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## **Undercover Policing, Overstated Culpability**

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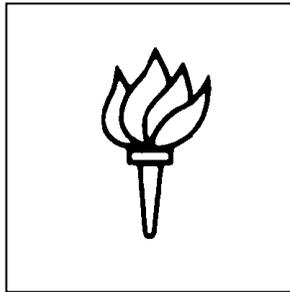
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### UNDERCOVER POLICING, OVERSTATED CULPABILITY

*Eda Katharine Tinto*

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## UNDERCOVER POLICING, OVERSTATED CULPABILITY

*Eda Katharine Tinto*<sup>†</sup>

*This Article examines the legal doctrine of “sentencing manipulation,” a claim, raised at the time of sentencing, in which the defendant argues that undercover police officers purposefully encouraged him to commit particular criminal conduct in order to expose him to a longer, and often mandatory, prison sentence. Currently, the claim of sentencing manipulation has no uniform definition or application and lacks a consistent animating theory. Based on traditional theories of punishment and the systemic interest in an accurate determination of a defendant’s criminal culpability, this Article argues that inducements, used by undercover officers and their agents to encourage the suspect to commit particular criminal conduct, should be the central focus of a reformed sentencing manipulation doctrine. The sentencing manipulation doctrine as currently conceived fails to recognize the potential and problematic impact of police inducements on an assessment of a defendant’s culpability. Moreover, current definitions of the claim reflect binary concerns of guilt versus innocence that, while perhaps appropriate for a claim made at trial, are inapposite for a claim made at the time of sentencing. In determining where to draw the line between police inducements that affect a defendant’s culpability and those that do not, this Article also suggests a new way to view police conduct—on a continuum ranging from conduct that “facilitated culpability” to conduct that “overstated culpability.” A reformed doctrine of sentencing manipulation, as proposed by this Article, appropriately directs courts’ focus to inducements used by the police that result in the overstatement of a defendant’s culpability, and to offense conduct that should therefore be removed from the sentencing calculus.*

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## INTRODUCTION

Undercover police operations are generally accepted as a necessary and important tool for crime prevention and control. Undercover officers, confidential informants, “sting” operations, and other covert techniques are commonplace aspects of modern day law enforcement.<sup>1</sup> In the context of undercover policing, police officers have virtually unfettered discretion to determine the type of undercover tactic used, the quantity of narcotics involved, the incentives given, and the words communicated to the suspect. These investigative choices allow law enforcement to structure and suggest various criminal offenses.<sup>2</sup>

<sup>1</sup> See Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 161 (2009); Gary T. Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, 28 CRIME & DELINQ. 165, 166-67 (1982) [hereinafter Marx, *Who Really Gets Stung?*]; Julius Wachtel, *From Morals to Practice: Dilemmas of Control in Undercover Policing*, 18 CRIME, L. & SOC. CHANGE 137, 145 (1992).

<sup>2</sup> See Richard A. Leo & Jerome H. Skolnick, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3 (1992).

Moreover, in today's world of sentencing guidelines and mandatory minimum sentences, these decisions also greatly impact the eventual sentencing of the targeted suspect.

The legal doctrine of "sentencing manipulation" addresses the tactics used by undercover officers and their effect on the defendant's sentence. Under current federal and state sentencing laws, law enforcement's encouragement or suggestion of particular criminal conduct has a direct impact on, and in fact often mandates, a defendant's ultimate sentence. For example, under federal law, a police officer's decision to sell a particular quantity of narcotics will dictate the defendant's minimum prison sentence.<sup>3</sup> In the court-created claim of sentencing manipulation, the defendant requests a reduced sentence based on the argument that the police deliberately encouraged particular offense conduct for purposes of guaranteeing a long prison sentence.<sup>4</sup> The claim of sentencing manipulation, and the related claim of "sentencing entrapment,"<sup>5</sup> is focused not on whether the defendant is legally guilty of the underlying conduct but rather on the extent to which the defendant should be sentenced on the basis of conduct that he alleges was improperly suggested by the police.<sup>6</sup>

To illustrate, imagine the parties agree to the following factual scenario: a defendant and an undercover officer negotiate a drug buy in which the defendant purchases ten grams of heroin. At some point, the defendant also agrees to purchase a gun. At sentencing, the defendant faces an additional mandatory prison term due to his possession of the gun. The parties' characterizations of the police conduct that led up to the purchase of the gun diverge. The defendant argues that he should not be sentenced for having a firearm because he believes the undercover officer unfairly encouraged him to possess it. The defendant requests instead to be sentenced solely on the basis of the narcotics involved. In contrast, the government's arguments focus on the defendant's willingness to commit the additional conduct (in this example, to possess the gun) and the legitimate goals of police investigation such as the interest in testing a suspect's readiness to commit a more serious crime.<sup>7</sup> As seen by this example, the claim of

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<sup>3</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2010) [hereinafter USSG].

<sup>4</sup> My discussion of the police conduct at issue in sentencing manipulation claims includes cases in which the police propose additional offense conduct that increases the sentence for an offense already underway, as well as cases in which the police suggest offense conduct that allows the charging of an additional substantive offense that carries a higher mandatory sentence.

<sup>5</sup> See *infra* Part I.A–B (discussing the related doctrines of sentencing entrapment and imperfect entrapment, respectively).

<sup>6</sup> For an exploration of the relationship between sentencing manipulation and the trial phase defense of entrapment, see *infra* Part I.A.

<sup>7</sup> See *infra* Part II.B.2 (examining law enforcement motives).

sentencing manipulation acknowledges the factual guilt of the defendant yet posits that a lower sentence may be warranted due to police conduct.

Although this defense claim may be unusual—and perhaps even of questionable legitimacy to some—sentencing manipulation is currently recognized as a valid claim in many federal and state jurisdictions. Since its inception in the early 1990s,<sup>8</sup> the claim of sentencing manipulation has been addressed by all the federal circuits and by more than half of state jurisdictions.<sup>9</sup> Nevertheless, the claim has no uniform definition or procedural treatment. State and federal courts are widely divergent in both their definitions of the claim and their application of it in practice.<sup>10</sup> In addition, the claim of sentencing manipulation has received scant scholarly attention.<sup>11</sup>

The doctrine of sentencing manipulation, together with the police conduct it addresses, warrants closer examination for several reasons. Most critically, under the doctrine as currently conceived, police officers are able to manipulate offenders' conduct and their sentences to such an extent that some defendants are being sentenced to unjustified lengthy prison terms. By "unjustified" I mean not justified by an assessment of the defendant's criminal culpability at sentencing. I use the term "culpability"—and will do so throughout this Article—to refer to a broad assessment of an offender's degree of blameworthiness, traditionally viewed as part of the sentencing calculus.<sup>12</sup> Such an

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<sup>8</sup> See *infra* Part I.A (discussing the historical background of the doctrine of sentencing manipulation).

<sup>9</sup> See *infra* Part I.B. It is difficult to ascertain how often sentencing manipulation and its related claims are raised in federal and state courts. Sentencing arguments and subsequent decisions are often not published in briefs or decisions, particularly in state court. In addition, the possibility of a successful sentencing claim influences a defendant's calculations in determining whether to accept a plea bargain or proceed to trial. It is impossible to know the number of plea bargains that are accepted in part due to the apparent lack of any judicial sentencing discretion (or viable claim of sentencing mitigation).

<sup>10</sup> See *infra* Part I.B.

<sup>11</sup> After some initial interest in sentencing manipulation and related claims in the mid-1990s, mostly by student authors, there has been little recent scholarship. See, e.g., Andrew G. Deiss, *Making the Crime Fit the Punishment: Pre-Arrest Sentence Manipulation by Investigators Under the Sentencing Guidelines*, 1994 U. CHI. LEGAL F. 419 (1994); Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims Under the Federal Sentencing Guidelines*, 94 MICH. L. REV. 2385 (1996); see also Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 817 (2012) (calling for more scholarly attention to the regulation of police beyond ex post constitutional challenges); Joh, *supra* note 1, at 159–60 (describing lack of legal scholarly attention to undercover policing).

<sup>12</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 118 (5th ed. 2009) (describing historical broad meaning of "culpability" to suggest "a general notion of moral blameworthiness"); Douglas Husak, "Broad" Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 459 (2012) (describing broad meaning of culpability as one which focuses on a more general sense of moral blameworthiness and allows blame "to be depicted in varying degrees"); see also *Graham v. Florida*, 130 S. Ct. 2011, 2030–31 (2010) (discussing appropriateness of juvenile sentencing in light of juveniles' "moral culpability"); Monu Bedi, *Blame it on the Government: A Justification for the Disparate Treatment of Departures Based on Cultural Ties*, 38 CAP. U. L. REV. 789, 813–14 (2010) (discussing traditional judicial sentencing

assessment takes into account the circumstances of the offense and characteristics of the offender.<sup>13</sup>

The doctrine of sentencing manipulation raises the fundamental underlying question of whether a defendant is fully culpable for all criminal conduct committed with the participation of an undercover officer.<sup>14</sup> To return to our earlier illustration, suppose the defendant asserts that he is not as culpable for possessing the gun as the prototypical gun possessor because, in his case, the undercover officer aggressively persuaded him to take the gun and eventually offered it to him at a substantial financial discount. Without these police inducements, the defendant contends, he would not have accepted the gun. According to this argument, the addition of the mandatory prison term for the gun is unjustified due to the defendant's lesser degree of culpability. From a systemic perspective, it is this potential consequence of an unmerited lengthy sentence that is the most troubling. Although a precise assessment of a defendant's culpability should always be of concern to the criminal justice system, in this time of prison overcrowding and finance-driven criminal justice reform, it is necessary, now more than ever, to examine the relative culpability of defendants and whether the lengths of sentences are justified.<sup>15</sup>

An examination of the sentencing manipulation doctrine is also warranted for two additional reasons—reasons which highlight the practical importance of the doctrine and the concerns raised by the doctrine as it currently stands. First, in the context of undercover policing cases, the creation of state and federal mandatory sentencing schemes has essentially shifted some sentencing discretion to the police

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function of assessing culpability or blameworthiness of the defendant).

<sup>13</sup> It is a long-standing tenet of sentencing that “the punishment should fit the offender and not merely the crime.” *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)); see also *id.* (“For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” (quoting *Penn. ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937))); Memorandum from Attorney General Eric H. Holder, Jr. to All Federal Prosecutors (May 19, 2010), available at <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf> (stating that unwanted sentencing disparities may result “from a failure to analyze carefully and distinguish the specific facts and circumstances of each particular case”).

<sup>14</sup> I am not using the term “culpability” to signify only that the defendant had the mental state required by the criminal offense—for instance, that he did in fact knowingly possess the gun. See *DRESSLER*, *supra* note 12, at 118 (describing narrow view of culpability as one equated with the particular mens rea required by the definition of the offense). Instead, my use of the term “culpability” reflects a more nuanced appraisal of the *degree* of a defendant's blameworthiness typically conducted by the judge at sentencing.

<sup>15</sup> See ACLU, SMART REFORM IS POSSIBLE 17–52 (2011), available at <http://www.aclu.org/files/assets/smartreformispossible.pdf> (detailing several states' bipartisan efforts to reduce prison populations); Charlie Savage, *Trend to Lighten Harsh Sentences Catches on in Conservative States*, N.Y. TIMES, Aug. 12, 2011, at A14 (reporting growing agreement between conservatives and liberals on need for sentencing reform).

and their agents.<sup>16</sup> As one court noted, “a judicial function has effectively slipped, at least in some cases, not only to the realm of the prosecution but even further to that of the police.”<sup>17</sup> Sentencing at the hands of law enforcement runs counter to its traditional placement with the judge, a placement still valued by the Supreme Court and Congress even in today’s age of determinate and mandatory sentencing.<sup>18</sup> An accepted and uniform sentencing manipulation doctrine would enable judicial sentencing discretion when appropriate—that is, it would give judges the discretion to reduce a defendant’s sentence when that sentence was improperly “manipulated” by the police.<sup>19</sup>

Second, the current state of the sentencing manipulation doctrine is a jumble of labels and definitions which lack any consistency in meaning or application. This doctrinal disarray is contrary to the systemic interest in avoiding sentencing disparities among similarly situated defendants.<sup>20</sup> As the doctrine currently stands, there are unjustified national inconsistencies in defendants’ ability to argue for a fair and appropriate sentence and in judges’ ability to sentence accordingly.

It is the concern for sentences that do not accurately reflect the degree of a defendant’s culpability that drives my analysis of the sentencing manipulation doctrine. A sentencing manipulation doctrine

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<sup>16</sup> The category of “mandatory sentencing schemes” encompasses both binding sentencing guidelines and statutory mandatory minimum sentences. The Federal Sentencing Guidelines, although no longer mandatory, remain recommended and are predominantly followed by lower courts. *See* *Rita v. United States*, 551 U.S. 338, 341 (2007) (holding that federal appellate courts may apply a presumption of reasonableness for within-Guidelines sentences); *United States v. Booker*, 543 U.S. 220, 245 (2005) (noting that the Guidelines are advisory but must be consulted); *Bedi*, *supra* note 12, at 790 (documenting most circuit courts’ position that trial courts should consult the Guidelines as part of the sentencing process); *see also* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1490 (2008) (stating that while judges have more discretion post-*Booker*, they still do not have nearly the discretion they had in the pre-Guidelines era).

<sup>17</sup> *United States v. Shepherd*, 857 F. Supp. 105, 106 (D.D.C. 1994).

<sup>18</sup> *See* *Pepper*, 131 S. Ct. at 1235 (reaffirming notion that judges have wide discretion when imposing sentences); *Mistretta v. United States*, 488 U.S. 361, 390 (1989) (discussing the Sentencing Guidelines and Congress’s “strong feeling that sentencing has been and should remain primarily a judicial function” (internal quotation marks omitted)); Stith, *supra* note 16, at 1489 (stating that *Booker* and its progeny “explicitly affirm the important role of the sentencing judge” in determining the “justness of punishment”).

<sup>19</sup> This of course raises the question, “When does such improper manipulation occur?” This question is the central inquiry of this Article.

<sup>20</sup> *See* 18 U.S.C. § 3553(a)(6) (2006) (highlighting “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”); 28 U.S.C. § 994(f) (2006) (promoting the goal of “reducing unwarranted sentence disparities”); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 *STAN. L. REV.* 85, 95–96 (2005) (stating that one principle of federal sentencing reform was that the region of the country should not determine a criminal sentence). States also have an interest in reducing unwarranted sentencing disparities. *See, e.g.*, ALA. CODE § 12-25-2(a)(2) (2012); CAL. PENAL CODE § 1170(a)(1) (West 2012) (expressing desire for “the elimination of disparity and the provision of uniformity of sentences”).

evaluated and reformulated in such light will necessarily address the other two concerns: it will provide a uniform doctrine for state and federal courts and it will permit judicial discretion in sentencing when and if it is necessary to allow a change in sentence to reflect a more accurate assessment of a defendant's criminal culpability.

In order to have analytical meaning as a sentencing *mitigation* doctrine, the claim of sentencing manipulation must focus on undercover police conduct that affects an assessment of the defendant's culpability at sentencing. In other words, the doctrine should target undercover police conduct that results in the defendant committing offense conduct for which he is not fully culpable and which therefore should not be part of his sentence.<sup>21</sup> Conversely, a suggested doctrine should not be concerned with police conduct that—although perhaps resulting in an increase in the defendant's sentence—does not affect an assessment of the defendant's culpability at sentencing.<sup>22</sup> The link to a defendant's culpability is the lens through which the sentencing manipulation doctrine and the underlying police conduct must be analyzed.

In this Article, I argue that inducements, used by undercover officers and their agents to encourage the suspect to commit particular criminal conduct, should be the central focus of a reformed sentencing manipulation doctrine. An inducement may be defined as “persuasion which overcomes the defendant's reluctance” to commit a crime.<sup>23</sup> Inducements range from aggressive verbal encouragement to offering below-market rate prices for contraband.<sup>24</sup> Inducements also include temptations more favorable than similar real-world criminal opportunities.<sup>25</sup> An evaluation of the extent and nature of the

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<sup>21</sup> Part III.B discusses types of police action that could potentially result in a defendant engaging in conduct for which he is not fully culpable. For justification of the idea that some police conduct can, and does, reduce a defendant's culpability, see *infra* Part II.A.

<sup>22</sup> See *infra* Part III.B for examples of types of cases in which the defendant is culpable for all the committed conduct regardless of police participation.

<sup>23</sup> *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991) (internal quotation marks omitted) (citing *Sorrells v. United States*, 287 U.S. 435, 441 (1932)). The Ninth Circuit also included “repeated and persistent solicitation” in its definition. *Id.* In my view, this type of solicitation is included in the description of “inducement” given above. Moreover, an action need not necessarily be repeated and persistent in order to qualify as an inducement. Inducements may evolve and increase over time. An inducement may also be a single offer or action. For instance, an officer may issue a threat of physical harm in order to pressure a reluctant suspect.

<sup>24</sup> See Bennett L. Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 625 (1982) (listing various inducements noted in court decisions, including repeated requests, physical threats, and appeals to friendship and sympathy); Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387, 407 (2005).

<sup>25</sup> In other words, temptations that are “too good to be true.” See Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 415 (1999) (discussing inducements that “exceed real world market rates, which includes both financial and emotional markets”). Inducements also include structural inducements—inducements built into the initial criminal

inducements utilized by the police, and the defendant's responses to those inducements, provides the critical nexus between an evaluation of police conduct and a nuanced assessment of a defendant's culpability at sentencing.<sup>26</sup> The sentencing manipulation doctrine as currently conceived fails to recognize the potential and problematic impact of police inducements on a determination of a defendant's culpability and reflects binary concerns of guilt versus innocence that, while perhaps appropriate for a claim made at trial, are inapposite for a claim made at the time of sentencing.

Part I of this Article begins with the historical background of the sentencing manipulation claim and explains its doctrinal roots in the trial phase claims of entrapment and outrageous government conduct.<sup>27</sup> Part I then reviews the current doctrinal mess of sentencing manipulation and sentencing entrapment claims in federal and state courts.

Part II justifies the principles behind the sentencing manipulation doctrine as conceived by this Article, namely that the focus of the sentencing manipulation doctrine should be on the inducements used by law enforcement. I look to traditional theories of punishment to support the premise that a defendant excessively induced by the police to commit additional criminal conduct is in fact not fully culpable for that offense conduct. I also justify the underlying notion that inducements used by the police, as opposed to inducements from private individuals, are of particular concern to the criminal justice system. Grounded in these foundational principles, Part II then critiques the current definitions of sentencing manipulation and argues that vestiges of the trial phase claims erroneously remain entangled in the current doctrine. This Part examines how the current formulations fail to provide courts with an effective way to evaluate the impact of undercover police conduct on a defendant's culpability.

Part III proposes a reconceived doctrine of sentencing manipulation. I suggest a doctrinal inquiry that appropriately directs courts' focus to police inducements that impact an assessment of a defendant's culpability and consequently produce unjustified lengthy sentences. I then apply this proposed doctrine to the undercover police

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opportunity itself; for example, an initial offer of significantly more money for an amount of drugs than would typically be proposed in the real-world or presenting a criminal opportunity in which the dangers are significantly minimized.

<sup>26</sup> As I later explain in more depth, the evaluation is from the point of view of the defendant and does not simply hinge on whether inducements were in fact used by the police. Rather, the inquiry focuses on the interaction between the defendant and the police and the defendant's responses to the police inducements used. *See infra* Part II.B.

<sup>27</sup> I use the term "trial phase doctrines" to refer to claims and defenses raised at the time of trial or pretrial that focus on the guilt (or non-guilt) of the defendant, and may result in an acquittal or the dismissal of the case. By contrast, a sentencing claim is raised at the time of sentencing, and thus necessarily assumes the legal guilt of the defendant.

conduct at issue in these claims. In determining where to draw the line between police actions that affect an assessment of a defendant's culpability and those that do not, I propose viewing police conduct on a continuum ranging from police conduct that merely "facilitated culpability" to conduct that results in the "overstated culpability" of the defendant.<sup>28</sup> I posit that inducements may be used to such an extent that the culpability of the defendant is, in effect, "overstated" and, as a result, the defendant is sentenced to an unjustified lengthy prison sentence. My proposed doctrine of sentencing manipulation appropriately focuses on the use of police inducements that result in "overstated culpability" and in offense conduct which therefore should be removed from the sentencing calculus.

## I. THE SENTENCING MANIPULATION DOCTRINE

Before exploring the development of a normative sentencing manipulation doctrine, it is helpful to have an understanding of the claim's doctrinal and historical underpinnings, as well as a clear picture of the current state of the doctrine. Recognizing the historical roots of the doctrine helps explain, but I later argue does not justify, the aspects of the trial phase doctrines that remain in current versions of the sentencing manipulation claim.

### A. *The Doctrinal and Historical Underpinnings*

Sentencing manipulation and the related claim of "sentencing entrapment"<sup>29</sup> are court-created doctrines that have their roots in the trial phase doctrines of entrapment and outrageous government misconduct. I will first discuss both trial phase doctrines and then review the development of the related claims at sentencing.

As is well-explored in scholarly literature, entrapment is a defense raised at trial that focuses on the question of whether the government encouraged a suspect to commit a crime he otherwise would not have, absent the police participation.<sup>30</sup> Most jurisdictions employ a "subjective" formulation of the defense in which the defendant must demonstrate that he or she was overcome by excessive governmental

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<sup>28</sup> See *infra* Part III (defining terms).

<sup>29</sup> See *infra* text accompanying notes 47–48 (defining sentencing manipulation and sentencing entrapment).

<sup>30</sup> See generally PAUL MARCUS, *THE ENTRAPMENT DEFENSE* (4th ed. 2009); Allen et al., *supra* note 25; 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 (1992).

inducements and had no predisposition to commit the crime.<sup>31</sup> A minority of jurisdictions use an “objective” test, which asks whether the government actions were sufficient to induce an average, law-abiding person to commit the crime.<sup>32</sup> While the objective approach does not require a finding that the defendant lacked the predisposition to commit the crime, and therefore arguably maintains a focus on government conduct, both versions of the entrapment defense are based on the reactions of an “innocent” person, whether a reasonably objective person or the one actually charged with the crime.<sup>33</sup> Under both approaches, the entrapment defense is a complete defense; if accepted by the judge or jury, the defendant is found not guilty.<sup>34</sup>

“Outrageous government conduct” is a second trial phase claim, raised by pretrial motion, which focuses on the actions of law enforcement.<sup>35</sup> This due process-based doctrine applies only when the police conduct is “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”<sup>36</sup> Thus, the standard for police actions that warrant a dismissal of the charges is very high—the government conduct must be “so grossly shocking and so outrageous as to violate the universal sense of justice.”<sup>37</sup> The Supreme Court, although suggesting in dicta that such misconduct might theoretically exist, has never explicitly found so on the facts before it.<sup>38</sup> Similarly, most federal courts, when

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<sup>31</sup> See *Jacobson v. United States*, 503 U.S. 540, 553–54 (1992); *Sherman v. United States*, 356 U.S. 369, 372 (1958); SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 626 (8th ed. 2007).

<sup>32</sup> See KADISH ET AL., *supra* note 31, at 626. About a half-dozen states follow a “hybrid” approach. MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES* 719 (4th ed. 2011).

<sup>33</sup> See Allen et al., *supra* note 25, at 409, 412 (arguing that whether a subjective or objective test is used is irrelevant as the outcome will almost always be the same); Hay, *supra* note 24, at 400–01 (stating that the subjective entrapment test looks at the defendant’s predisposition whereas the objective test looks at a hypothetical non-predisposed person). Each test is based on the perceptions of either the defendant or a person in the position of the defendant; neither considers the subjective intent of the police.

<sup>34</sup> The entrapment defense is rarely successful. MILLER & WRIGHT, *supra* note 32, at 1395. This is often due to a defendant being unable to show that he was not predisposed to commit the crime. Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 117 (2005).

<sup>35</sup> Although often referred to as a “defense,” the claim of outrageous government conduct is technically a bar to prosecution. See *People v. Wesley*, 274 Cal. Rptr. 326, 329 (Ct. App. 2002). The defense raises the claim before the judge, who would dismiss the pending charges if the motion is granted. *Id.*

<sup>36</sup> *United States v. Russell*, 411 U.S. 423, 431–32 (1973); see also *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007); *United States v. Twigg*, 588 F.2d 373, 380–82 (3d Cir. 1978).

<sup>37</sup> *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993) (internal quotations omitted) (defining such conduct as “so excessive, flagrant, scandalous, intolerable and offensive”).

<sup>38</sup> See *Russell*, 411 U.S. at 431–32. In *Hampton v. United States*, a plurality of the Court rejected the idea of a due-process-based police misconduct claim. 425 U.S. 484, 490 (1976) (plurality opinion). Two Justices in concurrence and three Justices in dissent, however,

faced with such a claim, have declined to find the government conduct at issue sufficiently “outrageous” to justify a dismissal of the indictment.<sup>39</sup>

It is in these two trial phase doctrines that the claim of sentencing manipulation has its doctrinal origins. Its historical roots lie in the creation of mandatory sentencing schemes and the corresponding restriction of judicial discretion in sentencing.

With the advent of the Federal Sentencing Guidelines in 1987, and the rise of statutory mandatory minimum sentences in state and federal law throughout the 1980s and 90s, judicial sentencing discretion became increasingly constrained.<sup>40</sup> Judges were required to sentence defendants to mandatory prison terms based on the type of offense and to increase the length of a sentence based on various aspects of the underlying conduct and the defendant’s criminal history.<sup>41</sup> Criminal sentencing moved from the ambit of unstructured discretion to a structured and mandatory calculation based on the particulars of the crime, such as the quantity of drugs, the existence of firearms, or the role of the defendant in the crime.<sup>42</sup> This approach to sentencing, while well-recognized as reducing judicial discretion and increasing the impact of prosecutorial discretion in charging decisions,<sup>43</sup> significantly changed the import of law enforcement discretion as well, particularly in the world of undercover policing.

The creation of mandatory sentencing laws placed enormous additional power in the hands of the police—namely, the opportunity to

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maintained that an outrageous government conduct claim would potentially be available to a predisposed defendant. *Id.* at 495 (Powell, J., concurring); *id.* at 497 (Brennan, J., dissenting).

<sup>39</sup> See *United States v. Walls*, 70 F.3d 1323, 1329–30 (D.C. Cir. 1995) (discussing lack of support for outrageous conduct claim throughout the circuits); MILLER & WRIGHT, *supra* note 32, at 722 (stating that although most state and federal courts recognize the claim, it rarely succeeds); see also, e.g., *United States v. Kelly*, 707 F.2d 1460, 1461 (D.C. Cir. 1983) (reversing district court’s finding of outrageous government conduct); *United States v. Cromitie*, 781 F. Supp. 2d 211, 227–28 (S.D.N.Y. 2011) (denying defendants’ outrageous government conduct claim related to terrorism investigation).

<sup>40</sup> Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34–35 (2003); William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 309–11 (1993); see also *Mistretta v. United States*, 488 U.S. 361, 390 (1989) (describing previous sentencing system as giving judges “wide discretion to determine the appropriate sentence in individual cases”).

<sup>41</sup> See USSG ch. 1, pt. A, subpt. 1.4(a) (detailing “real offense” sentencing structure); Wilkins et al., *supra* note 40, at 311–12.

<sup>42</sup> See *Mistretta*, 488 U.S. at 368 (stating that Sentencing Reform Act was “meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors”); USSG § 2D1.1(c) (establishing base sentencing levels depending on the quantity of drugs); *id.* § 2D1.1(b)(1) (increasing sentence length if a firearm was possessed); *id.* § 3B1.1–1.2 (adjusting sentence based on the role of the defendant).

<sup>43</sup> See Alschuler, *supra* note 20, at 102; Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004); Symposium, *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2066–68 (1992).

make strategic decisions during an undercover operation that would, in many cases, mandate and dramatically increase a suspect's ultimate sentence. For example, if a defendant bought a handgun and narcotics from an undercover officer, the defendant would potentially face a mandatory minimum sentence of five years; whereas if the police specifically provided a machine gun, the judge would then be required by law to sentence the defendant to an additional twenty-five years in prison.<sup>44</sup> Thus, the actions of undercover officers now had the potential to directly limit much of the remaining judicial sentencing discretion.

Once the impact of police tactical choices due to mandatory sentencing laws became evident, some courts began to acknowledge the possibility that government actions "even if insufficiently oppressive to support an entrapment defense . . . or due process claim" may still warrant a reduction in the sentence of a defendant.<sup>45</sup> The claim of sentencing manipulation and the related claim of sentencing entrapment arose from this recognition.<sup>46</sup>

The claim of "sentencing manipulation," also sometimes referred to as "sentence factor manipulation," parallels the trial phase claim of outrageous government conduct, maintaining, in theory, a primary focus on the actions of the police or government agents rather than on the defendant's prior willingness to commit such a crime.<sup>47</sup> "Sentencing entrapment," although similarly lacking in doctrinal clarity, is generally defined as occurring when the government pressures a suspect "initially predisposed to commit a lesser crime to commit a more serious offense."<sup>48</sup> Like the trial defense of entrapment, sentencing entrapment retains a focus on the predisposition of the defendant.<sup>49</sup> In both sentencing manipulation and sentencing entrapment claims, instead of asking for the entire case to be dismissed, a defendant requests that certain offense conduct be "filtered out of the sentencing calculus."<sup>50</sup>

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<sup>44</sup> See 18 U.S.C. § 924(c) (2006); see also *infra* notes 172–173 (discussing *United States v. Cannon*, 886 F. Supp. 705 (D.N.D. 1995), *rev'd*, 88 F.3d 1495 (8th Cir. 1996)).

<sup>45</sup> *United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992).

<sup>46</sup> See Marcia G. Shein, *Sentencing Manipulation and Entrapment*, 10 CRIM. JUST. 25, 25–28 (1995) (discussing development of sentencing entrapment claim); Amy Levin Weil, *In Partial Defense of Sentencing Entrapment*, 7 FED. SENT'G REP. 172, 173 (1995) (discussing circuits' early treatment of sentencing manipulation claims).

<sup>47</sup> To some extent, the claim of sentencing manipulation parallels the "objective" formulation of the entrapment defense. See Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 42 (2005). However, as discussed above, the objective test still involves consideration of an "innocent" whereas a sentencing manipulation claim does not do so, at least not explicitly. See *infra* Part II.B (critiquing predisposition as a component of sentencing manipulation).

<sup>48</sup> *United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009) (citing *United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996)).

<sup>49</sup> See *United States v. Searcy*, 233 F.3d 1096, 1099, 1101 (8th Cir. 2000); *People v. Smith*, 80 P.3d 662, 667 (Cal. 2003).

<sup>50</sup> See *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007); see also *infra* note

B. *The Current State of the Doctrine*

Federal and state courts are widely divergent in their acceptance of the claim of sentencing manipulation as well as how the doctrine is defined and applied. In fact, any attempt to summarize the current state of the doctrine necessarily oversimplifies the confusion. In some jurisdictions, the claims of sentencing manipulation and sentencing entrapment are defined differently but in others the labels are used interchangeably.<sup>51</sup>

There is no singular definition of what constitutes “sentencing manipulation.” Generally speaking, courts are divided between exceptionally broad definitions and definitions narrow in their application. For example, the Seventh Circuit expansively defines sentencing manipulation as “when the government engages in improper conduct that has the effect of increasing a defendant’s sentence.”<sup>52</sup> By contrast, the Eighth Circuit circumscribes the definition with respect to the factual circumstances to which it applies: “Sentencing manipulation occurs when the government unfairly exaggerates the defendant’s sentencing range by engaging in longer-than-needed investigation and, thus, increasing the drug quantities for which the defendant is responsible.”<sup>53</sup> These distinct definitions also play a role in a court’s acceptance or rejection of the claim itself. The Ninth Circuit, for instance, rejects the doctrine of sentencing manipulation as defined as a claim seeking a sentence reduction based solely on the government’s decision to delay the arrest and investigate further.<sup>54</sup>

Given the many names and definitions of the sentencing manipulation claim, it is difficult to ascertain the general acceptance of

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143 (discussing how such filtering may occur).

<sup>51</sup> For example, the First, Ninth, and Tenth Circuits use different labels interchangeably. *See* *United States v. Beltran*, 571 F.3d 1013, 1018 (10th Cir. 2009) (stating that the Tenth Circuit analyzes “claims of sentencing entrapment or manipulation under the rubric of ‘outrageous governmental conduct’” (citing *United States v. Lacey*, 86 F.3d 956, 963 (10th Cir. 1996)); *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999) (recognizing a single claim entitled either “sentencing entrapment” or “sentence factor manipulation”); *United States v. Gibbens*, 25 F.3d 28, 30 (1st Cir. 1994) (“The doctrine of sentencing factor manipulation is a kissing cousin of the doctrine of entrapment.”); *United States v. Medel*, No. CR 10-1738GB, 2011 WL 5223013, at \*4 (D.N.M. Oct. 25, 2011) (“Sentencing-factor manipulation, [is] also called sentencing entrapment . . .”).

<sup>52</sup> *Garcia*, 79 F.3d at 75; *see also* *United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007). The use of the word “improper” arguably narrows the scope of the definition, but as discussed *infra* Part II, it is not clear what “improper” actually means in this context. Is the police conduct improper because it results in an increased sentence? Is it improper because it increases the sentence in a way that seems unjust or unfair? Or is it improper based on some independent assessment of what the police should or should not do? The use of “improper” as a qualifier does not, on its own, say enough about how to view the underlying police conduct of a sentencing manipulation claim.

<sup>53</sup> *United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009).

<sup>54</sup> *See* *United States v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995).

the doctrine. On their face, the First, Eighth, Tenth, and Eleventh Circuits recognize a claim of sentencing manipulation.<sup>55</sup> The Eighth Circuit also recognizes a separate claim of sentencing entrapment but the Eleventh Circuit does not.<sup>56</sup> The First and Tenth Circuits recognize a single doctrine, which is interchangeably labeled sentencing manipulation or sentencing entrapment.<sup>57</sup> The Seventh and Ninth Circuits ostensibly reject the doctrine of sentencing manipulation, but do so using different definitions of the claim.<sup>58</sup> Both circuits, however, allow claims of sentencing entrapment.<sup>59</sup> The Second, Third, Fourth, Fifth, and Sixth Circuits have declined to recognize either sentencing claim due to their failure to find the factual circumstances upon which the defendant would prevail on such a claim.<sup>60</sup> The D.C. Circuit has suggested that it does not accept either doctrine.<sup>61</sup> In addition, the Second and Ninth Circuits, albeit circuits that do not recognize the doctrine of sentencing manipulation *per se*, do recognize a sentencing claim of “imperfect entrapment,” a claim in which the defendant seeks a reduction in sentence based on government conduct that “does not give rise to an entrapment defense but that is nonetheless aggressive encouragement of wrongdoing.”<sup>62</sup> State courts are similarly varied in

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<sup>55</sup> See *Beltran*, 571 F.3d at 1018–19; *Torres*, 563 F.3d at 734; *Ciszkowski*, 492 F.3d at 1270; *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995).

<sup>56</sup> See *Ciszkowski*, 492 F.3d at 1270 (stating that “our Circuit does not recognize sentencing entrapment as a viable defense”); *United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000) (recognizing sentencing entrapment as a doctrine).

<sup>57</sup> See *United States v. Jaco-Nazario*, 521 F.3d 50, 57 (1st Cir. 2008) (“We have used the terms ‘sentencing entrapment’ and ‘sentencing factor manipulation’ interchangeably.”); see also *supra* note 51.

<sup>58</sup> See *United States v. Garcia*, 79 F.3d 74, 76 (7th Cir. 1996) (“We now hold that there is no defense of sentencing manipulation in this circuit.”); see also *supra* text accompanying note 52 (defining the claim in the Seventh Circuit); *supra* text accompanying note 54 (stating the Ninth Circuit’s definition).

<sup>59</sup> *United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009); *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999).

<sup>60</sup> See *United States v. Floyd*, 375 F. App’x 88, 89 (2d Cir. 2010) (noting that the court has not accepted either theory as a ground for sentence reductions); *United States v. Sed*, 601 F.3d 224, 229 (3d Cir. 2010) (“We have neither adopted nor rejected the doctrines of sentencing entrapment and sentencing factor manipulation.”); *United States v. Guest*, 564 F.3d 777, 781 (6th Cir. 2009) (stating that the Sixth Circuit generally does not recognize either sentencing entrapment or sentencing manipulation); *United States v. Tremelling*, 43 F.3d 148, 151 (5th Cir. 1995) (stating that the Circuit has not expressly determined whether it accepts the concept of “sentencing factor manipulation”); *United States v. Jones*, 18 F.3d 1145, 1154 (4th Cir. 1994) (stating that the court has not yet accepted the legal viability of sentencing manipulation or sentencing entrapment but has never had to do so on the facts before it).

<sup>61</sup> See *United States v. Hinds*, 329 F.3d 184, 188 (D.C. Cir. 2003).

<sup>62</sup> *United States v. Bala*, 236 F.3d 87, 92 (2d Cir. 2000) (internal quotation marks omitted). Both circuits find the authority for such departures in section 5K2.12 of the USSG. *Bala*, 236 F.3d at 92; *United States v. Garza-Juarez*, 992 F.2d 896, 912 (9th Cir. 1993); USSG § 5K2.12 (2010) (allowing downward departure based on coercion or duress). One district court in the First Circuit has also granted a downward departure based on the claim of imperfect entrapment. See *United States v. Oliveira*, 798 F. Supp. 2d 319, 322, 325 (D. Mass. 2011) (citing

their acceptance of the sentencing entrapment and manipulation doctrines.<sup>63</sup>

In addition, there are differences in how the various definitions function when applied to defendants' claims. In determining what police conduct qualifies as "manipulative," some courts require the conduct to be sufficiently "outrageous" so as to meet the due process standard of outrageous government conduct.<sup>64</sup> Other courts suggest a less severe standard of police misconduct (though admittedly still a high bar), using descriptors such as "extraordinary,"<sup>65</sup> "overbearing and outrageous,"<sup>66</sup> and "extreme and unusual."<sup>67</sup> Significantly, no court gives further explanation as to what type of police conduct qualifies as extraordinary or extreme, nor provides an underlying justification for the "amount" of misconduct required.

A second variable is the consideration of the subjective police motive. Some courts require an "improper" motive on the part of the police.<sup>68</sup> Several courts go even further and hold that an improper government motive is necessary but not alone sufficient to prevail on a sentencing manipulation claim.<sup>69</sup> In contrast, other jurisdictions either

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Second and Ninth Circuit case law).

<sup>63</sup> See, e.g., *State v. Monaco*, 83 P.3d 553, 557 (Ariz. 2004) (holding that Arizona does not recognize either sentencing entrapment or manipulation); *People v. Smith*, 80 P.3d 662, 665 (Cal. 2003) (rejecting sentencing entrapment doctrine and declining to decide whether California recognized sentencing manipulation doctrine); *People v. Claypool*, 684 N.W.2d 278, 280 (Mich. 2004) (rejecting sentencing entrapment or manipulation per se but holding that police conduct which alters a defendant's intent can be a basis for a downward departure); *Commonwealth v. Petzold*, 701 A.2d 1363, 1366 (Pa. Super. Ct. 1997) (recognizing a doctrine blending sentencing entrapment and manipulation).

<sup>64</sup> See, e.g., *Sed*, 601 F.3d at 231 (discussing defendant's sentencing manipulation claim and stating that the police conduct was not "sufficiently outrageous to violate the Due Process Clause"); *United States v. Beltran*, 571 F.3d 1013, 1018 (10th Cir. 2009) (stating that the Tenth Circuit analyzes "claims of sentencing entrapment or manipulation under the rubric of 'outrageous governmental conduct'"); *United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007) (noting that a showing of outrageous government conduct is likely an element of sentencing manipulation).

<sup>65</sup> *United States v. Ciszkowski*, 492 F.3d 1264, 1271 (11th Cir. 2007).

<sup>66</sup> *United States v. Tremelling*, 43 F.3d 148, 151 (5th Cir. 1995).

<sup>67</sup> *United States v. Fontes*, 415 F.3d 174, 180 (1st Cir. 2005).

<sup>68</sup> See, e.g., *United States v. Shephard*, 4 F.3d 647, 649 (8th Cir. 1993) (stating that defendant failed to show that the police conduct was "for the sole purpose of ratcheting up a sentence"); *State v. Soto*, 562 N.W.2d 299, 305 (Minn. 1997) (stating that for a successful claim of sentencing manipulation, defendant must demonstrate that law enforcement's actions were solely motivated by an intent to increase defendant's sentence rather than other legitimate investigatory purposes). The requirement of an improper motive is also implicitly included in many of the standards of misconduct. See, e.g., *United States v. Cannon*, 886 F. Supp. 705, 708 (D.N.D. 1995) ("The test of sentencing manipulation is whether the government conduct was outrageous and aimed only at increasing the sentence, or whether it served some legitimate law enforcement objective."), *rev'd on other grounds*, 88 F.3d 1495 (8th Cir. 1996).

<sup>69</sup> See, e.g., *Fontes*, 415 F.3d at 179-81 (finding no sentencing manipulation even though government agent admitted that he switched to crack cocaine versus powder cocaine in narcotics transaction in part to get a higher sentence); *United States v. Glover*, 153 F.3d 749, 756 (D.C. Cir. 1998) (stating that even if police had chosen a school zone location to increase

do not require an improper motive or omit a discussion of motive when applying the sentencing manipulation doctrine.<sup>70</sup>

A third functional difference in the application of the sentencing manipulation claim is the consideration of the defendant's predisposition to commit the offense conduct.<sup>71</sup> While theoretically only a consideration of the claim most commonly labeled "sentencing entrapment," some courts also consider a defendant's predisposition when deciding claims of "sentencing manipulation."<sup>72</sup> On the other hand, some courts affirmatively rule out the consideration of predisposition in sentencing manipulation claims.<sup>73</sup>

One or more of these three components—a requisite amount of police misconduct, the "legitimacy" of the police motive, and the predisposition of the defendant—arises either explicitly or implicitly in the sentencing manipulation claim as currently applied.<sup>74</sup> These elements are contained in some courts' accepted definitions of the claim yet are also found in the definitions of jurisdictions that have never found before them the facts justifying its application.<sup>75</sup>

More generally, a consistent animating theory underlying the sentencing manipulation claim and its application is missing from current doctrinal definitions. In order to engage in a meaningful critique of the current doctrine, it is necessary to first have an independent understanding of a normative theory justifying the claim.

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defendant's sentence, that is insufficient for defendant to prevail); *United States v. Shephard*, 102 F.3d 558, 168–69 (D.C. Cir. 1996) (reversing the district court's downward departure based on sentencing manipulation, despite the court's finding that the government agent switched to crack cocaine only to increase the defendant's sentence), *rev'g* 857 F. Supp. 105 (D.D.C. 1994); *United States v. Walls*, 70 F.3d 1323, 1329 (D.C. Cir. 1995) (finding no sentencing entrapment despite the undercover agent's testimony that he insisted on dealing in crack cocaine rather than powder in order to "get any target over the mandatory ten years").

<sup>70</sup> See, e.g., *United States v. Lora*, 129 F. Supp. 2d 77, 90 (D. Mass. 2001) (noting that downward departure due to price manipulation by the government focuses on government conduct regardless of motive).

<sup>71</sup> See *infra* text accompanying note 123 (defining legal term).

<sup>72</sup> See *United States v. DePierre*, 599 F.3d 25, 29 (1st Cir. 2010) (noting that predisposition sometimes comes into courts' consideration and rejection of sentencing manipulation claims); see also, e.g., *United States v. Lacey*, 86 F.3d 956, 966 (10th Cir. 1996) (evaluating defendant's sentencing manipulation claim but concluding that government conduct was not so egregious as to overcome the will of the defendant predisposed only to committing lesser crimes); *United States v. Brewster*, 1 F.3d 51, 55 (1st Cir. 1993) (defining a sentencing factor manipulation claim, in part, as government conduct which "overbear[s] the will of a person predisposed only to committing a lesser crime" (quoting *United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992))).

<sup>73</sup> See, e.g., *United States v. Shephard*, 4 F.3d 647, 649 (8th Cir. 1993) (stating that sentencing manipulation claim focuses on government agents' conduct and not defendants' predisposition).

<sup>74</sup> See *infra* Part II.B. (critiquing these three aspects of the sentencing manipulation doctrine).

<sup>75</sup> See, e.g., *United States v. Docampo*, 573 F.3d 1091, 1097–98 (11th Cir. 2009) (stating that the Eleventh Circuit has not yet accepted the doctrine of sentencing manipulation as it has never found "extraordinary misconduct").

Therefore, in the next Part, I explore the theoretical foundation of sentencing manipulation and suggest a theory grounded in notions of proportionality, culpability, and a defendant's volition to commit a crime.

## II. A CRITIQUE OF THE SENTENCING MANIPULATION DOCTRINE

The underlying premise of the sentencing manipulation doctrine as proposed here is the idea that an evaluation of a defendant's culpability is critically linked to an evaluation of the inducements used by the police and their agents. Two main principles explain this linkage. First, all other things being equal, an induced defendant is less culpable than a non-induced defendant.<sup>76</sup> Second, government inducements, specifically police inducements, are of particular concern to criminal law and the criminal justice system. In this Part, I attempt to justify both underlying principles. Justifying a reduction in sentence is not the analytical equivalent of concluding that a defendant does not deserve punishment.<sup>77</sup> The question is not whether the underlying criminal conviction is lawful, but rather whether there is reason to reduce the sentence due to the inducements used by undercover police or their agents. It is possible, of course, to simply decide that a defendant is always culpable for all conduct he committed.<sup>78</sup> I argue, however, that theoretical rationales of punishment, as well as systemic interests of the criminal justice system, justify both a sentencing manipulation doctrine focused on inducements and a reduction in sentence for some police-induced conduct.

### A. *Sentencing Manipulation Justified*

The foundational premise that induced defendants should be sentenced less severely than non-induced defendants is consistent with theoretical justifications of punishment and sentencing. Punishment that is proportional to an evaluation of an offender's blameworthiness

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<sup>76</sup> I recognize that not every "induced defendant" is the same nor has a similar degree of decreased culpability. As explored in detail in Part III, it is the type and extent of inducements used and the defendant's interactions with those inducements that determine whether there is an impact—and how much of an impact—on an assessment of the defendant's culpability. For simplicity's sake, however, I will proceed with this next discussion by generally contrasting induced defendants with non-induced defendants.

<sup>77</sup> Theoretical justifications for the excusal of criminal liability (and non-punishment) of *entrapped* defendants are therefore related and may overlap, but are not identical.

<sup>78</sup> In other words, one could equate culpability with legal guilt of the criminal offense. See Husak, *supra* note 12, at 459 (defining a narrow view of culpability as the required mental state in the offense as defined by the penal code).

squares with the general theory of retribution.<sup>79</sup> Although some retributivists argue that the harm caused by the offense should be a factor in determining a just punishment<sup>80</sup> (which technically would include offense conduct induced by the police), this consideration is arguably less relevant in undercover policing cases in which there is typically no actual victim or harm caused.<sup>81</sup> Moreover, sentencing offense conduct induced by the police runs counter to retribution theory's consideration of individual autonomy as a component of a just punishment.<sup>82</sup> That a defendant may have been motivated by police inducements and, due to those inducements, did not make a truly independent and volitional choice, contributes to an understanding of what a "deserved" punishment should be.<sup>83</sup> Thus, a sentence based on an evaluation of a defendant's culpability for particular offense conduct, which includes a consideration of police inducements, serves the general retributive goal of proportional and fair punishment.

A reduction of sentence based on induced offense conduct is also compatible with the consequentialist aims of incapacitation and deterrence. To achieve the goal of effective incapacitation of offenders,

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<sup>79</sup> See MICHAEL S. MOORE, *PLACING BLAME* 88 (1997) (stating that retributivists "are committed to the principle that punishment should be graded in proportion to desert"); Andrew von Hirsch, *Proportionate Sentences: A Desert Perspective*, in *PRINCIPLED SENTENCING* 115, 118 (Andrew von Hirsch et al. eds., 3d ed. 2009) (stating that modern desert theory centers on notions of proportionality); see also *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010) (stating that at "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender" (alteration in original) (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)) (internal quotation marks omitted)).

<sup>80</sup> See MOORE, *supra* note 79, at 194–96 (describing two views of retributivism, one that considers the harm of the offense as part of desert and one that does not).

<sup>81</sup> That is to say, since no actual harm is caused by police-induced conduct, harm cannot be an independent justification for punishment of police-induced conduct. See Jonathan C. Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 VA. L. REV. 1011, 1061–62 (1987) (stating that an encouraged act by the government is not a basis for punishment under retributive theory in part because there is no harm to societal or legal interests); cf. Jacqueline E. Ross, *Valuing Inside Knowledge: Police Infiltration as a Problem for the Law of Evidence*, 79 CHI.-KENT L. REV. 1111, 1118 (2004) (discussing German sentencing law which links punishment to "harms and risk of harms" and treats crimes involving undercover officers as "reducing the risk of harm").

<sup>82</sup> See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 181 (2d ed. 2008) (discussing the need to reconsider notions of responsibility and the voluntary nature of a criminal act); NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 154 (1988) (explaining that retributive justice is grounded in liberal notions of autonomy and free, informed choice); Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 320 (1996) ("[O]ne is culpable if he chooses to do wrong in circumstances when that choice is freely made.").

<sup>83</sup> See Carlson, *supra* note 81, at 1084 (stating that the use of encouragement to detect and punish suspects conflicts with requirements of personal autonomy); Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 LAW & PHIL. 17, 26 (1985) (stating that the use of temptations by police raises issues of "the overcoming of the will" and responsibility).

one must predict a defendant's likelihood of reoffending.<sup>84</sup> Similarly, specific deterrence—deterrence of the individual defendant—also incorporates a determination of the likelihood that the defendant will commit the crime again.<sup>85</sup> The critical inquiry is therefore the likelihood that the defendant will re-commit the crime for which he is currently being punished (and for which we are justifying punishment). In the case of sentencing induced conduct, the predictive question becomes: will the defendant commit the induced conduct again? To answer this, one must first ask, will the same criminal opportunity present itself again to the defendant? For crimes involving more excessive inducements and unrealistic temptations, the answer is likely to be no.<sup>86</sup> Because it is less likely that the defendant will recommit this conduct in the same way under the same circumstances, an incapacitation or specific deterrence rationale provides less justification for the punishment of induced conduct.<sup>87</sup>

There may be a general deterrence argument in favor of punishing induced conduct. Sentencing based on the objective of general deterrence is aimed at influencing the behavior of other potential offenders.<sup>88</sup> There may be some general deterrent benefit to punish all criminal conduct no matter the cause or circumstances of that conduct.<sup>89</sup> Questions remain, however, regarding the extent of this benefit and at what cost it is achieved, both in terms of the resources

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<sup>84</sup> See Andrew von Hirsch, *Introduction* to Chapter Three: Incapacitation, in *PRINCIPLED SENTENCING*, *supra* note 79, at 75, 75.

<sup>85</sup> See Julian V. Roberts & Andrew Ashworth, *Introduction* to Chapter 2: Deterrence, in *PRINCIPLED SENTENCING*, *supra* note 79, at 39, 40.

<sup>86</sup> As Professor Seidman stated:

If the inducement is unlikely to be replicated, then a defendant responding to it poses little danger, and the enforcement costs are largely wasted. If the inducement is unusually attractive, then the possibility of deterring those tempted to succumb is small, and the effort to deter them may again produce a less than optimal allocation of resources.

Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 142–43; see also Allen et al., *supra* note 25, at 415–16 (arguing that the fact that a suspect responded to below-market rate inducements renders an incapacitation justification meaningless); Hay, *supra* note 24, at 425 (suggesting that deterrence benefits require the police to offer realistic inducements); McAdams, *supra* note 34, at 163 (agreeing that, to a certain extent, no deterrence or incapacitation benefits are derived from punishing offenders who would not commit this offense again except in an undercover operation).

<sup>87</sup> In addition, studies of the effects of prison sentences suggest that more severe punishment does not result in lower rates of criminality for the individual being punished. Tom R. Tyler & Jonathan Jackson, *Future Challenges in the Study of Legitimacy and Criminal Justice 2* (Yale Law Sch. Pub. Law Working Paper No. 264, 2012), available at <http://ssrn.com/abstract=2141322>.

<sup>88</sup> See Roberts & Ashworth, *supra* note 85, at 40.

<sup>89</sup> See Carlson, *supra* note 81, at 1068–69 (detailing deterrence-focused arguments in favor of punishing government-encouraged crimes such as increasing the perception of the prosecution of victimless crimes).

used in carrying out the punishment and the diversion of resources from the punishment of other crimes.<sup>90</sup> In addition, in the context of justifying the sentencing of induced conduct, the efficacy of *lengthening* sentences as a mechanism for the deterrence of others, as well as the general deterrent effect of undercover operations that use unrealistic inducements, raises questions regarding the extent of any benefit gained.<sup>91</sup>

The premise that induced defendants should be sentenced less severely than non-induced defendants is also directly supported by the systemic goal of identifying less blameworthy defendants and mitigating their sentences accordingly. It is a long-standing principle of criminal sentencing that an offender's blameworthiness dictates, at least to some extent, the severity of the punishment.<sup>92</sup> Through its focus on a defendant's culpability, the sentencing manipulation doctrine recognizes that there are gradations of blameworthiness that can, and should, be accounted for in sentencing.<sup>93</sup>

The theories considered here—retribution, deterrence, and incapacitation<sup>94</sup>—as well as the systemic interest in identifying those who are deemed less blameworthy, are reflected in Congress's instructions to judges on what to take into account in sentencing.<sup>95</sup> As

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<sup>90</sup> See McAdams, *supra* note 34, at 158 (discussing how there is "far less deterrence or incapacitation" in punishing probabilistic offenders); Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1173 (2004) (discussing failures of deterrent theory studies to consider other effects of criminal laws including substitution of other crimes and other normative reasons why a person may be deterred from breaking the law); Gideon Yaffe, "The Government Beguiled Me": *The Entrapment Defense and the Problem of Private Entrapment*, 1 J. ETHICS & SOC. PHIL. 2, 10 (2005) ("Deterrent pressures are a societal cost; they should be exerted only if by doing so crime rates can be substantially reduced.").

<sup>91</sup> See Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13, 14 (2011) (discussing empirical finding of a marginal deterrence impact, at most, of increasing already lengthy prison sentences); Gary T. Marx, *Police Undercover Work: Ethical Deception or Deceptive Ethics?*, in POLICE ETHICS: HARD CHOICES IN LAW ENFORCEMENT 83, 84 (William C. Heffernan & Timothy Stroup eds., 1985) [hereinafter Marx, *Police Undercover Work*] (describing research on effectiveness of undercover tactics as limited but not suggesting a deterrent effect).

<sup>92</sup> See *Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct . . . the more severely it ought to be punished.").

<sup>93</sup> Cf. Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G REP. 121, 122 (1994) ("Culpability doctrines do more than separate the innocent from the guilty. They mediate between the individual and society, ensuring that a complex web of legal commands and protections operates effectively and in a properly nuanced fashion.").

<sup>94</sup> Rehabilitation is a fourth theoretical justification for punishment. See Andrew Ashworth, *Introduction to Chapter One: Rehabilitation*, in PRINCIPLED SENTENCING, *supra* note 79, at 1. It is difficult to suggest a rehabilitative goal that would be served by *increasing* a sentence based on conduct a defendant only committed due to excessive inducements by the police.

<sup>95</sup> See 18 U.S.C. § 3553(a) (2006) (outlining sentencing considerations, including "to provide just punishment for the offense," "to afford adequate deterrence," and "to protect the public from further crimes of the defendant").

the Ninth Circuit recognized, a defendant who committed certain aspects of the crime due to excessive inducements by the police is “both less morally blameworthy than an enthusiastic [defendant] and less likely to commit other crimes if not incarcerated.”<sup>96</sup> These factors—“protection of the public” and “characteristics particular to the defendant’s culpability”—are of central concern in the sentencing calculus.<sup>97</sup>

The second foundational premise of the sentencing manipulation doctrine is the idea that police inducements are of specific concern to the criminal justice system and its jurisprudence. Our unease could be based solely on the use of inducements and their impact on a defendant’s culpability, and therefore one could argue that a doctrine (whether at trial or sentencing) should apply to inducements used by private individuals as well as the police.<sup>98</sup> But inducements used by the police or their agents raise unique concerns germane to the interests of the criminal justice system. Undercover operations that induce particular offense conduct raise the specter that the government is in effect “creating” crime. Would the crime have occurred if the police had not encouraged it? There is also the risk of “crime amplification”—the occurrence of unintended subsequent crimes as a result of the initial government-aided opportunity.<sup>99</sup> The potential for undercover operations to possibly increase crime provokes an important conversation regarding the use of limited law enforcement resources.<sup>100</sup>

The use of extensive police inducements also has potential negative implications for the social legitimacy of law enforcement. If the police

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<sup>96</sup> *United States v. McClelland*, 72 F.3d 717, 726 (9th Cir. 1995) (alteration in original) (quoting *United States v. Garza-Juarez*, 992 F.2d 896, 913 n.1 (1993)).

<sup>97</sup> *Id.*; see also 18 U.S.C. § 3553(a). These factors are also included in state sentencing schemes. See, e.g., IND. CODE § 35-38-1-7.1 (2012); *People v. Farrar*, 419 N.E.2d 864, 865 (N.Y. 1981) (“The determination of an appropriate sentence requires . . . due consideration given to . . . the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence.”).

<sup>98</sup> See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 237 (1982) (noting that if the focus of the entrapment defense was solely on inducements that render a defendant blameless then it should apply to private actor inducers as well). One possible response is that a criminal law doctrine is more effective in shaping the strategic decision-making of the system’s own actors (i.e., the police) as opposed to affecting third party behavior. In addition, inducements by private actors are punished—and therefore to some extent deterred—through other substantive criminal laws (e.g., accomplice and conspiracy liability and solicitation offenses). See McAdams, *supra* note 34, at 166. Furthermore, the argument that the sentencing manipulation doctrine should be limited to police inducements does not prohibit the broader argument that all inducements should be taken into account in determining a defendant’s culpability and sentence.

<sup>99</sup> For example, one unintended consequence would be the continued support of black markets that produce more crime. See GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 126–27 (1988); Joh, *supra* note 1, at 165.

<sup>100</sup> See Marx, *Who Really Gets Stung*, *supra* note 1, at 172 (stating that the use of “temptation” in undercover operations raises concerns of “the questionable fairness of such a technique, and whether scarce resources ought to be used to pose temptation”).

are—to state colloquially—“going out of their way” to induce a crime or particular criminal conduct, such action may well injure the public’s perception of the police as moral and fair actors.<sup>101</sup> The governmental creation of crime in order to punish that crime has the potential to butt up against our collective notions of fairness as well as raise ethical questions regarding the role of undercover police officers.<sup>102</sup> This in turn may impact the public’s confidence in the police and their level of cooperation with the police, particularly in communities with historically troubled relationships between citizens and law enforcement.<sup>103</sup> These potential consequences of the use of inducements by the police should be of concern to the criminal justice system, a system that relies heavily on public participation, assistance, and trust.<sup>104</sup>

In sum, a sentencing manipulation doctrine focused on police inducements and their impact on a defendant’s culpability is justified by both sentencing considerations for the individual defendant and systemic interests in promoting the legitimacy of law enforcement. A sentencing mitigation theory such as this one enables a nuanced evaluation of moral blameworthiness and simultaneously serves as a disincentive for police conduct that potentially results in a loss of public support.

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<sup>101</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 74 (2006) (summarizing studies as showing that “citizens evaluate the actions of legal and political authorities based on how fair the outcomes are for themselves and others”); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 263–64 (2008) (presenting study findings showing that people are more willing to cooperate with the police if they view the police as legitimate, and that legitimacy stems in part from people’s judgments about “the fairness by which the police exercise their authority”).

<sup>102</sup> See Marx, *Police Undercover Work*, *supra* note 91, at 107 (“In general terms, an undercover operation may offer an ethical approach, while particular aspects of it may be unethical.”); *cf.* Robinson, *supra* note 98, at 237 (noting that the entrapment defense is based in part on “an estoppel notion that it is unfair to permit the entity that has entrapped to also prosecute and punish”). For example, is it “fair” for the police to deliberately place undercover operations in a school zone, a locale in which Congress and state legislatures have—through sentencing enhancement statutes—purposefully tried to prevent and discourage crimes from occurring, and then request those same sentencing enhancements at a defendant’s sentencing? See *infra* Part III.B.3.d (discussing school zone cases).

<sup>103</sup> See JOHN KLEINIG, *THE ETHICS OF POLICING* 137 (1996) (discussing social costs of police deception such as loss of trust in government officials); Leo & Skolnick, *supra* note 2, at 9 (arguing that police deception undermines public confidence, cooperation, and belief in law enforcement’s veracity, “especially in the second America”); Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 95–96 (2004) (stating that people’s beliefs regarding the legitimacy of law enforcement impact their cooperation with the police and citing studies that document distrust of the police and racial differences within those levels of distrust).

<sup>104</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 916–17 (2006) (describing need for public participation in criminal justice system); Tyler & Fagan, *supra* note 101, at 233 (stating that police rely on public cooperation, both in obeying the law and working with the police to combat crime). Concerns regarding the legitimacy of police inducements also speak to the larger debate over the use of deception generally by law enforcement.

## B. Sentencing Manipulation Critiqued

This Section evaluates the sentencing manipulation doctrine as currently defined and applied. This critique is now grounded in theoretical justifications for a sentencing manipulation doctrine and in the understanding that the use of inducements may influence an assessment of a defendant's culpability at sentencing. An examination in this light illuminates the problematic aspects of the three doctrinal components previously highlighted: the focus on a particular amount of police misconduct, the requirement of an improper government motive, and the consideration of the defendant's predisposition.<sup>105</sup>

### 1. The Requisite Police Conduct

As noted earlier, there is no clear understanding of "how much" police misconduct is required to prevail on a sentencing manipulation claim. While there is certainly a doctrinal role for the consideration of the nature of the police conduct, the "level" of misconduct required is frequently an undefined and, in effect, impossibly high standard to meet.<sup>106</sup> In some jurisdictions, it is the exact same standard as required to bar prosecution under an "outrageous government conduct" trial phase claim.<sup>107</sup> This high prerequisite of governmental malfeasance helps explain why many courts have never ruled in favor of a defendant in a sentencing manipulation claim or even taken the opportunity to decide whether or not they recognize the doctrine in theory.<sup>108</sup>

As a preliminary matter, using the exact same standard as a due process-based trial phase claim makes no analytical sense. The same "amount" of police misconduct that bars prosecution under the due process clause should not be the same as required for a claim that merely asks for a reduction of sentence.<sup>109</sup> Clearly, if that standard of

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<sup>105</sup> For the sake of clarity—and mindful of the goal of a uniform, reformulated doctrine—the remainder of the Article will refer to the claim of "sentencing manipulation" as encompassing all of the cited variations and as the normative label of a reformed doctrine.

<sup>106</sup> See *supra* text accompanying notes 30–67.

<sup>107</sup> See *supra* note 64.

<sup>108</sup> See, e.g., *United States v. Jones*, 18 F.3d 1145, 1153–54 (4th Cir. 1994) (stating that sentencing manipulation requires "outrageous government conduct" and that the court has not yet accepted the legal viability of the claim because it has never found the requisite facts); see also *supra* note 75.

<sup>109</sup> See *Jones*, 18 F.3d at 1154 (noting the court's "skepticism as to whether the government could ever engage in conduct not outrageous enough so as to violate due process to an extent warranting dismissal of the government's prosecution, yet outrageous enough to offend due process to an extent warranting a downward departure with respect to a defendant's sentencing"); *State v. Steadman*, 827 So. 2d 1022, 1025 (Fla. Dist. Ct. App. 2002) (stating that to require a showing of "outrageous conduct" essentially rejects the principle of sentencing manipulation entirely because such a showing would amount to a complete defense).

police conduct was met, the defendant would prefer a dismissal of the charges against him. Similarly, the “amount” of police misconduct needed to prevail on the trial phase defense of entrapment—sufficient to induce an innocent person to commit the crime—is more than what should be required to justify a decrease in sentence given that the same “amount” would also potentially result in an acquittal.

Sentencing manipulation’s roots in the trial phase doctrines of entrapment and outrageous government conduct explain but do not justify courts’ insistence on an undefined high level of government misconduct. With respect to the trial phase claims, it is understandable that an extraordinary level of misconduct would be required in order to justify the bright-line and extreme results that these claims permit (i.e. dismissal or acquittal). Entrapment and outrageous government conduct are each “an all-or-nothing doctrine, allowing no subtlety or gradation in the analysis of government behavior or its effect.”<sup>110</sup> A sentencing doctrine, by contrast, allows a graded assessment of both police conduct and its impact on a defendant’s culpability.<sup>111</sup>

In addition, the requirement of a specific *quantity* of police misconduct is itself somewhat misleading. The focus of the claim with respect to police conduct is police inducements that are used to such an extent, or are of such an excessive nature, that they have the effect of pressuring and persuading the defendant to commit particular offense conduct. As is explored further in Part III, there is no “magic number” that would permit a judge to decide that the inducements went so far as to affect a determination of the defendant’s relative blameworthiness as compared to offenders not subject to such government encouragement. An assessment of the inducements and their effect on the suspect’s actions requires a more qualitative—rather than quantitative—evaluation than a standard requiring a particular level of police misconduct suggests.

## 2. The Government Motive

The requirement of an improper motive by the police is a related and equally problematic aspect of the current definitions of sentencing manipulation.<sup>112</sup> In many jurisdictions, a defendant must demonstrate

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<sup>110</sup> MILLER & WRIGHT, *supra* note 32, at 1395; *see also* Ross, *supra* note 81, at 1127, 1144 (stating that the entrapment defense and outrageous government conduct claim focus “only on extreme cases” with “inordinate inducements”).

<sup>111</sup> *See, e.g.*, United States v. Briggs, 397 F. App’x 329, 332–33 (9th Cir. 2010) (affirming denial of defendant’s outrageous government conduct motion but also affirming downward departure in sentence based on overstatement of culpability concerns).

<sup>112</sup> The argument that the subjective police motive should not guide a court’s inquiry parallels the Supreme Court’s position that an officer’s motive—even a pretextual one—is

that the sole intent of, and justification for, the police tactics was to increase the defendant's sentence.<sup>113</sup>

This requirement is hard to square with the realities of law enforcement practice. While it is likely that most police officers know that offering crack cocaine instead of powder cocaine will increase a suspect's eventual sentence, it is also likely that officers will simultaneously have "legitimate" law enforcement reasons for their operational decisions.<sup>114</sup> Legitimate law enforcement justifications for police conduct include: to identify other players or coconspirators in the criminal enterprise,<sup>115</sup> to seize additional narcotics,<sup>116</sup> and to ensure they have sufficient evidence to convict a suspect in court.<sup>117</sup> Broad justifications like "test[ing] the scope of a drug dealer's criminal activities"<sup>118</sup> and law enforcement's "responsibility to enforce the criminal laws of this country"<sup>119</sup> justify almost all imaginable police conduct.<sup>120</sup> Moreover, courts are generally very reluctant to intrude on law enforcement and their investigatory methods.<sup>121</sup> In short, it is a rare

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irrelevant in a search and seizure analysis under the Fourth Amendment. *See* *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080–81 (2011) (stating that, in general, the subjective motivations of government officials are irrelevant, and stating "we have almost uniformly rejected invitations to probe subjective intent"); *Whren v. United States*, 517 U.S. 806, 812–13 (1996) (explaining precedent holding that the actual motivations of police officers are not part of the reasonableness analysis).

<sup>113</sup> *See supra* notes 68–69.

<sup>114</sup> *See, e.g., United States v. Torres*, 563 F.3d 731, 735 (8th Cir. 2009) (describing police officer's testimony that they did not arrest the defendant after the first narcotics buy because they were "[t]rying to build a bigger case" and because repeat buys were necessary to build the defendant's trust and identify coconspirators).

More cynically, it is also possible that police officers will be able to easily state a legitimate reason even if the tactic was actually undertaken at the time for the sole purpose of exposing the suspect to a higher mandatory sentence. On the Florida Department of Law Enforcement's website, in a post discussing a recent court case in which a judge granted a downward departure based on sentencing manipulation, the Regional Legal Advisor wrote: "NOTE: If you make the decision not to immediately arrest the defendant and he engages in further illegal activity, be prepared to convince the judge that you did so for a reason other than simply attempting to increase the sentence." Steve Brady, *02-14: Police Engaging in Sentence Manipulation*, FLA. DEP'T OF LAW ENFORCEMENT (Sept. 13, 2002), <http://www.fdle.state.fl.us/Content/getdoc/2839a6fd-d13c-4c47-8178-97f9d7ccfb04/02-14---Police-Engaging-in-Sentence-Manipulation.aspx>.

<sup>115</sup> *United States v. Calva*, 979 F.2d 119, 123 (8th Cir. 1992).

<sup>116</sup> *United States v. Flores-Martinez*, No. 92-30253, 1993 WL 366586, at \*2 (9th Cir. Sept. 20, 1993).

<sup>117</sup> *United States v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995).

<sup>118</sup> *United States v. Floyd*, 375 F. App'x 88, 90 (2d Cir. 2010); *see also United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992) ("[A] well-constructed sting is often sculpted to test the limits of the target's criminal inclinations").

<sup>119</sup> *United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994).

<sup>120</sup> *Cf. United States v. Glover*, 153 F.3d 749, 756 (D.C. Cir. 1998) (opining that the police did not appear to have "much motive" to place the narcotics transaction in a school zone in order to mandate an increased sentence because the defendant had previously served longer prison terms).

<sup>121</sup> *See* *Harmon*, *supra* note 11, at 776 (stating that courts are deferential to the police in part

occasion when a police officer will not be able to state a “proper” police motive, thus essentially resulting in a blanket denial of all sentencing manipulation claims.

Like a requisite quantity of police misconduct, the requirement of an improper police motive is rooted in the trial phase claims’ focus on egregious, outrageous, or excessive police conduct. The notion of police impropriety is inherent in a discussion of both entrapment and outrageous government conduct. In the context of a sentencing manipulation claim, a focus on the motivation behind police conduct is similarly understandable—even implied by the very name of the claim itself. Moreover, we have an interest in prohibiting, or at least disincentivizing, certain types of police conduct.

But in the context of a sentencing claim, the *requirement* of an improper motive ignores the needed link between the police conduct and the justification for a reduction in sentence. Regardless of whether police officers are explicitly making strategic choices based on sentencing laws (and the desire to increase a suspect’s sentence), the motivation for the law enforcement conduct or the inducements used may or may not be relevant from the perspective of assessing the defendant’s culpability. As will be demonstrated in Part III, not all police conduct that affects a defendant’s sentence also impacts an evaluation of the defendant’s culpability. There are cases in which the police deliberately choose an amount of narcotics or the value of a soon-to-be-stolen item in order to increase the ultimate sentence (in other words, they have an “improper” motive), but such police conduct—due to a lack of inducements used—does not impact an evaluation of the defendant’s culpability. Evidence of the *lack* of a legitimate law enforcement motive may serve as a red flag that excessive inducements were used.<sup>122</sup> But the converse may or may not be true—the presence of

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due to recognition of limited institutional competence); Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 512 (2007) (noting the minor role of the judiciary in regulating policing other than the entrapment defense); *see also Jones*, 18 F.3d at 1155 (declining to impose a rule that would “unnecessarily and unfairly restrict the discretion and judgment of investigators and prosecutors”); *United States v. Calva*, 979 F.2d 119, 123 (8th Cir. 1992) (“Police must be given sufficient leeway to construct cases built on evidence that proves guilt beyond a reasonable doubt.”).

<sup>122</sup> For example, in *United States v. Cannon*, the district court found that there was no legitimate law enforcement justification for the operational decision to introduce a machine gun into the transaction other than to increase the defendant’s sentence by twenty-five years. *See* 886 F. Supp. 705, 708 (D.N.D. 1995), *rev’d on other grounds*, 88 F.3d 1495 (8th Cir. 1996). Similarly, in *United States v. Berg*, the government provided the defendant with the necessary amount of a precursor chemical needed to manufacture methamphetamine in order to ensure the maximum possible penalty. 178 F.3d 976 (8th Cir. 1999). The dissenting judge opined that there was no legitimate government justification for the provision of this particular amount. *Id.* at 985–86 (Bright, J., dissenting). However, given that these examples come from an overruled

a proper motive does not necessarily mean that the defendant should be sentenced on the basis of all offense conduct committed. The presence of a proper motive, as well as the presence of an improper motive, does not on its own dictate the impact of the police conduct on an assessment of the defendant's culpability. The doctrinal requirement of proof of an improper motive virtually ensures that a defendant will not prevail on his claim and misguides the court's appropriate focus on the reasons for, and the context of, the defendant's actions.

### 3. The Defendant's Predisposition

Clearly rooted in the trial phase entrapment defense, the explicit or implicit consideration of a defendant's predisposition to commit the offense conduct is a third problematic aspect of the current application of the sentencing manipulation claim. A defendant's predisposition is generally defined in the legal context as his "state of mind and inclinations before his initial exposure to government agents."<sup>123</sup>

In the context of the entrapment defense, determining whether a defendant was predisposed to commit the crime is notoriously difficult.<sup>124</sup> Indeed, the notion that a lack of predisposition can be demonstrated in a criminal case is perhaps itself nonsensical.<sup>125</sup> But, in the context of a sentencing claim, the consideration of a defendant's predisposition is even more analytically incongruous.

The very concept of predisposition differentiates between a guilty criminal and an "unwary innocent."<sup>126</sup> While this stark division may be

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opinion and a judge in dissent, in practice, a court may seldom find an illegitimate or improper law enforcement motive.

<sup>123</sup> United States v. Kaminski, 703 F.2d 1004, 1008 (7th Cir. 1983) (emphasis omitted) (quoting U.S. v. Janotti, 501 F. Supp. 2d 1182, 1191 (E.D. Pa. 1980)) (internal quotations marks omitted); see also BLACK'S LAW DICTIONARY 1297 (9th ed. 2009) (defining predisposition as "[a] person's inclination to engage in a particular activity; esp., an inclination that vitiates a criminal defendant's claim of entrapment").

<sup>124</sup> See MARCUS, *supra* note 30, § 4.05, at 127 (stating that the "predisposition" element of the entrapment defense has been the chief source of litigation); Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 833-34 (2004) (discussing courts' difficulty in applying factors to determine a defendant's predisposition).

<sup>125</sup> See Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1581 (1982) ("[T]he defendant is said to be predisposed because he committed the act, and then is held responsible for the act because he was predisposed."); see also Allen et al., *supra* note 25, at 413-14 (arguing that "predisposition" cannot meaningfully distinguish between innocent and guilty as every defendant is predisposed to a certain extent to commit the crime they are charged with having committed); Carlson, *supra* note 81, at 1040 ("Predisposition, on its own, is thus an almost meaningless concept. By their very actions, all entrapped defendants show their willingness to engage in crime under certain circumstances.").

<sup>126</sup> United States v. Russell, 411 U.S. 423, 429 (1973); see also Gershman, *supra* note 125, at 1582 (stating that the concept of predisposition divides society into two distinct classes of unwary innocents and corrupt criminals, but "[h]uman nature...is not so neatly categorized").

appropriate for a trial phase claim, in the sentencing context it makes little sense. At sentencing, it is inherent that the defendant is predisposed to commit some offense—he was, in fact, found guilty or admitted his guilt of some crime. Moreover, the question of a defendant's predisposition operates as a complete yes or no question—was the defendant ready and willing to commit the crime? At sentencing, however, the question should be a more nuanced question of “how willing was the defendant” or “how willing to do what?” The bare dichotomy of guilt versus innocence forced by the consideration of predisposition is not appropriate at sentencing, a context that necessarily focuses on degrees and gradations of culpability and blameworthiness.

In theory, a sentencing manipulation claim asks the judge to take a scaled approach to predisposition. The judge asks not whether a person went from an innocent to a criminal, but rather whether a defendant transformed from a criminal in one way to a criminal in another way. For instance, was the defendant predisposed only to deal in small quantities of drugs or only in powder cocaine rather than crack cocaine?<sup>127</sup> In practice, however, the concept of grades of predisposition rarely carries any analytical weight. For example, the Court of Appeals for the D.C. Circuit, upon considering a sentencing entrapment claim, stated that “[p]ersons ready, willing and able to deal drugs—persons like [the defendants]—could hardly be described as innocents.”<sup>128</sup> By incorporating the same legal term, “predisposition,” into the sentencing claim definition, the vestiges of the concept from the trial phase remain and judges stay trapped in the guilt-innocence dichotomy.<sup>129</sup>

Objections in application aside, the consideration of a defendant's predisposition during sentencing effectively shifts the analytical focus away from an examination of police conduct and its impact on a defendant's culpability.<sup>130</sup> As Judge Posner points out, determining

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<sup>127</sup> See, e.g., *United States v. Shepherd*, 102 F.3d 558, 567 (D.C. Cir. 1996) (noting defendant's arguments that he was predisposed to deal in powder cocaine and that government agents improperly encouraged him to switch to crack cocaine).

<sup>128</sup> *United States v. Walls*, 70 F.3d 1323, 1329 (D.C. Cir. 1995) (stating that the fact that defendants were predisposed to dealing in powder cocaine necessarily means they were predisposed to dealing in crack cocaine as well).

<sup>129</sup> See Eric P. Berlin, *Reducing Harm as a Determinative Factor: The Hidden Problem with Sentencing Entrapment*, 7 FED. SENT'G REP. 186, 187 (1995) (noting that courts are reluctant to find sentencing entrapment because offenders who make the claim “have admittedly demonstrated a predisposition to engage in some crime”); see also, e.g., *United States v. Franco*, 826 F. Supp. 1168, 1170–71 (N.D. Ill. 1993) (finding that the fact that defendant only previously dealt in small quantities was not evidence of lack of predisposition for large quantity sale but rather simply evidence that defendant did not previously have enough money for such a sale).

<sup>130</sup> This critique also holds true for a critique of predisposition within the entrapment doctrine. See Joh, *supra* note 1, at 172 (discussing how consideration of predisposition in the entrapment claim has allowed courts to fail to define what is permissible undercover police conduct).

whether someone is predisposed to commit the crime is asking whether “it is likely that the defendant would have committed the crime anyway” even without the participation of government agents.<sup>131</sup> Consequently, a determination of predisposition relies largely on evidence of a defendant’s prior criminal record and past “bad acts” in order to shed light on the defendant’s subjective intent and willingness during the crime itself.<sup>132</sup> This focus on the past conduct of the defendant—and the hypothetical of what the defendant might have done absent the police participation—renders moot the consideration of police inducements used in the actual transaction.<sup>133</sup>

For the sake of argument, imagine a suspect who previously dealt in crack cocaine. He was caught, prosecuted, and served substantial prison time. After his release, he returned to the drug trade but this time made the conscious decision to buy and sell only small amounts of powder cocaine, knowing he would face less serious penalties if caught again. One day, the suspect is approached by an undercover officer, who first offers to sell him an amount of crack cocaine at half the market rate. The suspect declines, but after much encouragement and even some veiled threats to complete the sale, eventually agrees. In this scenario, a consideration of predisposition would clearly result in a finding that the suspect was predisposed to buy crack cocaine. By focusing on whether the defendant would have done the crime, even without the police involvement, the police inducements that were actually used are rendered irrelevant.<sup>134</sup> This irrelevance runs counter to the focus of a normative sentencing manipulation doctrine—a focus on police inducements, and the defendant’s responses to those inducements, during the offense transaction itself.

It is important to recognize that a suspect’s *disposition* will clearly influence his own conduct during a criminal offense, including his

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<sup>131</sup> United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring).

<sup>132</sup> See Bennett, *supra* note 30, at 844–45 (describing factors to determine whether a defendant was predisposed).

<sup>133</sup> See Carlson, *supra* note 81, at 1039 (discussing how the predisposition test permits the government to use even extreme inducements against suspects generally considered to be criminal); McAdams, *supra* note 34, at 118 (noting that predisposed suspects do not merit the entrapment defense “regardless of the strength of the government inducement”); see also, e.g., United States v. Fontes, 415 F.3d 174, 179–81 (1st Cir. 2005) (finding no sentencing manipulation because defendant was predisposed to dealing in crack cocaine even though the government agent admitted during evidentiary hearing that he switched to crack cocaine in part to get a higher sentence); United States v. Glover, 153 F.3d 749, 756 (D.C. Cir. 1998) (stating that even if the government had purposefully chosen to do the drug transaction in a school zone just to increase defendant’s sentence, defendant would still need to show he was not predisposed).

<sup>134</sup> In this hypothetical, the consideration of the defendant’s predisposition effectively overrides an inducement the United States Sentencing Commission itself has found problematic. See *infra* text accompanying note 146 (describing an acceptable reduction in sentence if the Government uses a below-market rate purchase price).

reactions to any police inducements.<sup>135</sup> In this way, the consequences of a suspect's predisposition—that is, the current effects of a defendant's past conduct as observed in the current transaction—will be part of the evaluation of a sentencing manipulation claim. But as illustrated by the hypothetical, the inclusion of "predisposition" as a doctrinal component prohibits a graded assessment of a defendant's culpability for the offense conduct committed with the participation of the undercover officer. The normative sentencing manipulation doctrine includes "precisely those who *are* predisposed but who are then pressured unduly by the government to go forward with the offense."<sup>136</sup> The focus should therefore remain strictly on the relationship between the police inducements and a defendant's blameworthiness for the offense conduct at issue at sentencing. The consideration of the defendant's predisposition impedes such a focus, both practically and analytically.

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The disorder of the sentencing manipulation doctrine ranges from the labels used to the definitions given and elements applied. A lack of understanding of the theoretical justifications for the doctrine itself and of the specific context of a claim made at sentencing enables remnants of the entrapment defense and the claim of outrageous government conduct to remain entangled in the sentencing manipulation doctrine. These aspects of the trial phase claims are analytically inapposite for a claim raised at the time of sentencing. Moreover, they prohibit a meaningful analysis of undercover police conduct and the impact such conduct has on an assessment of a defendant's culpability.

### III. A REFORMULATED SENTENCING MANIPULATION DOCTRINE

The range of undercover police conduct is vast and diverse. From multi-year operations to a single drug sale, undercover police officers and their agents undertake a wide variety of actions in the name of catching criminals. Within each police tactic, be it setting up a crime with a single question or the development of a relationship with a

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<sup>135</sup> As part of assessing the degree of culpability for *current* offense conduct, a defendant's past criminal history is largely irrelevant. Certainly a defendant's criminal history plays a part in sentencing. But the consideration of criminal history is a separate and independent sentencing factor rather than a component of assessing culpability for the committed offense conduct.

<sup>136</sup> *United States v. McClelland*, 72 F.3d 717, 725 (9th Cir. 1995) (holding that a defendant is eligible for a downward departure based on "imperfect entrapment" even if jury rejected trial phase entrapment defense).

suspect over time, undercover officers make myriad decisions that ultimately affect a defendant's sentence. An undercover officer insisting on buying pure methamphetamine rather than a mixture; an informant convincing a suspect to take two stolen televisions instead of one; a police department ensuring a bicycle left by the side of the road for someone to steal has a particular monetary value—all of these decisions will impact the sentence of the defendant.<sup>137</sup>

The doctrine of “sentencing manipulation” *could* be seen as broadly encompassing all of the police conduct described above—that is, any police conduct that “manipulates” or affects a defendant's sentence. One difficulty with such a definition, however, is that, as exemplified above, almost every tactical decision made by undercover police officers will impact the defendant's eventual sentence. More significantly, such an expansive definition is missing an analytical link between the police conduct at issue and the purpose of the sentencing manipulation claim—to ask for (and to merit) a shorter sentence. Stated differently, a definition that includes all police conduct that ultimately impacts a defendant's sentence contains no underlying justification as to why that particular police conduct justifies a *reduction* in a defendant's sentence.

In this Part, I first propose a reformulated sentencing manipulation doctrine focused on the use of police inducements and their potential impact on an assessment of a defendant's culpability. I then evaluate the undercover police conduct at issue in these claims, including the inducements used, and suggest guidelines for the application of my proposed doctrinal inquiry.

#### A. *Sentencing Manipulation Reformulated*

As evidenced by the current state of the doctrine, it is no easy task to define “sentencing manipulation” or prescribe its application. It is perhaps simpler to start with what should not be retained from current doctrine. The term “sentencing entrapment” must be abandoned, along with other vestiges of the related trial phase doctrines, including the requirement of a high standard of police impropriety or illegitimate

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<sup>137</sup> In the first hypothetical, a defendant will face a higher mandatory minimum sentence for a transaction involving pure methamphetamine. See USSG § 2D1.1(c)(4). In the second hypothetical, the defendant could be charged with a misdemeanor for taking one television but might be charged with a felony for taking two. See, e.g., VA. CODE ANN. § 18.2-108.01(A) (2012) (stating theft of property with a value of \$200 or more with the intent to sell such property is a felony and “the larceny of more than one item of the same product is prima facie evidence of intent to sell”). Similarly, the suspect in the third example may face a felony theft charge if the value of the bicycle is over a certain monetary amount. See, e.g., ALA. CODE § 13A-8-4 to -5 (2012) (establishing a misdemeanor for theft of property valuing less than \$500 and a felony for property over \$500).

motive and the consideration of a defendant's predisposition.<sup>138</sup> For the sake of simplicity, the label of "sentencing manipulation" should encompass all claims that assert that a defendant merits a reduction in sentence due to police inducements. The sentencing manipulation doctrine should remain firmly rooted in the goals of accurate sentencing and a nuanced view of offender blameworthiness. As such, it must be grounded at the intersection of police inducements and defendant culpability.

My proposed definition of sentencing manipulation is as follows: sentencing manipulation occurs when the inducements used by the police or their agents result in the overstatement of a defendant's culpability and, consequently, an excessive and unjustified prison sentence. Accepting this recommended definition for the sake of argument, the question then becomes how should courts evaluate allegations of police inducements of this sort—in other words, how should courts determine when a defendant's culpability is in fact "overstated."

### 1. A Bright-Line Rule

One possible solution is to create a bright-line rule regarding the type of undercover tactic itself, rather than an inquiry into the nature of the inducements used within that tactic.<sup>139</sup> Such a proposal could look at the tactics most likely to contain excessive police inducements and prohibit those tactics generally.<sup>140</sup> Although a tactic-focused rule would clearly be over inclusive (as the use of a particular tactic does not always involve the use of problematic inducements), the cost is potentially balanced by the clarity of a bright-line rule and the avoidance of a more fact-intensive and case-by-case judicial analysis of the inducements used.

Courts, however, are typically reluctant to dictate the exact boundaries of law enforcement practices.<sup>141</sup> Furthermore, given the

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<sup>138</sup> Because the claim of "sentencing entrapment" typically includes a requirement that the defendant demonstrate a lack of predisposition—a doctrinal component I disagree with, *see supra* Part II.B.3—I therefore reject the label and underlying definition and suggest keeping "sentencing manipulation" as the name of the reformulated claim.

<sup>139</sup> I use the term "tactic" to refer to the general type of police operation (e.g., reverse sting or "buy and bust") whereas "inducements" are transactional terms, incentives, statements, or temptations that are components of all types of police operations.

<sup>140</sup> For example, a rule could prohibit the reverse sting tactic. *See infra* Part III.B.3 (detailing reverse sting operations and other tactics likely to contain excessive inducements).

<sup>141</sup> *See* *United States v. Russell*, 411 U.S. 423, 435 (1973) (refuting the notion that the judicial branch has authority to dismiss law enforcement practices of which it does not approve); *see also* sources cited *supra* note 121. It is interesting to note that this reluctance is a particularly American way of viewing policing. Western Europe generally has a much narrower view of permissible undercover policing tactics. For instance, the reverse sting tactic is not permitted by

possible lack of connection between the police tactic and an assessment of the defendant's culpability, it is arguably not appropriate to broadly prohibit specific police practices within the context of a sentencing mitigation claim.<sup>142</sup>

## 2. A Guided Inquiry

Another approach to the sentencing manipulation doctrine is to view the claim as a guided inquiry into the use of inducements by the police or their agents and the defendant's responses to those inducements. An inducement-focused approach is one that states that a reduction in sentence may be warranted when police inducements are used to such an extent that the offense conduct committed due to those inducements results in a sentence that does not accurately reflect the relative culpability of the defendant.<sup>143</sup> An evaluation of the inducements used is necessarily fact based and case specific, and involves an examination of the interaction between the undercover officer and the defendant, the individual characteristics of the

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most European police agencies. See Ethan A. Nadelmann, *The DEA in Europe, in UNDERCOVER: POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE* 269, 283 (Cyrille Fijnaut & Gary T. Marx eds., 1995).

<sup>142</sup> A rule prohibiting particular police tactics would function akin to the exclusionary rule of the Fourth Amendment—a rule designed to deter police misconduct without a link to the culpability of the defendant who benefits from the application of that rule.

<sup>143</sup> If the claim is granted, depending on the applicable sentencing laws, a court could downward depart, grant a variance in sentence, refuse to apply the sentencing enhancement, avoid a mandatory minimum, or sentence solely on the basis of non-induced offense conduct. See Shein, *supra* note 46, at 28–29; see also, e.g., *United States v. Huang*, 687 F.3d 1197, 1203 (9th Cir. 2012) (stating that when a mandatory minimum applies, proper procedure is to not apply the penalty provision for the induced conduct and only sentence based on lesser conduct); *United States v. Beltran*, 571 F.3d 1013, 1019 (10th Cir. 2009) (stating that post-*Booker*, courts could grant a downward departure or a variance under 18 U.S.C. § 3553(a) based on sentencing manipulation); *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007) (suggesting that a court can remove manipulated conduct from sentencing calculus and thereby avoid mandatory minimum); *United States v. Fontes*, 415 F.3d 174, 180 (1st Cir. 2005) (recognizing a court's ability to impose a sentence below the statutory mandatory minimum as an equitable remedy); *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999) (stating that district court could apply the mandatory minimum for a lesser offense as remedy for sentencing manipulation); *United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992) (noting that court could downward depart or exclude the "tainted transaction" from Guidelines calculation); *United States v. Carreiro*, 14 F. Supp. 2d 196, 201 (D.R.I. 1998) (stating that the only remedy for sentence manipulation in this case was to acquit defendant of the charge). *But see United States v. Winebarger*, 664 F.3d 388, 389 (3d Cir. 2011) (holding that a court may only impose a sentence below a statutory mandatory minimum under 18 U.S.C. § 3553(e) based on substantial assistance to the government); *United States v. Cromitie*, No. 09 Cr. 558 (CM), 2011 WL 2693297, at \*4–5 (S.D.N.Y. June 29, 2011) (stating that even if the court found sentencing manipulation, it had no authority to avoid the mandatory minimum).

defendant, the inducements used, and the defendant's response to those inducements.<sup>144</sup>

A guided approach to the evaluation of police inducements is similar to, though admittedly broader than, the approach the United States Sentencing Commission (Sentencing Commission) currently takes regarding below-market rate inducements used within the undercover policing tactic of a narcotics reverse sting.<sup>145</sup> In this context, the Sentencing Commission explicitly recognizes that a downward departure in sentence may be warranted if the government offers a price "substantially below the market value of the controlled substance" which thereby induces the defendant to purchase more drugs than he would normally be able to buy.<sup>146</sup> In this narrow instance, the Sentencing Commission flags the potential for overstated culpability and affirmatively provides for the possibility of a reduction in sentence. As the Ninth Circuit stated in *United States v. Stauffer*:

The significance of [Application Note 14] is that it shows that the Sentencing Commission is aware of the unfairness and arbitrariness of allowing [law enforcement] agents to put unwarranted pressure on a defendant in order to increase his or her sentence without regard for . . . the extent of his culpability.<sup>147</sup>

Following my proposal, the Sentencing Commission or the courts could raise awareness of the general use of inducements, which similarly deserve increased attention when sentencing.

In contrast to a bright-line rule, an approach that focuses on the use of police inducements with an eye towards a reduction in sentence appropriately acknowledges the need for police discretion while still providing some necessary limits on how that discretion is utilized. While it is important for sentencing reforms to allow for some discretion in undercover policing, "leaving matters to police discretion is not the same as leaving those matters to their arbitrary judgment."<sup>148</sup> The doctrine of sentencing manipulation as proposed here alerts law enforcement to the potential risks and consequences of aggressive

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<sup>144</sup> For instance, courts could ask such questions as: Did the undercover officer or the defendant initially suggest a change in transaction type? Did the defendant respond to an opportunity similar to a real-life criminal situation? Did the defendant appear reluctant to agree to the offense conduct suggested?

It is important to remember, however, that these questions should not serve as a sort of "checklist" of required factors. Rather, these are suggested ways in which a court may examine the impact of police inducements.

<sup>145</sup> See *infra* text accompanying note 181 (defining reverse sting tactic).

<sup>146</sup> USSG § 2D1.1 cmt. n.26. In addition, if the defendant is able to establish that he did not intend to purchase, or was not "reasonably capable" of purchasing, the ultimate amount of narcotics received, that additional amount of narcotics may be excluded from the sentencing calculus. *id.* § 2D1.1, cmt. n.5.

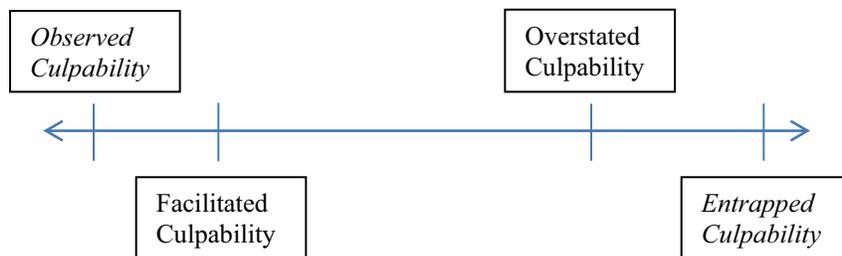
<sup>147</sup> 38 F.3d 1103, 1107 (9th Cir. 1994) (referring to USSG § 2D1.1 cmt. n.14).

<sup>148</sup> KLEINIG, *supra* note 103, at 93.

inducements. The possibility of a reduction in the suspect's sentence may serve as a disincentive to use questionable inducements in the first place.<sup>149</sup> Moreover, an inducement-focused sentencing manipulation doctrine may also impact the exercise of prosecutorial discretion. The knowledge that a court may reduce a sentence based on police inducements could result in prosecutors making different charging decisions as well as influence those prosecutors who supervise and structure undercover operations.<sup>150</sup>

### B. Sentencing Manipulation Applied

Having reconceived and justified the doctrine of sentencing manipulation as focused on the role of police inducements and their effect on a defendant's culpability, the question now becomes how to conduct this inquiry when faced with the underlying police conduct at issue in these claims. Although there are many ways to categorize undercover police tactics,<sup>151</sup> for my purposes here, I am suggesting a way to view police actions that sheds light on when police conduct may affect an assessment of the defendant's culpability at sentencing. My proposed spectrum of undercover police conduct is as follows:



<sup>149</sup> See James F. Doyle, *Police Discretion, Legality, and Morality*, in *POLICE ETHICS*, *supra* note 91, at 47, 65 (“[D]iscretionary decisions about goals should not commit police to the use of means that would call into question the worthiness of the goals pursued.”).

<sup>150</sup> See MARX, *supra* note 99, at 190–91 (stating that in many jurisdictions, prosecutors play an important role in supervising undercover operations and setting law enforcement priorities and targets); Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1562 (2008) (suggesting that judicial reduction of sentences for less serious offenders may encourage prosecutors to shift away from charging such cases).

<sup>151</sup> See, e.g., MARX, *supra* note 99, at 60 (discussing three categories of undercover operations by focusing on operational goals: intelligence, prevention, and facilitation); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 805–06 (1997) (dividing undercover tactics into active and passive categories); Wachtel, *supra* note 1, at 152 (suggesting a classification of undercover work based on the targeting mechanism and opportunity structure provided).

“Observed culpability” signifies the mere observing of crime by undercover officers. At the opposite end of the spectrum, “entrapped culpability” encompasses undercover police conduct that would enable the defendant to prevail on an entrapment defense or outrageous government conduct claim at trial.

My proposed doctrine of sentencing manipulation is primarily concerned with undercover police conduct between these two points. This span of undercover police conduct, in which the police participate in some way in the criminal transaction, ranges from “facilitated culpability” conduct—undercover actions that do not affect an assessment of a defendant’s culpability—to police conduct that results in “overstated culpability”—a category of police actions I argue does in fact impact a culpability assessment. As described in detail below, the nature and degree of various inducements used by the police to encourage particular criminal conduct causes the police conduct to move along the continuum. Viewing police conduct along this line aids the application of my proposed doctrine. More completely, this continuum is set up in a way so as to suggest that police conduct at the “facilitated culpability” end of the spectrum will not merit a reduction in sentence. While police conduct at the “overstated culpability” end of the spectrum—due to the extensive police inducements offered and the defendant’s responses to those inducements—results in offense conduct for which the defendant should not be deemed as culpable for relative to other offenders, and which therefore should be excluded when calculating the ultimate sentence.

### 1. Facilitated Culpability

To the left end of the spectrum are undercover police actions I label “facilitated culpability.” In this type of operation, the suspect is given “a government-provided opportunity to break the law,” the goal of which is “to encourage (or at least not to prevent) the commission of an offense.”<sup>152</sup> These are often the simplest of undercover policing cases—the undercover officer provides an opportunity, perhaps even several opportunities, to commit a crime but there are no additional inducements other than the bare opportunity itself. To the extent that undercover officers prolong or incentivize the opportunity, actions that fall at this end of the spectrum mirror “real-life” incentives and officers simply go along with the behavior and suggestions of the suspect.<sup>153</sup> The

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<sup>152</sup> MARX, *supra* note 99, at 65.

<sup>153</sup> For example, an undercover officer might try to negotiate a decrease in price for buying in bulk, but in a manner consistent with narcotics sales typically done in that region or neighborhood. See MARX, *supra* note 99, at 77–78 (discussing use of realistic temptations that

initial provision of the criminal opportunity could itself be termed an “inducement” (i.e. the offer of money in exchange for drugs).<sup>154</sup> But if that offer is merely presenting a criminal opportunity or simply mirrors a realistic criminal opportunity, and the defendant willingly accepts that opportunity, that “inducement” does not affect an assessment of the relative culpability of the defendant.

A clear example of police conduct that “facilitated culpability” is the single purchase of narcotics by an undercover officer on the street. The officer approaches a suspect who appears to be a narcotics seller and offers to buy an amount of drugs at the going market rate. The suspect willingly agrees and the transaction is completed. No additional persuasion or inducements are needed to complete the sale. Thus, the officer’s action—the inquiry to buy a particular amount of drugs—does not impact an assessment of a defendant’s culpability for the crime. More specifically, the police action does not suggest any decreased sense of the defendant’s culpability relative to other offenders. The defendant is culpable for the drug sale, regardless of the fact that it was prompted by an undercover officer.

Cases in which the police make strategic choices based on quantity or other numerical amounts that ultimately impact a defendant’s sentence but utilize no additional inducements as to the commission of the crime also fall at the “facilitated culpability” end of the spectrum. Take the above example but add the factual wrinkle that the undercover officer deliberately offers to buy twenty-eight grams of crack cocaine instead of twenty-seven. The sale then takes place exactly as described above—willingly and with no additional encouragement by the officer. Although the officer’s tactical decision regarding quantity clearly impacts the defendant’s sentence,<sup>155</sup> because no excessive inducements were used, the police conduct itself does not directly affect an assessment of the culpability of the defendant. If the defendant willingly sold twenty-eight grams, he is culpable for that conduct and should be sentenced accordingly.<sup>156</sup>

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are found in real-world settings).

<sup>154</sup> *But cf.* McAdams, *supra* note 34, at 117 (“Inducement requires ‘something more’ than creating a mere opportunity for the defendant to commit the crime.”).

<sup>155</sup> See USSG § 2D1.1(c)(7)–(8) (2010) (specifying that twenty-eight grams of cocaine base mandates a base offense level of twenty-six whereas twenty-seven grams of cocaine base carries a base offense level of twenty-four).

<sup>156</sup> A critique of the police tactic to suggest a particular drug quantity is perhaps better understood as a critique of the quantity-based drug sentencing laws. Sentencing based on drug quantity is often criticized as unlinked to offender culpability. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 920–21 (1991) (critiquing weight-based drug sentencing); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 854 (1992) (arguing that quantity-driven sentences in effect “mandate inequality”). If the police, however, propose a specific drug quantity accompanied by inducements which suggest that the suspect was not completely willing to deal in such quantities, then such inducements

An officer's tactical decision to complete additional narcotics transactions rather than arrest the suspect after the first completed drug sale is another police action which—by itself—does not affect the assessment of a defendant's culpability from the perspective of the sentencing manipulation doctrine. A common defense complaint is that instead of arresting the defendant immediately after the first drug sale, the undercover agent waited and completed additional drug buys before placing him under arrest.<sup>157</sup> Like the decision to increase the quantity of narcotics, the police strategy of delaying arrest often dramatically increases the defendant's sentence.<sup>158</sup> Nevertheless, if the defendant was not induced in any additional way to commit the subsequent transactions (other than being presented with the realistic opportunity to make the additional buy), the police conduct at issue does not impact the determination that the defendant is fully culpable for his conduct. Although the police officers may, in deciding to carry out additional narcotics transactions, be taking advantage of quantity-based sentencing schemes, such strategic decisions are different than excessively inducing a defendant into committing an act he is not completely willing to do. The police conduct at issue here merely *facilitates* the defendant's culpability—it does not affect the defendant's volition in any way, thus not resulting in (or justifying) a decreased sense of the defendant's culpability at sentencing relative to similar offenders.<sup>159</sup> In the context of the sentencing manipulation claim, the police tactic to delay arrest in order to complete additional criminal transactions does not, in and of itself, move the police conduct beyond “facilitated culpability” conduct.<sup>160</sup>

In sum, undercover police tactics that present a realistic opportunity to commit a crime and utilize no further inducements

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and the jump in quantity should be considered within the sentencing manipulation claim.

<sup>157</sup> See, e.g., *United States v. Sed*, 601 F.3d 224, 229 (3d Cir. 2010) (noting defendant's argument that police unfairly “strung out their investigation”); *United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996) (describing defendant's argument as protesting government's decision to continue to buy heroin from the defendant).

<sup>158</sup> Under the Federal Sentencing Guidelines, the amount of narcotics sold in each transaction is totaled to determine the appropriate guideline and length of sentence. See USSG § 2D1.1 cmt. n.7. This is also true of many state sentencing schemes. See, e.g., 18 PA. CONS. STAT. ANN. § 7508 (West 2003); TEX. HEALTH & SAFETY CODE ANN. § 481.112 (West 2009).

<sup>159</sup> The same reasoning can be applied to the police decision to increase the amount of drugs negotiated in the second or subsequent sales. See, e.g., *United States v. Appel*, No. 95-10387, 1996 WL 747899, at \*1 (9th Cir. Dec. 3, 1996) (finding that the defendant, with no pressure from police, was the cause of the final larger sale of forty grams of LSD).

<sup>160</sup> Similar to a critique of the police tactic of picking a particular drug quantity, a critique of the officers' decision to delay arrest can also be understood as a critique of sentencing laws' emphasis on cumulative drug quantity. See, e.g., *United States v. Genao*, 831 F. Supp. 246, 249 (S.D.N.Y. 1993) (“[T]he fact that the total quantity of drugs chargeable to a particular defendant was distributed over a substantial period of time is a mitigating factor not adequately taken into consideration by the Sentencing Commission.”); *supra* note 156.

comprise the “facilitated culpability” end of the spectrum. The mere suggestion of particular offense conduct by undercover police does not reduce a defendant’s ultimate culpability for all of the offense conduct willingly agreed to and committed.

## 2. Moving from Facilitated to Overstated Culpability

The variable that causes police conduct to move along the continuum is the nature and extent of the inducements utilized by undercover police officers or their agents. “Providing an opportunity structure is one thing; trying to insure that it is taken advantage of is quite another.”<sup>161</sup> Ultimately, consideration of a sentencing manipulation claim will also take into account the defendant’s actions in response to the police inducements, but the nature and extent of the police inducements are the starting focal points of the doctrinal inquiry.

To illustrate the use of inducements within a particular police tactic, take the basic undercover tactic of leaving “bait.” A “bait car,” or “bait bicycle” or “bait laptop,”<sup>162</sup> is an object used by police departments to capture thieves. These cars or objects often have internal surveillance and tracking devices, or are monitored via external surveillance. A bait item is placed in a location for the express purpose of having someone steal it. This police tactic is in essence “facilitative”—it is the provision of a mere opportunity to commit a crime. Ensuring that the bait bicycle has a certain monetary value in order to qualify as a felony theft,<sup>163</sup> like the investigative decision to offer a particular quantity of drugs, does not automatically affect an assessment of a defendant’s culpability.<sup>164</sup> Inducements that tempt beyond the initial opportunity, however, are frequently used in these bait tactics; for example, in order to encourage

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<sup>161</sup> MARX, *supra* note 99, at 78. Marx goes on to state: “This is particularly important when our concern is with the causes of the behavior, rather than only with the technical matter of legal guilt.” *Id.* This is precisely the concern of a claim raised in the sentencing context as opposed to a trial phase claim.

<sup>162</sup> See Bethany Braden, *Misdemeanor Theft on the Rise*, TENN. JOURNALIST, Nov. 23, 2010 (describing a bait laptop program at the University of Tennessee); Kim Vallez, *Bait Bicycle Nets Two Arrests*, KRQE NEWS 13 (May 29, 2010, 11:28 AM), <http://www.krqe.com/dpp/news/crime/bait-bicycle-nets-two-arrests> (describing Albuquerque Police Department’s operation leaving a bicycle worth \$750 unsecured across from a store). The New York Police Department is exploring the usage of bait pill bottles. See Tom Hays, *NYPD Looks to GPS Bottles to Combat Pill Bandits*, MYFOXNY.COM, Jan. 15, 2013, <http://www.myfoxny.com/story/20592464/nypd-looks-to-gps-bottles-to-combat-pill-bandits>.

<sup>163</sup> See, e.g., *The Bait*, BAITBIKE, <http://www.baitbike.com/the-bait/> (last visited Mar. 26, 2013) (company that makes bicycles for police departments fitted with a tracking device and designed to exceed “the minimum dollar amount required for felony classification”).

<sup>164</sup> One may, however, still have the related critique of how theft sentencing laws are structured and how the felonious nature of a theft is determined.

the theft, police officers leave the car ignition on, unlock the car doors or bicycle, or place enticing items in plain view.<sup>165</sup>

As justified previously, the analytical focus of the sentencing doctrine has as its starting point the extent and nature of the inducements used. For it is the extent of the inducements utilized that is problematic from the perspective of assessing the relative blameworthiness of the defendant. As Gary Marx states, “[t]here is a profound difference between carrying out an investigation to determine whether a suspect is, in fact, breaking the law, and carrying it out to determine whether an individual can be induced to break the law.”<sup>166</sup> In an attempt to illustrate inducements that may impact an assessment of a defendant’s culpability, consider the police tactic used by the New Orleans Police Department. In post-Hurricane Katrina New Orleans, the New Orleans police set up an undercover operation that placed food, cigarettes, and alcohol in an unlocked vehicle with its windows rolled down.<sup>167</sup> This bait car was then placed across from a homeless encampment.<sup>168</sup> Because they were inside a vehicle, theft of the food items constituted a felony burglary, a crime that carried up to twelve years in prison.<sup>169</sup> In this example, the impact of police inducements on an assessment of a defendant’s culpability is fairly easy to ascertain. It is not difficult to envision a judge (if he had the discretion to do so) deeming a homeless person breaking into a car to steal food less culpable than a prototypical offender who commits an auto burglary and warrants a twelve-year sentence. As demonstrated above, the nature

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<sup>165</sup> See *Bait Car Forum*, POLICE FORUMS & LAW ENFORCEMENT FORUMS @ OFFICER.COM, <http://forums.officer.com/forums/archive/index.php/t-150688.html> (last updated Aug. 4, 2010) (forum posting comments by police officers describing various bait car operations including leaving doors unlocked, leaving windows halfway down with a purse in plain view, and putting \$500 in the purse in order to be able to arrest for felony theft in addition to burglary); Jon Caramanica, *The Monitor: ‘Bait Car’ on TruTV*, L.A. TIMES, June 6, 2010, <http://articles.latimes.com/2010/jun/06/entertainment/la-ca-monitor-20100606> (describing bait tactics used by various police departments on a reality television show which included leaving bait vehicles abandoned after some ruse, like a false DUI arrest or a fight, and leaving the engine running and keys in the ignition); Allison Klein, *Police Credit Use of Bait Car in Arrest of Break-In Suspect*, WASH. POST, Mar. 8, 2008, at B02 (detailing tactics of D.C. police which included leaving a laptop computer and a cell phone in plain sight on the front seat of bait vehicle); Gary Taylor, *Stealing ‘Bait’ Bike Could Net Man 10 Years in Prison*, ORLANDO SENTINEL, Sept. 17, 2010, [http://articles.orlandosentinel.com/2010-09-17/news/os-bait-bike-conviction-20100917\\_1\\_net-man-bike-expensive-bicycle](http://articles.orlandosentinel.com/2010-09-17/news/os-bait-bike-conviction-20100917_1_net-man-bike-expensive-bicycle) (describing Daytona Beach Police’s actions of leaving an expensive bicycle unattended on a busy street corner with a purse attached to the handlebars).

<sup>166</sup> Marx, *Police Undercover Work*, *supra* note 91, at 99; see also Dworkin, *supra* note 83, at 24–27 (discussing how the use of various incentives by the police raises questions about the effect of these temptations on the defendant’s will and responsibility for the crime).

<sup>167</sup> See Richard A. Webster, *Commentary: Moving Target*, NEW ORLEANS CITY BUS., Jul. 14, 2008.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

of the inducements used may influence an evaluation of the criminal culpability of the defendant.

The listing of various inducements is not intended to suggest that the use of a particular inducement will, in and of itself, result in a decreased sense of a defendant's culpability. Nor is it meant to categorize which inducements result in "facilitated culpability" as opposed to "overstated culpability." Rather, claiming "the nature and extent of the inducements utilized" as the variable which moves police conduct along the continuum maintains a focus on the actions of the police and on the impact of inducements on a suspect's willingness to commit a particular crime.

### 3. Overstated Culpability

At the far end of the spectrum of police conduct are undercover actions that result in "overstated culpability." This label suggests that, at some point, due to the amount or nature of the inducements utilized by the police and the defendant's responses to those inducements, the defendant's culpability will be, in effect, "overstated" and the mandatory sentence unjustified by an assessment of culpability.<sup>170</sup> In other words, from the perspective of the offense conduct committed, the defendant appeared a very serious and blameworthy criminal (e.g. he possessed a machine gun; he transported a large quantity of drugs). However, upon an examination of why and how that offense conduct was committed, that is, when the extent of the inducements used is examined, a judge may—and I in fact suggest a judge *should*—find the defendant less culpable and reduce his sentence accordingly.

Admittedly, the difficulty with a focus on the nature of the police inducements is that the analysis is necessarily fact-specific. The type of inducements that fall at this end of the spectrum run the gamut from a non-threatening question that turns aggressive by being repeated fifty times to a single intimation of harm. Moreover, as stated previously, determining the effect of the inducements on the defendant's actions (and by proxy, on an assessment of the defendant's blameworthiness) also involves an examination of the overall context of the transaction, the facts known to the police and their agents, the nature of the relationship between the defendant and the undercover officer, and the reactions and actions of the defendant.

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<sup>170</sup> A defendant who was induced in such a way would also likely raise an entrapment defense at trial or an outrageous government misconduct claim pretrial. These claims would likely fail due to a finding that the defendant was predisposed to commit the offense conduct or due to the defense's inability to demonstrate government inducements "outrageous" enough or sufficient to tempt an innocent person.

Nevertheless, with the goal of providing some parameters for how and when police inducements may result in overstated culpability, this Section highlights several types of police tactics that serve as “red flags”—cases that carry a high risk that extensive inducements will be used. These categories of cases are ones that courts should examine closely for the use of inducements that rise to the level of impacting an assessment of the defendant’s culpability at the time of sentencing.

a. A Change in Transaction Type

Cases that involve a change in the type or nature of the transaction that was led by the undercover officer or his agent are one type of undercover operation in which extensive or aggressive inducements are likely to be utilized. This category includes cases in which, rather than simply allowing the criminal transaction to proceed as negotiated, the undercover officer induces additional offense conduct of a different type—offense conduct that often carries a high mandatory sentence. Undercover operations in which the inducements change the crime from a (realistically) difficult crime to commit to an extremely easy one to commit are also included in this category. Inducements or temptations of this nature are often seen in narcotics operations given the extreme mandatory sentencing laws in the area of drugs and firearms.<sup>171</sup>

Imagine the following hypothetical: Over a series of meetings, an undercover officer and a suspect negotiate a deal involving narcotics and handguns.<sup>172</sup> At the very last meeting (the arrest is planned and is to

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<sup>171</sup> Under 18 U.S.C. § 924(c) (2006), any person who is convicted of possession of a firearm in relation to a drug trafficking crime is sentenced to a mandatory minimum term of five years in prison and not less than a minimum of twenty-five years, served consecutively, for a second or subsequent conviction. Current law defines a “second or subsequent conviction” as including a finding of guilt and not simply a final judgment of conviction. *See Deal v. United States*, 508 U.S. 129, 132 (1993); *see also, e.g., United States v. Washington*, 301 F. Supp. 2d 1306, 1308 (M.D. Ala. 2004) (sentencing defendant, with no prior criminal record, to the mandatory thirty years in prison because he pled guilty to possessing guns in connection with drugs on two different occasions in separate locations six days apart), *aff’d*, 122 F. App’x 986 (11th Cir. 2004). Given this statute, there is a real incentive for undercover officers to introduce firearms into a drug sale if they want to expose the defendant to a higher mandatory sentence. For instance, an undercover agent who is selling drugs could inform the suspect he will only accept payment in guns. *See, e.g., United States v. Luke-Sanchez*, 483 F.3d 703, 704 (10th Cir. 2007) (detailing how most of the methamphetamine was sold to undercover agents in cash but three-quarters of an ounce was exchanged for two pistols); *United States v. Carreiro*, 14 F. Supp. 2d 196, 198 (D.R.I. 1998) (noting that transaction between undercover officer and defendant initially involved only firearms but then officer required payment in money and narcotics).

<sup>172</sup> This hypothetical is based on the facts of *United States v. Cannon*, 886 F. Supp. 705 (D.N.D. 1995) (*Cannon I*), *rev’d*, 88 F.3d 1495 (8th Cir. 1996) (*Cannon II*). The district court found that there were grounds for reducing the defendant’s sentence based on the police

take place after the completion of the transaction), the undercover officer repeatedly and aggressively persuades the suspect to buy an unloaded machine gun, in addition to the narcotics and handguns. Under current federal law, the addition of a machine gun changes the nature of the criminal offense and has a dramatic effect on the suspect's eventual sentence. Possession of a handgun dictates a mandatory minimum sentence of five years, but by accepting the machine gun, the suspect now faces a mandatory additional and consecutive twenty-five years in prison.<sup>173</sup>

Other undercover police actions that change the type of the criminal transaction include inducing a defendant to change, mid-transaction, to a different form of a narcotic. Due to the sentencing laws' punishment of some narcotics more harshly than others, the change to a different form of narcotic may signal that the undercover officer used extensive inducements to ensure the suspect's agreement.<sup>174</sup> In addition, undercover officers may use inducements that are more tempting than real-world opportunities or other extreme enticements to such an extent that the very nature of the transaction is transformed; for example, from a high-stakes criminal act to a very easy mission to complete.<sup>175</sup> In *United States v. Martinez-Villegas*, for instance, the government agents offered an extremely good payment to the defendants in exchange for transporting a large quantity of narcotics and invented a simple transportation route that was easy to complete.<sup>176</sup> The district court noted that, "as the risks were minimal, and the money substantial, it is not surprising that the [defendants] accepted the government's offer."<sup>177</sup>

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conduct. *Id.* at 709. On appeal, the Eighth Circuit reversed based on the finding of an unrelated prosecutorial error. *Cannon II*, 88 F.3d at 1503. Although the Eighth Circuit did not address the lower court's sentencing decision explicitly, it suggested its disapproval, stating that the officers' conduct was not "outrageous" nor violated the defendant's due process rights. *Id.* at 1507–08.

<sup>173</sup> In *Cannon*, if the transaction had involved only the handguns, the defendant would have faced a mandatory minimum sentence of five years. See *Cannon I*, 886 F. Supp. at 707. The addition of the machine gun increased the mandatory minimum to thirty years. *Id.*

<sup>174</sup> See, e.g., *United States v. Searcy*, 233 F.3d 1096, 1100–01 (8th Cir. 2000) (finding that the informant induced the defendant to switch from selling powder cocaine to crack cocaine), *vacated on appeal after remand*, 284 F.3d 938 (8th Cir. 2002) (holding that the defendant did not meet his burden to prove sentencing entrapment); *United States v. Shepherd*, 857 F. Supp. 105, 110–11 (D.D.C. 1994) (finding sentencing manipulation based on undercover officer's insistence that the defendant convert the powder cocaine to crack cocaine before he would purchase it), *rev'd*, 102 F.3d 558, 566–67 (D.C. Cir. 1996) (holding that prior circuit law mandates that the mere request to change powder cocaine to crack cocaine is insufficient to demonstrate sentencing manipulation).

<sup>175</sup> See, e.g., *United States v. Berg*, 178 F.3d 976, 984 (8th Cir. 1999) (Bright, J., dissenting) (arguing that sentencing manipulation occurred because the DEA supplied a hard-to-get chemical needed to make methamphetamine and purposefully put it in the purest form in order to maximize the defendant's sentence); *United States v. Cromitie*, 781 F. Supp. 2d 211, 221 (S.D.N.Y. 2011) (noting that the Government provided all the materials for the terrorist plot including cars, a gun, and the explosive devices).

<sup>176</sup> 993 F. Supp. 766, 774 (C.D. Cal. 1998).

<sup>177</sup> *Id.*

The government controlled the negotiations, thus ensuring that the defendants would “easily accept and undertake a relatively simple task for an extraordinarily high fee.”<sup>178</sup> Due to these inducements and the “unwarranted pressure” placed on the defendants, the court found that the defendants should not be sentenced on the basis of all the narcotics transported.<sup>179</sup>

The key to my claim that the above police conduct results in “overstated culpability” is the use of aggressive encouragement or extensive inducements that led the suspects to agree to the desired offense conduct—namely the possession of the machine gun or the transportation of an extremely large quantity of drugs. It is of course possible to imagine a case in which the undercover officer offers a machine gun and the suspect willingly and excitedly agrees (and therefore “overstated culpability” is not a concern). My aim in suggesting these examples is to highlight the fact that, due to sentencing laws in these areas and law enforcement’s own incentives to ensure that suspects agree to the desired offense conduct,<sup>180</sup> inducements which impact an assessment of the defendant’s culpability are likely to be used in this category of police actions.

#### b. The Reverse Sting

Another type of police action that carries the risk of “overstated culpability” is the undercover policing tactic of a reverse sting. A reverse sting is an undercover operation in which the police or their agents pose as the seller of an item, such as narcotics or weapons, and they recruit a suspect to be the buyer.<sup>181</sup> In a reverse sting, the police—as the seller, supplier, or provider of the criminal opportunity—create and ultimately

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<sup>178</sup> *Id.* at 774, 776.

<sup>179</sup> *Id.* at 777.

<sup>180</sup> The decision to induce additional offense conduct of a different type is linked to officers’ incentives to increase sentences generally. Although difficult to prove empirically, scholars and researchers generally agree that there are institutional and personal incentives for officers to seek longer sentences for arrested suspects. See JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 12, 137 (1978) (describing findings from qualitative study of law enforcement practices in eight communities and noting officers’ general desire to have a tough penalty imposed); Alan F. Arcuri, *Police Perceptions of Plea Bargaining: A Preliminary Inquiry*, 1 J. POLICE SCI. & ADMIN. 93 (1973) (describing the negative attitudes of police officers toward plea bargaining in part because they wanted defendants to receive longer sentences); see also, e.g., Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773, 1787 (1992) (noting that police groups vigorously lobbied the Minnesota Sentencing Guidelines Commission to make sentences more severe for their “favorite” crimes); sources cited *supra* note 69 (describing cases in which the officer admitted purposefully trying to increase the suspect’s sentence).

<sup>181</sup> This is in contrast to a “buy and bust” operation in which an undercover officer poses as the buyer of the contraband.

dictate the terms of the transaction. As defined by the Sentencing Commission, a reverse sting in the context of a narcotics transaction is “an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant.”<sup>182</sup> In a reverse sting, there is greater potential for the police to manipulate the quantity of the narcotics in order to maximize a defendant’s sentence because the government, as the seller, controls the transaction.<sup>183</sup> The police have complete discretion to set the price and amount of contraband delivered. This discretion allows the police to use inducements such as a below-market rate sales price and set other terms that do not mirror real life transactions. Such inducements may “transform a defendant who is a small dealer into a more substantial one, without regard to the defendant’s proclivities.”<sup>184</sup>

The facts underlying the case of *United States v. Naranjo* provide an illuminating example.<sup>185</sup> A confidential informant, working for the Drug Enforcement Agency (DEA), told agents that Lorenzo Naranjo had been trafficking cocaine for many years.<sup>186</sup> But when the informant, at the DEA’s urging, tried to get Naranjo to sell cocaine to him, Naranjo repeatedly and consistently refused.<sup>187</sup> The DEA then decided to change the operation into a reverse sting (thus making the government the seller) and told the informant to convince Naranjo to *buy* ten to twenty kilograms of cocaine.<sup>188</sup> The informant was not able to persuade Naranjo to purchase even a lesser amount of five to ten kilograms.<sup>189</sup> The DEA then instructed the informant to arrange for Naranjo to meet with the “seller,” in actuality an undercover DEA agent.<sup>190</sup> The undercover agent repeatedly stressed that he wanted to sell Naranjo five kilograms of cocaine.<sup>191</sup> Eventually, in order to complete a sale of five kilograms (an amount guaranteeing a mandatory minimum sentence), the undercover agent “agreed” to accept payment for only two kilograms and to “front” the other three.<sup>192</sup>

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<sup>182</sup> USSG § 2D1.1 cmt. n.14.

<sup>183</sup> See *United States v. Caban*, 173 F.3d 89, 93 (2d Cir. 1999) (“It is unsettling that in this type of reverse sting, the government has a greater than usual ability to influence a defendant’s ultimate Guidelines level and sentence.”).

<sup>184</sup> *United States v. Lora*, 129 F. Supp. 2d 77, 80 (D. Mass. 2001); see also *United States v. Goodwin*, 594 F.3d 1, 5 (D.C. Cir. 2010) (“Manipulation of this sort effectively decouples drug quantity from culpability. . .”).

<sup>185</sup> 52 F.3d 245 (9th Cir. 1995).

<sup>186</sup> *Id.* at 246.

<sup>187</sup> *Id.* (describing how the informant called Naranjo almost forty times and each time Naranjo said “no”).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 247. Upon these facts, the district court found that there were no grounds for a reduction in sentence. *Id.* at 251. The Ninth Circuit reversed and remanded, stating that “[o]ur

As seen by this example, the use of inducements in a reverse sting may result in a defendant committing offense conduct for which he may not be as blameworthy, compared to other offenders who commit the same level of narcotic crime, since it is unlikely that the defendant would have committed such conduct had he not been so induced.<sup>193</sup> As previously mentioned, the Sentencing Commission explicitly recognizes the possibility of a downward departure in the narrow instance of a reverse sting in which the government acts as the narcotics seller.<sup>194</sup> The same concerns that motivated the Sentencing Commission to provide for a reduction in sentence for this particular type of reverse sting operation also apply to reverse stings more generally. For one, much of the police conduct discussed in the previous Section—extensive inducements resulting in a change in the type of criminal transaction—occurred in the context of a reverse sting operation.<sup>195</sup> Because the police control the terms of the transaction, they are thereby able to at first suggest—and later insist on—the addition of a gun or a different form of narcotic in order to complete the transaction. Like the reverse stings targeted by the Sentencing Commission, reverse stings in general carry a high risk of the manipulation of sentences through the use of problematic inducements.<sup>196</sup>

### c. The Fictional Stash House

A third type of police tactic that serves as a red flag for the use of extensive inducements—and which appears to be increasingly used by law enforcement but has had little, if any, analytic scrutiny—is the fictional stash house operation.<sup>197</sup> A “stash house” is a location, often a

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reading of the record strongly suggests that Naranjo had neither the intent nor the resources to engage in a five-kilogram cocaine transaction.” *Id.* at 250–51.

<sup>193</sup> For instance, Naranjo may have only purchased two kilograms of cocaine had he not been offered the other three kilograms essentially for free.

<sup>194</sup> See *supra* text accompanying note 146.

<sup>195</sup> See, e.g., *United States v. Martinez-Villegas*, 993 F. Supp. 766, 774 (C.D. Cal. 1998); *United States v. Cannon*, 886 F. Supp. 705, 708 (D.N.D. 1995), *rev'd*, 88 F.3d 1495 (8th Cir. 1996). Because the reverse sting tactic in these cases did not involve government manipulation of drug price or quantity, they did not fall under the ambit of application note 14 of the U.S. Sentencing Guidelines.

<sup>196</sup> See *United States v. Caban*, 173 F.3d 89, 94 (2d Cir. 1999) (“We invite the Sentencing Commission’s attention to some more comprehensive measure that would consider what happens when a reverse sting involves a theft in which the government sets the bait (rather than a purchase in which the government sets the price).”).

<sup>197</sup> Personal interviews with practicing attorneys and an informal survey of court cases and mass media articles suggest the increased use of this tactic by law enforcement agencies. Law enforcement agencies that use this technique include the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Drug Enforcement Agency (DEA), and local police departments in the following jurisdictions: New York; Chicago; Fairfax County, Virginia; Alexandria; Baltimore; Atlanta; Miami; Houston; Austin; Shreveport; Las Vegas; Tucson; Santa Ana; Los

residential house or warehouse, where drugs, money, and other trafficking-related items such as firearms are kept until moved to another location. A fictional stash house operation is one in which an undercover officer, or an informant working with the police, recruits one or more suspects to rob a location where drug dealers allegedly keep large amounts of drugs and possibly money and weapons.<sup>198</sup>

The fictional stash house is completely imagined. The officers or informant create all the details of the stash house, including the quantity of drugs and money being held. In addition, because the stash house is entirely imaginary, the police invent other critical details that help entice the suspects, for example, telling the suspects how many people will be guarding the stash house, whether it is necessary for the suspect to be armed, and the degree of danger involved or risk of the occurrence of other crimes. Over the course of one or more meetings, the undercover officers or their agents meet with the suspects to discuss the robbery of the stash house. Once the suspects agree to commit the offense conduct, they are arrested, typically either at a meeting or in a vehicle, supposedly on their way to commit the “robbery.” Defendants captured in a fictional stash house operation face charges of conspiracy and attempt to distribute narcotics, as well as various weapons and other drug offenses.<sup>199</sup>

In fictional stash house operations, the potential for the use of extensive inducements and unrealistic temptations comes to the forefront. In these operations, the police have “virtually unfettered ability” to effectively guarantee a high sentence for the defendant and to say and do whatever is needed to ensure the suspect’s participation.<sup>200</sup> In a typical undercover drug operation, the government is theoretically constrained by realistic market rates and amounts. By contrast, in a fictional stash house operation, the police are less bound by typical or realistic quantities given the target’s nature as a storage facility. Undercover operatives often pick an amount of narcotics that will trigger the mandatory minimum sentencing laws.<sup>201</sup> Suspects are often

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Angeles; and Tacoma. For a case involving the stash-house tactic, see *United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011) (referring to fictional stash house technique as “what’s fast becoming a rather shopworn scenario in this court”).

<sup>198</sup> See, e.g., *United States v. Sardinias*, 386 F. App’x 927, 929 (11th Cir. 2010) (describing how an undercover police officer posed as a disgruntled drug dealer who wanted help in robbing one of his employer’s stash houses); Steven Kreytak, *Undercover Operation Nets Men Accused of Agreeing to Rob Drug Houses*, AUSTIN AM.-STATESMAN (Sept. 4, 2010), <http://www.statesman.com/news/local/undercover-operation-nets-men-accused-of-agreeing-to-898157.html> (detailing recent stash house operation by ATF).

<sup>199</sup> For example, the defendants caught in a stash house sting created by the New York Drug Enforcement Task Force were convicted of conspiracy, the attempt to possess cocaine with intent to distribute, and the use of a firearm during a drug trafficking crime. See *Caban*, 173 F.3d at 90.

<sup>200</sup> *United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010).

<sup>201</sup> See, e.g., *Caban*, 173 F.3d at 93 (“It is unsettling that in this type of reverse sting, the

encouraged to bring items, such as guns, zip ties, or duct tape, that will not only serve as evidence of their intent to participate in the conspiracy, but will also allow the charging of additional crimes.<sup>202</sup> The police, by dictating how the proceeds of the robbery will be divided, can effectively set a below-market purchase price.<sup>203</sup> In addition, the government can “minimize the obstacles that a defendant must overcome to obtain the drugs.”<sup>204</sup> For example, the police can convince a suspect that the stash house robbery would be a shockingly simple and easy crime to commit and can provide items, such as a car, needed to complete the crime.<sup>205</sup>

The underlying facts of *United States v. Diaz* exemplify the use of extensive inducements within the fictional stash house technique.<sup>206</sup> Agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and officers of the Tucson Police Department initially focused on suspects Diaz and Urrea based on a tip from a confidential informant.<sup>207</sup> Prior to their arrest in this case, Diaz, eighteen years old, and Urrea, thirty-seven years old, had very little criminal history.<sup>208</sup> The court noted that the evidence suggested that Diaz’s and Urrea’s statements about their capability to complete a stash house robbery were exaggerations and in fact it was unlikely they had ever committed a similar crime in the past.<sup>209</sup> Over two meetings, the undercover agents “set out most of the details for the proposed invasion and theft,”

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government has a greater than usual ability to influence a defendant’s ultimate Guidelines level and sentence. It appears to be no coincidence that the [police] chose to place no less than 50 kilograms of . . . cocaine in the warehouse.”).

<sup>202</sup> See, e.g., Statement of Facts and Memorandum of P. & A. in Support of Motions for Defendant at 1, *United States v. Johnson*, No. 3:10-CR-03507-W (S.D. Cal. May 2, 2011) (noting that defendant in a stash house case faced charges of conspiracy to possess with intent to distribute cocaine, conspiracy to affect commerce by robbery and extortion, possession of a firearm in furtherance of a crime of violence, and felon in possession of a firearm and ammunition). The nature of a conspiracy charge itself creates expansive possibilities for stash house operations to result in additional charges. See Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 105 (2004) (discussing how conspiracy laws create new opportunities to use sting operations).

<sup>203</sup> See, e.g., *United States v. Cambrelen*, 29 F. Supp. 2d 120, 125 (E.D.N.Y. 1998) (finding that the informant offered defendants their share of stash house narcotics far below the market rate).

<sup>204</sup> *Briggs*, 623 F.3d at 730.

<sup>205</sup> See, e.g., *United States v. Spentz*, 653 F.3d 815, 817 (9th Cir. 2011) (stating that an ATF agent told the suspects that two and a half million dollars’ worth of cocaine was guarded by two men, only one of whom was armed); *United States v. Sistrunk*, 622 F.3d 1328, 1334 (11th Cir. 2010) (noting defendant’s argument that undercover agents told him that the drugs were guarded by two or three older men with only one firearm); *United States v. Williams*, 547 F.3d 1187, 1193 (9th Cir. 2008) (describing an ATF agent’s statement to the defendants that the stash house would only be guarded by one man with a sawed off shotgun and two women who counted the money).

<sup>206</sup> No. CR 09-284-TUC-RCC (CRP), 2010 US DIST. LEXIS 134027 (D. Ariz. Dec. 2, 2010).

<sup>207</sup> *Id.* at \*3.

<sup>208</sup> *Id.* at \*22.

<sup>209</sup> *Id.* at \*19–22.

including that there were at least two thousand pounds of marijuana and that it was guarded only by two men with guns and two other “nerds.”<sup>210</sup> The agents did “a significant amount of the talking and planning” and supplied the cargo van needed for the robbery.<sup>211</sup>

An additional aspect of fictional stash house operations linked to the use of inducements is the frequent involvement of confidential informants. The risks of using informants in undercover policing generally are well documented.<sup>212</sup> Informants have strong incentives to create a criminal transaction. In exchange for arranging and assisting in the completion of crimes, informants are often paid money by the government or receive assistance from the police in their own criminal case.<sup>213</sup> Informants may have a particular incentive to encourage criminal transactions to become larger in scope or greater in number.<sup>214</sup> These motivations similarly incentivize the use of inducements in order to ensure the completion of a criminal transaction and credit to the informant. Indeed, informants might use persuasion tactics that law enforcement officers would not.<sup>215</sup>

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<sup>210</sup> *Id.* at \*4–5.

<sup>211</sup> *Id.* at \*17–18.

<sup>212</sup> See ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 69–81 (2009) (discussing incentives for informants to lie, law enforcement’s dependence on informants, and the lack of systemic oversight); Hay, *supra* note 24, at 407 (stating that when police use informants in undercover operations, it is particularly likely that the operation will not reveal whether the suspect would truly have committed this crime without police involvement); Wachtel, *supra* note 1, at 141–42 (discussing and listing sociological studies which document informant misconduct during investigations).

<sup>213</sup> See, e.g., NATAPOFF, *supra* note 212, at 32, 47; Hay, *supra* note 24, at 407; Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 100–02 (1994) (documenting various benefits received by informants); Adrienne Packer, *Targets of Police Sting Call Operation Unfair*, LAS VEGAS REV.-J. (Jan. 25, 2009), <http://www.lvrj.com/news/38291804.html> (describing how informant was arrested in an armed robbery after he became a paid informant but continued working as an informant on ATF stash house operations to “work off his charges”); see also Kreytak, *supra* note 198 (detailing informant’s Facebook posting after finishing a stash house operation which read “Crime is up. Crime pays”).

<sup>214</sup> See *United States v. Parker*, 376 F. App’x 1, 7 (11th Cir. 2010) (per curiam) (describing informant’s pay of \$50 per day for involvement in stash house undercover operation and “reward” of \$2,500 because the investigation was successful); Memorandum of P. & A. in Support of Defendant’s Motions in *Limine* at 2, *United States v. Warren*, 3:10-CR-03507-002-W (S.D. Cal. Jul. 11, 2011) (stating informant indicated he “has worked at nothing but setting up fictitious stash house robbery busts” for over three years and received money, housing, and food for his work); Sandra Guerra, *The New Sentencing Entrapment and Sentence Manipulation Defenses*, 7 FED. SENT’G REP. 181, 182 (1995) (discussing informants’ incentives to engage drug dealers in large transactions in order to reap more leniency or more money).

<sup>215</sup> See *United States v. Lora*, 129 F. Supp. 2d 77, 96 (D. Mass. 2001) (“The informants used a troubling tactic: They used [defendant’s] debt to a large Colombian trafficking organization to play upon his fear of retaliation.”); *United States v. Martinez-Villegas*, 993 F. Supp. 766, 769 (C.D. Cal. 1998) (noting that informant tried repeatedly, both in person and on the telephone, to get defendant to contact the undercover agent); see also *supra* note 187 and accompanying text (discussing tactics of informant in the *Naranjo* case).

Although the risks of using informants inhere in essentially all undercover operations in which they take part, the risk of informants using extensive and problematic inducements is particularly great in fictional stash house operations because the government—and by proxy the informant—often controls all of the aggravating aspects of the alleged offense. It is often left in the hands of the informant to make sure that the suspects agree to the various terms of the transaction. Informants may invent the quantity of drugs to be robbed as well as serve as the “co-conspirator” who gives the encouragement needed to ensure the suspects’ participation.<sup>216</sup> Informants may also be the ones to identify the suspect or suspects interested in committing the robbery.<sup>217</sup> Again, given the nature of informants and their incentives, how they recruit and identify suspects to participate in the stash house operation and how they present that “recruit” to the government is potentially very troublesome.<sup>218</sup> Considering that not all interactions with suspects are recorded, the use of informants is even more worrisome when envisioning how courts would consider the role of inducements during sentencing.<sup>219</sup>

Fictional stash house cases are reverse sting operations in which the government and their informants set the bait. Given the many criminal charges that can result from how the stash house operation is portrayed,

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<sup>216</sup> See, e.g., *United States v. Oliveras*, 359 F. App’x 257, 260 n.4 (2d Cir. 2010) (noting that the amount of narcotics was increased by the confidential source); *United States v. Stauffer*, 38 F.3d 1103, 1105 (9th Cir. 1994) (describing how informant convinced the defendant, his acquaintance of many years, to sell a large amount of LSD in part because the defendant had serious financial difficulties and had recently been robbed, beaten, and hospitalized); *United States v. Cambrelen*, 29 F. Supp. 2d 120, 125–26 (E.D.N.Y. 1998) (finding it troubling that informants influence the stated drug quantity because informants are often facing their own drug cases and have large incentives to inflate the drug quantities in the cases they help investigate).

<sup>217</sup> See, e.g., *United States v. Sardinas*, 386 F. App’x 927, 929–30 (11th Cir. 2010) (describing how confidential informant introduced the undercover agent to people interested in robbing a stash house); *United States v. Corson*, 579 F.3d 804, 806 (7th Cir. 2009) (noting that ATF agents met with a confidential informant who then identified the defendants as people who may be interested in robbing a drug stash house).

<sup>218</sup> Law enforcement’s position that these are individuals who in fact have either committed similar crimes in the past or are truly willing and able to commit such a crime if presented with the opportunity in the real world is often uncorroborated. See, e.g., *United States v. McKenzie*, 656 F.3d 688, 692 (7th Cir. 2011) (“The crime proposed was, in the district judge’s words, a ‘massive’ one; it is somewhat baffling, then, that the young men who the authorities recruited did not have ‘massive’ criminal histories to match.”); *United States v. Diaz*, No. CR 09-284-TUC-RCC (CRP), 2010 U.S. Dist. LEXIS 134027, at \*22 (D. Ariz. Dec. 2, 2010) (noting concern that government relied on an unclear and unreliable informant to identify, without corroboration, suspects allegedly actively involved in stash house robberies).

<sup>219</sup> See *Parker*, 376 F. App’x at 8 (noting that conversations between informant and defendant in stash house operation were not recorded); *Packer*, *supra* note 213 (stating that ATF disposed of recordings they believed were irrelevant). It is also important to remember that the recordings themselves are not foolproof or perfect evidence. See *MARX*, *supra* note 99, at 135–36 (discussing how tapes can contain omissions, can be selectively used, and are manipulated by techniques of scripting and criminalizing).

the potential augmentation of a defendant's criminal liability is often greater than that of a typical drug deal. Correspondingly, the risk that extensive inducements are used to ensure the suspect's participation is even greater. The inducements used to persuade suspects to commit, or simply to *agree* to commit, a serious and severely sentenced set of crimes elicits significant questions regarding the extent of the defendants' blameworthiness and the possibility that the mandatory sentence will be disproportional to any determination of culpability.<sup>220</sup>

d. No-Knowledge Conduct

A final category of police conduct that may result in "overstated culpability" is comprised of operations in which the police direct the defendant to unknowingly commit offense conduct that mandates an increase in sentence. For example, the suspect, at the behest of the police, unwittingly conducts a drug sale in a school zone or, unbeknownst to the suspect, the police pass him a purer form of narcotics.<sup>221</sup> In *United States v. Ciszkowski*, a confidential informant, working under the direction of the DEA, arranged to give narcotics and a pistol to the defendant.<sup>222</sup> At the time of the transaction, the informant passed the defendant a closed bag containing a firearm with a silencer.<sup>223</sup> There was no evidence to suggest that the defendant had asked for a silencer or that he even knew he had been given one.<sup>224</sup> Due to his acceptance and possession of a firearm with a silencer, the defendant faced a mandatory additional twenty-five year sentence.<sup>225</sup>

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<sup>220</sup> See *United States v. Briggs*, 397 F. App'x 329, 333 (9th Cir. 2010) (stating that "we recognize that 'reverse-sting operations' like the [fictional stash house] in this case may risk overstating a defendant's culpability"). The court in *Diaz* concluded that it "should treat these Defendants for who they really are, not for who the Government wishes they were." *Diaz*, 2010 U.S. Dist. LEXIS 134027, at \*23. The court, however, denied the defendants' motion to dismiss based on "outrageous" police conduct and stated that sentencing was the appropriate place to address the alleged manipulation. *Id.*

<sup>221</sup> See, e.g., *United States v. Eads*, 191 F.3d 1206, 1212 (10th Cir. 1999) (describing defendant's argument that the government, without his knowledge, purposely provided him with a sufficient percentage of pure methamphetamine to mandate a life sentence); *Graham v. State*, 608 So. 2d 123, 124 (Fla. Dist. Ct. App. 1992) (stating that the officer selected the apartment location in a school zone as well as the late night transaction time).

<sup>222</sup> 492 F.3d 1264, 1267 (11th Cir. 2007).

<sup>223</sup> *Id.* Both the gun and the silencer were supplied by the government. *Id.* at 1271.

<sup>224</sup> The defendant was arrested immediately after accepting the bag. *Id.* at 1267. At trial, an ATF agent testified that a layperson would not be able to tell just by looking at the firearm that a silencer was mounted to the interior. *Id.*

<sup>225</sup> *Id.* The Eleventh Circuit declined to find sentencing manipulation, stating that the police conduct was not "sufficiently reprehensible." *Id.* at 1271. The court stated that because the defendant agreed to accept a gun to complete a murder, "[i]t is conceivable that the government could reasonably decide that a muzzled firearm is the appropriate weapon for the commission of a murder for hire and then provide [the defendant] with such a weapon." *Id.*

In the context of evaluating police actions and their impact on an assessment of a defendant's culpability, this type of police conduct stands in sharp relief. In these cases, the defendants do nothing to suggest they are morally culpable for the government-planted offense conduct, since in fact they are not even aware that they are committing the conduct. This type of case, therefore, is on the extreme end of the "overstated culpability" side of the continuum. The police conduct unquestionably "overstates" the defendant's culpability and results in an unjustified lengthy sentence.<sup>226</sup> While not an example of the use of extensive inducements by law enforcement per se, the police conduct in these cases falls within a broader understanding of manipulative police action that impacts an assessment of the defendant's culpability and blameworthiness at sentencing, and therefore should also be included within the scope of the sentencing manipulation doctrine.

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In sum, it bears repeating that the labels of "facilitated culpability" and "overstated culpability" are not stringent, binary categories.<sup>227</sup> The

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<sup>226</sup> This type of police conduct is included within the ambit of the sentencing manipulation doctrine precisely because it is the *police* who are directing the transaction. See *supra* Part II.A. If a suspect unwittingly committed such offense conduct in the "real world" (without police participation), he would certainly bear the risk and resulting brunt of sentencing—there are typically no scienter requirements for these types of sentencing enhancements. For instance, the defendant need not know he is distributing drugs in a school zone in order to have his sentence increased for doing so. See 21 U.S.C. § 860 (2006) (school zone enhancement for narcotic offenses); *United States v. Haynes*, 881 F.2d 586, 590–91 (8th Cir. 1989). With respect to whether the defendant needs to have knowledge of the characteristics of the weapon under § 924(c), the courts of appeals are divided. The First, Sixth, Ninth, Eleventh, and D.C. Circuits have held that the defendant need not have knowledge as to the particular features of the weapon. See *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012); *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000); *United States v. Benner*, 188 F.3d 509 (6th Cir. 1999); *United States v. Gilliam*, 167 F.3d 628, 638 (D.C. Cir. 1999); *United States v. Shea*, 150 F.3d 44, 52 (1st Cir. 1998), *abrogated on other grounds as recognized in United States v. Vasquez-Castro*, 640 F.3d 19 (1st Cir. 2011); *United States v. Crawford*, 91 F.3d 155 (9th Cir. 1996); *United States v. Brantley*, 68 F.3d 1283, 1289 (11th Cir. 1995).

These "strict liability" sentencing enhancements are subject to a more general culpability-based critique whether undercover police officers are involved or not. Yet when it is the government supplying the "unknown" strict liability element, there is a direct relationship between the officers' conduct and an assessment of the defendant's culpability, and consequently, this police conduct should be of concern to the sentencing manipulation doctrine.

<sup>227</sup> There is, admittedly, a blurry line between inducements that result in the overstatement of a defendant's culpability and those that merely facilitate it. It is particularly blurry if one accepts my argument that there can be no particular level or amount of police "misconduct" required. While pointing out more extreme examples at the far ends of the spectrum, I acknowledge that courts will face many more close calls in the middle when evaluating the impact of the inducements used. But courts are competent to make such individualized factual assessments; indeed, historically, that was exactly the practice and point of providing judicial

tactics discussed above are examples of conduct along the continuum but should not be taken to suggest that a particular police strategy will have the same impact on an assessment of a defendant's culpability every single time it is used. Rather, the cited tactics highlight when it is *likely* that extensive and troubling inducements are used—inducements that may result in a less severe assessment of a defendant's culpability at sentencing. It is possible of course, for the sake of argument, to pose a hypothetical of each tactic that would fall at the opposite end of the spectrum. For instance, while simply extending a narcotics transaction to include two deals may be more "facilitative," if the police aggressively induce a suspect to make a huge change in the quantity of drugs exchanged, that could result in "overstated culpability." Similarly, there could be a stash house operation in which it is clear that the demonstration of the suspects' culpability is merely facilitated and no additional inducements were used other than the initial opportunity to commit the crime. Viewing police conduct along on this continuum does demonstrate, however, how current versions of the sentencing manipulation doctrine fail to provide for a sentence reduction even when merited. Broadly defining sentencing manipulation as any improper police conduct that impacts a defendant's sentence fails to provide any sense of what makes police conduct "improper." On the other hand, a definition strict in its applicability may fail to provide the necessary relief when an assessment of a defendant's culpability is in fact impacted by police inducements. My aim in proposing this spectrum of police conduct is not to identify finite categories or a checklist of inducements but rather to suggest a way to approach the application of my proposed sentencing manipulation doctrine and the determination of when and what police conduct impacts an assessment of a defendant's relative culpability.

#### CONCLUSION

The criminal justice system is founded on the principle of just punishment. While undercover policing is a necessary part of that same system, concerns of what Judge Friendly termed "government-induced criminality"<sup>228</sup> must temper a rush to view all suspects caught in undercover police operations as equally blameworthy, despite perhaps being equally guilty of the substantive offense.<sup>229</sup> In contrast to the

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discretion in sentencing.

<sup>228</sup> *United States v. Archer*, 486 F.2d 670, 677 (2d Cir. 1973).

<sup>229</sup> See Memorandum from Attorney General Eric H. Holder, Jr. to All Federal Prosecutors (May 19, 2010), available at <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf> ("[E]qual justice depends on individualized justice, and smart law enforcement demands it.").

black-white dichotomy of innocence versus guilt forced in a trial phase claim, a sentencing doctrine should enable the culpability of offenders to be viewed in shades of grey. A reformulated sentencing manipulation doctrine acknowledges this goal and balances our interest in accurately and justly punishing criminal offenders with the important role law enforcement has in catching these offenders in the first place.