

April 2006

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Jess D. Mekeel

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Repository Citation

Jess D. Mekeel, *Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine*, 14 Wm. & Mary Bill Rts. J. 1583 (2006), <https://scholarship.law.wm.edu/wmborj/vol14/iss4/10>

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MISNAMED, MISAPPLIED, AND MISGUIDED: CLARIFYING THE STATE OF SENTENCING ENTRAPMENT AND PROPOSING A NEW CONCEPTION OF THE DOCTRINE

Jess D. Mekeel*

INTRODUCTION

While American military and intelligence forces continue to wage,¹ and the American media continues to incessantly cover,² the global war on terrorism, popular attention has shifted away from a war closer to home — the war on drugs.³ Nevertheless, the war on drugs, as well as the war on other crimes, is waged on a daily basis. In fact, the United States government spends over \$40 billion per year on the drug war, yet drugs continue to threaten American society and carry both human and monetary costs.⁴ Law enforcement targeted at suppliers remains “the dominant [policy] lever in the United States,”⁵ and government officials continually

* B.A., Political Science and Peace, War, and Defense, University of North Carolina at Chapel Hill, 2004; J.D., College of William & Mary, Marshall-Wythe School of Law, 2006. I am grateful to the editors and staff members of the *William & Mary Bill of Rights Journal* for their aid on this Note and their dedication over the past year to Volume 14 of the *Journal*. I also am indebted to Jack Barnwell for allowing me to assist in the *State v. Foster* appeal, and to Kathleen Baldwin, Bill Hart, and Paul Marcus for providing invaluable research and writing instruction in the dynamic field of criminal law. Finally, I wish to express my sincere gratitude for the enduring love, patience, and support of my parents, Harold and Maria Mekeel, and Lara Whittaker. All mistakes in this Note remain my own.

¹ See *4 Terrorists Killed in U.S. Missile Strike*, CNN.com, Jan. 17, 2006, <http://www.cnn.com/2006/WORLD/asiapcf/01/17/pakistan.strike.ap/index.html> (last visited Jan. 25, 2006).

² For example, a search for the phrase “war on terrorism” in *New York Times* articles from January 1, 2003 until January 1, 2006 resulted in 819 hits.

³ The same kind of search yielded only eighty-nine hits for “war on drugs,” although naturally, I recognize that this is far from a perfect method of measuring media coverage.

A possible exception to the trend in coverage of the drug war has been the media obsession with the use of steroids and human growth hormones in professional sports. See, e.g., Media Advisory, Comm. on Gov’t Reform, Media Coverage for March 17 Hearing into Steroids in Major League Baseball, STATES NEWS SERVICE, Mar. 15, 2005 (on file with author) (“[W]e anticipate more requests for coverage than there are seats in the hearing room.”). Steroid use in athletics and the credibility of home run records, however, is a far cry from the national narcotics problem.

⁴ Jonathan Caulkins & Robert MacCoun, *Analyzing Illicit Drug Markets When Dealers Act With Limited Rationality*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 315, 315 (Francesco Parisi & Vernon L. Smith eds., 2005) (“[D]rugs create about \$100 billion per year in quantifiable social costs.”).

⁵ *Id.*

adopt new and creative strategies for catching offenders and protecting American citizens. One of the more common means of investigating and detecting criminal behavior has been through the use of sting operations.⁶ Whether posing as drug dealers and purchasers on the streets⁷ or as innocent and vulnerable children on the Internet,⁸ government officials frequently work undercover to root out and prosecute criminals in a variety of settings.

Such police methods have not gone unchallenged, however, particularly when used in the context of rigid, if not mandatory, sentencing laws.⁹ In North Carolina, for example, Michael Washington, a ten-year veteran of the police force and three-year veteran of the narcotics unit, arranged, with the assistance of a confidential informant, the sale of one ounce of cocaine for \$800.00,¹⁰ a "trafficking amount" of the substance.¹¹ The target of the reverse sting and the ultimate purchaser was Alvin Terrill Foster, Jr.¹² According to testimony at trial, Washington and the confidential informant planned to sell the ounce of cocaine for \$800.00, receiving \$500.00 at the time of the exchange and "fronting" the remaining \$300.00 until a later date.¹³ At the predetermined location, the defendant got in the car with the undercover agent and confidential informant, was handed a plastic bag containing cocaine, and was shown a scale that he could use to weigh the drugs.¹⁴ Because the plastic bag that the defendant had purchased contained 32.2 grams of powder cocaine, he was arrested and convicted for trafficking cocaine instead of simple possession.¹⁵ The defendant contended that he had never purchased more than five grams from the informant before, that he was a user and not a dealer, and that in the transaction for which he was arrested, he thought he was only purchasing five grams.¹⁶ While the defendant

⁶ See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5.2 (2d ed. 1986).

⁷ See Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1056-58 (1993) (differentiating traditional and reverse sting operations employed in the drug war).

⁸ See, e.g., *Infoseek Executive Is Charged With Seeking Sex from Minor*, N.Y. TIMES, Sept. 21, 1999, at C10.

⁹ See Todd E. Witten, Note, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 697-98 (1996).

¹⁰ New Brief for the State 2-3, *State v. Foster*, 592 S.E.2d 259 (N.C. Ct. App. 2004) (No. 104PA04) (on file with author). As noted in the brief, "[a]n ounce equals 28.350 grams." *Id.* at 7 n.2 (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1341 (10th ed. 1997)).

¹¹ *State v. Foster*, 592 S.E.2d 259, 261 (N.C. Ct. App. 2004).

¹² *Id.*

¹³ See *id.*

¹⁴ See *id.* There was conflicting testimony as to whether the defendant used the scale: the defendant testified that he never weighed the drugs, while Detective Washington testified that he showed the defendant the measured weight when the defendant placed the cocaine on the scale. Compare *id.*, with *id.* at 262.

¹⁵ See *id.* at 261.

¹⁶ See *id.* at 262.

did not raise the claim at trial, the appellate court sua sponte addressed the issue of sentencing entrapment¹⁷ and concluded that the defendant was entitled to a new trial at which he could present the defense.¹⁸

Between 1996 and 1998, academia produced a number of articles addressing the quagmire of “sentencing entrapment” or “sentencing manipulation.”¹⁹ A plethora of definitions have been employed to describe this controversial defense.²⁰ Many courts have struggled with this doctrine, including the Supreme Court of North Carolina, which was unable to come to a definitive decision in reviewing the Court of Appeals’ decision in *State v. Foster*²¹ and, consequently, left the controversy surrounding the doctrine unresolved in North Carolina.²² Because of the continuing confusion regarding the contours and viability of sentencing entrapment, it is necessary to revisit this troubling issue.

This Note will examine the different versions and the current status of sentencing entrapment. Part II of this Note will provide a brief background necessary for an understanding of sentencing entrapment. Particularly, the section will discuss the historical development of the traditional entrapment defense and federal sentencing laws, including the Federal Sentencing Guidelines and mandatory minimum sentences. Part III will evaluate the current status of sentencing entrapment in the federal circuits as well as various state courts. Part IV will examine the advantages and disadvantages of each version of sentencing entrapment. Part V will further examine

¹⁷ *Id.* at 264–65 (extending the defendant’s claim of entrapment to the doctrine of sentencing entrapment). Such a holding seemed to run counter to the North Carolina Supreme Court’s explanation of the entrapment defense as available only to “one who entertained *no* prior criminal intent.” *State v. Love*, 47 S.E.2d 712, 714 (N.C. 1948) (emphasis added).

¹⁸ *Foster*, 592 S.E.2d at 265. In framing the sentencing entrapment issue, the court cited *United States v. Si*, 343 F.3d 1116 (9th Cir. 2003), wherein the Ninth Circuit held that “‘sentencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped into committing a more significant crime that is subject to more severe punishment because of government conduct.’” *Id.* at 264 (quoting *Si*, 343 F.3d at 1128).

¹⁹ See, e.g., Joan Malmud, Comment, *Defending a Sentence: The Judicial Establishment of Sentencing Entrapment and Sentencing Manipulation Defenses*, 145 U. PA. L. REV. 1359 (1997); Jeff LaBine, Note, *Sentencing Entrapment Under the Federal Sentencing Guidelines: Activism or Interpretation?*, 44 WAYNE L. REV. 1519 (1998); Suzanne Mitchell, Note, *Clarifying the United States Sentencing Guidelines’ Focus on Government Conduct in Reverse Sting Sentencing: Imperfect Entrapment as a Logical Incomplete Defense that Warrants Departure*, 64 GEO. WASH. L. REV. 746 (1996); Witten, *supra* note 9.

²⁰ See *infra* Part II (discussing judicial treatment of the separate doctrines).

²¹ 604 S.E.2d 913, 913 (N.C. 2004) (per curiam). One justice took no part in the decision, and the remaining six were evenly divided on the issue. *Id.*

²² Despite being presented with the opportunity to resolve the issue of sentencing entrapment, the court passed the buck, forcing the doctrine to eventually find its way once again through the North Carolina legal system. *Id.* (“[T]he decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

sentencing manipulation.²³ Ultimately, this Note will conclude that sentencing entrapment should be rejected and that sentencing manipulation — provided it is carefully construed, narrowly applied, and cabined by either an intent-based standard or a market-based standard — is the more legitimate, desirable, and viable defense to a contested sentence.

I. BACKGROUND

A. *Traditional Entrapment*

*The serpent deceived me, and I ate.*²⁴

Sentencing entrapment has often been described as an extension of the traditional defense of entrapment.²⁵ Entrapment, in turn, has been defined generally as “[a] law-enforcement officer’s or government agent’s inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against that person.”²⁶ The two concepts are distinct, as traditional entrapment is an affirmative defense to the substantive crime, and sentencing entrapment is merely a defense to the sentence. Nevertheless, an adequate understanding of sentencing entrapment requires a brief discussion of the development of the traditional defense of entrapment.

In 1932, the Supreme Court definitively established and defined the entrapment defense in *Sorrells v. United States*.²⁷ The defendant in *Sorrells* was arrested for violating the National Prohibition Act after selling whiskey to an undercover agent.²⁸ The defendant initially denied possessing any liquor after multiple requests by the

²³ For purposes of uniformity, the phrase sentencing manipulation will be used instead of what some courts have called “sentencing factor manipulation.” While several states have retained mandatory sentencing in accordance with their sentencing guidelines, the federal system has returned to discretionary sentencing, at least for now. *See infra* note 68 and accompanying text. Thus, in that context, the issue is no longer manipulating a sentencing factor, which would have resulted in a pre-defined sentence, but rather, the issue is about manipulating the end product — the sentence itself.

²⁴ *Genesis* 3:13 (New Catholic ed.)

²⁵ *See* Daniel L. Abelson, Comment, *Sentencing Entrapment: An Overview and Analysis*, 86 MARQ. L. REV. 773, 779 (2003).

²⁶ BLACK’S LAW DICTIONARY 573 (8th ed. 2004).

²⁷ 287 U.S. 435 (1932). Scholars often point to *Woo Wai v. United States* as the first significant attempt at framing the entrapment issue. 223 F. 412, 415 (9th Cir. 1915) (reversing a conviction for conspiracy to bring aliens into the United States because the government had organized the operation and induced the defendants to commit the crime); *see also* PAUL MARCUS, THE ENTRAPMENT DEFENSE §1.03, at 11 (2d ed. 1995) (“It is clear that *Woo Wai* marks the beginning of the modern doctrine of entrapment . . .”).

²⁸ *Sorrells*, 287 U.S. at 438.

agent but finally yielded after the agent appealed to the bonds of men who served in the same military unit during World War I.²⁹ The Supreme Court reversed the conviction and found that the defense of entrapment exists “as a matter of law.”³⁰

Despite finding that the defendant in *Sorrells* had been entrapped, the Court was deeply divided over the contours of the entrapment defense. Writing for the majority, Chief Justice Hughes adopted what has since become known as the “subjective test” of entrapment.³¹ Such an approach focuses not on the actions of the government, but on the predisposition of the defendant to commit the offense.³² The court may remove the defendant’s conduct from the reach of the criminal statute when “the defendant is a person otherwise innocent,”³³ and the government prosecutes the defendant “for an alleged offense which is the product of the creative activity of its own officials.”³⁴ Chief Justice Hughes reasoned that Congress could not have intended to place such a defendant within the reach of the criminal law, and thus, convicting an entrapped defendant would constitute a “gross perversion”³⁵ of legislative intent.³⁶ The Supreme Court has since consistently followed this subjective approach to entrapment, and has held that “[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.”³⁷

An alternative approach to entrapment, however, has found substantial support in concurring and dissenting opinions of the Court,³⁸ as well as in numerous state court opinions.³⁹ This version of entrapment, often labeled the “objective test,”⁴⁰ originated in Justice Roberts’s dissent in *Sorrells*.⁴¹ Whereas the subjective approach

²⁹ See *id.* at 439.

³⁰ *Id.* at 452.

³¹ See MARCUS, *supra* note 27, §1.06, at 14–15.

³² See *Sorrells*, 287 U.S. at 451.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 452.

³⁶ See *id.* at 448–52.

[I]t was [not] the intention of the Congress in enacting [the National Prohibition Act] 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. at 448.

³⁷ *United States v. Russell*, 411 U.S. 423, 429 (1973) (quoting *Sherman v. United States*, 356 U.S. 369, 372 (1958)) (alteration in original).

³⁸ See, e.g., *Hampton v. United States*, 425 U.S. 484, 495–97 (1976) (Brennan, J., dissenting); *Sherman v. United States*, 356 U.S. 369, (1958) (Frankfurter, J., concurring in result).

³⁹ See, e.g., *Coffey v. State*, 585 P.2d 514, 521 (Alaska 1978); *People v. Smith*, 80 P.3d 662, 665 (Cal. 2003); *State v. Reed*, 881 P.2d 1218, 1228 (Haw. 1994), *overruled on other grounds*, *State v. Balanza*, 1 P.3d 281 (Haw. 2000).

⁴⁰ See MARCUS, *supra* note 27, §1.06 at 19.

⁴¹ *Sorrells*, 287 U.S. at 453–59 (Roberts, J., dissenting).

is focused on the predisposition of the defendant, the objective approach looks to the actions of the government agents involved in the investigation.⁴² Where the government agents engage in wrongful conduct, as a matter of public policy, Roberts argued that the Court should be able to use its supervisory power to invalidate the resulting prosecution.⁴³

While the federal courts have continued to apply the subjective standard for entrapment, there nevertheless have been attempts to utilize some of the elements of the objective standard by evaluating claims of "outrageous governmental conduct."⁴⁴ This is in large measure due to the increased use of reverse stings, a practice that has attracted attention and often criticism from the courts.⁴⁵ Accordingly, the Supreme Court has stated that even where predisposition is found and a defendant fails to show entrapment, the defendant may still pursue a due process claim based on outrageous government conduct.⁴⁶

These approaches⁴⁷ to entrapment have served as the underlying foundations for the various versions of sentencing entrapment, a defense primarily created in response to structured sentencing, particularly the Federal Sentencing Guidelines.

⁴² *Id.* at 453–54. While not adopting the doctrine because of a conflict with state legislation, the Supreme Court of Colorado noted that "commentators generally favor the objective test." *Bailey v. People*, 630 P.2d 1062, 1066 (Colo. 1981).

⁴³ *Sorrells*, 287 U.S. at 457–59 (Roberts, J., dissenting). "It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." *Id.* at 457.

⁴⁴ See Witten, *supra* note 9, at 714–15 (noting that the door for due process claims based on outrageous governmental conduct was opened first in dicta in *Russell* and again in *Hampton*).

⁴⁵ See, e.g., *Leech v. State*, 66 P.3d 987, 991 (Okla. Crim. App. 2003) (Johnson, P.J., concurring) ("The justice system should look with a jaundiced eye upon reverse sting operations. This effectively is the justice system becoming involved in committing crime and not stopping it.").

⁴⁶ See *Hampton v. United States*, 425 U.S. 484, 489 (1976) (citing *United States v. Russell*, 411 U.S. 423, 431–32 (1973)). The Due Process Clause was invoked as a result of government misconduct most notably in the classic case *Rochin v. California*, 342 U.S. 165 (1952). In *Rochin*, the police officers forcibly pumped the defendant's stomach in order to retrieve drugs that he had ingested. See *id.* at 166. The Court held that such behavior by the government was so shocking to the conscience that it violated substantive due process. See *id.* at 173.

⁴⁷ One scholar has suggested a third approach: a blending of the subjective and objective. See Camp, *supra* note 7, at 1085–95.

The proposed standard, then, involves a three-step process that encompasses both the objective and subjective views of entrapment. In the first step, the defendant must convince the court that some government impropriety exists. . . .

In the second step, the prosecution must offer proof that the defendant was predisposed to commit the offense. . . .

In [the] final step, the jury is charged with weighing the defendant's predisposition against the government's misconduct, since the court already has determined that both exist.

Id. at 1086–87.

B. Sentencing Guidelines

Sentencing entrapment is often seen as a last ditch effort in situations, like that of Alvin Terrill Foster,⁴⁸ where sentencing laws are mandatory and judges lack the authority to use discretion in imposing the sentence. Because of the relationship between sentencing entrapment and mandatory sentencing,⁴⁹ it is necessary to examine the development and status of sentencing laws, primarily the Federal Sentencing Guidelines.

Before the institution of the Federal Sentencing Guidelines, judges exercised substantial discretion in imposing sentences.⁵⁰ Such unfettered discretion, however, led to disparate treatment of similarly situated defendants.⁵¹ In 1984, Congress enacted the Comprehensive Crime Control Act (CCCA)⁵² in response to the rising concern about increased drug use and violent crime.⁵³ The CCCA included the Sentencing Reform Act, which replaced the United States Parole Commission with the United States Sentencing Commission.⁵⁴ The Sentencing Commission was charged with drafting sentencing guidelines for the federal courts,⁵⁵ thereby addressing the problem of disparate sentencing within the federal system. In developing a structured sentencing model, the Commission heeded Congress's three goals for the Guidelines: "enhancement of the criminal justice system's ability to reduce crime, uniformity in sentencing, and proportionality in sentencing."⁵⁶

The Guidelines were designed to work in a formulaic, mechanical fashion, thereby removing excessive discretion from the judges' hands.⁵⁷ The four-step process begins with the judge determining the offender's base offense level by examining the offender's "relevant conduct."⁵⁸ Next, the base offense level may be adjusted

⁴⁸ See *supra* notes 10–18 and accompanying text.

⁴⁹ See Witten, *supra* note 9, at 706 ("Because the length of a drug offender's sentence depends upon the quantity of drugs he or she bought or sold, some drug enforcement agents attempt to persuade suspects to buy or sell drugs in amounts necessary to trigger higher statutory penalties." (footnotes omitted)).

⁵⁰ See Mitchell, *supra* note 19, at 749 ("Before Congress adopted the Guidelines in 1987, judges wielded virtually unfettered discretion in sentencing.").

⁵¹ *United States v. Booker*, 543 U.S. 220, 272–303 (2005) (Stevens, J., dissenting). "The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim." *Id.* at 292.

⁵² Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C.).

⁵³ See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1945 (1988).

⁵⁴ See Witten, *supra* note 9, at 701.

⁵⁵ *Id.*

⁵⁶ LaBine, *supra* note 19, at 1527. See also U.S. SENTENCING COMMISSION, GUIDELINES MANUAL §1A1.1(3) (2005) ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentenc[ing] . . .") [hereinafter 2005 MANUAL].

⁵⁷ See Witten, *supra* note 9, at 703–04.

⁵⁸ *Id.* at 703.

depending on case-specific factors, such as acceptance of responsibility.⁵⁹ Third, the judge determines the defendant's criminal history level,⁶⁰ and using the Sentencing Guidelines' grid, the judge finds the point where the severity of the crime and the defendant's criminal record level merge on the grid.⁶¹ After plotting this information on the grid, the judge is left with a range of months for which he may sentence the defendant.⁶²

Recognizing that no sentencing scheme could be entirely comprehensive and that departures from the grid and guidelines sometimes may be warranted, the Commission provided that judges may depart from the guidelines only when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."⁶³ To decide whether a circumstance was not adequately considered by the Commission, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."⁶⁴

Some courts and commentators have criticized the Guidelines' quantity-based sentencing scheme, arguing that "prosecutors and law enforcement officials are presented with an incentive to manipulate criminal investigations by increasing the amount of drugs or money laundered to increase the defendant's sentence."⁶⁵ Critics contend that the discretion removed from the judges' sphere has been improperly placed in the realm of law enforcement.⁶⁶ Thus, the argument goes, "the Commission has inadvertently opened the door for governmental misuse and manipulation of sentencing factors."⁶⁷

With the recent *United States v. Booker* decision,⁶⁸ some of those fears have been alleviated⁶⁹ as the risk of governmental abuse has been lessened with the dismantling of

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 704.

⁶³ 18 U.S.C. § 3553(b) (2000).

⁶⁴ *Id.*

⁶⁵ Witten, *supra* note 9, at 706.

⁶⁶ *Id.* at 706–07; *see also Federal Judge Condemns Sentencing Laws*, CNN.com, Nov. 17, 2004 (on file with author).

⁶⁷ Witten, *supra* note 9, at 706.

⁶⁸ 543 U.S. 220 (2005). The principal issue in the case concerned the role of fact-finding by a sentencing judge, and the Court held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244. In deciding how to handle the impact on the Sentencing Guidelines, a different majority — the "remedial majority" — emerged within the Court. In an opinion authored by Justice Breyer, the Court "severed and excised" the mandatory provisions of the Guidelines, thereby transforming the Sentencing Guidelines into a model which judges are expected, but no longer required, to follow. *Id.* at 245–47.

⁶⁹ Critical of the rigidity of the Sentencing Guidelines, Daniel Abelson contends that "[s]entencing entrapment is an unfortunate byproduct of the Guidelines" and that the proper

the mandatory sentencing regime. *Booker* has been a controversial decision that has provoked both cheers⁷⁰ and jeers,⁷¹ as well as and a slew of unanswered questions.⁷² Nevertheless, until Congress acts to reinstate the mandatory nature of the Guidelines,⁷³ the federal sentencing laws are not the rigid provisions that they had been since 1984. Still it remains to be seen how far and how frequently judges will depart from the Guidelines, particularly considering that the Department of Justice has taken a clear position that it will continue to pursue sentences in accordance with the Guidelines.⁷⁴

solution would be to “shift some discretion back to district judges.” Abelson, *supra* note 25, at 794. With the *Booker* decision, Abelson may have gotten his wish, as district courts have regained sentencing discretion, at least to a degree. *See Booker*, 543 U.S. at 245–47.

⁷⁰ Professor Michael O’Hear of Marquette University Law School had been critical of the sentencing laws adopted by Congress, writing that the Federal Sentencing Guidelines were more extreme than their state counterparts and that “Congress attempted to put federal judges into a straitjacket.” Michael O’Hear, *Supreme Court Ruling on Sentencing Helps Judges*, MILWAUKEE J. SENTINEL, Jan. 15, 2005, at 15A. Professor O’Hear praised the remedial majority in *Booker* for allowing judges to have greater discretion to take into account various “complex human variables that cannot be quantified.” *Id.*

⁷¹ At a press conference shortly before leaving office, Attorney General John Ashcroft warned listeners that “[l]ast month’s Supreme Court ruling that federal judges are not bound by sentencing guidelines is a retreat from justice that may put the public’s safety in jeopardy” and may result in a “return to revolving door justice.” Terry Frieden, *Ashcroft Delivers Parting Shot to Foes on Sentencing, Patriot Act*, CNN.com, Feb. 1, 2005, available at <http://www.cnn.com/2005/ALLPOLITICS/02/01/ashcroft.parting/index.html> (last visited Jan. 25, 2006). Ashcroft argued that application of the Guidelines has effectively reduced violent crime in the nation, due in large part to the fact that “[c]riminals can’t commit crimes from behind prison walls.” *Id.*

⁷² For example, it remains to be seen if the return to discretionary sentencing will also cause a return to the sentencing discrepancies that precipitated the establishment of the mandatory sentencing laws in the first place. As Professor Douglas Berman noted, “there’s a big gap between completely advisory and completely binding. And it’s going to be for lower courts to figure out how much authority they are given . . .” Interview by Gwen Ifill with Douglas Berman, Professor, Ohio State University, and Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania (Jan. 25, 2006), available at http://www.pbs.org/newshour/bb/law/jan-june05/scotus_1-12.html (last visited Jan. 25, 2006).

⁷³ Justice Breyer noted that “[t]he ball now lies in Congress’ court.” *Booker*, 543 U.S. at 265. Similarly, Justice Stevens, in his dissent, contended that “Congress could reenact the identical substantive provisions,” provided that Congress included a clarifying provision showing that the revised Guidelines required jury fact-finding in accordance with the “merits” majority’s holding. *Id.* at 283 n.7 (Stevens, J., dissenting).

⁷⁴ Memorandum from James B. Comey, Deputy Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors 1–3 (Jan. 26, 2006), available at http://sentencing.typepad.com/sentencing-law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (last visited Jan. 25, 2006).

C. Mandatory Minimums

In the context of sentencing entrapment, it is also important to understand the nature and role of mandatory minimum sentencing laws. Many defendants that have raised sentencing entrapment claims have received heightened sentences based on the quantity of controlled substances in which they were dealing.⁷⁵

For nearly twenty years, drug sentencing in the federal system — as well as many states — has looked to the quantity of a drug involved in a crime to determine the appropriate sentence.⁷⁶ In response to public concern over the rising number of drug crimes, congressional leaders introduced mandatory minimums into the war on drugs.⁷⁷ Accordingly, Congress authorized the Federal Sentencing Commission to draft an elaborate sentencing regime that matched drug quantities with specific sentencing ranges.⁷⁸

The application of mandatory minimums has not gone without criticism from scholars and several courts, however. Mandatory minimums were challenged as cruel and unusual, but the United States Supreme Court upheld their use in the face of such Eighth Amendment challenges.⁷⁹ Additionally, although the Federal Sentencing Guidelines have been stripped of their role in mandatory sentencing,⁸⁰ the Supreme

⁷⁵ See, e.g., *State v. Foster*, 592 S.E.2d 259, 261 (N.C. Ct. App. 2004); see also Gina Cappello, *Drug Case Yields Enhanced Sentence: Judge Rejects Defense of "Sentencing Entrapment"*, LEGAL INTELLIGENCER, Aug. 18, 1999, at 7 ("I found the mandatory minimum to apply, unfair as it may be," [Judge Juan] Sanchez said. . . . Sanchez also said that sentencing entrapment did not apply in this case, although he admitted aspects of the investigation were troubling.").

⁷⁶ See William W. Wilkins, Jr. et. al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305 (1993) (discussing the historical development of mandatory minimums for drug violations).

⁷⁷ Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1280 (1999) (statement of Cokie Roberts) ("[I]t was obviously responding to what was seen by voters, i.e., parents, as a very genuine concern and a real need to do something about what a lot of people feared was a spreading drug epidemic and one that was harming their children.") [hereinafter Debate].

⁷⁸ See 2005 MANUAL, *supra* note 56, § 2D1.1(c) (2005).

⁷⁹ In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the petitioner claimed that his sentence was "cruel and unusual" because it was significantly disproportionate to the crime committed and because the sentence was mandated, thereby precluding the judge from "taking into account the particularized circumstances of the crime and of the criminal." *Id.* at 962. Writing for the Court, Justice Scalia outlined the foundations for the Eighth Amendment, noting that, historically, the phrase "cruel and unusual punishment" was employed to prevent judges from imposing punishments that were not authorized by law, not to prohibit "disproportionate punishments." *Id.* at 967–75. See generally Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475 (2005).

⁸⁰ *United States v. Booker*, 543 U.S. 220 (2005).

Court nevertheless has held that the decisions concerning sentencing guidelines do not extend to mandatory minimums.⁸¹ Specifically, in *Harris v. United States*, the Supreme Court noted that the decision in *Apprendi*⁸² did not extend to mandatory minimums.⁸³ Accordingly, many commentators have concluded that the role of mandatory minimums may have been greatly augmented.⁸⁴

II. DEFINING AND APPLYING SENTENCING ENTRAPMENT⁸⁵

A. Treatment in the Federal Courts

1. Tackling the Claim Head On: *United States v. Connell*⁸⁶

One of the leading cases in sentencing entrapment and one of the first cases to thoroughly discuss the doctrine was decided by the First Circuit Court of Appeals in *United States v. Connell*.⁸⁷ In *Connell*, the defendant, an accountant, began laundering money at the behest of an undercover Internal Revenue Service agent.⁸⁸ Initially, the undercover agent told the defendant that the money was coming from gambling activities.⁸⁹ During subsequent meetings, however, the agent told the defendant that

⁸¹ *Harris v. United States*, 536 U.S. 545, 568–69 (2002).

⁸² *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

⁸³ *Harris*, 536 U.S. at 568–69.

The Court is well aware that many question the wisdom of mandatory minimum sentencing. Mandatory minimums, it is often said, fail to account for the unique circumstances of offenders who warrant a lesser penalty. These criticisms may be sound, but they would persist whether the judge or jury found the facts giving rise to the minimum. We hold only that the Constitution permits the judge to do so, and we leave the other questions to Congress, the States, and the democratic processes.

Id. (citations omitted).

⁸⁴ Douglas Berman writes that many Washington insiders believe that “it is inevitable that the striking down of the federal guidelines in *Booker* and *Fanfan* would lead to congressional passage of additional mandatory minimums.” Posting of Douglas Berman to Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2004/09/fear_and_loathi.html (Sept. 12, 2004 10:23 EST).

⁸⁵ A comprehensive overview of the doctrines of sentencing entrapment and sentencing manipulation was recently published. See Abelson, *supra* note 25. An updated discussion of the current status of sentencing entrapment is nevertheless warranted before critiquing its formulation and application.

⁸⁶ 960 F.2d 191 (1st Cir. 1992).

⁸⁷ *Id.*

⁸⁸ *Id.* at 193.

⁸⁹ *Id.* (noting that the defendant neither asked nor was told by the agent whether the gambling activities were legal or illegal).

the money was acquired from the illegal drug trade.⁹⁰ After finding the defendant guilty of illegal money laundering, the sentencing court found that “the defendant knew or believed that [laundered] funds were criminally derived property” and, accordingly, applied a statutorily-prescribed, five-level sentence enhancement.⁹¹

While not challenging the sting operation per se,⁹² the defendant argued that he was entrapped into committing a greater offense than he otherwise would have committed.⁹³ Specifically, he contended

that the vice lay in the timing: by broaching the subject of the currency’s supposed origin (drug trafficking) only after Connell had fully completed three episodes of money laundering, the undercover agent forced (or lured) him into actions he would otherwise have eschewed, i.e., peripheral participation in the narcotics trade. This Machiavellian scenario, Connell add[ed], was orchestrated for the sole purpose of boosting the sentence he would ultimately receive.⁹⁴

The court recognized the possibility of manipulation in cases such as the defendant’s. Noting that “there is an element of manipulation in any sting operation,”⁹⁵ the real issue was whether there are times when the manipulation is of such a degree that it must be “filtered out of the sentencing calculus.”⁹⁶ The court ultimately rejected the application of such a defense to the facts of the defendant’s case.⁹⁷ Nevertheless, the court stated, “We can foresee situations in which exploitative manipulation of sentencing factors by government agents might overbear the will of a person predisposed only to committing a lesser crime.”⁹⁸ The court refused, however, “to chart the line between permissible and impermissible conduct on the part of government agents insofar as that conduct may have an impact upon the district court’s sentencing options.”⁹⁹

⁹⁰ *Id.*

⁹¹ *Id.* (quoting 2005 MANUAL, *supra* note 56, § 2S1.3(b)(1)) (alteration in original).

⁹² *Id.* at 194.

⁹³ *Id.* at 192 (“This appeal, in which the appellant complains that the government practiced ‘sentencing entrapment,’ calls upon us to venture onto *terra incognita*.”).

⁹⁴ *Id.* at 194.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 195–96 (noting that even if the defendant was unaware of the connection of the money to illegal drug trafficking during the initial stages of the laundering scheme, he became aware of the connection after being told by the undercover agent, and that at such a time, the defendant had the opportunity and obligation to remove himself from the laundering scheme).

⁹⁸ *Id.* at 196.

⁹⁹ *Id.*

The First Circuit clarified its position just three years later in *United States v. Montoya*.¹⁰⁰ Factually, *Montoya* is similar to *State v. Foster*,¹⁰¹ the North Carolina case discussed earlier: the defendants were arrested as a result of a reverse sting operation; they were convicted of possessing cocaine with the intent to distribute; and their sentences were predicated on the amount of cocaine they had purchased.¹⁰² Rejecting the defendants' claim of sentencing manipulation, the court explained that the focus of such a claim is on the government's conduct, which must be truly egregious, and that "sentencing factor manipulation is a claim only for the extreme and unusual case."¹⁰³ As the court explained, "[t]he standard is high because we are talking about a reduction at sentencing, in the teeth of a statute or guideline approved by Congress, for a defendant who did not raise or did not prevail upon an entrapment defense at trial."¹⁰⁴ The First Circuit has since indicated that it may be inclined to accept a sentencing manipulation claim, but the standard remains high and the burden remains on the defendant.¹⁰⁵ Accordingly, sentencing manipulation claims have encountered little success in the First Circuit.¹⁰⁶

¹⁰⁰ 62 F.3d 1 (1st Cir. 1995).

¹⁰¹ 592 S.E.2d 259 (N.C. Ct. App. 2004).

¹⁰² *Montoya*, 62 F.3d at 2–3.

¹⁰³ *Id.* at 4.

[D]efendant cannot make out a case of undue provocation simply by showing that the idea originated with the government or that the conduct was encouraged by it, or that the crime was prolonged beyond the first criminal act, or exceeded in degree or kind what the defendant had done before. What the defendant needs in order to require a reduction [in sentence] are elements like these carried to *such a degree* that the government's conduct must be viewed as "*extraordinary misconduct*."

Id. at 3–4 (second emphasis added) (internal citations omitted).

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *United States v. Maldonado-Montalvo*, 356 F.3d 65, 72 (1st Cir. 2003). In this case, the court reiterated that the *intentions of the government agents*, not the severity of their misconduct, was the central focus of determining sentencing manipulation. *See id.* As the majority stated, "[g]overnment manipulation designed solely to increase the severity of a criminal sentence may afford a ground for departure, provided there is sufficient record evidence to demonstrate that the government acted in 'bad faith.'" *Id.*

¹⁰⁶ *See, e.g., United States v. Sánchez-Berrios*, 424 F.3d 65, 78–79 (1st Cir. 2005) (dismissing a sentencing factor manipulation claim for drug trafficking charges), *cert. denied sub nom., Cruz-Pagan v. United States*, No. 05-7904, 2006 U.S. LEXIS 483 (Jan. 9, 2006); *United States v. Barbour*, 393 F.3d 82, 87 (1st Cir. 2004) (rejecting a sentencing factor claim because the government agents' conduct was permissible), *cert. denied*, 126 S. Ct. 212 (2005); *United States v. Capelton*, 350 F.3d 231, 246 (1st Cir. 2003) (denying a sentencing factor manipulation claim because the defendant failed to demonstrate the government engaged in "extraordinary misconduct"), *cert. denied*, 125 S. Ct. 142 (2004). It is worth noting, however, that the Court in *Barbour* stated that sentencing manipulation could be shown where the government agents "overpowered the free will of the defendant and caused him to commit a more serious offense than he was predisposed to commit." *Barbour*, 393 F.3d at 86. It remains to be seen how significant the predisposition aspect is to the First Circuit's analysis.

2. Application of the Doctrine in the Other Circuits

The Second Circuit has yet to decide whether either sentencing entrapment or sentencing manipulation is a viable defense to a sentence.¹⁰⁷ Even if the Second Circuit did accept such claims, however, it likely would require extreme or outrageous government conduct as the court has taken a hard line on the issue of predisposition.¹⁰⁸

Employing the subjective version, the Third Circuit has defined sentencing entrapment as “‘occur[ing] when a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment.’”¹⁰⁹ Much like the other circuits that have recognized the doctrine, the sentencing entrapment defense has encountered virtually no success.¹¹⁰

The Fourth Circuit first addressed the issue in *United States v. Jones*.¹¹¹ In *Jones*, the court recognized the distinction between the subjective doctrine of sentencing entrapment, which focuses on the defendant’s predisposition, and the objective doctrine of sentencing manipulation, which focuses on outrageous government conduct.¹¹² The court nevertheless refused to apply either doctrine to the facts of the case.¹¹³

¹⁰⁷ See *United States v. Bala*, 236 F.3d 87, 93–94 (2d Cir. 2000).

¹⁰⁸ See, e.g., *United States v. Perez*, 295 F.3d 249, 256 (2d Cir. 2000) (noting that simply because the defendant “was *knowingly* involved” in the drug deal, he could not have been “induced to commit an offense that he was not otherwise predisposed to commit” (emphasis added)); see also *United States v. Gowdie*, No. 99 Cr. 338-03 (RWS), 2004 U.S. Dist. LEXIS 6794, at *7 n.2 (S.D.N.Y. Apr. 16, 2004) (“Based on the available facts, the investigation of the conspiracy which led to Gowdie’s arrest did not constitute conduct so improper as to be outrageous, such as would arguably support a downward departure based on sentencing manipulation.”).

¹⁰⁹ *United States v. Sumler*, 294 F.3d 579, 582 n.1 (3d Cir. 2002) (quoting *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1506 (9th Cir. 1997) (internal citations and quotations omitted)). But see *Guzman-Marte v. United States*, Nos. 04-CV-0628, 01-CR-0365, 2005 U.S. Dist. LEXIS 18092, at *10–*11 (E.D. Pa. Aug. 24, 2005) (applying a hybrid test, looking for both extraordinary misconduct by the police *and* predisposition).

¹¹⁰ See, e.g., *United States v. Coplin*, 106 Fed. App’x 143, 147 (3d Cir. 2004); *United States v. Clark*, 95 Fed. App’x 459, 460–61 (3d Cir. 2004); see also *United States v. Kimley*, 60 Fed. App’x 369, 370 (3d Cir. 2003) (holding that the appellate court lacked jurisdiction to review the trial court’s decision not to depart from the sentencing guidelines for sentence entrapment where the trial court acknowledged its authority to so depart); *United States v. Waddy*, Crim. No. 00-66.1, Civ. No. 02-6827, 2003 U.S. Dist. LEXIS 18163, at *31 (E.D. Pa. Sept. 18, 2003) (“[A]lthough Judge Waldman noted that the Third Circuit has never recognized a departure for sentencing entrapment, he nevertheless believed that he had the power to depart downward on the basis of sentencing entrapment but exercised his discretion not to do so.”).

¹¹¹ 18 F.3d 1145 (4th Cir. 1994).

¹¹² *Id.* at 1152–54.

¹¹³ *Id.* at 1154 (“We have never spoken to the legal viability of ‘sentencing entrapment’ theory, and need not do so here.”); *id.* (“[W]e conclude that, here, we need not decide whether the theory of sentencing manipulation has any basis in law for, on the facts presented, it would, in any event, be inapplicable.”).

Resistance to applying the doctrines has continued, and defendants have raised the issue with little success in the various courts in the Fourth Circuit.¹¹⁴

The Fifth¹¹⁵ and Sixth Circuits¹¹⁶ have neither applied nor adopted the concepts of sentencing entrapment and sentencing manipulation. In fact, the Fifth Circuit noted that the doctrines were but a “‘trendy’ argument”¹¹⁷ and that there was only one instance where an appellate court reversed a sentence on the basis of either sentencing entrapment or sentencing manipulation.¹¹⁸ Also of particular note is a recent district court decision from the Sixth Circuit, where the court maintained that sentencing entrapment, based on the defendant’s predisposition, is still not a valid basis for a downward departure in sentencing, even after the Supreme Court rendered the Sentencing Guidelines advisory in *Booker*.¹¹⁹

¹¹⁴ See *United States v. Brown*, 69 Fed. App’x 175, 177 (4th Cir. 2003).

Brown’s sentencing entrapment claim fails because he did not claim that he lacked a predisposition to committing the drug offense. Further, his sentencing manipulation claim also fails because it is not outrageous for the government to continue to purchase narcotics from willing sellers even after a level of narcotics relevant for sentencing purposes has been sold.

Id. (quoting *United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994) (internal citation omitted). See also *Knight v. United States*, Nos. 3:03CR163, 3:04CV772, 2005 U.S. Dist. LEXIS 8622, at *11–*14 (E.D. Va. May 6, 2005); *United States v. Atwater*, 336 F. Supp. 2d 626, 629 (E.D. Va. 2004) (noting that “this Circuit cast grave doubt over [the doctrine of sentencing manipulation] in *United States v. Jones*.”). The court in *Atwater* also reiterated that “[s]entencing entrapment requires that a defendant be *devoid* of criminal disposition.” *Id.* at 630 n.2 (emphasis added).

¹¹⁵ See *United States v. Washington*, 44 F.3d 1271 (5th Cir. 1995); see also *United States v. Snow*, 309 F.3d 294, 295 (5th Cir. 2002) (reiterating that the court has not determined “whether sentencing entrapment is a cognizable defense to a sentence”). The court in *Snow* at least seemed to acknowledge the potential for either definition: “Snow has failed to show that the government agent persuaded Snow to commit a greater criminal offense than he was predisposed to commit or that the agent’s conduct was outrageous, resulting in sentencing factor manipulation.” *Id.*

¹¹⁶ See *United States v. Jones*, 102 F.3d 804, 809 (6th Cir. 1996) (“While other circuits have recognized sentencing entrapment, this circuit has never acknowledged sentencing entrapment as a valid basis for a downward departure”); see also *United States v. May*, 399 F.3d 817, 827–28 (6th Cir. 2005); *Sosa v. Jones*, 389 F.3d 644, 649 (6th Cir. 2004) (noting that while “Mr. Sosa’s case appears unfortunate,” there simply existed no precedent warranting adoption of sentencing entrapment).

¹¹⁷ *Washington*, 44 F.3d at 1279.

¹¹⁸ *Id.* at 1280 & n.28 (citing *United States v. Stauffer*, 38 F.3d 1103, 1107–08 (9th Cir. 1994)).

¹¹⁹ *United States v. Dottery*, 353 F. Supp. 2d 894, 897 (E.D. Mich. 2005).

This concept takes on less significance, perhaps, under a regime in which the Sentencing Guidelines are advisory rather than mandatory. Nonetheless, it does not appear that an argument is available to the defendant that the Court should calculate the drug quantity and type within the drug quantity table in [the Guidelines] by discounting those amounts for which the defendant claims he was entrapped.

Id. (internal citation omitted).

The Seventh Circuit has explicitly rejected sentencing manipulation.¹²⁰ While the court voiced its skepticism about the concept in 1995, it clarified its position the following year: "We now hold that there is no defense of sentencing manipulation in this circuit."¹²¹ Similarly, sentencing entrapment has found no appeal in this circuit.¹²²

In *United States v. Barth*,¹²³ the Eighth Circuit Court of Appeals held that "[s]entencing entrapment has been described by this court as 'outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities for the purposes of increasing the amount of drugs . . . and the resulting sentence of the entrapped defendant.'"¹²⁴ While conduct of the government officials is examined in this jurisdiction, such misconduct need not be "extraordinary" or "extreme and unusual."¹²⁵ Although it recognized and defined the doctrine, the court noted that it had never actually applied sentencing entrapment in any case and, yet again, the Court refused to apply it in *Barth*.¹²⁶ The court has continued its reluctance to reverse a defendant's sentence on grounds of entrapment or manipulation.¹²⁷

The Ninth Circuit relied on the Eighth Circuit's definition in adopting sentencing entrapment.¹²⁸ In adopting the doctrine, the court was particularly concerned about prosecutorial discretion:

¹²⁰ *United States v. Garcia*, 79 F.3d 74 (7th Cir. 1996); *see also* *United States v. Mitchell*, 353 F.3d 552 (7th Cir. 2003) (refusing to accept a sentencing entrapment claim for a sexual offense where the sentence was enhanced based on what the defendant believed to be the age of the undercover agent).

¹²¹ *Garcia*, 79 F.3d at 76.

¹²² *See* *United States v. Stephen*, No. 05-2100, 2005 U.S. App. LEXIS 28393, at *7 (7th Cir. Dec. 20, 2005) (explaining that sentencing entrapment is a "doctrine we do not favor").

¹²³ 990 F.2d 422 (8th Cir. 1993).

¹²⁴ *Id.* at 424 (citing *United States v. Rogers*, 982 F.2d 1241, 1245 (8th Cir. 1993)) (second and third alterations in original).

¹²⁵ *Cf.* *United States v. Montoya*, 62 F.3d 1, 4-5 (1st Cir. 1992).

¹²⁶ *Barth*, 990 F.2d at 425 ("While we are concerned with the government conduct in this case, Barth has failed to demonstrate that the government's conduct was outrageous or that the undercover officer's conduct overcame his predisposition to sell small quantities of crack cocaine.").

¹²⁷ *See, e.g., United States v. Parks*, 87 Fed. App'x 2, 4 (8th Cir. 2004). *Parks* also demonstrates the high degree of deference the Court of Appeals will grant to trial courts in evaluating such claims. *See id.* The court noted: "The district court was aware of its ability to depart on these grounds but chose not to do so based on its findings that the Government did not act improperly, try to manipulate Parks's sentence, or commit sentencing entrapment. . . . We thus affirm Parks's conviction and sentence." *Id.* (internal citation omitted).

¹²⁸ *United States v. Stauffer*, 38 F.3d 1103, 1106 (9th Cir. 1994) (citing *Barth*, 990 F.2d at 424). The Ninth Circuit later clarified the doctrine as applied to sellers of narcotics: "In making a sentencing entrapment claim, the burden is on the defendant to demonstrate both the lack of intent to produce and the lack of the capability to produce the quantity of drugs at issue." *United States v. Naranjo*, 52 F.3d 245, 250 n.13 (9th Cir. 1995). Interestingly, several of the states in the Ninth Circuit seem to employ the *objective* version of traditional entrapment. *See supra* note 39.

Drug agents can decide, apparently without any supervision by anybody to negotiate with somebody for an ounce, a pound, a kilo, 100 kilos, a million kilos of a substance and, of course, if the defendant bites at the bait, then that amount chosen by the drug agent will determine his drug sentence.¹²⁹

Unlike the courts previously described, the Ninth Circuit Court of Appeals did not evaluate the doctrine only to brush it aside on the facts of the case before it. Rather, the court reversed and remanded the *Stauffer* case for re-sentencing on the grounds that the defendant had been entrapped into committing a more serious offense than he otherwise would have committed.¹³⁰ This court has remanded other cases for possible resentencing,¹³¹ but has made equally clear that the burden remains firmly on the defendant,¹³² and if the defendant does not raise the issue of sentencing entrapment at the district court level, the claim is deemed waived on appeal.¹³³

In *United States v. Lacey*,¹³⁴ the defendant argued to the Tenth Circuit that the “government’s decision to continue the investigation and to negotiate a multi-kilogram purchase of cocaine was for the sole purpose of increasing his punishment under the sentencing guidelines.”¹³⁵ The court rejected the defendant’s argument and the doctrine of sentencing entrapment:

¹²⁹ *Stauffer*, 38 F.3d at 1107–08.

¹³⁰ *Id.* at 1108.

¹³¹ *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1508 (9th Cir. 1997).

[I]t was error for the district court to deny the motion to reveal the identity of the informant without holding an *in camera* hearing to determine whether the informant’s testimony would be relevant and helpful to the defendants on the question of sentencing entrapment.

....

... If the district court concludes that the testimony is relevant and potentially helpful as to the sentencing entrapment claim, then the district court must conduct a hearing to resolve that claim, and then, according to the outcome, either reinstate the sentences ... or resentence the defendants

Id. However, the court has rigidly applied the doctrine at times. For example, in rejecting one sentencing entrapment claim, the Court noted that the defendant stated he was not predisposed to commit any drug offense whereas the sentencing entrapment doctrine applies only to those predisposed to commit a minor offense but entrapped into committing a more serious offense. *United States v. Villa-Serrano*, 83 Fed. App’x 937, 938 (9th Cir. 2003).

¹³² *Naranjo*, 52 F.3d at 250 n.13. Satisfying such a burden, however, requires evidence beyond the defendant’s bare assertion of lack of intent or ability to sell the drugs. *See United States v. Nieto-Cruz*, 97 Fed. App’x 703, 704 (9th Cir. 2004), *cert. denied*, 543 U.S. 892 (2004).

¹³³ *United States v. Si*, 343 F.3d 1116, 1128 (9th Cir. 2003). Even if the defendant does raise the issue, the court may still refuse to review the district court’s decision to deny a defendant’s request for a downward departure based on sentencing entrapment. *See, e.g., United States v. Chang*, 7 Fed. App’x 650, 651 (9th Cir. 2001).

¹³⁴ 86 F.3d 956, 962–63 (10th Cir. 1996).

¹³⁵ *Id.* at 262–63.

[W]e believe that the analogy to entrapment at the sentencing phase is misplaced, for once a defendant crosses “the reasonably bright line between guilt and innocence, . . . a defendant’s criminal inclination has already been established, and the extent of the crime is more likely to be a matter of opportunity than of scruple.”¹³⁶

The Tenth Circuit has, however, entertained claims of sentencing manipulation, which it examines under the rubric of outrageous government conduct — “whether, considering the totality of the circumstances in any given case, the government’s conduct is so shocking, outrageous and intolerable that it offends ‘the universal sense of justice.’”¹³⁷ Nonetheless, as a result of this high standard, such claims routinely fail.¹³⁸

The Eleventh Circuit has taken a very clear position on sentencing entrapment — predisposition of the defendant is not a basis for a downward departure in sentencing.¹³⁹ In rejecting sentencing entrapment, the Eleventh Circuit focused more on the policies behind reverse stings:

Government infiltration of criminal activity is a recognized and permissible means of investigation, and frequently requires that the government agent furnish something of value to the criminal. The fact that government agents may supply or sell illegal drugs or provide other essential services does not necessarily constitute misconduct. Moreover, challenges to the “reverse sting” method of police investigation have been rejected by this Court on numerous occasions.¹⁴⁰

The court has, however, accepted the theoretical possibility of a sentencing manipulation claim, but has indicated that the government conduct will need to be truly extraordinary, whereby notions of fairness would preclude enforcing the defendant’s

¹³⁶ *Id.* at 963 n.5 (quoting *United States v. Montoya*, 62 F.3d 1, 4 (1st Cir. 1995)) (omission in original).

¹³⁷ *Id.* at 964 (quoting *United States v. Mosley*, 965 F.2d 906, 910 (10th Cir. 1992)).

¹³⁸ *See, e.g.*, *United States v. Westover*, 107 Fed. App’x 840, 847 (10th Cir. 2004) (“Regardless of why the delay [in indicting the defendant] occurred, the government’s conduct in this case did not contravene the applicable due process standard.”); *see also* *United States v. Rice*, 100 Fed. App’x 739, 743 (10th Cir. 2004); *United States v. Hightower*, 94 Fed. App’x 750, 755–56 (10th Cir. 2004).

¹³⁹ *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998) (“[D]efendants’ claim must fail as a matter of law because this Circuit has rejected sentence entrapment as a viable defense.”).

¹⁴⁰ *Id.* at 1413 (internal citations omitted). The Eleventh Circuit recently indicated that the Supreme Court’s decision in *Apprendi* may affect the doctrine of sentencing entrapment, but the court nevertheless refused to decide the viability of the doctrine under the facts present. *United States v. Gunn*, 369 F.3d 1229, 1237 (11th Cir. 2004), *cert. denied*, 543 U.S. 937 (2004).

sentence.¹⁴¹ Similarly, this court, much like the Tenth Circuit, noted that there may be situations where the government conduct is so outrageous as to violate due process and constitute a complete defense to the conviction itself.¹⁴²

The D.C. Circuit has also refused to accept sentencing entrapment. In *United States v. Walls*,¹⁴³ undercover officers offered to buy crack cocaine from the defendants.¹⁴⁴ The defendants produced only powder cocaine, but at the insistence of the officers, the defendants supplied crack cocaine, resulting in a heightened sentence.¹⁴⁵ According to the court:

Walls and Jackson ask us to concentrate on the agent's testimony that he insisted on crack rather than powder because the penalties are higher. . . . The main element in any entrapment defense is rather the defendant's "predisposition" — "whether the defendant was an 'unwary innocent' or instead an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." Persons ready, willing and able to deal in drugs — persons like Walls and Jackson — could hardly be described as innocents. These defendants showed no hesitation in committing the crimes for which they were convicted. Alone, this is enough to destroy their entrapment argument.¹⁴⁶

¹⁴¹ *Sanchez*, 138 F.3d at 1414 ("The fact that the government's fictitious reverse sting operation involved a large quantity of drugs does not amount to the type of manipulative governmental conduct warranting a downward departure in sentencing."); see also *United States v. Govan*, 293 F.3d 1248, 1251 (11th Cir. 2002). In *Govan*, the court stated:

In the present case, the district court concluded there was sentence manipulation because the government aggregated separate quantities of crack cocaine by buying small quantities on four separate occasions, instead of stopping and arresting Govan after the first buy. But these circumstances are indistinguishable in principle from those in *Sanchez*. Making four purchases instead of just one in this case is no more manipulative than the government in *Sanchez* setting in motion a fictitious sting operation involving a large quantity of drugs instead of a small one.

Id.

¹⁴² *Sanchez*, 138 F.3d at 1413. Citing the Supreme Court, the Eleventh Circuit stated in dicta: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . . the instant case is distinctly not of that breed."

Id. (quoting *United States v. Russell*, 411 U.S. 423, 431–32 (1973)) (alteration in original).

¹⁴³ 70 F.3d 1323 (D.C. Cir. 1995).

¹⁴⁴ *Id.* at 1328.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1329 (quoting *Matthews v. United States*, 485 U.S. 58, 63 (1988)) (citations omitted).

While the D.C. Circuit has rejected the sentencing entrapment defense, it has seemingly left open the possibility for recognition of sentencing manipulation based on a due process violation.¹⁴⁷ Nevertheless, the D.C. courts have made clear that due process requires truly outrageous conduct for a defendant to have his sentence decreased.¹⁴⁸

3. Summarizing the Federal Approach to Sentencing Entrapment

From sentencing entrapment to sentencing manipulation and from individual predisposition to outrageous governmental conduct, the courts have employed myriad terms, maxims, and definitions in an attempt to frame this controversial doctrine. Four circuits¹⁴⁹ seem to have adopted, and one circuit¹⁵⁰ has rejected, the objective definition of the doctrine focusing on outrageous government conduct. Three circuits appear to have adopted the subjective version focusing on predisposition, and one circuit¹⁵¹ has even applied the doctrine in remanding a case for resentencing; on the other hand, four circuits¹⁵² have rejected such an approach. Two courts¹⁵³ seem to have entertained the possibility of a combination of the subjective

¹⁴⁷ *Id.*

If the propriety of the agents' conduct had any significance, it would only be with respect to the following dictum in *Russell*: "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from involving judicial processes to obtain a conviction."

Id. (quoting *United States v. Russell*, 411 U.S. 423, 431–32 (1973)).

¹⁴⁸ See *United States v. Hinds*, 329 F.3d 184, 190 (D.C. Cir. 2003) (reiterating the requirement of proof of "coercion, violence, or brutality to the person"). The District Court for the District of Columbia has expressed concern and disdain in regards to the police practice of insisting that powder cocaine be cooked into crack, an offense resulting in a much higher sentence. *United States v. Shepherd*, 857 F. Supp. 105, 111 (D.D.C. 1994) (holding that "[t]he defendant . . . was asked to cook the cocaine for the sole purpose of increasing her resulting sentence" and that "[t]his purpose and practice must be viewed as outrageous."). However, the D.C. Circuit Court of Appeals has not been so moved. *United States v. Shepherd*, 102 F.3d 558, 567 (D.C. Cir. 1996) (reversing the district court and holding that "a request by a government agent for crack cocaine upon a seller's delivery of powder cocaine, without more, does not establish a claim of 'sentencing entrapment.'").

¹⁴⁹ The First, Tenth, Eleventh, and D.C. Circuits appear to have recognized the possibility of sentencing manipulation or an objective version of sentencing entrapment. See *supra* Part II.A.2.

¹⁵⁰ The Seventh Circuit expressly rejected sentencing manipulation. See *supra* Part II.A.

¹⁵¹ The Ninth Circuit is the only court of appeals to have actually *applied* either doctrine. See *supra* Part II.A.

¹⁵² The Sixth, Tenth, Eleventh, and D.C. Circuits have rejected the subjective approach. See *supra* Part II.A.

¹⁵³ The Fourth and Fifth Circuits have yet to conclusively decide the issue. See *supra* Part II.A.

and objective versions, but even those circuits remain undecided. Without question, there is no unanimity in the federal system on how, when, or even if to permit the imposition of a mitigated sentence based on a claim of entrapment.¹⁵⁴

B. Treatment in the State Courts

As demonstrated above, a rift divides the federal courts, but at the state level, a majority of the courts have rejected or refused to apply the doctrine of sentencing entrapment. Only four¹⁵⁵ state courts have approved of either sentencing entrapment or sentencing manipulation claims. The Oklahoma Court of Criminal Appeals adopted sentencing entrapment in *Leech v. State*.¹⁵⁶ The version adopted by the court was similar to the subjective approach to sentencing entrapment recognized in the Eighth Circuit.¹⁵⁷

If the defendant had no previous intent to commit the greater crime or did not become ready and willing to commit a greater crime during the course of the transaction, even though *predisposed* to commit the lesser crime, then a finding that law enforcement agents committed sentencing entrapment would require that the defendant be found not guilty of the greater crime, and guilty of the lesser offense.¹⁵⁸

As is further evident, however, the Oklahoma court viewed sentencing entrapment as a substantive defense to the crime charged.¹⁵⁹ Conversely, in the federal courts that have embraced the subjective doctrine of sentencing entrapment, the defendant would still be found guilty of the offense charged, but his sentence would be reduced

¹⁵⁴ As recently noted by Professor Alschuler: "The manipulation of sentencing exposure by law enforcement officers appears to be a significant source of disparity." Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 112 (2005).

¹⁵⁵ This does not include the North Carolina Court of Appeals, as that court's adoption of sentencing entrapment stands without precedential value. *See supra* notes 17, 21–22 and accompanying text.

¹⁵⁶ 66 P.3d 987 (Okla. Crim. App. 2003).

¹⁵⁷ *Id.* at 992 (Chapel, J., dissenting) (noting that the majority used the standard outlined by the Eighth Circuit).

¹⁵⁸ *Id.* at 990 (majority opinion) (emphasis added).

¹⁵⁹ *See id.*

A defendant who intended to possess small amounts of an illegal drug could be entrapped by officers into possessing a trafficking quantity or even a quantity sufficient to support a charge of intent to distribute. In that event, the defendant would be entitled to an instruction on sentencing entrapment to allow the jury to determine *whether the defendant was guilty* of the greater or lesser charge.

Id. (emphasis added).

to reflect reduced culpability.¹⁶⁰ Additionally, the Oklahoma court failed to indicate whether outrageous government conduct was an element of sentencing entrapment as well as what burden the defendant would have to carry to receive such an instruction. Finally, despite adopting the doctrine, albeit an odd version of sentencing entrapment, the court refused to apply it to the facts of the case.¹⁶¹

The Supreme Court of Michigan has stated that while “police misconduct . . . is not an appropriate factor to consider at sentencing,” there may exist rare cases in which a downward departure from the guidelines may be warranted based on sentencing entrapment.¹⁶² While the court did not rely on the precise phrase “sentencing entrapment,” it stated that “if the defendant has an enhanced intent that was the product of police conduct . . . and the enhanced intent can be shown in a manner that satisfies the requirements for a sentencing departure . . . it is permissible for a court to consider that enhanced intent in making a departure.”¹⁶³

Adopting the outrageous government conduct version of sentencing entrapment, often termed “sentencing manipulation,” one of the Pennsylvania lower courts held that “sentence reduction is an appropriate and just response to outrageous government conduct designed solely to increase a defendant’s term of incarceration.”¹⁶⁴ Despite acknowledging the doctrine, the court refused to apply it to the defendant in that case.¹⁶⁵ Furthermore, the court placed a heavy burden on defendants in future cases claiming sentencing entrapment:

Simply put, sentencing entrapment/manipulation is difficult to prove; it is not established “simply by showing that the idea originated with the government or that the conduct was encouraged by it, . . . or that the crime was prolonged beyond the first criminal act . . . or exceeded in degree or kind what the defendant had done before.”¹⁶⁶

¹⁶⁰ See, e.g., *United States v. Stauffer* 38 F.3d 1103 (9th Cir. 1994).

¹⁶¹ *Leech*, 66 P.3d at 990 (“*Leech* never claimed entrapment, whether in a traditional sense or in the nature of sentencing entrapment. There is no evidence of entrapment in the record.”). The court still reduced the defendant’s sentence, but based such a reduction instead on the defendant’s age and lack of access to good time credits. See *id.*

¹⁶² *People v. Claypool*, 684 N.W.2d 278, 283–84 (Mich. 2004).

¹⁶³ *Id.* at 284. In Michigan, the requirements for downward departure involve an “objective and verifiable” reason that “keenly or irresistibly grab[s] our attention”; is “of considerable worth in deciding the length of a sentence”; and “exist[s] only in exceptional cases.” *People v. Babcock*, 666 N.W.2d 231, 237 (Mich. 2003) (citations and internal quotation marks omitted).

¹⁶⁴ *Commonwealth v. Petzold*, 701 A.2d 1363, 1366 (Pa. Super. Ct. 1997) (“[W]e adopt the standard typically applied in such cases, namely, the existence of ‘outrageous government conduct’ . . . which is designed to and results in an increased sentence for the convicted defendant.”).

¹⁶⁵ *Id.* at 1367.

¹⁶⁶ *Id.* at 1366–67 (quoting *United States v. Montoya*, 62 F.3d 1, 3–4 (1st Cir. 1995)) (omissions in original).

The reasoning used by that court and the viability of sentencing entrapment in Pennsylvania will soon be addressed head on by the state's highest court.¹⁶⁷ Barring a different approach taken by the state supreme court, Pennsylvania is joined by Florida, which has taken a similar approach to sentencing manipulation — bad faith on the part of the government.¹⁶⁸

Essentially, Oklahoma and Michigan seem to adopt sentencing entrapment, and Pennsylvania and Florida appear to recognize sentencing manipulation as grounds for downward departure. Other state courts, however, have been more reluctant to acknowledge sentencing entrapment. The Hawaii Court of Appeals discussed the theoretical possibility of sentencing entrapment, but declined to adopt it.¹⁶⁹ The court also recognized that it is “germane to this question that the police do not solicit criminal activity from the general public or any other persons, other than those who actively seek out such activity.”¹⁷⁰

Among the states that have either declined to adopt or have expressly rejected the concept outright is Arizona, where a court noted that “[o]ur decision not to apply the doctrines of sentence entrapment or manipulation has substantial support from other jurisdictions.”¹⁷¹ The court recognized that, in addition to several federal circuits, “other state courts have found, as we have, that allowing a trial court to depart from the mandatory minimum sentence is either in conflict with or unnecessary under their state’s statutory scheme.”¹⁷² Minnesota has expressed the same skepticism as to the validity of a sentencing departure on such grounds.¹⁷³

Along with Arizona, the Supreme Court of California has rejected the defense. In *People v. Smith*,¹⁷⁴ the California high court affirmed the lower court’s decision

¹⁶⁷ See *Commonwealth v. Cole*, No. 675 MAL 2005, 2005 Pa. LEXIS 3087 (Pa. Dec. 28, 2005) (granting an appeal to determine whether police engaged in sentencing entrapment by continuing to make controlled buys even after they had sufficient evidence to convict the defendant for the purpose of enhancing his sentence).

¹⁶⁸ *State v. Steadman*, 827 So. 2d 1022, 1024–26 (Fla. Ct. App. 2002) (rejecting the defendant’s claim of sentencing manipulation, but holding that sentencing manipulation occurs when there are no “legitimate law enforcement reasons . . . to support the police conduct”), *disc. rev. denied*, 842 So. 2d 847 (Fla. 2003).

¹⁶⁹ *State v. Yip*, 987 P.2d 996 (Haw. Ct. App. 1999). The court noted that if it were to accept sentencing as a viable concept, it would fall under the rubric of outrageous government conduct and would constitute an affirmative defense. See *id.* at 1010.

¹⁷⁰ *Id.* at 1010. The court also acknowledged that it had upheld police tactics designed to produce first degree felony cases. See *id.* (citing *State v. Timas*, 923 P.2d 916, 931–33 (Haw. Ct. App. 1996)).

¹⁷¹ *State v. Monaco*, 83 P.3d 553, 557 (Ariz. Ct. App. 2004), *rev. denied*, No. CR-04-0154-PR, 2004 Ariz. LEXIS 115 (Ariz. Oct. 26, 2004).

¹⁷² *Id.*

¹⁷³ See, e.g., *State v. Smith*, No. A03-1859, 2004 Minn. App. LEXIS 1052, at *9–11 (Minn. Ct. App. Sept. 14, 2004), *rev. denied*, No. A03-1859, 2004 Minn. LEXIS 826 (Minn. Dec. 14, 2004).

¹⁷⁴ 80 P.3d 662, (Cal. 2003).

to reject the doctrine of sentencing entrapment.¹⁷⁵ Turning to sentencing manipulation, the court refused to reach a decision on whether to adopt it, but noted that if the doctrine was to be adopted, it would entail a rigid standard: "Were the doctrine of sentencing manipulation to be adopted in California, the predicate conduct should be truly *outrageous*. By contrast, as the United States First Circuit Court of Appeals observed, 'garden variety manipulation claims are largely a waste of time.'"¹⁷⁶

Other state jurisdictions that have refused to adopt the doctrines of sentencing entrapment and/or sentencing manipulation include Indiana,¹⁷⁷ Louisiana,¹⁷⁸ Massachusetts,¹⁷⁹ Ohio,¹⁸⁰ Tennessee,¹⁸¹ Texas,¹⁸² and Wisconsin.¹⁸³ Thus, in the states that have addressed the doctrines of sentencing entrapment or sentencing manipulation, only four have accepted such claims as compared to the ten that have either rejected the doctrines or refused to reach the issue, and of those four, only two have accepted the subjective doctrine of sentencing entrapment.

III. REJECTING SENTENCING ENTRAPMENT

The Fifth Circuit was absolutely correct in calling sentencing entrapment a "trendy argument,"¹⁸⁴ and this is one trend that needs to be abandoned. As will be shown, the subjective approach embodied in sentencing entrapment presents serious

¹⁷⁵ *Id.* at 667.

¹⁷⁶ *Id.* at 665 (quoting *United States v. Montoya*, 62 F.3d 1, 4 (1st Cir. 1995)).

¹⁷⁷ *See Salama v. State*, 690 N.E.2d 762, 765 (Ind. Ct. App. 1998) ("Indiana has yet to recognize the doctrine of sentencing entrapment.").

¹⁷⁸ *See State v. Hardy*, 715 So. 2d 466, 472 (La. Ct. App. 1998) ("No Court in this state has adopted 'sentencing entrapment' as a defense, and we decline now to adopt such a defense.").

¹⁷⁹ *See Commonwealth v. Cruz*, 724 N.E.2d 683, 691 (Mass. 2000) (noting that the doctrine had been rejected by *Commonwealth v. Garcia*, 659 N.E.2d 741 (Mass. 1996)).

¹⁸⁰ *See State v. Reno*, No. 04CA2759, 2005 WL 674455, at *2 (Ohio Ct. App. Mar. 14, 2005) ("In the case at bar, because Ohio does not recognize a sentencing entrapment defense, appellant's requested instruction is not a correct statement of Ohio law. Therefore, the trial court possessed no obligation to give appellant's requested sentencing entrapment instruction.").

¹⁸¹ *See State v. Blackmon*, 78 S.W.3d 322, 332 (Tenn. Crim. App. 2001) ("[S]uch a defense is not recognized in Tennessee . . ."), *rev. denied*, No. M2000-03149-SC-R11-CD, 2003 Tenn. LEXIS 839 (Tenn. Sept. 15, 2003).

¹⁸² *See Watrous v. State*, No. 14-96-00853-CR, 1999 Tex. App. LEXIS 1238, at *11-12 (Tx. Ct. App. Feb. 25, 1999) ("No Texas court, however, has recognized the concept of 'sentencing entrapment.'").

¹⁸³ *See State v. Farr*, No. 95-1158-CR, at *8-9 (Apr. 10, 1996). In rejecting sentencing manipulation, the court highlighted the fact that trial judges in Wisconsin have discretion in sentencing, unlike judges in the federal courts, and thus can consider outrageous government conduct. *See id.* As a result of the recent *Booker* decision, federal judges are no longer bound by the Federal Sentencing Guidelines. *See United States v. Booker*, 543 U.S. 220, 244-65, (2005) (explaining that federal judges must at least consider the Guidelines, but the Guidelines are no longer mandatory). Accordingly, the reasoning employed by the Wisconsin Court of Appeals reinforces the criticism of further judicial adoption and application of sentencing entrapment.

¹⁸⁴ *See supra* note 117 and accompanying text.

practical and legal problems that some courts have either overlooked or underestimated. It is because of these problems that the subjective version should be rejected and, with circuit courts unable to come to an agreement,¹⁸⁵ that responsibility may fall to the Supreme Court.¹⁸⁶

A. Difficulties in Establishing Predisposition

First, the focus of the substantive defense of entrapment, the foundation of sentencing entrapment, is on the predisposition of the individual defendant, not the conduct of the government. The Supreme Court first discussed this distinction in *United States v. Russell*,¹⁸⁷ and in *Jacobson v. United States*,¹⁸⁸ the Court reaffirmed this position. The Court explained that entrapment occurs “when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense.”¹⁸⁹

While the Supreme Court has adhered to such a definition,¹⁹⁰ it frequently continues to be a source of confusion for courts evaluating entrapment claims.¹⁹¹ In the context of sentencing entrapment, the issue of predisposition becomes even cloudier, and line drawing based on predisposition can pose unreasonable challenges to the courts. The Supreme Court in *Russell* was careful to note that the judicial doctrine of entrapment was designed to distinguish between “an unwary innocent” and “an unwary criminal.”¹⁹² However, the focus on innocence, as seen through the clause “innocent person,” is misplaced when it comes to sentencing entrapment because the defendant is clearly not “innocent.” As the D.C. Circuit Court of Appeals correctly noted, “[p]ersons ready, willing and able to deal in drugs . . . could hardly be described as innocents.”¹⁹³

Furthermore, even if the notion of “innocence” could be set aside,¹⁹⁴ proving predisposition to commit lesser crimes, as opposed to the mere predisposition to commit any criminal acts, could become an evidentiary nightmare. Courts would be left to decide issues such as whether a defendant only meant to purchase five

¹⁸⁵ See *supra* Part II.A.

¹⁸⁶ See *infra* Part VI.

¹⁸⁷ 411 U.S. 423 (1973).

¹⁸⁸ 503 U.S. 540 (1992).

¹⁸⁹ *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

¹⁹⁰ *Jacobson*, 503 U.S. at 553 (quoting *Sorrells*, 287 U.S. at 442).

¹⁹¹ See generally John David Buretta, Note, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 GEO. L.J. 1945, 1955 (1996) (discussing the ambiguity surrounding the subjective version of entrapment adopted by the Court).

¹⁹² See *supra* note 37 and accompanying text.

¹⁹³ *United States v. Walls*, 70 F.3d 1323, 1329 (D.C. Cir. 1995). See also *supra* note 146 and accompanying text.

¹⁹⁴ Ignoring “innocence” in sentencing entrapment would then make the doctrine fundamentally inconsistent with traditional entrapment, thereby leaving sentencing entrapment with no theoretical foundation. See *infra* Part III.B.

grams of cocaine for his own use as opposed to a trafficking amount of cocaine that he actually purchased.¹⁹⁵ Courts would be forced to inquire into the quantities and types of drugs and the frequency in which defendants dealt in the past. Additionally, such a doctrine may increase the incentives for perjury, as a defendant could testify or have others testify that he had previously been a small-time dealer; in the absence of a prior criminal record or evidence relating to the defendant from prior investigations, the prosecution would have a difficult time rebutting such claims. It is one thing for a court to decide and for a prosecutor to argue (or concede) that a defendant did or did not have a predisposition to commit the crime at all; it is quite another issue when a defendant claims he was not predisposed to commit a crime that severe.

B. Inconsistent with Traditional Entrapment

To reiterate, entrapment occurs when “the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense.”¹⁹⁶ Not only is proving disposition problematic, but sentencing entrapment is arguably inconsistent with the traditional entrapment defense, the very doctrine upon which sentencing entrapment is grounded.

As the Supreme Court held in *Sorrells*:

The predisposition and criminal design of the defendant are *relevant*. But the issues raised and the evidence adduced must be pertinent to the *controlling question* 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.¹⁹⁷

Predisposition was relevant, but innocence was controlling. With sentencing entrapment, however, *all* of the defendants are unwary criminals. Innocence is never present, much less controlling, in cases involving sentencing entrapment, as such defendants have already been found guilty of the substantive offense and only seek to reduce the resulting sentence. Protection of innocence has been the underlying theme in the Supreme Court’s entrapment jurisprudence,¹⁹⁸ and accordingly,

¹⁹⁵ See *supra* notes 10–18 and accompanying text.

¹⁹⁶ *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

¹⁹⁷ *Id.* at 451 (emphasis added).

¹⁹⁸ References to innocence pervade the relevant Court decisions. See, e.g., *id.* at 442 (“A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an *innocent* person the disposition to commit the alleged offense.” (emphasis added)); see also *Sherman v. United States*, 356 U.S. 369, 372 (1958) (“Congress could not have intended that its statutes were to be enforced by tempting *innocent* persons into violations.” (emphasis added)).

the benefits of the doctrine of entrapment were not intended to be extended to defendants who only intended to commit less severe crimes.

Indeed, if sentencing entrapment can be at all reconciled with the traditional defense of entrapment, that consistency is with the objective version of sentencing entrapment, often termed "sentencing manipulation." Specifically, analyzing whether the government "implant[ed]"¹⁹⁹ criminal intentions in the mind of the defendant "is consistent with the objective test of entrapment, since it focuses upon the government's actions in developing the crime."²⁰⁰

While ostensibly grounded on the substantive defense, the doctrine of sentencing entrapment is fundamentally inconsistent with traditional entrapment. In states where an objective approach to entrapment has been adopted, the subjective concept of sentencing entrapment cannot stand,²⁰¹ and insofar as entrapment has been outlined by the Supreme Court, the doctrine is more consistent with sentencing manipulation than sentencing entrapment.

C. Statutory Interpretation and Separation of Powers

While the Sentencing Commission thoroughly reviewed their creation, they nevertheless recognized the potential for gaps and the need for departure from the guidelines in rare cases. Thus, the sentencing guidelines, even in their pre-*Booker* mandatory state, allowed judges to depart from the guidelines where "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."²⁰² The Sentencing Commission explicitly delineated what sources a sentencing judge should examine in determining what was "taken into consideration."²⁰³ Specifically, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."²⁰⁴

The Sentencing Commission clarified that departure from the guidelines based on factors not enumerated in the guidelines should be "highly infrequent."²⁰⁵ Several courts that have analyzed sentencing entrapment claims have attempted to circumvent this explicit warning by construing the official commentary beyond its plain

¹⁹⁹ See *supra* note 187 and accompanying text.

²⁰⁰ David J. Elbaz, Note, *The Troubling Entrapment Defense: How About an Economic Approach?*, 36 AM. CRIM. L. REV. 117, 130 (1999).

²⁰¹ See, e.g., *People v. Smith*, 80 P.3d 662, 667 (Cal. 2003).

²⁰² 18 U.S.C.S. § 3553(b) (2001).

²⁰³ *Id.*

²⁰⁴ *Id.* "The official commentary, often referred to as application notes, provides examples of specific fact patterns and direction to judges for the appropriate use of the Guidelines." LaBine, *supra* note 19, at 1528.

²⁰⁵ U.S. SENTENCING COMM'N, GUIDELINES MANUAL §1A4(b) (1997) [hereinafter 1997 MANUAL].

language and import. In *United States v. Staufer*, the Ninth Circuit relied on Application Note Fifteen to section 2D1.1 of the Guidelines:

If, in a reverse sting [operation], . . . the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.²⁰⁶

The facts in *Staufer*, however, did not fit within the exception provided in Application Note Fifteen. In *Staufer*, the defendant was the seller, *not* the buyer, and the government agents conducted a traditional sting, *not* a reverse sting.²⁰⁷ By applying Application Note Fifteen to the facts in the *Staufer* case, the Ninth Circuit overstepped its authority and interpreted the Sentencing Guidelines in clear violation of plain language and legislative intent.

The following year, the Ninth Circuit interpreted Application Note Twelve as further authority for departure based on sentencing entrapment.²⁰⁸ In cases involving sales of controlled substances, that note provides that

[w]here the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.²⁰⁹

When taken together, these two Sentencing Commission Application Notes served as the foundation for the court's application of sentencing entrapment.²¹⁰

²⁰⁶ *United States v. Staufer*, 38 F.3d 1103, 1107 (9th Cir. 1994) (citing 1997 MANUAL, *supra* note 205, §2D1.1 cmt. 15) (second alteration and omission in original). The application note was originally number seventeen. In 2001, this application note was amended again, whereby the text was unchanged but the note number was changed to fourteen. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL §2D1.1 cmt. 14 (2001).

²⁰⁷ *Staufer*, 38 F.3d at 1105.

²⁰⁸ *United States v. Naranjo*, 52 F.3d 245, 250 (9th Cir. 1995). Much as in *Staufer*, however, the facts did not fit the Court's reasoning. Application Note Twelve applies to situations where the defendant is the seller, but in *Naranjo*, the defendant was the purchaser. *Id.* at 246.

²⁰⁹ *Id.* at 250 (citing U.S. SENTENCING COMM'N, GUIDELINES MANUAL §2D1.1 cmt. 12 (1993)).

²¹⁰ *See* LaBine, *supra* note 19, at 1532.

The Ninth Circuit erred in its formulation of sentencing entrapment. The Sentencing Commission clearly stated that departures not enumerated in the commentary or guidelines themselves must be founded on principles and situations not considered by the Commission.²¹¹ The Commission was clearly aware of the police practices of stings and reverse stings, but nevertheless limited the possibility for downward departures from the Sentencing Guidelines to particular instances of those practices.²¹² Application Note Fifteen was designed to apply to situations *only* where the government set the price for the drugs artificially and substantially below the market price.²¹³ Application Note Twelve *only* reaches scenarios where a defendant seller of drugs either did not intend to, or was not reasonably capable of, supplying the quantity of drugs agreed to by the defendant and the undercover agents.²¹⁴ This situation blatantly omits situations where the defendant seller in fact supplied the agreed-upon amount. Additionally, Application Note Twelve does not allow any departure based on the type of the substance.²¹⁵ Thus, where a defendant seller supplies powder cocaine, the undercover officers request that the defendant cook the cocaine to form crack cocaine, and the defendant willingly cooks the cocaine, Application Note Twelve is silent on any grounds for departure.

In essence, the Ninth Circuit, the only circuit to apply sentencing entrapment, has inflated the scope of the application notes to serve as a flimsy basis for a broader sentencing entrapment defense. In so doing, the court has taken an activist approach that infringes on the proper role of the legislature.²¹⁶ Justice Owen Roberts's concurring opinion in *Sorrells* over seven decades ago seems particularly apt with regard to the Ninth Circuit's adoption of sentencing entrapment, as the court's reasoning truly seems to be "a strained and unwarranted construction of the statute; [which] amounts, in fact, to judicial amendment."²¹⁷ As the Seventh Circuit recently noted, "no matter what the policy reason for doing so, a court may not rewrite a statute or guideline to suit its or any other needs."²¹⁸ If the court disapproves of the government conduct, perhaps it can simply exclude the evidence, an approach suggested by the First Circuit.²¹⁹ However, the courts must defer to the legislature to determine punishment for crimes. Fairness, the central premise of sentencing entrapment, is not an adequate ground for departing from the will of the people, as seen through the legislation enacted by their representatives.

²¹¹ See *supra* notes 200–03 and accompanying text.

²¹² LaBine, *supra* note 19 at 1530–32.

²¹³ See 2005 MANUAL, *supra* note 56, §2D1.1 cmt. 14.

²¹⁴ *Id.* at cmt. 12.

²¹⁵ Application Note Twelve mentions only "quantity" of drugs and not the type or severity of the substances. *Id.*

²¹⁶ Labine, *supra* note 19, at 1536 ("By accepting the defense, they have passed from saying what the law is . . . to making new laws, an action outside their granted power.").

²¹⁷ *Sorrells v. United States*, 287 U.S. 435, 456 (1932) (Roberts, J., concurring).

²¹⁸ *United States v. Mitchell*, 353 F.3d 552, 557 (7th Cir. 2003).

²¹⁹ *United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992) ("We are confident that, should a sufficiently egregious case appear, the sentencing court has ample power to deal with the situation . . . by excluding the tainted transaction from the computation of relevant conduct . . .").

D. Foreign Jurisprudence

Scholars and courts have often been torn on whether American courts should look to foreign judiciaries for guidance,²²⁰ and this issue was hotly debated recently before the Supreme Court.²²¹ While the decisions of courts in foreign jurisdictions naturally are not binding on our courts, such decisions and judicial perspectives nevertheless can hold persuasive value for American courts grappling with contentious issues and controversial doctrines.

First of all, the subjective formulation of entrapment is predominantly an American doctrine.²²² Few other countries accept entrapment as a defense,²²³ much less sentencing entrapment.²²⁴ Frequently, foreign jurisdictions find that the appropriate remedy is to attack the police practice and to curb the behavior of the law enforcement agents via the criminal law.²²⁵ The Australian High Court has held that "law enforcement agents who engage in criminal activity are criminally liable for their actions and liable to punishment accordingly."²²⁶

²²⁰ See generally Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

²²¹ Compare *Roper v. Simmons*, 543 U.S. 551, 574–79 (2005) (relying in part on international laws and norms in deciding to abolish the death penalty as applied to juvenile offenders), with *id.* at 1603–05 (O'Connor, J., dissenting), and *id.* at 622–28 (Scalia, J., dissenting).

²²² See Jacqueline E. Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501, 1521–22 (2002).

Defining entrapment subjectively rather than objectively, the American test largely focuses on the offender's predisposition. Even powerful inducements will fall short of entrapment if the offender is predisposed to commit the crime. By contrast, the offender's predispositions are less important to European legal systems that focus on the undercover agent's complicity.

Id. (internal citations omitted).

²²³ See, e.g., *Ridgeway v. The Queen*, (1995) 184 CLR 19, 71–72 (opinion of Gaudron, J.) (noting that Australian cases consistently hold "that there is no substantive defence of entrapment," and that "[i]nsanity and duress aside, the criminal law has developed in this and other common law countries on the basis that criminal liability attaches if a person intends to commit a crime and actually commits it." (internal quotation marks omitted)).

²²⁴ England has alluded to the possibility of decreasing a sentence on entrapment grounds. See Kate O'Hanlon, *Law Report: Entrapment by Journalists Mitigated Sentence*, INDEP. (London), Feb. 20, 1998, at 17 ("Although it was legitimate for police officers to entrap criminals, even in those circumstances some mitigation of the sentence was possible."). Still, this is not surprising as the traditional entrapment defense in the United States had its roots, in part, in English common law, even though most English judges rejected and, indeed, continue to reject, entrapment claims. See MARCUS, *supra* note 27, §1.02, at 2.

²²⁵ See Ross, *supra* note 222, at 1522 ("European legal systems treat such conduct as criminal unless a law expressly exempts the investigator from liability for specified acts." (citation omitted)).

²²⁶ *Ridgeway*, 184 CLR at 73. Some American judges and commentators have suggested such an approach. In the Sixth Amendment context, for example, Chief Justice Burger criticized the majority's exclusion of evidence: "It continues the Court — by the narrowest margin —

Not only have foreign courts demonstrated hostility toward the substantive defense of entrapment, few courts have been willing to even reduce a defendant's sentence because of entrapment. As the England and Wales Court of Appeals, Criminal Division, stated: "[W]here undercover officers purchase drugs from a willing seller there is no entrapment which requires the court to discount the sentence. . . . [I]n circumstances such as this it might be said to be a case of seller beware."²²⁷ Similarly, Canadian courts have refused to decrease a sentence on entrapment grounds.²²⁸

Entrapment has found little support outside the United States, and sentencing entrapment has encountered even less success. Nevertheless, some foreign courts will provide relief to a defendant where the government conduct has violated notions of justice and fairness and where, as a result of improper governmental action, the defendant has not received a fair trial. One factor in determining the impropriety of the government conduct is the presence of individualized, reasonable suspicion prior to the setting of the trap.²²⁹ This seems to indicate that the intent of the government officials is significant for some courts outside of the United States for determining whether an investigation was outrageous and undeserving of judicial system approval.

E. Public Policy

Part of what drives some courts to adopt sentencing entrapment has been a deep distrust of police tactics designed to detect and deter criminal behavior. Several judges have publicly expressed concern over the practice of traditional and reverse stings,²³⁰ the police tactic commonly associated with sentencing entrapment claims. However, as Justice Roberts cautioned in *Sorrells v. United States*, "[s]ociety is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime."²³¹ As a policy matter, recognizing the doctrine of sentencing entrapment would frustrate police efforts in the war on drugs. Should other courts follow the Ninth Circuit's lead and distort the intent of

on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing." *Brewer v. Williams*, 430 U.S. 387, 415–16 (1977) (Burger, C.J., dissenting).

²²⁷ *R. v. Thornton*, [2003] EWCA (Crim) 919 (Transcript: Smith), ¶23 (Mar 19, 2003).

²²⁸ *See, e.g., The Queen v. Sugden*, [1991] O.A.C. 20, ¶ 13 ("The one year sentence imposed is, if anything, lenient and fully reflects the mitigating factors outlined in detail by the trial judge.").

²²⁹ *S v. Mkonto*, High Court, 2001 (4) BCLR 401 (C) (describing the statutory provision by which a court, in deciding whether the government conduct went beyond merely providing an opportunity, must determine "whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates").

²³⁰ *See supra* note 45 and accompanying text.

²³¹ *Sorrells v. United States*, 287 U.S. 435, 453–54 (1932) (Roberts, J., dissenting in part).

the Sentencing Commission,²³² police officers may be inclined to only conduct sting operations with the aim of purchasing smaller quantities of drugs. This would surely be an unfortunate consequence and a distinct setback for the war on drugs, as greater amounts of drugs would remain on the streets and drug dealers would stand a better chance of avoiding upper-level mandatory minimums.

In a Sixth Amendment case, Justice White criticized the majority, stating, "I do not share this pervasive distrust of all official investigations."²³³ The adoption of sentencing entrapment by several federal courts and the handful of state courts has exemplified their pervasive and unfounded distrust of government agents and their efforts in fighting crime. Concerning sentencing entrapment, in particular, the First Circuit warned, "Courts should go very slowly before staking out rules that will deter government agents from the proper performance of their investigative duties."²³⁴

F. Philosophy of Punishment

The rationale underlying sentencing entrapment also runs counter to the prevailing goals of criminal sentencing. In authorizing the Sentencing Commission to promulgate the Sentencing Guidelines, Congress identified four objectives for criminal sentencing: incapacitation, deterrence, just punishment, and rehabilitation.²³⁵ Underlying the Sentencing Guidelines and mandatory minimums, however, seems to be a reflection of the changing goals of criminal sentencing, specifically, the shift away from rehabilitation and towards incapacitation, deterrence, and punishment. As Justice Breyer described while serving as a commissioner on the Sentencing Commission, the Commission had to find a compromise between "those who advocated 'just deserts' but could not produce a convincing, objective way to rank [the seriousness of] criminal behavior in detail, and on the other hand, with those who advocated 'deterrence' but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime."²³⁶

While the federal sentencing scheme and the sentencing laws of several states have been criticized for drawing quantitative distinctions in sentencing for drug crimes,²³⁷ "the public, the voters who asked for these laws in the first place, overwhelmingly favor mandatory minimums."²³⁸ As then-Congressman Asa Hutchinson stated in a debate at the Georgetown University Law Center, "[T]he public has to

²³² See *supra* notes 200–215 and accompanying text.

²³³ *United States v. Wade*, 388 U.S. 218, 252 (1967) (White, J., dissenting in part).

²³⁴ *United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992).

²³⁵ See 18 U.S.C. § 3553(a)(2) (2001).

²³⁶ See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 32–33 (2003) (quoting Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromise Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988) (alteration in original)).

²³⁷ See, e.g., Witten, *supra* note 9, 706–09.

²³⁸ Debate, *supra* note 77, at 1281 (statement of Cokie Roberts).

have a means of expressing its outrage toward certain offenses that are so harmful to the public.”²³⁹ Reflecting the shift in the philosophical basis for sentencing, Congressman Hutchinson conspicuously omitted any mention of rehabilitation while applauding the efficacy of mandatory minimums.²⁴⁰

Sentencing entrapment operates against these societal preferences. Citizens, through their representatives, have chosen to severely punish those who deal in large quantities of controlled substances. Whether a judge thinks a defendant was not “predisposed” to commit such a severe drug violation should not matter. Whether a judge believes a defendant could benefit from a sentence premised on rehabilitation is equally irrelevant. The sentence has been provided by the Sentencing Commission and state legislatures. The political process has chosen incapacitation, deterrence, and punishment as the primary bases for criminal sentencing, and it is not for a judge to circumvent popular will by decreasing a sentence on grounds of sentencing entrapment.

G. Individual Responsibility

Finally, sentencing entrapment ignores the notion that everyone is responsible for their actions and their own destiny.²⁴¹ In response to a sentencing entrapment claim, the Seventh Circuit Court of Appeals placed great importance on the notion of individual responsibility and stated rather succinctly, “The government is not the cause of Guereca’s predicament: Guereca is.”²⁴² The basic premise of the sentencing entrapment defense is that an individual who was predisposed to committing only minor offenses is entrapped by the government into committing a more severe offense subject to greater penalties. Contrary to the contention of sentencing entrapment proponents, however, drug dealers are not presented with some sort of Hobson’s Choice. Such offenders can *choose* to deal in small quantities and risk relatively short imprisonment or even probation, or they can *choose* to deal in quantities that our elected representatives have seen fit to punish more severely.²⁴³ Similarly, the decision made by a cocaine dealer to deal in crack instead of cocaine is not a *fait accompli*, regardless of how easy it may be to cook powder cocaine into crack. Should a drug dealer cook cocaine in the microwave, he actively made the decision to deal a more addictive, more dangerous, and more reprehensible drug. He may

²³⁹ *Id.* at 1282.

²⁴⁰ *Id.* (“And so I think the retribution theory is supported. I believe the deterrence theory is supported.”).

²⁴¹ See John H. Pearson, Comment, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CAL. L. REV. 697, 701 (1984) (“It is a fundamental tenet of American culture that individuals are responsible for shaping their own destinies.” (citing JOHN MILTON, *PARADISE LOST* bk. I, lines 258–63 (1667))).

²⁴² *United States v. Garcia*, 79 F.3d 74, 76 (7th Cir. 1996).

²⁴³ Naturally, a third and more desirable option would be for such individuals to exit the drug market entirely.

not like the prospect of spending more time in prison, but his decision was not a foregone conclusion, and courts should adhere to the consequences of offenders acting of their own free will. As Benjamin Disraeli once wrote: "Next to knowing when to seize an opportunity, . . . the most important thing in life is to know when to forego an advantage."²⁴⁴ These defendants were presented with an opportunity that violated our laws, an opportunity that should not have been seized, an advantage that should have been foregone.

The facts surrounding sentencing entrapment cases are often troubling, and it is understandable that some judges may feel sympathy for drug dealers facing longer sentences. However, that compassion ought to have its limits, as the judges are charged with enforcing the laws established by duly elected representatives of the citizenry. If a sentence is unconstitutional, that is one thing. If a sentence merely seems harsh, however, it is left to the legislature, not the court, to dictate what is fair in the context of our criminal justice system.²⁴⁵ When defendants raise claims of sentencing entrapment based on predisposition, it is they who are "shouting into the wind."²⁴⁶ It is only a shame that some courts, whose sympathetic ears have overpowered their better judgment, have listened.²⁴⁷

IV. EVALUATING SENTENCING MANIPULATION

Unlike sentencing entrapment, sentencing manipulation is based on outrageous government conduct²⁴⁸ or "'extraordinary misconduct.'"²⁴⁹ Instead of being rooted

²⁴⁴ DISRAELI THE YOUNGER, *THE INFERNAL MARRIAGE* 51 (William Jackson (Books) Ltd. 1929) (1834).

²⁴⁵ A similar criticism was recently raised by Justice Scalia: "The Court thus proclaims itself sole arbiter of our Nation's moral standards" *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting). Regardless of what a court may feel is the "right" thing to do, "[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Id.* at 616 (quoting *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion)).

²⁴⁶ David M. Zlotnick, *Shouting Into the Wind: District Court Judges and Federal Sentencing Policy*, 9 *ROGER WILLIAMS U. L. REV.* 645, 645 (2004).

²⁴⁷ *Cf. United States v. Booker*, 543 U.S. 220, 298 n.16 (2005) (Stevens, J., dissenting). (citing 149 CONG. REC. S5113, S5121–S5122 (Apr. 10, 2003) (statement of Sen. Hatch). Senator Hatch contends that the PROTECT Act

says the game is over for judges: You will have some departure guidelines from the Sentencing Commission, but you are not going to go beyond those, and you are not going to go on doing what is happening in our society today on children's crimes, no matter how softhearted you are. That is what we are trying to do here We say in this bill: We are sick of this, judges. You are not going to do this anymore except within the guidelines set by the Sentencing Commission.

Id. (omission in original).

²⁴⁸ *See, e.g., United States v. Montoya*, 62 F.3d 1, 4 (1st Cir. 1995).

²⁴⁹ *Id.*

in entrapment, which the Supreme Court has grounded on a defendant's predisposition, this doctrine finds its foundation in outrageous government misconduct, a substantive defense to a crime based on notions of due process.²⁵⁰ In essence, when a defendant raises a claim of sentencing manipulation, he is acknowledging that he is guilty of a crime but that the outrageous misconduct of the officers caused him to commit a more severe crime, thereby violating his right to due process. While not a perfect doctrine, sentencing manipulation has found greater support in the federal courts²⁵¹ and avoids many of the infirmities that plague sentencing entrapment.²⁵²

A. Balancing Costs and Benefits of Sting Operations

First, sentencing manipulation, more so than the subjective approach that constitutes sentencing entrapment, effectively balances the benefits of reverse stings and undercover law enforcement with the dangers of excessive police conduct in shaping the offense and punishment. As the Pennsylvania Superior Court acknowledged,

[t]he benefits of reverse sting operations, i.e., ferreting out those who are ready, willing and able to engage in crime, must be balanced against the danger of granting law enforcement officials unlimited power to define the scope of criminal culpability in a given case. The fact that a single officer in the field can determine the amount of drugs in a case, and, therefore, the length of sentence for a defendant, is a troubling scenario. Such awesome power cannot go unchecked.²⁵³

Accordingly, the Pennsylvania court adopted the objective version of sentencing entrapment: sentencing manipulation. Through a balancing of interests, courts will be better able to preserve the integrity of the criminal justice system while still ensuring just deserts for those who violate the law.

B. Less Statutory Conflict and Greater Deference to Legislature

Additionally, where there is a constitutional violation, such as a violation of due process, the Court can avoid the confines of a statute. Thus, while a particular sentence may be valid on its face, such a sentence may nevertheless be invalid under

²⁵⁰ See *United States v. Russell*, 411 U.S. 423, 431–32 (1973) (“[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”); see also U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

²⁵¹ See *supra* notes 149–53 and accompanying text.

²⁵² See *supra* Part III (discussing the flaws of the subjective doctrine of sentencing entrapment).

²⁵³ *Commonwealth v. Petzold*, 701 A.2d 1363, 1366 (Pa. Super. Ct. 1997).

due process when applied to a defendant who has been the target of outrageous police conduct.²⁵⁴ Where a constitutional right has been violated, the courts can circumvent legislation, including sentencing laws, and indeed, when sentencing manipulation has been found by courts, the courts should disregard applicable sentencing and sentence the defendant to a reasonable²⁵⁵ term of imprisonment that comports with the goals of criminal sentencing.²⁵⁶

C. Guidance to Police and Other Government Officials

Furthermore, a downward departure from sentencing laws based on government misconduct will provide more adequate guidance to government agents structuring their investigations. Cases such as *Ramirez-Rangel*²⁵⁷ will gain greater precedential value when officers learn that they cannot hand a defendant a black bag with guns without actually telling the defendant that the bag contains machine guns.²⁵⁸ Only under a rubric of sentencing manipulation can officers know that every time they engage in certain prohibited investigatory conduct, their conduct will be found outrageous by a court and the sentence they attempted to manipulate will in fact be decreased by the court. Where the focus is on the individual defendant and her predisposition, as is the focus of sentencing entrapment, government agents are left wondering what will happen if they conduct an identical investigation with a different suspected criminal. By providing a convicted criminal with a lesser sentence, the courts can appropriately deter government behavior that falls outside the bounds of justice, fairness and due process.

V. THE PROPER TEST

Sentencing manipulation could potentially open the door to courts micromanaging and over-scrutinizing government conduct. As has been noted, such a doctrine

²⁵⁴ Cf. Leonard N. Sosnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 TEMP. L. REV. 171, 214 (2000) ("If a court has power in this area . . . it is because the court has the independent constitutional authority and obligation under Article III to disregard the statute and enforce a defendant's due process . . . rights.").

²⁵⁵ See *United States v. Booker*, 543 U.S. 220, 260–61 (2005) (setting a reasonableness standard of review for departures from the Federal Sentencing Guidelines).

²⁵⁶ See *supra* Part III.F.

²⁵⁷ See *United States v. Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997).

²⁵⁸ As the Ninth Circuit stated,

The question may be different in cases like the present one, however. If the defendants did not initially bargain for machine guns in return for drugs, and the government supplied machine guns in a covered bag, it is possible that the defendants *neither agreed nor knew* that machine guns were involved. . . . The government ought not to be able to commit an entire act for a defendant without the defendant's knowledge, in order to increase a penalty by 25 years.

Id. at 1507.

risks putting the law enforcement officers on trial and detracting attention away from the defendant who is actually before the court.²⁵⁹ As the argument goes, determining the motives of the law enforcement agents and agencies may be relevant when it is the agents and agencies on trial, but not when the individual defendant is facing sentencing.

Those courts and commentators that are hesitant to examine the intent and motives of government officials may be correct that such an analysis would shift the focus in trial away from the defendant and onto the police. Perhaps that is a desirable consequence, however. If police and other undercover agents are allowed to use stings and traps to catch criminals, it is not unreasonable to ask them to explain their actions. If they cannot present a legitimate reason for their actions, the sentence should, in turn, be diminished. Police should support their investigative actions, and in instances when they cannot do so, it is apparent that the long arm of big brother simply has extended too far.²⁶⁰ When the government overreaches like this, it the obligation of the judiciary to not condone such behavior and to reject the lengthy sentence that the government sought to obtain. Accordingly, two possible formulations of a viable sentencing manipulation doctrine exist: one that is intent-based and the other that is market-based.

A. Intent-Based Standard of Sentencing Manipulation

While all of the federal courts have at least acknowledged that sentencing entrapment claims exist, it was a state court — the Third District of the Florida Court of Appeals — that came the closest to framing a viable test for challenges to sentences. That court stated that the focus should be on law enforcement intent: “[W]as the sting operation continued only to enhance the defendant’s sentence or did legitimate law enforcement reasons exist to support the police conduct, such as to determine the extent of the criminal enterprise, to establish the defendant’s guilt beyond a reasonable doubt, or to uncover any co-conspirators?”²⁶¹ Courts presented with such claims should avoid the issue of the predisposition of the defendant and should instead focus on the intent of the government official and the “purpose and flagrancy of the official

²⁵⁹ See Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 100 (2004) (“Some have also argued that it puts the police on trial and simply stalls the proceedings against the defendant, bogging down in a swearing match between the police and the defendant about what really happened”); see also *United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994) (rejecting any “rule that would require district courts to speculate as to the motives of, or to ascribe motives to, law enforcement authorities”).

²⁶⁰ This is such a concern that it is difficult for some courts and commentators to express approval for sentencing entrapment in the first place. See, e.g., Saul M. Pilchen, *The Underside of Undercover Operations*, CONN. L. TRIB., July 22, 1991, at 18 (“Big brother has gone big time It seems all the world’s a stage for the federal government as it pursues scores of undercover sting operations in its battle against crime.”).

²⁶¹ *State v. Steadman*, 827 So. 2d 1022, 1025 (Fla. Dist. Ct. App. 2002).

misconduct.”²⁶² The Florida court’s rationale for the intent standard was that it “prevents sentence manipulation for the purpose of enhancing punishment, does not interfere with undercover operations, and does not excuse a defendant.”²⁶³ Thus, when a defendant is caught in a sting operation, the court should not plunge hopelessly into a morass of evidentiary dilemmas, trying to establish what the defendant had done in the past and what the defendant would have done but for the actions of the undercover agents. Rather, should a defendant wish to challenge the sentence established for the crime that he duly committed, he should bear the initial burden of challenging the government’s intent in the investigation. The burden should then shift to the government to prove that the agents did not continue their actions “for the sole purpose of ratcheting up a sentence.”²⁶⁴

The question then becomes what burden is to be placed on the government to justify the heightened sentence. Because predisposition would not be a factor under this analysis, placing a heightened burden of proof on the government to justify its actions would provide further assurance that the resulting sentence is appropriate and just. Accordingly, this Note argues that the government should be required to prove by clear and convincing evidence,²⁶⁵ not just by a preponderance of the evidence, that each action that incriminates the defendant subsequent to the first undercover encounter be justified for reasons other than increasing the defendant’s sentence. By requiring the government to justify its actions, the concerns of some scholars that low-level criminals, as opposed to the “‘big fish,’”²⁶⁶ are being targeted may be alleviated.²⁶⁷ A defendant’s liberty is at stake, and the government ought to be able

²⁶² *Brown v. Illinois*, 422 U.S. 590, 604 (1975) (evaluating government misconduct in the Fourth Amendment context).

²⁶³ *Steadman*, 827 So. 2d at 1025.

²⁶⁴ *United States v. Shephard*, 4 F.3d 647, 649 (8th Cir. 1993).

²⁶⁵ *Cf. McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (upholding the preponderance of the evidence standard where there was no allegation that the sentencing enhancement was “a tail which wags the dog of the substantive offense”). Where sentencing manipulation is raised, there is just such a risk that the tail will wag the dog. Accordingly, several circuits, notably those that have adopted the doctrine of sentencing entrapment, have required a heightened standard of proof for sentencing factors where a substantial difference in potential sentences is at stake. *See United States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991) (“At the very least, *McMillan* allows for the possibility that the preponderance standard the Court approved for garden variety sentencing determinations may fail to comport with due process where, as here, a sentencing enhancement factor becomes ‘a tail which wags the dog of the substantive offense.’” (quoting *McMillan*, 477 U.S. at 88)); *United States v. Restrepo*, 946 F.2d 654, 656 n.1 (9th Cir. 1991) (en banc) (acknowledging the heightened standard of proof employed in other circuits where there exists the potential for an extraordinary upward adjustment in a sentence), *cert. denied*, 503 U.S. 961 (1992).

²⁶⁶ *See Witten*, *supra* note 9, at 727.

²⁶⁷ *Id.* at 727–28 (“Instead of imposing more severe penalties on the “big fish,” smaller criminals frequently receive the brunt of the stricter punishments.” (quoting Robert Eldridge Underhill, *Sentence Entrapment: A Casualty of the War on Crime*, 1994 ANN. SURV. AM. L. 165, 192)); *id.* at 729 (“Instead of capturing crime kingpins, sentence entrapment injures only the small-time, street-level criminal.” (quoting Underhill, *supra*, at 194)).

to demonstrate the necessity of continuing an investigation that potentially will result in a greater deprivation of liberty for the particular defendant.

If the government is able to carry its burden by clear and convincing evidence that it possessed legitimate reasons for its investigative tactics, beyond merely increasing the criminal penalty for the defendant, then the burden could shift back to the defendant. At this stage, the defendant could show that regardless of the government's intent or motivation in the operation, the government's conduct was simply so outrageous that due process must be invoked to preclude enforcement of the full sentence.²⁶⁸ The standard should be high here, however, for once the government has shown legitimate intent, the judiciary should remove itself from excessively scrutinizing executive action.²⁶⁹

By embodying notions of due process, such an analysis for sentencing entrapment or manipulation cases would preserve the integrity of the judicial process while still providing judges with the discretion to depart from the guidelines when the fundamental concepts of justice and fairness so dictate. Such an approach will also ensure that both overreaching by the government and sentencing disparities by the courts are contained. Finally, this analysis may place a higher burden on the government to justify its actions, but it nevertheless enables police and government agents to continue employing the same tactics in their war on drugs and other crimes.²⁷⁰

B. Market-Based Standard of Sentencing Manipulation

An alternative to the intent-based framework — and one that hitherto has not been considered by any court — is a market-based standard. Rather than looking to the intent of the government agents, which may pose its own evidentiary difficulties, courts should evaluate government conduct as it relates to the economic forces governing the illegal drug market. In short, government agents should not be able to manipulate a sentence by deviating from market norms.

²⁶⁸ See, e.g., *United States v. Snow*, 309 F.3d 294, 295 (5th Cir. 2002) (requiring outrageous conduct for a cognizable defense to a sentence).

²⁶⁹ See *Stevenson*, *supra* note 259, at 100 (noting the prevalent “skepticism about the courts acting as the morality police for law enforcement agencies”).

²⁷⁰ As some scholars have pointed out:

[I]t is possible that a society could simply prohibit all sting operations, acquitting the defendant at the slightest hint of government solicitation or involvement, which would obviate the need for either test. This would force the police to rely instead on surveillance *ex ante* and investigation *ex post* of the commission of crimes.

Id. at 90 n.94. Since society has not prohibited such tactics and such tactics have been proven quite effective, this standard will allow police to continue using them, provided their intent and motives are legitimate.

As a threshold matter, it scarcely can be doubted that, taken together, the importing, producing, selling, buying, and using of illegal drugs constitutes an ongoing market.²⁷¹ Naturally, the illegal drug market is in many regards unlike conventional and legal markets,²⁷² such as the buying and selling of goods, services, stocks, etc. Nonetheless, it is a vibrant market, and as the normal means of prosecuting the drug war have not always been successful in curbing this market,²⁷³ many jurisdictions and law enforcement agencies have altered their mindsets and approaches. For example, multiple states have begun imposing market liability on convicted drug dealers.²⁷⁴

It is a universal²⁷⁵ goal that criminal activity should be rooted out and punished.²⁷⁶ While perhaps not all criminal activity may be categorized as part of a market, surely there is a drug market, and if police are to play within this market by going undercover to root out criminals and criminal behavior, then they ought to abide by the rules of the market.²⁷⁷ When playing within the rules governing the drug market,

²⁷¹ For example, the Government Accountability Office (GAO) has used market terminology to evaluate the progress of the drug war in America. See David Adams, *GAO: Data Too Fuzzy to Measure Drug War*, ST. PETERSBURG TIMES, Dec. 24, 2005, at 1A (analyzing the “illicit drug market” and noting that “[i]t’s an illegal trade after all, and no one on Wall Street is tracking its performance.”). Some have even used the market terminology to refer to a drug industry. See, e.g., Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995).

²⁷² But see Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 398 n.82 (1995) (“In some areas of Los Angeles, the scene resembles a public market, with competing dealers loudly hawking their wares on the sidewalk . . .” (quoting PETER D. SCOTT & JONATHAN MARSHALL, *COCAINE POLITICS: DRUGS, ARMIES AND THE CIA IN CENTRAL AMERICA* at x (1991))).

²⁷³ See Sylvaine Poret, *Paradoxical Effects of Law Enforcement Policies: The Case of the Illicit Drug Market*, 22 INT’L REV. L. & ECON 465, 482 (2002) (“[R]etailers and traffickers react strategically to a tougher law enforcement policy by taking costs related to the law enforcement into account and adapt the number of transactions they make or the quantity exchanged at the time of a transaction.”).

²⁷⁴ See generally Wendy Stasell, Comment, “Shopping” for Defendants: Market Liability Under the Illinois Drug Dealer Liability Act, 27 LOY. U. CHI. L.J. 1023 (1996); Joel W. Baar, Note, *Let the Drug Dealer Beware: Market-Share Liability in Michigan for the Injuries Caused by the Illegal Drug Market*, 32 VAL. U. L. REV. 139 (1997).

²⁷⁵ With the exception of those engaging in criminal activities, of course.

²⁷⁶ See, e.g., *Ridgeway v. The Queen* [1995], 184 CLR 19, 51 (“It is desirable in the public interest that crime should be detected and punished.”).

²⁷⁷ I recognize the apparent contradiction of requiring government agents to abide by the rules of a market they ultimately hope to destroy. Nonetheless, the market will remain so long as there is a demand for recreational drugs. See Robert Sharpe, *Applying Market Principles to Drug Policy*, WASH. POST, Oct. 7, 2002, at A20. Simply put, it is not up to law enforcement officers to curb the demand for narcotics; that task falls to policy-makers, educators, health professionals, parents, and other individuals capable of effecting an influence on potential users. Law enforcement officers can, at least, affect the supply, but in doing so, they should act in accordance with the normal market forces.

government agents can be more certain to trap the truly criminally inclined — those who would violate the law with the same frequency and to the same severity in the absence of police involvement — rather than low-level drug dealers who may be unable to resist an unreasonably good deal.²⁷⁸ When deviating from that market, however, government agents are effectively creating the criminal activity, which is seen as going beyond the bounds of acceptable government behavior.²⁷⁹ Put another way, by stepping outside the rules of the drug market, the police are “improperly enlarg[ing] the scope or scale of the crime,”²⁸⁰ behavior that the Supreme Court has condemned.

So what, then, are the “rules” of the drug market? What qualifies as falling within that market, and conversely, what police tactics would fall outside the normal operations of the drug market? The facts surrounding numerous sentencing entrapment claims would seemingly fall within the confines of the illicit drug market. Drug dealers and traffickers typically carry firearms and other weapons with them during the ordinary course of their business.²⁸¹ Receiving a heightened sentence because, during the course of a drug deal, they carried a firearm, either of their own accord or on the suggestion of an undercover officer, in no way exceeds the normal bounds of the drug market, and accordingly, such a defendant should not receive a diminished or mitigated sentence for that reason alone. Another common argument employed by defendants caught in traditional and reverse sting operations is that the government agents continued the investigation and the series of controlled purchases and sales long after sufficient evidence had been obtained to convict the defendant. Essentially, such defendants argue that the agents should have ceased the investigation, rather than continuing the operation, which in turn resulted in larger amounts of drugs exchanging hands and, consequently, longer prison sentences for the defendants. Here, though, there is no circumvention of the market rules; indeed, the police are playing perfectly within the rules and appear no different than any other repeat player in the market.

The crucial question is when government agents go outside of the normal drug market and attempt to change the market from within. The Sentencing Commission itself noted one tactic of government agents that violates the rules of the drug market — setting unreasonably low prices as a seller.²⁸² By pricing below market prices, prices that are otherwise dictated by supply and demand, the agents have gone outside

²⁷⁸ Certainly, it has been noted “that drug dealing (like other crimes) disproportionately attracts those high in impulsivity and low in self-control.” Caulkins & MacCoun, *supra* note 4, at 321 (citation omitted).

²⁷⁹ *Sorrells v. United States*, 287 U.S. 435, 451 (1932) (condemning illegal conduct that is the “product of the creative activity of [government] officials”).

²⁸⁰ *United States v. Barbour*, 393 F.3d 82, 86 (1st Cir. 2004).

²⁸¹ *See United States v. Conyers*, 118 F.3d 755, 757 (10th Cir. 1995) (“[T]hose who transport drugs often carry (and all too often use) a firearm . . .”).

²⁸² *See supra* note 204.

the norms of the drug market and are prosecuting behavior that presumably would not otherwise have occurred. An additional example would be giving things away, such as guns or drugs, particularly without the criminal's knowledge or consent.²⁸³ Nothing comes free, especially in black markets, and when police officers give contraband to unwary persons, only to turn around and prosecute them for that possession, the police have overstepped the bounds of the normal drug market and have, in essence, created the very crime they seek to prosecute.

A police tactic that might be a closer call, however, is the practice of fronting purchase money for the drugs. Such a practice may be relatively common in the drug market, and indeed, \$300 of the \$800 purchase price was fronted by the police in *State v. Foster*.²⁸⁴ However, fronting money only pushes the actions of the government agents themselves closer to the criminal line. In the drug market, there certainly is no such thing as a purchase money security interest in cocaine, so fronting money is essentially done on an honor system. Should one fail to repay, however, the purchaser may be faced with the risk of violence to his person, his property, or even his loved ones. When a purchaser of drugs asks and receives permission to borrow the purchase money, he undoubtedly is cognizant of those risks inherent in failing to pay his supplier. Accordingly, by fronting money to unwitting purchasers of drugs, government agents are implicitly threatening the lives and/or property of the targets of their sting operations, and such coercive, threatening behavior by government agents seems to cross the line between acceptable investigatory tactics and conduct that the courts should not tolerate. Indeed, the notion that police officers are threatening the lives of the drug purchasers should rise to the level of a due process violation. Thus, while the market-based approach may condemn this police tactic, it certainly should not survive an outrageous government conduct claim.

A market-based standard of sentencing manipulation may prove easier for courts to apply, but that is not the only benefit of such a conception of the doctrine. It also may provide clearer guidance to law enforcement officers,²⁸⁵ which in turn would adversely affect the drug market. The market operates within a set of consistent rules, and by conducting investigations in accordance with those rules, government agents are less likely to attract the suspicion of courts concerned about overreaching.²⁸⁶ Additionally, at the street level, if government agents play by the market's rules, the risk of their investigatory schemes being detected will decrease, and consequently,

²⁸³ *E.g.*, *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1507 (9th Cir. 1997).

²⁸⁴ 592 S.E.2d 259 (N.C. Ct. App. 2004); *see supra* text accompanying note 13.

²⁸⁵ This may alleviate some of the concerns expressed in Part III.E.

²⁸⁶ To quote a recent film: "And he was the rarest breed of law enforcement officer — the type who knew I was breaking the law but wouldn't break it himself to bust me." *LORD OF WAR* (Lions Gate 2006). Such a "breed" of police officer should not be so rare, and in a system embracing the market-based standard of sentencing manipulation, law enforcement officers are less likely to "create" crimes as they will simply be abiding by the rules of the drug market. With courts less suspicious of sting operations and law enforcement practices, conviction rates may well increase, which in turn will improve the efficacy of the drug war.

the costs to drug dealers will increase.²⁸⁷ By restricting the supply through effective drug interdiction efforts, thus increasing the market price of drugs on the street, some suppliers will be forced out of the market and some users will lose their suppliers. These indirect effects of a market-based standard of sentencing manipulation would go a long way in accomplishing the goal of sting operations and the drug war as a whole.²⁸⁸

As an economic approach has been taken by other scholars with regards to traditional entrapment,²⁸⁹ there seems to be little standing in the way of a similar framework for sentencing manipulation. A market-based analysis, just as much as an analysis of the intent of police officers, may yield the optimal results in sentencing entrapment jurisprudence, particularly when acting in conjunction with other constitutional protections such as due process via the outrageous government conduct defense.

VI. FUTURE OF SENTENCING ENTRAPMENT AND MANIPULATION

The Supreme Court would be wise to resolve the controversy over sentencing entrapment and sentencing manipulation. The Supreme Court frequently takes cases when the courts of appeals are divided on an issue,²⁹⁰ and here, the circuits are split on whether the doctrine should be applied and, if so, how. Some courts use the phrase "sentencing entrapment," other courts say "sentencing manipulation," and still others refer to the concept as "sentencing factor manipulation." Some courts

²⁸⁷ Cf. Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSP. 175, 176 (1995) ("Enforcement and potential legal punishment effectively impose a 'tax' on suppliers, thereby raising the costs of supplying drugs. This tax includes the jail sentences and fines that drug suppliers face if apprehended, along with any costs that suppliers incur in evading detection.").

²⁸⁸ Cf. Juan Forero, *Cocaine Prices Rise and Quality Declines, White House Says*, N.Y. TIMES, Nov. 18, 2005, at A12 (noting that the drugs prices have increased, the purity of drugs has decreased, and as a result, "[t]here's a change in availability. The policy is working.").

²⁸⁹ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 231 (6th ed. 2003); see also Elbaz, *supra* note 200. Elbaz sets forth an efficiency-maximizing analysis for entrapment:

The efficient approach provides that entrapment strategies should exist only where the tactics supply reliable evidence that a target would engage in the crime under ordinary circumstances and such tactics yield a marginal increase in deterrence levels. If an entrapment strategy yields neither result, it is inefficient, and the entrapment defense should be considered applicable.

Id. at 143.

²⁹⁰ See Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 128 n.119 (1995) ("Public controversy over unusual published appellate decisions or a *split between circuits* is sometimes the only way to attract enough attention to obtain certiorari." (emphasis added)); see also *Missouri v. Seibert*, 542 U.S. 600, 607 (2004) (discussing the division in the lower courts on the effect on subsequent confessions on intentional violations of *Miranda* requirements designed to elicit an initial confession).

feel that sentencing entrapment and sentencing manipulation are synonymous,²⁹¹ while other courts distinguish the two as separate defenses.²⁹² States are equally confused by the doctrine and have taken varying approaches to such claims.²⁹³ The doctrines of sentencing entrapment and sentencing manipulation present unique challenges to the application of federal and state sentencing laws, and the Court has recently addressed challenges to federal and state sentencing guidelines.²⁹⁴ The time is ripe for the Supreme Court to address this controversial concept.

In addition to the legal confusion over the doctrine, the Court should address sentencing entrapment because of the liberty interests at stake; put simply, Supreme Court approval or rejection of sentencing entrapment defenses can result in substantial differences in the prison sentences for future defendants.²⁹⁵ Furthermore, the same government conduct by government agents in neighboring states can result in two starkly different sentences for violation of the same federal laws. It is imperative that the Supreme Court step in to prevent such disparities and to resolve the ongoing dispute over sentencing in the context of undercover operations.

CONCLUSION

The presence of rigid, if not mandatory,²⁹⁶ sentencing laws has allowed the potential for governmental abuse and manipulation of criminal sentencing, and commentators that are critical of such sentencing schemes are entirely correct that “sting operations create, at least, the potential for injustices in sentencing.”²⁹⁷ Nevertheless, “a crook is a crook is a crook,”²⁹⁸ and courts should not countenance crime by casually departing from sentencing laws, thereby providing convicted criminals with shelter from the punishment deemed appropriate by elected representatives. Sentencing entrapment has a certain attractiveness to it, but any such appeal must be discounted by the utter subjectivity and indeterminateness that such widespread application of the doctrine will undoubtedly wreak on sentencing in the federal and

²⁹¹ See, e.g., *United States v. Si*, 343 F.3d 1116, 1128 (9th Cir. 2003).

²⁹² See, e.g., *United States v. Atwater*, 336 F. Supp. 2d 626, 629 n.2 (E.D. Va. 2004) (“The sentencing manipulation theory is separate and distinct from its close cousin the ‘sentencing entrapment’ theory.”).

²⁹³ See *supra* Part II.B.

²⁹⁴ See, e.g., *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

²⁹⁵ Unlike deprivation of the right to counsel, however, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), this issue is not likely to be considered fundamental enough to warrant retroactive application. Cf. *Booker*, 543 U.S. 220.

²⁹⁶ *Booker*, 543 U.S. 220.

²⁹⁷ Saul M. Pilchen, *supra* note 260.

²⁹⁸ LaBine, *supra* note 19, at 1519 (quoting Letters to the Editor, *NEWSWEEK*, Mar. 3, 1980, at 5).

state systems. Where government behavior, however, has fallen below acceptable standards, intent-based or market-based, the defendant should receive a lesser punishment based on sentencing manipulation. The government should not benefit from its own misconduct and bad intentions, but neither should a defendant receive a lesser sentence solely because he was not predisposed to commit such a severe crime. Such a paradigm will deter inappropriate government behavior and oversee that due process is preserved, while still ensuring the fulfillment of legislative intent and sentencing the majority of defendants to their just deserts.