim of inducement), it would be impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret." *Id.* at 377 n.7 (quoting United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952)). *See also* United States v. Russell, 411 U.S. 423, 435–36 (1973) ("Nor will the mere fact of deceit defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available." (citation omitted)). Such so-called victimless crimes, typified by the example of a consensual purchase of illegal drugs where neither party has an incentive to report the crime to the police, are often cited as the reason that the police must be allowed in some circumstances to operate by deception or sting operations.

interpretation based on legislative intent,[66] and explained the judiciary's reason for allowing an entrapment defense: "[t]he courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced."[67] Like Justice Roberts, Justice Frankfurter based courts' authority to allow the entrapment defense on the courts' inherent responsibility to ensure that the legal process is not abused.[68] For that reason, Frankfurter argued that entrapment should be decided by the court as a question of law rather than left for factual determination by the jury.[69] Frankfurter emphasized that the entrapment defense is not intended only to do justice for individual defendants in individual cases but serves the broader purpose of upholding "[p]ublic confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, [and which] is the transcending value at stake."[70] For Justice Frankfurter, entrapment exists not to vindicate the rights of one defendant but to maintain the rule of law by ensuring the purity and dignity of the courts against abuses by government officers.

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66. Frankfurter divided questions of permissible police conduct in enforcement of the law from questions of statutory interpretation aimed at determining what conduct is forbidden by the statute. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring in the result) ("The statute is wholly directed to defining and prohibiting the substantive offense concerned and expresses no purpose, either permissible or prohibitory, regarding the police conduct that will be tolerated in the detection of crime. A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admissibility of illegally obtained evidence."). He also stated that basing an entrapment defense on fabricated legislative intent risks obscuring the purpose of the doctrine. *Id.* at 381 ("The reasons that actually underlie the defense of entrapment can too easily be lost sight of in the pursuit of a wholly fictitious congressional intent.").

67. *Id.* at 380.

68. *Id.* ("Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply proper standards for the enforcement of the federal criminal law in the federal courts, an obligation that goes beyond the conviction of a particular defendant before the court." (citation omitted)).

69. *Id.* at 385 (emphasizing the duty of the court to preserve the "purity of its own temple" and the improved clarity that can be developed in judicial opinions rather than jury verdicts to give better guidance to government officers).

70. *Id.* at 380.

C. VARIETY OF APPROACHES TO ENTRAPMENT IN THE STATES

Because the Supreme Court maintained that the entrapment defense is not mandated by the Constitution but rather flows from Congress's presumed legislative intent,[71] states (and Congress, for that matter) are free to adopt or decline to adopt the entrapment defense in any form in their own jurisdictions.[72] For this reason, states have approached entrapment in varied ways.[73] Most states follow the federal articulation of the defense and employ a subjective test that turns on the defendant's predisposition.[74] Other states employ a wholly objective test that inquires whether the government agent's conduct was objectively unreasonable,[75] outrageous,[76] or likely to induce a non-predisposed person to

71. The Court has emphasized this determination that the entrapment defense springs from a presumption of legislative intent. *See* United States v. Russell, 411 U.S. 423, 435 (1973) ("[E]ntrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been 'overzealous law enforcement,' but instead 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.").

72. *See Russell*, 411 U.S. at 433 ("Since the defense 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.").

73. For a summary of state approaches as of 1995, *see* Lombardo, *supra* note 50, at 224 ("[T]he *Sorrells* rule at one time or another was adopted either by statute or by judicial decision in every state except Hawaii and North Dakota. However, it has since been replaced in eleven states by its rival theory—the 'objective' test of entrapment—and in four other states by a hybrid of both theories." (footnotes omitted)).

74. Some present-day examples are Ala. Code § 13A-3-31 (2021) (adopting caselaw to the effect that entrapment requires a non-predisposed defendant); People v. Sprouse, 983 P.2d 771, 776 (Colo. 1999) ("[Colorado's] entrapment statute creates a subjective test that focuses on the state of mind of a particular defendant, and does not set a general standard for police conduct."); Harrison v. State, 442 A.2d 1377, 1385 (Dele. 1982) (finding that the explicit language of Delaware's entrapment statute required the application of the subjective predisposition standard).

75. *See, e.g.*, Pascu v. State, 577 P.2d 1064, 1067 (Alaska 1978) ("In determining whether entrapment has occurred, the trial court must focus upon the particular conduct of the police in the case presented. The question is really whether that conduct falls below an acceptable standard for the fair and honorable administration of justice." (citation omitted)).

76. The "outrageous government conduct" defense, however, is separate from the defense of entrapment insofar as the outrageous government conduct defense arises out of the Due Process clause of the Fifth or Fourteenth Amendments of the U.S. Constitution or a similar provision of state constitutions. *See, e.g.*, *Russell*, 411 U.S. at 431–32 (stating that the outrageous government conduct defense is available only in situations in which the government's conduct "violat[es] that 'fundamental fairness, [and is] shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment" (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960))); Effland v. People, 240 P.3d 868, 879 (Colo. 2010) (following *Russell* in defining outrageous government conduct as conduct that "violates fundamental fairness and is shocking to the universal sense of justice," based on the Fifth Amendment); People v. Guillen, 174 Cal. Rptr. 3d 703,

commit the crime.[77] Some adopt a middle ground in which both police conduct and a defendant's predisposition are relevant.[78] Some states have adopted their entrapment defense by judicial decision,[79] while others have defined entrapment by statute.[80] Some states have even amended the statutory definition of entrapment to adopt judicial decisions thought to be contrary to statutory language previously in place.[81]

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760 (Cal. Ct. App. 2014) ("A court's power to dismiss a criminal case for outrageous government conduct arises from the due process clause of the United States Constitution."). For discussion of the possible interplay between or combination of the entrapment and outrageous government conduct defenses, see John David Buretta, Note, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 GEO. L. J. 1945 (1996).

77. *See, e.g.*, People v. Barraza, 23 Cal. 3d 675, 690 (1979) (stating, first, that "if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established," such as when an officer makes appeals to "friendship or sympathy," and, second, that "affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment," such as when an officer "guarantee[s] that the act is not illegal or the offense will go undetected, [makes] an offer of exorbitant consideration, or [offers] any similar enticement"); State v. Folk, 278 N.W.2d 410, 413–14 (N.D. 1979) (stating that the test for entrapment in North Dakota turns on whether a "normal, law-abiding person" would be induced to commit a crime by the police's actions).

78. *See, e.g.*, Fla. Stat. § 812.028 (2021) ("It shall not constitute a defense to a prosecution for any violation of the provisions of ss. 812.012–812.037 that . . . [a] law enforcement officer solicited a person predisposed to engage in conduct in violation of any provision of ss. 812.012–812.037 in order to gain evidence against that person, provided such solicitation would not induce an ordinary law-abiding person to violate any provision of ss. 812.012–812.037."); *but see* State v. Dickinson, 370 So. 2d 762, 763 (Fla. 1979) ("The essential element of the defense of entrapment is the absence of a predisposition of the defendant to commit the offense."). Other states with hybrid approaches include Indiana, New Jersey, New Mexico, and New Hampshire. *See* Stevenson, *supra* note 1, at 12 n.29.

79. *See, e.g.*, State v. Stanley, 597 P.2d 998, 1006 (Ariz. Ct. App. 1979) (establishing a subjective predisposition test).

80. *See, e.g.*, Utah Code Ann. § 76-2-303 (West 2021) ("It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a peace officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."); Harrison v. State, 442 A.2d 1377, 1385 (Dele. 1982) (finding that the explicit language of Delaware's entrapment statute required the application of the subjective predisposition standard).

81. Alabama, for example, amended its original statute (providing that "[e]ntrapment occurs when a law enforcement agent induces the commission of an offense, in order to obtain evidence for the purpose of criminal prosecution, by methods creating a substantial risk that the offense would be committed by one not otherwise disposed to commit it[]") to read "The Alabama Criminal Code adopts the present case law on entrapment." Ala. Code § 13A-3-31 (2021) (amending Ala. Acts 1977, No. 607, § 650). The editor's commentary accompanying this change explained that "the [previous] section was deemed to differ from Alabama's case law on entrapment because it focused on whether the method of inducement created a substantial risk that the offense would be committed, and the actor's prior

II. THE DIFFERENT RATIONALES OF THE SUBJECTIVE AND OBJECTIVE FORMULATIONS

As the debate between various Justices and jurisdictions over the entrapment defense makes clear, the subjective and objective formulations of the entrapment defense are motivated by different underlying concerns and aim to remedy different problems. Part II will explore the implications of the divergent purposes served by the two approaches with the aim of identifying metrics to analyze the success of each formulation on its own terms to determine if either formulation functions as intended. Part II.A will analyze the rationale underlying the subjective formulation of protecting individual defendants; Part II.B will discuss the system-focused rationales of the objective formulation.

A. THE SUBJECTIVE FORMULATION'S FOCUS ON PROTECTING INDIVIDUAL DEFENDANTS

Under the subjective approach to the entrapment defense, a defendant may succeed on the defense of entrapment only upon showing that the government induced the defendant to commit a crime which he or she otherwise had no predisposition to commit.

As an affirmative defense, the subjective formulation of the entrapment defense requires that the defendant produce some evidence that the government induced the commission of the crime.[82] After the defendant produces evidence of inducement, the burden shifts to the government to show that the defendant was predisposed to commit the crime even absent the government's encouragement.[83] The determination of whether the defendant was predisposed is a question of fact regarding the defendant's state of mind that is typically submitted to the jury.[84]

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criminal record and predisposition to crime were not relevant and not admissible when considering entrapment." *Id.*

82. ROBINSON, *supra* note 25.

83. *See* Jacobson v. United States, 503 U.S. 540, 548–49 (1992) ("Where the Government has induced an individual to break the law and the defense of entrapment is at issue, . . . the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."); *but cf.* ROBINSON, *supra* note 25 ("The burden of production for the defense of entrapment is always on the defendant. The burden of persuasion is often on the defendant, by a preponderance of the evidence." (footnotes omitted)).

84. ROBINSON, *supra* note 25.

Under the subjective formulation of the entrapment defense, it is the defendant—not the government's conduct—that is interrogated for blameworthiness. The subjective formulation aims to protect particular defendants from the consequence of giving in to unfair government temptation; in this way, the subjective defense is an appeal to empathy for human fallibility in the face of the allure of wrongdoing.[85]

The subjective test can therefore be understood as simultaneously more and less protective of the individual defendant than an objective approach. In theory, if a non-predisposed defendant can overcome the low bar of showing some evidence of government inducement, he or she need not show that an average person would have given in to the temptation. Such a defendant need only show that he or she did in fact give in to the government's inducement despite having no predisposition to commit the crime at issue. Conversely, the subjective test pays no heed to police conduct (beyond the requirement of some showing of government inducement) if the target was a person predisposed to commit the crime at issue—in other words, under the subjective approach there can be no entrapment, even by "governmental misconduct[,] in a case . . . where the predisposition of the defendant to commit the crime was established."[86] The subjective test seeks to distinguish between police tactics that were a "trap for the unwary innocent" and a "trap for the unwary criminal" based on the moral character of the defendant ensnared by the trap rather than the abstract fairness of the trap itself.[87] The subjective formulation is a protection of an individual's right not to be induced to commit a crime wholly manufactured by the government; an individual who participates in a crime at the government's encouragement but who nevertheless was predisposed to commit the crime in any case has no defense because the subjective test finds him or her an "unwary criminal" rather than an "unwary innocent."

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85. *Cf.* Saunders v. People, 38 Mich. 218, 222 (1878) (Marston, J., concurring) ("Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction.").

86. Hampton v. United States, 425 U.S. 484, 489 (1976).

87. *See* Sherman v. United States, 356 U.S. 359, 372 (1958).

One noteworthy implication of the subjective formulation's focus on the defendant's traits rather than on the government's actions is that it provides no *ex ante* guidance to law enforcement agents. It is impossible for a government officer to consider the subjective entrapment formulation before or during an investigation to distinguish between permissible and impermissible investigatory tactics because there is no objective limit on the government's tactics under the subjective approach. Further, because the focus of the subjective approach is on the defendant's characteristics before any interaction with law enforcement, government agents have no incentive to narrow the reach or curtail the aggressiveness of their inducements as part of investigations. When all that matters is what was in the defendant's mind before any interaction with the government, the government has no reason to temper the aggressiveness of its investigations and all the reason to cast as broad a net as possible in hopes of coming across as many predisposed people as possible.[88] At least in theory, the government's investigatory tactics and inducements to criminality have no bearing on whether the defendant was entrapped by the government because the predisposition of the defendant is a question of fact regarding the defendant's state of mind prior to and without regard for the government's behavior.[89] In the case of crimes that consist of

88. Justice Frankfurter strongly criticized this aspect of the subjective formulation to which the majority adhered in *Sherman*. 356 U.S. at 383 (Frankfurter, J., concurring in the result) ("[A] test that looks to the character and predisposition of the defendant rather than the conduct of the police loses sight of the underlying reason for the defense of entrapment. No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society. . . . Permissible police conduct does not vary according to the particular defendant concerned."). The subjective approach is, Frankfurter believed, a violation of the fundamental principle of equality under the law and is akin to adopting the proposition that "when dealing with the criminal classes anything goes." *Id.*

89. This may be an overstatement, but it is one in practice rather than in theory. Though the fact of a defendant's participation in criminal activity manufactured by the government technically has no bearing on whether the defendant was predisposed to commit such activity before the government provided that opportunity, fact finders often use the circumstantial evidence of a defendant's willing or quick availment of a government agent's proffered criminal opportunity to infer that the defendant was predisposed to commit such an act even before the government inducement. Given the centrality of the circumstantial evidence of how a defendant responds to a criminal opportunity presented by the government, then, overly aggressive inducement tactics may make the circumstantial evidence of predisposition less persuasive to a fact finder because the defendant's submission to the government's pressure may be seen as indicative more of the

consensual dealings between willing parties where the only way for police to uncover criminal activity is through sting-style operations, the subjective entrapment approach encourages the police to lure as many people into committing crimes as possible. The only defendants who will be able to assert a successful entrapment defense are those who would not have otherwise committed a crime in the first place and thus were neither worthwhile targets of prosecution nor threats to the public outside the controlled context of police sting operations.[90]

This discussion suggests that an analysis of the successfulness of the subjective formulation of the entrapment defense at achieving its stated goals will in no way turn on the prevalence of police tactics that are commonly viewed as "entrapping" tactics. Instead, any analysis of the success of the subjective entrapment defense by its own metrics must turn solely on whether the defense prevents the conviction of people who are induced to commit crimes that are instigated wholly by the creative activity of government agents. Crucially, this means that analysis of the successfulness of the subjective entrapment defense will be essentially an inquiry into whether juries as the fact finders can faithfully apply the predisposition test and decline to convict non-predisposed defendants. Because the subjective formulation cares only for protecting unwary innocents from punishment for committing government-manufactured crimes, only conviction of a person who appears to have no predisposition to commit the crime at issue

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alluring or irresistible nature of the government's inducement than of the predisposition of the defendant.

90. To those who hope that the entrapment defense will serve to promote improved or proper police behavior, this analysis may be troubling because it suggests a flaw inherent to the subjective entrapment defense. Indeed, it seems that many of the Justices and judges who have endorsed the subjective formulation of the defense have not realized that the subjective defense has nothing to do with police conduct. While there are opinions like that of Justice Rehnquist in *Hampton*, 425 U.S. at 488–89 (plurality opinion) (stating that entrapment focuses on the defendant's state of mind, not on the police's conduct, and therefore that there can be no entrapment defense based even on government misconduct if the government can establish predisposition to commit the crime), by far the majority of the opinions echo the words of Chief Justice Warren in *Sherman*, 356 U.S. at 376 ("The case at bar illustrates an evil which the defense of entrapment is designed to overcome. . . . Thus the Government plays on the weakness of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. *Law enforcement does not require methods such as this*." (emphasis added)), which suggest some attention to limiting the methods of law enforcement rather than simply ensuring that otherwise innocent defendants are not convicted for participation in government-manufactured crimes.

would suggest that the subjective entrapment defense is not serving its foundational purpose.[91]

B. THE OBJECTIVE FORMULATION'S FOCUS ON MAINTAINING THE PURITY OF THE COURTS' LEGAL PROCESSES AND ON CHECKING IMPROPER POLICE BEHAVIOR

The objective approach to entrapment serves multiple purposes, but the key distinction between the rationales of the subjective approach and the objective approach is that the objective approach seeks to serve systemic interests rather than to protect the rights of individual defendants. Two parallel purposes underpin the objective formulation of the entrapment defense: first, preserving the purity of and public confidence in the courts' legal processes and, second, checking improper behavior by government agents.

One recurrent justification for the objective formulation is the preservation of the purity of the judicial system. Interestingly, the most obvious reason to have an entrapment defense that focuses on police conduct—to deter police misconduct—is not the only rationale that has been considered in judicial opinions about the objective formulation of the entrapment defense. Rather, the logically preceding consideration expressed in opinions like those of Justices Brandeis, Roberts, and Frankfurter is that the courts must not appear to be implicated in the misconduct of government agents who too vigorously induce people to commit crimes.[92] While closing the courts to overly aggressive police tactics may have the incidental effect of depressing overly aggressive police behavior,

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91. A guilty plea by a non-predisposed person would also suggest that the subjective entrapment defense is failing to serve its foundational purpose.

92. *See* Casey v. United States, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting) ("[The entrapment defense exists] in order to protect the government . . . from the conduct of its officers . . . [and] to preserve the purity of its courts."); Sorrells v. United States, 287 U.S. 435, 454, 457 (1932) (Roberts, J., concurring) ("[The entrapment defense is founded on] the public policy which protects the purity of government and its processes. Always the courts refuse their aid in civil cases to the perpetration and consummation of an illegal scheme. . . . The doctrine of entrapment in criminal law is the analogue of the same rule applied in civil proceedings."); *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring in the result) ("Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. . . . *Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake*." (emphasis added)).

the primary concern of the courts—and the one that gives legitimacy to the courts' creation of an entrapment defense—is the courts' interest in buttressing public faith in the courts and preventing the appearance of judicial participation in illicit government activities.[93]

Beyond concern with preventing the courts' complicity in improper government conduct, the objective approach as articulated by the non-majority Justices in *Casey*, *Sorrells*, and *Sherman* also focuses on preventing police misconduct in general. This is perhaps the most easily understood goal of any entrapment defense—the prevention of police behavior that is likely to induce criminal behavior even in a hypothetical law-abiding person.[94]

In view of the systemic rather than individual-level goals of the objective formulation of the entrapment defense, the checking value of a functioning entrapment defense requires that government agents know the limits on permissible police behavior *ex ante* so they can change their practices accordingly. This suggests that the question of whether there was entrapment based on the police's conduct should be a question of law for the court to decide rather than a question of fact for the jury, both because judicial opinions will provide clearer limits to which the police can refer and because the objective defense is based not on the factual guilt or innocence of the defendant but on preserving the purity of the courts.[95] Though a body of jury verdicts built up over time would provide some imprecise guidance to law enforcement regarding the limits of permissible behavior, treatment of the objective defense in judicial opinions as a question of law would

93. This goal of the objective formulation is absent when the objective approach has been adopted by state statute because in such a situation the courts are merely enforcing the legislature's command rather than asserting an independent authority to preserve the sanctity of the judicial process. It is worth pointing out the preservation of the purity of the legal system as a goal of the judicially-developed objective approach to entrapment because many academic articles scrutinizing the objective view fail meaningfully to treat any goals of such an approach other than checking police misconduct. *See, e.g.*, Colquitt, *supra* note 24, at 1402.

94. An illustrative example of such police action is the "drunken decoy" tactic from *State v. Powell*, in which a police officer pretended to be drunk and unconscious on the sidewalk with a large amount of cash protruding from his pockets in order to entice people to steal the money. 726 P.2d 266, 267 (Haw. 1986).

95. In this sense the objective formulation conceives of entrapment as something unrelated to the factual guilt or innocence of the defendant; entrapment is a separate concern altogether about the court's management of the legal process and is not in the province of the jury. *See Sorrells*, 287 U.S. at 456 (Roberts, J., concurring) ("It cannot truly be said that entrapment excuses [the defendant] or contradicts the obvious fact of his commission of the offense.").

ensure that the law of entrapment would both become clearer more quickly and provide law enforcement with more precise guidance demarcating permissible investigation from impermissible entrapment. In some states where the objective formulation of the entrapment defense has been adopted by statute, however, the question of whether a normal law-abiding person would be induced to criminal acts by the government's conduct is a question of fact that goes to the jury.[96] In such jurisdictions, the objective approach would in theory slowly define acceptable police behavior, though the imprecision of jury determinations suggests that these clarifications of the limits of acceptable police behavior will be less precise and slower than the clarification that would flow from the more robust discussion of the limits on permissible police conduct in published judicial opinions.

This discussion of the complementary goals of the objective formulation suggests that, to evaluate the formulation on its own terms, one must consider both of the objective formulation's stated goals. The first goal of the objective approach—keeping the courts' hands clean and inculcating public trust in the fairness of the legal process—is best answered in reference to public opinion. A more difficult conceptual problem arises when analyzing the effectiveness of the objective formulation entrapment at checking police misconduct. The objective defense might be entirely successful at achieving its goals even if it is rarely raised by defendants at trial if law enforcement officials change their behavior in response to greater clarification of what law enforcement tactics are impermissible. Consequently, analysis of the success of the objective approach in practice requires consideration both of whether police commonly employ tactics likely to entrap in the first place and of whether, in cases where police did employ such tactics, the courts are strict in refusing to give judicial approval to such prosecutions.

96. This is the situation in California, for example. *See, e.g.*, People v. Turner, 2019 WL 1970316, at *5 (Cal. Ct. App. May 3, 2019).

III. THE FAILURE OF EACH FORMULATION TO SERVE ITS UNDERLYING PURPOSE IN PRACTICE

Neither the subjective nor the objective formulation of the entrapment defense currently functions in a way that serves the purpose underlying its existence.

The majority subjective approach does not serve the goal of preventing the conviction of those with no predisposition to criminality. The subjective defense is practically unavailable to many appropriate defendants because of the steep costs and uncertain reward of raising such a defense,[97] which may partially explain why many entrapment claims arise after a conviction as a claim of last resort rather than during trial.[98] More significantly, the subjective defense does not serve its intended purpose because juries may (and, it appears, regularly do) infer criminal predisposition based on the circumstantial evidence of the

97. Raising a subjective entrapment defense requires that the defendant admit to committing the crime at issue but argue that "but for" the government's inducement he or she would not have committed the crime. *See* Part I.A, *supra*. Such an admission prejudices the defendant in the eyes of the jury and effectively forecloses an effective argument regarding factual guilt, which means that a defendant raising an entrapment claim must wager everything on that defense.

In addition, defendants who raise entrapment defenses risk incurring harsher sentences if they are convicted. Section 3E1.1(a) of the U.S. Sentencing Guidelines Manual provides that the offense level of a crime will be decreased by two "if the defendant clearly demonstrates acceptance of responsibility for his offense," and the notes to this section clarify that the reduction is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) cmt. n.2 (U.S. SENT'G COMM'N 2018). The Third Circuit, for example, has interpreted this provision to mean that defendants who raise entrapment defenses are usually ineligible for the § 3E.1.1(a) reduction because "[o]rdinarily a claim of entrapment seems to be the antithesis of the acceptance of responsibility." United States v. Jackson, 827 Fed.Appx. 209, 212–213 (3d Cir. 2020) (quoting United States v. Demes, 941 F.2d 220, 222 (3d Cir. 1991)).

Finally, defendants in subjective formulation jurisdictions who raise entrapment claims risk the government seeking to prove predisposition by introducing evidence of prior criminal acts, which will likely be admitted despite the likely prejudicial effect of such evidence given the centrality of the predisposition determination. *See* ROBINSON, *supra* note 25. Many defendants faced with such a possibility might decide that the prejudice of introduction of bad character evidence by the prosecution outweighs the slim chance that the jury will accept the defendant's entrapment defense.

98. Stevenson, *supra* note 1, at 35 (noting that one-third to one-half of all entrapment claims arise initially post-conviction and describing the entrapment defense as a "second-best defense" or "backup plan" for many defendants given the futility of raising the defense before conviction).

defendant's participation in the very government-manufactured crime that is the subject of the prosecution.[99]

The objective approach is more difficult to analyze because the rarity of defendants asserting entrapment could mean that the police are deterred *ex ante* from employing entrapping investigation techniques. We can conclude, however, that the objective approach also fails to serve its intended goals in practice because it does not appear that the objective approach has led to greater clarity of permissible conduct for law enforcement officers (or greater adherence to the lines that have been established).[100] Similarly, it is untenable to argue that public confidence in the integrity of the courts has been enhanced or maintained by the objective approach,[101] particularly in states where the question of

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99. *See, e.g.*, United States v. Cromitie, 2011 WL 1842219, at *9 (S.D.N.Y. May 10, 2011) (stating that the jury properly found predisposition in several of the defendants based solely on their commission of the crime itself and despite "the conspicuous lack of any evidence about their thoughts on jihad or terrorism prior to the time when they were recruited to join the plot"); *see also* Jacobson v. United States, 503 U.S. 540, 550 (1992) ("[T]he ready commission of the criminal act amply demonstrates the defendant's predisposition."); United States v. Aref, 285 Fed. Appx. 784, 791 (2d Cir. 2008) ("The government's evidence of predisposition sufficed because it showed 'the accused's ready response to the inducement' to commit the crime." (quoting United States v. Salerno, 66 F.3d 544, 547 (2d Cir.1995))); United States v. Gifford, 17 F.3d 462, 469 (1st Cir. 1994) (finding adequate evidence of the defendant's predisposition because "[there is no requirement that] the government to furnish direct evidence that a defendant had been violating (or . . . trying to violate) the law prior to the government's intercession[; r]ather . . . ready commission of the criminal act can itself adequately evince an individual's predisposition").

100. *See* Stevenson, *supra* note 1, at 3, 22–25 (describing the rarity of entrapment defenses in absolute terms, but noting a concentration of relatively more entrapment defenses raised in certain states such as California, Florida, Michigan, Ohio, Tennessee, Texas, and Washington that cannot be explained by the formulation applied in those jurisdictions, suggesting that the objective approach has not led to a decline in entrapment claims in jurisdictions that follow the objective formulation).

101. *See, e.g.*, WILLOW RSCH., DO AMERICANS HAVE CONFIDENCE IN THE COURTS? 2 (2018), https://willowresearch.com/wp-content/uploads/2019/10/Public_Confidence_in_US_Courts.pdf [https://perma.cc/C3AP-KUWU] (citing survey data suggesting that only thirty-six percent of respondents were "very" or "extremely" confident in state and local courts); GBAO STRATEGIES, STATE OF THE STATE COURTS—SURVEY ANALYSIS 2–3 (2020), https://www.ncsc.org/__data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf [https://perma.cc/YA5L-AL77] (citing survey data suggesting an overall public confidence rate in state courts of sixty-five percent in 2019 but citing more specific data showing lower confidence in state court's protection of civil rights (fifty-nine percent) and provision of equal justice for all (forty-nine percent)). Admittedly, state by state data on public confidence in state courts is difficult to find and so it is difficult to observe the effect of a jurisdiction's employment of the objective or subjective formulation on overall public confidence in an individual state's judicial system. Nevertheless, it is difficult to imagine that the public perception of state judicial systems in the minority of jurisdictions that employ the objective approach would be immune from the influence of public impressions of the dominant

objective entrapment is decided by the jury as a question of fact rather than by the trial judge as a question of law.[102]

This Part evaluates both formulations of the entrapment defense in practice on their own terms. Part III.A will discuss the frequency and likelihood of success of entrapment defenses in subjective and objective formulation jurisdictions. Parts III.B and III.C will evaluate the implications of the uniformly dismal success rate of entrapment claims in subjective and objective formulation jurisdictions, respectively, on the success of each formulation in achieving its foundational goals.

A. CONSISTENT FAILURE OF ENTRAPMENT DEFENSES IN BOTH SUBJECTIVE AND OBJECTIVE FORMULATION JURISDICTIONS

Empirical data about the rate of success for entrapment claims is difficult to uncover or produce. In part, data regarding the frequency of successful entrapment claims may be difficult to uncover because successful entrapment defenses at the trial court would most often not appear in reported opinions of appellate courts because the prosecution would not be able to appeal an acquittal at trial.[103] Direct reports of successful entrapment

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subjective approach and the predominantly negative view toward state judicial systems in general.

102. In such a case, the court has no ability to protect "the purity of its own temple," but must leave such diligence to juries. *Cf.* Sorrells v. United States, 287 U.S. 435, 455 (1932) (Roberts, J., concurring). There is little reason to think that juries will be overly concerned with ensuring the sanctity of the courts by refusing to give judicial backing to overly aggressive law enforcement tactics. For evidence of the public's distrust of both the jury system and judges, see WILLOW RSCH., *supra* note 101, at 5 (providing survey data suggesting a thirty-eight percent confidence rate in the jury system and a thirty-seven percent confidence rate in the judiciary).

103. *See* Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 103 (2004) ("Another point worth mentioning is that some commentators urge that the defense is largely irrelevant, supposedly because it almost always fails. There is a problem with getting an accurate picture here; when the defense is successful, it would result in an acquittal at the trial level, and the prosecutor may have trouble appealing the case without encroaching on double jeopardy issues; an appeal by the government is unlikely. Seldom are decisions reported in criminal cases at the trial level. The cases appealed will generally be ones where the defendant raised entrapment but lost and is arguing that a different legal standard would have helped his claim stand on all fours. Thus, useful empirical data on this subject is elusive; anecdotal evidence from the defense bar is interesting, but often little more than an expression of how frustrating their jobs are." (footnotes omitted)); *see also* Colquitt, *supra* note 24, at 1392 ("Gathering data to prove or disprove that entrapment does not live up to its billing is difficult but enough information can be marshaled to raise more than a scintilla of proof. Obviously, obtaining data on the number of criminal cases at the trial level that involve or potentially could involve entrapment defenses would be a substantial undertaking. Further, although studying the

defenses at the trial level are also uncommon because trial-level criminal decisions are rarely reported in state courts.[104] Nonetheless, cases that are reported in the federal system as well as practitioners' general views about the defense suggest a few basic conclusions about the prevalence of entrapment defenses and the rate of success of entrapment defenses that are raised.

The entrapment defense is rarely raised and is even more rarely successful, regardless of whether a jurisdiction applies the subjective or objective formulation. The frequency with which defendants raise entrapment defenses does not correlate with which formulation of the defense is applied in a particular jurisdiction.[105] In addition, there is no readily available evidence that the success rates of entrapment claims varies meaningfully based on what formulation is in place in a jurisdiction—practitioners and commentators uniformly bemoan that the entrapment defense is practically irrelevant given the incredible rarity of a successful entrapment defense under either formulation.[106]

B. IMPLICATIONS OF ALMOST UNIFORM FAILURE FOR THE SUBJECTIVE FORMULATION

The scant success of entrapment defenses in subjective formulation jurisdictions could be interpreted in several ways. Optimistically (in terms of the effectiveness of the subjective entrapment defense), such a scarcity could happen if non-predisposed people never committed crimes due to government inducement. A review of cases in which convictions are upheld (or even overturned), however, suggests that the more likely

number of entrapment-issue cases reaching the appellate courts is possible, because of the dearth of information they present, the process is not particularly enlightening.").

104. Stevenson, *supra* note 103, at 103.

105. *See* Stevenson, *supra* note 1, at 3, 22–25.

106. *See, e.g.*, Stevenson, *supra* note 103, at 103; Michael Winerip, *Convicted of Sex Crimes, but With No Victims*, N.Y. TIMES MAG. (Aug. 26, 2020), https://www.nytimes.com/2020/08/26/magazine/sex-offender-operation-net-nanny.html [https://perma.cc/RVK7-WFWS] ("[A]n entrapment defense is almost never successful in sting cases, according to Jessica Roth, a professor of criminal law at the Benjamin N. Cardozo School of Law in New York."); Rachel Poser, *Stash-House Stings Carry Real Penalties for Fake Crimes*, NEW YORKER (Oct. 11, 2021), https://www.newyorker.com/magazine/2021/10/18/stash-house-stings-carry-real-penalties-for-fake-crimes [on file with the *Columbia Journal of Law & Social Problems*] (discussing a clinic at the University of Chicago Law School that reframes entrapment claims as equal protection claims because, according to the clinic's founder, "[e]ntrapment [is] a non-starter").

explanation of the rarity of successful subjective entrapment defense is that juries fail to discriminate between convicting predisposed and non-predisposed defendants.[107] This explanation, in turn, demonstrates that the subjective formulation of the defense does not function in a way that achieves its goal of protecting individuals by preventing the conviction of non-predisposed defendants.

1. *An Optimistic (and Unlikely) Explanation for the Rarity of Successful Subjective Entrapment Claims*

Arguably, the dearth of successful subjective entrapment defenses could mean that non-predisposed people almost never commit crimes due to police inducement.[108] If this were so, it would be extraordinarily rare that such a person would ever need to assert the entrapment defense. The rarity of the phenomenon of an "unwary innocent" caught in a law enforcement sting operation could be explained by concluding that law enforcement almost never employs techniques or inducements so alluring as to entice non-predisposed people into the commission of crimes toward which they otherwise would have no inclination. This explanation seems unlikely. First, as discussed below, there are many cases decided under the subjective approach in which the jury's finding of predisposition appears dubious at best and based more on the fact that the defendant ceded to the government's inducement than

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107. *See, e.g.*, United States v. Cromitie, 2011 WL 1842219, at *23–24 (S.D.N.Y. May 10, 2011) (noting the conspicuous lack of prior evidence of predisposition on which the jury could have based its verdict); United States v. Aref, 285 Fed. Appx. 784, 791 (2d Cir. 2008) (upholding the jury's finding of predisposition though the only evidence was the defendant's ready submission to government inducement); Jacobson v. United States, 503 U.S. 540, 550 (1992) (overturning the jury's conviction of a man entrapped into buying child pornography because of a lack of sufficient evidence to establish predisposition). Cases like these demonstrate that under the subjective formulation juries must be rigorously policed or they will readily convict apparently non-predisposed defendants.

108. Another explanation that assumes that the subjective formulation effectively protects "unwary innocent" defendants could be that more people are predisposed to criminal conduct today than in the past and thus one should expect a decline in successful assertions of the subjective defense. This is a dubious argument, and it certainly is not an explanation that paints a flattering picture of the social effects of law enforcement operations since the genesis of the entrapment defense. If it truly is the case, however, that a greater portion of the population is inclined to criminality today than in the past, then the average defendant caught in a sting operation would more likely be predisposed to the criminal conduct for which he or she is prosecuted (and thus would be unable to raise a successful subjective entrapment defense) even if the police employ the same techniques they used in the past.

on a meaningful inquiry into the defendant's preexisting proclivity toward criminality,[109] which suggests that law enforcement does in fact utilize tactics that entice non-predisposed people to commit crimes. Second, as discussed in Part II.A, the subjective entrapment defense provides no incentive to police to reform or minimize investigatory tactics that induces criminality. For this reason, if the police employed techniques that could sometimes entrap "unwary innocents" in the past, it is likely that they would still do so because the incentive structure of the subjective formulation encourages police to cast as wide a net as possible in hopes of ensnaring as many predisposed defendants as possible.[110]

2. *A More Probable Explanation Based on Juries' Failure to Recognize Non-Predisposed Defendants*

A review of cases in which defendants raised (or could have raised) a subjective entrapment defense suggests a more likely, and more troubling, explanation. The incredible rarity of successful assertions of the entrapment defense based on the subjective approach, particularly in cases with little or no evidence of predisposition prior to the government inducement, suggests that non-predisposed defendants are in fact convicted for crimes they commit at the inducement of the government.[111] If this is true, the defense does not serve its intended purpose of providing protection for the rights of individual defendants against government inducement to criminality. This could either mean that non-predisposed defendants fail to assert the entrapment defense in the first place or that juries do not adequately

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109. This pattern of inference of predisposition due to the fact of the defendant's commission of the crime was at work in *Cromitie*, 2011 WL 1842219, at *23–24. For a more systematic study of terrorism cases after 9/11 in which indicators of potential entrapment were prevalent but not a single subjective entrapment defense was successfully raised, see Norris & Grol-Prokopczyk, *supra* note 2, at 652–58, and discussion *infra* Part III.B.2.

110. Indeed, the fact that many defendants who raise entrapment defenses are convicted based on a jury finding of predisposition implies that there was at least some evidence of government inducement because the issue of entrapment only goes to the jury if the defendant can produce some evidence of government inducement.

111. *See, e.g.*, *Cromitie*, 2011 WL 1842219, at *23–24 (noting the conspicuous lack of prior evidence of predisposition on which the jury could have based its verdict); *Aref*, 285 Fed. Appx. at 791 (upholding the jury's finding of predisposition though the only evidence was the defendant's ready submission to government inducement); *Jacobson*, 503 U.S. at 550 (overturning the jury's conviction of a man entrapped into buying child pornography because of a lack of sufficient evidence to establish predisposition).

discriminate between predisposed and non-predisposed defendants.

It is likely that many appropriate defendants fail to raise entrapment claims because of the procedural and prejudicial issues associated with asserting such a defense. To begin with, an entrapment defense typically requires that the defendant admit to the conduct alleged by the prosecution.[112] Such a defense runs the risk that the jury will decline to find entrapment but accept the defendant's admission of factual guilt, guaranteeing a conviction. Defendants raising subjective entrapment defenses also run the risk of the government seeking to prove predisposition by introducing evidence of prior criminal activity. Where predisposition is contested—as is the case with most subjective entrapment defenses—judges are likely to determine that the probative value of such character evidence outweighs the prejudicial effect to the defendant and admit the evidence.[113] Lastly, defendants who raise unsuccessful entrapment defenses may face stiffer sentences under the Federal Sentencing Guidelines because courts may determine that such defendants have not accepted responsibility for their actions in a way that merits a reduction in offense level.[114]

Even when a defendant raises a subjective entrapment defense, a review of a small sampling of cases suggests that juries do not rigorously interrogate whether defendants were truly predisposed to commit the crime. Most directly, entrapment convictions that are overturned due to a lack of sufficient evidence on which a jury could base a finding of predisposition show that juries at least sometimes fail to meaningfully evaluate the predisposition of defendants asserting entrapment defenses.[115] More generally, the

112. ROBINSON, *supra* note 25.

113. *See, e.g.*, United States v. McLaurin, 764 F.3d 372, 382–84 (4th Cir. 2014) (finding that the defendant's prior firearm possession and robbery conviction were admissible to show predisposition despite any prejudice to the defendant). This reasoning makes sense; because the subjective formulation requires inquiry into the predisposition of the defendant, prior bad character evidence is unquestionably relevant, and any prejudice that flows from the admission of such evidence is the very reason for which the court admits the evidence. This means, in turn, that a defendant who raises a subjective entrapment defense invites an inquiry into his or her character through the admission of evidence of prior bad acts.

114. *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) cmt. n.2 (U.S. SENT'G COMM'N 2018).

115. Research uncovered only a single case in which a jury's finding of predisposition was vacated due to a lack of sufficient evidence. *See Jacobson*, 503 U.S. at 550 (overturning the jury's conviction of a man entrapped into buying child pornography because "[t]he evidence that petitioner was ready and willing to commit the offense came only after the

facts of cases in which juries find predisposition despite a lack of pre-inducement evidence of predisposition suggest that juries do not rigorously examine predisposition as a requirement for conviction.[116] The remarkable number of unsuccessful entrapment defenses in subjective jurisdictions lends further support to the impression that juries' uniformly find predisposition and reject defendants' entrapment defenses with little concern for the lack of evidence of predisposition in particular cases. In the terrorism context, for instance, there appear to have been no successful entrapment defenses since 2001;[117] similarly, in the sex crime context, one journalist reported that he uncovered only one successful entrapment claim on appeal when reviewing nearly 300 prosecutions following an aggressive sting operation in Washington state.[118]

Cases like *Cromitie*—the sting operation in which the government provided fake bombs for the defendants to plant at New York synagogues—suggest a coherent (if unsatisfying) explanation for juries' convictions of apparently non-predisposed defendants: juries are permitted to infer predisposition from the defendant's mere submission to government inducement to commit the very crime that is the subject of the entrapment claim.[119] By allowing this completely circular inference of predisposition from the fact that the defendant committed the crime, the subjective formulation's goal of protecting non-predisposed defendants is dramatically undercut. It is difficult to see much practical difference between permitting juries to reason that (i) a defendant must have been predisposed to commit a crime because he or she readily gave in to government inducement and (ii) a defendant must have been predisposed because he or she in fact gave in to

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Government had devoted [two and a half] years to convincing him that he had or should have the right to engage in the very behavior proscribed by law" and stating that "[r]ational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner").

116. *See, e.g.*, *Cromitie*, 2011 WL 1842219, at *23–24 (noting the conspicuous lack of prior evidence of predisposition on which the jury could have based its verdict); *Aref*, 285 Fed. Appx. at 791 (upholding the jury's finding of predisposition though the only evidence was the defendant's ready submission to government inducement).

117. *See* Norris & Grol-Prokopczyk, *supra* note 2, at 612–13 (noting that, as of 2015, there had not been a successful entrapment defense in a terrorism prosecution since 2001); *see also* Laguardia, *supra* note 21, at 205 (noting the uniform failure of entrapment defenses in terrorism prosecutions).

118. Winerip, *supra* note 106.

119. *Cromitie*, 2011 WL 1842219, at *23–24.

government inducement and committed the crime. This circular inference of predisposition suggests that in many cases a jury's predisposition analysis will be merely a sham inquiry into whether the defendant in fact committed the crime.

C. IMPLICATIONS OF ALMOST UNIFORM FAILURE FOR THE OBJECTIVE FORMULATION

The rarity of successful objective entrapment defenses also suggests that the objective formulation fails to serve its foundational purposes of promoting public faith in the integrity of the courts' processes and of checking socially undesirable police conduct. While the rarity of successful entrapment defenses under the objective formulation could be interpreted to show that the police do not engage in objectively unreasonable conduct in the first place, there is good reason to doubt that the objective formulation has had such a beneficial effect, particularly in jurisdictions where the question of objective entrapment goes to the jury.[120]

To effectively deter police misconduct, the objective entrapment defense must be sufficiently available and attractive to defendants that they raise the entrapment defense in appropriate cases. Though issues of prejudicial character evidence are absent in objective formulation jurisdictions because the defendant's individual character is irrelevant, the defendant nonetheless faces many of the same procedural disincentives to raising such a defense as defendants in subjective formulation jurisdictions, including the gamble of admitting to the commission of a crime in order to raise an entrapment defense.[121]

There are also strong arguments that, even if consistently raised in appropriate cases, objective entrapment claims would not completely deter improper police conduct and thus that successful entrapment claims in objective formulation jurisdictions should

120. *See, e.g.*, People v. Barraza, 23 Cal.3d 675, 691 n.6 (1979) (stating, after deciding that the objective formulation applied in California, that "[i]n view of its potentially substantial effect on the issue of guilt, the defense of entrapment remains a jury question under the new test").

121. These disincentives include the requirement that the defendant admit to having committed the crime at issue as well as the chance for a harsher sentence if the court interprets an entrapment defense as the rejection of moral responsibility for having committed the crime. *Cf.* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) cmt. n.2 (U.S. SENT'G COMM'N 2018).

occasionally occur under a properly functioning objective entrapment defense. For example, one scholar has suggested that an objective entrapment theory may fail to realize its intended system-wide benefits because police departments may be more concerned with maximizing arrests than convictions; because individual officers likely to engage in objectively improper investigatory tactics are unlikely to be concerned with whether their arrestees are convicted; and—most significantly—because police may be motivated to entrap in order to acquire other incriminating evidence that will not be invalidated even by a successful entrapment defense.[122] Another scholar suggests that entrapment doctrine ineffectively deters improper police behavior because of other benefits associated with entrapment or near-entrapment,[123] including bolstering police's public image as crime fighters, assisting individual officers' professional advancement, justifying increased police funding by driving up arrest figures, and providing a bargaining chip for plea deals such that entrapment does not always result in an acquittal.[124] Whether for these or other reasons,[125] a survey of cases rejecting entrapment defenses in objective formulation jurisdictions leaves the distinct

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122. *See* Stevenson, *supra* note 103, at 75–80. Particularly surprising to most readers may be Stevenson's point that, because evidence of peripheral crimes obtained through entrapping investigatory techniques is not suppressed pursuant to the constitutional "fruit of the poisonous tree" doctrine, police may be willing to sacrifice a conviction on the crime that was the subject of the entrapping investigation in order to obtain evidence of other crimes committed by the target of the investigation. *Id.* at 79–80 ("If the police obtain incriminating evidence from a warrantless search, or a confession violating the Fourth Amendment, both could be thrown out of court. If the incriminating evidence comes out of an illegitimate sting operation, however, the evidence is immune to the exclusionary rules. Even if the defendant is acquitted of the charge related to the original entrapment scheme, evidence of other crimes, if gathered in the process, will be fully admissible. The potential payoffs for police can be great, especially if the unlawful sting operation targets someone vaguely suspected of being a 'big fish' for a criminal enterprise that is otherwise inherently hard to detect or investigate. If these potential payoffs are great enough to outweigh the 'cost' of letting the defendant off of the original charge, then the police would have an incentive to concoct truly devious plots.").

123. *See* Colquitt, *supra* note 24, at 1415–16 ("Proof, however, that the entrapment doctrine actually deters police from utilizing entrapment or quasi-entrapment methods is at most very weak. . . . Regardless of the basis in law for defenses against entrapment, police use methods bordering on or involving entrapment because those methods help them achieve their goals.").

124. *Id.* at 1416–21.

125. Another reason for the rarity of successful entrapment defenses could be that in jurisdictions where objective entrapment issues go to the jury, juries are so prejudiced by the defendant's factual guilt (or perhaps by their perception of the defendant's criminal predisposition) that they refuse to acquit factually guilty defendants even if the police employ objectively unreasonable and entrapping tactics.

impression that the objective entrapment defense is little more of a hindrance to police than its subjective counterpart.

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The foundational rationales for both formulations of the entrapment defense demand that the defense serve a meaningful purpose, either to protect individual defendants or to protect society by constraining the police and maintaining the purity of the courts. This Part makes clear that the present formulations of the entrapment defense fail to serve both of these underlying purposes. The subjective formulation fails to provide meaningful protection to non-predisposed defendants because defendants are disinclined to raise such defenses and because juries often reject such defenses in apparent disregard for the facts of a particular defendant's predisposition. The objective formulation has failed to induce systematic restraint by police because defendants face procedural disincentives to raising the defense, because police may be unresponsive even to successful entrapment defenses, and because juries might reject even appropriate entrapment claims by defendants. The practical failure of both formulations of the defense demands a rethinking of the entrapment defense on a broader scale than merely a choice between the competing formulations.

IV. THE ENTRAPMENT DEFENSE REFORMULATED AS A SET OF STATUTORY RIGHTS AGAINST CERTAIN POLICE BEHAVIORS

The statutory reformulation of the entrapment defense as a set of rights against certain police behaviors would better accomplish the goals of both the subjective and objective formulations of the defense. For this reason, adherents of either formulation should support this concrete and tangible reform to entrapment doctrine, which satisfies the goals of both sides of the present doctrinal debate and incorporates the positive aspects of both approaches.

Part IV advocates for a statutory reformulation of the entrapment defense as a set of specific rights against police behaviors that defendants may assert as defenses to prosecution for government-induced crimes. The Part concludes with a proposal of suggested rights; however, the goal of this Note is to show the superiority of the benefits of resuscitating the

entrapment defense by statute as a set of specific rights, not to establish the particular contours of those statutory rights.

A. BENEFITS AND COSTS OF ENTRAPMENT DEFINED AS A SPECIFIC SET OF RIGHTS AGAINST CERTAIN POLICE CONDUCT

A statutory reworking of the entrapment defense as a set of rights against certain police conduct would serve the goals of the subjective formulation by ensuring that non-predisposed defendants are not convicted for participating in crimes due to government inducement and the goals of the objective formulation by maintaining the purity of the courts' legal processes and deterring inappropriate police conduct.[126] This approach would provide clear *ex ante* guidance to police about the limits of permissible investigation tactics and clear *ex post* guidance to juries and to judges to protect individual defendants.

1. *From the Perspective of the Subjective Formulation*

From the perspective of the subjective formulation's focus on protecting individual defendants, the primary difficulty with the current entrapment defense is that juries appear to fail to faithfully discriminate between defendants with a predisposition to commit the crime at issue and those without such a predisposition.[127] A set of specific statutory rights against certain police behaviors that are particularly likely to entrap non-predisposed defendants would remedy this problem by removing discretion from juries and increasing the meaningfulness of appellate review in entrapment cases.[128]

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126. This approach could have the additional benefit of reducing the cost of raising an entrapment defense because the legislature could provide that a defendant would not be required to admit to having committed the alleged crime in order to raise an entrapment defense. Instead, a defendant raising an entrapment defense could do so simply by pointing to a violation of a statutory limitation on police conduct without admitting to the alleged crime.

127. *See supra* Part III.B.2.

128. While these rights would most likely be framed in factual terms (e.g., whether the police initially suggested the crime, whether the defendant was already engaged in committing crimes similar to the one involving the police, whether the police provided the essential means of the crimes commission, or whether the defendant had alternative avenues of accomplishing the crime without government support) and would therefore be questions for the jury, courts on review would be better positioned to evaluate the sufficiency of the evidence that the jury considered when making these more discrete determinations.

Though such a statutory elaboration would mirror the objective formulation's emphasis on police conduct rather than the individual defendant's character, it would also accomplish the subjective formulation's goal of protecting non-predisposed defendants. Rather than relying on the easily prejudiced jury, a non-predisposed defendant who commits a crime due to government inducement could establish an entrapment defense by demonstrating that the police's conduct violated the defendant's rights under the entrapment statute, such as by showing that the police initially suggested the crime or provided the essential means of committing the crime.[129] Admittedly, this approach may not protect every non-predisposed defendant because a particularly impressionable but non-predisposed defendant might succumb to police inducement not covered by the statute. Such a conviction, however, will likely occur to a narrower class of defendants than those who are convicted under the present subjective formulation by juries who either ignore the predisposition requirement or find predisposition based on little more than the defendant's commission of the crime at issue. On balance, a more mechanical rule to protect non-predisposed defendants will likely better serve the individual-protecting purpose of the subjective formulation.

The main cost of the proposed approach in terms of the subjective formulation is that the protection offered by a set of statutory rights will be broad enough that some predisposed defendants will escape conviction. In response to this concern, the words of Justice Holmes quoted by Justice Frankfurter in *Sherman* suffice: "[F]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."[130] The subjective formulation concerns itself with ensuring that normally law-abiding citizens are not convicted based on government inducement to crimes they otherwise would not have committed; one cannot in good faith argue that it better serves the goals of the subjective formulation to convict a non-predisposed person in order to ensure that predisposed people are always convicted.

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129. *See* discussion *infra* Part IV.B of possible limitations on police behavior under the proposed approach.

130. Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring in the result) (quoting Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)).

2. *From the Perspective of the Objective Formulation*

From the perspective of the objective formulation's focus on the purity of the courts and checking police misconduct, providing defendants with the means of asserting their own rights against police misconduct would doubtless increase the rigor with which limits are applied to law enforcement actions.[131] By removing juries' discretion and relying on defendants to act in their own self-interest by asserting their rights against certain police conduct, this approach would ensure that juries do not convict defendants based on judgments of defendants' character despite police misconduct. A statutory right against certain types of entrapping police conduct would empower defendants, rather than juries or judges, to police the police. A strong incentive for defendants to aggressively assert their rights against improper police conduct would also ensure the purity of the courts' legal processes against granting judicial imprimatur to prosecutions founded on government overreach. Last, such a statutory reformation would provide police with clear notice of permissible investigation tactics by defining a set of specific statutory limits on police behavior and would create strong incentives for police to remain within the bounds of behavior permissible under the statute.

The primary downside of the proposed approach from the vantage of the objective formulation is that a set of statutory rights against certain police behaviors will be less flexible than a general standard of reasonableness for police conduct. Though this is a valid concern, the benefits of increased clarity to police of such an approach should be understood to outweigh any concerns about inflexibility—if it becomes clear that the list of statutory rights is incomplete, the legislature may update the list to better meet the needs of society in response to the current policing climate.

131. Additionally, grounding the entrapment defense more firmly in statutory text would mitigate the need for courts to read in the entrapment defense based on fictive legislative intent.

B. PROPOSED RIGHTS

The purpose of this Note is to argue that the entrapment defense can be reformulated as a set of statutory rights to better realize the goals underlying both conceptual formulations of the defense. This Part suggests particular rights that could be included in such statutes; however, the key point of this part of the Note is not to establish the correct or exhaustive set of such rights but merely to provide concrete examples of the Note's proposed statutory reform of the entrapment defense.

An entrapment statute formulated as a set of rights against certain police behaviors could include rights such as:

> 1. Police may not create crime. Police may, however, infiltrate existing criminal organizations to secure evidence of criminal activity.

For example, police may induce criminal acts by those already involved in an illegal gambling parlor, may buy drugs from a person independently engaged in selling drugs but may not encourage a person to acquire drugs for the purpose of selling them, and may involve themselves in a person's preexisting plan to bomb a site but may not initially suggest such an act. The key question is whether the criminal activity preexisted the government's involvement or if the crime was initiated by the government.[132]

> 2. Police may not provide essential means of committing a crime when a person has no reasonable prospect of otherwise acquiring the means on his or her own.

For example, the police may not supply a person with a bomb or a fake bomb when there is no indication that the person could or would otherwise acquire a bomb; similarly, the police may not

132. For an example of a successful sting operation apparently carried out by infiltrating rather than creating criminal activity, see Yan Zhuang et al., *The Criminals Thought the Devices Were Secure. But the Seller Was the F.B.I.*, N.Y. TIMES (June 8, 2021) https://www.nytimes.com/2021/06/08/world/australia/operation-trojan-horse-anom.html?searchResultPosition=8 [https://perma.cc/4NLX-K8T6], which details a massive sting operation conducted by the Federal Bureau of Investigation in which the F.B.I. provided criminal organizations with what the organizations believed were encrypted cell phones but that in fact allowed the F.B.I. and Australian police to monitor the organizations' criminal activities.

provide a person with drugs to facilitate the illegal sale of those drugs if there is no indication that the person would or could otherwise have acquired drugs to sell.[133]

> 3. Police may not offer financial rewards for committing crime that are separate from the natural profit of the crime.

For example, the police may not offer to pay a suspect to commit a murder but may offer to pay a defendant in exchange for the sale of illegal drugs.

> 4. Police may not appeal to friendship, sexual relationships, sympathy, or other personal relationships in order to induce criminal acts.

For example, the police may not appeal to shared military service or shared experience of addiction treatment to encourage illegal sale of prohibited substances.[134]

> 5. Police may not make the crime especially attractive by falsely stating that the criminal conduct is not illegal or unreasonably assuring a person that there is no chance of being caught in the criminal act.

For example, the police may not attempt to convince a defendant that the defendant has or should have a right to engage in behavior that is in fact illegal[135] or otherwise assure a defendant that police never catch people engaging in a certain type of crime.

Legislatures that codify an entrapment defense in this way could adopt any statutory rights they deem appropriate and could update such a list of rights based on evolving police practices. Legislatures could also choose to lower the costs associated with raising an entrapment defense, such as by stating that a defendant may raise an entrapment defense under the statute without first

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133. For example, this limitation would compel a different result in *United States v. Cromitie*. *See* 2011 WL 1842219 (S.D.N.Y. May 10, 2011) (government provided fake bomb and weapons to the defendants with no showing that the defendants would have acquired these things otherwise).

134. *Cf.* Sorrells v. United States, 287 U.S. 435, 440 (1932) (false appeals to shared military service); Sherman v. United States, 356 U.S. 369, 371 (1958) (informant induces defendant who he met in addiction treatment to acquire then resell narcotics).

135. *Cf.* Jacobson v. United States, 503 U.S. 540, 553 (1992).

admitting to having committed the crime at issue or by providing that an entrapment defense does not necessarily require a sentencing determination that a defendant failed to accept moral responsibility for the crime.[136] Most fundamentally, however, this statutory approach requires that defendants be able to raise an entrapment defense by citing specific prohibitions on certain types of police behavior rather than more nebulous concepts such as unreasonableness of police tactics.

CONCLUSION

The present formulations of the entrapment defense fail to achieve their foundational purposes. The subjective formulation does not adequately protect non-predisposed defendants from conviction for participation in government-manufactured crimes because such defendants face strong disincentives to raising an entrapment defense and because juries routinely convict such defendants despite little or no evidence of predisposition other than the fact of the commission of the crime at issue. The objective formulation does not provide adequate clarity to law enforcement and is too rarely raised due to many of the same procedural disincentives as the subjective formulation. This Note proposes the statutory resuscitation of the entrapment defense as a set of specific statutory rights that defendants may assert as defenses to prosecution for government-induced crimes. Such a reformulation of the entrapment defense is superior to the status quo because it would more faithfully serve the goal of protecting individual non-predisposed defendants, provide clearer and more forceful incentives for police to refrain from objectively unreasonable conduct in investigations, and shield the courts from complicity in improper conduct by law enforcement officials.

The rationales underlying both the subjective and objective formulations of the entrapment defense are compelling and demand the existence of a functional entrapment defense. There are enough crimes for the government to investigate without the government artificially generating offenses to prosecute. Government's law enforcement efforts can be directed to better tasks than radicalizing a disaffected person, giving him encouragement and the means to commit a horrendous crime, then

136. *See supra* notes 97, 121 and accompanying text.

prosecuting him when he succumbs to the government's pressure.[137] We need not create criminals out of law-abiding citizens in order to punish them and we need not tolerate an overbearing police force in society. A statutory resuscitation of the entrapment defense as a set of concrete rights against certain police conduct is the best and most practical reform to accomplish the goals underlying the entrapment defense.

137. *Cf. Cromitie*, 2011 WL 1842219.