

SENTENCING ENTRAPMENT AND THE UNDUE INFLUENCE ENHANCEMENT

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With the rapid growth of the Internet, Congress and the United States Sentencing Commission have expressed concern over the increasing opportunities for sex predators to target children online. This concern has resulted in the creation of a complex sentencing regime for such sex offenders. The provision of the Guidelines that determines the sentence for persons convicted of attempted statutory rape includes an enhancement for exerting undue influence over the victim. Federal courts had struggled with whether this enhancement could be applied to those caught in undercover law enforcement stings in which no real "victim" existed. The Sentencing Commission intervened in 2009 to specify that the Undue Influence Enhancement was inapplicable to such undercover operations.

This Note explores the circuit split that prompted the Commission's clarification and examines the appropriateness of applying the Undue Influence Enhancement in undercover Internet stings. In particular, it analyzes the enhancement in light of entrapment and sentencing entrapment principles and ultimately concludes that these concerns do not compel a blanket prohibition on utilizing the enhancement in undercover operations.

INTRODUCTION

With the rapid growth of the Internet, Congress and the United States Sentencing Commission have expressed concern over the increasing opportunities for sex predators to target children online.¹ Consequently, the United States Sentencing Guidelines (Guidelines) establish complex sentences for federal sex crime violators. One provision of the Guidelines includes an enhancement applicable when a defendant has exerted "undue influence" over a victim of statutory

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¹ 144 CONG. REC. S12,262-63 (daily ed. Oct. 9, 1998) (statement of Sen. Hatch) (worrying that Internet may become "perverted into a hunting ground for pedophiles and other sexual predators"); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, §§ 501-507, 112 Stat. 2974, 2980-82 (directing Commission to "ensure that the sentences . . . are appropriately severe" and mandating series of enhancements for sex crimes, including enhancement for defendant's use of computer to persuade child to engage in sexual activity); U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 592 (2010) (implementing directives through amendment to Guidelines).

rape or attempted statutory rape.² This provision is of great importance in the context of undercover stings, during which law enforcement officials seek to apprehend sex predators by impersonating children or sex traffickers online, thereby precipitating criminal conduct by offenders. Courts have struggled with how to apply this Undue Influence Enhancement in the context of undercover stings, resulting in deep division among the federal circuit courts. Although the enhancement results in a relatively small sentence increase when applied,³ sex offenders' particular propensity for recidivism⁴ and society's strong interest in signaling disapproval of such predation militate in favor of appropriate sentencing increases, however small they may be. In May 2009, the United States Sentencing Commission (Sentencing Commission or Commission) amended the Guidelines commentary to state that courts should not apply the Undue Influence Enhancement when the "victim" is in fact an undercover government agent.⁵ Given the drastically divergent views of the circuit courts prior to this amendment, the Commission's decision and the arguments underlying it warrant further examination.

Finding undue influence when the "victim" is fictional raises several questions, including issues of statutory interpretation, factual impossibility, and entrapment, which in turn implicate myriad policy considerations. This Note will focus on concerns about government conduct and potential entrapment in undercover Internet stings⁶ in light of the government's control over the qualities and behavior—indeed, the very existence—of the "victim."⁷ Underlying my analysis

² U.S. SENTENCING GUIDELINES MANUAL § 2A3.2 cmt. n.3(B) (2010). The Undue Influence Enhancement is concerned with situations in which adults coerce or entice children to participate in illegal sex acts. See *infra* Part I.A. Undue influence includes an adult's abuse of superior knowledge, influence, or resources. See *infra* notes 39–43 and accompanying text.

³ See *infra* note 11.

⁴ According to the Department of Justice, fifty percent of statutory rapists are rearrested for some type of crime within three years of their release from incarceration. PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 15 tbl.8 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>. Five percent of statutory rapists are rearrested for another sex crime within three years of release. *Id.* at 24 tbl.22.

⁵ See *infra* notes 25–26 and accompanying text (detailing passage of amendment).

⁶ Entrapment occurs when the government induces a law-abiding citizen to commit a crime that he otherwise would not have undertaken. In the case of the Undue Influence Enhancement, there is a concern that undercover officers in Internet stings will manipulate offenders into exerting extra influence over the "victim" so as to trigger the enhancement. This government behavior is known as sentencing entrapment. See *infra* Part II for a thorough discussion of the entrapment and sentencing entrapment doctrines.

⁷ The court decisions discussed in Part I do not focus on entrapment doctrine, though the courts do express varying levels of concern about government conduct. I pick up on

is the assumption that applying the enhancement should promote a close fit between the defendant's culpability and his sentence. In that sense, the nature of the victim (i.e., a "real" child or an undercover officer) is less important than the question of whether the government behaved in a way that undermines the goals of culpability-based sentencing.

Part I outlines the origins and nature of the Undue Influence Enhancement as well as the accompanying circuit split. Part II addresses traditional subjective entrapment doctrine and alternative grounds for acquittal based on government inducement. It also explores the theory of sentencing entrapment by analogizing to traditional entrapment doctrine and then discusses the difficulties with sentencing entrapment claims in practice. Lastly, Part III applies traditional and sentencing entrapment principles to the sex crime context generally and to the challenges posed by the Undue Influence Enhancement in particular. I conclude that neither the subjective nor objective approach to sentencing entrapment prohibits increasing a sentence pursuant to the Undue Influence Enhancement when a defendant is apprehended in an undercover sting operation.

I

SECTION 2A3.2 OF THE UNITED STATES SENTENCING GUIDELINES AND THE UNDUE INFLUENCE ENHANCEMENT

A. *Background*

Many defendants caught in Internet stings are sentenced pursuant to section 2A3.2 of the Guidelines, which articulates the sentencing calculations for "Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts."⁸ By their nature, undercover stings typically result in prosecutions for attempt, as the ultimate sex crime never occurs. As the title of section 2A3.2 indicates, defendants convicted of attempted or completed crimes are each sentenced under that provision. Under federal law, a conviction for attempt requires proof of intent to commit the predicate offense and conduct that constitutes a substantial step toward its commission.⁹ In many undercover sting operations, criminal

these concerns about government behavior and explore the enhancement in light of entrapment principles.

⁸ U.S. SENTENCING GUIDELINES MANUAL § 2A3.2 (2010). Section 2G1.3 of the Guidelines is a parallel provision that covers commercial sex acts with minors.

⁹ See, e.g., *United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007) (setting out elements of attempt); *United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006) (same).

suspects commit acts that are sufficient for an attempt conviction. Examples of such conduct include obtaining a child's consent and going to meet him or her; making hotel or transportation reservations; and "initiat[ing] . . . sexual conversation . . . [and] writing insistent messages" to the child.¹⁰

An offender's sentence under the Guidelines includes the "base offense level," which is based upon the type of crime. The sentence range also incorporates specific offense characteristics and other adjustments, as well as the criminal history.¹¹ For statutory rape and attempted statutory rape sentences under section 2A3.2, the base offense level is set at eighteen, and the Guidelines provide for several potential enhancements based on specified factors of the crime.¹² The focus of this Note is the Undue Influence Enhancement, which applies when "a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct."¹³ The Undue Influence Enhancement provides for a four-level increase to the offense level. The enhancement will thus increase a defendant's Guidelines calculation by between 14 and 34 months under section 2A3.2, resulting in a sentence between 41 and 105 months.¹⁴

Courts have relied on the commentary to section 2A3.2 to reach different interpretations of the enhancement's applicability to under-

¹⁰ *United States v. Gladish*, 536 F.3d 646, 648–49 (7th Cir. 2008) (discussing conduct constituting substantial step toward sex crime with underage child).

¹¹ In general, sentences under the Guidelines are calculated by determining the "base offense level," adjusting upward or downward based on enumerated factors, and then using a table to incorporate the defendant's criminal history in calculating the actual sentence. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2010). Here, a base offense level of eighteen under section 2A3.2 earns a sentence of imprisonment between 27 and 71 months, depending on the defendant's criminal history. *Id.* § 5A (Sentencing Table). The Undue Influence Enhancement provides for a four-level increase in the offense level, resulting in a total sentence between 41 and 105 months. *Id.* §§ 5A (Sentencing Table), 2A3.2(b)(2). For a conviction under 18 U.S.C. § 2422(b) or 2423(a), sentenced pursuant to section 2G1.3—the parallel provision of the Guidelines for commercial sex acts—a sentence including the two-level Undue Influence Enhancement would be between 97 and 210 months, depending on the offender's criminal history category. U.S. SENTENCING GUIDELINES MANUAL § 5A (Sentencing Table). It should be noted that any sentence imposed under the Guidelines must still comport with any statutory minimum or maximum penalty established by the applicable criminal statute.

¹² These enhancements include: a four-level increase "[i]f the minor was in the custody, care, or supervisory control of the defendant," U.S. SENTENCING GUIDELINES MANUAL § 2A3.2(b)(1); a two-level enhancement if a computer was used to entice the child to engage in the unlawful sexual activity, *id.* § 2A3.2(b)(3); and a four-level enhancement if "the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct," *id.* § 2A3.2(b)(2)(B)(i).

¹³ *Id.* § 2A3.2(b)(2)(B)(ii).

¹⁴ *Id.* § 5A (Sentencing Table); *id.* § 2A3.2(b)(2). For additional details on the sentencing ranges at issue under both section 2A3.2 and section 2G1.3, see *supra* note 11.

cover stings. The commentary generally defines “minor,” for purposes of section 2A3.2, as

(A) an individual who had not attained the age of 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.¹⁵

This definition of “minor” clearly accounts for the use of sting operations in which undercover officers represent themselves as underage in order to induce perpetrators to attempt sexual crimes against children. This is consistent with the purpose of the Guidelines: to target offenders before they actually commit such crimes against children. The Sentencing Commission has explicitly stated that “victim” (later changed to “minor”) is defined to include undercover officers in order to ensure adequate punishment of offenders caught in stings.¹⁶

With regard to the Undue Influence Enhancement, the Guidelines commentary directs courts to engage in a thorough, fact-specific inquiry to determine whether the defendant’s “influence over the minor compromised the voluntariness of the minor’s behavior.”¹⁷ When it adopted the Undue Influence Enhancement in 2000, the Sentencing Commission noted that a defendant sentenced under the Guidelines often exerted undue influence over the child.¹⁸ Analysis of the Sentencing Commission’s own data showed “conduct such as coercion, enticement, or other forms of undue influence by the defendant that compromised the voluntariness of the victim’s behavior and, accordingly, increased the defendant’s culpability for the crime,”¹⁹ thereby justifying the enhancement.

Importantly, the Guidelines commentary applies a rebuttable presumption of undue influence when the offender is at least ten years older than the victim, because the “substantial” age difference between the offender and child indicates at least a threshold level of undue influence.²⁰ The Commission explained the rebuttable presumption of undue influence by noting that “such a presumption is appropriate because persons who are much older than a minor are

¹⁵ *Id.* § 2A3.2 cmt. n.1.

¹⁶ *Id.* at app. C, amend. 592.

¹⁷ *Id.* § 2A3.2 cmt. n.3.

¹⁸ *Id.* at app. C, amend. 592. For further review of the legislative history of the enhancement, see *United States v. Root*, 296 F.3d 1222, 1232–33 (11th Cir. 2002).

¹⁹ U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 592 (2010).

²⁰ *Id.* § 2A3.2 cmt. n.3.

frequently in a position to manipulate the minor due to increased knowledge, influence, and resources.”²¹

The applicability of the Undue Influence Enhancement to undercover stings was unclear until recently. Courts had split on the applicability of the enhancement when the so-called “victim” is in fact an undercover officer and not a minor child. The Eleventh Circuit found that the commentary’s definition of “minor” clearly permitted the application of the enhancement in undercover stings.²² In contrast, the Sixth and Seventh Circuits interpreted the Undue Influence Enhancement and its commentary to focus on the voluntariness of the victim’s behavior, thereby precluding its application in undercover operations.²³ As the Sixth Circuit noted, the definition of “minor” and the requirement that a court look to the voluntariness of the victim’s behavior apparently conflict.²⁴ Although the Sixth and Seventh Circuits did not rely on an entrapment analysis to reject the enhancement in undercover cases, they nonetheless expressed concern about the government’s control over the qualities of the fictitious victim that could lead to application of the Undue Influence Enhancement. I probe this concern further in Parts II and III.

As a result of the deep disagreement among courts, the Sentencing Commission adopted Amendment 732 to the commentary in May 2009 to clarify that the Undue Influence Enhancement “does not apply in a case in which the only ‘minor’ . . . involved in the offense is an undercover law enforcement officer,” though the general definition of “minor” that includes a law enforcement officer still applies to the remainder of the provision of the Guidelines.²⁵ The Commission noted that the enhancement is intended to measure the effect of the defendant’s behavior on the victim.²⁶ As discussed further in Part III, I take the opposite approach and argue that the Undue Influence Enhancement should apply in the undercover sting context in order to appropriately punish culpable behavior.

²¹ *Id.* Some may argue that this definition of undue influence is too broad as a policy matter because it will sweep in a significant proportion of offenders. However, this Note focuses on the appropriateness of the enhancement itself in light of entrapment principles; considering what factors should constitute undue influence is beyond the scope of this Note. For further discussion on this point, see *infra* note 145.

²² *Root*, 296 F.3d at 1233–34.

²³ See *infra* Part I.B.2 (outlining Sixth and Seventh Circuit positions).

²⁴ *United States v. Chriswell*, 401 F.3d 459, 464 (6th Cir. 2005).

²⁵ U.S. SENTENCING GUIDELINES MANUAL § 2A3.2 cmt. n.3 (2010); see also *id.* at app. C, amend. 732 (Supp. 2010) (describing amendment).

²⁶ *Id.* at app. C, amend. 732 (Supp. 2010).

B. *The Circuit Split*

1. *The Eleventh Circuit*

The Eleventh Circuit became the first federal court of appeals to address the Undue Influence Enhancement question in the context of undercover stings when it decided the leading case on the issue in 2002. In *United States v. Root*, the court of appeals ultimately held that the enhancement applies to defendants accused of improper sexual conduct without a “real” child victim.²⁷ Thus, the Eleventh Circuit’s pre-amendment approach is compatible with my view of the proper role of the Undue Influence Enhancement.

Root was convicted of attempting to persuade, induce, entice, and coerce a minor to engage in criminal sexual activity under 18 U.S.C. § 2422(b) and traveling in interstate commerce for the purpose of engaging in a criminal sexual act with a minor under 18 U.S.C. § 2423(b).²⁸ The district court increased *Root*’s sentence via the Undue Influence Enhancement under section 2A3.2(b)(2)(B).²⁹ Noting that undercover officers representing themselves as children qualified as victims under the guideline, the district court focused on the behavior of the defendant and not whether a real child or an undercover officer was the recipient of the influence.³⁰ The district court applied the presumption of undue influence, because the undercover officer had represented that the victim, “Jenny,” was thirteen, more than ten years younger than *Root*.³¹

On appeal, *Root* challenged the application of the Undue Influence Enhancement in his case because there was no “real” victim whom his behavior affected.³² In considering this contention, the Eleventh Circuit reiterated the guideline’s inclusion of undercover officers as within the definition of “victim.”³³ The court also reviewed the Sentencing Commission’s statement that this definition was expanded specifically so that perpetrators apprehended in undercover operations could be sentenced more severely.³⁴ The Eleventh Circuit went on to hold that “the identity of the victim of an attempt conviction is irrelevant for purposes of a sentence enhancement under section 2A3.2(b)(2)(B). The offender need only have exerted undue influence aimed at convincing the victim ‘to engage’ in future

²⁷ 296 F.3d at 1234.

²⁸ *Id.* at 1226 & nn.6–7.

²⁹ *Id.* at 1227.

³⁰ *Id.* at 1233.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1233–34.

³⁴ *Id.* at 1234.

improper sexual activities.”³⁵ The court reiterated that the applicability of the Undue Influence Enhancement depends entirely on the perpetrator’s conduct and not on whether the undercover officer’s will was actually overborne.³⁶ Therefore, the court considered the presumption of undue influence to be appropriate when there is a ten-year age difference between the offender and the represented age of the victim.³⁷ The court rejected Root’s argument that, in the absence of a real victim, he could not rebut the presumption of undue influence because no victim was available to testify about the voluntariness of her conduct. Instead, the court noted that the government is equally disadvantaged by the absence of a real victim, and that Root could challenge the reasonableness of the factual determinations that were made at trial.³⁸

In defining what constitutes “undue influence” for purposes of the enhancement, the court held that district courts may consider “a variety of factors, including whether [the offender’s conduct] displays an abuse of superior knowledge, influence and resources.”³⁹ In the case at hand, Root displayed superior knowledge by graphically explaining sexual vocabulary and activities to “Jenny.”⁴⁰ He also exerted persuasive influence over her by providing reassurances that other thirteen-year-olds engaged in such sexual activity, complimenting her appearance, and reiterating his interest in her.⁴¹ As the court noted, “[a]ll of these messages were phrased by Root to win over the insecure teenager portrayed by [the undercover officer].”⁴² Lastly, Root exploited his superior resources to influence his victim, by using his computer to communicate with her and driving across three state lines to meet her.⁴³

The Eleventh Circuit continued to apply the standard it enunciated in *Root*, focusing on the defendant’s conduct rather than on whether the victim was a “real” child or an undercover officer for purposes of the Undue Influence Enhancement.⁴⁴ As recently as

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1234–35.

³⁸ *Id.* at 1236 n.27.

³⁹ *Id.* at 1234; see also U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 592 (2010) (Reason for Amendment) (articulating same factors).

⁴⁰ *Id.* at 1235.

⁴¹ *Id.*

⁴² *Id.* at 1236.

⁴³ *Id.*

⁴⁴ See, e.g., *United States v. Vance*, 494 F.3d 985 (11th Cir. 2007) (upholding application of Undue Influence Enhancement under parallel section of Guidelines for commercial sex acts, U.S. SENTENCING GUIDELINE MANUAL § 2G1.3(b)(2)(B), despite fact that defendant had arranged his illicit meeting with minors through undercover intermediary).

September 2009, the Eleventh Circuit expressly declined to follow the contrary approaches of the Sixth and Seventh Circuits regarding the applicability of the enhancement to undercover stings.⁴⁵ More recently, however, the Eleventh Circuit has indicated that it will follow the Commission's amended commentary.⁴⁶

2. *The Sixth and Seventh Circuits*

Shortly after the Eleventh Circuit decided *Root*, the Sixth and Seventh Circuits adopted a fundamentally different approach in *United States v. Chriswell*⁴⁷ and *United States v. Mitchell*,⁴⁸ respectively. Both courts declined to apply the Undue Influence Enhancement to undercover stings. Rather than adopting a defendant-based approach like the *Root* court, these circuits endorsed a victim-centered test that asks whether the victim's will was in fact overcome.⁴⁹ The courts expressed particular concern about the potential for government abuse and manipulation if the enhancement were to apply to undercover operations, especially with regard to the rebuttable presumption.⁵⁰ The *Mitchell* court emphasized that, “[i]n these Internet sting operations, the police create the victim, decide what characteristics he or she will have, and what actions he or she will take,”⁵¹ and that “[o]f course the government will always ensure that the imaginary victim is more than ten years younger than the offender, and that his or her will can be overcome readily by the offender's influences.”⁵² This argument was echoed by the Sixth Circuit in *Chriswell*.⁵³ The victim-centered approach suggests that the

⁴⁵ See *United States v. Faris*, 583 F.3d 756, 761 (11th Cir. 2009) (concluding that approach taken by Sixth and Seven Circuits has no legal force until Congress adopts it).

⁴⁶ See *United States v. Jerchow*, No. 09-13795, 2011 WL 204751, at *4-5 (11th Cir. Jan. 25, 2011) (noting that amendment “overturns [Eleventh Circuit] precedent” and applying revised provision of Guidelines).

⁴⁷ 401 F.3d 459 (6th Cir. 2005).

⁴⁸ 353 F.3d 552 (7th Cir. 2003).

⁴⁹ *Chriswell*, 401 F.3d at 469; *Mitchell*, 353 F.3d at 559.

⁵⁰ This concern is similar to that underlying the entrapment and sentencing entrapment defenses, though the courts did not use entrapment analyses in their evaluations of the Undue Influence Enhancement. For more information on entrapment doctrine, see *infra* Part II. I address the objections to applying the enhancement in the context of undercover stings in Part III and conclude that they do not justify a blanket prohibition on application of the enhancement to offenders apprehended in undercover operations.

⁵¹ *Mitchell*, 353 F.3d at 561.

⁵² *Id.* at 560.

⁵³ The Sixth Circuit noted that “[b]ecause the government official presenting himself to the defendant will have full control over all aspects of the characteristics of the fictitious victim, the victim will always appear as an unwilling and inexperienced victim whose will is easily overcome,” rendering it “virtually impossible” for the defendant to overcome the presumption of undue influence. *Chriswell*, 401 F.3d at 470.

actions of government agents—rather than the defendant’s behavior—could determine whether the enhancement applies in a given undercover case and reflects the concern that the government will entice defendants to behave in more egregious ways than they would have otherwise.

Applying the Undue Influence Enhancement to undercover Internet stings thus raises several potential difficulties. One of these is a factual impossibility defense in the context of interpreting the provision of the Guidelines—i.e., whether it is even possible for an agent acting as a minor to be unduly influenced.⁵⁴ However, I will focus on concerns about government behavior and entrapment in undercover stings, and, in particular, on the argument that it is fundamentally unfair and inappropriate to increase a defendant’s sentence under the enhancement when the only “victim” is created by the government.

II

ENTRAPMENT AND SENTENCING ENTRAPMENT

As the Sixth and Seventh Circuits have suggested,⁵⁵ the government’s exclusive control over the qualities of the “victim” in undercover stings raises red flags for government misconduct, which could lead to an entrapment defense or application of the sentencing entrapment theory. Examining the intricacies of both the traditional and sentencing entrapment doctrines⁵⁶ helps to evaluate the appropriateness of applying the Undue Influence Enhancement to defendants caught in undercover stings. The entrapment defense generally is premised on the theory that it is improper to use law enforcement “to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law.”⁵⁷ Although courts recognize entrapment as a defense, defendants rarely raise it, and when they do, they are rarely successful.⁵⁸ As will be discussed further in Part II.B, sentencing entrapment is a variation on the traditional entrapment concept that, rather than providing a defense to the crime, warrants a sentencing reduction if law enforcement induces the defendant to commit a crime more serious than the one he

⁵⁴ See *infra* text accompanying notes 132–37 for a discussion of factual impossibility.

⁵⁵ See *supra* Part I.B.2 (discussing *Chriswell* and *Mitchell*).

⁵⁶ See *infra* Part II.B (outlining principles of sentencing entrapment doctrine).

⁵⁷ *Sherman v. United States*, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring); see also *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (“[A] gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation.”).

⁵⁸ See *infra* note 99 and accompanying text (citing empirical studies showing low success rate of entrapment defense).

would otherwise have committed. Defendants charged with attempted statutory rape in Internet stings and facing an enhanced sentence may consider raising a sentencing entrapment challenge. However, as I will explain, such a claim is unlikely to be successful.

A. Traditional Entrapment

Two distinct versions of the entrapment defense have emerged in criminal jurisprudence: a subjective and an objective test.⁵⁹ Under the subjective test that the Supreme Court and most states have adopted,⁶⁰ a court considers whether an offender would have committed the crime but for the government's inducement. If a defendant were predisposed to commit the offense, the entrapment defense would be unavailable to him, irrespective of the government's conduct.⁶¹ The predisposition test "maintain[s] the appearance of protecting the innocent" and allows the police to ensnare the predisposed without unduly limiting investigative tactics.⁶² The Supreme Court famously articulated this approach over seventy years ago in the Prohibition-era case *Sorrells v. United States*.⁶³ The Court explained that

the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent to its commission by repeated and persistent solicitation.⁶⁴

The *Sorrells* Court thus elucidated a subjective entrapment defense, which focuses on the character of the defendant and is applicable "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."⁶⁵ The Court called for examination of

⁵⁹ The objective entrapment test has often been conflated with the outrageous government conduct test. See *infra* Parts II.C and III.B for a discussion of these tests. For a thorough discussion of the evolution of the entrapment and outrageous government conduct defenses, see Kenneth M. Lord, *Entrapment and Due Process: Moving Toward a Dual System of Defenses*, 25 FLA. ST. U. L. REV. 463 (1998).

⁶⁰ See Lord, *supra* note 59, at 495 & n.269 (explaining that approximately thirty-seven states use subjective entrapment defense).

⁶¹ Scott C. Paton, Note, "The Government Made Me Do It": A Proposed Approach to Entrapment Under *Jacobson v. United States*, 79 CORNELL L. REV. 995, 1002 (1994).

⁶² Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1400 (2004).

⁶³ 287 U.S. 435 (1932).

⁶⁴ *Id.* at 441.

⁶⁵ *Id.* at 442.

a defendant's predisposition to determine his eligibility for the defense.⁶⁶

The *Sorrells* Court justified its construction of the entrapment defense on statutory interpretation grounds. The Court reasoned that Congress could not have intended that its penal statutes be used to entice the "otherwise innocent" into committing crimes, and that permitting entrapment would be inconsistent with the statute that criminalized defendants' conduct.⁶⁷ Moreover, the Court noted that an opposite conclusion would be contrary to public policy.⁶⁸

The Court reaffirmed its subjective approach to entrapment in *Sherman v. United States*,⁶⁹ famously holding that the inquiry requires that "a line . . . be drawn between the trap for the unwary innocent and the trap for the unwary criminal."⁷⁰ Over the years, the Court has continued to voice its preference, absent a contrary statutory specification, for a defendant-focused subjective entrapment defense.⁷¹ Although it was not explicitly discussing entrapment, the Eleventh Circuit in *Root* used an analogous defendant-centered approach in applying the Undue Influence Enhancement; that is, it sought to sentence *Root* based on his actions, not those of the government.⁷²

A minority of states have preferred an objective entrapment approach, which focuses on the tactics and potential misconduct of the government rather than on the predisposition of the defendant.⁷³ Justice Frankfurter forcefully advocated for this position in his *Sherman* concurrence, arguing that courts should discourage unjust government tactics by refusing to give the government the ultimate

⁶⁶ *Id.* at 451.

⁶⁷ *Id.* at 448.

⁶⁸ *Id.* at 449.

⁶⁹ 356 U.S. 369 (1958).

⁷⁰ *Id.* at 372. The *Sherman* Court found entrapment as a matter of law when a government informant needed several attempts to persuade the defendant to provide the informant with narcotics and ultimately succeeded in the trap by appealing to the defendant's sympathies regarding drug addiction. *Id.* at 373–74. The Court was especially displeased with the government's tactic of targeting a recovering drug addict and criticized it for "play[ing] on the weaknesses of an innocent party and beguil[ing] him into committing crimes which he otherwise would not have attempted." *Id.* at 376.

⁷¹ See, e.g., *Jacobson v. United States*, 503 U.S. 540, 553–54 (1992) (reversing defendant's conviction for receiving child pornography when government could not prove predisposition); *United States v. Russell*, 411 U.S. 423, 432–36 (1973) (affirming subjective entrapment test articulated in *Sherman* and *Sorrells*).

⁷² *United States v. Root*, 296 F.3d 1222, 1234 (11th Cir. 2002).

⁷³ See Lord, *supra* note 59, at 495 & n.269 (explaining that thirteen states and Model Penal Code have adopted some version of objective approach); see also Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 12 & n.29 (2005) (noting that five states utilize hybrid variation of objective defense).

prosecutorial benefit.⁷⁴ His proposed test would consider whether the police conduct in question violates commonly understood conceptions of the proper use of governmental power.⁷⁵ The Alaska Supreme Court similarly outlined a typical objective standard in the 1969 case *Grossman v. State*.⁷⁶ The *Grossman* court held that “unlawful entrapment occurs when a public law enforcement official . . . induces another person to commit . . . an offense by persuasion or inducement which would be effective to persuade *an average person*, other than one who is ready and willing, to commit such an offense.”⁷⁷ This approach is more policy oriented, focusing on the incentive structure for law enforcement and setting a proper standard of behavior for undercover investigations.

B. Sentencing Entrapment

Sentencing entrapment—which incorporates many of the principles of the traditional entrapment doctrine described above—is particularly relevant to the debate over the Undue Influence Enhancement. This theory allows offenders to argue that the government intentionally manufactured the specific qualities of the fictional victim so as to warrant a higher sentence (for example, by claiming the child lives geographically far from the adult, requiring him to use superior resources and cross state lines in order to meet him or her).⁷⁸ As mentioned above, sentencing entrapment doctrine differs slightly from traditional entrapment in that it applies when government officials induce a person *who has already committed or is committing an offense* to engage in more serious criminal conduct and earn a more significant sentence.⁷⁹ The defendant thus “claim[s] that the sole purpose of the government’s intentional coercive behavior [i]s to enhance the defendant’s sentence based on guideline factors” and that, as a result, the defendant’s sentence is inconsistent with his actual culpability.⁸⁰

⁷⁴ *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring).

⁷⁵ *Id.* at 382.

⁷⁶ 457 P.2d 226 (Alaska 1969).

⁷⁷ *Id.* at 229 (emphasis added); see also Paton, *supra* note 61, at 1003 (describing Alaska court’s approach).

⁷⁸ For a helpful explanation and evaluation of sentencing entrapment doctrine, see generally Stevenson, *supra* note 73.

⁷⁹ In contrast, the traditional entrapment defense rests “not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct.” *Sorrells v. United States*, 287 U.S. 435, 452 (1932).

⁸⁰ Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 716–17 (1996).

A prototypical sentencing entrapment scenario occurs when an undercover agent, posing as a drug buyer, encourages a seller to deal in a greater quantity or different quality of drug (for example, crack versus powder cocaine), thereby triggering a higher sentence.⁸¹ Sentencing entrapment is thus pegged to the extent of a defendant's criminality, rather than its existence: In other words, "the defendant acknowledges that he is a criminal, but argues that law enforcement encouraged him to be a worse criminal."⁸² Compared to traditional entrapment—which affords the defendant a complete defense at trial because the government induced him to commit the crime—a successful sentencing entrapment claim typically warrants only a sentencing reduction.⁸³

The Supreme Court has not yet addressed sentence mitigation due to sentencing entrapment, and the lower courts have been inconsistent in their terminology and approaches to the issue.⁸⁴ Federal district and circuit courts have adopted varying standards and names for sentencing entrapment, and, though some recognize the possibility of a mitigated sentence, they generally have been hesitant to apply sentence reductions in cases before them.⁸⁵

In articulating a standard for sentencing entrapment claims, some circuits have adopted a subjective approach, mirroring that of the widespread subjective traditional entrapment defense focusing on the defendant's predisposition.⁸⁶ Others apply an objective test to sentencing entrapment—often called "sentencing manipulation"—which, much like the objective approach to traditional entrapment, is

⁸¹ See *id.* (discussing law enforcement strategies to increase sentencing ranges under Guidelines). For a discussion of the underpinnings of sentencing entrapment claims and the various tests used, see Stevenson, *supra* note 73, at 39-53.

⁸² Amy Levin Weil, *In Partial Defense of Sentencing Entrapment*, 7 FED. SENT'G REP. 172, 174 (1995).

⁸³ See Stevenson, *supra* note 73, at 47 ("Sentencing entrapment and regular entrapment are conceptually distinct. The former is a mitigating factor for punishments, while the latter allows the defendant to go free if the claim is successful.")

⁸⁴ See *id.* at 44-45 (discussing lower court split).

⁸⁵ *Id.* at 44-45 & n.117. For a thorough survey of the approaches of various courts, see *United States v. Sed*, 601 F.3d 224, 229-30 (3d Cir. 2010), discussing differences between circuits; *United States v. Padilla*, No. 03-CV-85, 2003 U.S. Dist. LEXIS 12195, at *16-21 (E.D. Pa. June 20, 2003); and Jess D. Mekeel, Note, *Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine*, 14 WM. & MARY BILL RTS. J. 1583, 1593-1603 (2006).

⁸⁶ See, e.g., *United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009) (noting that, to succeed on sentencing entrapment claim, defendant must demonstrate lack of predisposition and government persistence that overcame his will); *United States v. Walls*, 70 F.3d 1323, 1329 (D.C. Cir. 1995) (stating that defendant's predisposition is "main element" in sentencing entrapment defense).

anchored in due process concerns⁸⁷ and “focus[es] on the conduct (or misconduct) of the government agents in manipulating the defendant’s sentence” rather than on the individual predisposition of the offender.⁸⁸ Some courts, including the First Circuit, have created a hybrid rule that requires both government misconduct and the defendant’s lack of predisposition to commit the more serious crime.⁸⁹ Even when courts recognize sentencing entrapment or manipulation, the sentencing reduction typically applies only in the case of the most extraordinary government misconduct involving rare and especially egregious circumstances.⁹⁰ For example, the Seventh Circuit—the court that decided *Mitchell*—requires that the defendant show “(1) that he lacked a predisposition to commit the crime, and (2) that his will was overcome by unrelenting government persistence.”⁹¹ In contrast, the Second and Sixth Circuits have not accepted sentencing entrapment or manipulation as a basis for sentence mitigation.⁹² Far from developing a clear and unified standard on sentencing entrapment, federal courts have not reached a consensus on whether they will accept sentencing entrapment claims at all and, if so, when and under what standard they will consider doing so.⁹³

On the whole, courts have proven largely unsympathetic to sentencing entrapment claims in specific cases, even when the relevant court accepts the concept as a theoretical possibility.⁹⁴ One commen-

⁸⁷ See *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007) (noting that defense of sentencing manipulation focuses on government behavior and can be invoked even if government’s manipulation is not sufficient for due process claim); Mekeel, *supra* note 85, at 1617 (“[W]hen a defendant raises a claim of sentencing manipulation, he is acknowledging that he is guilty of a crime but that the outrageous misconduct of the officers caused him to commit a more severe crime, thereby violating his right to due process.”). Note that the Eleventh Circuit’s focus on government conduct in its approach to sentencing entrapment/manipulation is different from its focus on defendant culpability in the context of the Undue Influence Enhancement.

⁸⁸ Weil, *supra* note 82, at 173.

⁸⁹ See, e.g., *United States v. Lora*, 129 F. Supp. 2d 77, 89 (D. Mass. 2001) (“[G]overnment misconduct must be found to have overborne the will of a defendant predisposed to commit a lesser crime than the one charged . . . [and t]he defendant also must show lack of predisposition to engage in an offense of the magnitude for which she is being sentenced.” (citing *United States v. Woods*, 210 F.3d 70, 75 (1st Cir. 2000))).

⁹⁰ *United States v. Montoya*, 62 F.3d 1, 3–4 (1st Cir. 1995).

⁹¹ *United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009) (internal quotation marks omitted).

⁹² *United States v. Floyd*, 375 F. App’x 88, 89–90 (2d Cir. 2010); *United States v. Greer*, No. 07-3687, 2011 U.S. App. LEXIS 3950, at *6–7 (6th Cir. Feb. 28, 2011).

⁹³ Mekeel, *supra* note 85, at 1603.

⁹⁴ For an overview of sentencing entrapment’s minimal success in the various circuits, see *id.* at 1595–1603. Since the late 1990s, the number of sentencing entrapment cases has steadily declined, as it was realized that the “claims do not fare well at all.” Stevenson, *supra* note 73, at 45.

tator has suggested that claims accounting for the offender's predisposition are more likely to succeed, because the objective sentencing manipulation regime requires very egregious government misconduct.⁹⁵ However, the subjective predisposition-based test is problematic for defendants as well. As the First Circuit has explained, in a sentencing entrapment scenario, "[h]aving crossed the reasonably bright line between guilt and innocence, . . . a defendant's criminal inclination has already been established, and the extent of the crime is more likely to be a matter of opportunity than of scruple."⁹⁶ In this way, the policy underlying sentencing entrapment claims is weaker than that for traditional entrapment, as the latter involves the transformation of an innocent into a guilty person rather than merely the opportunity for a proven (or admitted) criminal actor to increase the degree of his crime.⁹⁷ The Fourth Circuit effectively explained this difficulty, noting that

[i]t makes little sense to us to adopt a rule that would not provide an entrapment defense to a defendant who was predisposed to commit an illicit narcotics transaction where an undercover agent deliberately bargained for an amount of narcotics in excess of the applicable statutory minimum, yet would provide a ground for a downward departure to the same defendant merely because the undercover agent deliberately bargained for an amount of narcotics in excess of some amount relevant for sentencing purposes.⁹⁸

This underlying disconnect may explain the general reluctance of courts to impose sentence reductions based on sentencing entrapment rationales, especially since most commentators believe that even the traditional entrapment defense is rarely successful.⁹⁹ In this way, neither the objective nor subjective approach to sentencing entrapment is a particularly fertile option for defendants.

⁹⁵ Weil, *supra* note 82, at 173.

⁹⁶ United States v. Montoya, 62 F.3d 1, 4 (1st Cir. 1995).

⁹⁷ See Mekeel, *supra* note 85, at 1608–09 (“Protection of innocence has been the underlying theme in the Supreme Court’s entrapment jurisprudence, and accordingly, the benefits of the doctrine of entrapment were not intended to be extended to defendants who only intended to commit less severe crimes.” (citations omitted)).

⁹⁸ United States v. Jones, 18 F.3d 1145, 1152 n.7 (4th Cir. 1994).

⁹⁹ See, e.g., Stevenson, *supra* note 73, at 15–16 & n.36 (explaining that data accumulation on efficacy of entrapment defense is difficult given that successful claims often result in unpublished dismissals or acquittals, but noting that “conventional wisdom” indicates that few defendants raise defense and that it rarely succeeds); Stephen G. Valdes, Comment, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1715–17 (2005) (“[T]he entrapment defense arose in 0.08% of cases and succeeded in one-third of these cases.”).

The Guidelines have incorporated a narrow sentencing entrapment rationale in a specific context.¹⁰⁰ Section 2D1.1 of the Guidelines—the provision that prescribes sentences for drug offenses based on weight—permits a downward sentencing departure in reverse stings in which the law enforcement officer offers a price for drugs substantially below market value, thereby enabling the defendant buyer to purchase a greater quantity of drugs than he otherwise would have.¹⁰¹ Similarly, in a regular government sting, the defendant has the opportunity to show that he did not intend to, nor was he able to, deal in the quantity of drugs agreed to with the undercover officer, thereby reducing his offense level calculation based on the quantity he actually intended to or was able to buy and/or sell.¹⁰²

Sentencing entrapment was arguably a more significant problem when the Guidelines were mandatory prior to the Supreme Court's decision in *United States v. Booker*,¹⁰³ because the Guidelines as originally applied greatly restricted judges' discretion to account for questionable government conduct and potential sentencing entrapment in making sentencing decisions.¹⁰⁴ This problem was especially noticeable in the drug-crime context. As a pre-*Booker* Ninth Circuit decision noted, in a determinate drug sentencing regime, entrapment doctrine did not adequately protect defendants against government misconduct or sentences inconsistent with defendants' culpability.¹⁰⁵

¹⁰⁰ Although sentencing entrapment can be used in mitigation of many types of crimes, I frequently use drug crimes as examples in this section because they clearly illustrate the issues embedded in raising the defense.

¹⁰¹ Application Note 14 to section 2D1.1 of the Guidelines states:

If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 application n.14 (2010).

¹⁰² Application Note 12 to section 2D1.1 of the Guidelines states:

If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

Id. § 2D1.1 application n.12.

¹⁰³ 543 U.S. 220 (2005).

¹⁰⁴ See Mekeel, *supra* note 85, at 1590–91 & n.69 (noting that there is less concern about government sentencing entrapment with return of judicial discretion after *Booker*).

¹⁰⁵ *United States v. Stauffer*, 38 F.3d 1103, 1106–07 (9th Cir. 1994).

Particularly when there is a knowledge discrepancy between the government and defendant about the laws and sentencing regimes at issue, it is easy for an agent to target his investigation so as to “ratchet up” the applicable punishment.¹⁰⁶

Although the Guidelines are now “effectively advisory,”¹⁰⁷ estimates under the Guidelines are still based on the quantity of drugs involved in the crime,¹⁰⁸ and judges must consider the Guidelines calculations when determining sentences.¹⁰⁹ Consequently, sentences continue to be heavily influenced by drug quantities. Congress has also imposed substantial mandatory statutory minimums for drug offenses, again based on the weight of the drugs.¹¹⁰ Thus, although the risks of sentencing entrapment may be lessened with the increased sentencing discretion of judges after *Booker*, law enforcement still faces an incentive to produce defendants dealing in the largest quantity of drugs possible so as to increase the Guidelines sentencing range or trigger a statutory mandatory minimum. This theory applies to non-drug crimes as well: If a statute or section of the Guidelines provides for an increased sentence based on factors under the government’s control in an undercover operation (such as the Undue Influence Enhancement), law enforcement may manipulate the circumstances so as to trigger the increased penalty.

C. *Outrageous Government Conduct*

Defendants may also raise a substantive due process claim to challenge the activities of law enforcement officials in undercover operations. A successful “outrageous government conduct” defense precludes the government from prosecuting a defendant when law enforcement officials have engaged in extreme misconduct during the relevant investigation. In the case of an Internet sting, a defendant would have to claim that the undercover officer’s behavior during the online exchange was so egregiously improper that a conviction—or sentencing enhancement—resulting from this misbehavior would violate his due process rights.

The Supreme Court originally conceptualized outrageous government conduct in the Fourth Amendment context, prior to its incor-

¹⁰⁶ See Stevenson, *supra* note 73, at 52–53 (discussing benefit to government from having greater access to information than defendant and noting that “[p]rosecutors and undercover agents learn the rules ahead of time, or by being repeat players in the game, and plan their decisions around those [rules]”).

¹⁰⁷ *Booker*, 543 U.S. at 245.

¹⁰⁸ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2010).

¹⁰⁹ 18 U.S.C. § 3553(a) (2006); *Booker*, 543 U.S. at 259, 264.

¹¹⁰ 21 U.S.C. § 841(b) (2006).

poration against the states.¹¹¹ In the 1952 case *Rochin v. California*, law enforcement officials subjected a suspect to forced stomach pumping to recover morphine capsules he had swallowed.¹¹² The Court found that the underlying police conduct “shock[ed] the conscience” and “offend[ed] even hardened sensibilities,”¹¹³ and was thus violative of due process.¹¹⁴ The Court’s approach in *Rochin* has been characterized as applicable to only the *most* egregious circumstances that “involve[]: (1) flagrant disregard of the Fourth Amendment; (2) brutality to the person; and (3) the extraction of evidence from inside the suspect’s body.”¹¹⁵ Even prior to the Fourth Amendment’s incorporation, the Court was reluctant to expand these parameters, finding no outrageous government conduct when only flagrant illegality *or* bodily extraction had occurred, without more.¹¹⁶

More recently, defendants have challenged government conduct by mounting both a due process defense and an entrapment defense when agents were involved in undercover operations. The Supreme Court in *United States v. Russell* invoked *Rochin* and acknowledged that circumstances may indeed exist in which law enforcement officers behave in such an egregious manner that due process rights protect the defendant from a resulting conviction.¹¹⁷ Importantly, however, the *Russell* Court declined to find a due process violation where a government agent had supplied a chemical to aid the defendant in his ongoing methamphetamine manufacturing efforts, finding the government’s activities to be “scarcely objectionable.”¹¹⁸

Three years after *Russell*, a plurality of the Court severely limited the scope of the outrageous government conduct defense in prosecutions resulting from undercover investigations. In *Hampton v. United States*, the defendant claimed that a government informant had sup-

¹¹¹ The Supreme Court applied the Fourth Amendment’s exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), overruling its previous contrary holding in *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹¹² 342 U.S. 165, 166 (1952).

¹¹³ *Id.* at 172.

¹¹⁴ *Id.* at 174.

¹¹⁵ Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261, 267.

¹¹⁶ *Id.* at 267–68 (citing *Irvine v. California*, 347 U.S. 128 (1954), and *Breithaupt v. Abram*, 352 U.S. 432 (1957)). After the Fourth Amendment’s exclusionary rule was applied to the states, however, the outrageous government conduct defense became largely obsolete in the search and seizure context. See *Lester v. Chicago*, 830 F.2d 706, 710–11 (7th Cir. 1987), for a discussion of the evolution of the shocks-the-conscience standard between *Rochin* and the incorporation of the Fourth Amendment’s exclusionary rule.

¹¹⁷ 411 U.S. 423, 421–32 (1973).

¹¹⁸ *Id.* at 432.

plied him with heroin that he then sold, resulting in his arrest.¹¹⁹ Justice Rehnquist's plurality opinion rejected Hampton's due process claim, holding that a predisposed defendant is ineligible for such a defense.¹²⁰ In this view, a due process violation occurs exclusively when the government conduct actually violates the rights of the defendant, not when the defendant and government act together.¹²¹ However, Justice Powell's concurrence (joined by Justice Blackmun), left open the possibility of a successful due process challenge even in the case of a predisposed offender.¹²²

III

APPLICATION TO SEX-CRIME STINGS

In order to punish and deter perpetrators of sex crimes against children effectively, lawmakers and judges must address concerns about unfair government conduct and sentencing practices for these offenses. Both Congress and the Sentencing Commission have expressed particular distress over the use of the Internet by sex predators and have provided for the severe punishment of related crimes.¹²³ As the Supreme Court noted in the context of the drug trade, certain types of crimes are nearly impossible to detect without utilizing undercover agents.¹²⁴ In the sex-crime context—and especially when children are the intended victims—preemptive apprehension is crucial, and undercover operations are an invaluable tool in achieving this outcome. Such stings are permitted under Supreme Court jurisprudence,¹²⁵ with courts policing the boundaries of accept-

¹¹⁹ 425 U.S. 484, 487 (1976).

¹²⁰ *Id.* at 488–89 (“[T]he defense of entrapment [can never] be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.”).

¹²¹ *Id.* at 490.

¹²² *Id.* at 495 (Powell, J., concurring).

¹²³ See, e.g., U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 592 (2010); U.S. SENTENCING COMM'N, PROTECTION OF CHILDREN FROM SEXUAL PREDATORS ACT OF 1998: DIRECTIVES TO UNITED STATES SENTENCING COMMISSION (1998), available at http://www.ussc.gov/Research/Working_Group_Reports/Sex_Offenses/20000214_Child_Sex_Offenses/PREDLEGH.PDF (“[T]he Sentencing Commission shall promulgate amendments to provide an appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity.”).

¹²⁴ *United States v. Russell*, 411 U.S. 423, 432 (1973) (“[I]n drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. . . . Law enforcement tactics such as this can hardly be said to violate fundamental fairness or shocking to the universal sense of justice.” (internal quotation marks omitted)).

¹²⁵ *Jacobson v. United States*, 503 U.S. 540, 548 (1992).

able government conduct through application of the entrapment and due process doctrines discussed above.

Sentencing entrapment concepts are particularly salient in sentencing for drug crimes, where the type and weight of the drug are the primary determinants of the punishment. On the other hand, sex crimes generally, and the Undue Influence Enhancement in particular, are less amenable to traditional sentencing entrapment analysis.¹²⁶ “Undue influence” is a nebulous concept not easily compatible with either the subjective or objective entrapment models. Determining whether the enhancement is appropriate requires examination of the behavior of both parties—the undercover agent and the defendant.¹²⁷ Whether a perpetrator has exercised the requisite amount of influence will be highly fact-bound and a matter of interpretation since the term “undue” is certainly not, on its face, a quantifiable concept. Undue influence is thus a very difficult standard for undercover officers to knowingly manufacture in practice. For example, the undercover sting officer may not have intended to induce the defendant to exert additional pressure over the “victim,” or the officer may not have known whether the defendant’s actions would constitute undue influence in any particular circumstance. Still, in an undercover Internet predation sting, the government largely controls the parameters of the crime and the factors leading to imposition of the enhancement.¹²⁸ This situation is especially problematic given the nature of the enhancement—that the perpetrator is considered more culpable based on the victim’s response to the crime.

As courts have noted, the most troubling aspect of the Undue Influence Enhancement is the rebuttable presumption of undue influence that applies when the defendant is more than ten years older

¹²⁶ The Third Circuit, at least, has indicated that it is unlikely to accept a sentencing entrapment defense in Internet sting cases. See Elizabeth D. Tempio, *A/S/L? 45/John Doe Offender/Federal Prison—The Third Circuit Takes a Hard Line Against Child Predators in United States v. Tykarsky*, 52 VILL. L. REV. 1071, 1090 (2007) (referencing Third Circuit’s dicta regarding sentencing entrapment in *United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006)).

¹²⁷ Application Note 3 to section 2A3.2 of the Guidelines specifies that the court should “determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior.” U.S. SENTENCING GUIDELINES MANUAL § 2A3.2 cmt. n.3 (2010).

¹²⁸ See, e.g., *United States v. Chriswell*, 401 F.3d 459, 470 (6th Cir. 2005) (“Because the government official presenting himself to the defendant will have full control over all aspects of the characteristics of the fictitious victim, the victim will always appear as an unwilling and inexperienced victim whose will is easily overcome.”); *United States v. Mitchell*, 353 F.3d 552, 560 (7th Cir. 2003) (similar).

than the victim.¹²⁹ The presumption raises three principal concerns about entrapment. First, the presumption is a clear *ex ante* signal to law enforcement about what facts are necessary to trigger the enhancement. Second, it is a simple and attractive tactic for undercover agents to represent themselves as sufficiently young to qualify for the presumption. In combination, these two factors provide a disconcerting incentive for law enforcement to ensure that the “victim” they present is at least ten years younger than the potential offender.¹³⁰ Third, once the presumption applies, it is difficult for the defendant to rebut it sufficiently in the absence of a real victim who can testify about whether he or she felt pressured or whether the defendant’s influence actually did overcome his or her will.¹³¹

Yet there are compelling doctrinal and policy reasons to treat defendants similarly regardless of whether their victim was a real child or an undercover agent. The so-called “factual impossibility defense” provides a helpful parallel to the problem of treating defendants differently when the government is involved in orchestrating the commission of a crime. Factual impossibility is defined as a situation in which “the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him or her from bringing about that objective.”¹³² In the Internet sting context, the “impossibility” is that an undercover officer can never be unduly influenced by a defendant as a real child could.¹³³ However, factual impossibility is generally not a viable defense to an attempt charge.¹³⁴ The law focuses on the “circumstances . . . as [the defendant] believes them to be”¹³⁵—rather than the defendant’s ultimate ability to complete the attempted crime—in condemning behavior based upon

¹²⁹ See, e.g., *Mitchell*, 353 F.3d at 560 (“Of course the government will always ensure that the imaginary victim is more than ten years younger than the offender, and that his or her will can be overcome readily by the offender’s influences.”).

¹³⁰ See *id.* (arguing that government will manipulate victim’s age to ensure application of Undue Influence Enhancement).

¹³¹ For an example of a case where the defendant made this precise argument (and was unsuccessful), see *United States v. Root*, 296 F.3d 1222, 1236 n.27 (11th Cir. 2002).

¹³² 21 AM. JUR. 2D *Criminal Law* § 156 (2010).

¹³³ Cf. *Mitchell*, 353 F.3d at 558 (concluding that enhancement is not applicable because defendant did not target and thus could not have influenced real victim).

¹³⁴ See, e.g., *United States v. Rankin*, 487 F.3d 229, 231 (5th Cir. 2007) (“Factual impossibility is not a defense to a charge of attempt.” (internal quotation marks omitted)); *United States v. Hamrick*, 43 F.3d 877, 885 (4th Cir. 1995) (similar); *United States v. Medina-Garcia*, 918 F.2d 4, 8 (1st Cir. 1990) (similar); *People v. Thousand*, 631 N.W.2d 694, 701 (Mich. 2001) (similar); see also MODEL PENAL CODE § 5.01(1)(a) (Proposed Official Draft 1962) (stating that person can be guilty of crime if he or she “purposely engages in conduct which would constitute the crime if the attendant circumstances were as he [or she] believes them to be”).

¹³⁵ MODEL PENAL CODE § 5.01(1)(a) (Proposed Official Draft 1962).

mental culpability. In such a culpability-centered paradigm, it is inconsistent to punish a defendant less severely (in this case, by barring use of the Undue Influence Enhancement) solely because the target of his crime was, unbeknownst to him, an undercover officer, when the defendant undertook conduct that would otherwise trigger the enhancement if the victim were a real child. In other words, regardless of the identity of the victim, the seriousness of the defendant's behavior—here, the extent to which he made efforts to unduly influence the victim—should be determinative of punishment.

The factual impossibility analogy illuminates an important element of the sentencing entrapment defense: Contrary to the concerns of the Sixth and Seventh Circuits, even if the government does strategically manipulate the victim's qualities and behaviors so as to prompt the defendant to exert pressure over him or her more aggressively, the defendant's intent and behavior—rather than the government's tactics—should ultimately control. Particularly in light of the underlying policy rationale for Internet stings—capturing dangerous child predators—such tactics allow the government both to determine the extent of the defendant's dangerousness and to enhance his sentence accordingly. The dangerousness of the defendant is especially important in the context of sex crimes against children given such offenders' notorious recidivism rates.¹³⁶ Focusing on the defendant's culpability and predisposition—rather than the effect of his conduct on the victim—is thus critical in order to achieve the goal of preemptive apprehension. As Judge Easterbrook noted in his *Mitchell* dissent, an undue influence calculation “depends on the words exchanged [between the defendant and victim], not on the contents of the victim's head.”¹³⁷

Entrapment principles shed light on the appropriate balance between the competing interests at issue: rigorous apprehension of online sex predators and fair sentencing practices for defendants. In general, both the subjective and objective approaches permit application of the enhancement—including the presumption—in the undercover sting context.

A. *The Subjective Test Applied*

As discussed in Part II, the subjective entrapment approach involves an inquiry into whether the defendant would have committed the crime—or, in the case of sentencing entrapment, engaged in the additional conduct—in the absence of government involvement. This

¹³⁶ See *supra* note 4 (discussing statutory rapist recidivism).

¹³⁷ *Mitchell*, 353 F.3d at 566 (Easterbrook, J., dissenting).

approach protects the so-called “unwary innocent” by preventing punishment of a person whose conduct is not a result of his own criminal predisposition. Predisposition is particularly easy to prove in the Internet sting context.¹³⁸ In such cases, the offender never gets beyond the attempt stage, but often goes so far as to meet the supposed victim in person with the intent to commit an illegal sexual act. When a perpetrator takes such substantial steps toward committing a serious sex crime, it is not difficult to impute to him the willingness to pressure the victim in order to complete the crime.¹³⁹ The ease with which a court may attribute such intent undermines a claim of sentencing entrapment, particularly under a subjective paradigm.¹⁴⁰

Comparing sex crimes to drug crimes again provides a helpful illustration. Imagine that the defendant drug dealer offers to sell a government agent an ounce of cocaine. In one scenario, the agent then encourages the dealer to sell him two ounces instead. In another, the agent induces the defendant to sell him a kilogram. Although an outside observer may be more concerned about the seriousness of the criminality of an offender willing to sell the kilogram, the question of government inducement is more pressing when, at the undercover officer’s behest, the conduct becomes much more serious than the initial act. Put another way, we are most concerned when the defendant’s own, unprompted conduct (i.e., selling an ounce of cocaine) is minor relative to the criminal act prompted by the government. Logically, it seems less likely that the defendant is predisposed to sell a kilogram when he initially offers an ounce, and more likely that he is predisposed to sell two ounces.¹⁴¹

¹³⁸ See Stevenson, *supra* note 73, at 69 (noting that, for traditional entrapment, predisposition “is a foregone conclusion in almost all of the cases because the defendants actively log onto certain chat rooms and engage in repeated, typed communications with their intended victims”); cf. 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, 431 (explaining that lack of predisposition is difficult to prove in sentencing entrapment claims for drug crimes, partly due to defendant’s low credibility after committing underlying crime).

¹³⁹ Cf. *Mitchell*, 353 F.3d at 567 (Easterbrook, J., dissenting) (noting that defendant possessed “plenty of predisposition”).

¹⁴⁰ Focusing on the offender’s culpability rather than the victim is consistent with parallel trends in substantive criminal law and sentencing practices. For example, the Model Penal Code generally punishes inchoate crimes as severely as the most serious crime attempted, solicited, or that is the object of the conspiracy (unless that crime is a capital crime or first degree felony). MODEL PENAL CODE § 5.05 (Proposed Official Draft 1962). This illustrates the Code’s emphasis on the defendant’s mens rea, rather than on the ultimate harm to the victim.

¹⁴¹ Cf. Stevenson, *supra* note 73, at 44-45 (“Individual defendants often appear unsympathetic, given that they set out to commit some crime, and the government agent simply orchestrated an incremental escalation.”).

Incrementalism is similarly important when deciding whether sex offenders should be subject to a sentencing increase via the Undue Influence Enhancement. By expressing a willingness to participate in a sex crime against a child, the additional influential conduct that the defendant employs in order to effectuate the crime is a small incremental change from his baseline criminal propensity. Presumably, the defendant will have to use some amount of influence in order to initiate online contact with a minor, convince the minor to participate in sexual activity, and coordinate an actual meeting. As the Eleventh Circuit noted, relevant factors in the undue influence determination include the offender's use of his superior resources, knowledge, and influence.¹⁴² Even the mere use of a computer to communicate with a victim or adult intermediary can suffice as a "superior resource."¹⁴³ As discussed above, behavior such as reassuring a child about his or her appearance or driving over state lines to meet with a victim can also be part of the undue influence calculus.¹⁴⁴ The use of such tactics by a person predisposed to commit a sex crime against a child is a small leap.¹⁴⁵ Therefore, we should be critical of an offender's argument that he was entrapped by the government into exerting such influence.

This observation about criminal propensity is particularly relevant when the government agent's conduct mirrors that of an actual child of the represented age.¹⁴⁶ When the government has acted as a

¹⁴² United States v. Root, 296 F.3d 1222, 1234, 1236 (11th Cir. 2002).

¹⁴³ United States v. Faris, 583 F.3d 756, 760 (11th Cir. 2009).

¹⁴⁴ See *supra* text accompanying notes 39–43 (discussing behavior considered to constitute undue influence in *Root*).

¹⁴⁵ Of course, this argument raises the question whether *all* defendants captured in Internet stings will receive increased sentences under the Undue Influence Enhancement. Applying the enhancement will involve a rigorous, fact-intensive inquiry into the defendant's behavior and interactions with the child. These are the same facts relevant to a predisposition determination in a sentencing entrapment defense—the defendant's *pre*-undue influence behaviors will indicate whether he would have undertaken the additional influential conduct in the absence of government involvement and thus whether the enhancement is appropriate. If, as a normative matter, one believes that too many offenders are subject to the enhancement, the problem is with the definition of the enhancement—i.e., what types of behavior constitute undue influence—not whether a real child or government agent was on the receiving end of that conduct.

¹⁴⁶ As some commentators have noted, a market-based approach that asks whether the government made an offer to a defendant otherwise replicable in the market is an appropriate measure for evaluating allegations of entrapment. See generally Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407 (1999) (arguing that entrapment defense should exonerate defendants when inducement to commit crimes exceeds real world market rates). The Guidelines reflect this market approach in their recognition of sentencing entrapment in certain drug cases. See *supra* note 101 (detailing downward departure when government agent sets price for controlled substance substantially below market value).

typical child would in the same circumstances, it is easy to attribute to the defendant the willingness to engage in the conduct necessary to carry through with the crime, including any undue influence he exerts over the victim, since he is responding to a victim's natural reaction to his advances. In these circumstances, we are less concerned that the defendant's influential conduct would not have occurred but for government involvement.

It is of course true that the government creates the qualities of the victim that may prompt a certain response from the offender. But, as the *Sherman* Court noted in the context of traditional entrapment, "the fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment."¹⁴⁷ In order for government conduct to constitute inducement for entrapment purposes, the agent must provide something more than mere opportunity—this "might consist of persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship."¹⁴⁸ Although the government may provide the defendant with a situation in which certain tactics are helpful to complete the crime, the defendant is still ultimately responsible for his voluntary conduct and for taking the incremental steps constituting undue influence.

This rationale applies even when the age of the victim triggers the rebuttable presumption of undue influence. If the defendant initiates online contact with a person he believes to be more than ten years younger than he is, he has already shown predisposition to commit a sex crime with a child of that age. Perhaps this would not be the case if the defendant initially approached an agent purporting to be an older child (whose age would not trigger the presumption) and then the government either changed the age of the victim after contact was established, or later approached the defendant claiming to be a much younger child, thereby inducing a significant incremental change in behavior. However, defendant-initiated contact with a purportedly very young child implies that the adult is willing to make the extra efforts necessary to persuade a particularly young child to participate

¹⁴⁷ *Sherman v. United States*, 356 U.S. 369, 372 (1958) (citation omitted).

¹⁴⁸ J. Gregory Deis, Note, *Economics, Causation, and the Entrapment Defense*, 2001 U. ILL. L. REV. 1207, 1222 (citation and internal quotation marks omitted); see also *United States v. Hinds*, 329 F.3d 184, 189 (D.C. Cir. 2003) ("[W]hat the government informant did here was to facilitate the defendant's commission of a crime. And whether such facilitation rises to the level of entrapment . . . depends on whether the government induced the defendant to commit a crime for which he lacked predisposition.").

in sexual activity. Indeed, this was the very rationale underlying the Sentencing Commission's creation of the presumption.¹⁴⁹

Of course, one can imagine a scenario in which the government encourages acts by the defendant far beyond what could conceivably be presumed from his initial willingness to commit the crime itself. This may be the case, for example, if the agent somehow induces the defendant to make threats or instill fear in the "victim" so as to force him or her to participate in the sex act. In such a scenario, applying the Undue Influence Enhancement may be inappropriate, since predisposition to make such threats of violence may be relatively difficult to prove, especially compared to typical undue influence factors like using superior resources or knowledge of sex to entice victims. As I will address further in the next Section, defendants may have access to the outrageous government conduct defense (potentially sidestepping the predisposition inquiry) in such extreme situations.

B. *The Objective Test Applied*

The objective test regulates improper behavior of law enforcement officers and discourages them from being inappropriately zealous in their undercover efforts. As discussed above, it is certainly conceivable that, should the government employ excessively coercive tactics that prompt the defendant to change his behavior, due process concerns may be implicated.¹⁵⁰ Although the objective approach may act as a safety valve for defendants exposed to extremely egregious government conduct, it does not demand a blanket prohibition on applying the Undue Influence Enhancement to all Internet stings.

Although extreme government conduct is always a possibility, it is unlikely that an objective sentencing entrapment argument will succeed in the Undue Influence context with any regularity. Because courts require egregious government misconduct under the objective test, the government will have to seriously offend concepts of fundamental fairness in order for a defendant to successfully argue that he was entrapped into exerting undue influence over his undercover

¹⁴⁹ The Commission explained the rebuttable presumption of undue influence by noting that "such a presumption is appropriate because persons who are much older than a minor are frequently in a position to manipulate the minor due to increased knowledge, influence, and resources." U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 592 (2010) (Reason for Amendment).

¹⁵⁰ See *supra* Part II.C (describing outrageous government conduct that has been held to violate due process). After *Hampton*, it is unclear whether the Court will be responsive to an outrageous government conduct claim from a defendant predisposed to commit the more serious actions. Note, however, that *Hampton* was not a sentencing entrapment case, so its applicability in this context is uncertain.

“victim.”¹⁵¹ Given that law enforcement officials have proven to be quite passive in Internet stings by waiting for a potential offender to initiate contact, law enforcement behavior will typically not qualify as “outrageous.”¹⁵²

Certainly, courts should consider the merits of a due process claim if sufficiently extreme government conduct occurs. Indeed, the lurking possibility of a due process challenge may itself provide a safeguard against abusive government action.¹⁵³ This is especially true in Internet stings, where contact between the government agent and defendant will necessarily be documented via the use of a computer. Such documentation may incentivize law enforcement not to test the bounds of appropriate conduct and will provide a helpful record for defendants and courts considering the merits of such a claim.

Under the objective test, the mere possibility of inappropriate government conduct should not warrant a wholesale prohibition on applying the Undue Influence Enhancement in sting operations. The operative question underlying this Note is whether government involvement in securing the enhancement is inherently coercive and worthy of an entrapment defense. Any case in which an objective sentencing entrapment claim succeeds will be an anomaly. Such outlier cases of government abuse—such as when the government induces the defendant to engage in threats or extremely coercive behavior—justify a case-by-case analysis of government coercion rather than a blanket requirement that undercover Internet stings automatically constitute entrapment.

CONCLUSION

Undercover operations on the Internet may well be the most effective way for law enforcement to detect and apprehend sex predators before they can reach child victims. Given the efficacy of

¹⁵¹ See Deiss, *supra* note 138, at 434 (arguing that outrageous government conduct defense rarely will be successful in sentencing realm); see also *United States v. Cao*, 331 F. App'x 687, 691 (11th Cir. 2009) (“[T]o bring sting operations within the ambit of sentencing factor manipulation, the government must engage in extraordinary misconduct.”).

¹⁵² See, e.g., *United States v. Vance*, 494 F.3d 985, 988 (11th Cir. 2007) (noting that undercover agent posted notice of travel opportunities with minors, but “did not single out any person to entice them to respond to his advertisement. Instead, he waited until he received a response”); *United States v. Mitchell*, 353 F.3d 552, 554 (7th Cir. 2003) (showing that defendant initiated online conversation with undercover official in chat room where older men went to meet underage girls).

¹⁵³ In the drug context, the remote chance of a sentencing entrapment challenge has caused some prosecutors to seek to deter law enforcement officials from bargaining for drug types and quantities different from those the offender initially intended. David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 FED. SENT'G REP. 168, 176 n.42 (2001).

these tactics, however, we must carefully examine the compatibility of existing sentencing structures with such methods. The Undue Influence Enhancement is a pertinent illustration of the competing concerns at issue—the desire to deter sex predation and capture dangerous offenders while simultaneously ensuring that defendants are treated fairly and are not subject to inappropriate government conduct or unfair sentencing.

The issues discussed in this Note do not constitute the entirety of objections to applying the Undue Influence Enhancement to Internet stings; there may be other legal and policy reasons to limit or prohibit its application in this context. However, by outlining the doctrinal underpinnings of the traditional entrapment defense, sentencing entrapment theory, and the outrageous government conduct defense, this Note has argued that these doctrines do not preclude the enhancement's application to online sting operations outright. It will typically be easy to prove that the defendant was predisposed to commit the influential conduct at issue, and it will be the rare—and extreme—case where defendants can successfully argue that the government's conduct was sufficiently outrageous to preclude the operation of the enhancement. In the end, the Undue Influence Enhancement should be made available to courts sentencing defendants caught in Internet stings, subject to a case-by-case evaluation of the appropriateness of its application. Increasing these sentences is an important way to deter and appropriately punish dangerous and highly culpable sex predators.