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## Limiting The "Unlimited" Scope of 18 U.S.C. § 3661: Defining The Reach Of The Sentencing Courts' Discretionary Powers

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# LIMITING THE “UNLIMITED” SCOPE OF 18 U.S.C. § 3661: DEFINING THE REACH OF THE SENTENCING COURTS’ DISCRETIONARY POWERS

*Jonevin Sabado\**

## I. INTRODUCTION

In February of 2011, Collins Max Christensen pled guilty to one count of wire fraud.<sup>1</sup> The district court found that Christensen misappropriated \$985,994 of investor funds.<sup>2</sup> As a result of investments lost through Christensen, several investors were severely and negatively impacted.<sup>3</sup> During Christensen’s sentencing hearing, the district court relied heavily on testimony provided by these investors, which detailed the significant effect these losses had on their lives.<sup>4</sup> Although Christensen’s criminal conduct clearly contributed to a portion of these losses, the majority of the damages were a result of Christensen’s *non-criminal* activity.<sup>5</sup> Nonetheless, the district court determined that the recommended guideline sentencing range of thirty-one to forty-one months was insufficient, and consequently sentenced Christensen to sixty months in federal prison—nineteen months *above* the high end of the applicable advisory guideline range.<sup>6</sup> The Ninth Circuit affirmed.<sup>7</sup> While the Ninth Circuit recognized that much of the damage reported by Christensen’s victims resulted from his *non-criminal* conduct, it

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1. United States v. Christensen, 732 F.3d 1094, 1097 (9th Cir. 2013).

2. *Id.* at 1098.

3. *Id.* at 1099.

4. *Id.* at 1099–1100.

5. *See id.*

6. *Id.* at 1097.

7. *Id.*

asserted that under 18 U.S.C. § 3661,<sup>8</sup> a sentencing judge is virtually unlimited in the “kind of information he may consider” when making a sentencing determination.<sup>9</sup>

This Comment addresses the problematic implications of the majority’s decision—specifically, the dangers of interpreting § 3661 too broadly. Part II of this Comment provides the factual background of *Christensen*, while Part III discusses the Ninth Circuit’s reasoning in this case. Part IV considers salient issues raised by the dissent in *Christensen* and utilizes those issues to examine the appropriate scope of § 3661. Part V concludes that the Ninth Circuit erred in affirming the district court’s decision to vary Christensen’s sentence upward based on his non-criminal conduct.

## II. STATEMENT OF THE CASE

On February 11, 2011, Christensen waived indictment and pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343.<sup>10</sup> Christensen had solicited money from individual investors for six land-development companies that he managed from 2006 through 2008.<sup>11</sup> Through his efforts, Christensen received a total of \$2,385,959 from investors.<sup>12</sup> Although some of these funds were used for their purported use, Christensen diverted a significant portion of the investments for undisclosed purposes.<sup>13</sup> Christensen admitted to misusing \$985,994 of investors’ funds, \$507,805 of which was misappropriated for his own personal use.<sup>14</sup>

In preparation for Christensen’s sentencing hearing, the probation officer submitted his Presentence Investigation Report (PSR), which “summarized the losses sustained by the various ‘victims’ of Christensen’s [conduct].”<sup>15</sup> These statements included detailed illustrations of the negative impact Christensen’s conduct

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8. 18 U.S.C. § 3661 (2012). “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” *Id.*

9. *Christensen*, 732 F.3d at 1102 (quoting *Nichols v. United States*, 511 U.S. 738, 747 (1994)).

10. *Id.* at 1097.

11. *Id.*

12. *Id.*

13. *Id.* at 1097–98.

14. *Id.* at 1098.

15. *Id.* The court added that “[o]nly those persons who had some or all of their investment funds unlawfully diverted by Christensen were listed as ‘victims’” *Id.*

had on the investors’ lives, including a retirement-aged individual claiming he could no longer retire and a woman claiming that Christensen’s conduct led to the destruction of her marriage.<sup>16</sup>

In determining the appropriate sentence for Christensen, the district court seriously considered the victims’ testimony.<sup>17</sup> Noting the “egregiousness of [Christensen’s] conduct” and the fact that he “destroy[ed] [his] victims’ lives,” the district court determined the sentencing guideline range did not sufficiently account for his crime.<sup>18</sup> Accordingly, the district court informed Christensen’s counsel, one day before his sentencing was to begin, that “for ‘a number of reasons’—it was considering an upward variance to [his] sentence.”<sup>19</sup>

Upon giving Christensen a three-level credit for accepting responsibility, the probation officer calculated Christensen’s total offense level to be twenty.<sup>20</sup> From this, the probation officer provided that under the federal sentencing guidelines, Christensen’s sentence should range from thirty-three to forty-one months.<sup>21</sup> However, the district court maintained that the applicable advisory guideline range was insufficient to account for Christensen’s “egregious” and “life destroying” conduct and sentenced Christensen to sixty months in federal prison.<sup>22</sup>

### III. REASONING OF THE COURT

On appeal, Christensen raised several objections to his sentence, only two of which were properly preserved for appeal.<sup>23</sup> Ultimately, Christensen argued that the district court committed procedural error by, among other things, “taking into account the ‘uncorroborated,’

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16. *Id.* at 1099.

17. *See id.* The court also pointed out that Christensen had a prior felony conviction (although twenty-eight years prior) for obtaining money by false pretenses. *Id.*

18. *Id.* at 1099–1100. The sentencing judge asserted, “I believe that given the egregiousness of his conduct, including lying, covering up, using funds for personal purposes, destroying the victims’ lives, cheating victims out of significant sums of money that they needed, and taking advantage of personal relationships, that the guideline range doesn’t adequately account for the harm that his conduct has caused.” *Id.*

19. *Id.* at 1098.

20. *Id.*

21. *Id.*

22. *Id.* at 1099–1100.

23. *Id.* at 1100. Christensen asserted there was a “lack of notice regarding the basis for an upward variance” and that the district court discounted his acceptance of responsibility. *Id.*

‘unsworn,’ and ‘untested’ statements of victims.”<sup>24</sup> The Ninth Circuit, emphasizing that sentencing hearings are not limited by the Federal Rules of Evidence, maintained that Christensen’s objection was without merit.<sup>25</sup> The Ninth Circuit fortified its position by citing the Supreme Court’s decision in *Nichols v. United States*,<sup>26</sup> where the Court asserted that “a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it came.”<sup>27</sup> Additionally, the Court’s statement seems consistent with § 3661.<sup>28</sup>

Further, the Ninth Circuit underscored Federal Rule of Criminal Procedure 32(d)(2)(B), which provides that “the [PSR] must contain ‘information that assesses any financial, social, psychological, and medical impact on any victim.’”<sup>29</sup> Accordingly, at sentencing, “a district court may consider victim impact statements, whether sworn or not.”<sup>30</sup>

In addition to evaluating the district court’s decision to consider uncorroborated evidence in Christensen’s hearing, the Ninth Circuit also addressed whether it was appropriate for the district court to consider the “life-destroying impacts” described by Christensen’s victims.<sup>31</sup> Relying on § 3661 and *Pepper v. United States*,<sup>32</sup> the Ninth Circuit affirmed the district court’s decision.<sup>33</sup>

Christensen’s victims reported damages that exceeded purely financial losses. The PSR detailed several harrowing stories, including a man of retirement-age that could no longer afford to retire, and one woman’s failed marriage.<sup>34</sup> However, the Ninth Circuit acknowledged that “[t]he victims reported the impacts they suffered from having lost *all* of their investment dollars, without

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24. *Id.* at 1102. Christensen also argued that the district court failed “to resolve factual conflicts in the PSR regarding victim impact and loss amounts,” and failed “to provide advance notice of the precise grounds for the upward variance in his sentence.” *Id.* at 1101.

25. *Id.* at 1102. Federal Rule of Evidence 1101(d)(3) provides that the Federal Rules of Evidence are inapplicable to “sentencing.” FED. R. EVID. 1101(d)(3).

26. 511 U.S. 738 (1994).

27. *Christensen*, 732 F.3d at 1102 (internal quotation marks omitted) (quoting *Nichols*, 511 U.S. at 747).

28. *See supra* text accompanying note 8.

29. *Christensen*, 732 F.3d at 1102 (citing FED. R. CRIM. P. 32(d)(2)(B)).

30. *Id.* (citing *United States v. Santana*, 908 F.2d 506, 507 (9th Cir. 1990)).

31. *See id.* at 1104.

32. 131 S. Ct. 1229 (2011).

33. *Christensen*, 732 F.3d at 1106.

34. *Id.* at 1104.

differentiating losses that were solely attributable to Christensen’s diversion of funds.”<sup>35</sup> The Ninth Circuit then went on to say that “[t]hese ‘life-destroying impacts’ *undoubtedly went beyond the stipulated losses to investors based on [his] diversion of funds.*”<sup>36</sup> Despite this, the Ninth Circuit asserted that because of the broad discretionary powers given to sentencing judges by § 3661, even those “life-destroying impacts” that could not directly be tied to Christensen’s criminal conduct were appropriate for the district court to consider.<sup>37</sup>

In furtherance of this position, the Ninth Circuit likewise pointed to *Pepper v. United States*, where the Supreme Court encouraged sentencing courts to “consider the widest possible breath of information about a defendant.”<sup>38</sup> Accordingly, the Ninth Circuit discerned that the life-destroying impacts gave “greater insight into Christensen’s ‘background, character, and conduct’” which the district court was wholly within its discretionary powers to consider.<sup>39</sup>

Lastly, the Ninth Circuit maintained that the “dollar amount” of the victims’ losses was not the central basis for the district court’s decision to impose an upward variance.<sup>40</sup> Rather, it was the “intangible nature of [his] conduct.”<sup>41</sup> Therefore, the Ninth Circuit asserted that to reduce these life-destroying impacts to “simple arithmetic” and ignore the “indivisible nature of the harm” is to misunderstand the point entirely.<sup>42</sup> Moreover, the court noted, “This is precisely the type of situation in which the Guidelines do not adequately account for the seriousness of the offense.”<sup>43</sup> As such, it

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35. *Id.*

36. *Id.* (emphasis added).

37. *Id.*

38. *Id.* The Court asserted that this would “ensure that the punishment [would] suit not merely the offense but the individual defendant.” *Id.* (citing *Pepper v. United States*, 131 S. Ct. 1229 (2011)).

39. *Id.*

40. *Id.* at 1105.

41. *Id.*

42. *Id.* As an example, the court discusses the case of Jennifer R., the woman who lost her marriage. The court, defending its position against the dissent, explains that the important aspect of Jennifer R.’s story was not the amount of money lost but rather the fact that she and her husband entrusted Christensen with their life savings, and he defrauded them. *Id.*

43. *Id.*

was appropriate for the district court to consider the entirety of these life-destroying impacts.<sup>44</sup>

#### IV. ANALYSIS: DELINEATING THE SCOPE OF § 3661

As detailed above, in upholding Christensen's sentence, the Ninth Circuit relied principally on § 3661 and case law that illustrates the broad discretionary powers afforded to sentencing courts.<sup>45</sup> Accordingly, the key consideration in evaluating the Ninth Circuit's decision is the appropriate scope of § 3661.

There is no question that § 3661 grants broad discretionary powers to sentencing courts—its language is direct and unambiguous.<sup>46</sup> The statute provides, “*No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.*”<sup>47</sup> The phrase “no limitation” seems to confer an indisputable discretion to sentencing judges in this respect. Therefore, it would follow that a sentencing court is wholly within its discretionary powers to consider *any* information about the background, character, and conduct of a person when determining an appropriate sentence—including *non-criminal* conduct.

However, is this discretionary power really without limit? Take, for example, a man convicted of an armed robbery. May the court consider the fact that he is left-handed for sentencing purposes? Such consideration would seem bizarre and irrational, yet this type of deliberation is logically consistent with the Ninth Circuit's broad interpretation of § 3661.

To evaluate the reach of § 3661, it is useful to consider the general discretionary power given to sentencing courts and, moreover, where this power comes from.

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44. *Id.*

45. *See generally Christensen*, 732 F.3d at 1104–05 (quoting § 3661 multiple times and citing to supporting case law [e.g., *Pepper v. United States*, 131 S. Ct. 1229 (2011)]).

46. 18 U.S.C. § 3661 (2012); *see also* Mark T. Doerr, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 260 (2009) (explaining the “argument for broad discretion for the judge in sentencing is based on the public policy that sentences must be specifically tailored to the individual defendant”).

47. 18 U.S.C. § 3661 (emphasis added).

A. *The Sentencing Reform Act of 1984*  
and *United States v. Booker*<sup>48</sup>

Beginning in the 1970s and continuing into the early 1980s, the federal government commenced efforts to reform the federal sentencing system.<sup>49</sup> Historically, convicted offenders were sentenced pursuant to “one of two penal policies—indeterminate and determinate sentences.”<sup>50</sup> In the years leading up to the Sentencing Reform Act, indeterminate sentences predominated.<sup>51</sup> However, there was a “perceived failure of the indeterminate system to ‘cure’ the criminal.”<sup>52</sup> This “perceived failure” of the sentencing system, coupled with a growing national crime rate, prompted the government to create the Sentencing Reform Act of 1984.<sup>53</sup> In so doing, Congress hoped to “bring uniformity and determinacy to sentences in the United States courts.”<sup>54</sup> As a result of the Federal Sentencing Reform Act, Congress initiated mandatory sentencing guidelines that judges were required to follow except under limited and “specified circumstances [that] the judge [had to] explicitly identify.”<sup>55</sup>

In 2005, the federal sentencing guidelines were significantly weakened after the Supreme Court, in a two-part opinion, struck down the provision in the guidelines that made them mandatory.<sup>56</sup> In *United States v. Booker*, the Supreme Court held that the mandatory nature of the guidelines violated the Sixth Amendment right to a trial

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48. 543 U.S. 220 (2005).

49. LISA M. SEGHETTI & ALISON M. SMITH, CONG. RESEARCH SERV., RL32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS i (2007).

50. *Id.* at 10.

51. *See id.* at 11.

52. *Id.* at 12.

53. *See id.*

54. Doerr, *supra* note 46, at 238.

55. *Id.* at 239. Citing sections of the Sentencing Commission’s Guidelines Manual, Doerr explains,

The Guidelines operate by assigning to each criminal offense an initial “offense level” called the “Base Offense Level.” From there, the sentencing court is directed to “apply the adjustments as appropriate related to victim, role, and obstruction of justice” and “apply the adjustment as appropriate for the defendant’s acceptance of responsibility.” Both adjustments function to either increase or decrease the offense level. Once the appropriate offense level is determined, a sentencing judge determines the defendant’s criminal history category. The defendant’s sentencing range is then calculated.

*Id.*

56. *See* SEGHETTI & SMITH, *supra* note 49, at 1.



by jury.<sup>57</sup> Accordingly, “federal judges are no longer bound by mandatory sentencing guidelines but need only consult them when they punish federal criminals.”<sup>58</sup>

However, *Booker* also provides that while sentencing judges have broad freedom to decide for themselves what sentences are appropriate for criminals, their decisions are “subject to reversal if appeals courts find them unreasonable.”<sup>59</sup>

Although the *Booker* Court held that the sentencing guidelines would no longer be mandatory, the Court specified that the guidelines must still be considered during sentencing hearings.<sup>60</sup> Accordingly, sentencing judges must be familiar with key provisions of the sentencing guidelines, including what conduct they may consider when making a sentencing determination.

### B. The Scope of “Relevant Conduct”

The scope of what conduct a sentencing judge may consider is often referred to as *relevant conduct*,<sup>61</sup> specified in U.S. Sentencing Guideline (U.S.S.G.) § 1B1.3.<sup>62</sup> Section 1B1.3 provides that relevant conduct includes, “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by defendant,” “all harm that resulted from the acts and omissions specified [in the aforementioned section],” and “any other information specified in the applicable guideline.”<sup>63</sup>

Although § 1B1.3 does not articulate whether the scope of “relevant conduct” is limited to *criminal* conduct, several federal appellate courts have unanimously held that the provision considers only those acts of the defendant that are unlawful.<sup>64</sup> For example, in

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57. *Id.* The Sixth Amendment provides in relevant part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .” U.S. CONST. amend. VI.

58. Charles Lane, *Sentencing Standards No Longer Mandatory*, WASH. POST, Jan. 13, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A3336-2005Jan12.html>.

59. *Id.*

60. *United States v. Booker*, 543 U.S. 220, 264 (2005).

61. *See, e.g., United States v. Christensen*, 732 F.3d 1094, 1110 (9th Cir. 2013) (Tashima, J., dissenting).

62. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2013) [hereinafter § 1B1.3].

63. *See id.* at 22–23.

64. *Christensen*, 732 F.3d at 1110 (Tashima, J., dissenting). Judge Tashima cited to *United States v. Catchings*, 708 F.3d 710, 712, 720 (6th Cir. 2013); *United States v. Griffith*, 584 F.3d 1004, 1013 (10th Cir. 2009); *United States v. Schaefer*, 291 F.3d 932, 940–41 (7th Cir. 2002); *United States v. Dove*, 247 F.3d 152, 155 (4th Cir. 2001); *United States v. Jain*, 93 F.3d 436, 443

*United States v. Catchings*,<sup>65</sup> the Sixth Circuit in no uncertain terms asserted, “Relevant conduct under [§ 1B1.3] *must be criminal conduct*. If not, such conduct is not relevant for the purpose of calculating a defendant’s Guidelines range.”<sup>66</sup> There, the Court of Appeals found the district court incorrectly included non-criminal conduct as relevant conduct for the purposes of determining an appropriate sentence for the defendant.<sup>67</sup> Accordingly, the Sixth Circuit reversed the district court’s sentence and remanded for re-sentencing.<sup>68</sup> The Court of Appeals reasoned that,

In calculating the Guidelines loss under U.S.S.G. § 2B1.1(b)(1), district courts include losses sustained from relevant conduct under U.S.S.G. § 1B1.3. Although “relevant conduct is not limited to conduct for which the defendant has been convicted,” the conduct must “amount to an offense for which a criminal defendant could potentially be incarcerated.”<sup>69</sup>

Consistent with the Sixth Circuit’s holding in *Catchings*, the Tenth Circuit likewise determined that relevant conduct is limited to conduct that is “criminal” or “unlawful.”<sup>70</sup> Acknowledging that six other circuits have concluded that § 1B1.3 exclusively considers conduct that is criminal, the Tenth Circuit “[made] explicit what [had] been implicit in [its] own precedent.”<sup>71</sup> Accordingly, it further stated,

For a district court to consider a defendant’s conduct as “relevant” under the Sentencing Guidelines, the Government must prove by a preponderance of the evidence that the defendant (1) engaged in conduct (2) related to the offense of conviction pursuant to [§ 1B1.3] and (3) *constituting a criminal offense under either a federal or a state statute*.<sup>72</sup>

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(8th Cir. 1996); *United States v. Peterson*, 101 F.3d 375, 385 (5th Cir. 1996); and *United States v. Dickler*, 64 F.3d 818, 830–31 (3d Cir. 1995).

65. 708 F.3d 710 (6th Cir. 2013).

66. *Id.* (emphasis added).

67. *Id.* at 719–20.

68. *Id.* at 722.

69. *Id.* at 720 (citing *United States v. Maken*, 510 F.3d 654 (6th Cir. 2007)).

70. *United States v. Griffith*, 584 F.3d 1004, 1013 (10th Cir. 2009).

71. *Id.*

72. *Id.* (emphasis added).

Accordingly, although federal judges have broad discretionary sentencing powers, these powers are not without limits.

### C. *Relevant Conduct and Christensen*

Consistent with the Supreme Court's decision in *Booker*, Judge Tashima, the lone dissenting judge in *Christensen*, maintained that although the sentencing courts are afforded a substantial degree of deference, it "does not mean anything goes."<sup>73</sup> Moreover, Judge Tashima emphasized that "the abuse of discretion standard of review is not a rubber stamp of all sentencing decisions made by a district court, and [the appellate court] should not turn a blind eye when a district court distorts the sentencing process."<sup>74</sup>

According to Judge Tashima, this is precisely what the majority was guilty of doing.<sup>75</sup> In making this assertion, Judge Tashima focused primarily on the majority's over-inclusive interpretation of § 3661.<sup>76</sup>

From its own explanation, the district court based its decision to impose a harsher sentence on Christensen because of the *individual* impacts that his conduct had on his victims.<sup>77</sup> However, as the majority even acknowledged, the losses reported in the PSR contained *all* monetary losses suffered by the victims—including investments lost as a result of Christensen's *non-criminal* conduct.<sup>78</sup> Furthermore, the losses were undifferentiated between those funds lost as a result of Christensen's misappropriation and those lost through valid business investments.<sup>79</sup> Consequently, it follows that the district court at least partially based its decision to impose an upward variance on Christensen's sentence based on non-criminal conduct.

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73. United States v. Christensen, 732 F.3d 1094, 1106 (9th Cir. 2013) (Tashima, J., dissenting).

74. *Id.* at 1107 (citing United States v. Ruff, 535 F.3d 999, 1005 (9th Cir. 2008) (Gould, J., dissenting)).

75. *Id.*

76. *See id.* at 1111. In fact, Judge Tashima offered two explanations for the district court's erroneous sentencing determination: (1) Either the district court "mistakenly believed that [all] losses in question [resulted] from Christensen's conduct," or (2) "it knowingly increased the sentence based on the impact of non-criminal conduct." *Id.* at 1107. This Comment will only explore the second explanation.

77. *See id.* at 1099–1100 (majority opinion).

78. *Id.* at 1104.

79. *Id.*

Again, Christensen received a total of \$2,385,959 from investors, but he misappropriated only \$985,994 of that total.<sup>80</sup> As such, more than half of the total investments Christensen received were actually used for the intended use.

As mentioned above, during Christensen’s sentencing hearing, the district court focused on two of his victims in particular: Robert G. and Jennifer R.<sup>81</sup> Robert G. was a victim of retirement age.<sup>82</sup> Because of the money he lost investing with Christensen, Robert G. maintained that he no longer was able to retire as planned.<sup>83</sup> However, the PSR revealed that Robert G. lost only \$5,496 due to Christensen’s *criminal* conduct.<sup>84</sup> Furthermore, Christensen repaid Robert G. “all but \$192 of that loss more than two years prior to the sentencing hearing.”<sup>85</sup>

Likewise, Jennifer R., the victim most reviewed by the majority, reported that she had lost a total of \$330,000 investing with Christensen.<sup>86</sup> Jennifer R. asserted that the losses she suffered through her investments with Christensen led to the destruction of her marriage.<sup>87</sup> Like in the case of Robert G., the PSR revealed that while Jennifer R. may have lost a total of \$330,000 through her dealings with Christensen, only \$23,017 of that amount was attributable to his fraudulent conduct.<sup>88</sup>

Viewed together, the cases of Robert G. and Jennifer R. demonstrate that the district court’s reliance on losses based on *non-criminal* conduct were of no small consequence.<sup>89</sup> Therefore, the key question becomes: to what extent, if any, may a district court consider the impact of *non-criminal* conduct in making a determination to vary a sentence upwards?

Admittedly, the determination by the Sixth, Tenth, Seventh, Fourth, Eighth, and Fifth Circuits—that § 1B1.3 relevant conduct is limited to criminal conduct—is not controlling precedent for *Christensen*. However, by choosing to include non-criminal conduct

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80. *Id.* at 1097–98.

81. *See id.* at 1099–1100.

82. *Id.* at 1108 (Tashima, J., dissenting).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1109.

within the scope of § 1B1.3, the Ninth Circuit would be rejecting an established model endorsed throughout the country.<sup>90</sup>

Moreover, those six circuits have articulated compelling arguments to support their contention that § 1B1.3 is strictly limited to criminal conduct. For example, in *United States v. Peterson*,<sup>91</sup> the Fifth Circuit explained,

[f]or conduct to be considered “relevant conduct” for the purpose of establishing ones [sic] offense level that conduct must be criminal . . . *To hold otherwise would allow individuals to be punished by having their guideline range increased for activity which is not prohibited by law but merely morally distasteful or viewed as simply wrong by the sentencing court.*<sup>92</sup>

Additionally, including non-criminal conduct within the scope of § 1B1.3 poses some practical issues for the court. In *United States v. Dove*,<sup>93</sup> the Fourth Circuit affirmed the position that § 1B1.3 relevant conduct only concerns criminal conduct for sentencing purposes.<sup>94</sup> There, the government, in an attempt to expand the scope of § 1B1.3 beyond criminal conduct, argued that all “non-benign conduct [could] properly be considered as relevant conduct.”<sup>95</sup> Despite the government’s efforts to introduce a more inclusive definition of relevant conduct, the Fourth Circuit prudently rejected its approach. The court reasoned that “if conduct which is not illegal may be relevant conduct because it is ‘not benign,’ this approach would involve sentencing courts in the impossibly subjective task of determining the relative ‘benignness’ of various legally permissible acts . . . .”<sup>96</sup> The Fourth Circuit raises an important concern. Specifically, on what criteria would sentencing courts base their determination of what is, and what is not, “benign”? Furthermore, with such blatant ambiguity inherent in the process of determining “benignness,” sentencing courts would undoubtedly face difficulties achieving any consistency from case to case. In this respect, including non-criminal conduct within the scope of § 1B1.3

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90. See *supra* note 64 and accompanying text.

91. *United States v. Peterson*, 101 F.3d 375 (5th Cir. 1996).

92. *Id.* at 385 (emphasis added) (citations omitted).

93. 247 F.3d 152 (4th Cir. 2001).

94. *Id.* at 155.

95. *Id.*

96. *Id.*

frustrates the two main objectives the sentencing guidelines were designed to accomplish: consistency and uniformity.

Lastly, in the wake of *Booker*, perhaps the most controversial issue concerning sentencing practices may be the use of past-acquitted conduct.<sup>97</sup> Although the Supreme Court in *United States v. Watts*<sup>98</sup> held that evidence of acquitted conduct may be considered at sentencing,<sup>99</sup> there has been a growing concern for the rule’s constitutionality.<sup>100</sup> Still, even here, the conduct being considered is at least potentially unlawful or criminal.

## V. CONCLUSION

As noted above, when the federal sentencing guidelines were still mandatory, sentencing judges were only permitted to vary upward from the guidelines under very limited circumstances.<sup>101</sup> However, since the *Booker* ruling, upward variances are “imposed at a rate *double* that of the rate before *Booker*.”<sup>102</sup> The frequency of upward variances post-*Booker* is troubling, and may “suggest that judges have struggled with the implications of the advisory nature of the post-*Booker* Guidelines and are perhaps overusing the mandate that ‘no limitations’ shall be placed on the evidence considered at sentencing.”<sup>103</sup> Given this trend, it is increasingly important to ensure sentencing courts understand the limitations inherent in their § 3661 discretionary powers. While § 3661 provides sentencing courts with broad discretionary power, this Comment has established that this discretion is not without its limits—irrespective of the statute’s rigid language.

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97. See Doerr, *supra* note 46, at 235.

98. 519 U.S. 148 (1997).

99. *Id.* at 156.

100. Megan Sterback, *Getting Time for an Acquitted Crime: The Unconstitutional Use of Acquitted Conduct at Sentencing and New York’s Call for Change*, 26 TOURO L. REV. 1223, 1224 (2011).

Although the federal circuits generally adhere to the federal rule as proscribed by *Watts*, there is a growing chorus—from the bench and bar—calling into question the constitutionality and fundamental fairness of [the rule allowing acquitted conduct to be considered at sentencing], which has been called a repugnant and a uniquely malevolent aspect of the current federal sentencing regime.

*Id.* at 1224–25 (internal quotation marks omitted).

101. See Doerr, *supra* note 46, at 239.

102. *Id.* at 236 (citing Erin P. Johnson, *Advisory Guidelines and Lengthier Sentences: Relevant Conduct Sentencing as an Increasingly Harmful Sentencing Practice Post-Booker*, 1 HUM. RTS. & GLOBALIZATION L. REV. 147, 148–49 (2008)).

103. *Id.*

Here, the Ninth Circuit has stretched the breadth of § 3661 far beyond its permissible reach. By varying Christensen's sentence upward—due, in large part, to losses resulting from his *non-criminal* conduct—the court erroneously affirmed the district court's sentencing determination.

While the Ninth Circuit has not formally ruled on the question of whether non-criminal conduct can be considered relevant conduct for sentencing purposes, it should take note from its sister circuits. As Judge Tashima poignantly suggests, if the Ninth Circuit is able to employ § 3661 to depart upward in cases like *Christensen*, its logic may lead it down a slippery slope of absurdity. Judge Tashima stated “[if this were permissible,] then a sentencing court could vary upward based on a defendant's eating or dressing habits, the tradition or school of yoga he favors, or the regularity with which he recycles, all of which provide greater insight into the defendant's background, character, and conduct.”<sup>104</sup> Judge Tashima's message is clear: “relevant conduct” is criminal conduct—and six other circuits agree.

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104. *United States v. Christensen*, 732 F.3d 1094, 1111 (9th Cir. 2013) (internal quotation marks omitted).