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Molly F. Spakowski
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COMMENT

Crafted from Whole Cloth: Reverse Stash-House Stings and the Sentencing Factor Manipulation Claim

MOLLY F. SPAKOWSKI†

INTRODUCTION

Kenneth Flowers is currently serving a mandatory minimum sentence of 120 months imprisonment stemming from a conviction of conspiracy to possess with intent to distribute five or more kilograms of cocaine.¹ While the ten-year prison sentence is very real, the five-kilograms of cocaine is not, and *never was*. Mr. Flowers was caught-up in one of the elaborate and overused “reverse stash-house sting”² operations employed by the Bureau of Alcohol,

† J.D., 2019, University at Buffalo School of Law; Executive Publications Editor, *Buffalo Law Review*. I would like to thank the members of the *Buffalo Law Review*, specifically Richard P. Brooks, for their invaluable editing; Professor Guyora Binder for his insightful revisions to an earlier version of this Comment; and my family and friends, especially Gabriela A. Tremont and Andrew B. Plewinski, for their continued faith in me.

1. *United States v. Flowers*, 712 F. App’x 492, 496 (6th Cir. 2017).

2. In a traditional sting, undercover agents pose as buyers. In a reverse sting, undercover agents act as sellers. A reverse stash-house sting is a “reverse” sting because like selling, the government is providing the opportunity to rob the stash-house.

Tobacco, Firearms, and Explosives (“ATF”). His story goes like this.

ATF Special Agent Richard Zayas has made a career out of conducting reverse stash-house sting operations, and unfortunately for Mr. Flowers, Agent Zayas decided to give his well-worn skillset a try in Cleveland.³ To begin, Agent Zayas directed a confidential informant to gather general information about the community and report back any interesting findings.⁴ In doing so, the informant approached an acquaintance named Kali Alexander.⁵ He and Mr. Alexander discussed illegal activity, including a possible firearms sale.⁶ But while the weapon sale never occurred, Mr. Alexander did agree to sell the informant heroin.⁷

Agent Zayas accompanied the informant to the heroin sale.⁸ He posed as a disgruntled drug courier and during the exchange, Agent Zayas proposed to Mr. Alexander an idea to rob a cocaine stash-house he knew of.⁹ He said the house would have about eight to nine kilograms of cocaine stashed in it and was guarded by two men, at least one of whom was armed.¹⁰ The two discussed the potential robbery and the possibility of splitting the cocaine 50/50 between Agent Zayas and Mr. Alexander and anyone who Mr. Alexander chose to help him assist in the robbery.¹¹ The plan progressed over the next two weeks and Mr. Alexander brought

3. *Flowers*, 712 F. App'x at 495. ATF reverse stash-house sting operations follow nearly identical routines and this case is no different.

4. *See id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* Mr. Alexander sold the informant and/or Agent Zayas 6.5 grams of heroin for \$900. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

Rasheam Nichols and Justin Maxwell to meet Agent Zayas.¹² The four men discussed the details of the plan and Agent Zayas offered to provide a car for their use on the day of the robbery.¹³

On the day of the robbery, Mr. Alexander, Mr. Nichols, and Mr. Maxwell went to meet up with the informant and Agent Zayas.¹⁴ Accompanying them were Terrance Chappell and Mr. Flowers.¹⁵ Mr. Chappell and Mr. Flowers were armed.¹⁶ This was the first time Agent Zayas met Mr. Chappell and Mr. Flowers.¹⁷ The men discussed the robbery for a few minutes, going over the plan, resolving questions, and preparing.¹⁸ Agent Zayas told all the men what he had told Mr. Alexander before—that the stash-house contained about eight or nine kilograms of cocaine, was guarded by two men, and at least one of guards was armed.¹⁹ Geared up and ready to go, the informant took the wheel and began to drive to the stash-house.²⁰ However, they did not go to the imagined stash-house, and instead, he drove them to a warehouse where they were all arrested.²¹

On September 23, 2014, all five defendants, including Mr. Flowers, were charged with conspiracy to possess with intent to distribute five or more kilograms of cocaine and with using or carrying a firearm during and in relation to a drug conspiracy.²² Mr. Flowers had no criminal record and

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 496. Some were charged with additional, varying federal crimes.

was employed at the time of the fictitious robbery.²³ He was introduced into the scheme by his cousin²⁴ and his eagerness to make a large sum of money quickly ensnared him in the ATF's reverse stash-house sting. Not even the target of the operation, Mr. Flowers is now serving a mandatory minimum sentence for a crime he likely would never had thought to commit but for the government's creation and attractive framing of it.

Mr. Flowers' story is one of many similar cases resulting from the government operation conducted by the ATF known as a reverse stash-house sting operation. The ATF's reverse stash-house stings developed in the late 1980s to combat a rise in professional robbery crews targeting stash-houses.²⁵ The operations have grown extremely controversial in recent years because they "empower law enforcement to craft offenses out of whole cloth."²⁶

The government, being the sole creator of the operation, wields a dangerously unfettered amount of power. In creating the robbery, it is the government that chooses the quantity of drug to be robbed, the type of drug to be robbed, and the obstacles a target must overcome during the robbery. These elements correlate exactly to the defendant's sentence length. Therefore, the discretion the government has to manipulate these elements allows it full control over the amount of time the defendant spends in prison.²⁷

This dubious imbalance of power in the hands of the government spurred the creation of the court-created constitutional doctrine of sentencing factor manipulation. Sentencing manipulation is a violation of the Due Process Clause. "Sentencing factor manipulation occurs 'where government agents have improperly enlarged the scope or

23. *Id.* at 496–97.

24. *Id.* at 497.

25. *United States v. Washington*, 869 F.3d 193, 197 (3d Cir. 2017).

26. *Id.*

27. *Flowers*, 712 F. App'x at 509 (Stranch, J., dissenting).

scale of [a] crime.”²⁸ When a court determines the government has engaged in such manipulation, the court has the “power to impose a sentence below the statutory mandatory minimum as an equitable remedy.”²⁹

A claim of sentencing factor manipulation is raised by the defendant at the time of sentencing. Under the claim, the defendant argues the government, by and through its law enforcement officers, unduly influenced the factors relevant to determining sentence length, in a manner that exposed him to a longer and usually mandatory prison sentence. The sentencing factor manipulation doctrine is grounded in the doctrine of entrapment and the due process based doctrine of outrageous government conduct. It is highly applicable to cases of reverse stash-house stings.

This Comment proposes adopting a modified sentencing factor manipulation claim that can be brought by defendants in reverse stash-house sting cases. Part I explains how a reverse stash-house sting is conducted and briefly examines why the reverse stash-house stings are becoming more and more disfavored in federal courts. Part II describes the historical and doctrinal underpinnings of the sentencing factor manipulation claim, including a close examination of the entrapment defense, the due process based outrageous government conduct claim, and the structure of sentencing in the federal courts. Part III examines the current state of the sentencing factor manipulation claim across the federal circuit courts. Finally, Part IV discusses why the sentencing factor manipulation claim is so relevant to reverse stash-house sting cases, distinguishes other defenses and claims that are less applicable, and proposes a version of the sentencing factor manipulation claim to be adopted.

28. *United States v. Rivera-Ruperto*, 852 F.3d 1, 14 (1st Cir. 2017) (alteration in original) (quoting *United States v. Lucena-Rivera*, 750 F.3d 43, 55 (1st Cir. 2014)).

29. *Id.* (quoting *United States v. Fontes*, 415 F.3d 174, 180 (1st Cir. 2005)).

I. THE REVERSE STASH-HOUSE STING

A. *Explanation of the Operations*

Sting operations have been utilized by law enforcement officers for decades. Reverse sting operations started in the 1980s with “reverse buys”—instead of posing as a buyer, an undercover law enforcement agent poses as a seller and the defendant violates the law when he buys whatever illegal product the undercover agent is selling.³⁰ Reverse stash-house stings follow reverse stings in that the government offers the illegal opportunity to the defendant. The ATF created reverse stash-house stings in Miami in the early 1990s.³¹ Drug cartels moving large quantities of cocaine into South Florida attracted “freelance criminals” seeking to poach the shipments.³² This in turn resulted in shootouts and many innocent deaths.³³ The ATF combatted the freelance criminals using the reverse stash-house sting.³⁴

Over 1,000 people have been prosecuted in nearly identical operations conducted by the ATF across the country.³⁵ The protocol used in the operations is the same every time and proceeds as follows. A confidential informant working with the ATF selects a person (the target) he believes can be enticed into robbing a house used to store

30. Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1055–60 (1993). “Abscam and the pursuit of John DeLorean are perhaps the most notorious federal reverse sting operations.” *Id.* at 1058.

31. Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA TODAY (June 28, 2013, 11:26 AM), <https://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109/>.

32. *Id.*

33. *Id.*

34. *Id.* The ATF now has reverse stash-house sting operations in nearly half the states. *Id.*

35. *Id.*

drugs awaiting distribution (stash-house).³⁶ The informant identifies the target to an ATF agent.³⁷ The undercover ATF agent then approaches the target and poses as a disgruntled drug courier.³⁸ The agent tells the target he has knowledge about a stash-house containing a large quantity of cocaine and suggests they join forces to rob the house and spilt the proceeds.³⁹ Sometimes the agent suggests armed men guard the house, sometimes the agent suggests the target recruit others to help in the robbery, sometimes the agent suggests he can supply the extra manpower, sometimes the agent suggests the use of firearms, and sometimes the agent suggests he will provide the transportation on the day of the robbery.⁴⁰

Once the target or targets have taken steps to rob the stash-house, they are all apprehended and charged with conspiracy to violate federal narcotics laws, as well as a variety of other federal crimes.⁴¹ The only problem is . . . the house, the drugs, and the guards with guns are all *fictitious*—the whole scheme nothing more than a fiction authored by the government. Because the reverse stash-house sting operations are wholly the inventions of ATF agents, they have drawn criticism from not only the judiciary, but from news reporting and scholarly writings.

B. *Precarious Legal Position*

The ATF reverse stash-house sting operations have serious misgivings that have placed them in a precarious and near fatal legal position. On their face and in actuality, the operations do not achieve the government's declared goal of

36. *United States v. Pedrin*, 797 F.3d 792, 794 (9th Cir. 2015).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

making communities safer.⁴² Preexisting criminal enterprises are not targeted and no already existing drug rings or conspiracies are broken up as a result of the operations.⁴³ Often times, targets have little to no criminal record and are not the type of serious or violent offender one would expect the government to be targeting.⁴⁴ The crime proposed by the government is a “massive” one, and “somewhat baffling,” as the persons who the government targets do “not have ‘massive’ criminal histories to match.”⁴⁵ In some cases, the target is a reformed offender with a minor criminal history who has obtained gainful employment and worked to reestablish his place in society.⁴⁶ His success is immediately destroyed when he cannot resist the half-a-million-dollar payday touted by an undercover ATF agent and is subsequently placed back into the criminal justice system.⁴⁷

The operations are always scripted as a “big-hit”—a robbery of a stash-house containing an amount of drugs that will result in a lucrative and nearly irresistible payday.⁴⁸ The ATF uses this powerful inducement without fail and the quantity of drugs imagined is always enough to qualify for mandatory minimum sentences.⁴⁹ Furthermore, there just seems to be something inherently unfair with the fiction that is a reverse stash-house sting operation. The government is prosecuting a defendant “as if fantasy had been reality.”⁵⁰ Every element in the reverse stash-house sting is a falsity

42. *United States v. Flowers*, 712 F. App'x 492, 509 (6th Cir. 2017) (Stranch, J., concurring).

43. *Id.*

44. *See id.*

45. *United States v. McKenzie*, 656 F.3d 688, 692 (7th Cir. 2011).

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *United States v. Washington*, 869 F.3d 193, 196 (3d Cir. 2017).

dreamed up by the government, from the nonexistent drugs to the nonexistent house, yet the “ironclad mandatory minimum” the defendant serves is in fact existent and very much a painstaking reality.⁵¹

Moreover, the government “create[s] a criminal enterprise that would not have come into being but for the temptation of a big payday, a work of fiction spun out by government agents to persons vulnerable to such a ploy who would not otherwise have thought of doing such a robbery.”⁵² Absent the government’s manufacture, the crime would not have existed. A former ATF supervisor has been quoted as saying, “Do you want police to solve crimes, or do you want them to go out and prevent crimes that haven’t occurred yet?”⁵³ Arguably, most would answer government resources are not best used in the practice of inventing fake crimes.

Lastly, the stings present a great danger of racial profiling. “People of color are allegedly swept up in the stings in disproportionate numbers.”⁵⁴ While the ATF follows a protocol for reverse stash-house sting operations, the operations are “arbitrary and indiscriminate when it comes to the initial identification of suspects.”⁵⁵ A confidential informant for the government selects individuals that seem likely to fall prey to an ATF sting.⁵⁶ This lack of specificity has led several defendants to argue the operations are racially discriminatory and this controversy recently hit an

51. *Id.* at 211.

52. *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013).

53. Heath, *supra* note 31.

54. *Washington*, 869 F.3d at 197.

55. *United States v. McLean*, 199 F. Supp. 3d 926, 934 (E.D. Pa. 2016).

56. *Id.* Aside from racial profiling, the selection process presents a problem in relation to culpability. The ATF conducts a background investigation on the individual to determine if his criminal history makes him a good target. *Id.* However, the background investigation “does not necessarily reveal whether the subject has ever engaged in criminal activity of the magnitude contemplated by the sting.” *Id.* at 934–35. Just because an individual has dealt drugs or used firearms in the pursuit of crime does not mean he is inclined to deal drugs in the quantities proposed by the government. *See id.* at 935.

all-time high in Chicago.⁵⁷ District judges joined together several reverse stash-house cases in order to hold an unprecedented joint hearing to hear testimony on issues of racial profiling in these operations.⁵⁸ The court found that between 2006 and 2013, 78.7% percent of the defendants charged in the stash-house stings were black, 9.6% were Hispanic, and 11.7% were white.⁵⁹

The first judge to write as a result of the hearing was Chief Judge Castillo.⁶⁰ While he found the operations to be plagued with racial overtones, he ultimately did not dismiss the charges against the defendants.⁶¹ He acknowledged the tension between law enforcement procedures and the country's racially diverse community⁶² but stated in his 73-page opinion that the defendants fell short of proving that the reverse stash-house stings unfairly targeted blacks and Hispanics.⁶³ Chief Judge Castillo has also expressed his frustrations with the operations outside of his opinion. At a prior hearing, he told the government, "This isn't about winning cases. It's about doing justice. Some of these defendants have already served a lot of time. The government needs to think about that and needs to think about it very, very seriously."⁶⁴

II. BACKGROUND: THE HISTORICAL AND DOCTRINAL UNDERPINNINGS OF THE SENTENCING FACTOR MANIPULATION

57. Jason Meisner, *Federal Judge Finds ATF Drug Stash House Stings Distasteful but Not Racially Biased*, CHI. TRIB. (Mar. 13, 2018, 6:15 AM), <http://www.chicagotribune.com/news/local/breaking/ct-met-atf-drug-stash-house-ruling-20180309-story.html>.

58. *Id.*

59. *United States v. Brown*, 299 F. Supp. 3d 976, 983 (N.D. Ill. 2018).

60. *Id.*; Meisner, *supra* note 57.

61. *Brown*, 299 F. Supp. 3d at 986, 1022.

62. *Id.* at 985.

63. *Id.* at 986; Meisner, *supra* note 57.

64. Meisner, *supra* note 57.

CLAIM

The sentencing factor manipulation claim is a court-created doctrine rooted in the entrapment defense and the due process based claim of outrageous government conduct. The entrapment defense can be formulated either subjectively or objectively. The principles behind the objective formulation of the entrapment defense are the very principles that run rampant through the formulations of the sentencing factor manipulation claim.

The objective formulation of the entrapment defense spurred another sort of quasi-objective formulation based upon due process principles. Arguably, this quasi-objective formulation morphed into the outrageous government conduct claim. Nevertheless, the outrageous government conduct defense is firmly rooted in due process principles on its own accord. The outrageous government conduct claim, in turn, spawned the sentencing factor manipulation claim, which is also firmly rooted in the same due process principles.

The sentencing factor manipulation claim parallels both the objective formulation of the entrapment defense and the outrageous government conduct claim. The objective formulation of the entrapment defense, the outrageous government conduct claim, and the sentencing factor manipulation claim all focus on the actions of law enforcement officers.

Furthermore, the advent of mandatory minimum sentencing laws and the creation of the Federal Sentencing Guidelines took sentencing discretion away from the judiciary. In an attempt to regain some power, courts began to consider defenses that allowed them circumspection at the time of sentencing—thus the sentencing factor manipulation claim started to gain applicability in the eyes of the courts. The entrapment defense, outrageous government conduct claim, and federal sentencing structure will each be discussed in turn.

A. *The Entrapment Defense*

Entrapment is the defense that a “law enforcement officer used excessive temptation or urging to wrongfully induce the defendant[] to commit a crime [he] would not have ordinarily committed.”⁶⁵ It exists entirely in case law at the federal level. Entrapment as a defense did not achieve general acceptance until well into the twentieth century and it was harshly rejected in the early New York case of *Board of Commissioners v. Backus* when the court used the now famous Biblical analogy to declare:

Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the pleas as ancient as the world, and first interposed in Paradise: “The serpent beguiled me and I did eat.” That defence was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will.⁶⁶

Although initially rejected, the defense continued to arise in several influential nineteenth and early twentieth century cases and laid attacks on the propriety of governmental involvement in crime.⁶⁷ It eventually gained traction when several state courts and lower federal courts began crediting entrapment as a defense.

The defense was solidified when the Supreme Court first considered it in *Sorrells v. United States* and formally recognized entrapment as a defense.⁶⁸ The Court held “when

65. THOMAS J. GARDNER & TERRY M. ANDERSON, CRIMINAL LAW 185 (13th ed. 2018).

66. 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864).

67. See e.g., *Casey v. United States*, 276 U.S. 413 (1928); *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915); *People v. Mills*, 70 N.E. 786 (N.Y. 1904).

68. 287 U.S. 435 (1932). In *Sorrells*, a government prohibition agent visited Sorrells' home. *Id.* at 439–40. Sorrells was a North Carolina factory worker who served in World War I. *Id.* The agent represented himself as a fellow veteran and during their visit, twice asked Sorrells to procure liquor for him, to which Sorrells

the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion . . . lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution.”⁶⁹ The majority, authored by Chief Justice Hughes, found entrapment as a defense was not merely that the crime was committed at the insistence of the government, but that the key factor to consider was “[t]he predisposition and criminal design of the defendant.”⁷⁰ This has become known as the “subjective” test and is followed in all federal and most state courts.⁷¹ Under this formation, the focus is on the defendant’s predisposition—once the defendant has demonstrated improper government inducement, the government has the opportunity to show the defendant was predisposed to engage in the illegal conduct—a lack of predisposition renders the entrapment defense valid for the defendant.⁷²

However, in his concurring opinion, Justice Roberts took strong issue with the majority’s construction, and instead proposed that the key factor in evaluating entrapment was the conduct of the law enforcement officers.⁷³ He wrote,

twice refused. *Id.* The agent asked a third time while reminiscing over war stories and this time Sorrells obtained a bottle of whiskey for \$5. *Id.* He was then arrested for violating the National Prohibition Act. *Id.* at 438. The government called witnesses to show Sorrells had a reputation as a rumrunner, but there was no evidence Sorrells had ever previously possessed or sold liquor. *Id.* at 441.

69. *Id.* at 445 (quoting *Newman v. United States*, 299 F. 128, 131 (4th Cir. 1924)).

70. *Id.* at 451.

71. 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, 834–35 (1992).

72. The Court explained the burden shifting nature of the entrapment in *Sherman v. United States*, 356 U.S. 369, 372–73 (1958). The *Sherman* Court credited the *Sorrells* Court with having outlined the entrapment defense as when “the accused . . . examine[s] the conduct of the government . . . and [then] . . . the accused [is] subjected to an ‘appropriate and searching inquiry into his own conduct and predisposition.’” *Id.* (quoting *Sorrells*, 287 U.S. at 451); see also *Jacobson v. United States*, 503 U.S. 540, 550–54 (1992).

73. *Sorrells*, 287 U.S. at 456–59 (Roberts, J., concurring).

“[e]ntrapment is the conception and planning of an offense by an officer, and . . . its commission by one who would not have perpetrated it except for the trickery.”⁷⁴ He relied on well-established public policy grounds to argue that courts should refuse their aid in schemes where “the actual creation of a crime [was] by those whose duty [it was] to deter its commission.”⁷⁵ No weighing of equities between the guilty officer and the guilty defendant are necessary—where the government officer instigated the crime, the courts should be closed to prosecution.⁷⁶ This has become known as the “objective”⁷⁷ test and under this evaluation, the predisposition of the defendant is irrelevant—the focus is on the conduct of the law enforcement officers and whether the acts of the officers were likely to induce an ordinary citizen to commit the crime.⁷⁸

While Justice Roberts’ construction was not adopted, the disparity between the opinions has clouded the entrapment defense ever since. The dispute arose again nearly thirty-years later in *Sherman v. United States*,⁷⁹ where the Court considered entrapment for a second time. The case resulted in a five Justice majority opinion and a four Justice concurrence.⁸⁰ Justice Warren penned the majority, and finding for the defendant, stated, “[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for

74. *Id.* at 454.

75. *Id.*

76. *Id.* at 459.

77. The objective test can also be traced back to Justice Brandeis’ dissenting opinion in *Casey v. United States*, 276 U.S. 413, 423 (1928). The Court refused to consider the entrapment defense.

78. Bennett, *supra* note 71 at 836–37. If the inducements offered by law enforcement were of the sort to which a normally law-abiding citizen would have responded, then the defendant who committed a crime in response to such inducements cannot be convicted. RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE*, 791 (4th ed. 2016).

79. 356 U.S. 369 (1958).

80. *Id.*

the unwary criminal.”⁸¹ He declined to reassess Justice Roberts’ entrapment model proposed in his *Sorrells* concurrence,⁸² and instead relied on the facts to conclude there was no evidence that the defendant was predisposed to break the law.⁸³

The concurrence, written by Justice Frankfurter, again advocated for the objective test for entrapment and relied on Justice Roberts’ concurrence in *Sorrells*.⁸⁴ He asserted entrapment should be located in the conduct of the officers and “the prevailing theory of the *Sorrells* case ought not to be deemed the last word” because it was the Court’s “first attempt at an explanation” of the entrapment defense.⁸⁵ He made arguments based upon Congressional intent and public policy, asserting the courts should turn their backs to “enforcement of the law by lawless means.”⁸⁶ However, his most notable point came when he foreshadowed what was soon to become a prominent due process claim against entrapment, when he said, “[t]he courts refuse to convict an entrapped defendant . . . because even if his guilt be admitted, the methods employed on behalf of the [g]overnment to bring about conviction cannot be countenanced.”⁸⁷ This line inadvertently laid the groundwork for a due process based theory that would arise nearly two decades later.

Entrapment did not come before the Court again until the 1970s, when the government came out on the winning side both times—in *United States v. Russell*⁸⁸ and *Hampton*

81. *Id.* at 372.

82. *Id.* at 376.

83. *Id.* at 373–76.

84. *Id.* at 378–79 (Frankfurter, J., concurring).

85. *Id.* at 379.

86. *Id.* at 379, 380.

87. *Id.* at 380.

88. 411 U.S. 423 (1973).

v. United States.⁸⁹ *Russell* resulted in a 5–4 split with two separate dissents.⁹⁰ Justice Douglas authored the first dissent and took adamant issue with the majority’s continued adoption of the subjective test for entrapment; he argued the defendant should be excused via the entrapment defense because regardless of the defendant’s “inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society.”⁹¹ Justice Douglas found the government to not only be the instigator of the crime but a partner in its commission and the “creative brain behind the illegal scheme.”⁹²

Justice Stewart wrote the second dissent in *Russell* and took similar adamant issue with the majority’s refusal to hold the government accountable for its contributory actions;⁹³ he asserted, the government may not “create a crime and then punish the criminal, its creature.”⁹⁴ More prominently though, he not only pointedly argued against the subjective test and advocated for the objective test, but also articulated each clearly and comparatively.⁹⁵ In his opinion, the entrapment defense demands an approach that focuses on the conduct of the government rather than on the predispositions of the defendant.⁹⁶ The predisposition of the defendant is a moot point when considering entrapment, as the defendant has conceded commission and therefore shown he was in fact predisposed to commit the crime in the sense

89. 425 U.S. 484 (1976).

90. 411 U.S. 423.

91. *Id.* at 437 (Douglas, J., dissenting) (quoting *Sherman*, 356 U.S. at 382–83 (Frankfurter, J., concurring)).

92. *Id.* at 439.

93. *Id.* (Stewart, J., dissenting).

94. *Id.* (quoting *Casey v. United States*, 276 U.S. 413, 423 (Brandeis, J., dissenting)).

95. *Id.* at 440–41.

96. *Id.* at 441.

that he was capable of its commission.⁹⁷ He believed the objective test was better tailored to and more consistent with the purpose of the entrapment defense: to “prohibit unlawful governmental activity in instigating crime.”⁹⁸

While the majority, authored by Justice Rehnquist, stood by the subjective test, it did take the time to weigh the considerations of both tests.⁹⁹ Russell urged the Court to adopt the objective test in his appeal and consider not his state of mind, but only the conduct of the government officers.¹⁰⁰ Authentically, he relied on constitutional grounds to argue the officers were such vital participants in the criminal scheme and so overly involved in the ploy that criminally prosecuting him would violate the fundamental principles of due process.¹⁰¹ The Court found Russell’s argument did not fit the facts of his own case because the criminal scheme at issue could have been, and previously had been, carried out without the help of the government officers.¹⁰² Therefore, their aid and involvement stopped short of violating the fairness principles mandated by the Due Process Clause of the Fifth Amendment.¹⁰³

But, the Court did not dispose of his argument in whole¹⁰⁴: “we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”¹⁰⁵ This line has reverberated throughout discussions regarding the entrapment defense ever since, but

97. *Id.* at 442.

98. *Id.*

99. *Id.* at 427–31 (majority opinion).

100. *Id.* at 430.

101. *Id.*

102. *Id.* at 431.

103. *Id.* at 432.

104. *Id.* at 431–32.

105. *Id.*

has also taken shape as a new and separate claim to be brought by a defendant at trial, which is discussed *infra*.

The subjective versus objective test debate over the entrapment defense raged on in *Hampton*,¹⁰⁶ but it was the last case that featured this conflict in the context of entrapment.¹⁰⁷ The majority of the Court relied on the subjective test, finding Hampton was predisposed to selling drugs regardless of the supplier,¹⁰⁸ and the dissent relied on the objective test, finding the government's actions in outright supplying the illegal drugs was unacceptably beyond permissible limits.¹⁰⁹ For the purposes of this Comment, *Hampton* is more relevantly discussed *infra*.

The last and most recent consideration of the entrapment defense by the Supreme Court was in *Jacobson v. United States*¹¹⁰ and legal scholars have deemed it to be the resurrection of the entrapment defense.¹¹¹ The Court found for the defendant, reaffirming the principle that “[w]hen the [g]overnment’s quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene.”¹¹² The case received noteworthy amounts of press, and one reporter described the

106. *Hampton v. United States*, 425 U.S. 484 (1976).

107. Paul Marcus, *Presenting, Back from the [Almost] Dead, the Entrapment Defense*, 47 FLA. L. REV. 205, 214 (1995). The debate was furious for a long time, but Justice Brennan, the last major proponent of the objective test conceded the point in the 1988 case of *Matthews v. United States*, 485 U.S. 58, 66–67 (1988) (Brennan, J., concurring).

108. *Hampton*, 425 U.S. at 488–91. The case resulted in a plurality—the majority of Justices (5–3) agreed the defendant was predisposed to commit the crime. *Id.* at 485 (plurality opinion). But, two Justices penned a concurrence in which they disagreed with the plurality on a separate point. *Id.* at 491 (Powell, J., concurring). The dissenting three Justices disagreed in full. *Id.* at 495 (Brennan, J., dissenting).

109. *Id.* at 495–500 (Brennan, J., dissenting).

110. 503 U.S. 540 (1992).

111. Marcus, *supra* note 107, at 211.

112. *Jacobson*, 503 U.S. at 553–54.

government's conduct as "an extreme misuse of . . . power in which an innocent person was led to commit a manufactured crime."¹¹³ This idea of "manufactured" crime that surrounded the *Jacobson* case was the building block on which lower federal court judges relied when they began to confront the surge of ATF reverse stash-house sting operations in the early 2010s.

B. *The Outrageous Government Conduct Claim*

The *Russell* case and Justice Rehnquist's "we may some day" language within it have been deemed the birth of the outrageous government conduct claim.¹¹⁴ The claim, grounded in due process principles and raised by the defendant, asserts that the officers' conduct relating to the crime was so outrageous that it bars the government from invoking judicial process.¹¹⁵ The standard for a dismissal based on the actions of the law enforcement officers is very high and conduct is only considered outrageous when it violates "fundamental fairness" and "shock[s] . . . the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment."¹¹⁶

The claim was first raised by a defendant in *Hampton v. United States*.¹¹⁷ The defendant argued the government's role in supplying him with illegal drugs to sell fell within the

113. Linda Greenhouse, *Justices, in Entrapment Case, Cast a Rare Vote Against Prosecutors*, N.Y. TIMES, April 7, 1992, <https://www.nytimes.com/1992/04/07/us/justices-in-entrapment-case-cast-a-rare-vote-against-prosecutors.html>.

114. Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 NW. U. L. REV. 305, 314 (1996) ("With this somewhat cryptic statement, the outrageous government conduct defense was born.").

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

116. *Id.* at 432 (internal quotation marks omitted). *See also* *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993) (describing outrageous conduct as "so excessive, flagrant, scandalous, intolerable and offensive").

117. 425 U.S. 484, 488 (1976).

sort of “outrageous government conduct” Justice Rehnquist pondered in *Russell*.¹¹⁸ He argued this outrageous conduct constituted a violation of his due process rights.¹¹⁹ Justice Rehnquist, writing for three members of the Court, was not impressed. Justice Rehnquist opined the defendant misunderstood his commentary in *Russell* and attempted to destroy the very doctrine he created: “the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights.”¹²⁰

However, Justice Rehnquist did not capture the majority of the court and two Justices joined in a concurrence that specifically disagreed with Justice Rehnquist’s viewpoint on the outrageous government conduct claim: “I am unwilling to conclude that an analysis . . . would never be appropriate under due process principles.”¹²¹ The three dissenting Justices shared similar feelings, claiming the officers’ actions transcended permissible limits in that “[t]he beginning and end of this crime . . . coincided exactly with the [g]overnment’s entry into and withdrawal from the criminal activity.”¹²² Thus, five Justices, a majority of the Court, recognized the viability of an outrageous government conduct claim based upon due process principles.

Yet, this fractured holding created immense confusion, and the Court’s failure to revisit the claim since its articulation has permitted varying degrees of application of the claim in lower federal courts in the following years.¹²³ Some circuit courts have rejected the outrageous government conduct claim completely,¹²⁴ some have accepted it but only

118. *Id.* at 489.

119. *Id.*

120. *Id.* at 490–91.

121. *Id.* at 493.

122. *Id.* at 498 (Brennan, J., dissenting).

123. *See Miller, supra* note 114, at 315.

124. *See, e.g., United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995); *United States*

used it in application once or twice,¹²⁵ and some have recognized its viability but have yet to find a case where it applies because of their impossibly high standard for outrageousness.¹²⁶

Among the courts that recognize the claim but have declined to apply it thus far are the First, Second, Fourth, Fifth, Eighth, Tenth, Eleventh, and D.C. Circuits.¹²⁷ Their standard for outrageousness bars application of the claim even when the defendant has accurately presented it.¹²⁸ The First Circuit reserves the application of the claim for the most egregious and despicable situations, in which the government has been so overly involved in the crime so that it is as if the government has wholly created the criminal venture.¹²⁹ The Second Circuit applies the claim only when the government's conduct offends common notions of decency, and departing slightly from the First Circuit's standard, it has said "coaching [the defendant] in how to commit the crime" does not qualify as outrageous conduct.¹³⁰ The Fourth Circuit takes a similar stance to that of the Second Circuit. The conduct of the government must shock or offend traditional notions of fairness in order to violate due process and the court has never held government conduct to violate this standard.¹³¹

v. Tucker, 28 F.3d 1420 (6th Cir. 1994).

125. See, e.g., *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

126. See, e.g., *United States v. Hasan*, 718 F.3d 338 (4th Cir. 2013); *United States v. Al Kassar*, 660 F.3d 108 (2d Cir. 2011); *United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011); *United States v. Boone*, 437 F.3d 829 (8th Cir. 2006); *United States v. Guzman*, 282 F.3d 56 (1st Cir. 2002); see also *United States v. Dyke*, 718 F.3d 1282 (10th Cir. 2013) (recognizing the doctrine but failing to have yet applied it).

127. See *supra* note 126 and accompanying text.

128. See *supra* note 126 and accompanying text.

129. See *Guzman*, 282 F.3d at 59; *United States v. Santana*, 6 F.3d 1, 5 (1st Cir. 1993).

130. *Al Kassar*, 660 F.3d at 121.

131. *Hasan*, 718 F.3d at 343.

The Fifth Circuit has stated the defendant bears an extremely high burden,¹³² the Eighth Circuit has held the government's conduct must fall within a very "narrow band" of the "most intolerable" types of conduct,¹³³ and the Eleventh Circuit has asserted the claim will only be applied in the most rare and outrageous cases.¹³⁴ Interestingly, the D.C. Circuit has not "rule[d] out the possibility of finding valid a defense of outrageous government conduct," but it limits the defense to government conduct "involving 'coercion, violence, or brutality to the person.'"¹³⁵ The Tenth Circuit also recognizes the claim and has yet to apply it, but it has provided more guidance on the outrageousness standard.¹³⁶ The defendant must show undue government involvement in the creation of the crime or considerable governmental coercion to induce the crime.¹³⁷ The government cannot "engineer and direct the criminal enterprise from start to finish"¹³⁸ and it cannot "generate[] new crime for the purpose of prosecuting it or induce[] a defendant to become involved for the first time in certain criminal activity."¹³⁹

The two circuits that recognize the outrageous government conduct claim and have actually applied it, albeit only once or twice, are the Third and Ninth Circuits. They each have reversed a conviction, having deemed the government's conduct so outrageous as to violate due process principles; these are the *only* two reported Court of Appeals

132. *United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003).

133. *United States v. Boone*, 437 F.3d 829, 841 (8th Cir. 2006) (internal citation omitted).

134. *United States v. Augustin*, 661 F.3d 1105, 1123 (11th Cir. 2011).

135. *United States v. Caviria*, 116 F.3d 1498, 1533–34 (D.C. Cir. 1997) (quoting *United States v. Walls*, 70 F.3d 1323, 1330 (1995)).

136. *See, e.g.*, *United States v. Dyke*, 718 F.3d 1282, 1287–88 (10th Cir. 2013).

137. *Id.* at 1288; *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994).

138. *United States v. Mosley*, 965 F.2d 906, 911 (10th Cir. 1992) (quoting *United States v. Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983)).

139. *Id.* at 911.

cases that have found a violation of due process on outrageous government conduct grounds.¹⁴⁰

In *United States v. Twigg*, the Third Circuit found “the nature and extent of police involvement in [the] crime was so overreaching as to bar prosecution of the defendants as a matter of due process of law.”¹⁴¹ In *Twigg*, the Drug Enforcement Agency (“DEA”) asked an informant to approach the defendant with the suggestion of building a methamphetamine laboratory.¹⁴² The DEA supplied all the necessary materials, including glassware, isolated farmland on which to build the laboratory, and a difficult to obtain, indispensable chemical ingredient.¹⁴³ The defendant did not know how to produce methamphetamine and followed the instructions of the informant completely.¹⁴⁴ The DEA was completely in charge and provided the technical expertise necessary for the operation.¹⁴⁵ Furthermore, when a problem was encountered in the scheme, threatening its halt, the DEA readily found a solution.¹⁴⁶ Based upon these facts, the court had “no trouble in concluding that the governmental involvement in the criminal activities . . . [had] reached a ‘demonstrable level of outrageousness.’”¹⁴⁷

In *Greene v. United States*,¹⁴⁸ the Ninth Circuit found the government’s conduct so outrageous as to have violated due

140. *United States v. Combs*, 827 F.3d 790, 795 (8th Cir. 2016) (“We are aware of only two reported court of appeals decisions—both from the 1970s—that have deemed the government’s conduct so outrageous as to violate due process.”); *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. Greene*, 454 F.2d 783 (9th Cir. 1971).

141. 588 F.2d at 377.

142. *Id.* at 375.

143. *Id.* at 375–76.

144. *Id.* at 381.

145. *Id.* at 375.

146. *Id.* at 380.

147. *Id.*

148. 454 F.2d 783 (9th Cir. 1971).

process.¹⁴⁹ It reversed the defendants' conviction on charges related to an illegal bootlegging operation.¹⁵⁰ In *Greene*, an undercover government agent was intricately involved in the illegal bootlegging operation for over two years.¹⁵¹ He offered to supply, and did supply, necessary materials, an operator, a location for the still, and sugar at discounted prices.¹⁵² He also adamantly encouraged the revival of the operation, threatened the defendants to accelerate production, and was the sole purchaser of the illegal liquor produced.¹⁵³ Based on the facts, the court held "the [g]overnment may [not] involve itself so directly and continuously over such a long period of time in the 'creation' and maintenance of criminal operations, and yet prosecute its collaborators."¹⁵⁴ It found the government's conduct rose to a level "repugnant to [the] American criminal justice" system.¹⁵⁵

The Ninth Circuit is the only circuit court that has identified a set of relevant factors to be used in assessing a claim of outrageous government conduct.¹⁵⁶ *United States v. Black* is the seminal case for the claim because of the guidance the court provided for its evaluation. The court articulated a totality of the circumstances analysis, identifying the following six factors as relevant in determining if the government's conduct was so outrageous

149. The defendants argued entrapment on appeal, not an outrageous government conduct claim. *Id.* at 786. The court did not find entrapment as a matter of law (under the subjective test) because the defendants were predisposed to manufacture and sell bootleg whiskey. *Id.* However, the court relied on the objective test for entrapment to hold the government's conduct outrageous. *See id.* at 787. *See also* *United States v. Combs*, 827 F.3d 790, 795 (8th Cir. 2016) ("The Ninth Circuit found a due process violation in *Greene v. United States . . .*").

150. *Greene*, 454 F.2d at 783–84.

151. *Id.* at 786.

152. *Id.*

153. *Id.* at 787.

154. *Id.*

155. *Id.*

156. *United States v. Black*, 733 F.3d 294 (9th Cir. 2013).

as to bar conviction:

(1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendants to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.¹⁵⁷

It also provided loose limits for what is and is not considered to be outrageous: it is outrageous for the government to engineer the criminal ploy from beginning to end, to use excessive mental or physical coercion, or to generate new crime for the sake of prosecution, but it is not outrageous for the government to infiltrate an existing criminal organization, to approach a known criminal with a criminal act, or to provide items necessary in the criminal scheme.¹⁵⁸

Black did not result in reversal of the defendant's convictions but it did produce some of the most noteworthy comments on ATF reverse stash-house sting operations.¹⁵⁹ While *Black* attempted to provide some clarification regarding the outrageous government conduct claim, the confusion surrounding its viability and applicability continues on.¹⁶⁰ The outrageous government conduct claim laid the foundation for the sentencing factor manipulation claim, and in many ways the latter parallels the former. Both claims maintain a primary focus on the actions of the law enforcement officers and both fall within the broader category of due process violations. But while the outrageous government conduct claim is an attack on the conviction itself, the sentencing factor manipulation claim is a more

157. *Id.* at 303.

158. *Id.* at 302.

159. *See id.* at 313 (Noonan, J., dissenting).

160. Several district courts have attempted to apply the outrageous government conduct claim.

narrow attack on the actual sentence.¹⁶¹

C. The Federal Sentencing Guidelines and Mandatory Minimum Sentence Statutes

The creation of mandatory minimum sentencing laws and the Federal Sentencing Guidelines (“Guidelines”) inevitably begged for a defense or claim to counteract the increased discretion given to the government and taken away from the courts in charging and sentencing offenses. Congress enacted the Guidelines in 1987.¹⁶² By enacting the Guidelines, Congress intended to minimize judicial discretion in the sentencing process and eliminate disparities in sentences between similarly situated defendants.¹⁶³ The Guidelines took away the courts’ previously wide discretion to determine the appropriate sentence in a defendant’s individual case.¹⁶⁴

Separate from the Guidelines, Congress has also legislated mandatory minimum sentences for specific crimes.¹⁶⁵ Federal statutes are laced with mandatory minimum provisions. Mandatory minimum sentencing laws require a court to impose a specific sentence length for defendants convicted of certain federal crimes. A specific attribute of a crime triggers a minimum sentence statute—for example, if a defendant possesses a machine gun in relation to a violent crime or drug-trafficking crime, a mandatory minimum sentence of thirty years is triggered

161. *United States v. Washington*, 869 F.3d 193, 197 (3d Cir. 2017).

162. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A2 (U.S. SENTENCING COMM’N 1992).

163. SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 8 (U.S. SENTENCING COMM’N 1987).

164. Eric P. Berlin, Comment, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 187 (1993).

165. Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, The Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1851 (1995).

because of the presence of the machine gun.¹⁶⁶ If the defendant had possessed a handgun instead, he would only be facing a mandatory minimum sentence of five years.¹⁶⁷ At sentencing, when a mandatory minimum length is in conflict with the calculated Guidelines sentence length, the mandatory minimum takes precedent over the Guidelines.¹⁶⁸ A judge is required to impose the mandatory minimum, but under *United States v. Booker*, is not required to impose a sentence within the Guidelines so long as he considers the wider range of sentencing factors enumerated in 18 U.S.C. § 3553(a).¹⁶⁹

To calculate a sentence under the Guidelines, a judge examines the defendant's relevant conduct to determine the offense base level, makes mitigating adjustments to the offense base level, and selects the defendant's criminal history level.¹⁷⁰ Where offense level and criminal history level intersect on the grid contained within the Guidelines, determines the defendant's sentence length, or the range of months for which the defendant must be imprisoned.¹⁷¹ The defendant's sentence is therefore, under the Guidelines, primarily determined by the amount of harm attributed to, or resulting from, the offense the defendant committed.¹⁷²

This harm-based penology, “results in a heavy focus on the amount or quantity of, for example, drugs sold, money

166. 18 U.S.C § 924(c)(1)(B)(ii) (2018).

167. 18 U.S.C § 924(c)(1)(A)(i) (2018). In total, he would be facing ten years—five years for the drug trafficking charges and five years for the presence of the handgun.

168. Oliss, *supra* note 165, at 1854.

169. 543 U.S. 220, 221 (2005).

170. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 1992).

171. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2018). For example, using the *Sentencing Table*, an offense level of ten and a criminal history category of III corresponds to an imprisonment term of ten to sixteen months. *Id.*

172. Berlin, *supra* note 164, at 195.

stolen, money laundered, money embezzled, or taxes evaded.”¹⁷³ Thus, punishments for drug and money offenses increase at a rate proportional to the amount or quantity of drugs or money involved in the offense.¹⁷⁴ This quantity-based approach takes the focus away from the defendant’s culpability.¹⁷⁵ One of the major problems with the Guidelines is that defendants whose conduct caused the same harm are given similar sentences even though they may differ greatly in culpability.¹⁷⁶ Defendants who committed the same crime are sentenced similarly, but defendants who are of comparable culpability are not sentenced similarly.¹⁷⁷

As stated above, under the Guidelines, a defendant’s sentence correlates with the harm their conduct created—meaning the “quantity of drugs sold or bought [or] the amount of money stolen or laundered.”¹⁷⁸ The Guidelines therefore allow law enforcement an opportunity to increase a defendant’s sentence length by manipulating factors in reverse stash-house sting operations that equate with the relevant conduct used to calculate sentence length.¹⁷⁹ This is an unchecked increase in power in the hands of law enforcement.¹⁸⁰ There is a large possibility and a great danger for this power to be used capriciously.¹⁸¹ The mandatory minimum sentencing laws also grant law enforcement an unchecked increase in power during sting operations. The decisions an officer makes during the reverse stash-house sting operation about the presence or absence of certain attributes of the crime can determine the defendant’s

173. *Id.*

174. *Id.* The rate is slightly less than proportional.

175. *Id.* at 196.

176. *Id.* at 197.

177. *Id.* at 199.

178. *Id.* at 206.

179. *Id.* at 205.

180. *Id.* at 206.

181. *Id.*

mandatory minimum sentence.

This potential for unfettered power in the hands of the Government has not gone unnoticed by the courts. Courts have attempted to check this power and restore some amount of judicial control over sentencing through the entrapment defense and the outrageous government conduct claim.¹⁸² However, the application of these defenses are very limited.¹⁸³ But, as frustration within the judiciary grew, courts began to surmise that even if the action of the government is “insufficiently oppressive to support an entrapment defense . . . or due process claim,” it still may warrant a reduction in the sentence of a defendant.¹⁸⁴ From this suggestion arose the claim of sentencing factor manipulation.

182. *Id.* at 215.

183. *Id.*

184. *United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992).

III. THE CURRENT STATE OF THE SENTENCING FACTOR MANIPULATION CLAIM IN FEDERAL COURT

The term “sentencing factor manipulation” was first coined in *United States v. Connell*.¹⁸⁵ In *Connell*, an undercover Internal Revenue Service (“IRS”) agent approached Connell, a stockbroker, and requested he help launder money.¹⁸⁶ Connell complied: he accepted cash, opened several bank accounts to spread the cash around, withdrew cash and redeposited it, and bought stock with the cash.¹⁸⁷ The undercover agent told Connell the cash derived from the illegal drug trade but Connell was not overly inquisitive.¹⁸⁸ On appeal, Connell argued the undercover agent “gratuitously spun a yarn about the illicit origin of the funds for the sole purpose of guaranteeing that [his] punishment would be increased.”¹⁸⁹ He labeled this argument “sentencing entrapment” and requested a downward departure from the Guidelines range.¹⁹⁰

The court thought the term sentencing entrapment was catchy but that Connell’s argument was better labeled “sentencing manipulation.”¹⁹¹ Sentencing entrapment was

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

186. *Id.* at 193.

187. *Id.*

188. *Id.*

189. *Id.* at 194.

190. *Id.* It appears sentencing entrapment was first mentioned in dicta in the Eighth Circuit:

[i]n mounting this attack, appellant relies heavily upon two cases which, while affirming sentences imposed by district judges, mention in dicta that a creature such as ‘sentencing entrapment’ might be roaming loose in the guidelines jungle and, under certain unspecified circumstances, might warrant a downward departure from the GSR. See *United States v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir.), *cert. denied*, 499 U.S. 968 (1991); *United States v. Stuart*, 923 F.2d 607, 614 (8th Cir.), *cert. denied*, 499 U.S. 967 (1991).

Id.

191. *Id.*

an inappropriate and misleading term because Connell admitted he was predisposed to structure cash transactions, thus there was no basis for an entrapment defense.¹⁹² The court proposed Connell's argument was instead that "the government practiced what might more accurately be called 'sentencing factor manipulation.'"¹⁹³ It acknowledged an element of manipulation is natural in any sting operation and defined the sentencing factor manipulation claim as "the manipulation inherent in a sting operation, even if insufficiently oppressive to support an entrapment defense, or due process claims, [that] must sometimes be filtered out of the sentencing calculus."¹⁹⁴ The court declined to "chart the line between permissible and impermissible conduct on the part of . . . government" but did say, "should a sufficiently egregious case appear, the sentencing court has ample power to . . . exclud[e] the tainted transaction from the computation of relevant conduct."¹⁹⁵

Since *Connell*, the definition, use, application, and recognition of the sentencing entrapment defense and the sentencing factor manipulation claim have been massively chaotic. The federal courts are largely divergent in their treatment of the two claims. To say there is furious confusion over the definition and distinction of the claims would not do the current state of disarray justice. Therefore, the state of the claims will be discussed circuit by circuit.

The First Circuit uses the terms sentencing entrapment and sentencing factor manipulation interchangeably.¹⁹⁶ It recognizes both as one valid claim.¹⁹⁷ The court has even gone so far as to describe sentencing factor manipulation as

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 196.

196. *United States v. Kenney*, 756 F.3d 36, 51 n.10 (1st Cir. 2014); *United States v. Jaca-Nazario*, 521 F.3d 50, 57 (1st Cir. 2008).

197. *Jaca-Nazario*, 521 F.3d at 57–58.

the “kissing cousin” of sentencing entrapment.¹⁹⁸ It has defined the sentencing claim as when “law enforcement agents venture outside the scope of legitimate investigation and engage in extraordinary misconduct that improperly enlarges of the scope or scale of the crime”¹⁹⁹ “in order ‘to secure a longer sentence than [it] would otherwise obtain.’”²⁰⁰ If a sentencing factor manipulation claim is brought successfully, the defendant is entitled to a sentence below the statutory minimum.²⁰¹ The court has acknowledged the burden on the defendant is very high, as he must prove beyond a preponderance of the evidence that the government engaged in extraordinary misconduct.²⁰² While the inquiry focuses primarily on the behavior of the government, the defendant’s predisposition to commit the charged crime is also relevant as a secondary consideration.²⁰³

In its most recent consideration of the sentencing factor manipulation claim in the context of an ATF reverse stash-house sting, the First Circuit rejected the defendant’s argument of the claim.²⁰⁴ The defendant argued the government engaged in sentencing factor manipulation because the “ATF improperly expanded the scope of the planned robbery from \$100,000 in cash . . . to \$200,000 plus five kilograms of cocaine worth up to \$100,000, thereby subjecting [the defendant] to a ten-year mandatory minimum sentence on the drug conspiracy count.”²⁰⁵ Even

198. *United States v. Gibbens*, 25 F.3d 28, 30 (1st Cir. 1994).

199. *Jaca-Nazario*, 521 F.3d at 58 (quoting *United States v. Barbour*, 393 F.3d 82, 86 (1st Cir. 2004)).

200. *Kenney*, 756 F.3d at 51 (internal alterations) (quoting *West v. United States*, 631 F.3d 563, 570 (1st Cir. 2011)).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 52.

205. *Id.* at 49.

though the court admitted an explanation by the government as to why the changed terms of the robbery would have been preferable, it still rejected the defendant's claim based on a vague finding of predisposition.²⁰⁶

The Second Circuit defines sentencing entrapment and sentencing manipulation distinctly, but has not yet recognized the validity of either because it has not yet been presented with factual circumstances upon which a defendant would prevail on either claim.²⁰⁷ Sentencing entrapment is when the government has induced the defendant to commit a crime he was otherwise not predisposed to commit.²⁰⁸ It would “preclude a sentence where ‘outrageous official conduct’ has ‘overcome[] the [defendant’s] will.’”²⁰⁹ Sentencing manipulation occurs “when the government engages in improper conduct that has the effect of increasing the defendant’s sentence.”²¹⁰ It requires “a showing of ‘outrageous’ misconduct.”²¹¹ The court has applied the doctrines in theory but the claims have never been successful.²¹²

The Third Circuit’s approach is identical to that of the Second—it defines sentencing entrapment and sentencing manipulation distinctly, but has not yet adopted nor rejected the doctrines.²¹³ Sentencing entrapment occurs where “official conduct leads an individual otherwise indisposed to dealing in a larger quantity or different type of controlled

206. *Id.* at 51–52.

207. *United States v. Cromitie*, 727 F.3d 194, 226 (2d Cir. 2013).

208. *United States v. Gomez*, 103 F.3d 249, 256 (2d Cir. 1997).

209. *Cromitie*, 727 F.3d at 226 (alterations in original) (quoting *Gomez*, 103 F.3d at 256).

210. *Gomez*, 103 F.3d at 256 (quoting *United States v. Okey*, 47 F.3d 238, 240 (7th Cir. 1995)).

211. *Cromitie*, 727 F.3d at 226.

212. *Id.* at 227; *United States v. Gagliardi*, 506 F.3d 140, 148–49 (2d Cir. 2007); *United States v. Bala*, 236 F. 3d 87, 93 (2d Cir. 2000); *Gomez*, 103 F.3d at 256.

213. *United States v. Sed*, 601 F.3d 224, 229 (3d Cir. 2010).

substance to do so, and the result is a higher sentence.”²¹⁴ Sentencing factor manipulation is a violation of the Due Process Clause that “occurs when the government unfairly exaggerates the defendant’s sentencing range by engaging in a longer-than-needed investigation and, thus, increasing the drug quantities for which the defendant is responsible.”²¹⁵

It appears²¹⁶ the Fourth Circuit follows the Second and Third—it acknowledges the difference between the sentencing entrapment and sentencing factor manipulation claims²¹⁷ but has declined to formally recognize either thus far, as it has not been presented with a set of facts requiring it to do so.²¹⁸ The key element in its theoretical sentencing entrapment claim is the predisposition of the defendant and the key element in its theoretical sentencing manipulation

214. *Id.* at 230 (quoting *United States v. Martin*, 583 F.3d 1068, 1073 (8th Cir. 2009)).

215. *Id.* at 231 (quoting *United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009)).

216. The court in *United States v. Ramos*, 462 F.3d 329, 335 (4th Cir. 2006) appears to intertwine the two claims, but the majority of the cases do in fact distinguish the claims; see *supra* notes 131–32 and accompanying text.

217. See *United States v. Brown*, 69 F. App’x 175, 177 (4th Cir. 2003). In *Brown*, Brown was charged with conspiracy to possess with intent to distribute more than five kilograms of cocaine and more than fifty grams of cocaine base, which resulted in a 135 month imprisonment sentence. *Id.* at 176. Brown argued for downward departure on appeal based upon both, distinctively, sentencing entrapment and sentencing manipulation. *Id.* at 177. He argued the police engaged in sentencing entrapment because the officers demanded Brown sell them crack cocaine when he normally sold marijuana. *Id.* Separately he argued the police engaged in sentencing manipulation because they requested and two controlled buys instead of one. *Id.* The court rejected the sentencing entrapment claim because Brown “did not claim that he lacked a predisposition to committing the drug offense,” *id.*, and it rejected the sentencing manipulation claim because “it is ‘not outrageous for the government to continue to purchase narcotics from willing sellers even after a level of narcotics relevant for sentencing purposes has been sold.’” *Id.* (quoting *United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994)). See also *United States v. Herndon*, 232 F.3d 891 (4th Cir. 2000) (unpublished table decision).

218. See *Herndon*, 232 F.3d at 891 (“this court has declined to recognize claims of ‘sentence entrapment’ and ‘sentence manipulation’ in similar cases and declines to do so in this appeal”); *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994).

claim is the outrageous conduct of the government.²¹⁹

It is unclear if the Fifth Circuit uses the terms sentencing entrapment and sentencing factor manipulation interchangeably²²⁰ or if it acknowledges them as separate claims.²²¹ Either way, it has never recognized the claim or claims as valid.²²² Originally, the Fifth Circuit defined the claims separately. Sentencing factor manipulation was first defined in *United States v. Tremelling*,²²³ where the court mirrored the claim after a similar one in *United States v. Richardson*.²²⁴

Richardson centered on a reverse-sting-money-laundering operation.²²⁵ On appeal, the defendant argued the government, in violation of due process, brought more money to the table in order to increase his sentence: “the [g]overnment in its sole discretion could have put an additional \$1 million, \$2 million, or \$3 million dollars in front of the gentlemen . . . which would effect the Guidelines.”²²⁶ The court did not find the government unfairly manipulated the amount of money involved in the operation because the defendant repeatedly asked for larger sums to launder.²²⁷ Relying on this case, the *Tremelling* court thus defined the sentencing factor manipulation claim as a due process claim focusing on the unfair, manipulative, or arbitrarily

219. See *Brown*, 69 F. App'x at 177.

220. See *United States v. Rodriguez*, 603 F. App'x 306, 321 (5th Cir. 2015); *United States v. Macedo-Flores*, 788 F.3d 181, 187 (5th Cir. 2015); *United States v. Stephens*, 717 F.3d 440, 446 (5th Cir. 2013).

221. *United States v. Robertson*, 297 F. App'x 316, 317 (5th Cir. 2008); *United States v. Tremelling*, 43 F.3d 148, 150–51 (5th Cir. 1995).

222. *Macedo-Flores*, 788 F.3d at 187; *Stephens*, 717 F.3d at 446.

223. 43 F.3d at 150–51.

224. 925 F.2d 112, 117–18 (5th Cir.), *cert. denied*, 501 U.S. 1237 (1991).

225. *Id.* at 114–15.

226. *Id.* at 117, 118 n.17.

227. *Id.* at 118.

influential conduct of government officers.²²⁸ It distinguished sentencing claims related to entrapment from those sentencing claims related to Justice Rehnquist's outrageous government conduct in *Russell*.²²⁹

After *Tremelling*, the court's treatment of the claims becomes blurred. Sometimes the court has treated the claims as separate theoretical claims: "[w]e have not yet determined whether sentencing entrapment, or the related concept of sentencing factor manipulation, is a cognizable defense to a sentence."²³⁰ But other times, the court has combined the claims into one, labeled the quasi-claim sentencing entrapment, and combined the definitions into one: "[w]e have never recognized sentencing entrapment as a defense [but if we] were to accept it, it would only be cognizable in cases involving 'true entrapment,' or 'overbearing and outrageous conduct' on the part of the [g]overnment."²³¹ The combined theoretical claim focuses on both the predisposition or resistance of the defendant and the contributory or encouraging behavior of the government.²³²

The Sixth Circuit defines sentencing entrapment and sentencing manipulation distinctly, but has not yet recognized the validity of either claim.²³³ The court defines

228. *Tremelling*, 43 F.3d at 151.

229. *Id.* at 152.

230. *United States v. Robertson*, 297 F. App'x 316, 317 (5th Cir. 2008).

231. *United States v. Stephens*, 717 F.3d 440, 446 (5th Cir. 2013) (citations omitted).

232. *United States v. Macedo-Flores*, 788 F.3d 181, 189 (5th Cir. 2015) (rejecting the defendant's sentencing entrapment claim because he did not prove "the [g]overnment induced him to sell drugs generally" nor that "the [g]overnment induced him to sell larger quantities of drugs than what he was already predisposed to sell."); *Stephens*, 717 F.3d at 447 ("[S]ince the [g]overnment's conduct amounted to nothing more than passive encouragement, and since there is no evidence that [the defendant] resisted the increase in the targeted amount of money, we hold that [the defendant] would not be entitled to a sentencing entrapment defense even were it available in this circuit.").

233. *United States v. Flowers*, 712 F. App'x 492, 504 (6th Cir. 2017); *United States v. Hammadi*, 737 F.3d 1043, 1048 (6th Cir. 2013).

sentencing entrapment as “similar to the subjective theory of entrapment and ‘focuses on the defendant’s lack of predisposition to commit the greater offense.’”²³⁴ It defines sentence factor manipulation as similar to “the objective theory of entrapment, and ‘focuses on the [g]overnment’s conduct.’”²³⁵ It does not recognize either claim because under the facts it has been presented thus far, it has not needed to decide whether to adopt or reject the doctrines.²³⁶

The Seventh Circuit acknowledges that sentencing entrapment and sentencing factor manipulation are different claims.²³⁷ It accepts the sentencing entrapment claim but rejects the sentencing factor manipulation claim.²³⁸ The court explains sentencing entrapment as “when a defendant who lacks a predisposition to engage in more serious crimes nevertheless does so ‘as a result of unrelenting government persistence.’”²³⁹ It describes sentencing factor manipulation as “distinct from entrapment and occurs when the government ‘procures evidence “through outrageous conduct solely for the purpose of increasing the defendant’s sentence under the Sentencing Guidelines.’”²⁴⁰ While the court firmly rejects the sentencing factor manipulation claim, it does recognize that it “could be relevant to a district court’s application of the [18 U.S.C.] § 3553(a) factors” at sentencing.²⁴¹ But, the court finds its relevancy is lost when a defendant is sentenced to the mandatory minimum.²⁴²

234. *Flowers*, 712 F. App’x at 504 (quoting *Hammadi*, 737 F.3d at 1048).

235. *Id.* (quoting *Hammadi*, 737 F.3d at 1048).

236. *Hammadi*, 737 F.3d at 1048.

237. *United States v. Blich*, 773 F.3d 837, 848 (7th Cir. 2014).

238. *Id.*

239. *Id.* (quoting *United States v. Knox*, 573 F.3d 441, 451 (7th Cir. 2009)).

240. *Id.* (quoting *Knox*, 573 F.3d at 451).

241. *Knox*, 573 F.3d at 452.

242. *Blich*, 773 F.3d at 848 (citing *United States v. Wilson*, 129 F.3d 949, 951 (7th Cir. 1997)) (a district court may not use the doctrine of sentencing

The Eighth Circuit too considers sentencing entrapment and sentencing manipulation to be separate and distinct claims.²⁴³ Sentencing entrapment is where “an individual, ‘predisposed to commit a minor or lesser offense, is entrapped in[to] committing a greater offense subject to greater punishment.’”²⁴⁴ The locus of the inquiry when considering the claim is the defendant’s predisposition.²⁴⁵ Conversely, sentencing manipulation “focuses on ‘whether the government stretched out the investigation merely to increase [the defendant’s sentence].’”²⁴⁶ It is the defendant’s burden to prove the government engaged in conduct solely to enhance the defendant’s sentence.²⁴⁷ Sentencing manipulation is a violation of the Due Process Clause.²⁴⁸ If the court makes a finding of sentencing manipulation, “it should grant a downward departure to the Guidelines range it believes would apply absent the manipulation, since such manipulation artificially inflates the offense level.”²⁴⁹ The court accepts both claims as valid defenses available to a defendant.²⁵⁰

manipulation to impose a sentence below a statutory minimum).

243. *United States v. Booker*, 639 F.3d 1115, 1118 (8th Cir.), *cert. denied*, 565 U.S. 1043 (2011).

244. *Id.* (alteration in original) (quoting *United States v. Stuart*, 923 F.2d 607, 613 (8th Cir. 1991); *see also* *United States v. Ruiz*, 446 F.3d 762, 774–75 (8th Cir. 2006) (“Sentencing entrapment occurs when official [government] conduct leads a defendant predisposed to deal only in small quantities of drugs to deal in larger quantities, leading to an increased sentence.”) (alterations in original) (quoting *United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000)).

245. *United States v. Martin*, 583 F.3d 1068, 1073 (8th Cir. 2009).

246. *Booker*, 639 F.3d at 1118 (alteration in original) (quoting *United States v. Shephard*, 4 F.3d 647, 649 (8th Cir. 1993)); *see also* *United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009) (“Sentencing manipulation occurs when the government unfairly exaggerates the defendant’s sentencing range by engaging in a longer-than-needed investigation and, thus, increasing the drug quantities for which the defendant is responsible.”).

247. *United States v. Sacus*, 784 F.3d 1214, 1220 (8th Cir. 2015).

248. *Torres*, 563 F.3d at 734.

249. *Id.*

250. *Id.*

The Ninth Circuit likewise distinguishes between the sentencing entrapment and sentencing manipulation claims.²⁵¹ The former addresses the defendant's predisposition and the latter addresses the conduct of law enforcement.²⁵² Sentencing entrapment is found where "a defendant can show he was predisposed to commit a minor or lesser offense, but was entrapped [in committing] a greater offense, subject to greater punishment."²⁵³ Distinctly, sentencing manipulation results when "the government increases a defendant's guideline sentence by conducting a lengthy investigation which increases the number of drug transactions and quantities for which the defendant is responsible."²⁵⁴ The key difference between the claims is that for sentencing manipulation, "the judicial gaze should . . . focus primarily . . . on the government's conduct and motives."²⁵⁵

The Ninth Circuit defines sentencing manipulation as a due process based claim.²⁵⁶ The defendant must show the government engaged in behavior solely to enhance his potential sentence.²⁵⁷ Relief is granted in only extreme cases involving outrageous government conduct.²⁵⁸ If sentencing manipulation is found, the court should grant the defendant a downward departure to the guidelines range because such manipulation artificially inflates the offense level.²⁵⁹ The Ninth Circuit recognizes both claims as valid but has yet to

251. *United States v. Boykin*, 785 F.3d 1352, 1360–61 (9th Cir. 2015) (The court acknowledged its "lack of precision with which [it had] previously used the terms 'sentencing entrapment' and 'sentencing manipulation'" and clarified that they are distinct.).

252. *Id.*

253. *Id.* at 1360.

254. *Id.*

255. *Id.* (quoting *United States v. Fontes* 415 F.3d 174, 181–82 (1st Cir. 2005)).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 1361.

find a set of facts where either apply.²⁶⁰

The Tenth Circuit uses the terms sentencing entrapment and sentencing factor manipulation interchangeably.²⁶¹ It recognizes both as one valid claim to be analyzed under the due process principle of outrageous government conduct.²⁶² The court is allowed to grant the defendant a downward departure if the government's conduct is so shocking, intolerable, and outrageous that it has offended the universal sense of justice.²⁶³ Because the burden on the defendant is so high, the defendant's claim of sentencing entrapment or sentencing factor manipulation "may also be considered as request for a variance from the applicable guideline range under the § 3553(a) factors."²⁶⁴

The Eleventh Circuit defines sentencing entrapment and sentencing manipulation as separate and distinct defenses.²⁶⁵ "While sentencing entrapment focuses on the defendant's predisposition, sentencing factor manipulation focuses on the government's conduct."²⁶⁶ Sentencing entrapment occurs when a defendant, predisposed to commit a lesser crime, is entrapped into committing a greater crime and thus subjected to a greater punishment.²⁶⁷ The circuit has outright rejected sentencing entrapment as a viable

260. *Id.* at 1360–63. (The court applied the defendant's sentencing manipulation claim but did not find the government's conduct outrageous enough to meet the requirement for relief.)

261. *United States v. Beltran*, 571 F.3d 1013, 1017–18 (10th Cir. 2009).

262. *Id.* at 1018.

263. *Id.*; see also *United States v. Martinez*, 482 F. App'x 315, 317 (10th Cir. 2012) (giving an example of the type of conduct that would meet the outrageousness standard and warrant a departure: "heavily pressuring the defendant during a sting operation to deal a higher volume of drugs than he otherwise would").

264. *Beltran*, 571 F.3d at 1019.

265. *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998).

266. *Id.* (internal quotation and citation omitted).

267. *Id.*

defense.²⁶⁸

However, it does recognize the validity of the sentencing factor manipulation claim.²⁶⁹ The circuit recognizes the due process based claim of outrageous government conduct and consequently, recognizes sentencing factor manipulation as a defense interrelated to the outrageous government conduct defense.²⁷⁰ Sentencing factor manipulation occurs when “the government’s manipulation of a sting operation, even if insufficient to support [an entrapment defense] or due process claim, requires that the manipulation be filtered out of the sentencing calculus.”²⁷¹ The claim specifically involves “the opportunities that the sentencing guidelines pose for prosecutors to gerrymander the district court’s sentencing options and thus, defendant’s sentences.”²⁷² If successful, a claim of outrageous government conduct would reverse a defendant’s conviction, while a successful claim of sentencing factor manipulation would simply reduce the sentence.²⁷³

Finally, the D.C. Circuit recognizes both sentencing entrapment and sentencing manipulation and distinguishes between the two.²⁷⁴ Sentencing entrapment “occurs ‘if the government induces a defendant to commit a more serious crime when he was predisposed to commit a less serious offense.’”²⁷⁵ In slight contrast, sentencing manipulation

268. *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007); *Sanchez*, 138 F.3d at 1414.

269. *Ciszkowski*, 492 F.3d at 1270.

270. *Id.*; *Sanchez*, 138 F.3d at 1413. The Eleventh Circuit recognizes the outrageous government conduct defense, which focuses on “the tactics employed by law enforcement officials to obtain a conviction for conduct beyond the defendant’s predisposition.” *Sanchez*, 138 F.3d at 1413. The inquiry “is whether the methods comport with the Fifth Amendment’s guarantee of due process.” *Id.*

271. *Ciszkowski*, 492 F.3d at 1270; *see also Sanchez*, 138 F.3d at 1414.

272. *Sanchez*, 138 F.3d at 1414 (quoting *United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992)).

273. *Ciszkowski*, 492 F.3d at 1270.

274. *United States v. Mack*, 841 F.3d 514, 523–24 (D.C. Cir. 2016).

275. *Id.* at 523 (quoting *United States v. Walls*, 70 F.3d 1323, 1329 (D.C. Cir.

“occurs ‘when the government unfairly exaggerates the defendant’s sentencing range by engaging in a longer-than-needed investigation and, thus, increas[es] the drug quantities for which the defendant is responsible.’”²⁷⁶ The court illustrated the difference between the two claims in *United States v. Hopkins*.²⁷⁷

Hopkins and his co-conspirators were ensnared in a reverse sting operation: an undercover law enforcement officer proposed Hopkins and his co-conspirators rob a liquor store.²⁷⁸ Undercover officers met several times with Hopkins to discuss the details of the planned robbery.²⁷⁹ At the final meeting, an undercover officer handed Hopkins and each of his co-conspirators a gun.²⁸⁰ Shortly thereafter, Hopkins and his co-conspirators were arrested.²⁸¹ In affirming the district court’s order, the D.C. Circuit Court found the district court “clearly understood the difference between sentencing entrapment and sentencing manipulation.”²⁸² Hopkins’ sentencing entrapment claim was correctly rejected as he “was perfectly comfortable with the idea of using weapons” and predisposed to commit the crime.²⁸³

However, the district court properly credited Hopkins’ sentencing manipulation claim because the undercover agents brought and provided the weapons, weapons which the co-conspirators were likely incapable of supplying themselves.²⁸⁴ Thus the government’s conduct constituted

1995)).

276. *Id.* (quoting *United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009)).

277. 715 F. App’x 20 (D.C. Cir. 2018) (per curiam), *aff’g* *United States v. McKeever*, 824 F.3d 1113 (D.C. Cir. 2016).

278. *McKeever*, 824 F.3d at 1116, *aff’d sub nom. Hopkins*, 715 F. App’x 20.

279. *Id.* at 1118.

280. *Id.*

281. *Id.*

282. *Hopkins*, 715 F. App’x at 21, *aff’g McKeever*, 824 F.3d 1113.

283. *Id.* at 22.

284. *Id.*

sentencing manipulation. If the district court had found sentencing entrapment, it would have been required to sentence Hopkins without the five-level Guidelines enhancement for possessing or brandishing a firearm during a robbery.²⁸⁵ Whereas because the district court had found sentencing manipulation, it correctly factored the manipulation out of the sentencing calculus and sentenced him as if his Guidelines range had been enhanced by three levels rather than five.²⁸⁶

IV. ANALYSIS

Courts have long recognized that law enforcement officers “must be given leeway to probe the depth and extent of a criminal enterprise, to determine whether co-conspirators exist, and to trace the drug deeper into the distribution hierarchy.”²⁸⁷ Undercover operations and undercover agents serve an important purpose in the investigation of crime and “courts should go very slowly before staking out rules that will deter government agents from the proper performance of their investigative duties.”²⁸⁸ However, this is neither the case nor the purpose of the continued law enforcement conduct and manipulation prevalent in reverse stash-house sting operations.²⁸⁹ A claim

285. *Id.* at 21.

286. *Id.*

287. *United States v. Baber*, 161 F.3d 531, 532 (8th Cir. 1998) (quoting *United States v. Calva*, 979 F.2d 119, 123 (8th Cir. 1992); *see also* *United States v. Barth*, 990 F.2d 422, 424 (8th Cir.1993) (“[C]ourts should go very slowly before staking out rules that will deter government agents from the proper performance of their investigative duties.”) (quoting *United States v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992)); *Calva*, 979 F.2d at 123.

288. *Connell*, 960 F.2d at 196; *see also* ALLEN ET AL., *supra* note 78, at 791.

289. Reverse stash-house stings are not instances of the government “combating crime too energetically.” *Rochin v. California*, 342 U.S. 165, 172 (1952). And the government is not excused by the legitimacy and public policy purposes underlying typical sting cases—“[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues.” *Haley v. Ohio*, 332 U.S. 596, 605 (1948). After conducting an evaluation of cases, one court found

of sentencing factor manipulation would be especially applicable in these cases.

A. *Sentencing Factor Manipulation as it Relates to ATF Reverse Stash-House Sting Operations*

The structure of reverse stash-house sting operations is highly problematic.²⁹⁰ The freedom the government is allowed in charging offenses stemming from ATF reverse stash-house sting operations has created a “terrifying capacity for escalation of a defendant’s sentence.”²⁹¹ Bluntly put, “sentencing discretion is delegated all the way down to the individual drug agent operating in the field.”²⁹² “[A] stash house sting operation is the ‘perfect’ crime, at least from the standpoint of the prosecution, in that it predetermines both verdict and sentence.”²⁹³ This is because during a reverse stash-house sting operation, the ATF has the unbridled ability to choose the quantity of drugs, the type of drugs, and the obstacles the individual must overcome to obtain the drugs.

Under the Guidelines, the sentence for a particular drug crime is tied to the drug quantity.²⁹⁴ The quantity of drugs supposedly reflects the defendant’s position in the drug hierarchy.²⁹⁵ However, in cases like these, where the government controls the quantity of drug, rather than the defendant, the predicted correlation between the quantity of

a “constitutionally unacceptable” number of cases where the “crime [was] fabricated *entirely* by the police to secure the defendant’s conviction rather than to protect the public from the defendant’s continuing criminal behavior.” *United States v. Bogart*, 783 F.2d 1428, 1438 (9th Cir. 1986).

290. *United States v. McLean*, 199 F. Supp. 3d 926, 935 (E.D. Pa. 2016).

291. *Barth*, 990 F.2d at 424 (quoting *United States v. Barth*, 788 F. Supp. 1055, 1057 (D. Minn. 1992)).

292. *United States v. Stauffer*, 38 F.3d 1103, 1107 (9th Cir. 1994).

293. *McLean*, 199 F. Supp. 3d at 939.

294. *Id.* at 928.

295. *Id.* at 929.

drug and the defendant's culpability is disrupted.²⁹⁶ The defendant may not have been entrapped in the traditional sense because he was willing to participate in the illegal activity proposed by the government, but that defendant also might have never had the capability, capacity, or inclination to deal drugs in the minimum-triggering quantity selected by the government.²⁹⁷

The Sentencing Commission "is aware of the unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to increase his or her sentence without regard for his predisposition, his capacity to commit the crime on his own, and the extent of his culpability."²⁹⁸ The Guidelines identify the danger inherent in the government's ability to choose and then charge the quantity of drug.²⁹⁹ In limited circumstances, the Guidelines attempt to correct this danger by allowing judges to compensate for the government's abuse of discretion.³⁰⁰

Reverse stash-house sting operations give rise "to particularly dubious applications of the . . . Guidelines and mandatory minimum sentences."³⁰¹ The government sets the amount of drugs at a level that substantially increases sentencing exposure. "[S]entences should bear some rational relationship to culpability."³⁰² Often times, there is no

296. *Id.*

297. *Id.*

298. *United States v. Staufer*, 38 F.3d 1103, 1107 (9th Cir. 1994); *see also McLean*, 199 F. Supp. 3d at 929.

299. *McLean*, 199 F. Supp. 3d at 929.

300. *Id.* For example, if the government sets a below-market price for an undercover illegal drug purchase and the defendant therefore purchases a large quantity of drugs in the set-up transaction, the judge can depart downward. *Id.* But, this "downward departure when the government artificially lowers the price of the drugs . . . only addresses one of the ways in which drug enforcement agents are able to manipulate sentences." *Staufer*, 38 F.3d at 1107; *see also McLean*, 199 F. Supp. 3d at 929.

301. *United States v. Washington*, 869 F.3d 193, 226 (3d Cir. 2017) (McKee, J., dissenting).

302. *Id.*

evidence to suggest the defendant would not have conspired to rob a stash-house containing some amount less than the five-kilogram mandatory trigger.³⁰³ If five-kilograms translates to a street value of approximately \$200,000, who is to say that an impoverished defendant would not have agreed to rob the fictitious stash-house containing four-kilograms of cocaine with a street value of \$160,000?³⁰⁴ The government never answers this question and extremely few reverse stash-house sting operations have employed a fictional amount of cocaine less than the five-kilograms that triggers the mandatory minimum sentences.³⁰⁵

Furthermore, the defendant is not always inclined to deal in the type of drug (cocaine) that the government suggests. Cocaine, the government's drug of choice, is classified as a narcotic that requires harsher sentences. Cocaine lends itself to the reverse stash-house sting ploy. Quite simply, a large amount of cocaine can be stored in a house. Whereas in dealing with a large amount of another drug, for example marijuana, the house would not be a stash-house, it would be a grow-house, or in the case of other drugs, some kind of production center. The government defends the quantity and type of drug chosen as necessary to protect its officers.³⁰⁶ It argues the operation needs to be realistic. Not only is this rationale incapable of any meaningful validation but it is troublesome because the tactical concerns of law enforcement should not be allowed to control the severity of charges or the sentencing range and the defendant has little to no opportunity to challenge the government's reasoning.³⁰⁷

In sum, the sentencing factor manipulation claim would be obviously applicable to reverse stash-house sting operations because of the very nature of the operations. The

303. *Id.*

304. *See id.*

305. *Id.*

306. *United States v. McLean*, 199 F. Supp. 3d 926, 935 (E.D. Pa. 2016).

307. *Id.* at 928–35.

ploy, scripted by the government alone, gives “the government [the] virtually unfettered ability to inflate the amount of drugs . . . thereby obtain[ing] a greater sentence for the defendant.”³⁰⁸ It is the government that chooses the quantity of drug to be robbed, the type of drug to be robbed, and the obstacles a target must overcome during the robbery. These elements correlate exactly to the defendant’s sentence length. Therefore, the discretion the government has to manipulate these elements allows it full control over the amount of time the defendants spend in prison.³⁰⁹ The sentencing factor manipulation claim would allow removal of these elements or factors chosen by the government from the sentencing calculus.

B. *Proposal*

The solution is simple. At trial, an entrapment defense is available to a defendant in a reverse stash-house sting case, but likely will be unsuccessful.³¹⁰ Alternatively, where recognized, a defendant may bring an outrageous government conduct claim, but also will likely be unsuccessful. At sentencing, where recognized, a defendant may raise a sentencing entrapment defense or claim sentencing factor manipulation. Sentencing entrapment and sentencing factor manipulation are two separate and distinct claims—the former stems from the subjective theory of entrapment and the latter stems from the objective theory of entrapment. For cases involving reverse stash-house sting operations, sentencing entrapment is an inappropriate defense and will likely be unsuccessful. Therefore, the

308. *United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010).

309. *United States v. Flowers*, 712 F. App’x 492, 509 (6th Cir. 2017) (Stranch, J., dissenting).

310. Entrapment is usually unsuccessful in reverse stash-house sting cases because the defendant must show inducement and lack of predisposition. The defendant can rarely prove inducement because defendant’s are often eager to engage in the robbery plot due to the fictional high pay-off created by the government.

solution would be universal recognition of a sentencing factor manipulation claim.

1. Entrapment and Sentencing Entrapment Distinguished

A claim of sentencing entrapment is not appropriate in reverse stash-house sting cases and when evaluating a sentencing factor manipulation claim, it likewise is irrelevant whether or not the defendant raised or prevailed upon an entrapment defense at trial.³¹¹

a. Entrapment

Entrapment was adopted as a defense by the Supreme Court in *Sorrells* as a matter of statutory construction.³¹² The Court reasoned that in enacting the criminal prohibition at issue, Congress could not have intended “to permit law enforcement officers to instigate criminal acts by otherwise innocent people and then to punish them for such acts.”³¹³ Notably, entrapment, “rather than any constitutional prohibition, represents the principal legal restriction on the way in which undercover investigations are conducted.”³¹⁴ However, the federal courts employ the subjective test for entrapment—focusing on whether the defendant was predisposed to commit the crime at issue and affording a defense to a defendant who commits a crime pursuant to government inducement but who can show he was otherwise not predisposed in that direction.³¹⁵

311. A defendant has every right to bring an entrapment defense in the case of a reverse stash-house sting, but the success of his entrapment defense will be of no consequence to his claim of sentencing factor manipulation. Even if he falls short of proving entrapment, he may still be successful on proving sentencing factor manipulation. *See* *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007).

312. ALLEN ET AL., *supra* note 78, at 791.

313. *Id.*; *see* *Sorells v. United States*, 287 U.S. 435, 448 (1932).

314. ALLEN ET AL., *supra* note 78, at 791.

315. *Id.* The defendant may demonstrate lack of predisposition in response to the government’s demonstration of predisposition.

In cases involving reverse stash-house stings,³¹⁶ an entrapment defense is unlikely to be successful because the defendant cannot show sufficient inducement and lack of predisposition—even if he can prove one part, he cannot prove the other.³¹⁷ Universally, entrapment is rarely, if ever, brought as a successful defense.³¹⁸ As the Supreme Court explained when it first considered entrapment in *Sorrells*, entrapment occurs “when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense.”³¹⁹ The line is between “an unwary innocent” and “an unwary criminal”³²⁰—an innocent with no predisposition versus a criminal predisposed.

Illustrative is the case of *United States v. McLean*.³²¹ In

316. I would argue entrapment has occurred in the vast majority of reverse stash-house sting operations. By authoring the fictional robbery plot from start to finish, I find that the “criminal design originate[d], not with the accused, but [was] conceived in the mind of the government officers,” *Sorrells*, 287 U.S. at 445; the “commission [was] by one who would not have perpetrated it except for the trickery,” *id.* at 454; “the actual creation of [the] crime [was] by those whose duty [it was] to deter its commission,” *id.*; and the government was not only the instigator of the crime but the sole responsible “creative brain behind the illegal scheme.” *United States v. Russell*, 411 U.S. 423, 439 (1973). Regarding predisposition, I do not believe a defendant with minor drug convictions is predisposed to commit a large scale stash-house robbery using weapons and I do not find that his eagerness for a large pay-day demonstrates such predisposition.

317. Reverse stash-house sting cases also present a unique obstacle regarding an entrapment defense: sometimes the defendant in the case was not the target of the ATF and therefore can’t use entrapment as a defense. *United States v. Flowers*, 712 F. App’x 492 (6th Cir. 2017) is an example of a case with a defendant facing this scenario. Mr. Flowers was not contacted by the ATF and not brought into the robbery plot by the ATF. *Id.* at 497. The target of the ATF’s plot, Alexander, recruited Mr. Flowers. *Id.* Thus, Mr. Flowers could not claim the ATF entrapped him. There are different strings of entrapment defenses available to these defendants, such as derivative entrapment, *United States v. Conley*, 875 F.3d 391 (7th Cir. 2017), and indirect entrapment, *United States v. Valencia*, 645 F.2d 1158, 1168–72 (2d Cir. 1980), but those defenses are rarely successful.

318. ALLEN ET AL., *supra* note 78, at 791.

319. *Sorrells*, 287 U.S. at 442.

320. *Russell*, 411 U.S. at 429.

321. 702 F. App’x 81 (3d Cir. 2017).

McLean, a paid confidential informant for the ATF recruited Clifton McLean to participate in a reverse stash-house sting operation.³²² After meeting several times with the informant, McLean met with the ATF agent (posing as a drug courier) who described the robbery: the stash house would contain “at least eight or nine bricks of cocaine” and there would be at least three armed guards inside the house.³²³ The agent described the layout of the fictional house and described how the drugs and money would be divided.³²⁴ McLean expressed his interest in the robbery and assembled a team.³²⁵ Five days before the planned robbery, McLean, his co-conspirators, the ATF agent, and the informant met to plot the robbery in detail—McLean again expressed his interest in going through with the plan.³²⁶ On the day of the planned robbery, the group met at a junkyard where McLean and his co-conspirators were arrested.³²⁷

At trial, McLean requested the jury be instructed on entrapment, however, the district court denied his request and the circuit court found no error.³²⁸ The Third Circuit stated “[e]ntrapment is a ‘relatively limited defense’”³²⁹ and “in order to obtain the instruction, the defendant must show that (1) he was induced by the Government to commit a crime which (2) he was not predisposed to commit.”³³⁰ Defined, “[i]nducement is more than ‘mere solicitation’ to partake in a crime” and predisposition is “the defendant’s inclination to

322. *Id.* at 82–83.

323. *Id.* at 83.

324. *Id.*

325. *Id.*

326. *Id.* at 83–84.

327. *Id.* at 84.

328. *Id.* at 84–85, 86.

329. *Id.* at 85 (quoting *United States v. Lakhani*, 480 F.3d 171, 179 (3d Cir. 2007)).

330. *Id.*

engage in the crime for which he was charged.”³³¹ The Third Circuit found McLean could not show either inducement or lack of predisposition.³³² The evidence was insufficient to demonstrate inducement because “the Government merely offered McLean the criminal opportunity and . . . McLean willingly accepted.”³³³ He did not face “persuasion, fraudulent representation, threats, coercive tactics, harassment, [or] promises of reward or pleas based on need, sympathy, or friendship.”³³⁴ As to predisposition, the court found that even though McLean lacked *any* relevant criminal history, the fact that he was easily *enticed* by the ATF, showed enthusiasm for the plot, and never backed out evidenced his predisposition to the criminal conduct at issue.³³⁵ Thus, entrapment was not available to McLean as a defense.³³⁶

McLean illustrates why an entrapment defense is rarely successful in reverse stash-house sting cases: if the defendant does not hesitate to join the plot, exhibits a receptiveness to the plot, does not indicate reluctance to engage in the plot, or exhibits a readiness to participate in the plot, predisposition has been shown and the defense is unavailable.³³⁷ Predisposition will always be the barrier to the entrapment defense in reverse stash-house sting cases because of the nature of the criminal activity proposed by the ATF—a large scale drug robbery results in a high pay-off,

331. *Id.* (quoting *United States v. Wright*, 921 F.2d 42, 45 (3d Cir. 1990)).

332. *Id.* at 86.

333. *Id.*

334. *Id.* at 85 (alterations in original) (quoting *United States v. Fedoroff*, 874 F.2d 178, 184 (3d Cir. 1989)).

335. *Id.* at 86.

336. *Id.* *But see* *United States v. Dennis*, 826 F.3d 683, 690–94 (3d Cir. 2016) (finding the defendant’s criminal record demonstrated a predisposition to commit drug offenses *but did not* demonstrate a predisposition to commit robbery and firearm offenses).

337. *See McLean*, 702 F. App’x at 86; *United States v. Wright*, 921 F.2d 42, 46 (3d Cir. 1990).

usually near \$500,000, and this exorbitant pay-off draws an eagerness, readiness, and willingness to participate by the targets identified by the ATF who are of low socio-economic status.³³⁸

b. Sentencing Entrapment

Sentencing entrapment derives from the subjective theory of entrapment. A sentencing entrapment defense is successful where a defendant can show he was predisposed to commit a lesser offense, but was entrapped in committing a greater offense, subject to a greater sentence.³³⁹ It focuses on the defendant's lack of predisposition to commit the "enlarged" crime created by the government.³⁴⁰ In the case of a reverse stash-house sting, the defendant must argue the government led him to deal in a larger quantity or different type of drug than he was otherwise predisposed to.³⁴¹

338. Predisposition is a controversial component of entrapment and ill-defined. Predisposition is assumed to be based on something "real"—criminal record, character, state of mind, past acts, etc., but the facts of *McLean* show this assumption to be incorrect. McLean had no relevant criminal record, yet the court found him to be predisposed to the robbery because he was eager to engage. See *McLean*, 702 F. App'x at 86. I presume McLean was eager to engage because of the reward: the street value of nine bricks of cocaine. A high pay-off like this heavily blurs the line of predisposition:

We assume that there are a few people who would not commit any criminal acts no matter what the . . . enticement . . . Everyone else, we assume, has a price. That price may be quite high, for example because a person puts a high value on her good name, but it exists. If this assumption is true, then everyone except saints is predisposed to commit crimes. But, that in turn means that "predisposition" cannot usefully distinguish anyone from anyone else.

Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 413 (1999).

339. *United States v. Boykin*, 785 F.3d 1352, 1360 (9th Cir. 2015). Sentencing entrapment occurs when "a defendant who lacks a predisposition to engage in more serious crimes nevertheless does so" at the insistence of the government. *United States v. Knox*, 573 F.3d 441, 451 (7th Cir. 2009) (quoting *United States v. Veazey*, 491 F.3d 700, 710 (7th Cir. 2007)).

340. See *United States v. Flowers*, 712 F. App'x 492, 504 (6th Cir. 2017).

341. See *United States v. Sed*, 601 F.3d 224, 230 (3d Cir. 2010). Or where weapons are used, the defendant would have to show he was not predisposed to

The key distinction between entrapment and sentencing entrapment is that “traditional entrapment is an affirmative defense to the substantive crime, [whereas] sentencing entrapment is merely a defense to the sentence.”³⁴² As such, unlike in the case of entrapment, where the defendant must show he was not predisposed to commit the criminal act, in the case of sentencing entrapment, the defendant must show he was not predisposed to commit such a *degree* of the criminal act.³⁴³ But, like with the entrapment defense, the key element in a sentencing entrapment defense is the predisposition of the defendant and the line remains between an “unwary innocent” and an “unwary criminal.”³⁴⁴ Consequently, sentencing entrapment is just as unsuccessful as entrapment, and arguably more difficult to prove.

In *United States v. Black*, the defendants sought a sentencing entrapment defense.³⁴⁵ The Ninth Circuit recognized the defense as viable, and defined sentencing entrapment to occur “when a defendant is predisposed to commit a lesser crime, but is entrapped by the government into committing a crime subject to more severe punishment.”³⁴⁶ The court clearly articulated that “[i]n the

using weapons in the commission of offenses or was not predisposed to use that magnitude of weapon.

342. Jess D. Mekeel, *Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine*, 14 WM. & MARY B. RTS. J. 1583, 1586 (2006).

343. Proving “degree” results in an evidentiary nightmare:

Courts would be left to decide issues such as whether a defendant only meant to purchase five grams of cocaine for his own use as opposed to a trafficking amount of cocaine that he actually purchased. Courts would be forced to inquire into the quantities and types of drugs and the frequency in which defendants dealt in the past.

Id. at 1607–08.

344. *United States v. Russell*, 411 U.S. 423, 429 (1973).

345. 733 F.3d 294, 310 (9th Cir. 2013). In *Black*, the defendants were recruited by an ATF informant to carry out an armed robbery of a fictional cocaine stash house. *Id.* at 297–98. Criminal histories for three of the defendants showed no prior convictions for robbery or drug trafficking. *Id.* at 312.

346. *Id.* at 310 (quoting *United States v. Mejia*, 559 F.3d 1113, 1118 (9th Cir.

context of a fictional drug stash house robbery, a defendant can show sentencing entrapment by demonstrating that he lacked predisposition—either through a lack of intent or a lack of capability—to conspire with others to take by force the amount of cocaine charged.”³⁴⁷ However, the court then demonstrated the problem with a sentencing entrapment claim in the context of reverse stash-house stings: “none of the defendants met his burden of proving lack of predisposition.”³⁴⁸ The defendants

showed no reluctance about participating in the crime, the government did not induce the defendants’ participation in the fictitious robbery but simply presented the opportunity to them, and the defendants jumped at the opportunity to rob a stash house supposedly containing 23 or more kilograms of cocaine for purposes of making a profit.³⁴⁹

Just as with entrapment, proving predisposition is a bar to bringing a sentencing entrapment defense in reverse stash-house sting cases. Furthermore, and unlike entrapment, a sentencing entrapment defense is wholly inappropriate because of the predisposition component. A sentencing entrapment defense is brought at sentencing—the defendant asks the court to reduce the sentence because he was entrapped to commit a larger offense with a larger sentence than he was predisposed to. However, proving degree of predisposition further blurs the already blurred lines of predisposition by erasing the notion of “an innocent person.”³⁵⁰ Entrapment was meant to distinguish between the “innocent” and the “criminal,” but sentencing entrapment seems to try to distinguish between the “guilty criminal” and the “guiltier criminal.”

At sentencing, the defendant has already admitted guilt,

2009)).

347. *Id.* at 311.

348. *Id.*

349. *Id.* at 312.

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

and

the analogy at sentencing to ordinary entrapment is not going to help a defendant who is arguing only about the number or size of the transactions[—]having crossed the reasonably bright line between guilt and innocence, such a defendant's criminal inclination has already been established, and the extent of the crime is more likely to be a matter of opportunity than of scruple."³⁵¹

Thus the focus on innocence is lost and the notion of predisposition is misplaced in sentencing entrapment defenses, making them an inappropriate defense in the context of reverse stash-house stings.

2. Outrageous Government Conduct

In circuits recognizing a claim of outrageous government conduct, the claim survives in theory but is highly circumscribed because the standard for outrageousness is so high.³⁵² Unlike entrapment, which is rooted in statutory construction, the outrageous government conduct claim is rooted in due process principles.³⁵³ Theoretically, “governmental misconduct may be so outrageous that it requires dismissal of charges against a defendant under the Due Process Clause of the Fifth Amendment.”³⁵⁴ To violate due process, the “government’s conduct must be so outrageous as to shock the conscience of the court’ or be ‘offensive to traditional notions of fundamental fairness.’”³⁵⁵ The standard for outrageousness is *extremely* high. So high in fact that it is not practical to rely on the claim in order to combat the unfettered governmental power prevalent in

351. *United States v. Montoya*, 62 F.3d 1, 4 (1st Cir. 1995).

352. *See supra* notes 123–59 and accompanying text.

353. “Outrageous government conduct occurs when the actions of law enforcement officers or informants are ‘so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.’” *Black*, 733 F.3d at 302 (quoting *United States v. Russell*, 411 U.S. 423, 431–32 (1973)).

354. *United States v. Thorne*, 661 F. App’x 791, 792 (4th Cir. 2016).

355. *Id.* (quoting *United States v. Osborne*, 935 F.2d 32, 36, 37 (4th Cir. 1991)).

reverse stash-house stings. Courts recognize the blatant misbehavior of the government, but because variations of the law enforcement tactics used in reverse stash-house stings have been recognized as reasonable in the past, they have difficulty finding the government's misbehavior has met the outrageousness standard.³⁵⁶

For example, in *Black*, the defendants argued an outrageous government conduct claim and while the court found “troubling aspects about [the] fictional sting and how it came about,”³⁵⁷ ultimately, “the government did not cross the line” of outrageousness.³⁵⁸ In the opinion of the court, circumstances nearing the line of outrageousness included: (1) the crimes of conviction “resulted from an operation created and staged by the ATF”;³⁵⁹ (2) the “evidence against the defendants consisted of words used at meetings” between the defendants, ATF agent, and informant;³⁶⁰ (3) the ATF agent “invented the scenario, including the need for weapons[, the need] for a crew, and the amount of cocaine involved”;³⁶¹ (4) the defendants only overt actions were a response “to the government’s script”;³⁶² (5) in recruiting the defendants, the ATF “was not infiltrating a suspected crew of home invasion robbers, or seducing persons known to have actually engaged in such criminal behavior,” it was rather “trolling for targets”;³⁶³ (6) the informant “provocatively cast his bait in places defined only by economic and social conditions”;³⁶⁴ and most notably (7) the government created “a criminal enterprise that would not have come into being

356. *Black*, 733 F.3d at 302.

357. *Id.* at 302.

358. *Id.* at 310.

359. *Id.* at 302–03.

360. *Id.* at 303.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

but for the temptation of a big payday, a work of fiction spun out by government agents to persons vulnerable to such a ploy who would not otherwise have thought of doing such a robbery.”³⁶⁵

Yet, the court’s concerns were “mitigated to a large degree”³⁶⁶ because: (1) the defendants told the ATF agent they had participated in criminal activity in the past;³⁶⁷ (2) the defendant bragged about committing prior criminal offenses using drugs or guns;³⁶⁸ (3) the defendants responded to the ploy with enthusiasm and were eager to commit the fictional stash-house robbery;³⁶⁹ (4) there was little evidence of coercion or pressure;³⁷⁰ and (5) the government did not provide any weapons, manpower, plans, or direction on how to perform the stash-house robbery.³⁷¹ The court acknowledged the difficulty in discerning the line between law enforcement conduct that is acceptable and “that which goes a fraction too far”³⁷² and found that the government’s conduct was not “so grossly shocking and so outrageous as to violate the universal sense of justice.”³⁷³ Thus *Black* demonstrates why defendants who bring outrageous government conduct claims are almost always unsuccessful.

3. Sentencing Factor Manipulation

Defendants in reverse stash-house sting cases are then left with the possibility of claiming sentencing factor

365. *Id.*

366. *Id.* at 307.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 308.

371. *Id.* at 309.

372. *Id.* at 310 (quoting *United States v. Bogart*, 783 F.2d 1428, 1438 (9th Cir. 1986)).

373. *Id.* (quoting *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011)).

manipulation³⁷⁴—this is the most viable claim in reverse stash-house sting cases, however the current formulation of the claim requires modification in order to be a successful check on the unbridled power of the government. Sentencing factor manipulation should be defined as “when the government ‘improperly enlarge[s] the scope or scale of [a] crime’ to secure a longer sentence than [it] would otherwise obtain.”³⁷⁵ It is when “the government’s manipulation of a sting operation, even if insufficient to support [an entrapment defense or] a due process claim, requires that the manipulation be filtered out of the sentencing calculus.”³⁷⁶ It should be a type of due process claim that focuses on the conduct of the government and not the predisposition of the defendant.³⁷⁷ Under the modified claim, the conduct of the government offends due process when it arbitrarily interferes with the defendant’s liberty interests.³⁷⁸ If successfully brought, the conduct or manipulation of the government that arbitrarily inflated the defendant’s sentence should be filtered out of the sentencing calculus before mandatory minimums are applied.³⁷⁹

As it stems from the objective theory of entrapment and

374. Other disciplines have proposed solutions to address the injustices inherent in reverse stash-house sting cases. For an example, see Sensenbrenner-Scott SAFE Justice Reinvestment Act, H.R. 2944, 114th Cong., 1st Sess. (2015).

375. *United States v. DePierre*, 599 F.3d 25, 28–29 (1st Cir. 2010) (quoting *United States v. Vasco*, 564 F.3d 12, 24 (1st Cir. 2009)).

376. *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007).

377. Unlike in *United States v. Kenny*, 756 F.3d 36, 49–52 (1st Cir. 2014), predisposition should not be a secondary consideration that can deny relief to the defendant where the court has already found sentencing factor manipulation.

378. Due process based claims often create evaluation issues for law enforcement—how much is too much, how far is too far. But “under a rubric of sentencing [factor] manipulation . . . officers [can] know that every time they engage in certain prohibited investigatory conduct, their conduct will be found outrageous by a court and the sentence they attempted to manipulate will in fact be decreased by the court.” Mekeel, *supra* note 342, at 1616.

379. The defendant bears the initial burden of establishing sentencing factor manipulation. A judge’s determination is a highly factbound determination and subject to clear error review on appeal.

the outrageous government conduct claim, sentencing factor manipulation should be viewed as a type of due process claim.³⁸⁰ “The touchstone of due process is protection of the individual against [the] arbitrary action of government”³⁸¹ The Supreme Court has opined that,

The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.³⁸²

The concept of substantive due process is *fluid*—it not only is intended to prevent governmental conduct that “shocks the conscience”³⁸³ but it also protects against governmental conduct that is “arbitrary.”³⁸⁴ It is a buffer against the abuse of government power.³⁸⁵ In its whole, due process preserves the “rights implicit in the concept of ordered liberty.”³⁸⁶ “To the extent that principles of Due Process are meant to be a check on government power, there is no more fundamental interest than liberty.”³⁸⁷

In reverse stash-house sting operations, there is a “highly particularized and potentially dangerous form of

380. See generally *United States v. Russell*, 411 U.S. 423, 431–32 (1973); *United States v. Sherman*, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring); *Sorrells v. United States*, 287 U.S. 435, 453 (1932) (Roberts, J., concurring); *United States v. Black*, 733 F.3d 294 (9th Cir. 2013).

381. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

382. *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

383. *Rochin v. California*, 342 U.S. 165, 172–73 (1952).

384. *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992).

385. *DeShaney v. Winnebago Cty. Dep’t Soc. Servs.*, 489 U.S. 189, 186 (1989).

386. See *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969)).

387. *United States v. McLean*, 199 F. Supp. 3d 926, 943 (E.D. Pa. 2016).

governmental power, law enforcement activity that defines *both* the contours of a crime and the punishment for that crime.”³⁸⁸ The manifestation of that power allows the government to not only create a test for a defendant³⁸⁹ but also create the penalties for failing that test in advance.³⁹⁰ The penalty for failing the government’s test is a lengthy prison sentence. That lengthy prison sentence is a direct interference with one of defendant’s liberty interests: freedom. Therefore, due process is the appropriate basis to protect such an interest and the appropriate basis for sentencing factor manipulation claims.³⁹¹

Manipulation by the government is inherent in any sting operation, but reverse stash-house stings turn the typical sting on its head.³⁹² The government alone has the ability to control the very factors that determine how long the defendant will spend in prison: “[d]rug agents can decide [the quantity of drug stored in the fictional stash-house, and] if the defendant bites at the bait, then that amount chosen by the drug agent will determine his drug sentence.”³⁹³ Not only can the government dictate the quantity of drug, but it can dictate other factors that determine sentence length, like the type of drug or the need for weapons. This custom design of both the crime and punishment in reverse stash-house sting operations constitutes an interference with substantial due

388. *Id.* at 942. The concentration of power that allows the government to define both crime and punishment does “more than offend some fastidious squeamishness or private sentimentalism,” it rises to an interference with due process. *Rochin*, 342 US at 172.

389. “[T]he Government seeks out its citizens for the purpose of testing their willingness to commit a criminal act.” *McLean*, 199 F. Supp. 3d at 942.

390. *Id.* at 943.

391. The defendant is admitting his guilt but the government’s conduct has resulted in a lengthened prison sentence, thereby violating the defendant’s due process rights.

392. The danger of manipulation seems especially great where the defendant’s sentence depends in large part on the details of the crime chosen by the government, such as the quantity of drugs or presence of weapons.

393. *United States v. Stauffer*, 38 F.3d 1103, 1107–08 (9th Cir. 1994).

process, but often does not rise to the violation-level of due process required to dismiss charges or bar prosecution.³⁹⁴ The manipulative conduct of the government in reverse stash-house stings often does not meet the outrageousness standard for a due process violation, but the conduct does still interfere with due process and thereby should warrant relief on behalf of the defendant.

Sentencing factor manipulation should be argued as an interference with due process. While it's historical origins can be traced to entrapment, the focus of the claim should be on the impropriety of government's actions, not the predisposition of the defendant. The government's conduct should constitute manipulation that interferes with due process warranting relief when it is found to arbitrarily implicate the defendant's liberty interests by inflating sentence length.³⁹⁵ Sentencing factor manipulation occurs where the government engages in improper conduct that has the effect of increasing the defendant's sentence, including, but not limited to, engaging in a longer than needed investigation, increasing the drug quantity for which the

394. Regarding the government's custom design of both the crime and punishment, one court stated:

The benefits of reverse sting operations . . . must be balanced against the danger of granting law enforcement officials unlimited power to define the scope of criminal culpability in a given case. The fact that a single officer in the field can determine the amount of drugs in a case, and, therefore, the length of sentence for a defendant, is a troubling scenario. Such awesome power cannot go unchecked.

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

395. The *Black* court articulated this point well:

The agency creating the fictitious stash house can place any amount of imaginary drugs within it. The amount must, no doubt, be plausible; this limit aside, the ATF may make the object of the robbery as large as it chooses The ATF has free rein to . . . influence the number of defendants[,] . . . [and] invent[] armed guardians of the imaginary drugs [N]othing stops the government from filing additional charges and obtaining sentencing enhancements where the defendants, at the government's insistence, are found carrying explosives, body armor, or machine guns.

United States v. Black, 733 F.3d 294, 317–18 (9th Cir. 2013).

defendant is responsible, or introducing the need for weapons. In evaluating a sentencing factor manipulation claim, a court should consider factors such as:

the inherently arbitrary way in which stash house sting cases first ensnare suspects; the immense power delegated to case agents who can pre-ordain a sentence at the outset of the operation; the lack any meaningful way to test the validity of the Government's justification for the amount of narcotics built into the sting; the lack of a genuine nexus between the amount of narcotics proposed and the defendant's culpability; the lack of sufficient evidence . . . that [the defendant] ever sought to deal at the level proposed by the Government; the lack of a criminal record that unambiguously demonstrates [the defendant] had a propensity for violence, aside from his braggadocio; the risk that the sheer immensity of the sentences that follow from such operations compels guilty pleas; and the disparities in sentencing that are seemingly endemic to all of these prosecutions because the structure of the sting mandates lengthy imprisonment for any non-cooperator.³⁹⁶

The standard of conduct required to prove the claim would be "arbitrary," not the "outrageous" standard used for outrageous government conduct claims. The dilemma courts face in weighing their disdain for the behavior of the government in reverse stash-house sting operations against the high standard required for the outrageous government conduct claim would be alleviated. While courts have not found the government's conduct in reverse stash-house sting operations to be outrageous, they have found it to be arbitrary.³⁹⁷ Arbitrary conduct is a more applicable standard because of the opportunities the Guidelines pose for law enforcement to gerrymander a defendant's sentence.³⁹⁸ For example, in *United States v. Fontes*, the ATF agent testified he was "aware of the fact that there are guidelines that determine what a sentence is for a particular drug transaction, depending on what type of drug [is sold or purchased]" and when asked by the court if he was trying to

396. *United States v. McLean*, 199 F. Supp. 3d 926, 943 (E.D. Pa. 2016).

397. *See United States v. Hudson*, 3 F. Supp. 3d 772 (C.D. Cal. 2014).

398. *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998).

get a higher sentence for the defendant, the agent responded, yes, “[t]hat’s a part of it.”³⁹⁹ By recognizing a sentencing factor manipulation claim, courts would be expressly acknowledging that law enforcement officers are not allowed to structure reverse stash-house sting operations in such a way as to maximize the sentence imposed on a defendant.

Government conduct would meet the standard for the claim when it arbitrarily inflates a defendant’s sentence. The standard should be lessened because a sentencing manipulation claim derived from the outrageous government conduct claim should parallel the same substantive and procedural bounds as a sentencing entrapment defense derived from an entrapment defense. Comparing entrapment to sentencing entrapment, the substantive standard is lower for the derived defense of sentencing entrapment: a defendant must show he was not predisposed to commit the criminal act (entrapment) versus a defendant must show he was not predisposed to commit such a degree of the criminal act (sentencing entrapment)—lack of predisposition versus lack of some degree of predisposition. Similarly, the substantive standard should be lower for the derived claim of sentencing factor manipulation. On an outrageous government conduct claim, a defendant must show the government’s conduct was so outrageous as to shock the conscience. Current law requires a defendant to prove the same level of outrageousness on a sentencing factor manipulation claim. This should not be the case. A defendant bringing a sentencing factor manipulation claim should be required to some lesser level of inappropriate government conduct. Thus the claim and derived claim would come into focus with entrapment and its derived defense—outrageousness and some degree less than outrageousness.

The lesser degree of a substantive standard is logical based on procedure. An entrapment defense is brought at trial and is a basis upon which prosecution may be barred,

399. *United States v. Fontes*, 415 F.3d 174, 179 (1st Cir 2005).

whereas sentencing entrapment is brought at sentencing and is not a basis upon which prosecution may be barred, it merely is a tool to reduce the sentence length. Likewise, an outrageous government conduct claim is brought at trial and is a basis upon which prosecution may be barred, whereas sentencing manipulation is brought at sentencing and is not a basis upon which prosecution may be barred, it merely is a tool to reduce the sentence length. The consequences are less severe for the success of a derived defense or claim and so there is less risk in having a slightly lessened standard.⁴⁰⁰

As relief for a successful claim, the district court should filter out the government's improper conduct from the sentencing calculus. While a district court cannot disregard a mandatory minimum,⁴⁰¹ theoretically, an adjustment based upon a sentencing factor manipulation claim is not a downward departure.⁴⁰² The district court will have filtered the manipulative conduct out of the sentencing calculus before a sentencing provision is applied—therefore, a mandatory minimum would not have arisen to begin with.⁴⁰³ If a court finds a government action to be so objectionable that it amounts to sentencing factor manipulation, the court would simply remove that action and the mandatory minimum it would trigger (from the sentencing calculus)

400. The court in *Black* demonstrated this point: “[d]ismissing an indictment for outrageous government conduct [is such a severe consequence that it] is ‘limited to extreme cases’ in which the defendant can demonstrate that the government’s conduct ‘violates fundamental fairness’ and is ‘so grossly shocking and so outrageous as to violate the universal sense of justice.’” 733 F.3d at 302 (quoting *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011)). “This is an ‘extremely high standard.’” *Id.* (quoting *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993)).

401. Congress has only authorized a district court to depart downward from the statutory mandatory minimum in two limited circumstances: where the government files “a motion to recognize the defendant’s ‘substantial assistance,’” or where the defendant falls within “the provisions of the ‘safety valve’ embodied in 18 U.S.C. § 3553(f).” *United States v. Simpson*, 228 F.3d 1294, 1304 (11th Cir. 2000).

402. *United States v. Ciszowski*, 492 F.3d 1264, 1270 (11th Cir. 2007).

403. *Id.* at 1270.

before the sentence is computed.⁴⁰⁴ However, in the case where a minimum applies, success on the claim need “not be limited to a request for a discretionary departure, . . . it [should] appl[y] to statutory mandatory minimums as well as to guideline ranges.”⁴⁰⁵ Recognizing a sentencing factor manipulation claim would give greater discretion to the sentencing courts—reminiscent of the pre-*Booker* days where the Guidelines allowed courts to depart from the Guidelines sentence where “the court [found] ‘that there exist[ed] an aggravating or mitigating circumstance . . . that should result in a sentence different from th[e one described].’”⁴⁰⁶

Parts of this proposed claim have been successfully applied in *United States v. McLean*.⁴⁰⁷ In *McLean*, McLean was caught-up in a reverse stash-house sting operation and faced a sentence of thirty-five years to life in prison with a mandatory minimum sentence of twenty-five years.⁴⁰⁸ At sentencing, McLean argued the government improperly inflated his sentence by choosing a quantity of drug (five-kilograms of cocaine) that triggered a high mandatory

404. See *id.* at 1270 (giving an example: “[t]herefore, if the court found that inserting the silencer in the gun was so objectionable that it amounted to sentencing factor manipulation, that mandatory minimum would not apply because the silencer would be taken out of the sentencing calculation.”). Arguably, a finding of sentencing factor manipulation would authorize a court to depart not only from the Guidelines sentencing range but also from the mandatory minimum. *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995).

405. *Montoya*, 62 F.3d at 4.

406. U.S. SENTENCING GUIDELINES MANUAL § 8C4.1 introductory cmt. (U.S. SENTENCING COMM’N 2014) (quoting 18 U.S.C. § 3553(b)). The Guidelines specifically allow for departure in reverse sting operations if “the court finds that the government agent set a price for the controlled substances that was substantially below the market value . . . thereby leading to the defendant’s purchase of a significantly greater quantity of the controlled substance”—a quantity that would have been outside his means but became available because of the reduced price. *Id.* at § 2D1.1 cmt. n.27(A).

407. *United States v. McLean*, 199 F. Supp. 3d 926 (E.D. Pa. 2016).

408. *Id.* at 928.

minimum, and therefore his sentence should be reduced.⁴⁰⁹ McLean was convicted, but the court found that imposing a sentence prescribed for the five-kilograms of cocaine would have violated McLean's constitutional right to due process of law and therefore instead imposed a sentence that excluded consideration of the five-kilograms of cocaine and the corresponding mandatory minimum.⁴¹⁰

CONCLUSION

Echoing down the hallways of federal courthouses are the numerous warnings given by the federal judges presiding over the ATF's reverse stash-house sting cases, and they have not hesitated in expressing their disdain for the operations:⁴¹¹ the stings appear "highly susceptible to abuse;"⁴¹² be "wary of [stash-house] operations;"⁴¹³ the stings are "a disreputable tactic;"⁴¹⁴ "[z]ero[,] [t]hat's the amount of drugs that the Government has taken off the streets as the result of . . . the hundreds of . . . fake stash-house cases;"⁴¹⁵ "[t]he time has come to remind the Executive Branch that the Constitution charges it with law enforcement—not crime creation;"⁴¹⁶ "into temptation the Government has gone, ensnaring chronically unemployed individuals from poverty-ridden areas in its fake drug stash-house robberies;"⁴¹⁷ the Government "fire[s] [up] the imaginations of dreamers [with]

409. *Id.*

410. *Id.*

411. See *United States v. Conley*, 875 F.3d 391 (7th Cir. 2017) for a collection of cases criticizing reverse stash-house stings.

412. *United States v. Hare*, 820 F.3d 93, 103–04 (4th Cir.), *cert. denied*, 137 S. Ct. 224, *and reh'g denied*, 137 S. Ct. 460 (2016).

413. *United States v. Briggs*, 623 F.3d 724, 730 (9th Cir. 2010).

414. *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., dissenting), *reh'g en banc granted*, *opinion vacated* (Jan. 16, 2013), *on reh'g en banc sub nom.* *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014).

415. *United States v. Hudson*, 3 F. Supp. 3d 772, 775 (C.D. Cal. 2014).

416. *Id.* at 788.

417. *Id.* at 775.

easy wealth” and in turn becomes “the oppressor of its people;”⁴¹⁸ “[i]t is time for these false stash house cases to end and be relegated to the dark corridors of our past;”⁴¹⁹ “our criminal justice system should not tolerate false stash house cases in 2018.”⁴²⁰

The government should take heed of these advisements, but in its failure to do so, federal courts should adopt a sentencing factor manipulation claim applicable in reverse stash-house sting cases. The claim would mitigate the fact that the fictitious drugs, fictitious houses, fictitious players, and fictitious robberies result in very non-fictitious sentences for the targets of the operations. It would also protect the fundamental liberty interest so threatened in these operations. As James Madison penned,

If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.⁴²¹

The only way to control the government in the cases of reverse-stash house sting operations is to effectuate a sentencing factor manipulation claim.

418. *United States v. Black*, 733 F.3d 294, 318 (9th Cir. 2013) (Noonan, J., dissenting).

419. *United States v. Brown*, 299 F. Supp. 3d 976, 983–84 (N.D. Ill. 2018).

420. *Id.* at 984. Many state courts strongly disfavor the type of sting as well: “[t]he justice system should look with a jaundiced eye upon reverse sting operations[, t]his effectively is the justice system becoming involved in committing crime and not stopping it.” *Leech v. State*, 66 P.3d 987, 991 (Okla. Crim. App. 2003) (Johnson, P.J., concurring).

421. THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).