

Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines

Big brother has gone big time: He's posing as your friendly interior decorator, futures trader, salesman, investor, contractor, meat inspector, land developer, judge, and lawyer not to mention the usual drug dealer, arms merchant, pornographer, and money launderer. It seems that all the world's a stage for the federal government as it pursues scores of undercover sting operations in its battle against crime. 1

I. Introduction

Traditionally, judges have enjoyed wide discretion in sentencing defendants,² which often resulted in similarly situated defendants receiving disparate sentences.³ Congress enacted the Sentence Reform Act of 1984 to satisfy the public's desire for both harsher sentences and to end disparity in sentencing.⁴ This sentencing reform culminated in Congress' adoption of the United States Sentencing Commission Guidelines ("guidelines") in November, 1987.⁵ The universal hope was that the guidelines would end the problem of sentence disparity.⁶

One result of the enactment of the guidelines was a transfer of sentencing discretion from judges to prosecutors.⁷ Because the guidelines emphasize the amount of harm created by an offense, they encourage and enable prosecutors and law enforcement officials to manipulate investigations and sting operations so that defendants will receive greater sentences.⁸ In response to government manipulation of sentencing process, many defendants have begun to raise the newly recognized defense of "sentence entrapment" or "sentence manipulation" in an effort to receive a downward departure from the sentence mandated by the guidelines.⁹

This Comment discusses the theory of sentence entrapment and the application of the defense. Part II provides the reader with a general overview of the events leading up to the adoption of the guidelines and the manner in which they operate.¹⁰ Part III discusses the effect of the guidelines' quantity-based approach to criminal investigations. Part IV describes the role of the traditional "entrapment" defense, and Part V details the development of the "sentence entrapment" defense. Part VI analyzes the viability of the sentence entrapment defense, suggesting possible successful methods for raising the defense, and discusses the harms caused by the continued existence of sentence entrapment.

II. The Federal Sentencing Guidelines

A. Pre-Guidelines Sentencing

Many early examples of sentencing law illustrate the historic disagreement over the primary purpose of punishment: whether retribution or restitution should be the focus in sentencing.¹¹ Judicial sentencing philosophy underwent drastic changes in the modern era with the "humanization" of prisoners; during the 1950s, judges adopted the view that the punishment should fit the offender rather than requiring the punishment fit the crime.¹² Until the 1970s, the federal criminal justice system sought to rehabilitate convicted criminals.¹³ To realize the goal of rehabilitation, the criminal justice system relied on "indeterminate sentencing" for most of the last century.¹⁴ Under indeterminate sentencing, judges often gave long prison terms, but prisoners were released before serving the full term upon a determination by the parole commission that the prisoner had been rehabilitated.¹⁵

Before adoption of the Sentence Reform Act of 1984 ("SRA"),¹⁶ federal judges' discretion in sentencing seemed almost infinite, so long as the sentence imposed did not exceed broad statutory limits.¹⁷ In *Williams v. New York*,¹⁸ the Supreme Court recognized the broad scope of judicial discretion in sentencing when it stated:

Before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.¹⁹

In the early 1970s, both the federal courts and Congress expressed disapproval of the wide discretion granted to federal judges in imposing sentences.²⁰ The most frequent criticism of this broad grant of discretion was that it led to disparate treatment for similarly situated individuals, a conclusion that was bolstered by a number of studies.²¹ Growing dissatisfaction with the disparity and uncertainty of indeterminate sentencing led to broad support for the idea of structured sentencing.²² In addition, the concept of rehabilitation came under fire as being an improper goal of punishment, and commentators began to advocate greater emphasis on retribution and deterrence.²³ This change in ideology led one commentator to note that "[s]entencing is no longer for rehabilitating offenders into good citizens; it is based solely on the ideology of punishment and deterrence."²⁴

B. Sentencing Reform

In 1984, Congress enacted the Comprehensive Crime Control Act ("CCCA")²⁵ in response to "public concern about the increase in drug use and distribution, violent crime, and recidivism."²⁶ The CCCA contained various major federal criminal law reforms, including the SRA.²⁷ In short, the "Sentencing Reform Act of 1984 was the result of the criminal justice system's adjustment from a rehabilitative model to a 'just deserts' model."²⁸ Under the SRA, Congress abolished the United States Parole Commission,²⁹ created the United States Sentencing Commission ("Commission"), and directed the Commission to draft sentencing guidelines for the federal courts.³⁰

The Commission consists of seven voting members and two *ex officio* members.³¹ "Three of the members must be sitting federal judges, and no more than four may be members of the same political party."³² "The Commission's principal task is to draft and periodically modify the sentencing guidelines."³³ The SRA required the Commission to develop guidelines based on its study of past sentencing practice, the purposes of sentencing, and advancement in knowledge of human behavior as it relates to the criminal justice process.³⁴ The Commission hastily completed the final draft of the Guidelines Manual, which automatically became federal law on November 1, 1987.³⁵

To calculate an offender's sentence under the Guidelines Manual, the judge follows a series of "mechanistic" steps.³⁶ First, the judge examines the offender's "relevant conduct" in order to determine the offender's base offense level.³⁷ Second, the base offense level is adjusted for particular case-specific factors, such as victim-related adjustments, role in the offense, obstruction of justice, and acceptance of responsibility.³⁸ Third, the judge selects the offender's criminal history level.³⁹ Finally, using the Guidelines Manual's "sentencing grid," the judge determines where the seriousness of the offense and the extent of the offender's criminal history meet on the grid.⁴⁰ From this point the judge finds a range of months for which the offender must be imprisoned.

In addition to insisting upon an extremely narrow sentencing range for every guideline category, the SRA allows judges to depart from the Guidelines Manual *only* when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, that was not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed."⁴¹ In deciding whether a circumstance was adequately taken into consideration, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."⁴² A judge who departs from the guidelines must specify the reasons for such a departure.⁴³

Both the defendant and the prosecution can appeal a sentence.⁴⁴ The courts of appeals have concurrent review responsibilities: they hear appeals from individual sentences in order to determine their conformity to the guidelines; and, as part of those appeals, they hear challenges to particular guidelines to assure that the guidelines themselves conform to the United States Code.⁴⁵ The courts of appeals have strictly enforced the guidelines and have reversed or remanded a significant percentage of unwarranted downward departures.⁴⁶

Since their enactment, the guidelines have had a substantial impact on the federal court system.⁴⁷ Accordingly, they have been the subject of harsh criticism from commentators and members of the federal judiciary.⁴⁸ Some of the most common criticisms of the guidelines include: the concept of "relevant conduct"; inadequate consideration of offender characteristics; the failure to address the purposes of sentencing as set forth by Congress; the failure to eliminate sentencing disparity; the lack of consideration given to the potential impact of prison overcrowding; and the shift in sentencing discretion from the judge to the prosecutor.⁴⁹

III. The Effect of the Guidelines' Quantity-based Approach

The guidelines' use of a quantity-based sentencing scheme has resulted in a heavy focus on the amount or quantity of, for example, drugs sold, money laundered, money stolen, or taxes evaded.⁵⁰ As a result, 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.⁵¹ In enacting the guidelines with the noble goal of ending unfair and unwarranted disparities in sentences between like offenders, the Commission has inadvertently opened the door for governmental misuse and manipulation of sentencing factors.⁵²

Because the length of a drug offender's sentence depends upon the quantity of drugs he or she bought or sold,⁵³ some drug enforcement agents attempt to persuade suspects to buy or sell drugs in amounts necessary to trigger higher statutory penalties.⁵⁴ Agents may also wait to arrest a suspect until after they have bought or sold an amount of drugs sufficient to trigger a higher base offense level.⁵⁵ In addition, agents sometimes prolong transactions with "minor suspects" in an attempt to apprehend a "higher-level" criminal.⁵⁶ Because law enforcement officials are well aware of the guidelines, the emergence of such activity is not at all surprising.⁵⁷

A defendant's sentence can also be manipulated when law enforcement officials select the type of drugs to be bought or sold.⁵⁸ "Drug-type manipulation is a powerful undercover weapon because, under the Guidelines, some drugs carry far harsher penalties than others."⁵⁹ This is illustrated by the case of *United States v. Shephard*.⁶⁰ Here, the defendant, Shephard, alleged that he sold powder cocaine to an undercover agent, which he made into crack cocaine at the agent's request.⁶¹ The Guidelines Manual treats crack cocaine much more harshly than powder cocaine by using a 100:1 ratio 1g of crack is equal to 100g of powder cocaine.⁶² Thus, Shephard's offense level, based purely on drug quantity, was 121 to 151 months for selling crack cocaine, rather than the approximately 27 to 33 months he would have received if he had not complied with the undercover agent's request and converted the powder cocaine into crack.⁶³

Law enforcement officials can also manipulate a defendant's sentence by linking a drug transaction to ancillary crimes:

By orchestrating sting operations to follow specific Guidelines' provisions, agents can exert dramatic influence on the ultimate length of [the] defendant's sentence. For example, an agent can encourage a defendant to include a dangerous weapon in the transaction. She can also try to induce a sale within a thousand feet of a schoolyard, thereby taking advantage of the enhanced penalties under the "schoolyard statute."

Agents can also secure lengthy convictions by inducing defendants to enter into a conspiracy. Under the Guidelines, a drug conspirator who does not complete or only partially completes a planned transaction will be sentenced as if the object of [the] conspiracy had been completed. This rule potentially affords investigating agents significant power over the length of an individual defendant's sentence because an

undercover agent has full discretion to request as little or as much of a drug from the dealer as she chooses.⁶⁴

Another figure who plays a key role in the sentencing process is the prosecutor.⁶⁵ The prosecutor's discretionary decisions as to charges and factual allegations can powerfully expand or limit the judge's possible range for sentencing an offender.⁶⁶ Moreover, a prosecutor can drastically influence the sentencing range by including or excluding information that would be used to determine an offender's "relevant conduct."⁶⁷ The judge must consider the relevant conduct and the sentencing facts as they are presented and must impose a sentence within a given range if reliable evidence establishes the appropriate facts.⁶⁸ Prosecutors possess virtually *carte blanche* authority in guiding undercover sting operations. This presents prosecutors a "fertile field" to manipulate sentencing variables relevant to the calculation of the defendant's base offense level, thereby increasing the sentence if the defendant is convicted.⁶⁹

Prosecutors are undoubtedly key figures in criminal investigations.⁷⁰ They develop and coordinate strategies in major undercover investigations, use grand juries to investigate complex crimes, apply for authorization to obtain eavesdropping warrants, subpoena records, and receive cooperation from witnesses to whom immunity is granted.⁷¹ In pursuing sting operations, prosecutors have the discretion to determine: "(1) whether, which, and how many individuals to target; (2) how many opportunities for the commission of crime to offer; (3) the nature, magnitude, and locus of the crime; and (4) when to terminate the operation."⁷² The public demand for government officials who are "tough on crime" has led the judiciary to approve of more aggressive undercover activity.⁷³ On many occasions, these operations are under the direct supervision of federal prosecutors.⁷⁴

IV. The Traditional Defense of "Entrapment"

Difficulties in the detection and successful prosecution of "consensual crimes"⁷⁵ have forced law enforcement agents to use solicitation to apprehend criminals.⁷⁶ Defendants arrested in this manner have raised the traditional entrapment defense.⁷⁷ In these cases, the key question becomes whether the defendant would have participated in the criminal offense but for the active efforts of law enforcement agents.⁷⁸

The entrapment defense evolved slowly in this country and did not gain acceptance in the federal courts until the 1915 case of *Woo Wai v. United States*.⁷⁹ In *Woo Wai*, the Court reversed a conviction for conspiracy to bring illegal aliens from Mexico into the United States because the government had planned the operation and induced the defendants to act.⁸⁰ Seventeen years later, the Supreme Court recognized the use of the entrapment defense in *Sorrells v. United States*.⁸¹

The opinion in *Sorrells* presents two opposing approaches used to determine whether a defendant was entrapped. The first is the "subjective approach," and the second is the "objective approach."⁸² Under the subjective approach, the focus is on the defendant's predisposition to commit a crime.⁸³ The entrapment defense can be successfully asserted

if the actions of government officials induce otherwise innocent defendants to commit crimes.⁸⁴ To be successful, the defendant must prove he lacked the criminal disposition to commit the crime.⁸⁵ The government may then rebut the entrapment defense by presenting proof of a defendant's predisposition to commit the crime.⁸⁶

On the other hand, the objective test disregards the defendant's predisposition and focuses exclusively on the behavior of the law enforcement officers.⁸⁷ Under this test, if the method of encouragement used was likely to induce an ordinary law-abiding citizen to commit the offense, the case will be dismissed based on entrapment.⁸⁸ At trial, the question to be answered "is whether the police conduct fell below an acceptable standard."⁸⁹

To successfully assert the entrapment defense under the objective approach, a defendant must meet a two-prong test: (1) government inducement of the crime; and (2) a lack of predisposition.⁹⁰ To meet the first prong, "the accused must present evidence that a government agent took actions intended to persuade or induce him to engage in the alleged criminal behavior."⁹¹ If the defendant is able to establish that a government agent has induced him to commit the crime, the burden of disproving entrapment shifts to the government.⁹² "However, mere solicitation by an agent does not shift the burden of proof to the government . . . the defendant must show he was not ready to commit the crime when approached by the government agent."⁹³

As the Supreme Court stated in *United States v. Russell*,⁹⁴ "the principle element of the defense of entrapment [is] the defendant's predisposition to commit the crime."⁹⁵ To prove lack of predisposition, the defendant must be able to prove that he or she was an "unwary innocent" who committed the crime at the urging of the government.⁹⁶ The Court explained:

To determine the issue of predisposition, the court must inquire into the defendant's subjective intent. If the evidence establishes that the defendant was ready and willing to commit the offense at any favorable opportunity, the defendant is deemed to have been "predisposed" and, therefore, not entrapped. On the other hand, if a defendant lacked predisposition and was lured into committing the crime by government agents, the entrapment defense will prevail. If predisposition is found, the entrapment defense is unavailable even if the government employed unduly persuasive methods to encourage the defendant to commit the crime. Only when the conduct of government agents is so outrageous as to constitute a violation of the defendant's due process rights will the conviction of a predisposed defendant be barred.⁹⁷

The defendant bears the initial burden of producing evidence that the government induced him to commit a crime he was not otherwise predisposed to commit.⁹⁸ If sufficient evidence of inducement and lack of predisposition is produced at trial, the defendant does not even have to testify.⁹⁹ However, if the evidence does not sufficiently raise the entrapment issue, it will not be presented to the jury.¹⁰⁰

Significantly, the defendant's burden of production has been held to be so minimal that "any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be."¹⁰¹ Accordingly, an entrapment instruction must be given where a reasonable jury could entertain a reasonable doubt on the ultimate jury issue of whether the criminal intent originated with the government.¹⁰² If the defendant meets his or her burden of production, the government must prove beyond a reasonable doubt that entrapment has not occurred.¹⁰³

Courts follow one of two possible approaches to proving entrapment: the "unitary approach" and the "bifurcated approach."¹⁰⁴ Under the unitary approach, a defendant who raises the entrapment defense is required to produce evidence of both government persuasion and lack of predisposition.¹⁰⁵ If the defendant meets his burden of production on these two issues, the burden of persuasion shifts to the government to show the jury that entrapment did not occur.¹⁰⁶

In courts following the bifurcated approach, the jury is required to determine whether the defendant has carried his or her burden of proving inducement.¹⁰⁷ If the defendant proves inducement, the jury then decides whether the government has rebutted the evidence of inducement, or proved beyond a reasonable doubt the defendant's predisposition to commit the offense in question.¹⁰⁸

Closely related to entrapment is the due process defense of "outrageous governmental conduct."¹⁰⁹ This defense, in essence, is a limited version of the objective approach to the entrapment defense.¹¹⁰ Instead of focussing on the intent or predisposition of the defendant to commit the crime, as is done in the subjective approach to entrapment, the outrageous governmental conduct defense relates solely to the government's conduct.¹¹¹ This defense can be raised when law enforcement practices are so outrageous that due process principles bar the government from invoking judicial processes to obtain a conviction.¹¹²

The outrageous governmental conduct defense first originated in the Supreme Court's dicta in *United States v. Russell*.¹¹³ In rejecting the defendant's entrapment defense, the Court stated that, "[w]hile we may someday 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 process to obtain a conviction . . . the instant case is distinctly not of that breed."¹¹⁴ Three years later in *Hampton v. United States*,¹¹⁵ the defendant cited the *Russell* Court's dicta to directly raise the outrageous governmental conduct defense, claiming the government's conduct violated his Fifth Amendment due process rights.¹¹⁶ The Court rejected the defendant's argument, but conceded the existence of the outrageous governmental conduct defense.¹¹⁷

However, this defense is very limited as "appellate courts have over time continued to demonstrate a high shock threshold in the presence of extremely unsavory government conduct."¹¹⁸ Since *Hampton*, only one outrageous conduct claim has been upheld by the federal appellate courts, with two additional cases remanded for further findings. The

defense has been equally unsuccessful in the federal district courts; "although frequently raised, it rarely succeeds."¹¹⁹

Defendants who are the victims of government pre-arrest manipulation face great difficulty in asserting the defenses of entrapment and outrageous governmental conduct.¹²⁰ Accordingly, they have looked elsewhere for a solution to this problem and have found one possible "safe harbor" in the defense of sentence entrapment.

V. The Defense of Sentence Entrapment

Sentence entrapment has been defined as "government action that coerces an individual to participate in criminal conduct beyond that which the individual is predisposed."¹²¹ Defendants who assert this defense claim that the sole purpose of the government's intentional coercive behavior was to enhance the defendant's sentence based on guideline factors.¹²² The effect of this sentence factor manipulation is that sentences are imposed that are "significantly out of step with the defendant's criminal culpability."¹²³

Use of the sentence entrapment defense arises typically in crimes uncovered through undercover investigative operations, and which involve sentencing based on a quantitative determination of the activity—how much drugs or money was involved.¹²⁴ Due to the reliance on undercover stings, specifically reverse stings in money laundering and drug cases, control of the sentence imposed on a defendant can be exercised by the government through manipulation of the amount of money or drugs used in the staged transactions.¹²⁵

A defendant who raises the defense of sentence entrapment admits committing the exact offense charged, but challenges the government's introduction of certain factors used to increase the sentencing range. ¹²⁶ The offense the defendant is charged with is not necessarily altered, however, government manipulation can substantially increase the defendant's exposure at sentencing. ¹²⁷

*United States v. Lenfesty*¹²⁸ was the first case in which the sentence entrapment defense was raised. *Lenfesty* involved an undercover investigation into a methamphetamine distribution ring.¹²⁹ Over a six month period, an undercover agent purchased methamphetamine from three members of the drug ring.¹³⁰ At trial, a jury convicted five members of the ring for conspiracy to distribute methamphetamine, and with distribution of the drug during the particular transactions in which they participated.¹³¹

Twila Smith, one of the co-defendants, appealed alleging that her sentence of five years and ten months was improper.¹³² She claimed the government agent had engaged in sentence entrapment.¹³³ According to Smith, the agent's sole motive in repeatedly purchasing drugs from her was to increase both the amount of drugs in the conspiracy and her sentence.¹³⁴ Although Smith's argument failed, in dicta the court recognized the possibility of a sentence entrapment defense: "[w]e are not prepared to say there is no such animal as 'sentencing entrapment.' Where outrageous official conduct overcomes the

will of an individual predisposed only to dealing in small quantities, this contention might bear fruit."¹³⁵

In *United States v. Stuart*,¹³⁶ a case decided the same day as *Lenfesty*, the Eighth Circuit acknowledged the existence of the sentence entrapment defense, and elaborated on the nature of the defense.¹³⁷ In addition, the court adopted the defendant's definition, which would establish sentence entrapment "where a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment."¹³⁸ However, the court held it was "not persuaded that Hayden ha[d] succeeded in establishing [sentence entrapment]. This record [did] not show with sufficient clarity that Hayden was predisposed to commit only a lesser offense."¹³⁹

A year after *Lenfesty*, in *United States v. Connell*,¹⁴⁰ the First Circuit recognized the existence of the sentence entrapment defense, but renamed it "sentencing factor manipulation."¹⁴¹ The court realized this defense was a necessary result of the newly adopted guidelines, which presented opportunities for abuse. The court stated:

It cannot be gainsaid that the sentencing guidelines, by their very nature, may afford the opportunity for sentencing factor manipulation, particularly in sting operations. 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. This danger seems especially great in cases where the accused's sentence depends in large part on the quantity of drugs or money involved.¹⁴²

However, the court recognized that countervailing law enforcement interests demand the courts to exercise great caution in accepting the defense when it stated:

[t]here is, however, another side to the story. By their nature, sting operations are designed to tempt the criminally inclined, and a well-constructed sting is often sculpted to test the limits of the target's criminal inclinations. Courts should go very slowly before staking out rules that will deter government agents from the proper performance of their investigative duties.¹⁴³

Although rejecting the use of the defense in the case at bar, the court stated: "[w]e are confident that, should a sufficiently egregious case appear, the sentencing court has ample power to deal with the situation either by excluding the tainted transaction from the computation of relevant conduct or by departing from the [guideline sentencing range]."¹⁴⁴

The Second Circuit has addressed the sentence entrapment defense on only one occasion. In *United States v. Rosa*,¹⁴⁵ the court clearly conveyed their bias against sentence entrapment, notwithstanding the existence of the defense in other circuits. The court's disfavor of this defense was apparent when it stated:

[e]ven assuming the viability of the concept of 'sentencing entrapment,' such a defense would be inapplicable here. Even if we were prepared to suggest that the courts should

inject their views into the government's exercise of discretion as to whether and when its investigation was sufficiently complete that it should have been terminated, we surely would not second guess the government in the present case . . . if such an entrapment defense were in theory viable, it would undoubtedly be vulnerable to a showing that the defendants were predisposed to engage in [illegal activity]146

The Third Circuit recently addressed the sentence entrapment defense in *United States v. Raven*.¹⁴⁷ In *Raven*, the court considered the defendant's assertion that the district court had improperly declined to depart downward from the guidelines based on sentence entrapment. The court stated:

[w]e have not as yet had occasion to address the theory of sentencing entrapment described in *Rogers* and *Lenfesty*, and we do not do so today, but we agree with the district court that *Raven* is not a candidate for departure based on that ground even assuming that the doctrine has vitality in this circuit.¹⁴⁸

Accordingly, the Third Circuit's view on the viability of the sentence entrapment defense remains unknown.¹⁴⁹

In *United States v. Jones*,¹⁵⁰ the Fourth Circuit found that the defendant's sentence entrapment defense was actually "two related, but distinct, claims" of sentence manipulation and sentence entrapment.¹⁵¹ The court defined sentence manipulation as outrageous government conduct that offends due process and justifies a reduced sentence, i.e., where the government stretched out the investigation merely to increase the defendant's sentence.¹⁵² Conversely, sentencing entrapment was defined as occurring when "law enforcement authorities coaxed [the defendants] into engaging in illicit transactions in which they otherwise would not have engaged."¹⁵³ However, the court concluded that the instant case did not present an opportunity to address the legal viability of either defense.¹⁵⁴

In *United States v. Richardson*,¹⁵⁵ the Fifth Circuit faced a sentence entrapment argument, characterized by the defendants as both a due process and separation of powers argument.¹⁵⁶ The court rejected the defendant's separation of powers argument and stated there was no "'undue accretion of power to the Executive branch'. . . because the district court clearly retained the authority to find that the amount of money brought to the table was not legitimately part of the laundering conspiracy and was not, therefore, 'relevant conduct.'"¹⁵⁷ In addition, the court rejected the due process argument by holding that "[in light of] the defendants' knowledge and acceptance of the amount of funds involved in the laundering conspiracy, we find no violation of due process in the inclusion of this amount for sentencing purposes."¹⁵⁸

In *United States v. Newsome*,¹⁵⁹ the Sixth Circuit addressed the defendant's claim of sentence manipulation.¹⁶⁰ The court stated that it did "not find the government's conduct to be outrageous or fundamentally unfair" because the defendant had ratified the drug chosen by the government.¹⁶¹ From this decision it seems that the Sixth Circuit will

recognize the defenses of sentence entrapment and sentence manipulation if they are framed as a due process argument.¹⁶²

In *United States v. Fowler*,¹⁶³ the Seventh Circuit was faced with an appeal alluding to the sentence entrapment defense.¹⁶⁴ Although the court did not expressly mention the defense, it did recognize its underlying concepts in responding to the defendant's allegation that government agents "could increase the duration of a sentence by offering large amounts of drugs at bargain prices or by offering extraordinary credit terms."¹⁶⁵ The court stated that it did "not ignore the possibility that there could be such an overly-zealous pursuit of a reverse sting to the point of being virtually a giveaway deal that it could result in the exclusion of an entire transaction from an offender's sentencing calculations."¹⁶⁶ Presently, the Seventh Circuit has yet to determine the viability of either the defenses of sentence entrapment or sentence manipulation.¹⁶⁷

In *United States v. Stauffer*,¹⁶⁸ the Ninth Circuit became the first and only court to ever hold that a defendant was entitled to a downward departure under the guidelines based on the sentence entrapment defense.¹⁶⁹ The court did not differentiate between sentence entrapment and sentence manipulation, instead defining both as occurring when "a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment."¹⁷⁰ The court discussed the general dissatisfaction with the quantity-based approach of the guidelines, and the opportunities for abuse that it presented.¹⁷¹ Relying on a then recent amendment to the guidelines,¹⁷² the court held that "sentencing entrapment may be legally relied upon to depart under the Sentencing Guidelines" and concluded that in the present case the defendant was entitled to such relief.¹⁷³

In *Baughman v. United States*,¹⁷⁴ the Tenth Circuit addressed the sentence entrapment defense¹⁷⁵ and discussed the Eighth Circuit's treatment of the defense.¹⁷⁶ The court then held that the defendant was not the "victim of sentencing entrapment."¹⁷⁷ However, the Court never directly addressed the viability of the defense in the circuit.¹⁷⁸

In *United States v. Williams*,¹⁷⁹ the Eleventh Circuit became the only circuit to reject the sentence entrapment defense as a matter of law. The defendant argued that he was the victim of sentence entrapment because the government had allegedly set the marijuana quantity in order to get the mandatory minimum sentence. ¹⁸⁰ The court held that "as a matter of law, we reject [the defendant's] sentence entrapment theory."¹⁸¹ It reasoned that the sentence entrapment defense had not survived the Supreme Court's decision in *United States v. Hampton*,¹⁸² which held that the entrapment defense focuses on the intent of or predisposition of the defendant to commit a crime rather than upon the conduct of government agents.¹⁸³

Although popular with defendants, the sentence entrapment defense has not been warmly received by courts. As the foregoing review demonstrates, only the Ninth Circuit has actually upheld the defense, and even then under a set of unusual facts. In contradistinction, the Eleventh Circuit has expressly rejected the defense as a matter of law. Only two circuits, the Eighth and First, have expressly accepted the viability of the

defense, but have refused to apply it. Seven circuits have not addressed the viability of the defense. Of those seven, four appear receptive to the defense (the Third, Fifth, Seventh and Tenth), two seem hostile to its use (the Second and Fourth), while the Sixth Circuit seems to recognize sentence entrapment in the context of a due process claim of outrageous governmental conduct.

In response to the failure of the circuit courts to rectify the problems caused by government agents engaging in sentence entrapment, the United States Sentencing Commission's Practitioner's Advisory Group has proposed an amendment to the Guidelines Manual that would allow sentence entrapment to be used as a basis for downward departure in sentencing.¹⁸⁴

VI. Establishing Sentence Entrapment

A. The Harms Caused by the Continuing Existence of Sentence Entrapment

The courts should not allow the government to continue to engage in conduct which leads to sentence entrapment. This conduct causes five principal harms that cannot be ignored: "(1) circumvention of congressional intent; (2) damage to the image of law enforcement; (3) violation of ethical duties of prosecutors; (4) punishment of the wrong people; and (5) creation of an opportunity for additional abuse."¹⁸⁵

First, the congressional intent behind the Sentencing Reform Act is "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." ¹⁸⁶ Sentence entrapment circumvents congressional intent because it allows defendants who are manipulated into dealing larger quantities to be treated in the same manner as those who are predisposed to dealing in such amounts.¹⁸⁷

Congress intended the larger punishment to punish higher-up crime bosses more severely the larger penalty is aimed at the root of the problem, not at its result. Sentence entrapment circumvents these congressional intentions. Instead of imposing more severe penalties on the "big fish," smaller criminals frequently receive the brunt of the stricter punishments.¹⁸⁸

Accordingly, the continuing failure of the circuit courts to accept the sentence entrapment defense allows the congressional intent behind the Sentencing Reform Act of 1984 to be circumvented.

Second, although society has traditionally accepted the use of "trickery and deception" by the government in order to protect public safety, there is "a price to pay" for this behavior.¹⁸⁹ "Active deception by police undermines public confidence and breeds distrust in law enforcement officials; the increasing frequency of jury distrust of law enforcement witnesses is just one result. In the long-run, this deception and manipulation may hamper law enforcement's effectiveness."¹⁹⁰ Thus, sentencing entrapment only further exacerbates the current atmosphere of public distrust of law enforcement officials.

Third, prosecutors are ethically obligated to promote justice.¹⁹¹ Accordingly, it is appropriate to direct them away from conduct that causes sentence entrapment intentional manipulation of sentences.¹⁹² Several factors lead prosecutors to ignore this ethical standard: (1) prosecutors are under extreme pressure to keep "bad guys" off the street; (2) "[b]ecause prosecutors cannot possibly make society completely safe, they tend to focus their attention on attaining the maximum possible sentences for the suspects caught"; (3) prosecutors frequently are not adequately supervised, and often carry unbearably heavy workloads.¹⁹³ Consequently, judicial tolerance of sentencing entrapment encourages and even assists prosecutors in violating their ethical duties.

Fourth, the guidelines' quantity-based approach to sentencing was designed to punish the "higher-up crime bosses" more severely than the "small-time criminal."¹⁹⁴ However, the use of sentencing entrapment has a different effect:

Instead of capturing crime kingpins, sentence entrapment injures only the small-time, street-level criminal. Often, these are who would never have an opportunity to make the "big time" without the government's involvement . . . With sentence entrapment, a naive person may seize a totally unrealistic opportunity and be punished severely for it; consequently, sentence entrapment disproportionately incarcerates low-level offenders.¹⁹⁵

As a result, sentence entrapment often results in the punishment of the wrong person.¹⁹⁶

Finally, because prosecutors face enormous pressure to produce convictions and long sentences, the potential for abuse in sentence entrapment is great.¹⁹⁷ This pressure, together with the potential to manipulate sentences, sometimes tempts prosecutors to make examples of "less culpable defendants."¹⁹⁸ The result is the creation of "an improper incentive for law enforcement authorities."¹⁹⁹

B. Raising the Defense of Sentence Entrapment

Because the circuit courts have not been particularly receptive to the sentence entrapment defense,²⁰⁰ a defendant asserting this defense faces little chance of success.²⁰¹ Outside of assistance in the form of an amendment to the Guidelines Manual, only defendants with unique factual scenarios are likely to have a realistic chance of successfully asserting the defense.²⁰² Although most circuits have not addressed the legal viability of either the sentence entrapment or sentence manipulation defenses, only the Eleventh Circuit has rejected them as a matter of law.²⁰³ Accordingly, a defendant can set forth these defenses both at trial and on appeal.²⁰⁴ Their success will depend on the facts of the case and the evidence set forth.

A defendant can attempt to assert either a "pure" sentence entrapment defense, or try to distinguish this defense and establish sentence manipulation.²⁰⁵ To establish a pure sentence entrapment defense, the defendant must be able to prove by a preponderance of the evidence that he was predisposed to commit only a lesser offense, but that a government agent or informant engaged in activity that coerced him to participate in

criminal activity beyond the scope of his preexisting criminal disposition.²⁰⁶

A defendant asserting sentence entrapment will have to satisfy a two-prong test. Because the focus of the defense is on the defendant's predisposition, he will first have to present a sufficient amount of credible evidence to prove that he was predisposed to dealing in much smaller quantities of drugs prior to the case at hand.²⁰⁷ Second, and most importantly, he will have to prove that "but for" the alleged government coercion, he would never have engaged in a drug deal of such magnitude.²⁰⁸ If the defendant can satisfy both of these requirements, he may be able to successfully assert the sentence entrapment defense.²⁰⁹

To maintain a viable sentence manipulation claim, the defendant must prove by a preponderance of the evidence that there was outrageous government conduct which offends due process.²¹⁰ The courts have stated that this situation might arise when the government "stretched out the investigation merely to increase the sentence."²¹¹ Although faced with such allegations on numerous occasions, the courts have yet to determine that an allegation had satisfied the requisite standard.

The best possible explanation for the courts' apparent hostility toward the sentence manipulation defense is the deference given to the law enforcement officials.²¹² In many of the cases alleging sentence manipulation, the courts have expressed their unease with intruding into the realm of government investigation of crime.²¹³ Accordingly, it seems as though the only way to satisfy the "outrageous conduct" test will be in those extremely rare cases where there is government activity which "shocks the conscience."²¹⁴

Because most courts have yet to adopt either theory of the sentence entrapment defense, a defendant who is able to present a compelling argument that proves that he was the victim of sentence entrapment must still convince the court that the defense is legally viable.²¹⁵ There are a number of ways in which a defendant may attempt to persuade a court to accept the viability of the defense.²¹⁶

First, the defendant should try to persuade the court that the guidelines themselves recognize the sentence entrapment defense pursuant to application note 15 to Guidelines Manual §2D1.1 ("application note 15"). This provision states:

[i]f, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), 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.²¹⁷

The language used in this commentary seems to recognize behavior which falls within the definition of sentence entrapment.²¹⁸ Application note 15 appears to describe a

situation which falls within the *Lenfesty* court's formulation of sentence entrapment "outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities."²¹⁹ Thus, a defendant may successfully assert this defense if he can show that the government used favorable financial terms²²⁰ in order to "entrap" him into purchasing more drugs than he would have been able to purchase.

However, application note 15 addresses only one of the possible ways the government can manipulate sentences. Accordingly, defendants whose cases do not fall within this note must argue that "the Sentencing Commission now expressly recognizes that law enforcement agents should not be allowed to structure sting operations in such a way as to maximize the sentences imposed on the defendants" ²²¹

Defendants in this category should try to persuade the court that other conduct falling within the sentence entrapment defense should be recognized as a legally permissible basis for a downward departure under Guidelines Manual §5K2.0 and 18 U.S.C. § 3553(b).²²² If a defendant is able to persuade a court that the government activity which resulted in the sentence entrapment is "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 . . .," the court has the authority to depart from the guidelines and impose a different sentence.²²³ Thus, these defendants will have to convince the court that the Commission did not adequately consider all aspects of the sentence entrapment defense when it enacted application note 15. Once a factor is established as a legally permissible basis for departure, broad deference should be given to the district court's judgment as to the appropriateness of considering the factor, and the circuit courts will uphold the departure as long as it is reasonable.²²⁴

If a court finds that a defendant is entitled to the sentence entrapment defense, it could then exclude the particular behavior or amount of harm from the defendant's "relevant conduct," and calculate his base offense level only from the acts for which he, not the government, is responsible.²²⁵ "The court should attempt to make an accurate determination of the amount the defendant was predisposed to sell and would have sold, for example, had the government not entrapped him into doing more, thereby enhancing the defendant's relevant conduct."²²⁶ In addition, a court that finds the sentence entrapment defense applicable may decide to exclude the "tainted transaction" before calculating the defendant's sentence.²²⁷

VII. Conclusion

Congress enacted the Sentencing Reform Act of 1984 in response to the public's outcry for harsher sentencing of defendants. One consequence of this statute was the enactment of the United States Sentencing Commission's Guidelines Manual and its unprecedented limitation on the use of discretion by judges in the sentencing of defendants. While this may have satisfied the public's desire for a tough stance on crime, it has had other, much more undesirable effects. Law enforcement officials began to manipulate investigations for the sole purpose of increasing defendants' sentences under the guidelines. The sentence entrapment defense arose as a natural response to these abuses.

Defendants who believed they were subjected to improper governmental conduct began to appeal sentences. They attempted to extend both the traditional entrapment argument and the due process argument of outrageous governmental conduct into the sentencing stage. However, the courts, although recognizing the inherent potential for abuse under the guidelines, have rejected these arguments in all but one case. Thus, the future for the sentence entrapment defense does not seem bright in the absence of an amendment to the guidelines aimed at putting a stop to this governmental abuse.

Although it is hard to find sympathy for the "victims" of sentence entrapment who are guilty of violating the laws of our nation we would be wise to remember and heed the words of Justice Brandeis' eloquent dissent in *Olmstead v. United States*,²²⁸

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means to declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine this court should reasonably set its face.²²⁹

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1. Saul M. Pilchen, *The Underside of Undercover Operations*, Conn. L. Trib., July 22, 1991, at A18.
2. Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 Yale L.J. 1755, 1757 (1992) (the author was Chief Judge of the U.S. Court of Appeals for the Eighth Circuit from January 1980 to January 1992, and later served as Senior Circuit Judge). Because sentencing had traditionally been a judicial prerogative, judges thought that no one would ever have the audacity to deprive them of sentencing discretion. *Id.*
3. *See, e.g.*, Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1 (1972) (Frankel was one of the strongest proponents for enactment of sentencing guidelines and was instrumental in the process leading to adoption of the guidelines). For a discussion of Judge Frankel's role in the development of the federal sentencing guidelines, see Ogletree, *infra* note 4, at 1942-44.
4. Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1944-46 (1988).
5. The United States Sentencing Commission initially promulgated the guidelines pursuant to 28 U.S.C. § 994(a) on April 13, 1987.
6. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 Yale L. J. 1681, 1689 (1992) (stating that the theory behind structuring a sentencing judge's discretion was that if judges adhered to rational guidelines for formulating permissible sentences, and if other participants in the process did their jobs properly, unwarranted disparity in sentencing would decrease).
7. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 503 (1992) (Nagel is a member of the United States Sentencing Commission). "Sentencing reform [has] left the prosecutor with substantial discretion, which, [i]f abused and unchecked . . . has the potential to create the disparities that sentencing reform was intended to prevent." *Id.* (citing Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 274-86 (1989)).
8. Eric P. Berlin, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187, 187-88 (1993).
9. This defense has been examined by every federal circuit court with the exception of the Eleventh Circuit, although only in dicta in some cases. *See infra* notes 121-194 and accompanying text. The federal courts have labeled the defense as "sentence entrapment," "sentence manipulation," and "sentence factor manipulation." *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994). For purposes of this Comment, the most common term, "sentence entrapment," will be used whenever possible.

10. For a more thorough discussion of the guidelines, see Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901 (1991); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988); Freed, *supra* note 6; and Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223 (1993).

11. Ogletree, *supra* note 4, at 1940. Retribution has been defined as "punishment . . . based strictly on the fact that every crime demands payment in the form of punishment." Black's Law Dictionary 914 (6th ed. 1991). In the context of criminal law, restitution has been defined as "programs under which the criminal offender is required to repay, as a condition of his sentence, the victim or society in money or services." Black's Law Dictionary 910 (6th ed. 1991).

In an early example of "sentencing law," Biblical law set forth the maxim "eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe." *Id.* at 1940 n.12 (citing Exodus 21:24-25 (New American)). The Hammurabi Code stated:

If a man has stolen an ox, or a sheep, or an ass, or a pig, or a boat [sic], either from a god or a palace, he shall pay thirty-fold. If he is a plebian, he shall render ten-fold. If the thief has nothing to pay, he shall be slain. . . . If a son has struck his father, his hands shall be cut off . . . If a man has destroyed the eye of a freeman, his own eye shall be destroyed.

Id. (citing Chilperic Edwards, *The Hammurabi Code and the Sinaitic Legislation* 29, 61 (1904)).

12. Ogletree, *supra* note 4, at 1940-41. The "modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U. S. 241, 247 (1949). As the goals of penology shifted, deterrence and rehabilitation were favored over the concepts of retribution and incapacitation. Ogletree, *supra* note 4, at 1941. Rehabilitation has been defined as the "[r]estoration of [an] individual to his greatest potential, whether physically, mentally, socially, or vocationally." Black's Law Dictionary 891 (6th ed. 1991).

13. Berlin, *supra* note 8, at 188.

14. *Id.* at 188-89; Freed, *supra* note 6, at 1685.

15. Berlin, *supra* note 8, at 189 ("All the players in the criminal justice system, and particularly the judges, had broad discretion in administering individualized 'treatment.' They relied on the premise that an offender should be released when cured.").

16. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984) (codified at 18 U.S.C. §§ 3551-3673 (1994); 28 U.S.C. §§ 991-998 (1994)).

17. Ogletree, *supra* note 4, at 1941 ("Because no single purpose of punishment has reigned supreme, judges historically have been accorded extremely broad discretion to select among the purposes of punishment while fashioning an appropriate sentence.").

18. 337 U.S. 241 (1949). *Williams* is regarded as the seminal case on sentencing discretion. Ogletree, *supra* note 4, at 1941-42.

19. *Williams*, 337 U.S. at 246 (upholding a judge's imposition of the death penalty, pursuant to New York law, on a defendant convicted of murder, over the jury's recommendation of a life sentence through use of information concerning Williams, which was not known to the jury).

20. Ogletree, *supra* note 4, at 1942 (citing S. 2699, 94th Cong., 1st Sess., 121 Cong. Rec. 37,563-64 (daily ed. Nov. 20, 1975) (Senator Edward Kennedy's attempt to introduce an early sentencing guidelines bill)).

21. *Id.* at 1944 (citing S. Rep. No. 225, 98th Cong., 2d Sess. 37, 41, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221; Kevin Clancy et al., *Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. Crim. L. & Criminology 524 (1981); Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. Chi. L. Rev. 109 (1975); Frankel, *The Sentencing Morass, and a Suggestion for White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 Mich. L. Rev. 1427 (1982); Whitney N. Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. St. B.J. 163, 167 (1973)).

22. Freed, *supra* note 6, at 1685. *See also* Frankel, *supra* note 3, at 2 ("[T]hose of us whose profession is the law must not choose any longer to tolerate a regime of unreasoned, unconsidered caprice for exercising the most awful power of organized society, the power to take liberty and . . . life by process of what purports to be law."): Alschuler explained:

[A]lthough the problem of sentencing disparity may have been exaggerated, there undoubtedly are both Santa Clauses and Scrooges on the bench. An offender's punishment should not turn on the luck of the judicial draw or, worse, on a defense attorney's ability to maneuver the offender's case before a favorable judge. The vices of unconstrained discretion go beyond idiosyncrasy, caprice, and strategic behavior to invidious discrimination on the basis of race, class, gender, and the like.

Alschuler, *supra* note 10, at 901.

23. Berlin, *supra* note 8, at 189 ("This shift in emphasis culminated in 1984, when the United States Senate concluded that the government could not reliably induce

rehabilitation in a prison setting and that no one can really detect whether a prisoner has been rehabilitated." Chief Judge Gerald Bard Tjoflat, of the Eleventh Circuit, served as chairman of the Committee on the Administration of the Probation System of the Judicial Conference of the United States. He commented:

The sentencing guidelines grew out of the realization that sentencing according to the medical model of rehabilitation had failed. Prison inmates complained that indeterminate sentences with uncertain release dates constituted cruel punishment. Criminal justice practitioners and criminologists declared imprisonment incapable of advancing rehabilitative purposes. Even if imprisonment could rehabilitate, it had become clear that it was impossible to ascertain whether a particular prisoner had in fact been rehabilitated. Reports documented widely disparate sentences for similar offenders convicted of similar offenses.

Lay, *supra* note 2, at 1760 (quoting Chief Judge Tjoflat).

24. Berlin, *supra* note 8, at 190.

25. Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984) (codified as amended in scattered sections of Title 18 in the U.S. Code).

26. Ogletree, *supra* note 4, at 1945.

27. *Id.* (Other notable reforms included the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2057 (codified at 18 U.S.C. § 20 (1994)), and the Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified as 18 U.S.C. §§ 3141-3150 (1994)).

28. Berlin, *supra* note 8, at 191. Advocates of just deserts (i.e., retribution) believe that the punishment should be commensurate with the seriousness of the wrong and with the degree of the actor's culpability. *Id.* at n.15 (citing Michael Vitiello, *Reconsidering Rehabilitation*, 65 Tul. L. Rev. 1011, 1026 (1991)).

29. "For nearly seventy-five years, [the Parole Commission] had post-audited the sentences of imprisoned offenders to determine their suitability for early release." Freed, *supra* note 6, at 1689. "The theory behind indeterminacy was that imprisonment would serve a rehabilitative function: parole authorities would recognize the right moment to permit a reformed prisoner to reenter the community. When that optimistic theory lost credibility, it became evident that a system of uncertain sentences that left prisoners in limbo and deceived the public served no useful purpose." *Id.* at n.34.

30. Alschuler, *supra* note 10, at 901. The objectives of the SRA were:

1) To promote certainty in sentencing by mandating real-time sentencing and eliminating the possibility of parole before the imposed sentence is fully served;

- 2) To require district court judges to state their reasons for imposing a sentence;
- 3) To achieve proportionality in sentencing;
- 4) To reduce unwarranted sentencing disparity; and
- 5) To establish a Sentencing Commission charged with the development of guidelines to guide the discretion of judges in imposing sentences.

Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 162 (1991) (citations omitted).

31. Ogletree, *supra* note 4, at 1948 (citing 28 U.S.C. § 991(a)). *In Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court upheld the constitutionality of the Sentencing Commission.

32. *Id.* (Ogletree states that a "critical flaw" in the Commission is the absence of a prosecutor, judge, or defense attorney with extensive experience in federal sentencing practice).

33. Freed, *supra* note 6, at 1695. The Commission is authorized to promulgate policy statements and commentary, which do not enjoy the force of law but are pertinent to a court's assessment of the adequacy of the Commission's consideration of a guideline. *Id.* (citing 28 U.S.C. § 994(a)(1)-(2) (1988)).

34. *Id.* (citations omitted). The Commission began the onerous task of establishing guidelines for federal sentences by conducting public hearings; receiving written comments from probation and prison officials, Department of Justice and American Bar Association representatives, defense lawyers, criminologists, crime victims, federal judges and others with an interest sentencing reform; and by establishing a research program that considered summary reports on approximately 100,000 federal criminal cases and detailed reports. Ogletree, *supra* note 4, at 1948.

35. Ogletree, *supra* note 4, at 1950. The Commission made a "complex and detailed" preliminary draft, which was distributed for written comment. *Id.* at 1948-49. The preliminary draft was heavily criticized and the Commission created a revised draft. *Id.* at 1949. This draft, though a significant improvement over the preliminary draft, still received substantial criticism. *Id.* Despite this criticism, the Commission hurried through the revision process in one month, and without any additional comment. *Id.* The Commission's request for a nine month extension to subject the proposed guidelines to a "field test" by federal judges, prosecutors, defense attorneys and probation officers was rejected by Congress. *Id.* at 1950. This rejection came despite support from numerous federal judges, the American Bar Association, and members of Congress, including the House Judiciary Committee who had a proposed bill to delay implementation of the guidelines. *Id.* (Ogletree blames the legislators' apparent fear to appear "soft on crime" for the rejection). Six of the seven voting members of the Commission voted to support

the final draft, which automatically became law on November 1, 1987, the SRA's deadline for implementation of the guidelines. *Id.*

36. When imposing a sentence, the judge relies heavily on the work of the probation officer. *See Freed, supra* note 6, at 1721-23; Heaney, *supra* note 30, at 172-75. Generally, the probation officer proceeds as follows:

1) The probation office determines the essential sentencing facts to be included in the presentence investigation report ("PSI") from the files of the prosecutor and government investigators and from an interview with offender. The offender's attorney is usually, but not always, present at these interviews. Probation offices are compelled to rely primarily on the government files because they have neither the human nor material resources to make an independent investigation of the facts.

2) The probation office calculates the offense level from the facts filtered from the government files and the offender's interviews and recommends adjustments to the offense level for mitigating or aggravating factors.

3) The version of the facts set forth in the PSI and the probation office's calculation of the sentencing range ordinarily are accepted by the sentencing court.

Heaney, *supra* note 30, at 168-69.

37. Berlin, *supra* note 8, at 192 (citing United States Sentencing Commission, Federal Sentencing Guidelines Manual, §1B1.3 (relevant conduct) & ch. 2 (offender's base offense level) (Nov. 1995). The base offense level is the initial level at which the judge begins calculation of the offender's sentence and is adjusted during sentencing for case-specific factors which may aggravate or mitigate the ultimate sentence.

The guidelines call upon courts to calculate drug sentences by reference to a "Drug Quantity Table" that indicates the base offense level applicable to each quantity of a particular drug. Drug quantities also trigger mandatory minimum sentences established by Congress. If more than one drug transaction takes place, the guidelines require courts to add the quantities involved to determine an offender's sentence. The relevant conduct guideline requires courts to include quantities of drugs involved in uncharged offenses, offenses that are planned but not completed and offenses of co-conspirators. Again the total amount of drugs for which an offender is held accountable will determine the length of the sentence.

Sandra Guera, *The New Sentencing Entrapment and Sentence Manipulation Defenses*, 7 Fed. Sent. Rep. 181, 181 (citations omitted).

38. Berlin, *supra* note 8, at 192.

39. *Id.* at 192-93 (citing USSG. ch. 4 (Nov. 1995)). "Points are added for each prior imprisonment, current offenses committed while under criminal sentence such as probation, and offenses prior to age eighteen." *Id.* at n.35.

40. *Id.* at 193. The sentencing range is very narrow; its maximum time of imprisonment cannot exceed its minimum by more than the greater of twenty-five percent or six months. *Id.* (citing 28 U.S.C. § 994(b) (1988)) (for example, if the guidelines mandate a minimum sentence of 10 years for an offense, the maximum sentence for the same offense cannot be greater than 12 1/2 years). The sentencing grid is composed of forty-three base offense levels (of increasing severity) on the vertical axis and six criminal history levels (also of increasing severity) on the horizontal axis. USSG Ch. 5, Pt. A (Nov. 1995).

Score the crime, score the defendant's prior record, and where the axes intersect, the grid specifies a sentence or sentencing range. The judge may move up a box or two to adjust for aggravating circumstances like carrying a weapon, or down a box or two to adjust for mitigating circumstances like accepting responsibility for the crime. Where the judge's finger stops, he or she finds the answer.

Alschuler, *supra* note 10, at 907. "Whereas sentencing once called for hours spent reflecting on the offense and the person, we judges are becoming rubber-stamp bureaucrats. When we come to see ourselves as judicial accountants, freed from the awful responsibility of imposing a sentence, we will have abdicated our judicial role entirely." Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 357, 364 (1992).

41. Alschuler, *supra* note 10, at 908 (citing 18 U.S.C. § 3553(b) (1988)). The guidelines do not permit a court to adequately consider the offender's characteristics in determining the appropriate sentence. Ogletree, *supra* note 4, at 1953.

Congress urged the Commission to consider the relevance of the defendant's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and dependence upon criminal activity for a livelihood, and his acceptance of responsibility from his wrongdoing. The Commission was also urged to insure neutrality with respect to the race, gender, national origin, creed, religion, and socio-economic status of the offenders. Of these characteristics, the Commission concluded that only the defendant's criminal history, his dependence upon criminal activity for a livelihood, and his acceptance of responsibility for his wrongdoing were relevant.

Id.

42. 18 U.S.C. § 3553(b) (1994).

43. 18 U.S.C. § 3553(c) (1994).

44. 18 U.S.C. §§ 3742 (a)-(b) (1994). Appellate jurisdiction to review sentences is new under the SRA . Freed, *supra* note 6, at 1698. About 5,400 sentences are appealed annually, a significant addition to appellate caseloads. *Id.* at 1727. "Criminal appeals rose 33 percent in the first year of the Sentencing Guidelines." Lay, *supra* note 2, at 1761 (quoting Chief Justice Rehnquist).

45. Freed, *supra* note 6, at 1698.

46. *Id.* at 1729 (stating that reversal or remanding of sentences most frequently occurs when there is an unguided downward departure based on offender characteristics). "Torn between enforcing the unpopular guidelines of an administrative agency that sentences no one and respect for the expertise and the firsthand experience of district judges who sentence everyone, appeals judges seem to have opted in favor of the agency." *Id.* at 1730. "Courts of appeals have contributed to the rigidity [of sentencing] by restricting the authority of judges to depart from the guidelines in appropriate circumstances." Lay, *supra* note 2, at 1762. For example, in *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991), the court vacated the district court's sentence because of a downward departure based on the defendant's effort to overcome his drug addiction. *Id.*

47. The guidelines continue to increase the number of men and women incarcerated in our federal prisons and have resulted in longer sentences. Lay, *supra* note 2, at 1761. The federal prison population has increased from 42,000 in 1987 to a projected 72,000 in 1992. *Id.* at 1763. The average time served under a guideline sentence will be more than twice that served under a pre-guideline sentence. Heaney, *supra* note 30, at 164. Developing, revising and administering the guidelines has resulted in the Commission spending \$9.6 million during the fiscal year of 1991 alone. Alschuler, *supra* note 10, at 906. Ninety percent of judges responding to a Federal Courts Study Committee reported that the guidelines had made sentencing procedures more time consuming. *Id.* See also Lay, *supra* note 2, at 1761 (quoting Chief Justice Rehnquist) ("These new guidelines mean that a sentencing hearing before a district judge, which might have taken five or ten minutes a decade ago, could take an hour or more today.").

48. See, e.g., *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991) (Edwards, J. , concurring) (collecting cases that criticize the guidelines); Alschuler, *supra* note 10, at 924-25 (In one portion of this article, Alschuler discussed the effect of the guidelines on the judiciary and recounted how one judge was reduced to tears when he was forced to sentence a man with no prior criminal record to a ten year sentence because he had knowingly driven a friend to a drug transaction. He also discussed Judge Lawrence Irving who resigned from the bench because he could not "in good conscience continue to mete out sentences that are unfair."); Freed, *supra* note 6; Heaney, *supra* note 30; Lay, *supra* note 2; Weinstein, *supra* note 40.

49. These criticisms are outside of the scope of this Comment. However, for a detailed discussion of these and more criticisms of the guidelines, see the sources cited in note 46.

50. Berlin, *supra* note 8, at 195.

51. *Id.* at 205 "Prosecutors and law enforcement officials have incentive[s] to obtain harsh sentences for offenders because of the adversarial nature of their jobs and because of public pressure to put criminals behind bars." *Id.* at 207.

52. Marcia G. Shein, *Sentencing Manipulation and Entrapment*, Crim. Just., Fall 1995, at 25 (Shein is the President of the National Legal Services, and practices in Atlanta, Georgia, where she specializes in federal plea bargaining, sentencing, appellate and post-conviction consultation and representation). In drug cases, so called "amount-based" sentence manipulation is increasingly common. Andrew G. Deiss, *Making the Crime Fit the Punishment: Prearrest Sentence Manipulation By Investigators Under the Sentencing Guidelines*, 1994 U. Chi. Legal F. 419, 422 (1994) ("[j]udging from case law and press accounts, amount-based sentence manipulation is increasingly common"). *United States v. Rosen*, 929 F.2d 839 (1st Cir. 1991), is a perfect illustration of manipulation of sentencing factors. In this case the defendant "negotiated, paid for, and expected to receive only thirty pounds of marijuana." *Id.* at 843. Instead, undercover federal agents filled the defendant's car with one-hundred and fifty pounds of marijuana. *Id.* Not unexpectedly, when told of the total amount delivered, the defendant did not protest. *Id.* After conviction he was sentenced for the full amount of the marijuana, one-hundred and fifty pounds, rather than for the thirty pounds he had purchased. *Id.* Based on this difference, the defendant's sentence was two and a half years' longer. *Id.* at n.7. The Court of Appeals for the First Circuit upheld the defendant's sentence, because "Rosen accepted delivery of a car containing 150 pounds of marijuana with full knowledge that this was the quantity he would now be possessing." *Id.* at 843-44.

53. USSG §2D1.1 (Nov. 1995); 21 U.S.C. § 841(b) (1994).

54. Heaney, *supra* note 30, at 195.

So if you've got some agent negotiating with a client, they always say, "No, we only deal in five or more kilos of cocaine." I've listened to tape after tape where the defendant's saying, "I don't want that much; I don't want that much." The agent says, "Well, then, I won't have anything to do with you." And so to get the deal through, and agents push this real hard, the defendant will say, Okay, bring what you got," and then when the defendant shows up, he's only got enough money to buy two anyway. But because they've discussed five, that's what they get sentenced for, and that's what the charge is.

Id. at n.96 (citing an interview with a federal public defender).

55. Berlin, *supra* note 8, at 210. "In sting cases involving relatively small transactions, strikingly similar patterns of repeated buys and delayed arrests suggest an investigative modus operandi." Deiss, *supra* note 52, at 422-23.

56. Heaney, *supra* note 30, at 196. "Repeated drug transactions with the minor suspect prior to arrest can significantly escalate the sentence ultimately imposed under the

guidelines." *Id.* "[I]f officers delay arrest long enough, every small dealer is a potential kingpin." Deiss, *supra* note 52, at 426.

57. Deiss, *supra* note 52, at 422. "Drug enforcement agents are trained about the guidelines so that they know what evidence to collect. Negotiated amounts can increase and many times undercover agents suggest the amount." Berlin, *supra* note 8, at n. 116 (quoting Judy Clarke, former public defender).

58. Deiss, *supra* note 52, at 424.

59. *Id.* See *infra* note 62 and accompanying text.

60. 4 F.3d 647 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1322 (1994).

61. *Id.* at 649.

62. See USSG §2D1.1(c) (Nov. 1995). See also 21 U.S.C. § 841(b)(1) (1994). An interesting fact to consider is that "92 percent of all federal crack defendants are African-American; 72 percent of powdered cocaine defendants are not." Deiss, *supra* note 52, at 424 n.32.

63. *Shephard*, 4 F.3d 647 (8th Cir. 1993). Compare USSG §2D1.1(c)(7) (Nov. 1995) with USSG §2D1.1(c)(14) (Nov. 1995).

64. Deiss, *supra* note 52, at 425 (citations omitted).

65. Heaney, *supra* note 30, at 190.

66. Freed, *supra* note 6, at 1723.

67. *Id.*

68. Heaney, *supra* note 30, at 190.

69. Saul M. Pilchen, *The Federal Sentencing Guidelines and Undercover Sting Operations: Defense Perspective*, 4 Fed. Sent. R. 115, *2 (1991). As Judge Harry T. Edwards, of the D.C. Circuit, said, "[o]ne wonders whether the Guidelines, in transferring discretion from the district judge to the prosecutor, have not left the fox guarding the chicken coop of sentencing uniformity." *United States v. Harrington*, 947 F.2d 956, 965 n.4 (D.C. Cir. 1991) (Edwards, J., concurring).

70. See Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393 (1992) (presenting a detailed and thorough discussion of the ever-expanding scope and power of the "new prosecutors").

71. *Id.* at 395-96. Berlin explains:

Prosecutors often are heavily involved in investigations and sting operations. Prosecutors supervise police and other investigative officials and sometimes actively participate in investigations. Prosecutors have nearly unlimited authority to conduct undercover sting operations. During undercover sting operations, prosecutors control opportunities for the commission of a crime to offer the target; the nature, magnitude, and locus of the crime; and when to terminate the operation.

Berlin, *supra* note 8, at 210 (citations omitted).

72. Pilchen, *supra* note 69, at *2-*3. Pilchen comments:

Undercover agents posing as "co-conspirators" during dealings with targets can manipulate, for example, the amount and type of drugs purchased or sold, the location of the deal (e.g., near a school), the amount of money laundered, the amount of the fraud, or whether firearms are present during the offense. Under the [G]uidelines, each of these "enhancement facts" can have a quantifiable bearing on the sentence. If agents control the enhancement facts, the court may impose punishment based on relevant conduct for which the government, rather than the defendant, is responsible.

Id.

73. Gershman, *supra* note 70, at 396-400 (stating instances showing that "[a]s prosecutors have become more aggressive, the judiciary has become more permissive").

74. *See supra* note 65.

75. Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses in Federal Court*, 27 Wake Forest L. Rev. 829, 831 (1992). "Consensual crimes" include drug trafficking, trafficking in weapons, prostitution, and gambling. *Id.*

76. *Id.* These "transactions are the most difficult crimes to detect because they typically occur in private between willing participants who rarely complain to the police." *Id.*

77. *See, e.g.*, *Jacobson v. United States*, 503 U.S. 540 (1992); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

78. Bennett, *supra* note 75, at 831. Defendants raise the defense of entrapment when they believe the government has played an excessive role in the instigation of criminal activity. Berlin, *supra* note 8, at 218.

79. 223 F. 412 (9th Cir. 1915). "State courts, however, had been entertaining early notions of the defense of entrapment for nearly forty years prior to *Woo Wai*." Bennett, *supra* note 75, at n.7 (citing *O'Brien v. State*, 6 Tex. Civ. App. 665, 668 (1878); *Saunders v. The People*, 38 Mich. 218 (1878)). The first "use" of the entrapment defense was recounted in the Bible"[a]nd the Lord God said unto the woman, what is this thou hast

done? And the woman said, "[t]he serpent beguiled me, and I did eat." Bennett, *supra* note 69, at 831-32 (quoting Genesis 3:13 (King James)).

80. *Woo Wai*, 223 F. at 414-15. The court also felt it would be contrary to public policy to allow the government to induce defendants to engage in the commission of a crime. *Id.* at 415-16.

81. 287 U.S. 435 (1932). In *Sorrells*, an undercover agent repeatedly asked the defendant if he could buy some liquor. *Id.* at 439-40. Twice the defendant told the agent he had no liquor. *Id.* at 439. On the third occasion, after discussing their experiences in serving in the same military unit in World War I, the defendant sold the agent a half-gallon of whiskey. *Id.* The Supreme Court reversed the defendant's conviction based on use of the entrapment defense because it felt the defendant had been entrapped by the conduct of the undercover agent. *Id.* at 452.

82. In *Sorrells*, the majority adopted the subjective test while the minority adopted the objective test. *See, e.g.*, Bennett, *supra* note 75, at 833-38; Berlin, *supra* note 8, at 218-19; Deiss, *supra* note 52, at 427.

83. Deiss, *supra* note 52, at 427. The nature of the police conduct involved is irrelevant when using the subjective test because the focus is placed solely on the predisposition of the defendant. Bennett, *supra* note 75, at 834. This test is presently followed in all federal courts and in most state courts. *Id.* at 834-35.

84. Bennett, *supra* note 69, at 834 (stating the majority felt "Congress could not have intended to punish 'otherwise innocent' defendants who are induced to commit a crime by the creative activities of government agents . . . a defendant with a criminal predisposition would not qualify as an 'otherwise innocent' citizen, and thus, could be prosecuted.").

85. Deiss, *supra* note 52, at 427.

86. Bennett, *supra* note 75, at 834. The following are manners in which the prosecution can prove a defendant's predisposition to commit a crime: (1) evidence of other acts, wrongs, or crimes subject to Federal Rule of Evidence 404(b); (2) hearsay which fits within an exception to the hearsay rule; (3) evidence of a prior arrest; (4) evidence that a law enforcement agent gave the defendant an opportunity to withdraw from the crime, where the defendant does not avail himself of that opportunity. *Id.* at 850-54 (citations omitted). "Because entrapment bears on the guilt or innocence of the accused, the issue must be submitted to the jury." *Id.* at 834.

87. Deiss, *supra* note 52, at 427. The objective test has been favored by "several states, the Model Penal Code, the United States National Commission on Reform of Federal Criminal Laws, the Select Committee to Study Undercover Activities of Components of the Justice Department, and a persistent minority of Supreme Court justices." Bennett, *supra* note 75, at 835. The foundation for the objective test can be traced to Justice

Brandeis' "celebrated dissent" in *Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) ("The Government may set decoys to entrap criminals, but it may not provoke or create a crime and then punish the criminal, its creature."). *Id.* at 836 n. 46. Justice Brandeis felt the government should only initiate a "sting" operation when it had a sufficient factual basis to believe the defendant was violating the law. *Id.*

88. Bennett, *supra* note 75, at 836 (stating the objective test works "even if the defendant was a hardened criminal ready and willing to commit the offense at any opportunity.").

89. *Id.* at 837. In jurisdictions using the objective test, the traditional inquiry is whether the police "[c]reated a substantial risk that [the] offense [would] be committed by persons other than those who are ready to commit it." *Id.* Under the objective test, the court alone decides the entrapment defense." *Id.* at 836.

90. *See Mathews v. United States*, 485 U.S. 58, 63 (1988).

91. Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va. L. Rev. 1011, 1014 (1987).

92. Bennett, *supra* note 75, at 843. "The entrapment defense is available only to defendants whose crimes are directly induced by government agents." *Id.*

93. *Id.* Bennett explains that "solicitation" and "inducement" may not be the same thing:

"Solicitation" is a mere request by a law enforcement officer that the defendant engage in criminal activity. By contrast, "inducement" is defined as "government behavior that would cause an undisposed person to commit a crime." "Inducement may arise from 'persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship.'"

Id. (citations omitted).

94. 411 U.S. 423 (1973).

95. *Id.* at 433. The five relevant factors in determining a defendant's predisposition to commit a crime are:

- 1) the character or reputation of the defendant, including any prior criminal record;
- 2) whether the suggestion of criminal activity was made by the government;
- 3) whether the defendant was engaged in criminal activity for profit;
- 4) whether the defendant expressed reluctance to commit the offense which was overcome only by repeated government inducement or persuasions;
- and 5) the nature of the inducement or persuasion applied by the government.

United States v. Perez-Leon, 757 F.2d. 866, 871 (7th Cir. 1985).

96. Bennett, *supra* note 75, at 844 ("[T]he defense of entrapment exists only for the 'unwary innocent' who commits a crime at the urging of law enforcement officials . . . [and] is simply unavailable to the 'unwary criminal' who commits such a crime.").

97. *Id.* (citations omitted).

98. United States v. Osborne, 935 F.2d 32, 38 (4th Cir. 1991). "Entrapment is an affirmative defense that can be waived." Bennett, *supra* note 75, at 854. A guilty plea will waive the defendant's right to raise this defense on appeal. *Id.*

99. United States v. Henry, 749 F.2d 203, 210-11 (5th Cir. 1984) (en banc); United States v. Valencia, 645 F.2d 1158, 1172 (2d Cir. 1980)).

100. *Osborne*, 935 F.2d at 38.

101. United States v. Riley, 363 F.2d 955, 959 (2d Cir. 1966). In *Jacobson v. United States*, 503 U.S. 540 (1992), the Court held that the defendant's "ready response" to government solicitations "was not sufficient to establish beyond a reasonable doubt that any predisposition, prior to the government acts intended to create predisposition, to commit the crime charged." *Id.* at 553. Justice O'Connor dissented and "specifically criticized the majority for holding that government conduct could create a predisposition to commit a crime before any action to induce the crime was taken." Bennett, *supra* note 75, at 848 n.147.

102. United States v. Nations, 764 F.2d 1073, 1080 (5th Cir. 1985).

103. United States v. Rodriguez, 858 F.2d 809, 815 (1st Cir. 1988); United States v. Rivera, 855 F.2d 420, 423 (7th Cir.), *cert. denied*, 488 U.S. 974 (1988). The government must persuade the jury that one or more elements of entrapment are absent in order to defeat the defense. Bennett, *supra* note 75, at 848.

104. Bennett, *supra* note 75, at 848-49.

105. United States v. El-Gawli, 837 F.2d 142, 145 (3d Cir.), *cert. denied*, 488 U.S. 817 (1988).

106. Bennett, *supra* note 75, at 848.

107. United States v. Rivera, 778 F.2d 591, 600-01 (10th Cir. 1985), *cert. denied*, 475 U.S. 1068 (1986).

108. United States v. Whoie, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991).

109. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983). Entrapment focuses on the intent or predisposition of the defendant to commit the crime, while the defense of outrageous governmental conduct focuses solely on the government's actions. United

States v. Restrepo, 930 F.2d 705, 712 (9th Cir. 1991). Because it focuses solely on the government's conduct, the outrageous governmental conduct defense is available even where the defendant was predisposed to commit the crime with which he or she is charged. Berlin, *supra* note 8, at 223. In addition, because this defense is one of constitutional dimension (it is based on Fifth Amendment's Due Process Clause), it is entitled to more exacting scrutiny than is the defense of entrapment. Bennett, *supra* note 75, at 858.

110. Deiss, *supra* note 52, at 427 (both the objective test and the outrageous governmental misconduct defense focus on the government's actions).

111. Bennett, *supra* note 75, at 858.

112. United States v. Russell, 411 U.S. 423, 431-32 (1973). "[T]he due process defense of outrageous governmental conduct applies only to conduct which 'is so grossly shocking and so outrageous as to violate the universal sense of justice,' 'where government agents engineer and direct the criminal enterprise from start to finish,' or where government conduct constitutes 'in effect, the generation by police of new crimes merely for the sake of pressing criminal charges against the defendant.'" Bennett, *supra* note 75, at 858 (citations omitted). The outrageous governmental conduct defense may only be successfully raised by defendants who can "prove that the government's conduct was 'so grossly shocking and so outrageous as to violate the universal sense of justice.'" Berlin, *supra* note 8, at 223 (citation omitted).

Rochin v. California, 342 U.S. 165 (1952), was the predecessor to the outrageous governmental conduct defense specifically recognized in *Russell*, *supra*, and *Hampton*, *infra* notes 113-17 and accompanying text. In *Rochin*, the Court reversed the defendant's conviction on drug charges and held that police officers' use of a stomach pump to retrieve morphine capsules the defendant had swallowed violated due process. *Rochin*, 342 U.S. at 172. The Court stated that the officers' conduct did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.* at 171.

113. *Russell*, 411 U.S. 423 (1973).

114. *Id.* at 431-32 (In *Russell*, the defendant claimed that he had been entrapped by a government agent who had provided him with an essential and hard to obtain ingredient for the manufacture of methamphetamine.).

115. 425 U.S. 484 (1976).

116. *Id.* The defendant was convicted of selling heroin supplied by the government. *Id.* at 485.

117. *Id.* at 490. The Court stated:

The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant. Here, as we have noted, the police, the government informant, and the defendant acted in concert with one another. If the result of the government activity is to "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . ." the defendant is protected by the defense of entrapment. If the police engage in illegal activity in concert with a defendant beyond the scope of their duties, the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law.

Id.

118. Berlin, *supra* note 8, at 223. The federal courts of appeals approach due process claims in two ways. "The first view limits the defense to instances of extreme abuse to the defendant. The second and more expansive view holds that the defense exists when the governmental involvement either creates the crime or coerces the defendant to participate in it." Robert Eldridge Underhill, *Sentence Entrapment: A Casualty of the War on Crime*, 1994 Ann. Surv. Am. L. 165, 177 (1994) (citations omitted). The current case law seems to indicate that the first, and more limited view of the due process claim, is more prevalent than the more expansive view. *See, e.g.*, Berlin, *supra* note 8, at 222-26 (discussing the outrageous governmental conduct defense and the lack of success faced by defendants who assert the defense).

119. Underhill, *supra* note 118, at 177 (stating the outrageous governmental conduct defense "has aptly been described as moribund"). *See* *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) (holding that there was outrageous governmental conduct where a drug manufacturing operation was "conceived and contrived by the government agents" in order to entice the defendant into joining the operation); *but see* Deiss, *supra* note 52, at 434 ("the defense of outrageous government conduct may exist only in theory").

120. *See* Underhill, *supra* note 118, at 183-91 (discussing the traditional entrapment defense and the outrageous governmental conduct defense and asserting the difficulties defendants face when using either of these defenses in the context of prearrest manipulations).

121. Shein, *supra* note 52, at 25; *see also* Berlin, *supra* note 8, at 221 ("'[S]entencing entrapment' occurs when a defendant, although predisposed to commit a greater minor or lesser offense, is entrapped to commit a greater offense subject to greater punishment."); Underhill, *supra* note 118, at 177 ("[S]entence entrapment occurs when a defendant is predisposed to commit the crime for which he is accused, but the government manipulates the mechanics of the crime in order to increase the suspect's potential sentence."). The sentence entrapment defense has also been referred to as "sentencing manipulation." *See, e.g.*, *United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992). Underhill breaks down sentence entrapment into one of three categories based on the government's conduct:

[(1) level one:]

describes extreme cases in which the government acts in an egregious manner that induces a suspect into violating the law in a manner with more severe consequences than otherwise would have occurred . . . [t]he requirements for level one conduct are egregious governmental misconduct and an intent to increase a defendant's sentence. Level one . . . is reserved for those situations in which the governmental misconduct is so egregious that . . . the courts should refuse to prosecute;

[(2) level two:]

refers to non-egregious conduct that increases a defendant's sentencing exposure either intentionally or for reasons unrelated to the defendant's investigation . . . [t]he most common versions occur when the government delays an arrest in order to accumulate evidence against the suspect, lure other parties into the illegal activity, or locate the target's source . . . [t]he difficulty arises in determining which delays were based on improper motives and which were actually proper. A delay stemming from an improper motive would constitute a level two situation, whereas a delay attributable to a proper motive would be a level three situation;

[(3) level three:]

refers to non-intentional, sentence-increasing conduct that is, conduct designed to serve other purposes which incidentally increases the suspect's sentence . . . [i]n this type of situation, the governmental agents do not intentionally conduct the operation with the goal of increasing a defendant's sentence. Most commonly, undercover agents will delay the arrest of a suspect in order to determine the highest quantity that the defendant will deal in, or to gauge other crimes the defendant is willing to commit. A level three situation differs from a level two situation because the government undertakes the investigation to determine the culpability of the defendant. The delay is not solely to increase the sentence nor to catch other criminals.

Underhill, *supra* note 118, at 183-90.

122. Shein, *supra* note 52, at 25 ("Through the use of undercover stings and reverse stings (where the government provides the drugs or money to the defendant), the government has garnered too much control over the ultimate sentence to which the defendant will be exposed.").

123. *Id.*

124. Underhill, *supra* note 118, at 172 (discussing the use of undercover operations for detecting and exposing consensual crimes, such as drug related offenses).

Drug cases are the most common source of sentence entrapment claims . . . In drug cases defendants generally raise one of three types of manipulation allegations: that the government delayed the arrest until the cumulative amount of drugs exceeded a threshold level; that the government introduced a larger amount of drugs than the defendant

otherwise would (or could) have been involved with; or that the government introduced an external factor into the activity in order to enhance the sentence.

Id.

125. Shein, *supra* note 52, at 25.

126. Underhill, *supra* note 118, at 167-68.

127. *Id.* at 168 ("For example, a money launderer or drug buyer caught with a larger than anticipated cache of money or drugs will still be liable for the same substantive criminal law violation, but will face an increased sentencing range because of the additional quantity of contraband.").

128. 923 F.2d 1293 (8th Cir.), *cert. denied sub nom.* Smith v. United States, 499 U.S. 968 (1991).

129. *Id.* at 1295.

130. *Id.*

131. *Id.* at 1296. The convictions were for violations of 21 U.S.C. §§ 841(b)(1)(B), 846 (for conspiring to distribute methamphetamine) and 21 U.S.C. §§ 8451 (a)(1), (b)(1)(C), 845(a), 18 U.S.C. § 2(a) (for the actual distribution of methamphetamine during the undercover operation). *Id.*

132. *Id.* at 1300. The court did not look to Smith's other alleged grounds for reversal, stating that "[o]nly one of her alleged grounds for reversal deserves discussion." *Id.*

133. *Id.*

134. *Id.* ("[Smith] styles this objection as a violation of her due process rights, though she deploys it against her sentence rather than her conviction.").

135. *Id.* (Smith's sentence was affirmed).

136. 923 F.2d 607 (8th Cir.), *cert. denied*, 499 U.S. 967 (1991). In *Stuart*, a co-defendant attempted to use the sentence entrapment defense alleging "that the conduct of the government in fronting the necessary money to purchase a larger quantity of drugs than that which Stuart had the means with which to pay, entrapped Hayden into committing an offense greater than that which he was predisposed to commit." *Id.* at 613.

137. *Id.* ("Perhaps there is such a thing as 'sentencing entrapment'").

138. *Id.*

139. *Id.* (Hayden's sentence was affirmed). In *United States v. Barth*, 990 F.2d 422 (8th Cir. 1993), the Eighth Circuit reversed a district court's downward departure from the sentencing guidelines based on the sentence entrapment defense. *Id.* at 424. In the process, the court articulated the possible effect of successful assertion of the sentence entrapment defense: "[U]nder our standard of review, we hold that sentencing entrapment may be legally relied upon to depart under the sentencing guidelines" *Id.* at 424-25. However, under the facts of this case, the court of appeals failed to agree "with the district court that the undercover officer continued to purchase drugs merely to enhance Barth's potential sentence." *Id.* at 425.

140. 960 F.2d 191 (1st Cir. 1992). In *Connell*, the defendant, a stockbroker, was approached by a federal agent who requested assistance in laundering money from a gambling operation. *Id.* at 193. On four occasions, the defendant violated federal law by structuring cash transactions to avoid filing currency transaction reports with the IRS. *Id.* On the first occasion, the defendant believed that the money was from the gambling operation. *Id.* However, on the next three occasions, the agent told the defendant that the money was from the illegal drug trade. *Id.* This resulted in a five-level increase in the defendant's offense level. *Id.* The defendant claimed that the agent had "gratuitously spun a yarn about the illicit origin of the funds for the sole purpose of guaranteeing that [his] punishment would be increased." *Id.* at 194.

141. *Id.* at 194. "[W]e prefer to dismiss the inexact, albeit catchy, label that Connell uses . . . [H]is predisposition to engage in illegal currency transactions makes the use of the term 'sentence entrapment' both inapposite and misleading. His complaint, at bottom, is that the government practiced what might more accurately be called 'sentencing factor manipulation.'" *Id.* "We prefer the term 'sentencing factor manipulation,' which places the focus of judicial inquiry where it belongs on the government's activity not on whether the defendant would have committed the crime but for the government's influence." *United States v. Brewster*, 1 F.3d 51, 55 n.5 (1st Cir. 1993).

142. *Connell*, 960 F.2d at 196.

143. *Id.*

144. *Id.* In *United States v. Gibbens*, 25 F.3d 28 (1st Cir. 1994), the First Circuit elaborated on the difficulties inherent in analyzing sting operations for sentencing factor manipulation. In recognizing that the nature of sting operations forced courts to apply an ad hoc, rather than a "bright line" approach when analyzing claims of alleged government misconduct, the court observed, "[w]e can plot no bright line to separate the government's ordinary conduct in a conventional sting operation from extraordinary misconduct of a sort that might constitute sentencing factor manipulation . . . the subject must be approached on a case-by-case basis" *Id.* at 31. The court also stated that the defendant bore the burden of proving the defense by a preponderance of the evidence. *Id.* at 32.

145. 17 F.3d 1531 (2d Cir.), *cert. denied*, 115 S. Ct. 211 (1994). In *Rosa*, the defendants were convicted of conspiring, in violation of 18 U.S.C. § 371 (1994), to receive stolen goods in violation of 18 U.S.C. § 2315 (1994). *Id.* at 1537. The defendants claimed they were the victims of sentencing entrapment because the government should have arrested them before proposing a deal for 5,600 pounds of stolen silver. *Id.* at 1551. They alleged this deal was proposed for the sole purpose of enhancing their sentences. *Id.* at 1551.

146. *Id.* The court's opinion in *Rosa* "reveals that the Second Circuit is not nearly as receptive of this concept as other circuits." Shein, *supra* note 52, at 26.

147. 39 F.3d 428 (3d Cir. 1994). The defendant pleaded guilty to conspiracy to import heroin into the United States from Thailand, in violation of 21 U.S.C. § 963 (1994). *Id.* at 430. On appeal, the defendant claimed that the government engaged in sentence entrapment because they single-handedly determined the amount of drugs involved in the conspiracy. *Id.* at 438 (the government informant told the defendant that he wanted to import three to four kilograms of heroin or the trip would not be worthwhile).

148. *Id.*

149. Unlike the Second Circuit's decision in *Rosa*, the *Raven* court did not use any language to show a bias against the use of the sentence entrapment defense. In addition, the court did not cite any cases opposed to the defense. Accordingly, it seems probable that the Third Circuit would accept the defense in a case with the right factual setting.

150. 18 F.3d 1145 (4th Cir. 1994).

151. *Id.* at 1152-54. The defendants in *Jones* were convicted of numerous violations of federal law stemming from the operation of crack-cocaine base enterprise in West Virginia. *Id.* at 1146. As one of their challenges to their sentences, the defendants alleged that "they were denied due process of law where law enforcement authorities and those persons acting under their control made purchases for the purpose of manipulating the base offense level." *Id.* at 1151-52.

152. *Id.* at 1153.

153. *Id.* at 1154.

154. *Id.* at 1154-55. In *United States v. Satterwhite*, No. 93-5387, 1994 WL 118110 (4th Cir. Apr. 4, 1994), decided a month after *Jones*, the Fourth Circuit addressed arguments based on sentence entrapment and sentence manipulation, and stated that "[w]e reemphasize today that we do not embrace these theories" *Id.* at *4.

Based on the statements of the Fourth Circuit in *Jones* and *Satterwhite*, it seems as though this circuit will be reluctant to accept either the sentence entrapment or sentence manipulation defense. The court's decision in *Jones* provides ample support for this position:

Appellants invite us to adopt a rule [sentence manipulation] that, in effect, would find the conduct of an investigation by the government "outrageous" whenever the government, even though it has enough evidence to seek an indictment for some crime, opts instead to wait in favor of continuing its investigation. We decline this invitation, the acceptance of which, we believe, would unnecessarily and unfairly restrict the discretion and judgment of investigators and prosecutors Just as it is not outrageous for law enforcement authorities proceeding in an undercover "buy" to attempt to bargain with a seller of narcotics into selling an amount which constitutes a crime for the sole purpose of obtaining a conviction, we find it is not outrageous for the government to continue to purchase narcotics from willing sellers even after a level of narcotics relevant for sentencing has been sold We decline to impose a rule that would require the government to come forward with a purpose or motivation, other than its responsibility to enforce the criminal laws of this country, as a justification for an extended investigation or for any particular step undertaken as part of an investigation. We also decline to adopt a similar rule that would require district courts to speculate as to the motives of, or to ascribe motives to, law enforcement authorities.

Jones, 18 F.3d at 1154-55. Accordingly, defendants who assert either defense face a long uphill battle.

155. 925 F.2d 112 (5th Cir.), *cert. denied sub nom.* Boudreaux v. United States, 501 U.S. 1237 (1991).

156. The defendants pleaded guilty to charges stemming from a conspiracy to launder money. *Id.* at 114. The defendants appealed their sentences and raised the constitutional claims based upon the fact the amount of money was arbitrarily designated by the government. *Id.* They argued the government's ability to manipulate the amount of money in a "sting" operation should preclude its reliance on that amount to ratchet up a criminal sentence. *Id.*

157. *Id.* at 117. The defendants' separation of powers argument alleged that "under the Guidelines, the power of the executive branch to determine a defendant's sentence based on the amount of money that undercover agents bring to the table in a 'sting' operation violates the separation of powers doctrine" because the executive branch has the unilateral power to directly and automatically ratchet up a sentence. *Id.*

158. *Id.* at 118. The defendants' due process argument posited the opinion that "the government unfairly manipulated the amount of money involved in the 'sting' operation" in order to increase their sentences. *Id.* Although the court rejected the defendants' due process claim, it did state that it could "envision a theoretical scenario in which a due process violation could occur." *Id.* at 118 n.18. Four years after *Richardson*, the Fifth Circuit addressed the sentencing entrapment defense in *United States v. Tremelling*. 43 F.3d 148 (5th Cir.), *cert. denied*, 115 S. Ct. 1990 (1995). In *Tremelling*, the defendant asserted that sentence entrapment occurred when government agents brought an additional 65 pounds of marijuana to a drug deal in which he had only agreed to purchase 150 pounds of marijuana, and then "fronted" it to him (not requiring payment until a later

time) for the sole purpose of increasing his sentence. *Id.* at 149-50. The defendant asserted that the additional 65 pounds should not be used in computing his sentence. *Id.* at 151. The court recognized the defense as "sentence factor manipulation," without passing judgment on its viability. The court then held that sentence factor manipulation was not present in the case at bar.

The district court's finding that the government's conduct in bringing the additional marijuana was not suspicious is not clearly erroneous. However, even if it were suspicious, we are not disposed to find that the government's suspicious conduct by itself would constitute sentencing manipulation. Nor do we feel that the government's conduct in this case should be subject "to a special brand of scrutiny when its effect is felt in sentence, as opposed to offense, determination."

Id. In *United States v. Washington*, 44 F.3d 1271 (5th Cir.), *cert. denied*, 115 S. Ct. 2011 (1995), the Fifth Circuit stated that "[u]ntil now . . . we have not had occasion to address the viability of [sentencing entrapment], and we conclude that we need not do so today given the facts before us." *Id.* at 1280. Accordingly, the view of the Fifth Circuit remains uncertain.

159. No. 94-5551, 1995 WL 140826 (6th Cir. Mar. 29), *cert. denied*, 116 S. Ct. 327 (1995).

160. In *Newsome*, the defendant appealed his sentence arguing sentence manipulation. *Id.* at *1. He alleged the government informant changed the terms of the drug deal from requiring powder cocaine to crack cocaine in order to enhance his sentence. *Id.* The court recognized that other circuits have made a distinction between sentence entrapment and sentence manipulation. *Id.*

161. *Id.* at *2. ("In any event, the government's desire to find out what a particular individual is selling and to make a substantial case against that individual generally cannot be considered fundamentally unfair.")

162. In *Newsome*, the Court approvingly referred to their earlier decision in *United States v. Sivils*, 960 F.2d 587 (6th Cir.), *cert. denied*, 506 U.S. 843 (1992), which held that "in some circumstances principles of fundamental fairness preclude the government from increasing a defendant's sentence through manipulating the quantity of drugs involved in the offense."

163. 990 F.2d 1005 (7th Cir. 1993).

164. The defendant claimed that the government agent allowed him to purchase 600 pounds of marijuana with a down payment which was half that which was originally requested by the agent in order to enhance his sentence. *Id.*

165. *Id.* at 1007.

166. *Id.* In *United States v. Cotts*, 14 F.3d 300 (7th Cir. 1994), the Seventh Circuit said that sentencing entrapment by itself did not constitute a mitigating circumstance for a downward departure unless it rose to the level of traditional entrapment or outrageous governmental conduct, *see id.* at 306 n.2. The Seventh Circuit recognized the distinction between sentence entrapment and sentence manipulation in *United States v. Okey*, 47 F.3d 238, 240 n.3 (7th Cir. 1995) ("sentencing entrapment . . . occurs when the government improperly causes a defendant initially predisposed to commit a lesser crime (e.g., sell a smaller quantity of drugs or produce less counterfeit money) to commit a more serious crime."). "Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence." *Id.* at 240. However, the court never decided the viability of such defenses. *Id.* at 240-41 ("even if sentencing manipulation claims are viable in this Circuit . . ."). The court held that even if the defendant's claim was viable, the government did not improperly prolong its investigation of Okey in order to obtain an increased sentence. *Id.* at 241.

167. *See, e.g., Velasquez v. United States*, No. 94-9470, 1995 WL 89357 (7th Cir. Mar. 3), *cert. denied*, 115 S. Ct. 2633 (1995) ("[t]his circuit has not yet been presented with facts requiring us to determine if [sentencing entrapment or manipulation] [are] viable"); *United States v. Garcia*, Nos. 93-2512, 93-3881, 1995 WL 131495 (7th Cir. Mar. 23, 1995) ("whether a defendant may rely on the doctrine is still an open question . . . [w]e cannot say that any appeal raising the sentencing entrapment/manipulation claim would be legally frivolous").

168. 38 F.3d 1103 (9th Cir. 1994).

169. *Id.* In *Staufer*, the defendant agreed to meet with an undercover agent interested in purchasing LSD, succumbing to the persistent prodding of a government informant. *Id.* at 1105. The informant had frequently contacted the defendant and had always encouraged him to sell drugs. *Id.* At one point the informant had phoned the defendant so often at work that his supervisor was upset with him. *Id.* While the defendant was experiencing serious financial difficulties, he finally agreed to meet with the undercover agent. *Id.* The defendant agreed to sell the agent 10,000 doses of LSD. *Id.* At trial, the defendant testified that he had only wanted to sell 5,000 doses, but the informant and agent insisted that he sell 10,000. *Id.* In addition, there was evidence that the informant and agent immediately offered to pay the defendant more money when he balked at the larger deal. *Id.* The defendant had never previously engaged in any drug deals outside of an \$8 transaction with some friends. *Id.* The defendant was convicted and the judge reluctantly sentenced the defendant to 151 months in prison and 5 years of probation. *Id.* (the judge explained to Staufer that he had just been reversed by the court of appeals for giving a life sentence to a man who killed his wife by throwing her off a ship during their honeymoon and stated his disapproval of the system which required him to give the defendant more time in prison than he was authorized to give a man who had murdered his wife on their honeymoon). The judge stated that he would "be delighted if the court of appeal[s] would find that [he was] in error." *Id.*

170. *Id.* at 1106.

171. *Id.* at 1106-07.

Now that our sentencing scheme has moved from a discretionary process to a determinate system based on the weight of the drugs involved in a transaction, the entrapment doctrine designed for the previous system no longer adequately protects against government abuse nor ensures that defendants will be sentenced on the basis of the extent of their culpability. Under the present sentencing scheme, government abuse can be discouraged and corrected only if courts also are able to ensure that the government has some reason to believe that defendants are predisposed to engage in a drug deal of the magnitude for which they are prosecuted. Furthermore, courts can ensure that the sentences imposed reflect the defendants' degree of culpability only if they are able to reduce the sentences of defendants who are not predisposed to engage in deals as large as those induced by the government.

Id.

172. The court referred to the amended application note to §2D1.1 which stated that:

[i]f 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.

Id. at 1107 (citation omitted).

The significance of the amendment is that it shows that the Sentencing Commission is aware of the unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to increase his or her sentence without regard for his predisposition, his capacity to commit the crime on his own, and the extent of his culpability.

Id.

173. *Id.* at 1108. In the recent case of *United States v. Naranjo*, 52 F.3d 245 (9th Cir. 1995), the Ninth Circuit remanded a case for resentencing, stating "[b]ecause the district court provided no factual findings on the record, we are unable to ascertain what facts it relied upon in finding that Naranjo did not adequately prove sentencing entrapment." *Id.* at 251. The court stated that "[w]e find Naranjo's sentencing entrapment theory convincing." *Id.* at 249. In *Naranjo*, the defendant conceded that he was predisposed to dealing in cocaine, but that the government engaged in sentencing entrapment when they agreed to "front" him four kilograms of cocaine while he only had enough money to purchase one kilogram. *Id.* at 249.

174. No. 92-3401, 1993 WL 141198 (10th Cir. Apr. 27, 1993).

175. The defendant pleaded guilty to possession and distribution of cocaine. *Id.* at *1. He appealed his sentence claiming that he was the victim of sentencing entrapment. He alleged that the government delayed arresting him until the quantity of cocaine trafficked was sufficiently large to result in a significantly larger sentence. *Id.*

176. *Id.* The court cited the Eighth Circuit's decisions in *Lenfesty*, *Stuart* and *Barth* in its discussion of sentence entrapment. *Id.*

177. *Id.* ("On the record in the present case, we are not persuaded that Mr. Baughman was the victim of sentencing entrapment.").

178. *Id.* The *Baughman* decision alone does not provide much assistance in assessing the Tenth Circuit's view on sentence entrapment. However, the court did seem to pay close attention to the law enforcement interests involved in cases alleging sentence entrapment, quoting the Eighth Circuit's decision in *Barth*, that "courts should go very slowly before staking out rules that will deter government agents from the performance of their investigative duties." *Id.*

179. 954 F.2d 668 (11th Cir. 1992).

180. *Id.* at 672.

181. *Id.* See also *United States v. Edenfield*, 995 F.2d 197 (11th Cir. 1993) (recognizing that the Eleventh Circuit still rejected the sentence entrapment defense as a matter of law), *cert. denied*, 115 S. Ct. 76 (1994).

182. 425 U.S. 484 (1976).

183. *Id.* at 488.

184. Shein, *supra* note 52, at 29. The proposed amendment states:

Where the government engages in continuing undercover or sting transactions for the primary purpose of exposing the defendant to a greater potential sentence, then a downward departure may be warranted. This departure will most often apply in cases involving drugs and money laundering where the government through its conduct in the investigation controls the amount or type of drugs, or the value of funds attributable to the defendant. This provision is designed to insure that the executive branch through its law enforcement activities does not impinge on the authority and independence of the judiciary to make sentencing determinations.

Id.

185. *Id.*

186. 18 U.S.C. § 3553(a)(6) (1994).

187. *See* United States v. Naranjo, 52 F.3d 245 (9th Cir. 1995); United States v. Tremelling, 43 F.3d 148 (5th Cir. 1995); United States v. Stuart, 923 F.2d 607 (8th Cir.), *cert. denied*, 499 U.S. 967 (1991).

188. Underhill, *supra* note 118, at 192. *See also* United States v. Barth, 990 F.2d 442 (8th Cir. 1993) (in which a defendant who was arrested after making seven small sales of crack cocaine to law enforcement officials totalling in 49.8 grams was treated for sentencing purposes in the same fashion as larger scale drug traffickers who sell the same amount in one transaction).

189. Underhill, *supra* note 118, at 192-93. For further discussion of the use of trickery and deception by the government during interrogations, see Jerome Skolnick & Richard Leo, *The Ethics of Deceptive Interrogation*, 11 *Crim. Just. Ethics* 3 (1992); Welch S. White, *Police Trickery in Inducing Confessions*, 127 *U. Pa. L. Rev.* 581 (1979).

190. Underhill, *supra* note 118, at 193. For further discussion of the harms caused by this conduct, see Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 *Mich. L. Rev.* 662 (1986); Skolnick & Leo, *supra* note 189; White, *supra* note 189; Daniel W. Sasaki, Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 *Stan. L. Rev.* 1593 (1988).

191. Underhill, *supra* note 118, at 193 (citing Model Rules of Professional Conduct Rule 3.8 (1992)).

192. *Id.* at 193.

193. *Id.*

194. *Id.* at 190-92.

195. *Id.*

196. *See* United States v. Barth, 990 F.2d 422 (8th Cir. 1993).

197. *See* Underhill, *supra* note 118.

198. *Id.*

199. *Id.*

200. *Supra* notes 121-84 and accompanying text (discussing the development of sentence entrapment in the circuit courts).

201. *See id.* and accompanying text.

202. *See* United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994) (this was the only case in which sentencing entrapment was successfully asserted, and this was mostly due to the unique circumstances of the case, e.g., Staufer was a sometimes user of LSD and seller whose only previous drug deal with some personal friends had earned him \$8, nowhere near the magnitude of the deal set up by the confidential informant and government agent).

203. United States v. Williams, 954 F.2d 668 (11th Cir. 1992).

204. Even the courts that question the viability of the defense do engage in a sentence entrapment analysis. *See, e.g.*, United States v. Okey, 47 F.3d 238 (7th Cir. 1995). Accordingly, defendants should continue to raise the sentence entrapment defense until the issue is addressed by the Supreme Court or in amendments to the Guidelines Manual.

205. As discussed in the previous section, some courts recognize only the sentence entrapment defense, while others have distinguished between sentence entrapment and sentence manipulation. As with the traditional entrapment defense, sentence entrapment focuses on the defendant's predisposition, whereas sentence manipulation focuses on the government's conduct. For purposes of the discussion which follows, the term sentence entrapment will refer solely to the pure sentence entrapment defense and the phrase sentence manipulation will refer only to that particular variety of the sentence entrapment defense which has been dubbed sentence manipulation by some courts.

206. *See, e.g.*, United States v. Gibbens, 25 F.3d 28 (1st Cir. 1994); United States v. Lenfesty, 923 F.2d 1293 (8th Cir.), *cert. denied sub nom.* Smith v. United States, 499 U.S. 968 (1991); Shein, *supra* note 52, at 26.

207. *See generally* United States v. Connell, 960 F.2d 191 (1st Cir. 1992); *supra* notes 135-39 and accompanying text.

208. *Id.* Although the "but for" test has never been employed by the circuit courts in a sentence entrapment analysis, it clearly satisfies the requisite causation element required to prove that the government activity did in fact overcome the defendant's predisposition.

209. Even if the defendant is able to satisfy this test, at the present, it seems unlikely that the defense will succeed.

210. *See, e.g.*, United States v. Jones, 18 F.3d 1145 (4th Cir. 1994); United States v. Gibbens, 25 F.3d (1st Cir. 1994); United States v. McLinn, No. 93-2793, 1994 WL 62388 (8th Cir. Mar. 3, 1994).

211. *Jones*, 18 F.3d at 1153. A defendant may succeed here if he is able to convince the court that the government continued to engage in purchases or sales of drugs beyond that which were necessary to convict the defendant or which were clearly not leading them to a larger drug supplier or purchaser.

212. *Id.* at 1154-55; *see also supra* notes 150-54 and accompanying text.

213. *United States v. Connell*, 960 F.2d 191 (1st Cir. 1992). "Courts should go very slowly before staking out rules that will deter government agents from the proper performances of their investigative duties." *Id.* at 196.

214. This in essence converts the sentence manipulation defense into nothing more than the 5th Amendment "outrageous government conduct" outlined in notes 109-19. For an example of government conduct which "shocks the conscience," see *Rochin v. California*, 342 U.S. 165 (1952) (pumping the defendant's stomach to retrieve drugs violates Due Process Clause).

215. "It is abundantly clear that [the sentence entrapment defense] is still a very unsettled area of the law. As of today, although a few circuits have recognized the validity of sentencing entrapment, many are still unsure, and only the Ninth Circuit, on one occasion, has vacated a sentence based on sentencing entrapment grounds." Shein, *supra* note 52, at 28.

216. If a defendant is unable to convince the court to accept either variety of the sentence entrapment defense, he can resort to: (1) that there has been "outrageous governmental conduct" which violates his 5th Amendment right to Due Process; (2) that "the power of the executive branch [i.e., the law enforcement officials] to determine a defendant's sentence based on the amount of money or drugs that the executive branch brings to the table in a 'sting' operation violates the separation of powers doctrine." *United States v. Richardson*, 925 F.2d 112, 117 (5th Cir.), *cert. denied sub nom.* *Bourdeaux v. United States*, 501 U.S. 1237 (1991).

217. USSG §2D1.1, comment (n.15) (Nov. 1995).

218. In *United States v. Stauffer*, 38 F.3d 1103 (9th Cir. 1994), the court used this comment as support for its decision to accept the defendant's sentence entrapment argument.

219. *United States v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir.), *cert. denied sub nom.* *Smith v. United States*, 499 U.S. 908 (1991). While application note 15 does not use the word "predisposition," this term does encompass the situation the note envisioned, i.e., where an individual purchases "a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase . . ." USSG §2D1.1, comment. (n.15) (Nov. 1995). A defendant's predisposition must necessarily include within its boundaries the financial resources available to the defendant. One can hardly envision a case in which a defendant with little or no funds could be predisposed to dealing in large quantities of drugs. Accordingly, it can be argued that the comment does implicitly recognize that it is a defendant's predisposition which is being overcome by government conduct.

220. This would most likely only apply to cases where: (1) drugs are offered for prices "substantially" lower than their market price; (2) the suspicious "fronting" of drugs to defendants; (3) any other financial aspects of a deal which are meant solely to entice the defendant. *See United States v. Fowler*, 990 F.2d 1005, 1007 (7th Cir. 1993).

221. *Staufner*, 38 F.3d at 1107.

222. The policy statement to §5k2.1 provides:

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if 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." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines . . . if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

USSG. §5K2.0, p.s (Nov. 1995).

223. "In deciding whether the Sentencing Commission adequately accounted for a particular circumstance, 'the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.'" *United States v. Harrington*, 947 F.2d 956, 957 (D.C. Cir. 1991) (citing 18 U.S.C. § 3553(b)).

224. *United States v. Burns*, 893 F.2d 1343, 1345 (D.C. Cir. 1990) (citing 18 U.S.C. § 3742(e)(4)), *rev'd on other grounds*, 501 U.S. 129 (1991). Findings of fact underlying the sentencing court's decision to depart will not be disturbed unless clearly erroneous. *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989).

225. Berlin, *supra* note 8, at 221.

226. Shein, *supra* note 52, at 28.

227. *See, e.g., United States v. Barth*, 990 F.2d 422, 425 (8th Cir. 1993) ("[W]hen a sufficiently egregious case arises, the sentencing court may deal with the situation by excluding the tainted transaction or departing from the sentencing guidelines."); *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 either by excluding the tainted transaction from the computation of relevant conduct or by departing from the GSR.").

228. 277 U.S. 438 (1928).

229. *Id.* at 485 (Brandeis, J., dissenting).