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## Is “Relevant Conduct” Relevant? Reconsidering the Guidelines’ Approach to Real Offense Sentencing

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The relevant conduct rule in some respects is a bigger bugaboo than it ought to be. In several respects, the relevant conduct rule is a defendant's friend. Over time, the Commission has sought to restrain the breadth with which the original relevant conduct was interpreted. The relevant conduct rule encompasses two factors: conduct and temporal limitations. And there are two different temporal limitations involved. The broader, more expansive one is "same course of conduct" or "common scheme or plan." Both of those concepts have subjective elements to them, and my reading of the cases suggests that the courts do not always notice the subjective elements.

"Some course of conduct" requires that the conduct be "sufficiently" connected to the offense of correction to warrant a conclusion that the conduct is part of an ongoing spree or part of a single episode. "Sufficiently" is something of a subjective judgment. "Common scheme or plan" requires a "substantial" connection by a common factor. How "substantial" a connection is, is clearly a subjective determination. As David Yellen has indicated,<sup>1</sup> I think a good share of the problem with the relevant conduct rule focuses on the Commission's choice of factor to use in determining the severity for drug trafficking—quantity.

That choice is defensible because Congress has based mandatory minimums on quantity, which is something of a signal to the Commission that Congress views quantity as a principle determinant of the harm of the crime. The problem that we have found when we combine the relevant conduct rule with the use of quantity is that relatively low-culpability defendants—minor participants in large criminal activities—are punished excessively harshly.

The federal public defenders have proposed a number of changes to limit the consequences of this in drug cases by advocating a cap on the offense level applicable to a minor or minimal participant. At one point, a majority of the Commissioners voting even agreed to that. Unfortunately, the majority of Commissioners voting was not the majority required by the statute. Nevertheless, there was interest on the part of the Commission, and the public defender's proposal is one way to ameliorate a problem in the most numerous type of cases in the federal system – drug cases.

The other problem that I see I will call "creeping real offensism." As David [Yellen] said, the basic compromise was that the offense with which the

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1. Editor's Note: See Professor Yellen's comments, 44 ST. LOUIS U. L.J. 409, 410 (2000), in this issue.

defendant has been convicted will determine which Guideline in Chapter Two to start with, that is, which offense Guideline to apply. If a defendant is convicted of drug trafficking, the Guideline used is § 2(d)1.1. If the defendant is convicted of bank robbery, the Guideline used is § 2(b)3.1. That decision is made on the basis of the conduct alleged in the charge of which the defendant has been convicted.

When you get to the offense Guideline, there is a cross reference which says, "If the offense involved X, go to some other Guideline." This second determination is made on the basis of relevant conduct. In essence, every time there is a cross reference, you have eroded the compromise between real offense and charge offense that the Commission drew. There have been a lot of cross references put in offense Guidelines. The Commission's justification has been that defendants were plea-bargaining to lesser offenses, and had they been convicted of the that, the court (by a preponderance of the evidence) has found that they engaged in, they would have been punished more.

From the defendant's standpoint, the situation is ameliorated somewhat because, if the defendant usually will have pleaded to an offense with a lower maximum. But, if the real offense element was not in the Guideline, if there were not a cross reference, the defendant would receive an even lower sentence, comparable to the sentence of persons who have been convicted of that offense.