SENTENCING AFTER STASH HOUSES: ADDRESSING MANIPULATION OF THE FEDERAL SENTENCING GUIDELINES

*Elizabeth Foy Gudgel**

In the realm of undercover work, law enforcement has broad discretion to define the contours of a criminal offense. Due to quantity-based provisions in the Federal Sentencing Guidelines, federal agents or their informants may coerce an individual into a higher sentencing range by escalating their behavior to align with mandatory minimums or quantifiable offense levels. Because this type of offense is police-initiated, law enforcement has discretion to select the individuals subject to these tactics and influence their eventual sentences. The defenses of sentencing entrapment and sentencing manipulation are meant to combat this discretion. However, these defenses are rarely invoked successfully and often fail to provide defendants with relief at the sentencing phase.

These defenses received new attention after the proliferation of "fake stash house" cases that displayed a pattern of selective enforcement in federal sting operations. Subsequent litigation showed that federal agents almost exclusively targeted people of color for these stings and incarcerated hundreds of these individuals with inflated sentences. This Note proposes that the findings of that litigation can be used to argue for reduced sentences under a judge's consideration of the sentencing factors in 18 U.S.C. § 3553(a) to provide relief for defendants caught in similar schemes. This Note draws on data obtained in the stash house litigation and on documented instances of similar selective enforcement cases to illustrate the necessity of sentencing relief in cases where law enforcement weaponizes the Federal Sentencing Guidelines. Accordingly, this Notes argues that bolstering defensive arguments at sentencing could provide warranted relief for individuals sentenced as a result of coercive, discriminatory tactics.

* J.D. Candidate, 2023, Fordham University School of Law; B.A., 2018, Johns Hopkins University. A sincere thank you to Professor John Pfaff, Melissa Romanovich, and the staff of the *Fordham Law Review* for their invaluable guidance and edits. I am most grateful for the humor and support of my extraordinary friends at this law school, without whom this would still be a draft.

INTRODUCTION

Undercover policing, confidential informants, and "sting" operations are familiar law enforcement tactics.[1] In this realm of undercover work, police officers and federal agents have broad discretion to define the contours of a criminal offense.[2] They may initiate contact with a suspected narcotics dealer and stretch out purchases over time to obtain a higher quantity of

1. *See* Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401, 1402 (2013).
2. *See id.*

drugs.[3] They can offer to obtain a weapon for a suspect, encouraging him[4] to select an automatic weapon over a handgun.[5] They may guide the transaction toward a school zone, request for a suspect to bring associates to a meeting, or provide money for a suspect to front a laundering scheme.[6] Critically, law enforcement also selects whom to ensnare in these operations.[7]

Within the current federal sentencing regime of guidelines and mandatory minimums, these enforcement decisions can functionally determine a defendant's sentence.[8] By relying on knowledge of sentencing provisions, law enforcement can manipulate an individual's behavior to align with mandatory minimums, guideline provisions, or sentencing enhancements.[9] These discretionary choices result in higher sentences because of factors in the Federal Sentencing Guidelines (the "Guidelines") that tie larger volumes of narcotics, money, or weapons to greater offense levels.[10] The Guidelines are full of similar quantity-based provisions or enhancements for theft offenses, money laundering, or tax evasion.[11]

The defenses of sentencing entrapment and sentencing manipulation are intended to combat this discretion to ratchet up a criminal offense.[12] A sentencing entrapment claim alleges that the defendant was deliberately induced into more severe criminal activity than he otherwise was predisposed to.[13] A sentencing manipulation claim alleges that the arresting officer intentionally manipulated the scenario to align with guideline provisions that secure a higher sentence.[14] These sentencing defenses focus on severity. They do not argue that the defendant was wholly forced into offending, but rather that the severity of the offense was much greater because of law

3. *See, e.g.*, United States v. Boykin, 785 F.3d 1352, 1356 (9th Cir. 2015); United States v. Barth, 990 F.2d 422, 423 (8th Cir. 1993).

4. When referring to "defendants," this Note uses he/him/his pronouns to reflect the criminal legal system's predominant focus on male-identifying individuals. *See* Sonja Starr, *Estimating Gender Disparities in Federal Criminal Cases* 14–17 (Univ. of Mich. L. Sch. Law & Econ. Working Papers, Paper No. 57, 2012).

5. *See, e.g.*, United States v. Cannon, 88 F.3d 1495, 1506 (8th Cir. 1996).

6. *See, e.g.*, United States v. Bala, 236 F.3d 87 (2d Cir. 2000) (sentencing defendant—who had no record of involvement in money laundering—to fifty-one months after federal agents requested he assist them in laundering hundreds of thousands of dollars over four separate transactions); United States v. Atwater, 336 F. Supp. 2d 626, 627 (E.D. Va. 2004) (involving police conduct that induced the defendant to conduct a drug transaction within 1,000 feet of a school); *see also* Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 156 (2009).

7. *See* Joh, *supra* note 6, at 157.

8. *See* Tinto, *supra* note 1, at 1403.

9. *See id.*

10. *See id.*

11. *See* Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 705 (1996).

12. Several circuit courts distinguish between "sentencing entrapment" and "sentencing manipulation," although both defenses are typically a response to the same set of facts. For clarity, this Note refers to these defenses separately. For a more thorough explanation of the differences between the defenses, see *infra* Part II.B.

13. Tinto, *supra* note 1, at 1403.

14. *See id.*

enforcement encouragement, delay in arrest, or manipulation of factors outside the defendant's control.[15]

In theory, a successful sentencing entrapment or manipulation defense would warrant a downward departure from the Guidelines or a lower sentence in recognition of the officer's role in pushing the defendant's behavior toward a higher offense level.[16] In reality, sentencing entrapment and manipulation defenses are widely unsuccessful.[17] This is due, in part, to federal courts' erratic treatment of these defenses.[18] There is no uniform name for these defenses, no standard approach to evaluating them, and no agreement that manipulation warrants leniency in sentencing.[19] In federal district courts, defendants are regularly sentenced for volumes of narcotics, weapons, or money that were the result of coercion.[20]

Recent litigation of "fake stash house" stings—a federal law enforcement tactic designed by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) or the U.S. Drug Enforcement Agency (DEA) to ensnare targets in fictional robberies[21]—also questions the role that a defendant's race plays in manipulated sentencing.[22] In these schemes, an undercover agent or confidential informant recruits individuals to assist them in robbing a fictitious stash house containing a specific amount of drugs, weapons, or cash.[23] The volumes of substances in the house are selected to correspond to mandatory minimums or quantity-based sentences in the Guidelines.[24] When the targets arrive to the predetermined location to execute the ploy, they are immediately arrested by federal agents.[25] The house and the drugs—the entirety of the setup—are a fiction of the government's design, but the individuals involved are charged under guideline recommendations or mandatory minimums that the scheme triggered.[26] Defendants caught in these schemes received decades-long sentences because of the high volumes

15. These defenses are distinct from the defense of "entrapment," a trial defense that wholly immunizes a defendant from prosecution. *See* Joh, *supra* note 6, at 172.

16. *See* Tinto, *supra* note 1, at 1404. For an explanation of sentencing enhancements and downward departures, see *infra* Part I.A.

17. *See* Witten, *supra* note 11, at 726 ("Although popular with defendants, the sentence entrapment defense has not been warmly received by courts.").

18. *See* Tinto, *supra* note 1, at 1404.

19. *See id.* ("State and federal courts are widely divergent in both their definitions of the claim and their application of [sentencing manipulation] in practice.").

20. *See id.* at 1403.

21. *See* Benjamin Weiser, *In D.E.A. Sting Operations, Robberies Aren't Real, but Charges Are*, N.Y. TIMES (Dec. 4, 2014), https://www.nytimes.com/2014/12/05/nyregion/in-dea-sting-operations-robberies-arent-real-but-charges-are.html [https://perma.cc/5QD9-KDN3].

22. *See, e.g.*, United States v. Black, 733 F.3d 294, 298–300 (9th Cir. 2013) (describing a common stash house setup involving a confidential informant).

23. *See id.*

24. *See id.* at 311 n.14. (upholding a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b), which applied because the fictitious robbery involved five kilograms of cocaine).

25. *See id.*

26. *See id.*

of narcotics the government chose to lure the targets with—the fact that those drugs never existed was irrelevant to their sentence.[27]

In the past five years, fake stash house tactics received significant condemnation when investigations revealed that the government sought out young, financially insecure people of color for these schemes.[28] In the cities where the DEA or ATF conducted these stings, nearly every defendant targeted was Black or Latine.[29] A series of lawsuits highlighting these disparities resulted in widespread case dismissals, sentencing reductions, and the release of individuals incarcerated by these tactics.[30] Significant court denunciation indicates that fake stash houses are slowly being "relegated to the dark corridors of our past."[31]

The legal challenges resulting in exoneration or early release were undoubted successes for individuals caught in these schemes, sentenced to spend decades in prison for a crime impossible to commit.[32] But, they are extreme examples of a phenomenon that is likely much more common in law enforcement and is not always met with the same reproach.[33] Whether posing as street-level dealers, buyers, or traffickers, or encouraging coconspirators, the police, DEA, and ATF have significant opportunities to choose their targets selectively and escalate their behavior to trigger longer periods of incarceration.[34] These lower-level manipulated offenses rarely receive the same attention as fake stash house stings because they do not result in the same extreme sentences, often do not prompt media outcry, and do not have a team of highly resourced attorneys working to combat them.[35] And, while there is now a body of data on the racial disparities in stash house

27. *See* Annie Sweeney & Jason Meisner, *"Stash House" Stings Have Been Discredited. Now, the Convicted See a Chance for Redemption*, CHI. TRIB. (Mar. 5, 2021, 1:51 PM), https://www.chicagotribune.com/news/criminal-justice/ct-stash-house-defendants-compassionate-release-20210305-qiwa4codkzabhpsalorsns35ae-story.html [https://perma.cc/QJ3B-5DUJ].

28. *See, e.g.*, Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA TODAY (July 20, 2014, 3:40 PM), https://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/ [https://perma.cc/7VV5-LNLT] (finding that 91 percent of people incarcerated for ATF stash house stings were racial or ethnic minorities).

29. *See id.*

30. *See* Jason Meisner, *Under Pressure by Judges, Prosecutors to Offer Plea Deals in Controversial Drug Stash House Cases*, CHI. TRIB. (Feb. 21, 2018, 4:55 PM), https://www.chicagotribune.com/news/breaking/ct-met-atf-stash-house-prosecutions-20180221-story.html [https://perma.cc/TT8Z-KHAX].

31. United States v. Brown, 299 F. Supp. 3d 976, 984 (N.D. Ill. 2018).

32. *See, e.g.*, Sweeney & Meisner, *supra* note 27.

33. *See* Damon D. Camp, *Out of the Quagmire After* Jacobson v. United States*: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1057–60 (1993) (describing escalating use of reverse sting operations by the government, initially in the narcotics context).

34. *See id.*

35. The exact statistics on the number of defendants reliant on public defenders are outdated, but generally, approximately 70 percent of defendants in federal courts rely on publicly financed counsel. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/E3CF-CPVY].

cases, there is little comparable transparency into how law enforcement escalates sentences for defendants in lower-level undercover arrests, and whether these arrests mirror stash house cases in their racially disproportionate enforcement.[36]

This Note examines the defenses of sentencing entrapment and sentencing manipulation for these lower-level manipulated offenses in light of the recent stash house litigation that reveals clear racial discrimination in DEA and ATF tactics. Significant academic analyses have examined the ethical quandaries of police inducement and have proposed judicial reforms to strengthen sentencing entrapment and manipulation claims.[37] But very few examine whether sentencing manipulation may disproportionately ensnare Black and Brown defendants and whether this phenomenon may be addressed at the sentencing level.

This Note neither attempts to reform the disorderly doctrines of sentencing entrapment and manipulation, nor does it present conclusive data on selective enforcement. Rather, this Note proposes new arguments to use at sentencing to combat this phenomenon of racist enhancement and manipulation on behalf of individuals subjected to law enforcement conduct that weaponizes the Guidelines' quantity-based approach.[38] In doing so, this Note draws from data obtained in stash house cases and similar selective enforcement suits to argue that the manipulation of sentences warrants a downward variance under a sentencing court's consideration of sentencing factors in 18 U.S.C. § 3553(a).

Part I of this Note provides the relevant background in federal sentencing practices and explains the opportunities for manipulation in the Guidelines' quantity-based approach. Part I also introduces stash house stings, similar lower-level manipulated offenses, and subsequent litigation that scrutinized these schemes' racialized tactics. Part II discusses the various circuit court approaches to sentencing entrapment and manipulation defenses, as well as the debated rationales behind such claims. Part III argues that these defenses, in their current form, offer inadequate protection for defendants subjected to manipulated sentences. Part III then proposes using the tactics and findings of stash house cases to improve arguments at the sentencing stage in cases involving lower-level manipulated offenses, framed as a request for a downward variance within a sentencing judge's existing § 3553(a) discretion.

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36. *See, e.g.*, Samuel R. Wiseman, *The Criminal Justice Black Box*, 78 OHIO ST. L.J. 349, 350–57 (2017) (describing the challenges of obtaining accurate arrest, sentencing, and incarceration data).

37. *See, e.g.*, Molly F. Spakowski, Comment, *Crafted from Whole Cloth: Reverse Stash-House Stings and the Sentencing Factor Manipulation Claim*, 67 BUFF. L. REV. 451, 455 (2019); Jess D. Mekeel, Note, *Misnamed, Misapplied, Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine*, 14 WM. & MARY BILL RTS. J. 1583, 1585–86 (2006).

38. *See infra* Part III.

I. SENTENCING AND THE STASH HOUSE STING: MANIPULATION OF THE FEDERAL SENTENCING GUIDELINES

This part discusses the historical sentencing developments that created the opportunity for manipulated sentences. Part I.A briefly describes the history of federal sentencing and the implementation of the Guidelines. Part I.B describes the manipulable qualities of the Guidelines and how these qualities were used in a racially selective manner to secure higher sentences in fake stash house operations. Part I.C discusses how these tactics are applied to lower-level offenses. Part I.D describes how courts typically address these cases and the potential to improve these arguments at sentencing hearings.

A. A Brief History of Federal Sentencing

Prior to the adoption of the Guidelines, federal courts subscribed to an indeterminate sentencing regime.[39] Under this model, judges provided sentences within a range (such as "five to ten years"). Local parole boards then determined the exact release date for an incarcerated individual.[40] Indeterminate sentencing, in theory, stemmed from a rehabilitative approach to punishment: judges sentenced a range of years based on an individual assessment of the defendant, and parole boards were trusted with measuring an incarcerated individual's "progress" or "rehabilitation" within that prescribed sentence.[41] This discretionary model led to wide sentencing disparities in similarly situated defendants, consistently to the detriment of racial minorities.[42]

This unstandardized approach invited criticism from reformists, which gained traction in the 1970s.[43] Liberal critiques focused on the inconsistent discretionary power of judges and parole boards.[44] A widely circulated report published at the time deemed the emotional impact of an indeterminate sentence—in which incarcerated individuals have no clear notion of their release date—an "exquisite form of torture."[45] A similar critique by Judge Marvin E. Frankel of the U.S. District Court for the Southern District of New York condemned the sentencing system that afforded individual judges such broad discretion in a legal system that otherwise prioritized certainty and

39. *See* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695–96 (2010).

40. *See id.*

41. *See id.*

42. *See* Griffin Edwards, Stephen Rushin & Joseph Colquitt, *The Effects of Voluntary and Presumptive Sentencing Guidelines*, 98 TEX. L. REV. 1, 8 (2019); Lawrence P. Tiffany, Yakov Avichai & Geoffrey W. Peters, *A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967–1968*, 4 J. LEGAL STUD. 369, 387–88 (1975) (noting that Black defendants in federal court received significantly longer sentences than similarly situated white defendants).

43. *See* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 992 (2013).

44. *See id.*

45. *Id.* (quoting AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 29 (1971)).

finality.[46] Conservative reformists took issue with indeterminate sentencing as well.[47] A burgeoning right-wing opposition to penal rehabilitation emerged, arguing for a focus on punishing the severity of the act rather than on encouraging rehabilitation of the "offender."[48]

The long-term effects of criminal policy shifts in the late twentieth century are borne out today in the country's legacy as the largest carceral state on earth.[49] These policies led to the founding of the U.S. Sentencing Commission in 1984, the congressional group responsible for promulgating and updating the Federal Sentencing Guidelines.[50] The Guidelines minimized an individual judge's discretion by providing federal courts with calculable tables for offense levels and criminal histories.[51] Shortly thereafter, mandatory minimums arrived: sentences mandated by Congress, rather than by individual judges, requiring application of a specific sentencing floor.[52] Mirroring the Guidelines, mandatory minimums are usually tied to a quantifiable element of a crime, such as the type of weapon used, amount of money laundered, or volume of narcotics sold.[53]

To calculate a sentence under the Guidelines, a judge examines the defendant's relevant conduct to determine an offense level, incorporates any mitigating factors, and then assigns a criminal history category to the defendant.[54] The intersection of an individual's criminal history and offense level on the Guidelines' table provides the judge with a recommended sentence in a range of months.[55] Within this calculation, defendants may be subject to sentencing enhancements, departures, or variances based on elements of their offense behavior. Enhancements are increases in a sentencing level due to prior history or certain elements of the defendant's offense.[56] Alternatively, downward departures permit a judge to reduce a

46. *See id.* at 992; *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

47. *See* Doherty, *supra* note 43, at 994.

48. *Id.*

49. The subsequent rise in aggressive prosecution, mass incarceration, and their disparate impact on communities of color is beyond the scope of this Note. For a more thorough illustration of the United States' extreme system of confinement, see WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/RU5V-DC85].

50. *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 2 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf [https://perma.cc/YHY6-PEEE].

51. *See id.* at 60.

52. *See* Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1860–61 (1995).

53. *See id.* There are now several exceptions for mandatory minimum charges that defendants may pursue. *See* Memorandum from Eric Holder, Att'y Gen., U.S. Dep't of Just., to U.S. Att'ys & Assistant Att'y Gen., U.S. Dep't of Just. (Aug. 12, 2013); *see also Safety Valves*, FAMS. AGAINST MANDATORY MINIMUMS, https://famm.org/our-work/u-s-congress/safety-valves/ [https://perma.cc/HS6A-PK82] (last visited Sept. 2, 2022).

54. *See* U.S. SENT'G COMM'N, *supra* note 50, at 6.

55. *See id.* at 21–22.

56. *See id.* at 17 n.110, 26 n.140.

defendant's sentence calculation.[57] Some downward departures are codified, while others are permitted for broad categories of factors, including coercion, duress, or diminished capacity.[58] Variances are sentences outside the Guidelines that a judge has the authority to issue based on an analysis of the broad range of sentencing factors enumerated in 18 U.S.C. § 3553(a).[59] Under this reformed approach, similarly situated defendants are, theoretically, more likely to have consistent sentences, and judges are limited in their consideration of personal characteristics.[60]

However, judicial discretion remains. In *United States v. Booker*,[61] the U.S. Supreme Court held that the Guidelines are advisory, not mandatory, so long as a judge considers the range of sentencing factors enumerated in § 3553(a).[62] The seven factors included in this section are broad, particularly the factors that require a sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant,"[63] "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,"[64] and "the need for the sentence imposed . . . to reflect the seriousness of the offense."[65] So long as a sentencing judge justifies a deviation on the record, courts are permitted to sentence below the Guidelines if their assessment of the facts of the case and these § 3553(a) factors support imposing a more lenient sentence.[66] With this flexibility, judges ultimately maintain the ability to enhance or reduce sentences to some degree, albeit within broad confines.[67]

B. The Opportunity for Manipulation of Quantity-Based Guidelines

The combination of quantifiable sentencing, mandatory minimums, and guideline advisory ranges created an overt opportunity for law enforcement to strategically increase a suspect's sentence.[68] Because drug or weapon sales are typically planned and consensual transactions, law enforcement can alter these meetings to fit the needs of mandatory minimums or sentencing enhancements.[69] For example, federal agents posing as dealers have slashed

57. *See id.* at 29.
58. *See id.*; *see also* U.S. SENT'G GUIDELINES MANUAL § 5K2.13 (U.S. SENT'G COMM'N 2021).
59. *See* 18 U.S.C. § 3553(a); U.S. SENT'G COMM'N, PRIMER ON DEPARTURES AND VARIANCES 42–44 (2021), https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Departure_Variance.pdf [https://perma.cc/9RPS-52Q5] (delineating the difference between a downward departure and a below-Guidelines variance).
60. *See* Doherty, *supra* note 43, at 996.
61. 543 U.S. 220 (2005).
62. *See id.* at 226.
63. 18 U.S.C. § 3553(a)(1).
64. *Id.* § 3553(a)(6).
65. *Id.* § 3553(a)(2)(A).
66. *See* Gall v. United States, 552 U.S. 38, 49–50 (2007) (describing the procedure by which a judge may sentence below the Guidelines range).
67. *See* U.S. SENT'G COMM'N, *supra* note 50, at 28.
68. *See* Tinto, *supra* note 1, at 1402–03.
69. *See id.* at 1403.

the price of large quantities of narcotics, inducing a defendant to buy a high volume.[70] They have cajoled defendants into bringing weapons to the transactions.[71] And they have delayed arrest until the amount of drugs bought or sold secured higher statutory penalties.[72]

There are only two codified downward departures that allow a judge to independently account for this type of manipulation in their sentencing decisions: U.S. Sentencing Guidelines Manual sections 5K2.12 and 2D1.1. Section 5K2.12 permits a downward departure "[i]f the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense."[73] Serious coercion is ordinarily defined as physical injury or substantial damage to property; desperate financial circumstances are insufficient.[74] In a reverse sting operation—where law enforcement sells drugs to a defendant—a judge may also consider a downward departure under section 2D1.1 if the government set a price for the controlled substance that was substantially below market value, leading the defendant to purchase a greater quantity of the drug than he otherwise could afford.[75] The defendant has the burden of proof to raise and substantiate these departures.[76]

Outside of these codified departures, a defendant may raise a sentencing entrapment or sentencing manipulation defense at the sentencing phase. Generally, the sentencing entrapment defense alleges that an undercover officer encouraged the defendant to engage in a level of criminal activity he otherwise would not have been involved in.[77] On the other hand, a sentencing manipulation defense alleges that an officer improperly enlarged the scope of a crime to increase a defendant's sentence under the Guidelines.[78] Both defenses seek the same outcome: a downward departure, on the basis that the government played an active role in enhancing the defendant's conduct.[79]

Although popular with defendants, these defenses have an unsuccessful track record.[80] They have historically failed to provide defendants with

70. *See* United States v. Lora, 129 F. Supp. 2d 77, 81 (D. Mass. 2001) (describing how the government reduced a down payment for a $1,137,500 purchase of sixty-five kilograms of cocaine from $50,000 to $27,000).

71. *See* United States v. Abbott, 975 F. Supp. 703, 711 (E.D. Pa. 1997).

72. *See* Thompson v. McCullick, No. 2:16-cv-14353, 2019 U.S. Dist. LEXIS 108497, at *14 (E.D. Mich. June 28, 2019).

73. U.S. SENT'G GUIDELINES MANUAL § 5K2.12 (U.S. SENT'G COMM'N 2021).

74. *See id.*

75. *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1 app. 27(A) (U.S. SENT'G COMM'N 2021).

76. *See* United States v. Gambino, 106 F.3d 1105, 1110 (2d Cir. 1997) ("Generally, under the Sentencing Guidelines, a defendant who seeks to take advantage of a sentencing adjustment carries the burden of proof.").

77. *See* Daniel L. Abelson, Comment, *Sentencing Entrapment: An Overview and Analysis*, 86 MARQ. L. REV. 773, 780 (2003).

78. *See id.*

79. *See id.* at 776–78 (explaining statutory grounds for downward departures and the rareness with which they are granted for sentencing entrapment defenses).

80. *See id.*

sentencing relief due to federal courts' strict treatment of these claims and their reluctance to "exclude" manipulated behavior from a defendant's calculated offense level.[81] Several circuit courts refuse to recognize these defenses at all, precluding relief for individuals in those districts.[82] In the majority of cases invoking these claims, a defendant is nonetheless sentenced according to the volume of narcotics, quantity of weapons, or number of dollars the government coaxed him into offending with.[83]

1. Fake Stash Houses

The recent proliferation of fake stash house stings made clear that there is a need for an improved sentencing argument to address manipulation of the Guidelines.[84] The example of twenty-two-year-old Dwayne White illustrates the standard playbook for a fake stash house operation.[85] In 2009, White received a phone call from a friend with an offer to make money.[86] According to the friend, there was a drug stash house nearby that contained twenty to thirty kilograms of cocaine that they could steal and sell for profit.[87] For White and his friend, both in difficult financial straits, the opportunity seemed like a simple get-rich-quick scheme.[88] White was a last-minute addition to the plot, receiving the phone call mere hours before the robbery was set to occur.[89] Right before their attempt, the ringleader of the plot verbally reminded them that there was a guaranteed volume of twenty to thirty kilograms of cocaine in this house, and that they should plan to arrive armed in case there were guards.[90]

The drugs, the house, and the need for weapons were a fabricated scheme concocted by undercover federal agents.[91] The amount of cocaine and the weapons that informants encouraged White's codefendants to bring were all selected to align with mandatory minimums in the Guidelines.[92] There was

81. For a more extensive discussion of court evaluation of these defenses, see *infra* Part II.

82. *See* Abelson, *supra* note 77, at 776–78.

83. *Id.* at 776.

84. Rachel Poser, *Stash-House Stings Carry Real Penalties for Fake Crimes*, NEW YORKER (Oct. 18, 2021), https://www.newyorker.com/magazine/2021/10/18/stash-house-stings-carry-real-penalties-for-fake-crimes [https://perma.cc/SRE9-9KMK]; *see also* Katharine Tinto, *Fighting the Stash House Sting*, CHAMPION, Oct. 2014, at 16, 20–25 (encouraging defense attorneys to strengthen sentencing entrapment and manipulation claims for stash house cases).

85. *See* United States v. White, No. 09 CR 687-4, 2021 U.S. Dist. LEXIS 146891, at *2–6 (N.D. Ill. Aug. 5, 2021).

86. *See* Sweeney & Meisner, *supra* note 27.

87. *See White*, 2021 U.S. Dist. LEXIS 146891, at *10; Sweeney & Meisner, *supra* note 27.

88. *See* Sweeney & Meisner, *supra* note 27.

89. *See id.*

90. *See White*, 2021 U.S. Dist. LEXIS 146891, at *11; Sweeney & Meisner, *supra* note 27.

91. *See* United States v. Mayfield, No. 09 CR 0687, 2010 U.S. Dist. LEXIS 106633, at *5 (N.D. Ill. Oct. 5, 2010).

92. *See* Sweeney & Meisner, *supra* note 27.

no stash house, no drugs, and no potential for an actual crime to occur. That did not matter—White received a twenty-five-year sentence for his role in the scheme.[93]

White's case is unexceptional in that it mirrored a common tactic of the DEA and ATF. In each scheme, an informant or undercover agent approached someone like White—a young, Black man in difficult financial straits—and encouraged him to obtain weapons and recruit friends to rob a fictional stash house.[94] Federal prosecutors and these agents intentionally selected drug, weapon, or cash amounts that corresponded to guideline recommendations or mandatory minimum sentences.[95] In Chicago, Illinois, where White's arrest occurred, the United States Attorney for the Northern District of Illinois prosecuted twenty stash-house stings between 2006 and 2013 involving ninety-four defendants: seventy-four were Black, twelve were Latine, eight were white.[96] In New York, 179 individuals were arrested by the DEA over the course of ten years for their participation in these schemes—not a single defendant was white.[97] This reflects a broader pattern of racial disparity for these traps in Los Angeles, Tampa, D.C., and other cities where law enforcement focused stash house efforts in communities of color.[98]

2. Evolution of the Stash House Sting

Early stash house cases raised the defenses of sentencing entrapment and sentencing manipulation, but courts widely rejected them.[99] For example, in *United States v. Sanchez*,[100] the U.S. Court of Appeals for the Eleventh Circuit reviewed the sentence of an individual subjected to a fake stash house scheme and deemed the tactic a "common and more troublesome issue" created by the government.[101] The court recognized that the volume of fake substances used to charge the defendant was tailored for sentencing, writing, "the amount used for sentencing guideline purposes was the amount set by

93. *See id.*

94. *See* Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 989 (2020).

95. *See id.*

96. *See* Report of Jeffrey Fagan, Ph.D. at 2, 15, United States v. Brown, 299 F. Supp. 3d 976 (N.D. Ill. 2018) (No. 12-CR-0632-RC), https://www.law.uchicago.edu/files/files/report_of_jeffrey_fagan.pdf. [https://perma.cc/2ADQ-96CU].

97. *See* Shayna Jacobs, *10 Years. 179 Arrests. No White Defendants. DEA Tactics Face Scrutiny in New York.*, WASH. POST (Dec. 14, 2019, 8:05 PM), https://www.washingtonpost.com/national-security/10-years-179-arrests-no-white-defendants-dea-tactics-face-scrutiny-in-new-york/2019/12/14/f6462242-12ce-11ea-bf62-eadd5d11f559_story.html [https://perma.cc/GXA2-J3DG].

98. *See* Poser, *supra* note 84; Victoria Kim, *Jury Acquits L.A. Man Accused in ATF Drug "Stash House" Case*, L.A. TIMES (Apr. 10, 2015, 3:36 PM), https://www.latimes.com/local/lanow/la-me-ln-atf-stash-house-case-acquittal-20150410-story.html [https://perma.cc/37Z4-5Q3E].

99. *See, e.g.*, United States v. Turner, 569 F.3d 637, 641–42 (7th Cir. 2009); United States v. Ciszkowski, 492 F.3d 1264, 1271 (11th Cir. 2007).

100. 138 F.3d 1410, 1413 (11th Cir. 1998).

101. *Id.*

the government informant under direction from a government agent."[102] Nevertheless, as grounds to reject his defenses, the court pointed to the fact that: (1) the defendant agreed to participate voluntarily, (2) the defendant had his own vehicle and weapon he was willing to contribute, and (3) it is legal and acceptable for federal authorities to use fake narcotics in their operations and charge defendants as if those substances were real.[103] Law enforcement told Mr. Sanchez that there would be fifty kilograms of cocaine and 300 pounds of marijuana in his stash house; this translated to a thirty-year sentence of incarceration that the court upheld on appeal.[104]

Similar versions of this rationale played out in federal courts each time defendants in stash house schemes challenged their sentences.[105] Despite an acknowledgment by courts that stash house cases are "troubling"[106] and give the government "unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant,"[107] appellate courts rarely find that sentencing entrapment and manipulation defenses are substantiated, for reasons discussed more thoroughly in Part II.[108]

In 2015, a clinic led by Professor Alison Siegler at the University of Chicago Law School tried a novel method for challenging fake stash house cases.[109] Professor Siegler's Federal Criminal Justice Clinic (FCJC) filed pretrial motions to dismiss for racially selective law enforcement on behalf of forty Chicago defendants ensnared in twelve stash house operations.[110] The filings alleged that the ATF discriminated on the basis of race when selecting targets for the stash house schemes.[111] The clinic coordinated cases for a class action–type suit and brought a swath of racially coded data collected from Chicago stash house cases that showed the clear, disproportionate targeting of Black and Latine defendants.[112] By showing that nearly every defendant selected for one of these schemes was an individual of color, the clinic sought to prove that the ATF was engaging in selective enforcement.[113] This is not a standard approach; selective

102. *Id.*
103. *See id.* at 1414–15.
104. *See id.* at 1412, 1417.
105. *See, e.g.*, United States v. Black, 733 F.3d 294, 307 (9th Cir. 2013) (rejecting the sentencing defenses for a stash house scheme where defendants were found to be willing participants); United States v. Yuman-Hernandez, 712 F.3d 471, 474–76 (9th Cir. 2013) (expressing concern over the government's ability to manipulate the defendant's sentence but upholding the sentence on predisposition grounds).
106. *Black*, 733 F.3d at 302.
107. United States v. Briggs, 623 F.3d 724, 729 (9th Cir. 2010).
108. *See infra* Part II.B.
109. *See* Alison Siegler & Judith P. Miller, *Federal Criminal Justice Clinic Moves to Dismiss Cases Because ATF Discriminated on the Basis of Race*, UNIV. OF CHI. L. SCH. (Sept. 24, 2016), https://www.law.uchicago.edu/news/federal-criminal-justice-clinic-moves-dismiss-cases-because-atf-discriminated-basis-race [https://perma.cc/D3SG-YAKN].
110. *See id.*
111. *See id.*
112. *See id.*
113. *See id.*

enforcement claims have a remarkably unsuccessful track record due, in part, to difficulties in obtaining discovery that would validate their claims.[114]

Prior to 2015, claimants in federal court alleging selective enforcement were first required, at the discovery stage, to obtain internal law enforcement documentation to substantiate their claims.[115] To justify a request for internal government documents related to racially selective tactics, a claimant needed to point to evidence of discriminatory effect and discriminatory intent.[116] The discriminatory effect prong further required a defendant to show that a "similarly situated" person of another race was *not* selected for arrest *because* of his race.[117] The discriminatory intent prong demanded that the defendant present "some evidence" of discriminatory intent on the part of the government.[118] In essence, a defendant was asked to produce firm evidence of white offenders who were *not* arrested, as well as some evidence that race played a role in the selection of the defendant's own arrest.[119] Both tasks are effectively impossible without access to the government's internal documents, which is often the exact discovery that a claimant is trying to obtain.[120]

FCJC's litigation sought to lower this discovery standard because it would allow the clinic to obtain discovery about the ATF's selection criteria, criminal history data, and racial composition of the selected targets for stash house stings.[121] The clinic was successful: in *United States v. Davis*,[122] the U.S. Court of Appeals for the Seventh Circuit was persuaded by the FCJC's defendant data, which demonstrated an overwhelming targeting of Black individuals for stash house schemes, and it became the first court of appeals in the country to lower the discovery standard for defendants seeking evidence in selective law enforcement claims.[123]

The decision prompted the U.S. Courts of Appeals for the Third and Ninth Circuits to follow suit, eliminating the requirement that a claimant be "similarly situated" and provide "some evidence" to show discriminatory effect and intent.[124] In a concurrence, Judge Jacqueline H. Nguyen of the Ninth Circuit hypothesized that evidence of law enforcement's targeting

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114. *See* Siegler & Admussen, *supra* note 94, at 1002 ("Since the Court established *Armstrong*'s demanding discovery standard, there has not been a single successful selective prosecution or selective law enforcement claim on the merits."). "Selective enforcement" refers to a defense under the Equal Protection Clause, where the defendant alleges law enforcement applied or enforced a law in a discriminatory manner. *Id.* at 991.

115. *See id.* at 990–93.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI. KENT L. REV. 605, 606 (1998) ("[T]he similarly situated requirement renders many meritorious claims impossible to prove.").

121. *Id.*

122. 793 F.3d 712 (7th Cir. 2015) (en banc).

123. *See* Siegler & Admussen, *supra* note 94, at 1009–11.

124. *See* United States v. Sellers, 906 F.3d 848 (9th Cir. 2018); United States v. Washington, 869 F.3d 193, 216 (3d Cir. 2017).

minority neighborhoods could, in and of itself, be proof of discriminatory effect.[125] Although the court created the new, lower standard in the context of fake stash houses, it now also applies to any case where a criminal defendant seeks discovery to support a claim of selective enforcement.[126]

This litigation drew significant attention to fake stash house cases across the country.[127] The FCJC's motions to dismiss the charges against individual defendants were denied, but the U.S. Attorney's Office for the Northern District of Illinois, in Chicago, made highly unusual plea offers to every defendant in the suit, releasing most defendants after time served or dismissing all of their remaining mandatory-minimum charges.[128] The ATF stopped bringing fake stash house cases in Chicago entirely.[129] And district judges did not mince words when reflecting on the clear racial discrimination baked into the schemes. Chief Judge Rubén Castillo implored the government to relegate fake stash houses to "the dark corridors of our past," writing, "[t]he inherent problems of this District's false stash house cases must be seen through the lens of our country's sad history of racism."[130] In another FCJC case, Judge Robert Gettleman issued a decision "express[ing] [the] court's disgust with the ATF's conduct in this case."[131]

C. Stash House Parallels in Lower-Level Manipulated Offenses

Stash house litigation was undoubtedly a success for the individuals released from incarceration. But, there is a serious question of why it took years, a team of lawyers funded by an elite law school, and hundreds of motions to have the cases addressed.[132] Sentencing entrapment and manipulation defenses have existed for decades and should have been perfectly suited for stash house cases where the substances were fake, volumes completely arbitrary, and crimes impossible to commit.[133] But, these defenses were wholly inadequate in reducing the sentences of

125. *See Sellers*, 906 F.3d at 860–61 (Nguyen, J., concurring). Judge Nguyen wrote:

> I question whether conducting stash house operations almost exclusively in neighborhoods known to be [B]lack and Hispanic, and excluding neighborhoods known to be white, is in fact a "facially neutral" policy . . . . Even if, for the sake of argument, stash house robberies are more likely to be committed by persons of color than by whites for reasons having nothing to do with race, limiting reverse stings to minority neighborhoods will still result in the systematic overrepresentation of minority targets.

Id. (citations omitted).

126. *See* Siegler & Admussen, *supra* note 94, at 1019.

127. *See* Sweeney & Meisner, *supra* note 27; Heath, *supra* note 28 (showing that 91 percent of people incarcerated for ATF stash house stings were racial or ethnic minorities).

128. *See* Meisner, *supra* note 30.

129. *See id.*

130. United States v. Brown, 299 F. Supp. 3d 976, 983–85 (N.D. Ill 2018).

131. United States v. Paxton, No. 13 CR 0103, 2018 WL 4504160, at *2 (N.D. Ill. Sept. 20, 2018).

132. *See supra* note 109 (discussing the time and resources it took to undertake the Chicago stash house litigation).

133. *See* Spakowski, *supra* note 37, at 504–14 (explaining why traditional sentencing entrapment and manipulation claims are insufficient to address stash house schemes).

individuals subjected to this manipulation.[134] Relief relied on complex litigation that is inaccessible to most defendants.[135]

Although stash house cases are disappearing due to judicial rebuke, several documented instances of federal law enforcement tactics show that the ATF or the DEA may still engage in similarly racist operations at a much broader level, especially for lower-level narcotics or weapons offenses where Guidelines manipulation is easiest.[136] There is no national database that catalogues federal law enforcement manipulation and displays whether it is applied in a discriminatory manner.[137] So although the following instances are inconclusive, they illustrate standard techniques used in federal enforcement efforts.[138] These types of enforcement tactics are far more common than stash house schemes ever were, and the rest of this Note focuses on these cases, recognizing that they constitute the bulk of scenarios where defendants traditionally raise sentencing entrapment and manipulation claims.[139]

1. Sentencing Schemes in San Francisco and Albuquerque

In 2013, when the DEA partnered with the San Francisco Police Department (SFPD) to address the drug trade in San Francisco, California, every one of the thirty-seven individuals who were federally prosecuted as a result of the joint operation were Black.[140] The operation was called "Operation Safe Schools" because most of the Tenderloin neighborhood, where the efforts were concentrated, is within 1,000 feet of a school, subjecting the defendants to a federal school zone enhancement for their offenses.[141] The joint law enforcement effort was intended to curb narcotics dealings by subjecting arrested individuals to harsher federal sentencing than

134. *See id.*

135. *See supra* note 109.

136. *See* Tinto, *supra* note 1, at 1445–49.

137. This is, in part, due to the dearth of public law enforcement or prosecutorial data that illustrates which individuals are subject to a ratcheted sentence. *See* NICOLE ZAYAS FORTIER, ACLU, UNLOCKING THE BLACK BOX: HOW THE PROSECUTORIAL TRANSPARENCY ACT WILL EMPOWER COMMUNITIES AND HELP END MASS INCARCERATION 8–12 (2019), https://www.aclu.org/sites/default/files/field_document/aclu_smart_justice_prosecutor_transparency_report.pdf [https://perma.cc/WD8U-WPB9] (describing the difficult nature of obtaining data on prosecutorial decision-making). The best illustrative data may also be scattered across various public defenders' offices, which cannot disclose such information for confidentiality reasons and do not have the resources to maintain massive databases. *See* Jennifer E. Laurin, *Data and Accountability in Indigent Defense*, 14 OHIO ST. J. CRIM. L. 373, 373–75 (2017).

138. *See* Tinto, *supra* note 1, at 1411–12.

139. *See id.*

140. *See* Ezekiel Edwards & Shilpi Agarwal, *Racist Drug Laws Lead to Racist Enforcement in Cities Across the Country*, ACLU (Feb. 21, 2020), https://www.aclu.org/news/criminal-law-reform/racist-drug-laws-lead-to-racist-enforcement-in-cities-across-the-country/ [https://perma.cc/CB4Q-6357]; Max Cherney, *SFPD at Odds with Feds After Taking Blame for Racist Drug Busts*, HOODLINE (Feb. 26, 2017), https://hoodline.com/2017/02/sfpd-at-odds-with-feds-after-taking-blame-for-race-based-drug-busts/ [https://perma.cc/WJ35-JK6C].

141. *See* Cherney, *supra* note 140.

they otherwise would receive under state sentencing.[142] Undercover officers or confidential informants walked through the Tenderloin district and repeatedly purchased small volumes of drugs from suspects.[143] According to a subsequent civil lawsuit brought by the American Civil Liberties Union (ACLU), body-worn camera footage of the undercover purchases showed the officers ignoring persons of other races to approach Black suspects, and in one recording, an officer was heard using racial epithets to describe the operation's targets.[144]

In 2016, the ATF initiated similar drug-buying operations in Albuquerque, New Mexico, by using confidential informants to persuade individuals to find and purchase drugs across the city.[145] The operation used five confidential informants—three Black and two Latine individuals—placed in racially marginalized neighborhoods to find targets to persuade.[146] The informants typically approached individuals and offered a "finder's fee," a small amount of cash, in return for locating a source of drugs or weapons.[147] The informant, or a partnering undercover agent, selected the amount of drugs they wanted to buy or the number of purchases to be undertaken.[148] After successfully arranging the purchases, police arrested the "finding" individual and charged them with conspiracy to distribute the type of substance they located.[149] An independent study found that 27 percent of those arrested were Black and 57 percent were Latine—in a city with a 3 percent Black population and 47 percent Latine population.[150] In the decade prior to those operations, Black individuals comprised just 5 percent of drug and gun defendants in New Mexico federal court.[151] The study also found that many of the individuals targeted were unhoused and lacked the violent criminal histories that the ATF stated they used as a prerequisite for targeting.[152] The same report noted that two of the ATF agents involved in the Albuquerque operations worked in the stash house schemes in Chicago several years prior.[153]

These statistics reflect a broader phenomenon where law enforcement weaponizes the Guidelines in small narcotics and weapons purchases and

142. *See id.*
143. *See id.*
144. *See* Cross v. City of San Francisco, 386 F. Supp. 3d 1132, 1150 n.10 (N.D. Cal. 2019).
145. Jeff Proctor, *Feds' Sting Ensnared Many ABQ Blacks, Not "Worst of the Worst,"* N.M. IN DEPTH (May 7, 2017), https://nmindepth.com/2017/05/07/feds-sting-ensnared-many-abq-blacks-not-worst-of-the-worst/ [https://perma.cc/AYH7-VY6L].
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*
151. *See* Jeff Proctor, *Black Community Wants Answers on ATF's Albuquerque Sting, Says It Was "Punch in the Face,"* N.M. POL. REP. (June 13, 2017), https://nmpoliticalreport.com/2017/06/13/black-community-wants-answers-on-atfs-albuquerque-sting-says-it-was-punch-in-the-face/ [https://perma.cc/R7UF-B84V].
152. *See id.*
153. *See* Proctor, *supra* note 145.

intentionally trains its efforts on racially marginalized communities.[154] Such selective methods are concerning not only because entrapment-style tactics raise ethical concerns, but also because these actions may contribute to existing sentencing disparities as prosecutors charge defendants of color with higher volumes of substances, or enhancements, than their white counterparts.[155] This effect is difficult to measure because of inadequate data showing the discretionary decisions of law enforcement.[156] However, broader analyses of sentencing disparities by race consistently show disproportionate harshness toward Black and Latine defendants.[157]

2. Racialized by Design

The technicalities of undercover work play a role in these selective enforcement patterns. Because undercover purchases or arrangements are police-initiated, agents or confidential informants select particular places and particular people for their investigations.[158] Searching for targets in socioeconomically depressed neighborhoods tends to be both more successful and more affordable because those areas are more likely to include street transactions than sales in private homes.[159] Because of historical disenfranchisement, drug transactions in neighborhoods composed of communities of color may be more likely to occur between strangers in public places rather than between acquaintances in bars, clubs, or houses.[160] The former type of operation is easier to penetrate, consumes fewer resources, and is less likely to garner negative attention.[161]

Confidential informants also play an important role in enabling this racial tilt.[162] Informants are critical in enforcement tactics that rely on covert purchases.[163] Informants are typically members of the targeted community themselves or are already implicated in some criminal activity, making their presence unsuspicious.[164] In a sentencing scheme, informants often initiate

154. *See, e.g.*, Edwards & Agarwal, *supra* note 140.

155. *See, e.g.*, *Controlled Substances: Federal Policies and Enforcement: Hearing Before the H. Comm. on Crime, Terrorism & Homeland Security*, 117th Cong. 17–19 (2021) (statement of Alison Siegler, Clinical Professor of Law and Director, Federal Criminal Justice Clinic at the University of Chicago Law School) (calling for the abolition of harsh drug laws and mandatory minimums and citing the lack of tangible reform that addresses these sentencing practices' racial disparities).

156. *See* Wiseman, *supra* note 36, at 350–54.

157. *See generally* Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1321–24 (2014) (showing racial disparities in federal sentencing for the most common categories of offenses).

158. *See* William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1820 (1998).

159. *See id.*

160. *See id.* at 1803.

161. *See id.* at 1820.

162. *Id.* at 1821–22.

163. *See* Alan Feuer & Al Baker, *Officers' Arrests Put Spotlight on Police Use of Informants*, N.Y. TIMES (Jan. 27, 2008), https://www.nytimes.com/2008/01/27/nyregion/27informants.html [https://perma.cc/9NJW-6YCR].

164. *See id.*

contact with someone they believe is already engaged in criminal activity or recruit someone willing to participate.[165] The race of the confidential informant can thus be determinative of who they will report or select for their efforts.[166] Informants are more likely to operate in their own neighborhoods and initiate contact with individuals of their same race because of community social dynamics.[167] There is the potential for a cyclical "blinders effect" in these situations: if police believe criminal activity is more likely to occur in neighborhoods composed of people of color, they will recruit informants who can operate in those neighborhoods, who will in turn select and recruit individuals of their same demographics.[168] This series of events rewards the police's initial bias.[169]

Given the nature of informant work, demographic data on confidential informants and their selection techniques are limited.[170] But, as noted in the subsequent lawsuit challenging selective enforcement in Albuquerque, every confidential informant selected for that city's operations was Black or Latine, which narrowed the ATF's focus to demographically similar individuals.[171] When an ATF agent from the Albuquerque stings was cross-examined on this exact issue, he admitted there were zero materials or efforts related to antibias in planning the scheme, and when asked about the recruitment of informants, responded, "[f]or the most part, I don't even ask what their race is."[172] Further, when asked about any implicit or explicit bias training that the informants or assigned ATF agents received, the agent testified there had been none.[173] In response to critiques that his sting operations brought in an excessive number of individuals of color, the agent responded, "we're colorblind, we're race blind . . . we're race neutral."[174]

165. *See* Proctor, *supra* note 145 (interviewing Professor Katharine Tinto on the discriminatory use of confidential informants).

166. *See id.*

167. *See* JUDITH GREENE & PATRICIA ALLARD, ACLU OF MISS. & JUST. STRATEGIES, NUMBERS GAME: THE VICIOUS CYCLE OF INCARCERATION IN MISSISSIPPI'S CRIMINAL JUSTICE SYSTEM 44–45 (2011), https://www.aclu.org/sites/default/files/field_document/DLRP_MississipppiReport_sm.pdf [https://perma.cc/GLL2-YYBZ].

168. *See* Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 101, 136–37 (2008) (describing the "blinders effect" and explaining racial disparities in warrants issued on the basis of confidential informants' tips in San Diego, California).

169. *See id.*

170. *See* Green & Allard, *supra* note 167, at 29.

171. *See* Jeff Proctor, *ATF Used Traveling, Well-Paid Informants in ABQ Sting*, N.M. IN DEPTH (May 15, 2017), https://nmindepth.com/2017/05/15/atf-used-traveling-well-paid-informants-in-abq-sting/ [https://perma.cc/H6EY-GTJL].

172. United States v. Jackson, No. 16-CR-2362, 2018 WL 6602226, at *10 (D.N.M. Dec. 17, 2018).

173. *See id.*

174. *Id.*

D. Sentencing as Opportunity for Advocacy

A defendant in a sentencing scheme has limited options for challenging his charge.[175] At the pretrial stage, he may raise a selective enforcement claim that argues that he was unfairly targeted on the basis of race.[176] However, as shown by the Chicago stash house cases, these claims are exceptionally difficult to win, even with the lower discovery standards recently established in several circuits.[177] Stash house defendants have yet to prevail solely on grounds of a selective enforcement or prosecution claim.[178] Defendants subject to lower-level manipulated offenses have had similar difficulty in raising these challenges. In San Francisco and Albuquerque, selective enforcement suits have not yet been successful.[179]

At the trial stage, the entrapment defense is also difficult to win.[180] Pure entrapment claims have a set of arduous standards and typically do not inquire into bias factors or whether the race of the defendant played a role in his entrapment.[181] The entrapment defense also may not be appropriate for sentencing schemes that are focused on the magnitude of the offense, not the offense itself; these cases will inherently have well-documented evidence or repeated transactions that illustrate a willingness to comply.[182] And, today's criminal legal system is defined by plea bargaining, a process that attaches serious penalties to taking the risk of proceeding to trial.[183] Very few defendants are willing to gamble on the likelihood of a trial victory, particularly if there is a more attractive plea bargain offered.[184]

Finally, at the sentencing stage, a defendant may raise a sentencing entrapment or manipulation defense that challenges the government for guiding him toward an enhancement or using high volumes of substances in

175. *See* Tinto, *supra* note 84 (describing options for defense attorneys in challenging manipulation cases).

176. *See* McAdams, *supra* note 120, at 605–07.

177. *See* Siegler & Admussen, *supra* note 94, at 1018–19 (discussing the lower discovery standard achieved for selective enforcement claims but noting this has not yet resulted in success of those claims).

178. *See id.*; *supra* Part I.B.1.

179. *See* Cross v. City of San Francisco, 386 F. Supp. 3d 1132, 1155 (N.D. Cal. 2019) (granting San Francisco defendants' selective enforcement discovery requests but rejecting selective prosecution claims); United States v. Laneham, No. CIV 16-2930, 2017 U.S. Dist. LEXIS 176486, at *97 (D.N.M. Oct. 25, 2017) (rejecting an Albuquerque defendant's selective enforcement claim).

180. *See generally* Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1390–93 (2004) (describing the difficulties of raising an effective entrapment defense); Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 75 (2015) (citing available statistics showing that 97 percent of federal criminal charges and 94 percent of state criminal felony convictions were settled by guilty plea).

181. *See* Joh, *supra* note 6, at 194–96.

182. *See* Witten, *supra* note 11, at 730.

183. *See, e.g.*, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NAT'L ASS'N OF CRIM. DEF. LAWS. (July 10, 2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct [https://perma.cc/2C6C-HLHB].

184. *See id.*

his individual case.[185] Although this is successful in rare instances, as the next part discusses, these defenses typically preclude the defendant from arguing that his race played any role in the offense.[186] This reflects a legal norm that sentencing hearings should focus on the individual and his offense, rather than on racial equity concerns.[187]

Despite these challenges, there is an opportunity to use sentencing hearings as a platform to challenge racial disparities in sentencing schemes.[188] As codified, the Guidelines do not permit judges to use race or other immutable characteristics as grounds for consideration in sentencing.[189] However, courts are required to evaluate any aggravating or mitigating sentencing factors, and they increasingly rely on data or "evidence-based" materials to determine an appropriate sentence.[190] Further, the Federal Rules of Evidence do not apply at sentencing, giving defendants and their attorneys a broad opportunity to introduce information, hearsay, and narratives that would otherwise be excluded at trial.[191] For defendants, this has translated into sentencing arguments ranging from discussing local prison conditions to arguing that mass incarceration or the nation's racialized "drug wars" warrant leniency at sentencing.[192]

These arguments often speak to a sentencing judge's ability to issue a downward variance from a Guidelines sentence, because sentencing judges, post-*Booker*, must consider whether the seven factors outlined in § 3553(a) support the calculated Guidelines sentence.[193] This includes an evaluation of the "nature and circumstances of the offense,"[194] the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,"[195] and whether there is a "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[196] For example, in

185. *See infra* Part II.A.

186. *See infra* Part II.A.

187. *See* Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 136 (2018) ("Judges have not typically used the autonomy and flexibility of sentencing and sentencing hearings to consider or address broader questions of mass incarceration or racial inequities. Instead, sentencing hearings are generally focused on the specifics of the individual defendant, crime, and victim.").

188. *See id.* at 127.

189. *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.10 (U.S. SENT'G COMM'N 2018).

190. Webb, *supra* note 187, at 134–35.

191. *See id.* at 134.

192. *See id.* at 143–48; *see also* Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-*Booker, 91 MARQ. L. REV. 723, 727 (2008) (arguing that sentencing courts, post-*Booker*, have the opportunity to engage in sentencing correction for Native American defendants).

193. *See* United States v. Booker, 543 U.S. 220, 246 (2005); Gall v. United States, 552 U.S. 38, 49–50 (2007) (describing the factors a sentencing judge must consider under *Booker*'s holding that the Guidelines are advisory); *see also* U.S. SENT'G COMM'N, *supra* note 59, at 42–44 (describing the circumstances under which federal courts issued downward variances).

194. 18 U.S.C. § 3553(a)(1).

195. *Id.* § 3553(a)(2)(A).

196. *Id.* § 3553(a)(6).

United States v. Dayi,[197] a Maryland district court issued significant downward variances for defendants in a marijuana distribution ring in recognition of the fact that governmental policies toward marijuana have significantly changed, and the selective enforcement of marijuana offenses could lead to unwarranted sentencing disparities.[198] The decision was grounded in the § 3553(a) sentencing factors that the court was mandated to consider—the court cited § 3553(a)(2)(A), which calls for a sentence to reflect the seriousness of the offense, as well as § 3553(a)(6), which calls for a sentence to avoid imposing unwarranted sentencing disparities.[199]

Similarly, in *Kimbrough v. United States*,[200] the Supreme Court held that § 3553(a)(6) justified a substantial downward variance in cases that implicated the infamous crack/powder cocaine sentencing ratio on the basis that it promotes an unwarranted sentencing disparity.[201] Previously, the Guidelines treated every gram of crack cocaine as equivalent to 100 grams of powder cocaine for sentencing purposes, a decision traceable to racialized fears that motivated the Anti-Drug Abuse Act of 1986.[202] The *Kimbrough* Court held that it was properly within any sentencing court's § 3553(a) discretion to deviate from the 100-to-1 ratio prescribed by the Guidelines if it believed that doing so would better ensure sentencing fairness and consistency.[203] In another important opinion supporting the use of discretion under the § 3553(a) sentencing factors, the Supreme Court held in *Gall v. United States*[204] that a downward sentencing variance did not need to be justified by "extraordinary circumstances" but must display a thorough consideration of the seven § 3553(a) factors.[205]

There are many factors still outside a sentencing court's control: prosecutors' charging decisions, plea bargain stipulations, and mandatory minimum charges continue to limit discretion.[206] Most empirical evidence indicates that the Guidelines are still highly influential on a judge's

197. 980 F. Supp. 2d 682 (D. Md. 2013).
198. *See id.* at 687–89.
199. *See id.* at 683.
200. 552 U.S. 85 (2007).
201. *Id.* at 108–10 ("Under this instruction, district courts must take account of sentencing practices in other courts and the 'cliffs' resulting from the statutory mandatory minimum sentences. To reach an appropriate sentence, these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by the crack/powder ratio itself.").
202. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.); *see, e.g.*, United States v. Maske, 840 F. Supp. 151, 152 n.3 (D.D.C. 1993) (noting that, if the defendant had possessed the equivalent volume of powder cocaine, rather than crack, his sentence would have been one-fifth of what it was); DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 2–4 (2006), https://www.aclu.org/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf [https://perma.cc/6NUV-QPQQ] (discussing public fears and presumptions surrounding crack cocaine use in the 1980s).
203. *See Kimbrough*, 552 U.S. at 111.
204. 552 U.S. 38 (2007).
205. *See id.* at 45, 53–56.
206. *See* Webb, *supra* note 187, at 135.

decision-making.[207] However, sentencing hearings provide one of the only opportunities for defendants to address racial injustice in their cases and to build a narrative that is both factually and emotionally persuasive.[208] *Booker* and its progeny restored some judicial independence in sentencing, further making it possible to better address disparities in the criminal system at sentencing hearings.[209]

II. THE CHAOTIC DOCTRINES OF SENTENCING ENTRAPMENT AND SENTENCING MANIPULATION

This Note argues that, for individuals caught in manipulated sentencing schemes, a stronger case for sentence leniency could be made by using stash house cases as precedent to argue for a downward variance under the § 3553(a) sentencing factors.[210] This argument emphasizes that manipulated Guidelines do not accurately reflect the nature and seriousness of an offense under §§ 3553(a)(1)–(2) and lead to unwarranted sentencing disparities that are discouraged by § 3553(a)(6).

This part discusses the legal doctrines of sentencing entrapment and sentencing manipulation, the traditional arguments made at sentencing in these cases, and why they rarely offer adequate protections for defendants. Part II.A presents a hypothetical manipulation scenario and examines each circuit court's treatment of the hypothetical to illustrate the evaluation of these defenses. Part II.B discusses the justifications for courts' treatment of these defenses and explains some of the critiques levied against the standards used to evaluate each defense.

A. An Illustration

Two basic evaluations underline a court's approach to sentencing entrapment and manipulation claims: a "subjective test" that focuses on the predisposition and intent of the defendant and an "objective test" that focuses on the government's conduct and manipulation.[211] For courts that distinguish between sentencing entrapment and manipulation, the former typically triggers a subjective analysis, whereas a sentencing manipulation claim triggers an objective analysis.[212] Even within these generalities, courts are inconsistent in their approaches. Jurisdictions utilizing an objective approach have looked to a defendant's predisposition, borrowing from the

207. *See* U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 5 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf [https://perma.cc/L4VZ-PLYL] ("During the *Gall* period, 80.7 percent of federal sentences were either within the guideline range (53.9% of sentences) or below the range pursuant to a government motion (26.8% of sentences).").

208. *See* Webb, *supra* note 187, at 141–42.

209. *See id.* at 135–37.

210. *See supra* note 67 and accompanying text.

211. *See* Abelson, *supra* note 77, at 781.

212. *Id.* at 781–84.

subjective approach.[213] Several courts merge the inquiries, treating sentencing entrapment and manipulation as the same defense and using some combination of objective and subjective factors to evaluate the claim.[214] Three circuits refuse to consider the defenses at all, declining to inquire into law enforcement discretion.[215] These inconsistencies make a concise summary impossible, but an illustration may help.

Take the common example of an unknowing suspect asked by an undercover agent to procure and sell him narcotics.[216] The suspect complies and deals small volumes of the drug of choice to that agent several times over the course of a year. After the cumulative volume the defendant sells is comfortably over the 100-gram statutory minimum that triggers a five-year prison term, the agent arrests him.[217]

At sentencing, the defendant seeks to raise two claims: (1) if not for the officer's coercion and payment, he would never have sold that volume of drugs and (2) it is clear that the agent delayed his arrest until a five-year sentence was guaranteed under the Guidelines, even though the intervention could have happened at any point that year. The following two sections analyze how each claim would be examined in federal circuit courts.

1. Sentencing Entrapment

The first claim would be deemed a sentencing entrapment defense in most circuits.[218] The U.S. Courts of Appeals for the Eighth, Ninth, and District of Columbia Circuits apply a subjective analysis to these claims, requiring the defendant to show that he was not predisposed to engage in that volume of narcotics dealing without the agent's encouragement, or that he would not have had the resources to engage in that activity.[219] If successful, the court would exclude the volume of "induced" narcotics from the defendant's offense-level calculations or reduce their sentence in a discretionary way.[220] To refute this defense, the government may point to prior drug convictions

213. *See, e.g.*, United States v. Kenney, 756 F.3d 36, 51 (1st Cir. 2014). The inquiry for sentencing manipulation used by the U.S. Court of Appeals for the First Circuit purports to focus objectively on the government's conduct during the manipulated scheme. *See id.* But, in *Kenney*, the First Circuit rejected a defendant's sentencing manipulation defense based on the district court's finding that the defendant was an "enthusiastic participant" in the scheme. *Id.* In that instance, the ATF ensnared the defendant in a fake stash house scheme, arbitrarily increasing the stash amount from $100,000 to $200,000 plus five kilograms of cocaine before the staged robbery, resulting in a ten-year Guidelines sentence. *See id.*

214. *See* Abelson, *supra* note 77, at 781–84.

215. *See infra* note 227.

216. *See, e.g.*, Quinones-Figueroa v. United States, No. 12-CV-2230-T-27, 2013 U.S. Dist. LEXIS 69324, at *26 (M.D. Fla. May 15, 2013); United States v. Beltran, 571 F.3d 1013 (10th Cir. 2009).

217. *See* 21 U.S.C. § 841(b)(1)(B)(i).

218. *See* Abelson, *supra* note 77, at 779.

219. *See* United States v. McKeever, 824 F.3d 1113, 1123 (D.C. Cir. 2016); United States v. Boykin, 785 F.3d 1352, 1360–61 (9th Cir. 2015); United States v. Ruiz, 446 F.3d 762, 773–74 (8th Cir. 2006).

220. *See Ruiz*, 446 F.3d at 774.

or behavior that implies that the defendant was, in fact, predisposed to that degree of drug activity.[221]

The U.S. Court of Appeals for the Second Circuit diverges from this pattern and applies an objective analysis, requiring the defendant to show that the government engaged in "outrageous official conduct" that overcame his will to resist the criminal activity.[222] This is a high bar; the court has never recognized a single case that meets that standard.[223]

The Third Circuit has never explicitly ruled on the validity of either a sentencing entrapment or manipulation defense but has held that there would not be grounds for departure from the Guidelines if agents intentionally stretch out an operation, leading a defendant to greater sentencing penalties.[224] Recently citing a defendant's "willingness to participate" in a sting drug trafficking operation, the court dismissed the opportunity to rule on the legal merits of either defense.[225] The U.S. Court of Appeals for the Fourth Circuit follows the Third Circuit in declining to recognize the legal viability of a sentencing entrapment claim.[226] The U.S. Courts of Appeals for the Fifth, Sixth, and Seventh Circuits offer even less clarity, declining to rule on the merits of either a sentencing entrapment or manipulation defense.[227] The defendant in this illustration is unlikely to proceed on his claim in any of these circuits.

2. Sentencing Manipulation

The defendant's second claim in the above illustration—that the agent purposefully delayed his arrest to secure a five-year sentence under the Guidelines—is a sentencing manipulation defense. The U.S. Court of Appeals for the First and Tenth Circuits treat sentencing entrapment and manipulation as equivalents, but every circuit that recognizes some version of the manipulation defense applies an objective analysis.[228] Under an objective analysis, the defendant must show by a preponderance of the evidence that the government exhibited "extraordinary misconduct" in the offense.[229] Showing that the government concocted the idea for the crime

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221. *See e.g*, United States v. Jennings, No. 17-264, 2021 U.S. Dist. LEXIS 151963, at *8 (D. Minn. Aug. 12, 2021).

222. United States v. Soborski, 708 F. App'x 6, 10 (2d Cir. 2017).

223. *See id.* at 10.

224. *See* United States v. Baird, No. 20-2262, 2021 U.S. App. LEXIS 24314, at *5 (3d Cir. Aug. 16, 2021).

225. *See id.* at *5–6.

226. *See* United States v. Young, 818 F. App'x 185, 195 (4th Cir. 2020).

227. *See* United States v. Zuniga-Medrano, 778 F. App'x 329, 330 (5th Cir. 2019) ("We have not decided whether sentencing entrapment or sentencing factor manipulation is a viable defense, and we need not do so here." (citing United States v. Stephens, 717 F.3d 440, 446 (5th Cir. 2013))); United States v. Hammadi, 737 F.3d 1043, 1048 (6th Cir. 2013); United States v. Turner, 569 F.3d 637, 641 (7th Cir. 2009) ("[O]ur circuit does not recognize the sentencing manipulation doctrine.").

228. *See* Abelson, *supra* note 77, at 781–84.

229. United States v. Montoya, 62 F.3d 1, 4 (1st Cir. 1995) (quoting United States v. Gibbens, 25 F.3d 28, 31 (1st Cir. 1994)); *see also* Adams v. United States, No. 06 Cr. 218,

itself, could have ceased the conduct earlier, or steered the defendant toward satisfying a guideline minimum, is insufficient.[230] The high volume of narcotics, even if obviously corresponding to a guideline sentence, is typically irrelevant to the analysis without more evidence of intolerable pressure or illegitimate motive by the agent involved.[231] The defendant in the above illustration would only find relief if he could show that law enforcement acted with extraordinary misconduct that was "sufficiently reprehensible."[232]

The D.C. Circuit recently decided a rare, successful sentencing manipulation case that illustrates where this standard lies. In *United States v. Hopkins*,[233] undercover officers proposed that the defendant rob a liquor store, meeting with him several times to plan the robbery.[234] At one of those meetings, an undercover officer handed the defendant and his coconspirators guns to use in the robbery.[235] The officers arrested the defendants shortly after they held the weapons for a few minutes.[236] Upon sentencing, the court rejected a sentencing entrapment defense on the grounds that Hopkins and codefendants were perfectly comfortable planning the robbery and using weapons in its commission, satisfying predisposition.[237] But the court held that the district court properly reduced Hopkins's sentence on manipulation grounds, noting that the weapons were obviously placed in the defendants' hands to enhance their sentences, and that they were unlikely to have been able to obtain those weapons themselves.[238] Nonetheless, Hopkins was still sentenced to seventy-two months for his participation in an orchestrated crime that did not, and could not, have occurred.[239]

B. Justifications for the Sentencing Defenses

Though federal courts' treatment of these sentencing defenses is somewhat erratic, the defendant in the initial illustration is unlikely to find relief on either of his claims. The two standards in place for evaluating these defenses—predisposition and outrageous conduct—are heavily relied on by

2013 U.S. Dist. LEXIS 30012, at *46 (S.D.N.Y. Mar. 4, 2013); United States v. Beltran, 571 F.3d 1013, 1018–19 (10th Cir. 2009).

230. *See Montoya*, 62 F.3d at 3–4 ("A defendant cannot make out a case of undue provocation simply by showing that the idea originated with the government, or that the conduct was encouraged by it, or that the crime was prolonged beyond the first criminal act or exceeded in degree or kind what the defendant had done before." (citations omitted)).

231. *See* United States v. Pérez-Vásquez, 6 F.4th 180, 204 (1st Cir. 2021) (declining a downward departure in a case where the government provided five kilograms of cocaine to each defendant). Though five kilograms of cocaine triggers a ten-year sentence under 21 U.S.C. § 841(b)(1)(A)(ii)(I), the *Pérez-Vásquez* court declined to grant the defendants' sentencing manipulation claims). *Id.*

232. United States v. Gallardo, 977 F.3d 1126, 1144 (11th Cir. 2020).

233. 715 F. App'x 20, 22 (D.C. Cir. 2018).

234. *See id.*

235. *See* United States v. McKeever, 824 F.3d 1113, 1116 (D.C. Cir. 2016).

236. *See id.*

237. *See Hopkins*, 715 F. App'x at 22.

238. *See id.*

239. *See id.*

courts but face significant critiques.[240] The following section discusses the rationale and criticisms of the high bar for these defenses. Part II.B.1 examines predisposition for the subjective test, and Part II.B.2 examines outrageous government conduct under the objective test.

1. Predisposition

The subjective test's "predisposition" inquiry stems from the analysis given to a pure entrapment defense.[241] To determine if a defendant is predisposed to commit an offense at a certain level, a court examines his state of mind and inclinations before his initial exposure to government agents.[242] The goal of this examination is to distinguish between a ready and able criminal and an innocent person ensnared by government coercion.[243]

As with any intent inquiry, an exact understanding of the defendant's mind at the moment of the offense is impossible. Predisposition analyses maneuver around this impossibility by typically examining two factors: (1) prompt acquiescence or participation in the government's proposed criminal activity and (2) the individual's criminal history and behavior prior to the offense.[244] By looking at an individual's "willingness" to engage in criminal activity, proponents of this approach argue that a subjective analysis easily separates ready and able criminals from innocent victims caught in a government-induced scheme.[245] And, a common argument follows that a truly reasonable, innocent person would not eagerly participate in a crime at all, particularly one that involves several transactions and presents many opportunities to walk away.[246]

Critics of the subjective approach highlight the circular nature of this argument. First, using predisposition to determine culpability allows significant room for sentencing stereotyping and prejudice, given that the inquiry is centered on intangible notions of willingness and history.[247] Second, raising a sentencing entrapment defense in a subjective jurisdiction

240. *See, e.g.*, Tinto, *supra* note 1, at 1417.

241. *See* Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 71–72 (2005).

242. *See* Davis v. State, 570 So. 2d 791, 793 (Ala. Crim. App. 1990) (summarizing the standard legal definition of predisposition); *see also* United States v. Russell, 411 U.S. 423, 429 (1973).

243. *See Davis*, 570 So. 2d at 793.

244. *See* Stevenson, *supra* note 241, at 67, 71; *see also* United States v. Reyes, 239 F.3d 722, 739 (5th Cir. 2001) ("Other factors that may tend to prove predisposition include desire for profit; demonstrated knowledge or experience with the criminal activity under investigation; the character of the defendant, including past criminal history; whether the government first suggested criminal activity; and the nature of the inducement offered by the government."); United States v. Myers, 692 F.2d 823, 842 (2d Cir. 1982) ("Prompt acquiescence shows predisposition to accept a bribe, whether or not a promise of official action is intended to be kept."); United States v. Burkley, 591 F.2d 903, 916 (D.C. Cir. 1978) ("Clearly, one way of proving predisposition is to show that the defendant responded affirmatively to less than compelling inducement by the government agent.").

245. *See* Stevenson, *supra* note 241, at 48.

246. *See id.*

247. *See id.* at 48–49.

may draw attention to the defendant's prior bad acts or criminal history and result in more scrutiny of the individual's character rather than the government's conduct.[248] Together, these two factors give law enforcement significant incentive to target individuals with prior convictions in their undercover operations, giving law enforcement an opportunity to argue that a predisposition exists.[249]

The subjective test may also create more room for racial prejudice, given its analysis of criminal history.[250] It is now better recognized that the past decades' drug wars caused tremendous damage to communities of color and levied harsher sentences on Black and Latine individuals.[251] This left thousands of individuals with prior criminal histories that today would have been shorter, dismissed, or diverted.[252] Criminal history often speaks more to the legacy of policing and race than it does to an individual's propensity for criminal behavior.[253] Yet, for sentencing purposes, lengthier criminal history is grounds for a higher offense level, leading to a higher Guidelines sentence.[254] For federal agencies conducting sentencing schemes, individuals with prior criminal records make easier targets because they will automatically receive higher sentences under the Guidelines and satisfy a predisposition analysis.[255] From the government's perspective, it is far easier to argue that a defendant's offense was not manipulated or escalated if he has a record that indicates prior involvement in criminal activity.[256]

2. Outrageous Government Conduct

Examining whether an officer or agent's actions constituted "extraordinary misconduct" stems from the due process–based outrageous government conduct claim.[257] This is a vague standard rooted in dicta from the Supreme Court case *United States v. Russell*.[258] No federal court has strictly defined the contours of an outrageous conduct claim, with most reiterating that the relevant inquiry is whether, under the totality of the circumstances, the government's conduct is so "shocking, outrageous and clearly intolerable"

248. *See id.*
249. *See id.*
250. *See id.* at 48 n.127.
251. *See* JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 17–18 (2017).
252. *See id.*
253. *See id.*
254. *See* U.S. SENT'G COMM'N, *supra* note 50, at 26.
255. *See* Witten, *supra* note 11, at 727–28 (describing how a predisposition analysis often punishes "smaller" offenders by incentivizing law enforcement to target individuals with prior records).
256. *See id.*
257. *See* Tinto, *supra* note 1, at 1410.
258. 411 U.S. 423, 431–32 (1973) ("[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.").

that it offends "the universal sense of justice."[259] The cited reasoning for such a high standard is "due in primary part to the reluctance of the judiciary to second-guess the motives and tactics of law enforcement officials."[260] A finding of outrageous conduct is typically reserved for the most egregious and rare situations—a defendant rarely succeeds in reducing his sentence on this claim.[261]

Circuit courts typically justify this high bar by citing the necessity of offering broad discretion to the undercover activities of law enforcement, writing that "[c]ourts should go very slowly before staking out rules that will deter government agents from the proper performance of their investigative duties."[262] The judiciary's hesitance to admonish sting operations stems from respect for the notion that agents may draw out an offense to catch a "bigger fish" or more senior offenders in the scheme, and that sting operations are reliable methods for law enforcement to probe the contours of a conspiracy and better establish a case beyond a reasonable doubt.[263]

Courts also acknowledge that undercover techniques are designed to overcome difficult detection problems in transactional crimes.[264] Investigations into ongoing drug or weapons purchases, money laundering schemes, or trafficking operations are police-initiated, rather than victim-initiated.[265] Law enforcement must rely on surveillance and "buy-and-bust" tactics to make arrests in these cases rather than wait for a victim to come forward.[266] It may take repeated transactions or a high payout to induce individuals to get involved in the scheme.[267] And, because the evaluation of outrageous government conduct stems from a trial-based complete defense, courts often approach the analysis with an "all-or-nothing" lens, allowing for no subtleties or degrees of culpability—judges look for only the most egregious behavior.[268]

Judges may also be reluctant to grant defendants sentencing relief when it is difficult to describe what type of reduction is warranted.[269] Notions of fairness and justice are difficult for courts to construe in the world of undercover work and criminal activity.[270] Is it "outrageous" for law enforcement to use five kilograms of narcotics in a sting arrest, but perfectly

259. United States v. Mosley, 965 F.2d 906, 910 (10th Cir. 1992) (quoting United States v. Russell, 411 U.S. 423, 432 (1973)); Tinto, *supra* note 1, at 1410.

260. United States v. Lacey, 86 F.3d 956, 964 (10th Cir. 1996) (citing Hampton v. United States, 425 U.S. 484, 495–96 n.7 (1976) (Powell, J., concurring in judgment) (stating that enforcement officials "must be allowed flexibility adequate to counter effectively [narcotics] activity")).

261. *See* Spakowski, *supra* note 37, at 471–72.

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

263. *See* United States v. Gibbens, 25 F.3d 28, 31 (1st Cir. 1994).

264. *See* Joh, *supra* note 6, at 163–65.

265. *See id.*

266. *Id.*

267. *See id.*

268. *Id.* at 174.

269. *See id.*

270. *See id.*

valid to use one?[271] Is a sentencing hearing the correct venue for theorizing what crime a defendant *could* have committed, absent police involvement?[272] Judges often express the view that there is a line between acceptable coercion and unfair manipulation but are reluctant to define the scope of acceptable law enforcement behavior.[273]

Since the introduction of the Guidelines and its opportunities for quantity-based manipulation, academics have questioned the ethics of this judicial deference to the government's ability to amplify an offense level.[274] Police magnification of a crime may have negative implications for the perceived legitimacy of law enforcement.[275] This, in turn, diminishes public confidence in law enforcement, particularly in communities historically subject to police brutality, racial profiling, and negative relationships with law enforcement.[276]

C. Consideration Under the § 3553(a) Factors

Traditionally, with a sentencing entrapment or manipulation defense, defendants request removal of an enhancement or a lower calculated offense level.[277] This is a rational argument when there is a clearly defined illustration of how an agent manipulated an individual—steering him toward a school zone or handing him an automatic weapon as opposed to a handgun, for example.[278] This is more difficult to do in a standard narcotics case. If an undercover officer requests 100 grams of a substance, and the defendant provides that, how much should be "calculated out"? If the officer conducts ten purchases with the individual, should only the first nine transactions be used to calculate his sentence? When defendants make such requests, they are almost uniformly rejected.[279]

There is some indication, however, that these sentencing arguments are effective if framed as a request for a general downward variance or below-Guidelines sentence. The Tenth Circuit explicitly noted that, following *Booker*'s clarification that the Guidelines are advisory (rather than mandatory), a sentencing judge may consider a sentencing entrapment or manipulation defense outside of their strict doctrines as a request for variance under the § 3553(a) factors.[280] The court noted that these factors require courts to consider the "nature and circumstances of the offense" and

271. *Cf.* United States v. Sanchez-Berrios, 424 F.3d 65, 78–79 (1st Cir. 2005).
272. *See* Joh, *supra* note 6, at 163–65.
273. *See id.* at 174.
274. *See* Tinto, *supra* note 1, at 1421; *supra* Part I.B.
275. *See* Tinto, *supra* note 1, at 1421–22.
276. *See id.* at 1422.
277. *See, e.g.*, United States v. Hopkins, 715 F. App'x 20, 22 (D.C. Cir. 2018); United States v. Ruiz, 446 F.3d 762, 773–74 (8th Cir. 2006).
278. *See* United States v. Atwater, 336 F. Supp. 2d 626 (E.D. Va. 2004) (challenging a school zone enhancement); United States v. Brewster, 1 F.3d 51, 55 (1st Cir. 1993) (challenging an enhancement based on an undercover officer's request that the defendant sell automatic weapons).
279. *See, e.g.*, *supra* notes 224–29.
280. *See* United States v. Beltran, 571 F.3d 1013, 1019–20 (10th Cir. 2009).

theorized that manipulation would be appropriate grounds for a below-Guidelines sentence.[281] This mirrors an earlier holding in the Eighth Circuit, which explained that judges may consider a downward variance in a manipulation scenario under § 3553(a)(1)'s "nature and circumstances" provision.[282] And, as one district court in Rhode Island suggested in response to a sentencing manipulation defense, "[t]here may be cases in which the subjective motives of agents is a consideration because a defendant is unfairly targeted for different treatment due to his race or some other invidiously discriminatory reason."[283]

These suggestions point to what may be an unspoken reality of manipulated sentencing cases: sentencing courts are reluctant to set firm definitions for these two defenses but may be open to issuing a downward variance under § 3553(a) for conduct that clearly inflated an individual's sentence.[284] *Booker*'s determination that the Guidelines are advisory made it possible for sentencing judges to subconsciously or explicitly adjust sentences to reflect exceptional elements of a defendant or their offense, especially when those elements are clearly racialized.[285]

For example, a California district court recently held that information on racial disparities in federal criminal cases can and should be a sentencing consideration under § 3553(a)(6).[286] In resentencing proceedings for one of the Chicago stash house cases, an Illinois district court held that the § 3553(a) factors heavily supported a sentencing reduction because of disparities produced by stash house tactics.[287] In another stash house case, after deeply criticizing the ATF's discriminatory enforcement tactics, a district judge wrote:

> In sentencing any defendant, one of the primary purposes of the governing statute is to "promote respect for the law." 18 U.S.C. § 3553(a). Respect for the law begins with respect for the people and institutions that are sworn

281. *Id.* (quoting 18 U.S.C. § 3533(a)(1)).

282. *See id.*

283. United States v. Dion, 89 F. Supp. 2d 185, 188 (D.R.I. 2000).

284. *See Beltran*, 571 F.3d 1013, 1019 ("*Booker* did not alter the standard for a defendant to succeed on a claim of outrageous governmental conduct, but a defendant's claim of sentencing factor manipulation may also be considered as request for a variance from the applicable guideline range under the § 3553(a) factors.").

285. *See* United States v. Booker, 543 U.S. 220, 334 (2005) (Stevens, J., dissenting) ("As long as 'there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission,' they permit a judge to depart from a Guidelines sentence based on facts that constitute elements of the crime . . . ." (citation omitted)).

286. *See* United States v. York, No. 20-CR-00479-EMC-1, 2021 U.S. Dist. LEXIS 104307, at *4–7 (N.D. Cal. June 1, 2021) ("Disparities in the racial composition of transferees from state to federal court is important because it may tend to confirm and underscore the validity of the disparities . . . it may also provide insight into the sources of that disparity.").

287. *See* United States v. Conley, No. 11 CR 0779-6, 2021 U.S. Dist. LEXIS 40763, at *16 (N.D. Ill. Mar. 4, 2021).

> to enforce and protect the law. In fashioning the sentences for each of the defendants in this case, this court will be most mindful of that directive.[288]

Following this precedent, it may be more effective for defendants to build a sentencing argument under the § 3553(a) factors, questioning the nature and seriousness of their offense because of the way agents selectively weaponized the Guidelines.[289] This type of argument would permit a sentencing judge to use their discretion, either explicitly or implicitly, to exercise sentencing leniency without forcing the court to evaluate the difficult, high bars for predisposition or outrageousness in sentencing entrapment and manipulation claims.[290] And it would allow defendants to point to manipulative law enforcement conduct on the grounds that it leads to unwarranted sentencing disparities, implicating a sentencing court's discretion under § 3553(a)(6). This type of argument is normally precluded under a sentencing entrapment or manipulation defense because of the standards used to evaluate these claims.[291]

This corrective opportunity at sentencing is far from perfect—there is extensive evidence that sentencing judges continue to ignore obviously racialized aspects of the criminal legal system.[292] But, for defendants, it is an argument available nowhere else.[293] In the decades since the implementation of the Guidelines, there has been ample opportunity to weaponize them into inflated sentences.[294] Stash house cases illustrate what occurs when this opportunity enables virtually unlimited discretion.[295] Although stash house stings are disappearing, lower-level manipulated offenses are not.[296] With the eradication of stash house cases comes the

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288. United States v. Paxton, No. 13 CR 0103, 2018 WL 4504160, at *3 (N.D. Ill. Sept. 20, 2018).

289. For example, in 2015, the D.C. Circuit remanded a sentence for reconsideration after holding that a sentencing manipulation argument spoke to the "nature of the offense," a relevant § 3553(a) factor. United States v. Bigley, 786 F.3d 11, 14 (D.C. Cir. 2015) (per curiam).

290. *See, e.g.*, United States v. Genao, 831 F. Supp. 246, 247–50, 253 (S.D.N.Y. 1993) (finding that the amount of narcotics induced by undercover buyers overstated the defendant's culpability in a drug conspiracy, warranting a downward variance, even absent a sentencing entrapment or manipulation defense).

291. *See, e.g.*, United States v. McGee, No. 99-1009, 1999 U.S. App. LEXIS 26504, at *1–3 (2d Cir. Oct. 20, 1999) (rejecting a race-based sentencing manipulation claim, where a Black defendant argued that white defendants implicated in the same sting operation were coerced to sell a form of cocaine subject to lesser punishment).

292. *See* Webb, *supra* note 187, at 136–37.

293. *Id.* at 141–42 ("Sentencing provides a particularly rich opportunity for defense lawyers to advocate for individual clients while addressing larger questions of social and racial injustice. At sentencing, a powerful narrative on the client's behalf can impact the court's decision-making in significant ways.").

294. *See supra* Part I.B.

295. *See* United States v. Briggs, 623 F.3d 724, 729 (9th Cir. 2010) (stating that stash house stings give the government "unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant.").

296. Outside of immigration offenses, narcotics and firearms offenses are the most common charges faced by defendants in federal court. *See* GLENN R. SCHMITT & AMANDA RUSSELL, U.S. SENT'G COMM'N, FISCAL YEAR 2020: OVERVIEW OF FEDERAL CRIMINAL CASES 9–11 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-

chance to counter similarly manipulated sentences in a way that acknowledges the discriminatory harm of this phenomenon.

III. ADDRESSING MANIPULATION AT THE SENTENCING PHASE

In their current form, the sentencing entrapment and manipulation defenses do not adequately protect defendants.[297] These defenses are unrecognized in several circuits, barring meritorious claims that an individual's sentence was grossly increased by law enforcement misconduct.[298] The circuits that do recognize the defenses have chosen such arduous standards of evaluation that the claims are effectively barred there as well.[299] Moreover, the standards chosen to evaluate sentencing entrapment or manipulation claims may, in fact, propagate racial disparities at sentencing. The "subjective" analysis is a regressive view of a defendant, looking to his past behavior as an indication of how likely he was to commit the new offense independent of government coercion.[300] This encourages courts to look at racialized factors such as criminal history, rather than at the broader picture of how and why the escalated offense occurred.[301] The "objective" analysis is a more helpful lens, shifting focus onto the government's conduct in the offense.[302] But the standard chosen to evaluate this argument—outrageousness—is a high bar to pass due to its focus on overwhelming coercion.[303] And, outrageousness is usually an inquiry into how law enforcement interacted with a single defendant, rather than how they are conducting their sentencing schemes on a broader level.[304] So although, in retrospect, it is instinctive to assert that the conduct of police in Albuquerque, Chicago, or San Francisco was outrageous, that argument does not resonate under an individualized sentencing manipulation defense.[305]

The failure of viable sentencing entrapment and manipulation defenses is troubling. First, the lack of a successful defense for manipulated sentencing schemes gives the government immense authority to predetermine an individual's sentence at the outset of an undercover operation.[306] This undermines the Guidelines' stated goal of pursuing consistency in sentencing by subjecting a set of individuals to higher sentences than they would have

publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/26GG-VBE8].

297. *See* Tinto, *supra* note 1, at 1413–15 (critiquing the current doctrine of sentencing manipulation).

298. *See, e.g.*, United States v. Baird, No. 20-2262, 2021 U.S. App. LEXIS 24314, at *5 (3d Cir. Aug. 16, 2021); United States v. Young, 818 F. App'x 185, 195 (4th Cir. 2020) (declining to rule on the merits of sentencing entrapment and manipulation claims).

299. *See supra* Part II.B.

300. *See supra* Part II.B.1.

301. *See supra* Part II.B.1.

302. *See* Abelson, *supra* note 77, at 781.

303. *See id.*

304. *See supra* Part II.B.2.

305. *See supra* note 230.

306. *See supra* Part I.B.

received absent manipulation.[307] Second, the history, structure, and incentives of federal DEA or ATF operations indicate that this manipulation can be done in a racist manner without any safeguards or court rebuke.[308] Recourse for this type of discriminatory enforcement has had to come from lengthy civil rights litigation or public outcry, which has almost certainly left some defendants without relief.[309]

This Note argues that sentencing hearings offer an earlier opportunity to push back against manipulated sentences. This can be done by making an argument under § 3553(a) that law enforcement's manipulation of the Guidelines warrants a downward variance under §§ 3553(a)(1)–(2)'s "nature and seriousness of the offense" provisions, as well as § 3553(a)(6)'s "need to avoid unwarranted sentence disparities" provision.[310] This Note proposes two methods to build this argument. Part III.A argues that defendants can use a narrative approach to point to parallels between their lower-level manipulated offense cases and fake stash house cases to argue that the nature of their offense was influenced by law enforcement misconduct. This argument would be supported by the materials obtained in stash house litigation. Part III.B proposes bolstering this argument with district-level data that would illustrate how manipulative law enforcement conduct contributes to sentencing disparities and warrants departure under § 3553(a)(6). Both sections describe how this approach could circumvent the high standards used to evaluate the traditional sentencing entrapment and manipulation defenses and avoid a race-neutral analysis that ignores the disparities inherent in sentencing schemes.

A. Building a Sentencing Narrative Under § 3553(a)

Fake stash house cases provide a powerful narrative. They implicate both the DEA and ATF, the agencies responsible for the bulk of federal narcotics and weapons charges.[311] The orchestrated stings occurred in major urban hubs around the country and present a clear picture of selective enforcement.[312] They demonstrate that many individuals will comply with requests for high volumes of narcotics and weapons out of economic desperation, or because the government has entirely selected the determinative volumes in their offense, and it takes substantially less effort on the defendant's part to independently obtain such a volume.[313] Stash house cases are an emotionally salient, compelling illustration of how weaponizing the Guidelines can unduly influence an individual to engage in conduct he otherwise would never be involved in.[314]

307. *See supra* note 6 and accompanying text.
308. *See supra* Part I.C.2.
309. *See supra* notes 229–33.
310. 18 U.S.C. § 3553(a).
311. *See supra* notes 27–30.
312. *See supra* notes 27–30 and accompanying text.
313. *See, e.g.*, Heath, *supra* note 28.
314. *See supra* Part I.B.1.

Because there are few limits to the types of arguments that a defendant can make at sentencing, there is an opportunity at these hearings to describe any factors of their case that mirror this persuasive narrative. A defendant can point out that, like in stash house cases, his manipulation took place in an economically depressed or historically over-policed neighborhood, limiting the types of individuals who would be ensnared.[315] He may describe how an agent or confidential informant had absolute discretion to influence his sentence with the volume, number of transactions, and incentives they used.[316] A defendant may argue that the opportunity that law enforcement created was an exceptional windfall and did not accurately reflect any previous offense he engaged in.[317]

These arguments would state that the nature and circumstances of the defendant's offense under § 3553(a)(1), and the seriousness of the offense under § 3553(a)(2)(A), warrant leniency in cases of manipulation.[318] They would imply that the resulting offense should not be considered as severe as that same offense committed by an individual absent law enforcement coercion. The fact that those tactics often rely on vulnerable or financially pressed individuals speaks to this point.[319] By incorporating information about questionable law enforcement tactics into sentencing narratives, a defendant can argue for a sentence outside his guideline calculation by connecting such concerns to the § 3553(a) goals that guide judicial sentencing discretion.[320]

Defendants may also point to a stronger body of evidence that the DEA or ATF failed to introduce safeguards to prevent discriminatory enhancement of sentences.[321] The discovery order pursued in the Chicago stash house litigation sought all ATF manuals, circulars, field notes, and documentation that would reveal how the agency selected targets for stash house operations and determined the volumes of narcotics or weapons to use in the setups.[322] These materials were important to obtain because, by documenting tangible, official government policy, they can supplant testimony regarding abstract, in-the-moment decision-making by law enforcement.[323] Showing that the official policy of federal agencies lacks safeguards for preventing large increases in individual's sentences, and increases those sentences in a discriminatory manner, may help illustrate to a judge how the circumstances of an offense were arbitrarily defined.[324]

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315. *See* United States v. Sellers, 906 F.3d 848, 859 (9th Cir. 2018) (Nguyen, J., concurring).

316. *See, e.g.*, United States v. Briggs, 623 F.3d 724, 729 (9th Cir. 2010).

317. *See, e.g.*, *supra* notes 6, 70 and accompanying text.

318. 18 U.S.C. § 3553(a).

319. *See, e.g.*, Stuntz, *supra* note 158, at 1820–22.

320. *See, e.g.*, Mark D. Duda, Essay, *Remedying Police Brutality Through Sentencing Reductions*, 107 VA. L. REV. ONLINE 99, 112–14 (2021) (proposing similar remedial sentencing arguments in cases of police brutality).

321. *See* Siegler & Admussen, *supra* note 94, at 987.

322. *See id.*

323. *Cf. id.* at 1009–10.

324. *See id.* at 1013.

Civil rights organizations, law school clinics, and defense attorneys are mounting more of these selective enforcement suits to take advantage of the new, lowered discovery standards.[325] Individual defendants not included in these suits can leverage those efforts at their own sentencings by referencing findings that a federal agency acted in a biased manner in targeting defendants for manipulated sentencing schemes, particularly if they are located in the same city where the suit is brought.[326] It would not be an uncredible argument to say the ATF or DEA has a historical track record of failing to self-regulate their efforts or to take precautions that would eliminate the racial tilt of their tactics.[327] It would not be an enormously difficult inference for a sentencing judge to understand that, if the federal agencies are acting in a discriminatory manner in some of their operations, those tactics likely carry over to lower-level offenses.[328] Substantiating those points with the hundreds of pages of testimony, data, and materials brought to light in stash house cases may make these arguments more persuasive.[329]

Rather than attaching this argument to a specific enhancement or calculable volume, as the traditional sentencing entrapment and manipulation defenses require, a § 3553(a) argument would need to be framed as a request for a substantial downward variance in light of the extenuating circumstances that influence a sentencing scheme. Although this may make relief less predictable, it allows defendants to argue for a more holistic review of their offense and avoid the high standards under the subjective and objective analyses.[330] And although a judge's discretion is a difficult variable to predict, both the Eighth and Tenth Circuits have already approved of this approach, permitting judges to consider sentencing entrapment and manipulation-type arguments as requests for variance.[331] The circuits that do not entertain the two sentencing defenses at all are mandated to consider § 3553(a) factors, so this strategy could provide relief for defendants who are otherwise barred from manipulation defenses.[332]

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325. *See id.* at 991.

326. *See, e.g.*, Duda, *supra* note 320 (proposing localized, remedial sentencing arguments in cases of police brutality).

327. *See supra* Part I.C.2.

328. One fact speaking to this point is that the testifying agent in Albuquerque, who stated that ATF actions were "race neutral," was one of the agents responsible for orchestrating the Chicago stash house cases. *See* Proctor, *supra* note 171.

329. For example, the ACLU obtained all of the offender statistics that the ATF relied on in the Albuquerque drug trafficking operation to undermine the argument that the ATF was targeting individuals with violent criminal histories. *See* United States v. Jackson, No. 16cr2362 MCA, 2018 U.S. Dist. LEXIS 21067, at *3–5 (D.N.M. Feb. 7, 2018). The ACLU also obtained all the location data for where confidential informants were sent to contact targets to see the neighborhoods and locations where the ATF focused their efforts. *Id.* at *34–35.

330. *See supra* Part II.B.

331. *See supra* notes 280–83 and accompanying text.

332. *See, e.g.*, United States v. Lucas, 676 F. App'x 177, 178 (4th Cir. 2017). Although the Fourth Circuit generally declines to recognize sentencing entrapment or manipulation defenses, here, the *Lucas* court noted that a district court evaluated the argument under a § 3553(a) consideration. *See id.*

Raising these systemic arguments against sentencing manipulation would invoke the slowly emerging willingness to use § 3553(a) to correct overly harsh sentences for drug offenses.[333] Writing in support of deviation from punitive Guidelines sentences in 2016, Judge John Gleeson from the U.S. District Court for the Eastern District of New York articulated, "[w]e need to make smart, bold choices about two things: (1) the lengths of the prison terms we impose on those who need to be imprisoned; and (2) the categories of defendants we routinely incarcerate who don't need to be imprisoned in the first place."[334] In 2010, Judge Nancy Gertner from the U.S. District Court for the District of Massachusetts criticized the Guidelines recommendation for a narcotics offense as "wholly inconsistent to the purposes of sentencing under 18 U.S.C. § 3553(a)."[335] These statements reflect a broader contingent of sentencing courts now willing to consider their role in redressing the Guidelines' ability to levy disproportionate punishment.[336] Sentencing arguments that speak to the injustice of selectively weaponizing the Guidelines implicate these exact concerns and may convince a court that shorter sentences are warranted.

Arguing for a sentencing reduction on § 3553(a) grounds will likely require more than just a presumption that cases involving lower-level manipulated offenses mirror the problems inherent in stash house schemes. Using some of the tactics key to stash house litigation could overcome this problem and help build an argument under § 3553(a)(6) that sentencing manipulation contributes to unwarranted sentencing disparities based on an individual's race. This could be accomplished by including racially coded district-level data into sentencing briefings, which would show a pattern of selective enforcement for sentencing schemes on the local level. The following section discusses how such data could be compiled without requiring the same degree of cohesiveness as the stash house litigation.

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333. *See, e.g.*, United States v. Hayes, 948 F. Supp. 2d 1009 (N.D. Iowa 2013) (sentencing defendant below the Guidelines recommendation after a § 3553(a) evaluation showed minimal role in a narcotics offense); United States v. Woody, No. 8:09CR382, 2010 WL 2884918, *4–5 (D. Neb. July 20, 2010) (sentencing defendant to under half the Guidelines recommendation, in recognition of policy concerns over methamphetamines sentences).

334. United States v. Dokmeci, No. 13-CR-00455, 2016 WL 915185, at *1 (E.D.N.Y. Mar. 9, 2016).

335. United States v. Whigham, 754 F. Supp. 2d 239, 242 (D. Mass. 2010).

336. *See, e.g.*, United States v. Feauto, 146 F. Supp. 3d 1022, 1024–25 (N.D. Iowa 2015) ("[I]n most of the over 1,000 congressionally-mandated mandatory minimum sentences that I have imposed over the past twenty-two years, I have stated on the record that they were unjust and too harsh."); United States v. Shull, 793 F. Supp. 2d 1048, 1050 (S.D. Ohio 2011) ("The history of unfairness in crack cocaine sentencing is well known, but the inaccuracies it was based on and the injustices it caused make its retelling all the more necessary."); *see also* Mark K. Bennett, *A Slow Motion Lynching?: The War on Drugs, Mass Incarceration, Doing* Kimbrough *Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 892–96 (2014) (describing the potential for sentencing judges to consider serious policy disagreements with Guidelines sentences).

B. Using Data to Warrant Consideration Under § 3553(a)(6)

On the national level, there is no cohesive, quantitative data on the prevalence of police inducement or the race of defendants caught in these schemes. This information is likely siloed in public defenders' offices nationwide.[337] The difficulty of collecting data from these offices is well-documented: crushing caseloads, under-resourced attorneys, and underfunded offices all contribute to the deficit in data from public defense systems.[338]

Data showing a cohesive portrait of ATF actions in Chicago was critical to convincing courts and the broader public that stash house stings are conducted in a discriminatory manner.[339] In Professor Siegler's later statements to the U.S. House Committee on the Judiciary on this topic in March 2021, Siegler noted that it took nine months, hundreds of pages of motions, and a civil enforcement subpoena to obtain the racially coded data that they needed to bring their selective enforcement claim.[340] The resources and time needed to do this are completely inaccessible to most defendants and their attorneys, particularly when dealing with cases that are not as discrete or do not carry the same intense sentences as stash house schemes.[341]

However, a sentencing defense does not require the same level of discovery or cohesiveness as a selective enforcement claim.[342] At sentencing, a judge need only be swayed that there is a likelihood of unwarranted sentencing disparity if they adhere to the recommended Guidelines sentence.[343] What would thus be useful in this setting is reliable data showing that a narrow subset of defendants is being subjected to ratcheted sentences, or that law enforcement is concentrating their sentencing schemes in a narrow set of neighborhoods.[344] Most of this information is already located in defendant case files and should be disclosable so long as they are anonymized.[345] If public defenders' offices can obtain some data that indicates that law enforcement in their district is ratcheting up defendants' sentences in a discriminatory manner, public defenders may build an argument for leniency on the basis of sentencing disparity.

This reverse engineering of sentencing patterns using internal data is already underway in some public defender offices in an effort to better

337. *See* Laurin, *supra* note 137, at 373–75.
338. *See id.*
339. *See* Siegler & Admussen, *supra* note 94, at 987–89.
340. *See id.*
341. *See* U.S. SENT'G COMM'N, *supra* note 296, at 9 (noting that approximately 75 percent of defendants in federal court face a term of incarceration of less than five years).
342. *See* Webb, *supra* note 187, at 134.
343. *See, e.g.*, *id.* at 147–49 (describing how to build a persuasive sentencing narrative on racial justice grounds).
344. *See supra* note 137 and accompanying text.
345. *See, e.g.*, NAT'L LEGAL AID & DEF. ASS'N, BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK: A TOOLKIT FOR DEFENDER LEADERS (2014), https://www.nlada.org/sites/default/files/pictures/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf [https://perma.cc/3XJY-UWQB].

understand sentencing disparities.[346] The North Carolina Indigent Defense Manual Series recommends that public defenders' offices rely on interns, volunteers, or paralegals to anonymously track biographical data and sentencing patterns in their district to better see disparities.[347] Coding by offense type could be more time-consuming, but flagging any case where undercover work or manipulation was at play could help reverse engineer a picture of what undercover enforcement looks like in the district. Defenders also often rely on checklists or interview sheets at the arraignment stage to gain critical information about their client's lives.[348] It is standard procedure to ask a client about conditions of the incident arrest, and information on law enforcement's role in the offense may be collected at this juncture.[349]

Working this information into sentencing materials gives a more complete picture of how Guidelines manipulation can selectively increase individuals' sentences, implicating consideration under § 3553(a)(6).[350] This would follow the emerging willingness to use § 3553(a)(6) to consider race and policy-based sentencing disparities.[351] For example, after *Booker* restored some judicial sentencing discretion in 2005, the number of marijuana offenses sentenced below-Guidelines nearly doubled.[352] This was attributed to an acknowledgement of selective enforcement of federal marijuana offenses and its resulting sentencing disparities.[353] Data on selective manipulation may also be particularly salient in narcotics cases, where federal judges have shown more willingness to engage with facts and studies that show sentencing disparities for these offenses.[354]

The applicability of these arguments to lower-level manipulated offense cases will not be perfect. Sentencing hearings typically focus solely on an individual and their actions, which is rational, given that this is the primary opportunity for the defense to humanize a defendant and credibly advance their sentencing goals.[355] Not all cases of offense manipulation mirror stash

346. *See, e.g.*, Andrew Lucas Blaize Davies, *How Do We "Do Data" in Public Defense?*, 78 ALBANY L. REV. 1179, 1189 (2015) (discussing improvements to data tracking in public defense offices).

347. *See* Alyson A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases*, *in* INDIGENT DEFENSE MANUAL SERIES, at 9-1, 9-15 (John Rubin ed., 2014), https://defendermanuals.sog.unc.edu/sites/default/files/pdf/20140457_chap%2009_Final_2014-10-28.pdf [https://perma.cc/3AWC-C6RG].

348. *See, e.g.*, Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, CHAMPION, July 2013, at 51, 51–52.

349. *See id.*

350. *See supra* notes 285–87 and accompanying text.

351. *See* Adam Davidson, Comment, *Learning from History in Changing Times: Taking Account of Evolving Marijuana Laws in Federal Sentencing*, 83 U. CHI. L. REV. 2105, 2150–52 (2016) (discussing the emerging interpretation of § 3553(a)(6) as a mandate to consider equity principles).

352. *See id.* at 2151.

353. *See id.*; *see also* United States v. Dayi, 980 F. Supp. 2d 682, 687–89 (D. Md. 2013).

354. *See, e.g.*, United States v. Bannister, No. 10-CR-0053, 2011 U.S. Dist. LEXIS 30569, at *61–65, *159 (E.D.N.Y. Mar. 24, 2011) (extensively discussing data on racial disparities in drug sentencing and refusing to uphold a defendant's higher sentence); *see also* Kimbrough v. United States, 552 U.S. 85, 97 (2007).

355. *See* Webb, *supra* note 187, at 142.

house tactics in their egregiousness and could convince a court to look outside the individual. And not all judges may be persuaded that manipulation of an individual creates sentencing disparities or warrants leniency in consideration of their offense. Still, sentencing courts can and should be more willing to engage with these issues, particularly when law enforcement weaponizes the Guidelines that sentencing courts use to justify their monumental decision to incarcerate a person.[356]

Concerns about the linkage between race and policing are not new and arise directly from the United States's extensive history of violence against people of color.[357] Examinations of nationwide policing tactics and the criminal legal process itself consistently show harshness toward individuals of color, particularly young Black and Latino men.[358] Reducing sentences on grounds of manipulation will not cease such embedded racism. But it is one slight method of reducing sentencing inequity and the disproportionate harm of incarceration. And, as shown by stash house cases, judicial admonishment of discriminatory manipulation can act as a deterrent to law enforcement designing these stings.[359] This Note argues that those are objectives worth pursuing.

CONCLUSION

From school zone enhancements to inflated narcotics volumes, the government will always have the opportunity to mold and manufacture an individual's sentence. Federal law enforcement agencies have shown, repeatedly, that this discretion will be exercised in a discriminatory manner. So long as this reality exists, this Note argues that every effort should be made to ensure that an individual is not sentenced on that basis.

The Chicago stash house litigation was a momentous success for the individuals it exonerated, but that victory should not be viewed as conclusive. It should instead be conceived as a first step in dismantling a long pattern of selective enforcement and an opportunity to analogize and leverage its successes. That task will require far more than this Note's recommendations for sentencing arguments. This proposal advances that any opportunity to advocate for sentencing reduction is a valuable one.

356. *See id.* at 136.
357. *See supra* note 49 and accompanying text.
358. *See supra* notes 160–63 and accompanying text.
359. *See supra* notes 30–31 and accompanying text.