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"[C]omplexities . . . are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others."[1]

— Justice Felix Frankfurter

INTRODUCTION

The government's main purpose and policy in the "war on drugs" is to get drug dealers off the streets.[2] Because of the furtive nature of the drug trade, undercover operations are an essential tool in performing this task. Courts therefore allow the government the enormous discretionary power necessary to run "stings." For example, government agents have almost exclusive control over who gets targeted for stings, the amount of drugs[3] involved in the transaction, and how long the sting lasts. This level of authority carries with it an inherent risk of abuse.[4] Variations in these factors can have a profound impact on the extent of a defendant's criminal conduct before a sentencing court — and therefore potentially on the length of a defendant's sentence.[5] Until 1987, abuses of these investigative powers or, as is more often the case, inequalities in criminal conduct arising from the legitimate use of such powers, could be compensated for by the sentencing court's use of dis-

1. Brown v. Allen, 344 U.S. 443, 498 (1953) (Frankfurter, J., concurring).

2. *See* United States v. Barth, 990 F.2d 422, 425 n.3 (8th Cir. 1993) ("[T]he ultimate law enforcement goal is to get drug dealers off the streets . . . ."). The war on drugs, launched during the Reagan era, also includes treatment and educational proponents, but heavily emphasizes law enforcement. *See* Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 25. Thus, the success or failure of this war rests primarily on the effectiveness of law enforcement efforts.

3. Sting operations occur in enforcement efforts other than drugs busts. However, this Note focuses on drug stings as a paradigm that highlights the problem of sentence manipulation.

4. *See* United States v. Cannon, 886 F. Supp. 705, 709 (D.N.D. 1995); United States v. Monocchi, 836 F. Supp. 79, 88 (D. Conn. 1993).

5. *See* United States v. Cotts, 14 F.3d 300, 306 n.2 (7th Cir. 1994) ("[T]he government, in the carrying out of its investigative and prosecutorial functions, [has] great power to dictate the options which will ultimately be available to the sentencing court.").

cretion.[6] By looking at the circumstances surrounding the defendant's conduct, the court could ensure that the defendant's sentence matched his culpability.

However, under the Federal Sentencing Guidelines (the "Guidelines") such judicial flexibility no longer exists. The Guidelines, drafted amid growing criticism of the inequities of discretionary sentencing, were designed to restrict judicial discretion and thereby reduce disparity in sentencing.[7] Yet many judges and commentators contend that certain sections of the Guidelines have failed to achieve this goal.[8] As one commentator put it: "The sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors."[9]

The identical transfer of discretion has also taken place from judges to federal agents and investigators.[10] As investigators become increasingly knowledgeable about the inflexible Guidelines, they are utilizing their discretion to manipulate the sentences of their subjects in ways that they never could have before.[11] But the harsh prison terms that result from such investigative strategies are causing several courts to rethink their theories governing the relationship between stings and aggregate sentencing.[12]

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6. *See* United States v. Staufer, 38 F.3d 1103, 1106-07 (9th Cir. 1994); John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 551 (1993); *see also* Mistretta v. United States, 488 U.S. 361, 390 (1989) (noting that, prior to the Guidelines, "[f]or more than a century, federal judges . . . enjoyed wide discretion to determine the appropriate sentence in individual cases and . . . exercised special authority to determine the sentencing factors to be applied in any given case").

7. *See* 18 U.S.C. § 3553(a)(2) (1994); U.S. SENTENCING COMMN., GUIDELINES MANUAL [hereinafter USSG] ch. 1, pt. A(3) (1994); Koon v. United States, 116 S. Ct. 2035, 2053 (1996); *see also* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 901 (1991) (describing the supposed virtues of reducing judicial discretion and how they led to the Guidelines).

8. *See generally* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991).

9. Alschuler, *supra* note 7, at 926.

10. *See* Eric P. Berlin, Comment, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 206-13; *see also infra* text accompanying notes 60-62.

11. *See* Andrew G. Deiss, Comment, *Making the Crime Fit the Punishment: Pre-Arrest Sentence Manipulation by Investigators Under the Sentencing Guidelines*, 1994 U. CHI. LEGAL F. 419, 438 ("In organizing undercover operations, law enforcement officers possess extraordinary power to control a criminal defendant's sentence by orchestrating the circumstances surrounding a crime, thereby taking advantage of the inflexible sentences established under the Guidelines and the mandatory minimums.").

12. *See, e.g.*, United States v. Egemonye, 62 F.3d 425, 427-28 (1st Cir. 1995) (expressing great concern at the possibility that law enforcement agents may prolong stings "to make up for any [perceived] shortfall[s] in prior punishments"); United States v.

Compare the following two drug cases that resulted in virtually identical sentences. Eric Payne was a habitual drug pusher who sold crack out of his apartment, bringing in as much as $1000 to $2000 a day.[13] After a tape recorder malfunctioned on one purchase, government agents successfully negotiated and purchased two ounces of crack from Payne.[14] Payne was arrested, prosecuted, and convicted on the basis of the two ounces — the equivalent of 56.7 grams[15] — of crack.[16] Sales of over fifty grams of crack carry a mandatory ten-year prison sentence,[17] and this proved to constitute the lion's share of Payne's seventeen-and-one-half year sentence.[18]

Angela Diane Reese was also a habitual drug pusher, but she was comparatively small-time. Reese, a "street-corner peddler" — also a single mother and first-time offender — sold crack to an undercover agent on seven different occasions. Perhaps not coincidentally, the sev-

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Staufer, 38 F.3d 1103, 1107 (9th Cir. 1994) (expressing concern that the system no longer ensures that defendants will be punished according to their culpability); United States v. Floyd, 738 F. Supp. 1256, 1260-61 (D. Minn. 1990) ("The Court is troubled by the fact that the guidelines, in conjunction with certain investigative methods, can multiply a few months' jail time into a potential multi-year sentence.").

13. *See* United States v. Payne, 63 F.3d 1200, 1205 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1056 (1996).

14. *See* 63 F.3d at 1203-04.

15. *See* USSG § 2D1.1 application note 10 (1994) (drug measurement conversion table).

16. *See Payne*, 63 F.3d at 1202. The government also prosecuted Payne on the basis of the sale in which the tape recorder malfunctioned and on one count of conspiracy to distribute crack and other narcotics. Payne was acquitted of the former and convicted of the latter. 63 F.3d at 1202-03.

17. *See* 21 U.S.C. §§ 841(b)(1)(A) (1994). The Guidelines incorporate "mandatory minimum" sentences, like the above statute, into their base level sentences. Mandatory minimum sentences, therefore, operate as a floor for the Guidelines. *See* Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1878 (1995). If the Guidelines, after considering possible reductions, dictate a sentence below a mandatory minimum, the mandatory minimum controls, thereby giving the defendant the longer sentence. USSG § 5G1.1(b) (1994). There is one exception to this rule. Section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1796, 1985 (1994) (amending 18 U.S.C. § 3553), allows courts to go below the mandatory minimum when the defendant meets several criteria, which include having minimal prior convictions, performing a nonmanagerial role in the crime, and telling the government everything he knows about the offense(s). Under this exception, however, courts still must follow the Guidelines. *See generally* Oliss, *supra*, at 1882-92 (evaluating § 80001 and concluding that it fails to correct adequately the disparities that result from quantity-based, mandatory minimum sentences).

18. *See Payne*, 63 F.3d at 1202. Payne was sentenced to 210 months of imprisonment on the basis of the two-gram sale and one count of conspiracy to distribute crack and other narcotics. *See* 63 F.3d at 1202.

enth sale brought the aggregate amount of drugs to fifty-nine grams.[19] This placed Reese over the "magic number"— the fifty-gram threshold that carries the mandatory ten-year prison sentence,[20] compared to only a five-year minimum sentence for 5 to 49.9 grams.[21] Reese was sentenced based on all seven sales to fourteen years in prison, after which she remarked in dismay, "There are people that murder, rape and kill who don't get that much time."[22]

The truth is that, short of finding extreme governmental misconduct, most courts feel that they have no choice but to treat the fifty grams that Payne dealt in one sale exactly like the fifty grams that Reese accumulated in seven sales.[23] Under section 2D1.1 of the Guidelines, sentences for drug offenses are determined by aggregating the quantity of drugs involved in the relevant criminal transaction(s).[24] Further, none of the Guidelines' enumerated departure provisions addresses the possibility of excessive sentences due to protracted sting operations — indeed, nothing in the Guidelines' legislative history or numerous policy statements mentions the issue.[25] Thus, most courts end up sentencing all drug defendants according to one factor, and one factor only: quantity — irrespective of the number of transactions that it took to reach certain thresholds.

Yet many small-time defendants like Reese claim that this scheme, in the words of one commentator, "introduce[s] disparity in a system

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19. *See* Robert L. Steinback, *Sentencing Rules Distort Logic of Court System,* MIAMI HERALD, July 16, 1993, at 1B.

20. *See* 21 U.S.C. §§ 841(a)-841(b)(1)(A) (1994); United States v. Barth, 788 F. Supp. 1055, 1057 (D. Minn. 1992), *vacated on other grounds,* 990 F.2d 422 (8th Cir. 1993).

21. *See* 21 U.S.C. § 841(b)(1)(B) (1994). The 50 grams also made Reese's crime a federal crime. Under Florida state law, Reese would have faced three to seven years in prison and would have served about 28 months. *See* Steinback, *supra* note 19, at 1B.

22. *Id.* Reese's sentence was affirmed without opinion by the Eleventh Circuit in United States v. Lyons, 53 F.3d 1198, 1199 (11th Cir.), *cert. denied,* 116 S. Ct. 262 (1995).

23. For example, the Eighth Circuit stated: "While we are concerned with the government conduct in this case, [the defendant] has failed to demonstrate that the government's conduct was outrageous . . . . [A]dopting [the defendant's] theory would require us to abandon [our] long-established rule of entrapment which focuses on the predisposition of the defendant to commit crime." *Barth,* 990 F.2d at 424-25 (internal quotation marks and citation omitted).

24. *See* USSG § 2D1.1, application note 6 (1994).

25. *See infra* Part I.A.1. The latter point does open up an avenue for departure. Courts may depart under unusual circumstances that were not adequately considered by the Sentencing Commission. *See infra* text accompanying note 43. However, the *Barth* court, like the others that share its approach to these types of claims, failed to inquire into the latter possibility.

intended to eliminate disparity."[26] These defendants point out that just punishment flows from more than mere quantity or harm; culpability — which consists of factors like the number and frequency of the sales at issue and their role in the offense — also matters, and can be over-represented easily under these rules. Therefore, these defendants argue, rigidly applying section 2D1.1 can lead to a serious and unintended result: Government investigators have the ability — and arguably the incentive — to manipulate defendants' sentences by exercising nearly complete control over the quantity of drugs involved in the crimes for which they are charged. This practice has been termed "sentence manipulation."[27] Yet while most courts concede the potential for governmental abuse and disparate sentences under these circumstances, they remain hesitant to scrutinize governmental investigative conduct when it only affects the length of a defendant's sentence.[28]

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26. Sandra Guerra, *The New Sentencing Entrapment and Sentence Manipulation Defenses*, 7 FED. SENTENCING REP. 181, 181 (1995).

27. Sentence manipulation is different from a similar partial defense known as "sentence entrapment," though the two claims are often confused. *See* Eric P. Berlin, *Reducing Harm as a Determinative Factor: The Hidden Problem with Sentencing Entrapment*, 7 FED. SENTENCING REP. 186, 186 (1995); *see also* United States v. Chavez-Vasquez, 64 F.3d 667 (unpublished disposition), 1995 WL 492903, at *5 (9th Cir. Aug. 17, 1995) (analyzing a sentence manipulation claim by the sentence entrapment test for predisposition); United States v. Rosa, 17 F.3d 1531, 1551 (2d Cir.) (same), *cert. denied*, 115 S. Ct. 211 (1994); United States v. Barth, 990 F.2d 422, 424 (8th Cir. 1993) (same). Sentence entrapment is government conduct that "overcomes the will of an individual predisposed only to dealing in small quantities for the purpose of increasing the amount of drugs in the conspiracy and the resulting sentence of the entrapped defendant." United States v. Hulett, 22 F.3d 779, 782 (8th Cir.) (internal quotation marks and citation omitted), *cert. denied*, 115 S. Ct. 217 (1994). Thus, sentence entrapment claims focus on the predisposition of the defendant — and specifically on whether the defendant would have been willing and able to create as much harm without the government's help. Sentence manipulation claims typically focus on the relationship between the *blameworthiness* of the defendant and the conduct of the government, there being no dispute as to whether the defendant was predisposed to commit the number of transactions.

Notably, the Sentencing Commission has responded, at least partially, to the problem of sentencing entrapment by amending § 2D1.1 with two application notes. The first note permits a downward departure when the defendant either "did not intend to produce or was not capable of producing the negotiated amount." USSG § 2D1.1, application note 12 (1994) (adopted Nov. 1, 1993). The second note permits a downward departure when the government sold drugs to the defendant at an "artificially low price" that led the defendant to purchase significantly more drugs than his "resources would have allowed." USSG § 2D1.1, application note 17 (1994) (adopted Nov. 1, 1993). For a good discussion of these application notes and the doctrine of sentence entrapment, see United States v. Naranjo, 52 F.3d 245 (9th Cir. 1995).

28. *See, e.g.*, United States v. Cotts, 14 F.3d 300, 306 n.2 (7th Cir. 1994) (declining to "subject isolated government conduct to a special brand of scrutiny when its effect is felt in sentence, as opposed to offense, determination . . . [barring government]

This Note rejects this stance. It argues that sentence manipulation should be a legally viable partial defense — a defense that does not warrant complete exoneration, but does warrant a reduced sentence when the government's investigative techniques place a quantity of drugs before the court[29] that overrepresents the defendant's culpability, or individual blameworthiness. Part I describes the policies and objectives that underlie the Guidelines, but then demonstrates how the rigid application of quantity-based sentencing provisions can lead to sentence manipulation that thwarts these goals, particularly the goal of sentencing according to culpability. Part II describes how courts have responded to sentence manipulation claims. It contends that the majority of the courts' position — examining police practices under the due process "outrageous government conduct" test — is misplaced and inadequate, while the minority's position of departing downward for less-than-constitutional violations is more appropriate and promising. Part III proposes alternative legal formulas for recognizing sentence manipulation as a viable and effective partial defense: allowing it as a special circumstance that warrants a downward departure under the Guidelines or amending the Guidelines themselves to limit the number of transactions that may constitute relevant conduct.

I. Quantity-Based Sentencing and Its Consequences

This Part describes the impulses behind the adoption of a rigid quantity-based sentencing scheme and argues that this scheme is easily thwarted because it gives government investigators the ability to manipulate defendants' sentences by continuing to conduct transactions long after the extent of the defendants' culpability has been determined. Section I.A recounts the reasons for creating the Guidelines and elaborates on the policies that they attempt to achieve. Section I.B shows how the drug sentencing provisions of the Guidelines embody these objectives, but asserts that rigidly applying these provisions places too much power in the hands of investigators, particularly undercover agents, and, there-

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conduct so outrageous that due process principles would absolutely bar the government from invoking judicial processes." (internal quotation marks omitted)).

29. The quantity of drugs before the court is called the offender's "relevant conduct," which largely determines his "offense level" under the Guidelines. USSG § 1B1.3 (1994). A defendant's relevant conduct includes not only the crime(s) of conviction but also includes separate offenses of "a character for which § 3D1.2(d) would require grouping of multiple counts, [and] all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG § 1B1.3(a)(2) (1994). Thus, even if a defendant plea bargains, or is found guilty of only one count of a several count indictment, the court must consider all other allegedly related criminal actions in crafting a sentence. *See also infra* note 43.

fore, can lead to sentence manipulation. Section I.C rejects the principal argument against reducing sentences in cases of sentence manipulation — that offenders should always be punished according to the total amount of harm that they cause, regardless of police tactics — and contends that sentence manipulation is a serious problem that should be recognized by courts.

A. *The General Objectives of the Guidelines*

The Federal Sentencing Guidelines were created amid growing dissatisfaction over the inconsistency and ineffectiveness of criminal punishment. Many offenders were serving only a small portion of their lengthy sentences[30] while rates of recidivism and violent crime continued to rise.[31] Further, judges were not required to explain the sentences that they mandated — which often varied greatly from their colleagues' sentences under similar circumstances — and appellate courts had virtually no authority to rectify the differences.[32] The system was seen as so unfair and ineffective that Senator Edward Kennedy termed it a "national disgrace."[33] Consequently, the Guidelines sought to create new, more consistent procedures for the American sentencing system and, in doing so, shifted the focus of its overall penal philosophy from rehabilitation to desert.[34]

1. *The Goals of the Guideline System*

In 1984, Congress passed the Sentencing Reform Act,[35] which created the United States Sentencing Commission. The Act, and the Guidelines that the Commission drafted pursuant to its mandates, had three main objectives. First, they sought to reduce "disparity in sentences im-

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30. *See* Edward M. Kennedy, *Sentencing Reform — An Evolutionary Process*, 3 FED. SENTENCING REP. 271, 271 (1991).

31. *See* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1945 (1988) (claiming that "public concern about the increase in the rate of drug use and distribution, violent crime, and recidivism led to the enactment of the Comprehensive Crime Control Act [of 1984,]" which contained the Sentencing Reform Act). The public had cause for concern. The number of inmates serving sentences increased 123% between 1980 and 1989. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, BJS DATA REPORT: 1989, at 78 (1990).

32. *See* Andrew von Hirsch, *Numerical Grids or Guiding Principles?*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES 47, 47 (Andrew von Hirsch et al. eds., 1987); Kennedy, *supra* note 30, at 271.

33. *See* Kennedy, *supra* note 30, at 271.

34. *See infra* text accompanying notes 45-47.

35. Pub. L. No. 98-473, §§ 211-39, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3673 (1994); 28 U.S.C. §§ 991-998 (1994)).

posed for similar criminal offenses committed by similar offenders."[36] This was perhaps the single most important objective behind the Guidelines.[37] Second, "Congress sought proportionality in sentencing through a system that impose[d] appropriately different sentences for criminal conduct of differing severity."[38] Third, Congress sought to achieve "honesty in sentencing" — that is, to create a system in which all offenders served the vast majority of their prison sentences.[39] Through accomplishing these three goals, Congress also sought to increase deterrence[40] and keep defendants in jail in order to protect the public from further crimes,[41] while still attempting to prevent overcrowding in prisons.[42]

It was predictable that a system designed to do so many things would have to be quite structured and rather inflexible, and the Guidelines certainly possess those qualities. Under the Guidelines, a judge now derives a sentence by aligning mechanically two factors on a grid: (1) the "offense level," which essentially measures the severity of the defendant's relevant conduct and (2) the defendant's criminal history. The grid produces a "heartland" sentencing range from which the judge may "depart" only in limited enumerated situations or under unusual circumstances of a kind not considered by the drafters of the Guidelines.[43] The idea is that by forcing judges to treat nearly all of-

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36. USSG, ch. 1, pt. A(3) (1994); 18 U.S.C. § 3553(a)(6) (1994); *see also* Berlin, *supra* note 10, at 191 n.24 (collecting references regarding the concern over sentencing disparity from the Sentencing Reform Act's legislative history).

37. *See* U.S. SENTENCING COMMN., SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 8 (1987); Alschuler, *supra* note 7, at 901; W. Clinton Terry III, *The U.S. Sentencing Guidelines and Police Officer Discretion, in* THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 21, 21 (Dean J. Champion ed., 1989).

38. USSG, ch. 1, pt. A(3) (1994); *see also* 18 U.S.C. § 3553(a)(2)(A) (1994) (stating that the Guidelines' sentences are intended "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"); U.S. SENTENCING COMMN., SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 13 (1987) ("The increase in uniformity was not, however, to be achieved through sacrificing proportionality.").

39. *See* USSG, ch. 1, pt. A(3) (1994).

40. *See* 18 U.S.C. § 3553(a)(2)(B) (1994).

41. *See* 18 U.S.C. § 3553(a)(2)(C) (1994).

42. *See* 28 U.S.C. § 994(g) (1994).

43. Under the Guidelines, the defendant's offense level is determined by combining the defendant's relevant conduct, or "base offense(s)," with any special characteristics, such as the use of a firearm, and adjustments for things like the defendant's acceptance of responsibility. The offense level, ranging from 1 to 43, then is matched with the appropriate criminal history category, ranging from 1 to 6, to provide the appropriate sentencing range. Sentencing ranges are quite narrow; for example, a 10-year sentence can vary by only about one year. Courts may depart from these ranges only in certain enumerated situations or under unusual circumstances that the drafters of the Guidelines

fenders alike, sentences will necessarily be less disparate than under the old, discretionary system.

2. *The Shift in Penal Philosophy*

Disparity cannot be reduced in a vacuum. Disparity can only be defined — and then reduced — in terms of a rationale and certain defined factors.[44] Thus, the Commission adopted the philosophy that defendants should be sentenced according to their culpability[45] — and that defendant's culpability was primarily a function of the amount of societal harm they caused. In espousing this rationale, the Guidelines embodied a theoretical shift in the theory of just punishment from a rehabilitative model to a "just deserts" model.[46]

The primary characteristic of the Commission's just deserts model is its focus on the amount of harm as the dominant factor in determin-

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failed to consider. When courts depart, though, they must do it under the general framework of the Guidelines. *See generally* PAUL BORMAN ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE (forthcoming 1996) (providing an excellent overview of how the Guidelines work).

44. *See* Andrew von Hirsch, *The Sentencing Commission's Functions*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES, *supra* note 32, at 3, 9-10.

45. *See* 18 U.S.C. § 3553(a)(2) (1994) (directing courts to craft a sentence commensurate with the offender's culpability); USSG ch. 1, pt. A (1994) (same).

46. *See* Berlin, *supra* note 10, at 191; Steven P. Lab, *Potential Deterrent Effects of the Guidelines*, *in* THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE, *supra* note 37, at 33, 46. Popular support for a just deserts, or retributive, model of criminal punishment had been gaining momentum in the period leading up to the adoption of the Guidelines. *See, e.g.*, WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5(a)(b), at 26 (2d ed. 1986) ("[R]etribution . . . 'is suddenly being seen by thinkers of all political persuasions as perhaps the strongest ground . . . upon which to base a system of punishment.' ") (quoting Martin R. Gardner, *The Renaissance of Retribution — An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 784); Charles E. Goodell, *Preface* to ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS at xvi-xvii (1976).

Although increasing deterrence was also listed among the Commission's goals, it was largely lost in the shuffle. *See* Alschuler, *supra* note 7, at 908 (arguing that the 258-box guideline system "does not seem to offer any deterrent advantage"); Lab, *supra* at 46 (maintaining that the Guidelines "fail to address most of the crucial issues related to deterrence" and thus "hold little promise for enhancing crime deterrence"). That is not to say, though, that draconian drug sentencing guidelines that are enforced unbendingly hold absolutely no promise for at least making a potential drug offender think twice. As one infamous drug consumer illustrated, "[T]here was a giant billboard on the outskirts of Las Vegas, saying:

DON'T GAMBLE WITH MARIJUANA!
IN NEVADA: POSSESSION — 20 YEARS
SALE — LIFE!

So I was not entirely at ease drifting around the casinos on this Saturday night with a car full of marijuana and head full of acid." HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS 42 (1971).

ing the length of the prison sentence that the offender serves.[47] Factors affecting a particular individual's blameworthiness apparently matter very little. Courts have therefore perceived the Guidelines as instructing them "to rest sentences on the offense committed, not upon the offender."[48] Hence, sentences under the Guidelines are generally less disparate only in the sense that offenders who create similar amounts of harm receive sentences of a similar length.

Though the Guidelines surely represent a shift in penal philosophy, scholars and judges have strongly criticized the perception that they constitute a shift to a *purely* harm-based penology. To begin with, a purely harm-based penology is at extreme tension with — and may violate — the theory of punishment expounded by the Supreme Court less than five decades ago when it said the "punishment should fit the offender and not merely the crime."[49] Moreover, just deserts systems are premised on the idea of sentencing according to harm and culpability,[50] and, simply put, harm is different than culpability.[51]

Harm is not a substitute for culpability and should never obscure its importance. Culpability, unlike harm, measures individual blameworthiness. It envelops various situation and offender characteristics, such as motivation and awareness, that matter just as much as harm.[52]

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47. *See* Alschuler, *supra* note 7, at 908-09 (calling the move to a harm-based penology a shift from focusing on people to focusing on harms); Berlin, *supra* note 10, at 196 ("Allowed less (or perhaps no) interest in rehabilitation, judges now focus on the offense for which a defendant is convicted rather than on the defendant's mental processes and individual situation.").

48. United States v. McHan, 920 F.2d 244, 247 (4th Cir. 1990); *see also* United States v. Brewer, 899 F.2d 503, 507 (6th Cir.), *cert. denied*, 498 U.S. 844 (1990); United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989).

49. Williams v. New York, 337 U.S. 241, 247 (1949).

50. Andrew von Hirsch, a leading proponent of just deserts systems, explains that the seriousness of the crime "depends both on the harm done (or risked) by the act and on the degree of the actor's culpability." VON HIRSCH, *supra* note 46, at 98-101.

51. Professor Alschuler illuminates this idea well: "[O]ffenders who have produced comparable harms differ greatly in culpability. A system grounded on 'just deserts' need not — indeed should not — focus primarily upon harm." Alschuler, *supra* note 7, at 909; *see also* Berlin, *supra* note 10, at 197 ("[O]ffenders who have produced comparable harms can differ significantly in culpability.").

Two basic examples demonstrate the importance of each independent factor. First, consider two men with identical mindsets who attempt to kill their brothers. If one succeeds and the other does not, the latter should receive a lighter sentence because he produced less harm. Now, consider two men who both succeed in killing their brothers, but imagine that one did it while being threatened with a knife. This man should receive a lighter sentence because he is less culpable.

52. *See* Alschuler, *supra* note 7, at 902 ("Situational and offender characteristics are as important as social harm in assessing sentences even from a 'just deserts' perspective . . . ."); *see also* Albert W. Alschuler, *Sentencing Reform and Prosecutorial*

Consequently, one should never assume that culpability is approximated by social harm measured on a grid. As Judge Jon O. Newman observed:

> This "incremental immorality" theory is lunacy. . . . This system is ludicrous because the number of grams a defendant happens to possess at the moment of arrest has nothing to do with her morality or culpability. Similarly, a thief who commits a typical larceny has no idea how much he is stealing when he commits the crime, but is punished according to the amount of money involved, although his intent was to simply take whatever money he found.[53]

Though courts are tempted to define their mission under the Guidelines as simply determining the amount of harm and plugging that figure into the grid, such a mission is fatally oversimplified.[54] The Guidelines and their enabling statute "expressly require both judges and the Sentencing Commission to take account of offender characteristics."[55] Even in the face of the harm-based specifics of the Guidelines,

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Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. PA. L. REV. 550, 555-63 (1978) (arguing that the consideration of offender characteristics is as essential to a just deserts approach as it is to a rehabilitative approach); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1047 (1991) ("Harm alone is an insufficient measure of the punishment deserved" because offender characteristics are also relevant.).

53. Colloquy, *Conference on the Federal Sentencing Guidelines: Summary of Proceedings* 101 YALE L.J. 2053, 2072-73 (1992) (comments of Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit).

54. For instance, Judge Pierre Leval has explained that the viability of the Guidelines absolutely depends on judges' power to consider offender characteristics and depart from the presumptive sentence when such characteristics present an unusual case. He continued, "If [harm was the only factor that determined sentences], a serious question would arise whether the Guidelines must be struck down for failure to conform to the governing statute." United States v. Rodriguez, 724 F. Supp. 1118, 1120-21 (S.D.N.Y. 1989).

55. Alschuler, *supra* note 7, at 910 (citing 28 U.S.C. § 994(b)(1) (1994)). The statute directs the Sentencing Commission to establish sentencing ranges "for each category of offense *involving each category of defendant.*" 28 U.S.C. § 994(b)(1) (1994) (emphasis added); *see also* 18 U.S.C. § 3552 (1994) (requiring a pre-sentence examination of the defendant and authorizing additional psychological examination when appropriate); 18 U.S.C. § 3553(a)(1) (1994) (directing the Guidelines and courts to consider both "the nature and circumstances of the offense and the history and characteristics of the defendant"); 28 U.S.C. § 991(b)(1)(C) (1994) (stating that sentences should "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"). These sentiments are codified in § 1B1.4 of the Guidelines, which reads, "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant . . . ." USSG § 1B1.4 (1994). While one scholar has argued that this general provision is severely restricted by the specifics of the Guidelines, *see* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1716-18 (1992), the provision nevertheless

sentencing courts must strive to consider the defendant's culpability as well as the harm he has caused.

B. *Quantity-Based Drug Sentencing*

Like other specific provisions of the Guidelines, the drug-sentencing provisions focus on a proxy for harm, but here that proxy — quantity — exposes an unfortunate avenue for investigative abuse and sentence manipulation. Section 2D1.1 of the Guidelines requires courts to sentence defendants convicted of drug offenses based on the total quantity of drugs involved in the criminal transaction(s).[56] The number of transactions that it takes to reach a given quantity is, in itself, immaterial. Moreover, the offender's role in the crime or risk to the community has little effect on the length of his sentence.[57] For example, a dealer caught selling one kilogram of cocaine on a single occasion would receive essentially the same sentence as a street peddler who admitted to an undercover agent that he had sold twenty-five grams of cocaine a day while working a street corner for about seven weeks.[58]

This focus on quantity creates the opportunity — and perhaps even a catalyst — for injustice and abuse.[59] Government agents have virtually unfettered control over sting operations, and defendants usually receive longer sentences when government agents prolong sting operations beyond one or two transactions because each transaction increases the amount of drugs for which the defendant is criminally responsible. As the quantity of drugs grows, so grows the defendant's presumptive sentence as it rises through the Guidelines' series of thresholds. Thus, government agents can control the sentences of those whom they investigate, and, as more and more agents become trained in the operation of the Guidelines,[60] they are doing just that. As a public defender in a metropolitan area with heavy drug traffic explained:

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clearly states a policy of considering offender characteristics to which courts must give weight.

56. *See* USSG § 2D1.1 application note 6 (1994).

57. *See infra* text accompanying note 78.

58. *See* United States v. Genao, 831 F. Supp. 246, 248 (S.D.N.Y. 1993).

59. *See* United States v. Connell, 960 F.2d 191, 196 (1st Cir. 1992); United States v. Calva, 979 F.2d 119, 123 (8th Cir. 1992) (noting that the "mechanism of boosting sentences based on the cumulation of additional drug sales has the potential for abuse by police"); United States v. Monocchi, 836 F. Supp. 79, 88 (D. Conn. 1993) (same); United States v. Floyd, 738 F. Supp. 1256, 1260 (D. Minn. 1990) (holding that cumulative sentencing produces the "harsh, and most probably unintended, effect" of the potential for sentence manipulation); *see also* cases cited *supra* note 12; *infra* text accompanying note 61.

60. *See* United States v. Cabrera, 756 F. Supp. 134, 135-36 (S.D.N.Y. 1991) ("The existence of sentencing guidelines [is] well-known to police officers and federal agents

> [O]ne of the things that I have noticed over the years is the police officers and agents are a little more savvy about these guidelines. All of a sudden rather than busting at two buys, they're busting after seven buys. What that does, is that just raises those guidelines, so those guys are buried. . . . I'm also aware of the fact that law enforcement agents say you need to get at least three buys off this guy because we want him to do X number of years; they will make a determination of the sentence before the man's ever even been charged.[61]

The sentencing discretion that once resided in the chambers of judges now lies largely in the hands of government agents. Government agents can prolong their investigation as long as it takes to reach a threshold quantity of drugs that predetermines the defendant's sentence. Even less egregious tactics, such as making numerous purchases from the defendant "in order to get to his source," can lead to similarly inflated quantities. This activity produces sentences that exceed the culpability of defendants and is the essence of sentence manipulation.[62]

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and the impact of specific evidence on the sentence a defendant will receive surely cannot have escaped their notice."), *vacated on other grounds sub nom.* United States v. Tejada, 956 F.2d 1256 (2d Cir.), *cert. denied*, 506 U.S. 841 (1992); Marcia Chambers, *Unwelcome Blurring of Boundaries*, NATL. L.J., Sept. 30, 1991, at 17 ("[T]he U.S. Sentencing Commission now is training FBI [and other federal agents] in sentencing procedures."). In her article, Chambers poses the disturbing question, "why do federal agents need to know about sentencing when their job is to investigate and arrest criminals?" *Id.* The answer, of course, rests in their desire to exert power over the punishment — as well as the apprehension — of the offender.

61. Heaney, *supra* note 8, at 196 n.97, 197 n.99. Another public defender reported that some drug agents " 'would move heaven and earth to get over fifty grams' which triggers a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(iii)." *Id.* at 196 n.97; *see also infra* note 91.

62. Sentence manipulation also occurs in other settings where relevant facts are manipulated by government agents in order to overstate the defendant's culpability. *See generally* Deiss, *supra* note 11, at 424-26 (covering several scenarios). For example, government agents may, unbeknownst to the defendant, arrange a sale within one thousand feet of a school, taking advantage of the "schoolyard statute." *See* United States v. Noble, 1993 U.S. App. LEXIS 27062 (4th Cir. Oct. 18, 1993). Government agents may also, against the wishes of the defendant, attempt to involve firearms or automatic weapons in the transaction, which enhances considerably the defendant's sentence. *See* United States v. Overstreet, 5 F.3d 295, 296-97 (8th Cir. 1993) (per curiam); United States v. Cannon, 886 F. Supp. 705, 706-09 (D.N.D. 1995) (departing downward when the government brought machine guns to a drug transaction in order to increase the defendants' sentences from five to thirty years).

In addition, sentence manipulation claims may arise in stings other than drug transactions. The conduct of the government can produce the same dubious results in any sting that involves numerous transactions and when the amount involved in the transactions determines the offender's sentence. *See, e.g.*, United States v. Egemonye, 62 F.3d 425 (1st Cir. 1995) (involving stolen credit cards); United States v. Okey, 47 F.3d 238 (7th Cir. 1995) (involving counterfeit bills).

C. *Is Sentence Manipulation a Legitimate Problem?*

One might argue that, barring improper inducement, defendants should always be punished for the total harm that they create. Even if the government keeps the sting going solely in order to reach some threshold amount, the defendants still voluntarily commit the crimes and should therefore be punished for them.[63] According to this view, as long as the defendant is willing to commit crimes, he has no right to complain when punished for his actions. Alternately stated, so long as a defendant is willing to commit crimes, his culpability — and desert of a larger sentence — grows with each crime he commits.

However, this argument oversimplifies the notion of culpability and confuses sentence manipulation claims with sentence entrapment claims. Culpability depends both on what the defendant was willing to do and on his individual blameworthiness for doing it. Predisposition guides us only regarding the former. Therefore, predisposition is the test for entrapment claims,[64] but it is irrelevant to sentence manipulation claims.[65] Sentence manipulation focuses on the individual blameworthiness of the defendant and can be unjust and harmful for at least three reasons: (1) it creates an incentive for the government to perpetuate crime when its duty is to remove it from the streets; (2) it creates sentencing disparity among similarly situated defendants; (3) it allows sentences disproportionate to the crimes committed. The first consequence contravenes the very purpose of law enforcement, and the other two results violate the directives of the Guidelines.[66]

1. *Government-Perpetuated Crime*

The proper scope of a sting has limits. The government should never be in the business of perpetuating crime to increase punishments.[67] Yet while some law enforcement agencies have contended in one case that they would never abuse their power in order to reach a

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63. This is essentially the view held by the Eleventh Circuit. *See* cases cited *infra* note 92.

64. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL LAW § 5.2(a) (2d ed. 1992). It is also the focus of sentence entrapment claims. *See supra* note 27.

65. *See* Guerra, *supra* note 26, at 181.

66. *See supra* text accompanying notes 36-38.

67. *See* Sherman v. United States, 356 U.S. 369, 372 (1958) (stating that the function of law enforcement does not include the manufacturing of crime); United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc) (explaining that the government's inducement in a sting should not create offenses "by exploiting the susceptibility of a weak-minded person").

threshold amount,[68] others have admitted to doing just that in other cases.[69]

It is irresponsible for the government to claim that it has the right to continue a sting so long as the defendant is a willing participant in the illegal activity. If we truly believe that dealing drugs is extremely harmful to society — and the length of sentences we impose on drug offenders suggests that we do[70] — leaving a drug dealer on the street one more day than necessary should be regarded as intolerable. Undercover officers should be, and usually are, aware that the dealer whom they are investigating is supplying other customers.[71] Thus, the harm to society from leaving a drug dealer on the street is likely to outweigh grossly any benefit received from imposing a longer sentence on him. Judge Friendly's analogy between drug dealing and other crimes makes this point very clearly:

> It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.[72]

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68. The government has argued on at least one occasion that two institutional factors prevent it from ever inflating sentences by delaying arrest. First, the undercover agent has a strong incentive to arrest the dealer to prevent him or her from supplying others besides the agent. Second, law enforcement agencies have limited resources and "it is unlikely that an officer would make excessive purchases because the officer must account for every dollar expended to apprehend drug dealers." United States v. Barth, 990 F.2d 422, 425 n.3 (8th Cir. 1993).

69. In the Eleventh Circuit, the only circuit where sentence manipulation claims are barred *per se*, police officers have admitted openly making extra purchases to substantiate higher sentences. *See, e.g.*, United States v. Edenfield, 995 F.2d 197, 199-200 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 76 (1994); *see also supra* text accompanying note 61.

70. According to a 1994 Department of Justice study, the average sentence for "low-level" drug offenders was, for example, higher than that for offenders convicted of kidnapping/hostage taking, robbery, assault, arson, firearms, or racketeering/extortion. Marc Miller & Daniel J. Freed, *The Disproportionate Imprisonment of Low-Level Drug Offenders*, 7 FED. SENTENCING REP. 3, 4 (1994) (citing U.S. DEPT. OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES, (1994)).

71. *See Barth*, 990 F.2d at 425 n.3.

72. United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973); *see also* United States v. Cannon, 886 F. Supp. 705, 709 (D.N.D. 1995) ("Reverse stings present an inherent risk of abuse, and the courts must ensure that the government uses this powerful tool only to detect crime, not to create it."). *But cf.* PAUL MARCUS, THE ENTRAPMENT

The government should not induce additional crime with immediate and substantial harms to society in the hopes that it *may* lock up its perpetrator for a longer period of time and prevent some undefined crime far off in the future.

2. *Sentencing Disparity*

Sentence manipulation creates sentencing disparity in violation of the key objective of the Guidelines[73] because, when courts rigidly follow section 2D1.1 and sentence exclusively according to quantity, offenders similar in culpability may receive vastly divergent sentences. This is because quantity does not always equal culpability.[74] The number of times that a habitual drug user buys crack from an undercover agent has little do with his culpability.[75] As one commentator explains, "The fact that A made numerous sales to an agent before arrest while B's agent arrested him after only one sale should not make a difference. Such arbitrarily determined sentences introduce disparity into a system intended to eliminate disparity."[76] In short, a defendant's sentence should not depend so heavily on the actions of federal agents. If two defendants were engaged in the same course of criminal action on the street, then they both deserve similar sentences.

3. *Disproportionate Sentences*

Sentence manipulation allows offenders to be punished disproportionately to the crimes they commit — regardless of whether the severity of a crime is measured according to harm, or culpability, or both. The reason for this is that — despite the fact that the Guidelines' stiff drug sentences were drafted with big-time dealers and typical stings in

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DEFENSE § 7.08 (2d ed. 1995) (claiming that the government is given more leeway in drug cases than in other crimes because of the difficulty of infiltrating and apprehending persons in drug rings).

73. *See supra* text accompanying notes 36-37.

74. *See* Berlin, *supra* note 10, at 197 (same); Stephen J. Schulhofer, *Excessive Uniformity — And How to Fix It*, 5 FED. SENTENCING REP. 169, 169-170 (1992) (concluding that "[i]n effect, quantity-driven sentences *mandate inequality* by requiring that different cases be treated alike); Vitiello, *supra* note 52, at 1051 (arguing that quantity does not equal culpability); Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENTENCING REP. 63, 63 (1990) (same); *see also supra* text accompanying note 53.

75. *See* Michael Katz & Caroline Durham, *Department of Justice Low-Level Drug Offender Study: A Defense Perspective*, 7 FED. SENTENCING REP. 28, 31 (1994) (arguing that quantity-based sentencing is unfair on just punishment grounds).

76. Guerra, *supra* note 26, at 181. To make the hypothetical real, see United States v. Floyd, 738 F. Supp. 1256, 1260-61 (D. Minn. 1990), discussed *infra* in note 164.

mind[77] — section 2D1.1 fails to distinguish between small-time users who are convicted of multiple transactions and the big-time dealers for whom they work.[78] Couriers convicted of multiple transactions may be punished as severely as drug "kingpins" who are arrested after one large transaction. The investigator merely has to keep buying drugs from the courier until some threshold quantity is reached.

Yet, as one court has noted, "[a]nyone familiar with narcotics distribution in our society would have to agree that those who deal in kilogram quantities of narcotics are more culpable than . . . street peddler[s]."[79] The former have a much larger influence on the drug trade and, hence, create more harm *and* are far more blameworthy for their actions.[80] Thus, even if, after several transactions, a street peddler deals the same amount of drugs as a kingpin sells in a single transaction, the kingpin's crime is still worse in terms of both harm and culpability — and the kingpin still deserves a longer sentence. To hold otherwise strains not only the Guidelines' policy of proportionality,[81] but also the

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77. *See infra* notes 142-43.

78. *See* Berlin, *supra* note 10, at 186. The "role-in-offense" provision of the Guidelines, § 3B1.2, was somewhat aimed at mitigating this shortcoming, but the provision has proved largely ineffective. *See* United States v. Lara, 47 F.3d 60, 67 (2d Cir. 1995) (noting extensive criticism); United States v. Batista-Segura, 1989 WL 125838, at *3 (S.D.N.Y. Oct. 18, 1989) (The guidelines "give[] insufficient consideration to the significance in drug offenses of a participant's . . . stake in the scope of a transaction, in view of the weight-driven system of grading such offenses."); Douglas A. Berman, *The Second Circuit: Attributing Drug Quantities to Narcotics Offenders*, 6 FED. SENTENCING REP. 247, 251 (1994) (questioning the wisdom of quantity-based sentences); Jon O. Newman, *Five Guideline Improvements*, 5 FED. SENTENCING REP. 190, 190 (1993) (advocating abandonment of the "excessive reliance on the drug quantity table" in favor of a system that will "correlate drug sentences primarily with the defendant's role in the drug distribution system"); Young, *supra* note 74, at 64 (pointing out the necessity of more fully considering the offender's role in the criminal enterprise). Young argues that the role-in-offense provision does little to remedy this injustice because the provision was not drafted with drug couriers in mind and, in any event, the Commission has instructed the courts that this provision should rarely be used and courts generally have followed this instruction. *Id.* at 64.

79. United States v. Genao, 831 F. Supp. 246, 248 (S.D.N.Y. 1993), *affd. in relevant part sub nom.* United States v. Lara, 47 F.3d 60 (2d Cir. 1995).

80. *See supra* text accompanying note 52.

81. *See* USSG, ch. 1, pt. A(3) (1994). Further, insofar as sentence manipulation allows offenders to receive sentences disproportionate to their culpability, sentence manipulation also unnecessarily exacerbates congestion in prisons — a problem courts are supposed to keep in mind under the Guidelines. *See* 28 U.S.C. § 994(g) (1994) (providing that the "guidelines . . . shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons"). In fact, drug sentencing is already the primary cause of the overcrowding of federal prisons. Department of Justice statistics reveal that in 1992 a full 60% of all prisoners were incarcerated because of drug offenses, and another study concluded that drug offenders alone are consuming three times more prison space than all other federal crimes combined.

dictates of the Supreme Court, who, as recently as 1983, reaffirmed the principle that the Eighth Amendment prohibits punishments disproportionate to the crime committed.[82]

II. COURTS' ANALYSIS OF SENTENCE MANIPULATION CLAIMS

Though a few courts have not yet directly passed judgment on the viability of the sentence manipulation doctrine,[83] two basic approaches to the doctrine have surfaced in the federal courts. The majority's approach is extremely restrictive and essentially never affords relief, while the minority's approach is more flexible and allows downward departures under broader circumstances. This Part sets forth these two approaches and evaluates their soundness and their effectiveness. Section II.A presents the majority's approach of analyzing sentence manipulation claims under the outrageous government conduct test. It asserts that this test is too severe because it places an inordinate emphasis on police motives over the defendant's culpability. Section II.B presents the minority's approach of departing downward under the Guidelines when the quantity of drugs the defendant bought or sold overstates his culpability — regardless of police motives — and maintains that this position more effectively allows for just punishment.

A. *Sentence Manipulation Only as Outrageous Government Conduct*

The majority of courts have taken a very restrictive view of sentence manipulation claims that overemphasizes the importance of police motives over the defendant's culpability and analyzes these motives under an overly stringent test. This group of courts recognizes sentence manipulation only in the sense that it may constitute outrageous government conduct — in essence, a violation of due process[84] — that would

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See Miller & Freed, *supra* note 70, at 3; Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 FED. SENTENCING REP. 29, 30 (1993).

82. *See* Solem v. Helm, 463 U.S. 277, 284 (1983); *see also* Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 27-33 (1985) (gathering Supreme Court cases that affirm the principle of proportionality).

83. Two courts of appeals, for example, have abstained from deciding the validity of sentence manipulation and have held simply that even if there was such a doctrine, the facts before it did not constitute such a case. *See, e.g.*, United States v. Washington, 44 F.3d 1271, 1272 (5th Cir.), *cert. denied*, 115 S. Ct. 2011 (1995); United States v. Raven, 39 F.3d 428, 438 (3d Cir. 1994).

84. *See infra* text accompanying notes 99-101.

require a downward departure.[85] The Fourth,[86] Seventh,[87] Eighth,[88] Ninth[89], and Eleventh[90] Circuits hold this view.[91] Within the group, only the Eleventh Circuit has concluded that sentence manipulation can *never* amount to outrageous government conduct;[92] all other circuits have left that possibility open.

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85. Every court in the majority has failed to address the threshold question of whether the Sentencing Commission adequately considered the potential problem of sentence manipulation. Instead, each court has leaped immediately into its due process analysis. The answer to this inquiry is crucial because if a court finds that the Commission has not adequately considered the problem of sentence manipulation it is allowed to depart under a showing of far less than outrageous government conduct. *See infra* text accompanying notes 134-39.

86. *See, e.g.*, United States v. Jones, 18 F.3d 1145, 1154 (4th Cir. 1994).

87. *See, e.g.*, United States v. Messino, 55 F.3d 1241, 1256 (7th Cir. 1995).

88. *See, e.g.*, United States v. Warren, 16 F.3d 247, 251 (8th Cir. 1994).

89. *See, e.g.*, United States v. Baker, 63 F.3d 1478, 1500 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 824 (1996).

90. *See* United States v. Edenfield, 995 F.2d 197, 199-200 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 76 (1994); United States v. Williams, 954 F.2d 668, 672-73 (11th Cir. 1992), *cert. denied*, 116 S. Ct. 1546 (1996).

91. The First Circuit has taken a stance slightly more lenient than the majority position — if only in dicta. The court has asserted that it "has ample power," United States v. Montoya, 62 F.3d 1, 3 (1st Cir. 1995) (quoting United States v. Connell, 960 F.2d 191, 195 (1st Cir. 1994)), to depart from the Guidelines in a case "where government agents have *improperly* enlarged the scope or scale of the crime" and exclude the tainted transaction. United States v. Egemonye, 62 F.3d 425, 427 (1st Cir. 1995) (quoting *Montoya*, 62 F.3d at 3). To depart, the court requires a showing of "extraordinary misconduct" on the part of the government, but, in defining this standard, claimed that "something less than a constitutional violation might" establish sentence manipulation. *Egemonye*, 62 F.3d at 427 (quoting *Montoya*, 62 F.3d at 3-4).

However, in *Egemonye*, the First Circuit resisted an inviting opportunity to find such a violation — leaving one to wonder whether there is any significant practical difference between its stance and the majority's overly stringent outrageous government conduct requirement. In *Egemonye*, undercover agents sold stolen credit cards to the defendant on four occasions. The fourth sale of 40 credit cards was significantly larger than the defendant had either requested or could afford. It also more than doubled his base offense level. 62 F.3d at 426 (citing USSG §§ 2F1.1(a), (b)(1)(h) (1994)). The agents allowed the defendant to put 25% down on the fourth purchase and then arrested him. 62 F.3d at 426. The court was concerned that this conduct may have been inspired by the government's admitted unhappiness with Egemonye's prior record and "lenient treatment." Nevertheless, it refused to exclude any of the four transactions because the government had valid investigatory purposes for continuing the investigation and — even though predisposition should have been irrelevant, *see supra* text accompanying note 65, because the defendant was predisposed to commit the crimes. 62 F.3d at 427-28.

92. In *Williams*, the Eleventh Circuit held that one defendant's claim that "the government manipulated the transaction in order to get the mandatory minimum sentence" was invalid as a matter of law because the defendant was predisposed to commit the crime. 954 F.2d at 672-73. The following year, in *Edenfield*, the court applied *Williams* and held that, although the sheriff — who had political enmity toward the defendants — testified that he kept the sting going long enough to "support a mandatory

These courts' excessive deference to police discretion is exemplified by the case of Michael Barth. Barth made seven sales of crack to an undercover police officer over a five-week period, even though the officer claimed that his "main purpose" after the fourth buy was to get to Barth's source.[93] The seventh and final sale brought the aggregate amount of crack that Barth had sold to the officer to 50.4 grams,[94] placing the aggregate over the "magic number": the fifty-gram threshold that carries the mandatory ten-year prison sentence[95] — compared to only a five-year minimum sentence for 5 to 49.9 grams.[96] Yet, even in the face of such dubious circumstances, the court still refused to impede police discretion and vacated the district court's reduced sentence.[97] The court concluded, "[w]hile we are concerned with the government['s] conduct in this case, Barth has failed to demonstrate that the government's conduct was outrageous . . . ."[98]

The outrageous government conduct defense stems from dicta in *United States v. Russell*,[99] in which the Supreme Court stated, "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ."[100] Outrageous government conduct has proved extremely difficult to establish; it is therefore rarely a successful de-

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minimum trafficking sentence under Georgia law," the defendants' sentence manipulation claims were invalid as a matter of law. 995 F.2d at 199-201.

Unfortunately, the court's position on sentence manipulation is legally flawed. It suffers from the infirmity of taking the defendant's predisposition into account. Predisposition is irrelevant to sentence manipulation claims. *See supra* text accompanying notes 64-65.

93. *See* United States v. Barth, 990 F.2d 422, 423 (8th Cir. 1993); United States v. Barth, 788 F. Supp. 1055, 1058 (D. Minn. 1992), *vacated on other grounds*, 990 F.2d at 422 (8th Cir. 1993).

94. *See* 990 F.2d at 423.

95. *See* 990 F.2d at 423; *Barth*, 788 F. Supp. at 1057; 21 U.S.C. § 841(b)(1)(A) (1994).

96. *See* 21 U.S.C. § 841(b)(1)(B) (1994).

97. *See Barth*, 990 F.2d at 423-25.

98. 990 F.2d at 425.

99. 411 U.S. 423 (1973).

100. 411 U.S. at 431-32. The doctrine of outrageous government conduct is the surviving element of the objective entrapment defense. *See* United States v. Santana, 6 F.3d 1, 3 (1st Cir. 1993); MARCUS, *supra* note 72, § 7.03. Though the objective test has never been adopted by the Supreme Court, it is gaining support and is followed by several states and by the Model Penal Code, *see* MODEL PENAL CODE (1985) § 2.13, and is favored by a majority of commentators. LAFAVE & ISRAEL, *supra* note 64, § 5.2(b); MARCUS, *supra* note 72, § 3.01. Since the Supreme Court's recognition of objective entrapment as a due process defense in extreme cases, the resulting doctrine of outrageous government conduct has been somewhat controversial and was most recently challenged before the Supreme Court in Hampton v. United States, 425 U.S. 484 (1976). Neverthe-

fense.[101] Hence, its application to sentence manipulation has been predictably stingy in affording relief.

Courts that use the outrageous government conduct test generally have been reluctant to "subject isolated government conduct to a special brand of scrutiny when its effect is felt in sentence . . . determination."[102] Moreover, courts have hesitated to question police decisions regarding sting operations that are, by their very nature, dangerous and manipulative.[103] Thus, so long as the government has been able to present a potentially legitimate law enforcement goal for prolonging its investigation, courts have refrained from finding outrageous government conduct and have upheld defendants' sentences. Such goals or motives have included: (1) going after more major players (suppliers or "kingpins") in a drug ring;[104] (2) the need to bolster the confidence of a weary suspect;[105] (3) the right to probe the extent of the defendant's criminality or extent of the drug conspiracy;[106] and (4) the need to procure evidence to prove guilt beyond a reasonable doubt.[107] With so many potentially legitimate reasons for perpetuating investigations, it is

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less, in *Hampton*, the Court upheld the validity of the doctrine by a vote of five to four. *See* 425 U.S. at 491-95.

101. *See Santana*, 6 F.3d at 4. Perhaps the most famous triumph of the outrageous government conduct defense occurred in United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). In *Twigg*, DEA agents and informants initiated and completely managed an operation to manufacture illegal drugs with the willing, yet utterly passive defendant. *See* 588 F.2d at 375-76. The court held that the police involvement in the crime was so overarching that it barred prosecution of the defendants. *See* 588 F.2d at 380-81.

102. United States v. Cotts, 14 F.3d 300, 306 n.2 (7th Cir. 1994); *see also* United States v. Jones, 18 F.3d 1145, 1155 (4th Cir. 1994) (declining "to impose a rule that would require the government to come forward with a purpose or motivation, other than its responsibility to enforce the criminal laws of this country, as a justification for an extended investigation").

103. *See Jones*, 18 F.3d at 1155 (citing United States v. Connell, 960 F.2d 191, 196 (1st Cir. 1992)).

104. *See* United States v. Chavez-Vasquez, 64 F.3d 667, 1995 WL 492903, at *13 (9th Cir. Aug. 17, 1995); United States v. Warren, 16 F.3d 247, 251 (8th Cir. 1994); United States v. Shephard, 4 F.3d 647, 649 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1322 (1994); United States v. Barth, 990 F.2d 422, 424 (8th Cir. 1993); United States v. Floyd, 738 F. Supp. 1256, 1260 (D. Minn. 1990).

105. *See, e.g., Barth*, 990 F.2d at 425 (maintaining that "an established drug dealer will not readily sell large quantities of drugs to a new customer and . . . repeated buys are necessary to gain the dealer's confidence").

106. *See Shephard*, 4 F.3d at 649; United States v. Calva, 979 F.2d 119, 123 (8th Cir. 1992).

107. *See* United States v. Baker, 63 F.3d 1478, 1500 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 824 (1996); *Calva*, 979 F.2d at 123. The First Circuit has expressed a similar concern in impeding police discretion in this area: "[T]he line is thin and blurred between such a dubious motive and a simple desire to be sure that a committed criminal is caught and tried for a substantial offense based on unshakable evidence." United States v. Egemonye, 62 F.3d 425, 428 (1st Cir. 1995).

not surprising that no court that views sentence manipulation as a species of outrageous government conduct has allowed the doctrine to provide a successful partial defense to a quantity-based sentence.[108]

However, courts examining sentence manipulation claims under the outrageous government conduct test incorrectly apply the test because sentence manipulation claims do not request the total relief that it is designed to afford.[109] Outrageous government conduct violates constitutional due process and "*absolutely bar[s] the government from invoking the judicial processes* to obtain a conviction."[110] Yet these courts claim that sentence manipulation, if found under their test of outrageous government conduct, only warrants a *reduction in the defendant's sentence.*[111] This reasoning is logically incorrect; if sentence manipulation rises to the level of outrageous government conduct it must completely bar prosecution.[112] Because a finding of sentence manipulation warrants only a downward departure, the outrageous government conduct test is

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108. One such court did find sentence manipulation where the government brought machine guns to a drug purchase where the defendants had only acquiesced to purchasing handguns. The use of machine guns in a drug-trafficking crime carries a 30-year mandatory sentence while the similar use of a handgun carries a five-year minimum. *See* 18 U.S.C. § 924(c)(1) (1994). The court found outrageous misconduct because "the only possible motive for[] this action was to increase the defendants' sentences from five to thirty years." United States v. Cannon, 886 F. Supp. 705, 707-09 (D.N.D. 1995).

109. *See supra* text accompanying note 29.

110. United States v. Russell, 411 U.S. 423, 431-32 (1973) (emphasis added); *see also* United States v. Lard, 734 F.2d 1290, 1296 (8th Cir. 1984) (granting complete relief on the basis of outrageous government conduct); United States v. Twigg, 588 F.2d 373, 382 (3d Cir. 1978) (same); United States v. Marshank, 777 F. Supp. 1507, 1524 (N.D. Cal. 1991) (same).

111. *See, e.g.*, United States v. Baker, 63 F.3d 1478, 1500 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 824 (1996); United States v. Jones, 18 F.3d 1145, 1154 (4th Cir. 1994); United States v. Barth, 990 F.2d 422, 424-25 (8th Cir. 1993).

112. Of all the courts to recognize sentence manipulation as a species of outrageous government conduct, the Seventh Circuit apparently is thus far the only one to identify this truism. *See* United States v. Messino, 55 F.3d 1241, 1256 (7th Cir. 1995) (holding that if sentence manipulation were found it would "bar the government from invoking judicial processes" (citations omitted) (internal quotation marks omitted)). The Fourth Circuit almost has recognized it, "not[ing its] skepticism as to whether the government could ever engage in conduct not outrageous enough so as to violate due process to an extent warranting dismissal of the government's prosecution, yet outrageous enough to offend due process to an extent warranting a downward departure [in] a defendant's sentencing." *See* United States v. Jones, 18 F.3d 1145, 1154 (4th Cir. 1994). The Fourth Circuit has, however, refused to take the next step to realize that sentence manipulation therefore cannot be analyzed under a complete defense doctrine. *See* 18 F.3d at 1154.

The Eleventh Circuit, while totally rejecting the doctrine of sentence manipulation, also follows this logic. The court only considers such claims under the due process analysis, which either bars prosecution or finds no violation at all. *See* United States v. Edenfield, 995 F.2d 197, 200 (11th Cir. 1993).

too stringent. This explains why so many courts express deep concern with police conduct in these situations, but so rarely afford relief. Courts really should be asking whether they should recognize sentence manipulation — something less than outrageous government conduct — as a valid *partial* defense warranting a downward departure in sentencing.

The arguments against allowing sentence manipulation claims for fear of impeding police discretion are outweighed by the need to punish offenders according to their culpability as well as the harm they create. As an initial matter, it is unclear why courts should not apply a "special brand of scrutiny" to police decisions when they affect sentencing, rather than offense, determination.[113] The integrity of our criminal justice system is based on the idea that the punishment must fit the crime.[114] If police investigative tactics unjustly cause an offender's punishment to be more severe than he deserves, the defendant faces the prospect of spending time in prison during which he should have the right to be a member of society. Unless courts act to remedy this disproportionality, they abridge the offender's Eighth Amendment right to be free from excessive punishment.[115]

Moreover, recognizing sentence manipulation claims does not impede police discretion in any way; police officers suffer no negative consequences from their strategic decisions so long as the decisions plausibly reflect legitimate law enforcement goals — which they nearly always do.[116] The partial defense of sentence manipulation simply adjusts an offender's sentence when police discretion operates in a way that produces quantities that overrepresent an offender's culpability. Under the sentence manipulation doctrine, law enforcement officers may still wait as long as they wish to arrest a suspect;[117] they just do not have the ability to ratchet up sentences by inviting the defendant to commit additional crimes. Guilty defendants are still convicted; their

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113. *See* United States v. Cotts, 14 F.3d 300, 306 n.2 (7th Cir. 1994).

114. *See* Solem v. Helm, 463 U.S. 277, 284 (1983) (noting that the Eighth Amendment requires that the punishment must fit the crime committed). *See generally* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 327-41 (5th ed. 1989) (collecting essays that describe the importance of proportionality to the moral underpinnings of criminal justice). Proportionality is also an explicit objective of the Guidelines. *See* USSG, ch. 1 pt. A(3) (1994).

115. *See Solem,* 463 U.S. at 286 (stating that the framers of the Eighth Amendment sought to create a constitutional "right to be free from excessive punishments").

116. *See supra* text accompanying notes 104-07.

117. The doctrine of sentence manipulation therefore is not in tension with Supreme Court precedent that declined to find a "constitutional right to be arrested" once the police have sufficient evidence. Hoffa v. United States, 385 U.S. 293, 310 (1966).

sentences are just required to reflect their culpability, not the agent's investigative tactics.[118]

B. *Sentence Manipulation as a Mitigating Circumstance Warranting Downward Departure*

The Southern District of New York and the Second Circuit, who generally see as many or more drug cases than any other district and circuit courts,[119] have taken a different approach to sentence manipulation claims — one that is far more promising. The Southern District of New York, with the approval of the Second Circuit, has departed downward in cases in which the "quantity/time factor," the amount of drugs the defendant bought or sold over the period of time in question, did not accurately reflect the culpability of the defendant.[120] This method of departing has been the most accommodating treatment of sentence manipulation claims that defendants have received in any court. More importantly, it allows for just punishment under the Guidelines more effectively than does the majority's approach.

The case of *United States v. Genao*[121] illustrates this approach. Pedro Lara, one of the defendants, was a relatively minor member of a

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118. *See* 18 U.S.C. § 3553(a) (1994) (listing the factors to be considered in imposing sentences, all of which focus on the defendant, or society, or both, and none of which focuses on the government's motives — legitimate or not); United States v. Genao, 831 F. Supp. 246, 253 (S.D.N.Y. 1993), *affd. in relevant part sub nom.* United States v. Lara, 47 F.3d 60 (2d Cir. 1995) (departing downward to ensure that defendants were punished commensurately with their culpability); Berlin, *supra* note 27, at 187 ("[G]overnment activity should not affect an offender's sentence when an agent's actions result in a sentence incommensurate with the offender's actual mens rea or culpability."); Guerra, *supra* note 26, at 182 (arguing that "[t]he courts should focus not on the motives of the government but on imposing punishment commensurate with the offender's level of culpability").

119. In 1991, for example, the Second Circuit heard 2023 narcotics or controlled substance cases — 40% of its total docket. This percentage exceeded the drug-related portion of every other circuit court's docket. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 58-61 (1991). The Southern District of New York heard 639 such cases, the fourth highest total among the 95 federal district courts. *See id.*

120. *See* United States v. Lara, 47 F.3d 60, 65-66 (2d Cir. 1995); *Genao*, 831 F. Supp. at 251-52; United States v. Giles, 768 F. Supp. 101, 103-04 (S.D.N.Y. 1991), *affd.*, 953 F.2d 636 (2d Cir. 1991), *cert. denied*, 503 U.S. 949 (1992). The District of Minnesota — which sits in the first state to establish a sentencing commission and is therefore presumably more informed than most district courts regarding the flaws in sentencing guidelines — also has departed downward on similar grounds. *See* United States v. Floyd, 738 F. Supp. 1256, 1260-61 (D. Minn. 1990) (departing); Michael Tonry, *Sentencing Guidelines and Their Effects*, *in* THE SENTENCING COMMISSION AND ITS GUIDELINES, *supra* note 32, at 18-20 (describing Minnesota's guidelines experience).

121. 831 F. Supp. 246 (S.D.N.Y. 1993), *affd. in relevant part sub nom.* United States v. Lara, 47 F.3d 60 (2d Cir. 1995).

large drug dealing operation. Lara distributed crack — never more than twenty-five grams at a time — to federal agents on several occasions over seven months. By the time he was arrested and convicted, he had participated in the distribution of 7.3 kilograms of crack and, based on the government's presentence report, faced nineteen years and seven months in prison with no chance for parole.[122]

The court justifiably found this predicament "impossible to believe"[123] and departed from the Guidelines' recommended sentence in three steps. First, the court noted that it was empowered to depart if "there exists a[] . . . mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[124] Second, the court found that in this case, Lara's culpability was overstated by the Guidelines' excessive reliance on quantity irrespective of time.[125] Third, the court departed because it found that the Sentencing Commission had in fact not adequately taken this mitigating circumstance into consideration.[126] Therefore, the court departed and sentenced Lara to ten years in prison.[127] The Second Circuit later affirmed the court's reasoning and judgment.[128]

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122. 831 F. Supp. at 247-49.

123. 831 F. Supp. at 248.

124. 831 F. Supp. at 248 (quoting 18 U.S.C. § 3553(b) (1988)) (internal quotation marks omitted).

125. *See* 831 F. Supp. at 248, 251-52.

126. *See* 831 F. Supp. at 249. Significantly, the court avoided all allegations of police misconduct, presumably because it deemed the police's motives somewhat beside the point — surely the government had a legitimate motive in seeking to investigate and arrest more major players in Lara's drug operation. Further, the court did not examine the defendant's predisposition to engage in criminal activity. The court did, however, pay special attention to the defendant's level of culpability. Instead of rigidly applying the Guidelines to reach an absurd result, the court thought it crucial that Lara's sentence reflect the true extent of his criminal conduct. *See* 831 F. Supp. at 253-54.

127. *See* 831 F. Supp. at 252-53.

128. *See* United States v. Lara, 47 F.3d 60, 67 (2d Cir. 1995). The Second Circuit made one minor adjustment to the District Court's analysis. It saw Application Note 16 (effective Nov. 1, 1993) as additional evidence that the Sentencing Commission had not adequately considered the "quantity/time factor" before 1993. "That amendment recognizes that under some circumstances . . . 'the quantity of the controlled substance for which the defendant is held accountable under § 1B1.3 (Relevant Conduct) may overrepresent the defendant's culpability in the criminal activity.' " 47 F.3d at 66 (quoting USSG § 2D1.1 application note 16 (1994)). Yet in making this adjustment the court declined to hold that this amendment constituted adequate consideration of the "quantity/time factor." The court therefore left open the possibility of departing downward for sentence manipulation-type conduct occurring after 1993. *See* 47 F.3d at 66.

Note 16 since has been construed to apply to a situation significantly different from sentence manipulation, demonstrating that the Sentencing Commission did not consider the "quantity/time factor" in drafting Note 16. The Ninth Circuit explained

These courts are on the right track. They are the only courts, save the District of Minnesota,[129] to address the necessary, threshold question of a sentence manipulation claim: whether the Sentencing Commission has considered adequately the potential for sentence manipulation. This difference in inquiring into the Commission's understanding, or lack thereof, of sentence manipulation scenarios explains why these courts have departed downward in cases similar to those in which other courts reluctantly have refused to depart. The answer to this inquiry determines the level of proof the defendant must establish.

If courts find that the Commission has considered adequately this potential problem, it seems that only a constitutional violation will justify a departure from the Guidelines.[130] However, if courts find — as these courts have — that the Commission has not considered adequately the problem, the standard may be significantly lower. In this case, the defendant must only establish that a downward departure complies with the policies of the Guidelines.[131] Hence, if these courts are correct in finding that the Commission has not considered adequately this potential problem, their analysis appears sound, both in terms of following the dictates of the Guidelines and in terms of sentencing according to the defendant's culpability.

III. LEGAL SOLUTIONS TO SENTENCE MANIPULATION

This Part proposes alternative legal solutions for recognizing sentence manipulation as a viable and effective partial defense. Section III.A elaborates on the Second Circuit's reasoning[132] and maintains that sentence manipulation is a mitigating circumstance that provides courts with a sound legal basis under which to depart downward by analogy to

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that Note 16 was adopted to address the problem that occurs when defendants, under the relevant conduct provision, are sometimes "held 'accountable' for large amounts of controlled substance *with which he may have little personal contact or involvement.*" United States v. Pinto, 48 F.3d 384, 387 (9th Cir.) (emphasis added), *cert. denied*, 116 S. Ct. 125 (1995). Thus the court held that the district court correctly refused to apply Note 16 where "the defendants were only charged at a level reflecting drugs that they actually transported or handled." 48 F.3d at 388. Because in virtually all sentence manipulation claims the defendant has "transported or handled" the drugs, Note 16 cannot apply to sentence manipulation cases.

129. *See* United States v. Barth, 788 F. Supp. 1055, 1057 (D. Minn. 1992), *vacated*, 990 F.2d 422 (8th Cir. 1993); United States v. Floyd, 738 F. Supp. 1256, 1259 (D. Minn. 1990).

130. Recall, though, that none of the courts requiring a constitutional violation for downward departure has found that the Commission adequately considered the potential for sentence manipulation. *See supra* text accompanying note 85.

131. *See* 18 U.S.C. §§ 3553-3553(b) (1994).

132. *See supra* section II.B.

the Guidelines. In the alternative, section III.B proposes amending the Guidelines to limit the quantity of drugs that constitutes "relevant conduct" to the amount bought or sold in any thirty-day period — or shorter if the government has continued the investigation without a legitimate law enforcement goal. Section III.C argues that either of these solutions would better achieve the Guidelines' goals of punishing according to culpability and minimizing sentence disparity, while not impairing any legitimate police practices.

A. *Departing Under the Guidelines*

Courts have the ability to depart downward under the Guidelines when the government's actions in conducting a sting do not rise to a constitutional violation, yet still adversely affect an offender's sentence.[133] This method is available because sentence manipulation constitutes a mitigating circumstance that was not considered adequately by the Sentencing Commission. When the defendant can show that the government's conduct — whether or not it was aimed at legitimate law enforcement goals — created a situation in which the quantity of drugs overstates his culpability, courts should depart downward to see that the defendant's sentence is commensurate with those of other defendants who have engaged in a similar course of criminal conduct.

1. *The Basis for Departure*

The Sentencing Commission intended each guideline to serve as a "heartland" to cover "a set of typical cases embodying the conduct that each guideline describes."[134] Therefore, courts may depart downward from the Guidelines when they find a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[135] Because the Guidelines were designed to deal with typical cases — and because the Guidelines are admittedly something of a "work-in-progress"[136] — the Sentencing

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133. *See infra* text accompanying notes 134-43.

134. USSG ch. 1, pt. A(4)(b) (1994).

135. 18 U.S.C. § 3553(b) (1994). The Supreme Court explained the process for such a departure: "If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' . . . decide whether it is sufficient to take the case out of the Guideline's heartland." Koon v. United States, 116 S. Ct. 2035, 2045 (1996) (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)).

136. *See* USSG ch. 1, pt. A(2) (1994) ("The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing

Commission intended this provision to be construed liberally.[137] As the Second Circuit has highlighted, "[E]ven adequate consideration of a factor in general would not preclude its use as a ground for a departure if the factor was present in a particular case 'to a degree' not adequately considered."[138] In short, courts should never blush to depart in the unusual case; such departures are essential for the vitality of the Guidelines system.[139]

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statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress."); Kennedy, *supra* note 30, at 272 ("It was always understood that the guideline system would be evolutionary in nature."); Amy Levin Weil, *In Partial Defense of Sentencing Entrapment*, 7 FED. SENTENCING REP. 172, 175 (1995) ("The sentencing guidelines were intended to be a work in progress — designed to be revised and improved upon through amendment.").

In fact, "[s]ince the Guidelines took effect in 1987, the Commission has fine-tuned them with several hundred amendments." Schulhofer, *supra* note 74, at 171.

137. *See* USSG ch. 1, part A(4)(b) (1994) (With exceptions not applicable here, "the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."); *see also* 28 U.S.C. § 991(b)(1)(B) (1988) (instructing the Commission to establish policies that "avoid[] unwarranted sentence disparities . . . while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices"); Freed, *supra* note 55, at 1745 ("[The Commission] expressly invited judges to depart in unusual cases."). *But cf. id.* at 1744-45 (arguing that the Commission sent courts "mixed messages" about departures by combining its statements advocating flexibility in the Guidelines' Introduction with strict language in the Guidelines themselves).

138. United States v. Lara, 47 F.3d 60, 65 (2d Cir. 1995) (quoting 18 U.S.C. § 3553(b) (1988)). The Second Circuit has stressed the importance of departure in other cases as well. For example, in *United States v. Monk*, the district court thought it was ridiculous that the defendant had to be sentenced to twelve years in prison for possessing a relatively modest amount of crack, but felt that it lacked any legal basis for departure and thus felt compelled to impose the sentence. The Second Circuit, however, remanded the case because it felt that "[t]he record raise[d] the disturbing possibility that the sentencing judge failed to appreciate his authority to depart under § 3553(b)." 15 F.3d 25, 29 (2d Cir. 1994).

139. *See* Schulhofer, *supra* note 74, at 171; *see also supra* note 54. In his article, Professor Schulhofer notes the disturbing trend toward an "unduly sparing use of the departure power" — among the causes of which is overly stringent appellate review — and argues that this threatens the fairness and effectiveness of the Guidelines. Schulhofer, *supra* note 74, at 171. The Supreme Court recently echoed these concerns when it emphasized the fact that "[a] district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by the sentencing court." *Koon*, 116 S. Ct. at 2046. Thus, the Court held, appellate courts should review departures only for abuse of discretion. 116 S. Ct. at 2047-48.

There is, of course, the worry that if some courts depart and others do not, some measure of disparity will be reintroduced into the Guidelines' system. However, this should not prevent courts from departing when it truly is necessary; it merely should encourage all courts to be consistent. If, after careful consideration, the circuits still do

Nothing in the Guidelines' legislative history or policy statements indicates that the Commission considered the possibility of sentence manipulation arising from the operation of quantity-based guidelines in sting cases.[140] No court of appeals has suggested otherwise. Even courts of appeals that have overturned district court downward departures based on the Commission's inadequate consideration of sentence manipulation have failed to assert that the Commission adequately considered the problem.[141] It seems most likely that the Commission's stiff "heartland" drug sentencing guidelines are aimed at big-time drug dealers[142]

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not agree on the appropriateness of a departure, the Sentencing Commission is likely to adopt an amendment or application note to eliminate the disparity.

140. *See* United States v. Genao, 831 F. Supp. 246, 248 (S.D.N.Y. 1993), *affd. in relevant part sub nom.* United States v. Lara, 47 F.3d 60 (2d Cir. 1995); United States v. Giles, 768 F. Supp. 101, 104 (S.D.N.Y. 1991); Saul M. Pilchen, *The Underside of Undercover Operations*, LEGAL TIMES, July 15, 1991, at 39.

Two amendments were proposed in 1992 to address the problem of sentence manipulation, but proposed amendments do not constitute "adequate consideration" by the Commission. *See* 18 U.S.C. § 3553(b) (1994). The first amendment sought to limit the relevant conduct in any offense involving a number of transactions to the largest transaction; the second sought to limit the relevant conduct in any offense involving a number of transactions to the total amount from any 30-day period. 57 Fed. Reg. 62,832, 62,837 (proposed Dec. 31, 1992). The Commission noted, "[o]ther than in extremely large scale cases, the use of such a 'snapshot' arguably provides a more reliable method of distinguishing larger from smaller scale drug traffickers." *Id.*

However, the Commission neither addressed the proposals at its public hearings of March, 1993, nor submitted them to Congress when it proposed amendments to the Guidelines in May, 1993. *See* U.S. SENTENCING COMMN., PUBLIC HEARINGS ON PROPOSED GUIDELINE AMENDMENTS (Mar. 22, 1993); 58 Fed. Reg. 27, 148 (May 6, 1993). Further, courts are not allowed to consider these, or any other, proposed amendments in deciding whether the Sentencing Commission has considered the problem adequately. *See* 18 U.S.C. § 3553(b) (1994) (stating that district courts are to consider "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."); *Genao*, 831 F. Supp. at 248, 250 (following this dictate and citing several courts of appeals to explicitly reiterate its importance). Such a practice, it is argued, would lend too much importance to congressional inaction. *See* Scripps-Howard Radio v. FCC, 316 U.S. 4, 11 (1942) (arguing that Congress acts only by affirmatively passing laws); *Genao*, 831 F. Supp. at 251 ("[T]he failure of the Sentencing Commission to amend the Guidelines as proposed is not indicative of any intent or consideration on its part."); 133 CONG. REC. S16,644 (daily ed. Nov. 20, 1987) (statement of Sen. Kennedy) (explaining that the intent of the Commission should only be divined from "the official pronouncements of the Commission").

141. *See* United States v. Barth, 990 F.2d 422, 424-25 (8th Cir. 1993) (vacating the district court's sentence without addressing its finding that the "commission ha[d] failed to adequately consider the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make an arrest"); *see also* United States v. Jones, 18 F.3d 1145, 1152-55 (4th Cir. 1994) (neglecting to address appellants' claim that the Sentencing Commission failed to consider the theory of sentence manipulation adequately).

142. Senator Bob Graham, for instance, described the stereotypical drug dealer that the Guidelines' harsh sentences were out to punish: "They live in the fast lane.

who are busted in typical sting operations after a couple of buys.[143] Therefore, sentence manipulation scenarios, which usually involve low-level couriers and several transactions, provide the precise type of unusual circumstance that warrants a departure from the Guidelines' heartland categories.

2. *The Method of Departure*

Once courts understand that the unusual circumstance of sentence manipulation provides a sound basis for departure, courts need a method to formulate a proper sentence. The best way to formulate a proper departing sentence with sound reasoning is to draw an analogy from the Guidelines.[144] The best analogy that can be drawn to the problem of sentence manipulation is by comparing it to the "incomplete" or "partial" sentences recognized in several other sections of the Guidelines.[145] In keeping with this theme, courts may view sentence manipu-

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They drive big cars — usually several — like BMWs and Mercedeses. . . . They like gold. Big gold chains and big gold diamond rings. . . . They spend most of their money on themselves and their women." 134 CONG. REC. S3127 (1988) (Statement of Sen. Graham (quoting Lt. W.B. Hodges, Jacksonville, Florida narcotics division)).

143. The average sting operation involves one or two buys followed by an arrest. *See Genao*, 831 F. Supp. at 248; *see also* Heaney, *supra* note 8, at 197 n.99 (stating that before the advent of the Guidelines most busts were made after two buys).

144. *See* USSG ch. 1, pt. A(4)(b) (1994) (pointing out that the Commission recommends "departure by analogy" if courts are to depart from certain sections); United States v. Cherry, 10 F.3d 1003, 1012 (3d Cir. 1993) (stating that district courts properly depart by analogy to the Guidelines); United States v. Pearson, 911 F.2d 186, 190-91 (9th Cir. 1990) ("Any departure should be guided by analogy to the guidelines."); *cf.* Koon v. United States, 116 S. Ct. 2035, 2045 (1996) (holding that departures should consider "structure and theory" of the Guidelines).

145. The theory of "incomplete defense" is entrenched firmly in the guidelines. *See* Weil, *supra* note 136, at 174. Weil states that:

> Although early on an argument could have been made that a sentencing court should be prohibited from departing on the basis of an "incomplete defense," it is too late in the game to argue this point convincingly. Even the original version of the guidelines allowed for downward departures where there was proof of other "incomplete defenses": § 5K2.10 provides for a departure based on the "victim's conduct" in a situation amounting to something less than "self-defense"; § 5K2.12 allows for a departure based on "coercion and duress" under circumstances not amounting to a complete defense of coercion or duress; and § 5K2.13 permits a departure based on "diminished capacity" in a situation where an insanity defense would not be available. Hence, the Sentencing Commission has made it clear that an "incomplete defense" can provide a basis for a departure from the guidelines.

Id. Weil also points out that application note 17 to § 2D1.1 — allowing a downward departure when the government sold drugs to the defendant at an artificially low price — is cut out of this same mold. It is an incomplete entrapment defense. *See id.* at 174-75.

The idea of incomplete or partial defenses also has been recognized by Minnesota, the first state to adopt guidelines, as a necessary part of a guideline scheme. The Minne-

lation as a partial defense amounting to partially outrageous government conduct. In other words, sentence manipulation is government conduct that is not outrageous enough to offend due process principles, but that nevertheless demonstrates an excessive influence in the crime(s) such that it mitigates an offender's culpability under the Guidelines.

At first glance, the theory of "partially outrageous" government conduct may seem a bit unusual or linguistically contradictory.[146] However, an examination of the policy behind the outrageous government conduct doctrine reveals that recognizing a lesser form of it as a partial defense is entirely consistent with criminal law due process principles. The outrageous government conduct doctrine reflects a principle of fundamental fairness — a principle that says that government overinvolvement in crime mitigates an offender's culpability.[147] Courts therefore refuse to convict defendants when the government's conduct is "not aimed at facilitating discovery or suppression of ongoing illicit dealings . . . [but r]ather . . . [is] aimed at creating new crimes for the sake of bringing criminal charges against [the defendant]. . . ."[148] The government admittedly acts less than outrageously when it simply prolongs an existing investigation, but it is still *unfair* to the defendant to make the length of his sentence turn on, for example, how long it takes the government to apprehend the other drug dealers that he knows.[149]

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sota Sentencing Guidelines provide for a downward departure when "[o]ther substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense." MINN. SENT. GUIDELINES II.D.103(2)(a)(5) (1995).

146. This theory may seem especially problematic to a court that believes that it must test each transaction for outrageous government conduct and, depending on the result, either wholly include or wholly exclude that transaction from the defendant's sentencing calculus. But such a method would misapply the idea of partially outrageous government conduct. Partially outrageous government conduct warrants a reduced sentence from each illegal transaction consummate with the level of governmental overinvolvement in that particular transaction.

147. *See* United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993); United States v. Lard, 734 F.2d 1290, 1297 (8th Cir. 1984); United States v. Twigg, 588 F.2d 373, 379 (3d Cir. 1978).

148. *Lard*, 734 F.2d at 1297.

149. This formula for a partial reduction of a defendant's sentence also is consistent with the Supreme Court's other line of due process, pre-indictment misconduct cases, United States v. Marion, 404 U.S. 307 (1971), and United States v. Lovasco, 431 U.S. 783 (1977). *Lovasco* precludes the government from prosecuting a case when (1) it has delayed indictment in order to gain a tactical advantage, and (2) the defendant has suffered prejudice. 431 U.S. at 795-96. When the government continues an investigation after it has decided to prosecute and after it can establish guilt beyond a reasonable doubt, and in so doing increases the defendant's sentence, the government acts — at least in part — to gain a tactical advantage, *see* 431 U.S. at 792-95, and obviously prejudices the defendant. Under guidelines that fail to account for this situation, a reduced sentence seems thoroughly appropriate.

The idea of a partial defense based on the due process doctrine is new simply because the Guidelines are new. Before the Guidelines, courts could use their discretion to make sure an offender's sentence matched his true level of culpability.[150] But today, under section 2D1.1 of the Guidelines, courts must sentence offenders almost exclusively according to the quantity of drugs involved in his crimes.[151] Courts need the partial defense of sentence manipulation to depart from the Guidelines when inequities in sentencing flow from this harm-based sentencing provision.

Such a rule is also consistent with other provisions and policies in the Guidelines. It "limit[s] the significance of the formal charging decision and . . . prevent[s] multiple punishment for substantially identical offense conduct."[152] This is consistent with the Guidelines' desire to prevent disproportionate punishment for a single course of conduct,[153] like being a weekly drug courier. Sentence manipulation also reduces the harshness of tough sentences for those offenders without a significant role in the criminal enterprise.[154] This is consistent with the Guidelines' desire to make drug sentences correlate with the offender's level of culpability[155] as demonstrated by his role in the offense.[156] Lastly, such a rule considers offender characteristics that are often lost in the rigid calculations of the Guidelines, but that are supposed to be considered by courts.[157] Situation and offender characteristics, such as the

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150. *See* United States v. Staufer, 38 F.3d 1103, 1106 (9th Cir. 1994).

151. *See* USSG § 2D1.1 (1994).

152. USSG ch. 3, pt. D, Introductory Commentary (1994).

153. *See* USSG ch. 3, pt. D, Introductory Commentary (1994); United States v. Barth, 788 F. Supp. 1055, 1058 (D. Minn. 1992), *vacated on other grounds*, 990 F.2d 422 (8th Cir. 1993).

154. Sentence manipulation defenses seek to differentiate, for example, between the courier who sells ten grams of crack ten times and the kingpin who sells 100 grams once. *See supra* section I.C.3.

155. *See supra* note 78.

156. *Cf.* USSG §§ 3B1.1 - .2 (1994) (listing the Guidelines role-in-offense categories); United States v. Payne, 63 F.3d 1200, 1212 (2d Cir. 1995) (highlighting the importance of the Guidelines role-in-offense categories), *cert. denied*, 116 S. Ct. 1056 (1996); Young, *supra* note 74, at 64 (pointing out the necessity of giving more weight to the offender's role in the offense under the Guidelines).

157. *See* 28 U.S.C. § 994(b)(1) (1994) (instructing the Sentencing Commission to establish sentencing ranges "for each category of offense involving each category of defendant"); USSG ch. 1, pt. A(3) (1994) (expressing the importance of offender characteristics to a workable system of guidelines); USSG § 5K2.0 (1994) (stating that offender characteristics that are present in an unusual degree — distinguishing the case from "heartland" cases — may provide grounds for departure). The Supreme Court also has stated emphatically that courts always should consider offender characteristics. *See* Williams v. New York, 337 U.S. 241, 247 (1949) ("[P]unishment should fit the offender and not merely the crime.").

defendant's motivation in committing crimes or his level of knowledge about the criminal enterprise, matter as much as harm in a just deserts punishment scheme like the Guidelines.[158]

B. *Amending the Guidelines*

As an alternative to having courts recognize sentence manipulation claims under the "not adequately considered" provision of the Guidelines, the Commission could amend section 2D1.1 to deal explicitly with the problem. Adding an application note to section 2D1.1 would, at a minimum, ensure that federal courts apply the same rule to sentence manipulation claims. Indeed, amending the Guidelines represents the same sensible solution that the Commission adopted to deal with the similar problems of sentence entrapment[159] and the injustice that can occur when the amount of drugs for which the offender is "accountable" overstates his culpability.[160] Thus, in this spirit of the Guidelines as a "work-in-progress,"[161] this Note proposes the following application note to section 2D1.1:

> When the offense involved a number of transactions over a period of time of more than thirty days, the offense level is to be limited by the amount with which the defendant was involved in any thirty-day period, using the thirty-day period that results in the greatest offense level. In addition, if the court finds that the government continued to conduct transactions within the relevant thirty-day period while serving no legitimate law enforcement goal, the transactions that served no legitimate law enforcement goal are to be excluded from the offense level calculation.[162]

This proposal is extremely reasonable. It is hard to imagine a situation in which an offender's culpability could not be fairly determined by a thirty-day "snapshot."[163] It is simply unjust to allow two offenders who are both low-level drug couriers to be sentenced to grossly disparate

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158. *See* Alschuler, *supra* note 7, at 902.

159. *See* USSG § 2D1.1, application notes 12 and 15 (1994) (adopted Nov. 1, 1993) (discussed *supra* in note 27).

160. *See* USSG § 2D1.1, application note 16 (1994) (adopted Nov. 1, 1993) (discussed *supra* in note 128).

161. *See supra* note 136.

162. This proposed amendment, and much of its language, is adopted partially from a proposed amendment from 1992 that the Commission declined to pass on to Congress. *See supra* note 140.

163. Perhaps such an exceptional situation would occur if a major drug dealer sold huge amounts of drugs to smaller dealers, but always at intervals more than one month apart. Here, the major dealer's infrequent sales might serve to underrepresent his culpability as a kingpin in the drug trade whose drugs were constantly dealt — just not by him. In a rare situation like this, the court could depart upward to craft a more just sentence.

sentences just because one was investigated for two weeks and the other for two months.

There are several advantages to this application note. First, it does not inhibit or deter legitimate police behavior. Because the thirty-day period that produces the largest amount of drugs is used for offense level calculations, federal agents may still make several buys in order to bolster the confidence of a weary suspect, examine the full depths of a drug ring's criminality, and be sure that they have airtight evidence for trial. Indeed, federal agents are not punished in any way for continuing investigations as long as they deem necessary to apprehend all of their suspects.[164] The amendment merely provides the missing incentive to arrest a criminal when no legitimate reasons remain for continuing the investigation, thereby ensuring that defendants' culpability will not be overrepresented by the police's discretionary decisions over which defendants have no control.[165]

Second, the "thirty-day" provision, without a limit on the number of relevant transactions within the period, still distinguishes the frequent dealer from the offender who conducts single or occasional transactions, the former presumably being more culpable.[166] Third, the thirty-day provision avoids the problem of "structuring," performing several small transactions in lieu of one large transaction, that might occur under a rule limiting the number of transactions that could be taken into consideration.[167] The total amount of drugs that the drug dealer sells is still the relevant quantity for calculating purposes. Fourth, the amendment's final sentence ensures that the government does not act as if it always has

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164. This amendment would produce results similar to the court's in United States v. Floyd, 738 F. Supp. 1256 (D. Minn. 1990). In *Floyd,* the government continued to purchase drugs from the defendant long after she ceased to be the target of the investigation. The court saw nothing wrong with the government's decision to pursue its investigation in this fashion (i.e., through the defendant) but refused to punish the defendant for it and, therefore, departed downward from the Guidelines because the defendant's "role clearly was exaggerated by the investigative methods in this case." *Floyd,* 738 F. Supp. at 1260-61.

165. *See* Berlin, *supra* note 27, at 187 (arguing that "government activity should not affect an offender's sentence when an agent's actions result in a sentence incommensurate with the offender's actual mens rea or culpability"). In this sense, the 30-day cutoff could be seen as marking the point when the government's tactics normally begin to overwhelm any discernable gradations in culpability.

166. *See* United States v. Genao, 831 F. Supp. 246, 251 (S.D.N.Y. 1993) (supporting this distinction), *affd. in relevant part sub nom.* United States v. Lara, 47 F.3d 60 (2d Cir. 1995).

167. *See* United States v. Barth, 990 F.2d 422, 425 n.3 (8th Cir. 1993) (noting the government's concern that a rule limiting the number of transactions that a court could consider would "unduly reward[] those drug dealers who are savvy enough to 'go slow' with new customers").

a "free month" with which to play. Once the government has sufficient evidence to convict the suspect, and no other legitimate law enforcement goals remain in the investigation, the government should arrest the suspect.[168]

Finally, this application note would provide a bright-line rule. Bright-line rules are applied easily by courts and save courts time. This rule basically would cover all sentence manipulation claims. Yet, under the "not adequately considered" savings clause, courts would still retain the ability to depart further if it found that a thirty-day snapshot still overrepresented the defendant's culpability.[169] Courts could find, for example, that the Commission had not considered problems posed before it "to a[n adequate] degree." On the other hand, courts would still retain the ability to depart upward when they found an aggravating circumstance made a thirty-day snapshot an inadequate representation of the defendant's culpability. Such departures, whether upward or downward, would prove extremely rare, though, given the high degree of consideration that such an amendment would probably signify.

C. *The Benefits of a Viable Sentence Manipulation Doctrine*

The most basic policy of the Guidelines, as with nearly every just deserts system of criminal punishment, is to punish according to some combination of culpability and harm. Yet as courts and the Commission have begun to recognize,[170] drug quantity does not always equal culpability or even harm. Strictly implementing section 2D1.1 of the Guidelines can sometimes produce incentives and outcomes that frustrate the objectives and policies of the Guidelines. Hence, courts and the Commission,[171] by recognizing the doctrine of sentence manipulation, would advance the major objectives of the Guidelines far more effectively than the current framework does.

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168. The import of this provision is already accepted by most courts to directly address the sentence manipulation issue. *See, e.g.*, United States v. Montoya, 62 F.3d 1, 3 (1st Cir. 1995) (concluding that "where government agents have *improperly* enlarged the scope or scale of the crime, the sentencing court" should exclude that tainted transaction(s)); United States v. Okey, 47 F.3d 238, 240 (7th Cir. 1995) ("Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence.").

169. For a discussion of how this general process would work, see *supra* section III.A.

170. *See supra* text accompanying notes 12, 140.

171. The benefits described in this section pertain with equal force whether the courts recognize sentence manipulation claims under the current Guidelines structure or the Commission amends the Guidelines. *See supra* sections III.A, III.B (respectively). This obviously reflects this Note's assumption that courts should depart downward in a manner similar to that of the proposed amendment.

Recognizing valid sentence manipulation claims would reduce sentencing disparity that results from rigidly applying the Guidelines.[172] It would also curtail the government's incentive to perpetuate the additional crime that leads to such disparity.[173] The government's decision of when to arrest a habitual drug offender would not single-handedly determine the offender's sentence. Offenders who pursue a similar course of criminal conduct on the street — and who are therefore roughly equal in terms of culpability — would more likely serve similar sentences. Moreover, sentences would be more proportional to the crimes committed. Notwithstanding the Guidelines' largely ineffective role-in-offense provisions,[174] a drug courier would be less likely to serve a similar sentence to that of a drug kingpin just because they both were convicted of selling the same quantity of drugs. This exhibits the basic understanding that culpability must be considered in sentencing — and that culpability depends on individual blameworthiness, not on the amount of drugs an offender has in his briefcase. Lastly, recognizing sentence manipulation claims would ensure that the criminal justice system punishes crimes sufficiently, but "not greater than necessary" to promote respect for the law, deter criminal conduct, protect the public, and provide needed training or treatment.[175]

CONCLUSION

As America's drug problem continues to wreak havoc, the last thing that courts should do is restrict legitimate law enforcement tactics aimed at combating the problem. Therefore courts and commissions are justifiably reluctant to take any action that may impede law enforcement's already arduous task. However, there is a difference between restricting police discretionary decisions and limiting their adverse effects. The doctrine of sentence manipulation seeks only to do the latter. In this case, manipulation does not necessarily imply governmental malfeasance; it simply implies unfair increases in punishment over which an offender has no control. In a quantity-based sentencing scheme, such outside influence overrepresents an offender's culpability and leads to the very disparity and disproportionality that the Guidelines were designed to prevent.

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172. *See supra* section I.C.2.
173. *See supra* section I.C.1.
174. *See* Miller & Freed, *supra* note 70, at 5-6; Young, *supra* note 74, at 64-65.
175. *See* 18 U.S.C. § 3553(a) (1994).

The Guidelines were designed to be a good starting point in an evolutionary process aimed at more just sentencing practices.[176] But we have reached a point where courts are recognizing that there is a problem with the Guidelines' insistence on quantity-based sentencing: Police discretionary decisions can exert too much control over an offender's sentence. Federal agents cannot be permitted to investigate the crime and determine the sentence of the offender; this excessively blurs the tenuous boundaries of our adversarial system. Now it is up to courts *and* the Sentencing Commission to deal with the problem. If the Commission fails to address the issue promptly, courts should exercise their authority under the Guidelines to depart downward in cases of sentence manipulation under the theory of partially outrageous government conduct. The Commission should then learn from these departures and amend the drug sentencing provision of the Guidelines to provide a uniform rule to address the problem. A thirty-day snapshot would be a most reasonable solution.

176. As then-Judge Stephen Breyer explained, the very theory of the Guidelines requires and depends on a learning process to refine and improve the Guidelines. United States v. Rivera, 994 F.2d 942, 949-50 (1st Cir. 1993); *see also supra* note 136 (Guidelines are a "work-in-progress").