NOTES

THE DOMESTIC DOG'S FOREIGN TAIL: FOREIGN RELEVANT CONDUCT UNDER THE FEDERAL SENTENCING GUIDELINES

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In this Note, Valerie Roddy studies the continuing hesitancy of U.S. courts to include foreign relevant conduct in federal sentences, despite the expansive inclusion of domestic relevant conduct. Roddy analyzes the courts' principal concerns and concludes that the distinctions that courts are drawing between foreign and domestic relevant conduct are illusory. She argues that to achieve consistency in sentencing and proportional sentencing for international defendants, foreign and domestic conduct must be treated identically. Finally, she contends that distinguishing foreign relevant conduct and subjecting it to a special analysis is best viewed as a means of retaining a measure of discretion in a federal sentencing system struggling with both the potent effect of relevant conduct on sentences and the shrinking judicial discretion over sentences.

INTRODUCTION

Federal prosecutors charge a man with the possession of thirty videotapes depicting child pornography. He pleads guilty and proceeds to sentencing. The evidence that the defendant also produced the child pornography is damning—the defendant is visible in all of the videos, giving direction to the children. Although he was only charged and convicted of possession of the videotapes, the court will sentence him as if he were convicted of the production of child pornography.

Suppose that, upon closer inspection, the sentencing court notices that all of the minors in the films appear to be Asian and the backdrop is unfamiliar. Further investigation reveals that the defendant filmed

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all of the videos while living in Thailand. Still, the court will most likely use the defendant's foreign conduct to sentence him as if he were convicted in a U.S. court of the production, rather than mere possession, of child pornography.[1]

The first scenario depicts relevant conduct, the backbone of the U.S. Sentencing Guidelines (Guidelines), at work, bringing conduct that is not captured by the statutory elements of the crime of conviction to bear on the defendant's sentence.[2] Relevant conduct is such a potent provision of the Guidelines that sentencing courts are always wary of it being "a tail which wags the dog of the substantive offense."[3]

The second scenario, in which the pornography was made in Thailand, depicts foreign relevant conduct, that is, relevant conduct that occurs beyond the territorial borders of the United States. Although it is difficult to know in just how many sentencing decisions foreign relevant conduct plays a role,[4] the increasingly international nature of many federal crimes—such as drug trafficking, child pornography, "cyber" crime, money laundering, and terrorism-related crime—suggests that foreign relevant conduct plays a substantial role in federal sentencing today and will play an even greater role in years to come.[5] Since the inception of the Guidelines in 1987, however, for-

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[1] Although this defendant is a hypothetical one, the facts of his case are not substantially different from the facts of *United States v. Dawn*, 129 F.3d 878, 879–80 (7th Cir. 1997), or *United States v. Wilkinson*, 169 F.3d 1236, 1237 (10th Cir. 1999). *Dawn* and *Wilkinson* are discussed *infra* at notes 92–97 and accompanying text.

[2] *See generally* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. background (2003) [hereinafter U.S.S.G.] (describing use of relevant conduct in sentencing).

As this Note goes to press, the future of the Guidelines remains uncertain following the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). For more on the constitutional challenge that the precedent in *Blakely* poses to the relevant conduct provision of the Guidelines, see *infra* note 138.

[3] This expression was coined in a Supreme Court opinion concerning a state sentencing provision, McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986), and has been cited in a number of federal sentencing law decisions. *See, e.g.*, United States v. Watts, 519 U.S. 148, 156 n.2 (1997) (citing *McMillan*).

[4] Many defendants who plead guilty and waive their trial rights have incentives to remain silent on factual or legal issues surrounding the inclusion of relevant conduct at sentencing. Objections to relevant conduct may endanger sentencing reductions available to defendants who accept responsibility for their crimes and even invite increases for obstruction of justice if the objection is found to be unmerited, which may minimize the occasions on which the issue appears in sentencing case law. *See* John J. Tigue, Jr. & Jeremy H. Temkin, *Second Circuit Handles Sentencing Issues*, N.Y.L.J., Nov. 14, 2001, at 3 (reporting on United States v. McLeod, 251 F.3d 78 (2d Cir. 2001)).

[5] Transnational criminal activities include traditionally international crimes such as narcotics trafficking, trafficking in human beings (as migrants or for sexual exploitation), arms dealing, and smuggling, but also previously national crimes, such as trade in cigarettes, traffic in stolen cars, and fraud. *See, e.g.*, Louise Shelley et al., *Global Crime, Inc.*, *in* BEYOND SOVEREIGNTY: ISSUES FOR A GLOBAL AGENDA 143, 147–50 (Maryann

eign relevant conduct has spawned only a small body of case law. Though it has received little attention from practitioners and has been almost completely ignored by scholars, those cases that have addressed foreign relevant conduct offer a valuable window into larger tensions within the Guidelines regime.

This Note argues that courts considering the question of foreign relevant conduct have done so in a manner that is seemingly haphazard and divorced from the fundamental principles of relevant conduct jurisprudence established in the context of domestic relevant conduct. Courts frequently have asked the wrong questions from a relevant conduct perspective, often distinguishing and raising special concerns about the proper treatment of conduct simply because of its foreignness. This Note contends that courts should simplify their analyses of foreign relevant conduct and adhere to the general principles of relevant conduct that uniformly dictate its inclusion in sentencing, regardless of where that conduct took place. Finally, it suggests that, though seemingly misguided, the courts' occasionally convoluted analyses of this issue should not be dismissed out of hand; under the guise of concerns about the conduct's foreignness, these cases may represent a venting of judicial concern about the scope and application of relevant conduct in general and constitute another front in the battle over judicial discretion in the Guidelines.[6]

Part I of this Note provides a basic introduction to relevant conduct: its definition, its role in the Guidelines, and the purposes it serves. Part II briefly describes the general principles of relevant con-

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Cusimano Love ed., 2003). In the United States, the American Mafia now competes with outposts of foreign criminal organizations, such as the Russian Mafiya, the Chinese Triads, the Japanese Yakuza, and the Jamaican posses that all tend to be pointedly transnational in both membership and criminal activities. Susan W. Brenner, *Organized Cybercrime? How Cyberspace May Affect the Structure of Criminal Relationships*, 4 N.C. J.L. & TECH. 1, 4–6 (2002). Meanwhile, advents in transportation and communications have facilitated crimes such as drug trafficking while advances in information technology and the proliferation of the Internet have facilitated crimes such as fraud. *See, e.g.*, Ariana Eunjung Cha, *Internet Dreams Turn to Crime; Russian Start-Up Became a Profitable Protection Racket*, WASH. POST, May 18, 2003, at A1 (describing Russian company that exploited vulnerabilities in American company networks, stole valuable information including credit card numbers of customers, and extorted money for its return); DEA, INTELLIGENCE DIV., DRUGS AND TERRORISM: A NEW PERSPECTIVE (Sept. 2002) (describing effect of globalization on modern criminal enterprises), http://www.dea.gov/pubs/intel/02039/02039.html.

The increasingly transnational character of federal law enforcement also is reflected in the number of federal agents stationed abroad. The Federal Bureau of Investigation has operations in fifty-two other countries, and the Drug Enforcement Agency has eighty foreign offices in fifty-eight countries. *See* FBI, *Legats*, *at* http://www.fbi.gov/contact/legat/legat.htm (last visited June 21, 2004); DEA, *Inside the DEA: Office Locations*, *at* http://www.dea.gov/agency/domestic.htm (last visited June 21, 2004).

[6] *See infra* notes 141–148 and accompanying text.

duct that courts normally apply and then sketches the contours of the courts' forays into foreign relevant conduct. Part III analyzes the foreign relevant conduct cases, highlighting some of the special concerns that foreign conduct might raise, and argues that these concerns notwithstanding, courts should apply general relevant conduct principles to foreign conduct and treat foreign and domestic relevant conduct identically. This Note concludes by positing that current foreign relevant conduct jurisprudence should be considered within the much larger context of the judicial backlash against relevant conduct's expansive scope and application, lengthy federal sentences, and limited judicial discretion.

I
THE IMPORTANCE OF RELEVANT CONDUCT IN THE UNITED STATES SENTENCING GUIDELINES

A basic understanding of relevant conduct generally, the critical role it plays in sentencing, and the purposes it serves is essential to correctly framing this Note's analysis of the courts' approach to foreign relevant conduct. This Part defines relevant conduct and identifies the several junctures at which sentencing courts must consider it. It then briefly explains the purpose and theoretical justifications for the use of relevant conduct in sentencing.

A. Defining Relevant Conduct

At various points in the sentencing process, the Guidelines require the sentencing court to use the defendant's conduct for calculating the guideline range.[7] That conduct will include not only the conduct described in the elements of the offense of conviction, but also the defendant's *relevant conduct*, that is, other acts that the defendant (or sometimes others) committed that bear a certain close logical relationship to the offense of conviction.

The U.S. Sentencing Commission (Commission), the architect of federal guideline sentencing, defines "relevant conduct" in section 1B1.3 of the Guidelines. "Conduct" includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and, when the defendant worked with others, "all reasonably foreseeable acts and omissions of

[7] *See generally* U.S.S.G., *supra* note 2, § 1B1.1 (application instructions); *id.* § 1B1.3 (directing court to consider defendant's conduct at four different stages of sentencing process). After working through the applicable guidelines for a defendant, the Guidelines prescribe a guideline range, such as 210–262 months, from which the court must ordinarily select a sentence. *See id.* § 1B1.1 (application instructions); *id.* ch. 5, pt. A (chart indicating sentencing range based on base offense level and defendant's criminal history).

others in furtherance of the jointly undertaken criminal activity . . . ."[8] There are two logical relationships that make conduct "relevant": (1) if it "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense"; or, (2) for certain offenses that would require grouping under the Guidelines, such as theft, fraud, and drug offenses, if it was "part of the same course of conduct or common scheme or plan as the offense of conviction."[9]

A typical example of the first formulation of relevant conduct would be the shooting of a bank guard by a defendant convicted of bank robbery. If, while robbing a bank, the defendant or a co-conspirator shot a bank guard, the court would consider the shooting of the bank guard at sentencing even though it is not an element of bank robbery, the offense of conviction. The second formulation of relevant conduct, the "same course of conduct" or "common scheme" form, often applies in cases involving drugs or monetary loss. For example, if a defendant ran the same scam on several victims—even though the defendant was charged and convicted of defrauding only *one* of the victims—the conduct surrounding the defrauding of all of the victims would be considered. Thus, if the defendant defrauded ten victims of $1000 each, the defendant's sentence would reflect $10,000 of loss even though he was convicted of defrauding only one victim of $1000.

Although the definition of relevant conduct is quite broad, it occasionally operates to exclude some logically related conduct from consideration. Most notably, the "same course of conduct" formulation applies *only* to those offenses that would require grouping under the Guidelines and thus does not apply to violent crimes like robbery.[10] Therefore, a defendant could rob a different branch of the same bank every day for a week in exactly the same manner, but because robbery is not a grouped offense, the bank robberies for which the defendant is not charged or convicted would not be relevant conduct under the Guidelines.[11]

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[8] *Id.* § 1B1.3(a)(1). The defendant needs only to have been involved in a "jointly undertaken activity"; a formal conspiracy charge is not required. *Id.*

[9] *Id.* § 1B1.3(a)(1)–(2).

[10] *Id.* § 1B1.3(a)(2); § 3D1.2(d) (listing guidelines governing offenses that require grouping and specifically excluding, inter alia, crimes against the person (ch. 2, pt. A), such as sexual abuse (§ 2A3.1) and kidnapping (§ 2A4.1); burglary (§ 2B2.1); trespass (§ 2B2.3); robbery (§ 2B3.1); extortion (§ 2B3.2); promoting commercial sex acts (§ 2G1.1); sexual exploitation of minors by producing child pornography (§ 2G2.1); civil rights violations (§ 2H1.1); slave trade and peonage crimes (§ 2H4.1); espionage (§ 2M3.1); prison breaks (§ 2P1.1); and inciting prison riots (§ 2P1.3)).

[11] *Id.* § 1B1.3, cmt. background.

A particularly important feature of relevant conduct as the Guidelines define it is the standard of proof that it requires. The Guidelines require only that the government meet a preponderance of the evidence standard in proving relevant conduct at sentencing.[12] Courts have wrestled with the question whether a higher standard might be required in some circumstances, notwithstanding the general guidance from the Guidelines, but the Supreme Court has noted the sufficiency of the preponderance standard in all but the most exceptional of cases.[13] Some circuits have required the higher standard of "clear and convincing evidence" for relevant conduct that will greatly increase a sentence.[14] Other circuits have required district courts to use the lower preponderance standard and rely on downward departures to prevent extraordinary or unjust results.[15] It is clear, however, that the standard of proof required for establishing relevant conduct at sentencing is lower than the "beyond a reasonable doubt" standard required for proving the elements of an offense at trial.[16] The result is that conduct that the government did not and perhaps in some cases *could not* prove beyond a reasonable doubt at trial nevertheless can

[12] *Id.* § 6A1.3, cmt. ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.").

[13] *See, e.g.*, United States v. Watts, 519 U.S. 148, 156–57 & n.2 (1997) (noting cases reviewing issue and reserving judgment but clarifying that "preponderance of the evidence" standard is sufficient for considering acquitted conduct under § 1B1.3 barring exceptional circumstances).

[14] *E.g.*, United States v. Mezas de Jesus, 217 F.3d 638, 645 (9th Cir. 2000) (requiring clear and convincing standard for nine-level increase for uncharged kidnapping); United States v. Hopper, 177 F.3d 824, 833 (9th Cir. 1999) (requiring "clear and convincing" standard where acquitted conduct more than doubled defendant's sentence); United States v. Kikumura, 918 F.2d 1084, 1100–01 (3d Cir. 1990) (requiring clear and convincing standard where enhancement on basis of relevant conduct is of such magnitude as to be "a tail which wags the dog of the substantive offense").

[15] *See, e.g.*, United States v. Cordoba-Murgas, 233 F.3d 704, 709 (2d Cir. 2000). In this case, while the district court could not substitute a clear and convincing standard of proof for the preponderance standard that usually governs relevant conduct solely because the potential effect of uncharged conduct (here, murder) was great, the court found that the district court could depart downward where there was "(i) an enormous upward adjustment (ii) for uncharged conduct (iii) not proved at trial and (iv) found by only a preponderance of the evidence, [and] (v) where the court has substantial doubts as to the accuracy of the finding"). *See also* United States v. Washington, 11 F.3d 1510, 1516 (10th Cir. 1993) ("At least as concerns making guideline calculations the issue of a higher than a preponderance standard is foreclosed in this circuit.").

[16] *See, e.g.*, *Watts*, 519 U.S. at 157 ("We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

affect the defendant's sentence through its inclusion as relevant conduct.[17]

It is also clearly established that courts *must* include relevant conduct that meets the formal guideline definition, if proven by the requisite standard of proof, in sentencing defendants. If the court finds that conduct meets the technical requirements of relevant conduct, it does not have the discretion to exclude it.[18]

B. Relevant Conduct and the Sentencing Process

The ubiquitous consideration and application of relevant conduct throughout the sentencing process underscores its importance. A sentencing court must consider relevant conduct at no fewer than four stages of sentencing: (1) in setting the base offense level where there is a range of base offense levels, (2) in determining specific offense characteristics, (3) in applying cross-references from one substantive offense to another, and (4) in applying Guidelines adjustments.[19]

While the offense of conviction dictates which substantive offense guideline initially applies at sentencing, many of the offense guidelines provide a range of base offense levels, and the sentencing court must consider both offense elements and relevant conduct for selecting the proper base offense level from within that range.[20] This is particularly important in the offense guidelines that govern drug offenses. For example, the general guideline for drug offenses includes a table that lists base offense levels ranging from as low as six to as high as thirty-eight, depending on the quantity and type of drugs.[21] For a defendant convicted of a drug crime and sentenced under this guideline, the sentencing court must aggregate the quantities of the drugs involved in the offense of conviction and any drugs involved in transactions that meet the definition of relevant conduct; that aggregate quantity will determine the base offense level.[22]

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[17] United States v. Dawn, 129 F.3d 878, 884 (7th Cir. 1997) ("The cases make clear that sentencing judges may look to the conduct surrounding the offense of conviction in fashioning an appropriate sentence, regardless of whether the defendant was ever charged with or convicted of that conduct, and regardless of whether he could be.").

[18] U.S.S.G., *supra* note 2, § 1B1.3(a) (listing junctures at which sentencing decisions "shall" be determined on basis of relevant conduct); *see also* United States v. Greer, 285 F.3d 158, 179 (2d Cir. 2002) (interpreting use of "shall" in Guidelines to require inclusion of all conduct meeting relevant conduct definition).

[19] U.S.S.G., *supra* note 2, § 1B1.3(a).

[20] *Id.* § 1B1.1–1B1.2.

[21] *Id.* § 2D1.1(a), (c). Section 2D1.1(a) provides for higher base offense levels than those prescribed in the drug table for certain statutory offenses if death or serious bodily injury was involved. *Id.* § 2D1.1(a).

[22] *Id.* § 1B1.3(a). The Guidelines note:

The sentencing court then must consider relevant conduct to adjust the base offense level in light of specific offense characteristics spelled out in the individual offense-specific guidelines.[23] In the general guidelines for sentencing most theft, larceny, and fraud crimes, for example, the amount of loss is a specific offense characteristic.[24] Depending on the amount of aggregate loss from the crime *and* the relevant conduct, the sentencing court will increase the initial base offense level by as many as thirty levels.[25] Besides loss, however, there are many other specific offense characteristics that aggregate relevant conduct and offense conduct. For example, the guideline governing simple possession of child pornography includes as a special offense characteristic the number of images possessed; similarly, the guideline governing general firearm possession includes the number of firearms involved as a specific offense characteristic.[26] Other types of special offense characteristics consider relevant conduct when applying increases for more discrete aspects of a crime that would not necessarily be charged elements of the offense of conviction, such as bodily harm to a victim or the discharge or brandishing of a weapon.[27]

> For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales.

Id. cmt. n.3. That different drugs are involved is no obstacle. The Guidelines provide a conversion chart by which all drugs can be converted into an equivalent weight in marijuana. The marijuana equivalents are then aggregated and used to select the appropriate base offense level. *Id.* § 2D1.1, cmt. n.6 & tbls.

[23] *See id.* § 1B1.1(b).

[24] *Id.* § 2B1.1(b)(1).

[25] *Id.* For example, suppose a defendant is convicted of defrauding one victim of $50,000 but also defrauded another victim of $100,000 by using the same ruse. If the only loss taken into account were the loss from the offense of conviction, the sentencing court would increase the base offense level by six levels. However, since the other fraud would be considered relevant conduct under the "common scheme or plan" formulation, the sentencing court would aggregate the loss from the two frauds. Thus, the guideline would require the court to increase the base offense level by ten levels for the $150,000 of aggregate loss. *See id.* (setting forth loss amounts and corresponding level increases).

[26] *Id.* § 2G2.4(b)(5) (increasing base offense levels by two levels if offense involves 10–149 images, by three levels if it involves 150–299 images, by four levels if it involves 300–599 images, and by five levels if it involves 600 or more images); *id.* § 2K2.1(b)(1) (increasing base offense level by two levels if offense involved 3–7 firearms, by four if it involves 8–24 firearms, by six if it involves 25–99 firearms, by eight if it involves 100–199 firearms, and by ten if it involves 200 or more firearms).

[27] *See, e.g.*, *id.* § 2A2.1(b)(1) (classifying injury to victim as special offense characteristic for attempted murder); § 2B3.1(b) (including as special offense characteristics in robbery guideline, inter alia, bodily injury to victim, discharge, use, and brandishment of firearm, and abduction to effect escape).

Relevant conduct also triggers cross-referencing provisions from one substantive offense guideline to another.[28] A common example of a cross-reference application is where a defendant convicted of simple possession of child pornography but who also produced the pornography, like the hypothetical defendant in the introduction to this Note, is referred from the guideline for simple possession to the guideline for production.[29] The result is that the defendant will be sentenced under the higher production guideline triggered by the relevant conduct, as if production of child pornography were the offense of conviction. The statutory maximum for the actual offense of conviction, in this case possession, will however, cap the maximum possible sentence under the cross-referenced provision.[30]

The sentencing court must also consider relevant conduct when applying Guidelines adjustments that apply to all of the different substantive offense guidelines.[31] A hate crime motivation, the physical restraint of a victim, a terrorist connection, the use of body armor, the reckless endangerment of another while escaping, and obstruction of justice are all possible forms of relevant conduct that require upward adjustments under the Guidelines.[32] After applying these adjustments, the sentencing court is formally finished considering relevant conduct. The remaining steps—accommodating multiple counts of conviction, deducting for acceptance of responsibility, and calculating the defendant's criminal history category—are not dependent on relevant conduct.[33] However, in the final considerations of whether to grant a downward or upward departure from the prescribed guideline range or in choosing a specific sentence from *within* the prescribed guideline range, courts have extensive discretion concerning what

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[28] *See id.* § 1B1.3(a).

[29] *Id.* § 2G2.4(c)(1)–(2) (cross-referencing provisions § 2G2.1 ("Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production") and § 2G2.2 ("Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic")).

[30] *Id.* § 5G1.1(a) (stating that when statutory maximum is less than minimum applicable guideline range, statutory maximum shall be guideline sentence).

[31] *Id.* § 1B1.3(a).

[32] *Id.* § 3A1.1(a) (hate crime motivation); *id.* § 3A1.3 (restraint of victim); *id.* § 3A1.4 (felony that involved or intended to promote federal crime of terrorism); *id.* § 3B1.5 (use of body armor in drug trafficking crime or crime of violence); *id.* § 3C1.1 (obstruction of justice); *id.* § 3C1.2 (reckless endangerment during flight).

[33] *Id.* § 1B1.1(d), ch. 3, pt. D, introductory cmt. (multiple counts of conviction); *id.* §§ 1B1.1(e), 3E1.1 (acceptance of responsibility); *id.* §§ 1B1.1(f), 4A1.1, 4A1.2, 4B1.1, 4B1.4 (criminal history category).

information to consider and may revisit a defendant's conduct that falls within the formal definition of relevant conduct.[34]

The cumulative effect of relevant conduct on a defendant's sentence can be extremely pronounced. The only definite limit on its ability to increase a sentence is the statutorily prescribed maximum sentence for the offense of conviction.[35] For example, the statutory maximum sentence is twenty years for violating one extortion statute.[36] If relevant conduct is not considered *at all*, a defendant's sentence under that Act and the corresponding offense guideline could be as little as twenty-seven months.[37] Thus, in a twenty-year sentence for extortion, it is possible that relevant conduct could be the basis for almost eighteen years of the sentence. The extraordinary cumulative effect of relevant conduct on some sentences has drawn harsh criticism from judges with shrinking powers of mitigation.[38]

C. *The Original Purpose and Present Function of Relevant Conduct*

As a final piece of essential background, it is important to understand the ends that the relevant conduct provision originally was intended to serve and the function that it performs today. The relevant conduct provision is the primary means by which the Guidelines embrace the real offense model of sentencing and seek to mitigate the negative effects of the charge offense model of sentencing.[39] Arguably, however, while still functioning to sentence offenders in a manner commensurate with the retributive goals of sentencing, relevant conduct has failed to serve this original purpose effectively.

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[34] *See, e.g.*, *id.* § 5K2.0, cmt. background ("Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing."); *id.* § 1B1.4 ("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, unless otherwise prohibited by law."); *see also infra* note 141.

[35] U.S.S.G., *supra* note 2, § 5G1.1(c)(1).

[36] 18 U.S.C. § 1951 (2000) (criminalizing forcible extortion and robbery that interferes with commerce).

[37] *See* U.S.S.G., *supra* note 2, § 2B3.2 (indicating base offense level of eighteen for offenses under this provision). *See also id.* ch. 5, pt. A (indicating that sentencing range for base offense level eighteen, for defendant with zero or one criminal history points, is twenty-seven to thirty-three months).

[38] The judicial reaction to these aspects of Guidelines sentencing is discussed in Part III.C, *infra*. *See also infra* notes 139–148 and accompanying text.

[39] *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 66–67, 70 (1998) (identifying legislative support for real offense model and describing relevant conduct as one of five major means by which Guidelines consider more than charge offense elements in prescribing sentences).

A pure charge offense model of sentencing keys sentences only to the statutory offense of conviction; all defendants convicted of the same statutory crime would get the same sentence.[40] Its advantage is that it ensures procedural fairness: Each aspect of the crime that will influence a defendant's sentence must be proved beyond a reasonable doubt.[41] One of its key drawbacks, however, is that it vests discretion over sentencing in the hands of the prosecutor who makes the charging decision instead of the judge. If the judge must base the sentence solely on the offense of conviction, a prosecutor can thereby "control the sentence by manipulating the charge."[42]

The effects are particularly pronounced when defendants plead guilty pursuant to a plea bargain. Prosecutors may substitute a low charge to induce a guilty plea which will result in an artificially low sentence unless the judge takes the extra initiative to reject a plea agreement supported by both the defendant and the government.[43]

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[40] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988). Then–First Circuit Court of Appeals Judge Breyer was one of the inaugural members of the U.S. Sentencing Commission (Commission) and the informal representative of Senator Edward Kennedy, who had championed the sentencing reform movement in Congress. *See, e.g.*, STITH & CABRANES, *supra* note 39, at 49–51 (describing composition of first Commission).

[41] *See, e.g.*, Breyer, *supra* note 40, at 9. For example, a defendant who stole $100,000 and a defendant who stole $1000 would receive the same sentence unless the amount stolen was a statutory element of the crime. Obviously, sometimes value *is* a statutory element of the offense of conviction. For example, most American jurisdictions divide larceny into categories such as grand and petit larceny based on the amount of money or the value of goods stolen; it is most common to see two or four very large categories based on value created by statute. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 8.4(b) (3d ed. 2000) (describing larceny statutes generally). However, statutory categories tend to be so broad that they fail to differentiate among vastly different amounts. For example, the $100 cutoff that exists in many jurisdictions would make no statutory distinction between the theft of $1000 and $100,000. *Id.*

[42] Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENTENCING REP. 180, 183 (1999) (countering criticism that Guidelines have given still greater power to prosecutors).

[43] *See* David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 420 (1993) (describing charge offense system as theoretically more conducive to charge bargaining because prosecutor has more power to induce defendant to plead where charge controls ultimate sentence).

Not all reduced charges, of course, are "artificially" low. There are many legitimate reasons why a prosecutor might pursue a lower sentence or offense of conviction in hopes of inducing a guilty plea: if there is a risk of a dangerous criminal being acquitted at trial otherwise, or if the age of the defendant is such that a shorter sentence will serve the government's punishment goals and save resources that might be expended in other ways. *See, e.g.*, John Gleeson, *Sentence Bargaining under the Guidelines*, 8 FED. SENTENCING REP. 314, 315 (1996). At the same time, however, there is evidence that prosecutors make bargains that result in lower sentences "because they view the otherwise applicable Guidelines sentence as too severe." Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1380 (1997); *see also* Dan Christensen, *Florida Judge Complains U.S. Prosecutor Is 'Weak-Kneed'*, MIAMI

Allowing too much of this "charge bargaining" risks great disparities among sentences for similar crimes since neither the prosecutor nor the defendant has a vested interest in uniformity of sentences. Prosecutors may value a secured conviction over uniformity of sentences and thus be willing to accept a plea for a much lower charge where a conviction at trial is uncertain.[44] Defendants, of course, are more concerned with sentence reduction than uniformity.[45] Since reducing the vast disparities in sentences was a principal legislative purpose underlying the creation of the Commission and the Guidelines,[46] the potential for unfettered charge bargaining was a strong argument against a pure charge offense model.[47]

The proposed solution was a system that would include some aspects of a "real offense" sentencing model. The real offense model considers the actual behavior of the defendant and the total nature of the crime, including factors such as the total harm caused and the use of threats or fraud, rather than just the formal elements of the statutory crime of conviction.[48] While a real offense model enhances the potential substantive fairness of the sentence by considering more of the circumstances surrounding the crime, it compromises procedural

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DAILY BUS. REV., Mar. 18, 2004 (reporting highly unusual case in which Southern District of Florida Judge K. Michael Moore rejected "charge-bargained" plea for ecstasy possession, instead of distribution, where unexpected career-criminal status of defendant would exponentially increase his sentence), *available at* http://www.law.com/jsp/printerfriendlyjsp?c=lawarticlecid10.htm (last visited July 21, 2004).

[44] *See* O'Sullivan, *supra* note 43, at 1379–80.

[45] *See, e.g.*, Yellen, *supra* note 43, at 419–20.

[46] *See, e.g.*, Breyer, *supra* note 40, at 4–5 (citing pre-Guidelines studies showing that in Second Circuit identically situated defendants received sentences ranging from three to twenty years, while defendants sentenced in southern United States received six months more for crimes, and defendants sentenced in central California received approximately twelve months less for crimes).

[47] In practice, there are other institutional limits on prosecutors' ability to charge bargain in addition to those imposed by the Guidelines. *See, e.g.*, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.300 (directing prosecutors to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," though allowing room for "individualized assessment" and "maximiz[ing] the impact of Federal resources on crime"), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (last visited June 21, 2004); Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors (Sept. 22, 2003) (mandating that, except with permission of designated officials, "in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case"), http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

[48] *See* STITH & CABRANES, *supra* note 39, at 66–69. Real offense factors embrace the judgment that any additional harm caused by the defendant should result in an increased punishment. *Id.* at 69. Thus, a defendant who stole $100,000 would get a longer sentence than a defendant who stole $1000 even if they were convicted under the same statute. *But see supra* note 41.

fairness since a wide range of relevant facts could not be determined reliably at trial. In addition, a system in which post-trial determinations carried all of the same procedural protections of trials would be unmanageable.[49]

Through the relevant conduct provision, the Commission sought to create a compromise between the two models that would have "some real elements, but not so many that it becomes unwieldy or procedurally unfair."[50] The result is that a defendant's sentence is first grounded in the charge offense to select the initial guideline to be applied, and then that guideline is applied using myriad "real offense" factors. Since the judge relies on the presentence report prepared by the probation officer for information about the defendant's conduct,[51] the potential for disparity resulting from charge bargaining is at least partially reduced. Even where the defendant and the prosecutor have incentives to pursue an artificially low charge, at sentencing the real conduct of the defendant will be before the judge, who may be more concerned with uniformity.[52]

However, a pervasive criticism of the Guidelines is that they continue to concentrate sentencing power in the hands of prosecutors,

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[49] Breyer, *supra* note 40, at 10 ("A drug crime defendant, for example, cannot be expected to argue at trial to the jury that, even though he never possessed any drugs, if he did so, he possessed only one hundred grams and not five hundred, as the government claimed."); Breyer, *supra* note 42, at 183 ("[T]he fairness, or wisdom, of requiring the Government to prove, in the midst of its substantive case, the added harms that an offender's criminal behavior may have caused may not always prove 'fairer' to the defendant (who may not want to present evidence then on such matters)."). Proponents of the real offense model argue that it closely resembles the pre-Guidelines sentencing practice in the United States of judges sitting in judgment of individual defendants. Prior to the adoption of the Guidelines, judges commonly based sentences on information that came in outside of regular trial practice and did not conform to standard evidentiary rules or meet the reasonable doubt burden of proof. Breyer, *supra* note 40, at 11 (discrediting argument as both partly untrue and on grounds that "it was the unfair, hidden nature of prior sentencing practices that the Guidelines set about to change").

[50] *Id.* at 11. Although it is purportedly a mixed system, the Guidelines are virtually unique in the extent to which they embrace real offense sentencing. *See* Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 10 FED. SENTENCING REP. 51, 53 (1997) (noting that sentencing commissions of Canada and several U.S. state governments rejected real offense sentencing in favor of guidelines driven by offense of conviction).

[51] A federal probation officer, who is theoretically the court's investigator, includes all of the facts that he thinks will be relevant to the defendant's sentence in the presentence investigation report and also includes an initial sentencing calculus applying the relevant offense guidelines to the facts. FED. R. CRIM. P. 32(c)–(d); STITH & CABRANES, *supra* note 39, at 86; *see also* CATHARINE M. GOODWIN, U.S. COURTS, THE INDEPENDENT ROLE OF THE PROBATION OFFICER AT SENTENCING, AND IN APPLYING KOON V. UNITED STATES 4–5 (1996) (stressing duty of probation officer to provide objective information as agent or investigator of court), *available at* http://www.ussc.gov/training/rolepo.pdf.

[52] *See supra* notes 43–45.

not judges.[53] Some critics also argue that the Guidelines' treatment of relevant conduct has shifted sentencing authority to law enforcement agents at the investigation stage, since agents can "determine the ultimate punishment by shaping the conversation with a suspect concerning the extent of [other criminal conduct]."[54] The Guidelines succeeded only in substituting "fact bargaining" for "charge bargaining."[55] In practice, the independence of the probation officer's presentence report as a check on prosecutorial discretion is compromised by the probation officer's dependence on the prosecution and the defendant as the main sources of information.[56] At the same time, the Guidelines have drastically shorn judicial discretion over sentencing which, it now appears, operated as a pre-Guidelines check on the charging and sentencing power of prosecutors.[57] Thus it seems that relevant conduct has failed to serve its originally intended purpose of limiting prosecutorial discretion over a defendant's ultimate sentence.

As the Guidelines have become entrenched, however, relevant conduct now serves another essential purpose in sentencing. It is now the chief mechanism by which the Guidelines "differentiate sentences among offenders of different culpabilities."[58] The federal criminal code contains many very broadly written statutes in which drafting concerns focused primarily on jurisdictional issues and little attention

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53 For example, Stith and Cabranes note:

> [C]ritics of the Guidelines have focused primarily on the sentencing disparity said to result from the exercise of prosecutorial discretion. The consensus of these critics is that, while prosecutors have always had considerable discretion to affect sentencing in the federal system, they now have much more. We would state the matter differently: prosecutorial discretion is now greater *relative* to judicial discretion in criminal sentencing.

STITH & CABRANES, *supra* note 39, at 130.

54 Jon O. Newman, *The New Commission's Opportunity*, 8 FED. SENTENCING REP. 8 (1995) ("The current practice whereby an undercover agent mentions a large quantity of drugs and that quantity becomes the required basis for sentencing is one of the most dangerous features of the guidelines.").

55 STITH & CABRANES, *supra* note 39, at 136 ("Now prosecutors know the rules the judges must follow; all that remains is to arrange, if not stack, the deck.").

56 *See generally id.* at 134–35 ("The Sentencing Commission would apparently view the prosecutor as hiding the 'actual' facts and the probation officer as undertaking the prescribed 'independent' investigation to report these 'actual' facts. . . . The prosecutor and defense attorney in most cases have more complete information for assessing *these facts* than does . . . [the] probation officer.").

57 *See, e.g.*, Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1473–76, 1505 (1993) (arguing that, in absence of judicial discretion to set sentencing parameters, Guidelines give prosecutors monopsony power over guilty pleas and sentencing).

58 U.S. SENTENCING COMM'N, RELEVANT CONDUCT AND REAL OFFENSE SENTENCING (simplification draft paper), *available at* http://www.ussc.gov/simple/relevant.htm (last visited June 21, 2004).

was paid to relative culpability. As a result, the same statutes, standing alone, subject defendants of widely varying culpability to the same vast sentencing ranges.[59] Because of the great reduction of judicial discretion that accompanied the Guidelines, the relevant conduct provision is essential in order to sentence defendants in relation to their just deserts. Although the relevant conduct provision may have inadvertently aggravated the problem it was originally designed to correct—prosecutorial power over sentencing—relevant conduct remains the heart of the Guidelines and has replaced judicial discretion as the chief vehicle by which blameworthiness is apportioned.[60] The next Part describes how this blame-apportioning mechanism has evolved in the courts, first describing the evolution of key principles in domestic relevant conduct and then summarizing the development of foreign relevant conduct cases.

II
JUDICIAL TREATMENT OF DOMESTIC AND FOREIGN RELEVANT CONDUCT

This Part first gleans some general principles of relevant conduct from the courts' treatment of domestic relevant conduct that have important ramifications for the discussion of how foreign conduct should be treated. It then briefly surveys the courts' treatment of foreign relevant conduct since the inception of the Guidelines.

A. General Principles of Relevant Conduct

In defining the contours of the far-reaching definition of relevant conduct in the Guidelines, courts have been expansive in their interpretation in the domestic context to an extent that many have found startling.[61] Two of the more surprising principles establishing the

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[59] *Id.*

[60] *See, e.g.*, United States v. Dawn, 129 F.3d 878, 884 (7th Cir. 1997). In *Dawn*, the Seventh Circuit explained:

> [T]he very purpose of looking to circumstances beyond the offense of conviction is to decide what degree of punishment to impose within the typically broad range authorized by the criminal statute, by determining what a particular defendant actually did. In this way a felon who uses a gun to commit assault, for example, is punished more harshly than one who simply keeps a gun underneath his mattress for protection, notwithstanding that both are convicted of the same offense.

Id. (citations omitted).

[61] *See, e.g.*, Tonry, *supra* note 50, at 53 ("More than once when describing the relevant conduct system to government officials and judges outside the United States, I have been accused of misreporting or exaggerating.").

outer limits of relevant conduct (or the lack thereof) are essential to the analysis of the role foreign conduct should play in sentencing.[62]

First among these important holdings is that relevant conduct includes acquitted conduct, which the Supreme Court announced in *United States v. Watts*.[63] Since this seems to strip partial acquittals of much of their meaning and to show a shocking disregard for jury verdicts, the majority opinion was accompanied by cautionary dissents that foreshadowed the discomfort judges and scholars would feel with sentencing policy's divergence from commonly accepted notions of criminal justice.[64] *Watts* also demonstrated that relevant conduct can include behaviors that are, at least sometimes, legal—such as possessing a handgun, piloting an airplane, or using a computer.[65]

The Supreme Court established the other principle of great import to the analysis of foreign relevant conduct in *Witte v. United States* when it clarified that the inclusion of relevant conduct does not constitute punishment for the conduct being considered but merely for the underlying offense of conviction.[66] As a result, conduct that even drastically increases the sentence for the offense of conviction still can be prosecuted later and punished without running afoul of double jeopardy.[67] More broadly, *Witte* makes clear that the opera-

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[62] This Note takes no normative position on the Guidelines, the relevant conduct provision, or the Supreme Court's relevant conduct jurisprudence. It merely recognizes them as entrenched pillars of modern federal sentencing practice.

[63] 519 U.S. 148, 157 (1997). For example, if a defendant charged with four related drug transactions is convicted of two and acquitted of the other two by a jury, the court must, if it believes by a preponderance of the evidence that the defendant engaged in all four transactions, consider all four transactions for sentencing purposes. *Id.* at 156–57.

[64] *See id.* at 170 (Kennedy, J., dissenting) ("At several points the *per curiam* opinion shows hesitation in confronting the distinction between uncharged conduct and conduct related to a charge for which the defendant was acquitted. The distinction ought to be confronted by a reasoned course of argument, not by shrugging it off."); *id.* at 164 & n.3 (Stevens, J., dissenting).

[65] *See id.* at 163 n.2 (Stevens, J., dissenting). In *Watts*, one of the defendants was acquitted on the charge of using a firearm in relation to a drug offense but convicted of the drug offense itself. Finding by a preponderance of the evidence that the defendant possessed a firearm—a special offense characteristic—in connection with the offense of conviction, the district court enhanced the base offense level by two levels. *Id.* at 150. This case is particularly interesting since it bridges both legal and acquitted forms of relevant conduct: The defendant had been acquitted of the charged illegal use of the weapon, and mere possession of a handgun is not always illegal. Other examples are the two level increase, at minimum, for the use of a non-commercial airplane to import or export drugs and the two level increase in base offense level for the use of a computer to receive child pornography, even though use of a private plane or a computer is not illegal per se. U.S.S.G., *supra* note 2, §§ 2D1.1(b)(2), 2G2.2(b)(5).

[66] 515 U.S. 389, 403 (1995).

[67] For example, in *Witte*, the defendant pled guilty to attempted possession of marijuana with intent to distribute but was sentenced on the basis of not only that transaction but also another involving cocaine; his later indictment by a different grand jury in the

tive theory behind relevant conduct is that "the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense (which that related conduct may or may not constitute)."[68] While this distinction is surely of little consolation to individuals serving sentences that were enhanced by relevant conduct,[69] the Court relied on pre-Guidelines precedents that judges could consider conduct that had formed the basis of previous convictions to enhance the sentence for a subsequent conviction without violating the prohibition against double jeopardy.[70] Working in tandem to establish that the limits to the inclusion of relevant conduct are few, *Watts* and *Witte* are profoundly relevant to the proper treatment of foreign relevant conduct. As the next Section and Part III demonstrate, however, the courts' treatment of such conduct often has obscured the clear implications that these two principles have for the issue of foreign relevant conduct.

B. Survey of Foreign Relevant Conduct Jurisprudence

Most circuits addressing the foreign relevant conduct issue use fact-specific analyses that seem tailored to the particular crimes and conduct before them instead of a principled analysis that applies to all crimes consistently. The general trend, however, has been toward the inclusion of foreign relevant conduct in defendants' sentences.[71] This Section briefly outlines the cases that have addressed foreign relevant conduct and the question of whether it is properly included in sentencing.

The Second Circuit was the first to tackle the issue of foreign relevant conduct, doing so fairly early in Guidelines jurisprudence in *United States v. Azeem*, in which the defendant was convicted of

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same district for the cocaine transaction was not barred by double jeopardy. *Id.* at 391–95, 406.

[68] *Id.* at 403. The Court clarified that this theory of relevant conduct applies to the "same course of conduct" formulation as well: "[W]hile relevant conduct thus may relate to the severity of the particular crime, the commission of multiple offenses in the same course of conduct also necessarily provides important evidence that the character of the offender requires special punishment." *Id.*

[69] In his concurring opinion, Justice Scalia found unconvincing the argument in *Witte*, which he paraphrased as: "'We do not punish you twice for the *same* offense,' says the Government, 'but we punish you *twice as much* for *one* offense solely because you also committed another offense, for which other offense we will also punish you (only once) later on.'" *Id.* at 407 (Scalia, J., concurring). Instead, he would reach the same result by reading the double jeopardy prohibition to protect against multiple prosecutions and *not* against multiple punishments. *Id.*

[70] *See id.* at 397–99.

[71] *See infra* Part III.

importing heroin into the United States from Pakistan.[72] Decided in 1991, without the guidance of either *Watts* or *Witte*, *Azeem* held that a defendant's foreign conduct could not be considered in the calculation of his base offense level.[73] The court's central argument was that the foreign conduct, a drug shipment from Pakistan to Egypt, did not constitute "a crime against the United States."[74] It also raised several other issues. First, it noted that, while the Guidelines are silent on foreign activities as relevant conduct, they do provide that foreign *sentences* may not be used in computing a defendant's criminal history, even though they may be used as a basis for upward departure; thus, the court concluded, "Congress has already shown that where it intends to include foreign crimes in sentencing, it will do so."[75] Second, the court noted that the consideration of foreign conduct in figuring the base offense level would "require courts to perform a careful comparative analysis of foreign and domestic law" to distinguish between "activities that violate both domestic and foreign law and those which violate only domestic law or only foreign law."[76] Finally, the court raised the specter of evidentiary problems that might arise if foreign relevant conduct were included.[77]

Four years later, but still prior to the Supreme Court's decisions in *Witte* and *Watts*, the Second Circuit confronted a case presenting some of the very evidentiary issues foreshadowed in *Azeem.* In *United States v. Chunza-Plazas*,[78] the court reversed a district court's inclusion as relevant conduct murders allegedly committed by the defendant in Colombia; referencing *Azeem*, it noted that, "[a]lthough we are confident that homicide is prohibited by both domestic and Colombian law, we are less certain that courts in the United States are in a good position to assess the reliability of Colombian arrest warrants."[79]

In more recent cases, courts have begun to resolve the question of foreign relevant conduct in favor of inclusion, yet have gone to great lengths to leave *Azeem* and *Chunza-Plazas* intact. Even in the

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[72] 946 F.2d 13 (2d Cir. 1991).

[73] *Id.* at 18.

[74] *Id.* at 16.

[75] *Id.* at 17 (citing U.S.S.G., *supra* note 2, §§ 4A1.2(h), 4A1.3(a)). Of course, since the Guidelines provide examples of both explicit exclusion and inclusion, there is equal room to argue the converse, i.e., that when foreign crimes are to be *excluded*, it is done so explicitly.

[76] *Id.*

[77] *Id.* at 17–18.

[78] 45 F.3d 51 (2d Cir. 1995).

[79] *Id.* at 57 (assessing evidence used as basis for issuance of arrest warrants for murder in Colombia).

Second Circuit, post-*Watts* cases suggest that foreign relevant conduct can be included: In *United States v. Greer*,[80] the Second Circuit relied on the extraterritorial nature of the statutory provisions of the Maritime Drug Law Enforcement Act (MDLEA)[81] to include foreign drug shipments as relevant conduct, distinguishing that case from *Azeem* and *Chunza-Plazas*. In a strange turn, the court first agreed with the government's argument that "nothing in the [Guidelines] limits their application to 'activity undertaken against the United States,'" but then claimed consistency with its prior holding in *Azeem* because "the crimes in this case are not foreign crimes; the MDLEA is a United States criminal statute that specifically covers conduct outside the United States."[82] In remanding for resentencing, the court held that the district court was required to include drugs bound for Canada as relevant conduct at the outset and that it could then, in its discretion, depart downward on the basis of a previous prosecution in Canada for the same drugs.[83]

Even beyond the context of the MDLEA, however, a district court recently looked to foreign conduct in deciding to apply an obstruction of justice sentencing adjustment in *United States v. Teyer*, a case involving a large drug conspiracy in which defendants were arrested in Belize with 1500 kilograms of cocaine bound for the United States.[84] After being arrested and while facing Belizean charges, Jorge Manuel Torres-Teyer plotted with others to bribe his co-defendants to take full responsibility for the drugs and to bribe a Belizean magistrate to secure an acquittal for Torres-Teyer, his girlfriend, and one of his accomplices.[85] The district court held that even though there was no evidence to suggest that the purpose of the bribery scheme was to avoid extradition to and prosecution in the United States (the ultimate result of the Belizean arrest), the Belizean bribery attempt had to be considered as a basis for an obstruction of

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[80] United States v. Greer, 285 F.3d 158 (2d Cir. 2002).

[81] 46 U.S.C. app. § 1903 (2000) (making unlawful distribution of controlled substances by any person aboard vessel subject to U.S. jurisdiction while at same time allowing other nations to consent to U.S. jurisdiction over their territorial waters).

[82] *Id.* at 179–80.

[83] *Id.* at 180–181. In *Greer*, the district court had excluded from relevant conduct ninety-eight percent of the drugs involved in a Canadian and Dutch drug smuggling operation that involved the movement of thousands of pounds of drugs across the U.S.-Canada border by land and on the St. Lawrence River over a period of thirteen years on the basis that all but two percent of the drugs were "intended for distribution in Canada" and had already been the basis of a Canadian prosecution. *Id.* at 163, 179. Interestingly, the district court that the Second Circuit deemed so errant in the sentencing phase of the case was presided over by Judge William K. Sessions, Vice Chair of the Commission. *Id.* at 162.

[84] 322 F. Supp. 2d 359, 363 (S.D.N.Y. 2004).

[85] *Id.* at 365–66.

justice enhancement. According to the court, the Belizean prosecution and the investigation of Torres-Teyer by the DEA and other U.S. authorities were so closely intertwined that, had Torres-Teyer's bribery scheme been successful, it would have obstructed the U.S. prosecution.[86] The court rejected the defendant's arguments against including the bribery attempt, based on *Chunza-Plazas* and *Azeem*, noting that the salient feature of *Azeem* was that shipping drugs from Pakistan to Egypt was not a crime against the United States and describing *Chunza-Plazas* as involving a situation where "[the] alleged crimes could not plausibly be deemed 'part of the same course of conduct'" as the offense of conviction.[87]

This strange approach of including foreign relevant conduct while distinguishing *Azeem*, however, is common among the foreign relevant conduct cases. It certainly has carried the day in the Seventh Circuit, as evidenced in *United States v. Farouil*[88] and *United States v. Dawn*.[89] In *Farouil*, another drug importation case, the court held that drugs seized from the defendant's co-conspirator in Belgium were correctly included in calculating the defendant's sentence because the co-conspirator was preparing to board the same flight to Chicago as the defendant when the drugs were seized.[90] The court found that the co-conspirator's crime was "directed against the United States" and thus unlike the situation in *Azeem*.[91] Soon thereafter, the Seventh Circuit again included foreign relevant conduct in the context of a child pornography case in *Dawn*, where it held that the fact that the defendant had produced the films that were the basis of his conviction for receiving and possessing child pornography was relevant conduct

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[86] *Id.* at 366–67. It is not immediately clear whether the court considered the Belizean bribery attempt to be relevant conduct. In its decision, the court noted that the obstruction of justice provision applies to "obstructive conduct 'related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense.'" *Id.* at 366 (quoting U.S.S.G., *supra* note 2, § 3C1.1). Even if considered only as an attempt to avoid prosecution in Belize and not to avoid extradition to the United States, the bribery attempt was obstructive conduct related to "a closely related offense" or to the defendant's offense of conviction, since the Belizean and U.S. prosecutions centered on the same offense conduct. *Id.* The court viewed the legal question before it as "whether [the obstruction of justice provision] applies where a defendant attempts to obstruct a foreign prosecution for an offense that is relevant conduct or an offense closely related to the offense of conviction in the United States." *Id.* Regardless of how the legal question is phrased, however, the analysis in *Teyer* considers the same underlying issues as *Azeem*, *Chunza-Plazas*, and *Greer*.

[87] *Id.* at 367 n.3 (quoting United States v. Chunza-Plazas, 45 F.3d 51, 57–58 (2d Cir. 1995)).

[88] 124 F.3d 838 (7th Cir. 1997).

[89] 129 F.3d 878 (7th Cir. 1997).

[90] *Farouil*, 124 F.3d at 845.

[91] *Id.* at 845.

despite the fact that the production of the child pornography occurred entirely in Honduras.[92] The court first noted that the Guidelines do not "make[ ] the relevance of the defendant's conduct turn on whether that conduct took place within or without the borders of the United States" but instead focus on "the factual and logical relationship between the offense of conviction and the defendant's other acts, wherever they may have occurred."[93] The court then reviewed the direction of relevant conduct jurisprudence developed in cases like *Watts* and observed that "[t]he cases make clear that sentencing judges may look to the conduct surrounding the offense of conviction in fashioning an appropriate sentence, regardless of whether the defendant was ever charged with or convicted of that conduct, and regardless of whether he could be."[94] The court concluded that, regardless of whether U.S. laws criminalizing the production of child pornography reach so far as to cover U.S. nationals in Honduras, the issue creates no obstacle to applying the cross-reference for production of child pornography when the offense of conviction is possession of child pornography in the United States.[95] Once again, however, the court then went to great lengths to distinguish the Second Circuit's reasoning in *Azeem*.[96] Although *Azeem* was decided before *Witte* and *Watts* and seems contrary to the more recent trend of including foreign relevant conduct in sentencing, the unwillingness of courts to overturn it and its recurring prominence in subsequent decisions suggests that the concerns raised by *Azeem* still have some currency with courts.

Only a few courts have straightforwardly included foreign relevant conduct without reservation. In *United States v. Wilkinson*, the Tenth Circuit, confronted with facts nearly identical to those in *Dawn*, held that "it [is] appropriate for courts, when applying the cross-reference to [the production of child pornography], to consider . . . relevant conduct that occurs . . . outside of the United States" and went on to note that it would be "absurd" if judges could not consider conduct just because it occurred outside of the United States.[97] Similarly, the Fifth Circuit, in *United States v. Levario-Quiroz*, engaged in one of the most thorough analyses of the foreign relevant conduct issue to date.[98]

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[92] *Dawn*, 129 F.3d at 880–81, 886.

[93] *Id.* at 882.

[94] *Id.* at 884.

[95] *Id.*

[96] *See id.* at 885 ("[W]e do not think our holding today conflicts with [*Azeem* and *Chunza-Plazas*].").

[97] United States v. Wilkinson, 169 F.3d 1236, 1239 (10th Cir. 1999).

[98] 161 F.3d 903 (5th Cir. 1998). The facts in *Levario-Quiroz* were unusual. Levario-Quiroz had shot a man to death in Oijnaga, Mexico, and, armed with a semi-automatic

Although it held that the foreign conduct in the case did not meet the technical requirements of relevant conduct, it concluded without reservation that the fact that the conduct occurred outside the United States was not itself a bar to consideration.[99]

Although the trend clearly indicates a uniformity of end results favoring the inclusion of foreign relevant conduct, the reasoning in the cases on this subject is still varied, internally inconsistent, and misdirected. The next Part argues that this trend is yielding the correct outcome through unnecessarily circuitous means and suggests that the confusion surrounding this issue is a reflection of a much larger storm brewing. Courts' unwillingness to reject the reasoning in *Azeem*—and the lengths to which they have gone to preserve *Azeem* from their contrary holdings—suggest that the question of foreign relevant conduct has provided a forum in which courts have been at liberty to question the expansive scope of relevant conduct and its serious implications for sentences in all contexts.

III
APPLYING THE SAME RULES IN DIFFERENT CONTEXTS: SOME GUIDANCE FOR COURTS CONSIDERING FOREIGN RELEVANT CONDUCT

This Part argues that the general principles of relevant conduct apply to foreign as well as domestic conduct and uniformly dictate its inclusion as long as it meets all of the criteria of relevant conduct. As

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rifle, had engaged in a gunfight with Mexican law enforcement before crossing the Rio Grande. Arrested in Texas after fleeing across the border, he pled guilty to illegal importation of a firearm and illegal entry into the United States. Factoring in the gunfight with Mexican law enforcement as relevant conduct, the district court sentenced him on the firearm charge to the statutory maximum of sixty months.

On review, the Fifth Circuit held that the cross-references did not apply—not because they were foreign acts, but because they did not meet the requirement of relevant conduct that the acts occurred during the commission of, in preparation for, or in the course of attempting to avoid detection of responsibility for the offense of conviction. In this case, the offense of conviction occurred in the course of attempting to avoid responsibility for the acts being included as relevant conduct. Although it occurred prior to the offense of conviction, the conduct did not occur in preparation for the offense since it could hardly be argued that the defendant committed homicide and entered into a gunfight with Mexican police *in order to* enter the United States illegally and possess a firearm there. Nor were the acts relevant conduct under the alternate formulation, requiring the inclusion of all acts that are part of the "same course of conduct" as the offense of conviction since assault and attempted murder are offenses that require separate treatment rather than grouping. As a result, even if Levario-Quiroz's conduct in Mexico had occurred within the United States, it would not properly have been considered relevant conduct. If the other requirements of relevant conduct had been met in *Levario-Quiroz*, however, it appears that the Fifth Circuit would have held that the Mexican offenses should have been considered. *Id.* at 905–08.

[99] *Id.* at 906.

Part II.B described, courts in foreign relevant conduct cases generally arrive at outcomes that are consistent with this argument despite employing analyses that often treat foreign relevant conduct as a different beast than domestic relevant conduct.[100] This Part identifies three broad groups of concerns that seem to be driving these competing analyses in different directions, and argues that all of these concerns are substantially misguided in that they apply equally to domestic conduct as well as foreign conduct. It then posits that, because the concerns are about relevant conduct generally, the strange development of cases treating foreign relevant conduct differently is a reflection of judicial discomfort with the scope and application of relevant conduct in all contexts, and part of a larger judicial backlash against long sentences based on conduct not encompassed by the offense of conviction rather than a real concern with the conduct's foreignness.

A. Concerns About Foreign Relevant Conduct Apply to Domestic Relevant Conduct

This Section identifies three broad categories of concerns about foreign relevant conduct discernible in the cases outlined in Part II.B. It then argues that these concerns, while not illegitimate, either are not uniquely applicable to foreign relevant conduct or are otherwise inconsistent with general principles established in *Witte* or *Watts*. A distinct analysis for foreign relevant conduct is therefore simply not required and should be abandoned by the courts.

1. "Jurisdictional" Concerns Are Not Relevant

The first group of concerns driving the analyses in these cases might be loosely termed "jurisdictional" concerns, where the courts seem to be motivated by concerns about the *power* of an American court to reach the foreign conduct. These types of concerns seem to be at the forefront of *Azeem*, *Farouil*, *Greer*, and *Teyer*.

The Second Circuit clearly was concerned with these issues in *Azeem*, where it held that a drug shipment from Pakistan to Egypt should not be included as relevant conduct in a conviction for a drug shipment from Pakistan to the United States because the former "was not a crime against the United States."[101] Its warning that including foreign conduct would require courts to "perform a careful comparative analysis" to distinguish between conduct that violated domestic

[100] *See supra* notes 81–99 and accompanying text.
[101] 946 F.2d 13, 16 (2d Cir. 1991).

and foreign law, or only domestic or only foreign law,[102] also reflects a concern for the court's power to reach foreign conduct. In *Farouil*, however, where drugs seized in Belgium were clearly intended for the United States, the Seventh Circuit held that the foreign relevant conduct could be included since it constituted a crime "directed against the United States."[103]

The Second Circuit's apparent about-face in *Greer*, where the court included drugs transported from Europe to Canada as relevant conduct for a conviction under the MDLEA, also reflects a concern for the court's power to punish the conduct.[104] Here the court reconciled its inclusion of foreign conduct with *Azeem* by stating that "the MDLEA is a United States criminal statute that specifically covers conduct outside the United States."[105] The district court's statement in *Teyer* that the "effort to frustrate the Belizean prosecution would reasonably be expected to have an effect on the prosecution here" seems to contemplate an expansion of *Greer* to reach foreign conduct that would have a considerable negative impact on the United States.[106]

In these cases, concerns about the power of the court to consider conduct beyond the borders of the United States or the propriety of doing so seemed to determine both the outcome and the analysis: *Azeem* rejected the foreign conduct while the others went to great lengths to distinguish the foreign conduct from the rule in *Azeem* by making the foreign conduct a crime against the United States.

Yet the principles that can be distilled from the Supreme Court cases on general relevant conduct make it clear that the "jurisdictional" concerns of *Azeem* and the cases that have followed its rationale ask the wrong questions. *Witte* demonstrates that the importance of the court's reach in relevant conduct cases is limited to its power to reach the underlying offense of conviction: "[T]he offender is . . . punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense (which that related conduct may or may not constitute)."[107] Thus it should matter only that the offense of conviction was "a crime

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[102] *Id.* at 17. It is unclear whether the court thought that conduct would have to be illegal both in the United States and in the other country in order to be included, but it was clearly concerned that it might be called upon to consider conduct that was *legal* in the other country but *illegal* in the United States. *Id.*

[103] 124 F.3d 838, 845 (7th Cir. 1997).

[104] 285 F.3d 158, 179–80 (2d Cir. 2002). *Greer* is also discussed *supra* notes 81–83 and accompanying text.

[105] *Greer*, 285 F.3d at 179–80.

[106] United States v. Teyer, 322 F. Supp. 2d 359, 367 (S.D.N.Y. 2004).

[107] Witte v. United States, 515 U.S. 389, 403 (1995).

against the United States," since in considering foreign conduct, the court is merely increasing the punishment for the domestic offense. Current relevant conduct jurisprudence requires the court to consider acquitted conduct,[108] and certain guideline provisions even apply to legal conduct;[109] legal domestic conduct is not "a crime against the United States" any more than is the shipment of drugs from Pakistan to Egypt, and acquitted conduct could not ordinarily be brought for a second time before the court. Since sentencing courts must include domestic conduct that they could never punish independently, it is unclear why the punishability of foreign conduct should have any relevance in the sentencing of a domestic offense.

Furthermore, the use of the word "conduct" rather than "crime" throughout the relevant conduct provision itself, and the inclusion of some legal conduct as relevant conduct makes it clear that its inclusion depends on its logical relationship to the offense conduct, not on its inherent criminality.[110] Therefore, the Second Circuit's fear of comparative law forays to determine the criminality of conduct around the world is also misplaced.[111]

To the extent that courts are concerned about their power to punish, then, the relevant question is whether the offense of conviction was a crime against the United States, a question that is answered long before the sentencing phase. To the extent that courts are concerned about their power to consider conduct in sentencing another offense rather than their power to punish that conduct, the lesson of general relevant conduct is that the limits on what courts must consider for relevant conduct purposes are few; any limit imposed on the inclusion of foreign relevant conduct would be an artificial one, divorced from general relevant conduct principles.

2. *"Definitional" Concerns Are Not Justified*

A second group of concerns might be loosely termed "definitional" concerns, in the sense that courts are expressing concerns about the sufficiency of the relationship between the foreign conduct and the offense of conviction. These concerns are at least tangentially related to the "jurisdictional" concerns, but are not explicitly aired and linger beneath the surface. Specifically, it appears that courts are acting upon a subconscious preference for conduct that is made rele-

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108 United States v. Watts, 519 U.S. 148, 155–57 (1997).

109 *See, e.g.*, U.S.S.G., *supra* note 2, § 2G2.2(b)(5) (increasing offense level for use of computer under child pornography guideline); *supra* note 65 and accompanying text (discussing use of legal conduct as relevant conduct).

110 *See, e.g.*, U.S.S.G., *supra* note 2, § 1B1.3; *supra* note 65.

111 *See supra* text accompanying note 76.

vant because of its closer logical relationship to the offense of conviction, rather than conduct which is made relevant because of a "similar course of conduct."

This concern is particularly noticeable in the Seventh Circuit's decision in *Dawn*, where the court stated that its decision to include as foreign relevant conduct the fact that the defendant produced the child pornography he was convicted of possessing—a case where the defendant's "domestic offenses were the direct result of his relevant conduct abroad" and "inextricable from one another"—*did not conflict* with the Second Circuit's decisions in *Azeem* and *Chunza-Plazas* because in those cases the links were more "tenuous."[112]

The relationship between the foreign conduct and the offense conduct was also clearly in the foreground in *Levario-Quiroz*, where the holding turned not on the foreignness of the conduct but on the technical definition of relevance under section 1B1.3.[113] While the foreign conduct did not fall within the technical definition of relevant conduct, the Fifth Circuit relied on the close logical relationship to conclude that the sentencing court could have upwardly departed anyway since the accusations of the defendant's involvement in a murder and gunfight with police in Mexico "markedly distinguish[ed defendant's] conduct from the norm of illegal enterers and illegal firearm importers."[114]

In *Farouil*, the court's concern with the relationship between foreign conduct and the offense conduct was closely intertwined with the "jurisdictional" concerns. The Seventh Circuit stressed that the foreign drugs seized in Belgium were carried by Farouil's traveling companion and *would have been on the same flight* as the drugs underlying the conviction; there was "[not] any doubt" that the foreign conduct was part of the "same scheme to import heroin."[115] Although the relevant conduct in *Farouil* and the relevant conduct in *Azeem* both involve the grouping of drug transactions under the "same course of conduct" formulation of relevant conduct, the drug shipments in *Azeem*, which were to different corners of the world one month apart, seem more discrete and episodic than the two shipments in *Farouil* that give the impression of a more unitary crime.[116] Similar concerns were evident in *Teyer*, where the district court observed that the

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112 United States v. Dawn, 129 F.3d 878, 885 (7th Cir. 1997).

113 United States v. Levario-Quiroz, 161 F.3d 903, 906 (5th Cir. 1998).

114 *Id.* at 907–08. The facts of *Levario-Quiroz* are described *supra* note 98.

115 United States v. Farouil, 124 F.3d 838, 845 (7th Cir. 1997).

116 *See* United States v. Azeem, 946 F.2d 13, 14 (2d Cir. 1991) (involving shipment of heroin from Pakistan to New York in May and shipment of heroin from Pakistan to Egypt in June).

Belizean prosecution that the defendant sought to obstruct was "closely intertwined" with the American offense to which the obstruction of justice adjustment was added, while later distinguishing *Chunza-Plazas* as involving "alleged crimes [that] could not plausibly be deemed 'part of the same course of conduct.'"[117]

These "definitional" concerns are clearly understandable on an instinctual level, but there is simply no justification for an approach that would require the inclusion of all relevant domestic conduct but only *really* relevant foreign conduct. Under section 1B1.3, conduct is either relevant or not relevant; it is not a graduated concept. Nor does the relevant conduct guideline endorse the preference of one definition of relevant conduct over another.[118]

A principle in *Witte* again sheds light on the inappropriateness of requiring a more stringent degree of relevancy for foreign conduct than for domestic conduct: Relevant conduct can enhance sentences because of the light it sheds on the seriousness of the defendant's offense.[119] If courts were to apply a stricter definition of relevancy where foreign conduct was concerned, there would be cases where the same conduct might be "relevant enough" if it occurred in the United States, but not if it occurred abroad. With the jurisdictional concerns disposed of, there is no apparent reason why the "American-ness" of the same conduct should be more probative of the seriousness of the offense of conviction.

3. *"Procedural" Concerns Apply Equally to Domestic Relevant Conduct*

The third group of concerns might be loosely termed "procedural" concerns, where the courts seem to be troubled with issues such as the types of evidence of foreign conduct that should be permitted and the courts' institutional competence to make reliable determinations about foreign relevant conduct.

Such concerns were explicitly recognized in *Azeem*, where the Second Circuit discussed the evidentiary problems that might flow from a "global approach" to relevant conduct, particularly noting the

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117 United States v. Teyer, 322 F. Supp. 2d 359, 367 n.3 (S.D.N.Y. 2004) (quoting United States v. Chunza-Plazas, 45 F.3d 51, 57–58 (2d Cir. 1995)). *See also supra* note 87 and accompanying text.

118 *See* U.S.S.G., *supra* note 2, § 1B1.3.

119 *See* Witte v. United States, 515 U.S. 389, 402–03 (1993). "The relevant conduct provisions of the Sentencing Guidelines, like their criminal history counterparts and . . . recidivism statutes . . . are sentencing enhancement regimes evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity." *Id.* at 403; *see also Dawn*, 129 F.3d at 884 (citing *Witte*).

potential for problems where, for example, "an arrest . . . by the foreign country . . . [was] plainly unconstitutional by our law."[120] The procedural and evidentiary concerns were also at the forefront of the decision in *Chunza-Plazas*, where the court repeatedly emphasized the ways in which the relevant conduct evidence from Colombia fell short of the dictates of federal evidence law at trial, pointing to "an anonymous judge" who was a witness, a statement from "an unidentified witness," and the lack of oaths.[121] The court also overturned the upward departure on the additional ground that the district court had relied on uncorroborated "triple-hearsay testimony" that did not meet "an acceptable standard of reliability," even though sentencing courts may consider hearsay generally.[122]

It is also clear that courts have been wrangling with the procedural sufficiency of the preponderance of the evidence standard when it comes to greatly enhancing sentences based on relevant conduct.[123] Thus, it may be that, in the absence of any explicit guidance on how to treat foreign relevant conduct from the Commission or Congress, courts are more likely to be troubled by the foreignness of conduct where the evidence provides a lesser degree of certainty that the conduct should be attributed to the defendant. In the child pornography cases, for example, there was little room for doubt that the defendants had produced the pornography which they were convicted of possessing. In *Dawn*, the defendant admitted that it was his adult hand featured in several of the films;[124] the issue was also uncontested on appeal in *Wilkinson*.[125] In cases like *Farouil* and *Levario-Quiroz*, the coordinated efforts of law enforcement both in the United States and abroad bolstered the veracity of the reports of the relevant conduct from abroad. In *Farouil*, the reports of drugs seized from the defendant's traveling companion in Belgium may have seemed more reliable in light of the discovery of the same drugs on the defendant upon his arrival in the United States; and in *Levario-Quiroz*, the Border Patrol's discovery of the defendant—wounded, armed, and hiding in

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120 *Azeem*, 946 F.2d at 17. The Second Circuit worried:

> Were a global approach required, we would soon find it necessary to determine the appropriate evidence that must be produced by the prosecution to show that the activity occurred and that it violated foreign law. For example, we would have to decide whether an arrest or conviction by the foreign country is necessary for inclusion and, if so, whether it should be disregarded if plainly unconstitutional by our law.

Id.

121 *Chunza-Plazas*, 45 F.3d at 53.

122 *Id.* at 58.

123 *See supra* notes 12–17 and accompanying text.

124 *Dawn*, 129 F.3d at 880.

125 United States v. Wilkinson, 169 F.3d 1236, 1239 (10th Cir. 1999).

Texas—seems to corroborate the reports of the gunfight and killing in Mexico. By contrast, in *Chunza-Plazas*, the Second Circuit was reluctant to consider the foreign evidence where it seemed doubtful that the foreign conduct allegations were true; the court, for example, repeatedly described the foreign conduct as "alleged" and labeled the government's theories of the evidence of relevant conduct as "contradictory" and "irreconcilable"—the result of the government's "zeal" to include the Colombian conduct.[126] Thus it appears that where courts are more certain that the defendant engaged in the foreign relevant conduct they are less likely to be troubled by the conduct's foreignness; where they harbor serious doubts about the conduct, they are predisposed to worry about the evidentiary problems raised by including it.

Yet the "procedural" concerns raised by the courts apply equally to domestic relevant conduct and are therefore of little value in shaping the analysis of the proper role of foreign relevant conduct. An approach based on these concerns could have perverse effects. Consider *Azeem*'s concern that a "global approach" might force courts to confront questions about the level of procedural protection afforded in other countries.[127] It would be an odd result indeed to exclude foreign relevant conduct on the basis that the evidence involved an arrest that would violate the U.S. Constitution when domestic relevant conduct can be proven by evidence that was obtained in violation of the very same Constitution and that, for trial purposes, would be suppressed.[128]

Furthermore, concerns about issues such as hearsay or the reliability of evidence apply to domestic as well as foreign conduct. Evidence is not "more" hearsay, for example, because it was related to the witness by a Canadian rather than a New Yorker, and the Guidelines specifically allow judges to consider hearsay evidence.[129] The concerns expressed in *Chunza-Plazas* about anonymity and reliability apply to domestic as well as foreign conduct and are resolved by the Guidelines. If the court does not consider the evidence to be reli-

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126 *Chunza-Plazas*, 45 F.3d at 58.

127 United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991).

128 *See, e.g.*, United States v. Brimah, 214 F.3d 854 (7th Cir. 2000) (finding that drugs suppressed before trial where seized in violation of Fourth Amendment were properly included as relevant conduct at sentencing).

129 U.S.S.G., *supra* note 2, § 6A1.3 cmt. (allowing consideration of "reliable hearsay evidence").

able, it must ignore it anyway;[130] there is no need to adopt a separate analysis based on the conduct's foreignness.[131]

Similarly, to the extent that the decisions to include or exclude foreign relevant conduct correlate with the certainty or doubt attached to the accounts of the foreign conduct, concerns about the sufficiency of proof apply to domestic conduct equally. As is the case with all of the concerns evident in the foreign relevant conduct cases, it may be simply that where courts are already troubled by one of these general concerns, the foreignness of the conduct becomes an obvious scapegoat. This is problematic, however, in that international offenders may benefit from these convoluted analyses designed to create extra "outs," all based on a false distinction between foreign and domestic relevant conduct.

B. Courts Should Apply the Same Rules and Eliminate the Needless Analytical Distinction

The concerns that seem to underlie the scattered and inconsistent decisions on foreign relevant conduct have equal currency in a discussion of domestic relevant conduct. Foreign relevant conduct must be included in sentencing simply because no different rule is warranted. Although courts are moving toward the uniform inclusion of foreign relevant conduct, many courts are taking circuitous routes to get there. By drawing analytical distinctions on the basis of the concerns described in the previous Section—which are either irrelevant or universal—courts are creating extra "outs" by which some foreign relevant conduct might be excluded. These "outs" have the potential to give international offenders an unwarranted windfall vis-à-vis strictly domestic offenders of similar culpability.

Uniform treatment is also essential, however, because without including foreign relevant conduct, the intricate sentencing scheme created by the Guidelines is incomplete, and international offenders will be sentenced without an adequate blame-apportioning mechanism. As this Note argued in Part I, relevant conduct now functions to

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130 *Id.* ("Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. . . . Unreliable allegations shall not be considered.").

131 The district court's opinion in *Teyer* is a positive demonstration of how foreign relevant conduct can be presented and proven to the sentencing court. United States v. Teyer, 322 F. Supp. 2d 359 (S.D.N.Y. 2004). In *Teyer*, the court relied on live witnesses, documentary evidence, and even the affidavit of the Belizean magistrate, which stated that he was never approached or offered a bribe on behalf of the defendant; furthermore, the sentencing opinion is replete with the court's assessments of the credibility and persuasiveness of the evidence. *Id.* at 366. *Teyer* thus suggests that many of the evidentiary concerns in *Chunza-Plazas* can be satisfied through the application of standard evidentiary norms.

position people convicted of the same offense along a spectrum of culpability.[132] Without considering foreign relevant conduct, the true magnitude of some offenses could not be captured. Some of the existing foreign relevant conduct cases, in fact, are suggestive of the inadequacy of the count of conviction and the domestic conduct to capture the actual nature of the offense in all cases. Consider, for example, the offense of conviction and the alleged real offense conduct of the defendant in *Azeem*.[133] An approach that looks only at the offense of conviction and the domestic relevant conduct fails to capture the real magnitude of the defendant's conduct: Azeem's involvement in a drug conspiracy was more culpable because of his other drug shipments abroad.[134] Without considering foreign relevant conduct, however, a member of a drug conspiracy that enjoys economies of scale because it exports massive quantities of drugs to many nations besides the United States, or a member of a drug conspiracy that employs widespread violence in drug source countries, will receive an identical sentence to a member of a small-scale drug conspiracy or a nonviolent drug conspiracy who has brought the same quantity of the same drugs into the United States. The more pernicious nature of the crimes of the large-scale drug conspirator or the violent drug conspirator is lost at sentencing if foreign relevant conduct is not included. Although relevant conduct is essentially a one-way ratchet that will not help the less culpable defendant, not including foreign relevant conduct will result in a failure to fairly apportion blameworthiness to international defendants.

C. *Foreign Relevant Conduct Jurisprudence as a Critique of Relevant Conduct*

More interesting is the question of what has motivated courts to pursue these roads less traveled rather than follow the well-worn paths established by the principles announced in *Witte* and *Watts* or even in the plain language of the relevant conduct provision itself. Why have courts made such a simple question relatively complex? As this Note argued in the previous Section, the concerns expressed by the courts in the foreign relevant conduct decisions reflect, in large part, concerns with relevant conduct in general.[135] This Section posits that the odd development of foreign relevant conduct cases is better

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[132] *See supra* notes 58–60 and accompanying text.

[133] *Azeem*, 946 F.2d at 15.

[134] *Id.* at 16. The Second Circuit, in fact, specifically rejected Azeem's argument that the drug shipment from Pakistan to Cairo was not part of the same course of conduct as the drug shipment from Pakistan to New York. *Id.*

[135] *See supra* Part II.B.

explained as but another small skirmish in a much larger battle. The Guidelines regularly call upon courts to mete out sentences that condemn the defendants before them to prison *for decades*, a duty which weighs heavily on many judges.[136] When placed in the context of judicial resistance to the potent effect of relevant conduct on sentences, increasingly long federal sentences, and shrinking judicial discretion, the fancy footwork to preserve the mere possibility of excluding foreign relevant conduct is understandable.

The judicial resistance to the wholesale inclusion of foreign relevant conduct is unsurprising given reactions to the relevant conduct provision in general. The Guidelines' treatment of relevant conduct, in the attempt to more accurately reflect the seriousness of the real offense, parted ways with core principles of criminal justice.[137] The resulting backlash has not been limited to the pages of law journals but is evident in courtrooms as well.[138] As Part I described, one

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[136] *See, e.g.*, United States v. Teyer, 322 F. Supp. 2d 359, 363 (S.D.N.Y. 2004). *Teyer* is discussed *supra* notes 84–87. The judge in this case wrestled with the rigidity and severity of the sentence prescribed by the Guidelines for one of Torres-Teyer's co-defendants, a *pistolero* employed to guard the cocaine, in attempting to decide whether the *pistolero* qualified as a "minor role" participant (thus deserving a substantial reduction in sentence):

> [The defendant] remained an insignificant cog in the machinery of the drug trade, recruited to serve as one soldier in a virtual army of pistoleros working for Torres-Teyer. To say that he could easily be replaced in the drug trade would be an understatement. Before his extradition, he never set foot in the United States in his life, and indeed, save for his ill-fated expedition to Belize, apparently never left Mexico. Surely no cartel leader had any interest in breaking him out of a Belizean jail. His extradition to the United States seems to have been essentially a tail attached to the larger project of obtaining jurisdiction over his more significant codefendants. He is only an afterthought in this indictment, as expendable to U.S. authorities as he was to leaders of the narcotics conspiracy.
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> . . . Undoubtedly, a considerably lower sentence [than twenty years] would adequately serve these [same sentencing] goals. But to impose a sentence of less than ten years on an armed guard in a drug enterprise of monumental proportions would be disproportionately lenient, particularly when viewed in comparison to the penalties imposed on relatively minor street dealers in crack cocaine, whom the Guidelines subject to ten-year sentences for dealing in quantities of drugs of a street value that would not constitute a rounding error in Torres-Teyer's ledger books.

Id. at 381–82. As the facts of this defendant's case illustrate, applying the Guidelines in a manner that is uniform, fair, and proportionate to an individual defendant can be a near-impossible task. *See also infra* notes 144, 147.

[137] *See, e.g.*, Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1756–58, 1788 (1999) (using relevant conduct provision as one of three illustrations of "unthinkable" contemporary punishment policies "of a ferocity not previously known in this country and unknown today anywhere else in the Western world").

[138] The Supreme Court's recent decision in *Blakely v. Washington*, announced just as this Note was being readied for publication, has rendered the constitutionality of the relevant conduct provision, and essentially the Guidelines themselves, uncertain. 124 S. Ct.

avenue that judges have pursued aggressively is the possibility of applying a higher standard of proof than "preponderance of the evidence," such as the "clear and convincing evidence" standard, especially where relevant conduct might greatly increase a sentence or where acquitted conduct is at issue.[139] However, in circuits where a higher standard of proof is precluded, sentencing courts have used the departure power to take away with one hand what they were reluctantly forced to give with the other.[140] Curtailment of the downward departure power, however, may effectively seal off this escape hatch for many judges troubled by the effects of relevant conduct applications.[141]

2531 (2004). In *Blakely*, reviewing a sentence imposed under the Washington State sentencing system, a five-member majority of the Court held the state guideline provision unconstitutional for violating the petitioner's Sixth Amendment right to trial by jury because it allowed judges, upon making additional findings of fact, to impose sentences higher than the maximum that could be imposed without any additional factual findings. *Id.* at 2537–38. Although the Court reserved the issue of the constitutionality of the federal system, the similarities between the federal system and the state system in *Blakely* are striking enough that the Court's decision in *Blakely* has already significantly disrupted the federal system. *Id.* at 2538 n.9; Dan Eggen & Jerry Markon, *High Court Decision Sows Confusion on Sentencing Rules*, WASH. POST, July 13, 2004, at A1 (relating post-*Blakely* confusion among federal district and appellate courts and changes in charging and plea bargaining practices in U.S. Attorneys' offices nationwide).

In some districts, plea bargaining is at a standstill, and prosecutors are amending and adding to indictments all "readily provable" aggravating factors that previously would not have been considered until sentencing. Eggan & Markon, *supra*, at A1. Less than one month after the *Blakely* decision, the U.S. Senate passed a unanimous resolution stating that "it is the sense of Congress that the Supreme Court of the United States should act expeditiously to resolve the current confusion and inconsistency in the Federal criminal justice system by promptly considering and ruling on the constitutionality of the Federal Sentencing Guidelines." S. Con. Res. 130, 108th Cong. (2004) (citing circuit split regarding application of *Blakely* to Guidelines, confusion in district courts producing "results that disserve the core principles underlying the Sentencing Reform Act," and encouragement from both Department of Justice and Sentencing Commission to postpone "corrective legislation" so that Court might "clarify the applicability of its Blakely decision to the Federal Sentencing Guidelines in an expeditious manner"). However, until such time as the Court does address the issue, the constitutionality of relevant conduct, the Guidelines and the 1200 sentences imposed in federal courts each week remain uncertain. *E.g.*, Editorial, *Clean Up This Mess*, WASH. POST, July 26, 2004, at A18.

139 *See supra* notes 13–14 and accompanying text.

140 *See supra* note 14 and accompanying text.

141 With the PROTECT Act of 2003, Congress directly attacked the federal judiciary's use of downward departures through the Feeney Amendment, which targeted departures and judicial discretion. *See generally* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 401(m), 117 Stat. 650 (2003) (codified as amended in scattered sections of 28 U.S.C.) (directing Commission to "promulgate . . . appropriate amendments . . . to ensure that the incidence of downward departures is substantially reduced"). Among other things, the statute provides for de novo appellate review of departure decisions. 18 U.S.C. § 3742(e) (2003); *see, e.g.*, United States v. Stultz, 356 F.3d 261, 264 (2d Cir. 2004) (describing PROTECT Act's effect on standard of review for departures and noting that "mov[ing] the various appellate courts

This judicial backlash against the effects of the relevant conduct provision is in turn part of a larger judicial backlash against the increasing severity and inflexibility of sentencing imposed by Congress.[142] Justice Kennedy has advocated for a shortening of sentences throughout the Guidelines and the congressional repeal of mandatory minimums.[143] In June 2003, one federal judge announced his intention to resign rather than continue "being part of a sentencing system that is unnecessarily cruel and rigid" as a result of Congress's disdain

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from their traditional function of reviewing to the front lines of determining sentences de novo . . . will certainly at the least undermine the Commission's laudable goal of eliminating unjustified disparities in sentencing"). The passage of the PROTECT Act has sparked a tremendous amount of controversy that is largely beyond the scope of this Note. However, since judges occasionally have used downward departures to mitigate what they perceive to be the overly-punitive excesses of relevant conduct inclusions, the curbing of the downward departure power has pronounced significance to any discussion of relevant conduct. For a thorough critique of the provisions of the Feeney Amendment, both as passed and as initially proposed, see Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENTENCING REP. 310 (2003).

There is substantial concern, however, that the reporting requirements related to downward departures included in the Feeney Amendment, which involve identifying individual judges for departure decisions, will reduce judicial independence (along with the number of downward departures granted), and, to the extent that this violates separation of powers limitations, some courts have held that the departure reporting portions of the Feeney Amendment are unconstitutional. *See, e.g.*, William Rehnquist, Remarks of the Chief Justice at the Federal Judges Association Board of Directors Meeting (May 5, 2003) ("There can . . . be no doubt that the subject matter of the questions, and whether they target the judicial decisions of individual federal judges, could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties."), http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html; United States v. Mendoza, No. 03-CR-730-ALL, 2004 WL 1191118, at *6–*7 (C.D. Cal. Jan. 12, 2004) ("The chilling effect resulting from such reporting requirements is sufficient to violate the separation of powers limitations of the United States Constitution. . . . [T]he specific legal provision in question is a power grab by one branch of government over another branch . . . ."). Thus it seems that the final word on downward departures has yet to be uttered.

142 Michael Tonry has noted that in the first two years of the Guidelines system, over two hundred federal district judges invalidated the Guidelines or parts of the implementing legislation on constitutional grounds before their constitutional validity was established by the Supreme Court in *Mistretta v. United States*, 488 U.S. 361 (1989), and has cited the "number of cases and the vehemence of the opinions" as evidence of "the judges' deep antipathy to the guidelines themselves." Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. COLO. L. REV. 713, 716 (1993). Post-*Mistretta* evidence of judicial hostility to the Guidelines includes Federal Judicial Center surveys of judges "showing that large majorities want the guidelines repealed or fundamentally overhauled" and the "ongoing manipulations and evasions of the guidelines by judges and prosecutors in many district courts." Michael Tonry, *Federal Sentencing Can be Made More Just, If the Sentencing Commission Wants to Make It So*, 12 FED. SENTENCING REP. 83, 84 (1999).

143 *See generally* Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

for the federal judiciary;[144] another resigned in February 2004, also citing as a primary reason the current sentencing process, which he described as "not only dehumanizing to the person being sentenced, but to everybody in the room."[145] In the October 2002 trial of an eighteen year-old college freshman with no criminal record facing a minimum ten-year prison sentence for distributing child pornography images via file-sharing computer software, the trial judge took the radical step of announcing that he would instruct the jury on the sentence that the defendant faced if convicted.[146] Prosecutors immediately appealed and won, since such an instruction would be tantamount to an invitation for jury nullification. The jury was not instructed on the sentence, but the judge's hostility to the mandatory minimum sentencing law remains a stirring critique of the current federal sentencing system.[147] Other judges have taken the less drastic, but still telling, measure of changing their jury instructions: Two judges have changed the standard jury instruction that the sentence that a defendant will receive upon conviction is not the concern of the jury but will be up to the discretion of the trial judge, now instructing jurors that

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144 John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (oped announcing decision to retire). Judge Martin explained:

> Every sentence imposed affects a human life and, in most cases, the lives of several innocent family members who suffer as a result of a defendant's incarceration. For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice. . . . I no longer want to be a part of our unjust criminal justice system.

Id.

145 Leonard Post, *Feeney Fallout*, MIAMI DAILY BUS. REV., Feb. 12, 2004, at A10 (reporting resignation of Western District of Pennsylvania Judge Robert Cindrich and decision of Eastern District of New York Judge Jack Weinstein to videotape all sentencing hearings so that appeals courts applying de novo review might review sentencing factors that cannot be captured in transcript, such as facial expressions, body language, and feebleness).

146 Benjamin Weiser, *A Judge's Struggle to Avoid Imposing a Penalty He Hated*, N.Y. TIMES, Jan. 13, 2004, at A1 (describing trial, conviction, and sentencing of Jorge Pabon-Cruz before Southern District of New York Judge Gerard E. Lynch). The judge acknowledged that jury nullification was both prohibited by law and an unlikely outcome, but that if the jury were to nullify "[it] would be an instance where the government, the lawmakers and all of us would best be advised to learn what the community's standards are if they are so inconsistent with those that the court and the government believe appropriate." *Id.*

147 *Id.* Judge Lynch noted the perverse result that had the defendant actually molested a child, his sentence would have been approximately half the mandatory minimum sentence that he in fact faced, despite the fact that there was no evidence that he was involved in the creation of the child pornography or profited from its distribution. *Id.* It is interesting to note that Judge Lynch also authored the *Teyer* opinion, discussed *supra* notes 84–87 and accompanying text.

the defendant's sentence is determined by Congress and the Commission.[148]

Against this backdrop of judicial discomfort with expansive applications of relevant conduct and increasingly high statutory and Guidelines sentencing ranges, it is worth considering that the diversity of approaches to foreign relevant conduct may be a subconscious critique of the relevant conduct system. Courts, now restricted by the principles handed down by the Supreme Court in *Witte* and *Watts*, have little choice but to include foreign relevant conduct, yet in cases like *Dawn* and *Greer* the courts have refused to overturn *Azeem*, which is wholly inconsistent in both outcome and reasoning. By distinguishing each case on its facts, some courts are leaving open the smallest of windows for judicial discretion in cases yet to be contemplated.

CONCLUSION

This Note argues for the simplification of the complex approach that courts have taken to the issue of foreign relevant conduct. Though there is a clear trend toward inclusion, courts generally have stopped short of embracing the principles that govern domestic relevant conduct and have insisted on maintaining distinct analyses that focus on specific concerns attributed to the foreignness of the conduct. Special consideration is unwarranted, however, since valid concerns about foreign relevant conduct are really concerns about relevant conduct in general. Treating foreign and domestic relevant conduct as separate concepts has merely served to relieve critical pressure on the relevant conduct provision itself by preserving some "outs" by which courts might mitigate the effect of foreign relevant conduct where it would be particularly severe by relying on the conduct's foreignness. This pressure valve explanation of the unnecessarily complicated approaches taken by courts is consistent with a larger phenomenon of judicial resistance to the expansive scope of relevant conduct and increasingly long sentences that judges have little discretion to reduce. By adopting a simplified approach to foreign relevant conduct and uniformly applying the principles that govern domestic relevant conduct, courts might force more of the critical debate about this provision to the fore.

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[148] Jonathan Groner, *Federal Bench Feels Benched by Criminal Sentencing Amendment*, MIAMI DAILY BUS. REV., Jan. 2, 2004, at A8 (describing actions of Judge Paul Friedman and Senior Judge Thomas Penfield Jackson, both of the District of Columbia District Court).