

1 DENNIS JACOBS, Chief Judge, dissenting:

2 I respectfully dissent from the affirmance of the 30-
3 year prison sentence and would remand for imposition of the
4 15-year mandatory minimum sentence. 18 U.S.C. § 2251(e).

5 Broxmeyer has been sentenced for two offenses against
6 the federal sovereign: possession of child pornography, and
7 attempted production. Since the maximum sentence for
8 possession of the number of images he possessed is ten
9 years, and since the mandatory minimum for attempted
10 production is 15 years, I focus on the sentence for
11 attempted production (as does the majority).

12 Broxmeyer's attempt consisted of inducing a 17-year old
13 to take a lewd photo of herself. Under New York law, a 17-
14 year old (such as the victim, K.T.) is of the age of
15 consent. See N.Y. Penal Law § 130.05(3)(a); see also id.
16 §§ 130.25, 130.40. She and Broxmeyer could do with each
17 other whatever consenting adults may do behind closed doors
18 in New York. True, the federal statute treats a 17-year old
19 as a minor, 18 U.S.C. § 2256(1), so that a lewd photograph
20 of her must be classified as child pornography. But surely
21 it is an arresting irony that the only thing forbidden
22 between Broxmeyer and K.T. was photography.

23

1 And the sentence was stiffened by reason of
2 "distribution" because after she took the picture of herself
3 she transmitted it to Broxmeyer. In short, the offense of
4 conviction for which he was sentenced to thirty years
5 imprisonment consisted in whole of sexting.¹

6 I start there because a reader of the majority opinion
7 may find it hard to keep in mind what Broxmeyer was
8 convicted of, and what he was sentenced for. As the
9 majority vigorously affirms, a sentencing court is not
10 limited to the conduct giving rise to the offense of
11 conviction. Nor is an appellate court so limited; and I
12 would agree with much of what is said in the majority
13 opinion if it were not cast as rebuttal to a crude
14 caricature of my views. My objection is this: the offense
15 of federal conviction has become just a peg on which to hang
16 a comprehensive moral accounting. But in imposing a
17 sentence that can be upheld as reasonable, a court should
18 not lose sight of the offense of conviction.

¹ This Court described the conduct of conviction as sexting in United States v. Broxmeyer, 616 F.3d 120, 123, 124, 126 (2d Cir. 2010) (hereinafter "Broxmeyer I"). The word has entered common usage for the reason that it has become a common practice. Rene Lynch, 'F-bomb,' 'sexting' among new Merriam-Webster dictionary words, L.A. Times, Aug. 14, 2012, available at <http://www.latimes.com/news/nation/nationnow/la-na-nn-f-bomb-dictionary-20120814,0,2597300.story> (last accessed Aug. 16, 2012).

1 I respectfully argue that the majority has done just
2 that. In the fact section of the majority opinion, the
3 offenses of conviction are embedded in graphic accounts
4 (twice as long) of misconduct that (however egregious) forms
5 no basis for either of the convictions for which Broxmeyer
6 was sentenced. The fact segment of the majority opinion is
7 largely preoccupied with an act underlying both [i] a
8 federal Mann Act conviction (18 U.S.C. § 2423(a)) that was
9 reversed,² and [ii] a state prosecution for which Broxmeyer
10 was convicted and is imprisoned. Maj. Op. at 9-11. Much of
11 the rest is a catalog account of sexual activities with
12 other high school girls for which Broxmeyer could not be
13 charged in federal court. Maj. Op. at 11-15. And it is not
14 at all clear how much of this long fact recitation is
15 premised on findings that were actually made by the district
16 court.³

17 Moreover, the majority's analysis does not rely on any
18 of that misconduct; mainly, it primes and incites the
19 reader, who might otherwise focus on the offense of

² Broxmeyer I, 616 F.3d at 127-30.

³ For example, the majority opinion recounts Broxmeyer's use of force in sexual encounters. Maj. Op. at 11-15. But the majority cannot dispute that the district court made no findings as to whether Broxmeyer used force or whether each uncharged sexual encounter was, in fact, criminal.

1 conviction, and the fact that it amounts to a single act of
2 attempted sexting.

3 When the majority opinion does get to the offense of
4 conviction (attempted production), it is enlarged to include
5 additional, subsequent conduct. True, Broxmeyer continued
6 to importune K.T. to sext him nude pictures of herself, and
7 did so with more success. But if that were the offense,
8 Broxmeyer would have been charged with *production itself*,
9 not the attempt. The prosecution chose not to do so, for
10 its own (presumably sufficient) reasons. Maj. Op. at 33.

11 My conclusion is that it is error to impose a 30-year
12 sentence for an offense that amounts to attempted sexting.
13 My reasons are: **[I]** the statutory range from 15 to 30 years
14 calls for a calibration according to severity of the
15 offense; **[II]** the enhancements to base offense level do not
16 bear the weight assigned to them; **[III]** the enhancement to
17 the adjusted offense level for a pattern of sexual
18 misconduct is unsustainable as a matter of law; **[IV]** the
19 sentence is substantively unreasonable; and **[V]** the sentence
20 is not supported by the 18 U.S.C. § 3553 factors.

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I

For the offense of producing child pornography (and attempt), Congress opened a considerable range, of 15 to 30 years. Broxmeyer's base offense level of 32 (which yields 121 to 151 months in his Criminal History Category) lies below the mandatory minimum. Various U.S. Sentencing Guidelines enhancements yielded a Guidelines sentence of life in prison. The enhancements were applied without manifest error; but a Guidelines calculation that so far exceeds the statutory maximum should give pause. In this instance, many of the enhancements reflect no incremental evil beyond the base offense itself. And the base offense itself is the eliciting of (in the majority's words) a "suggestive, but not sexually explicit" self-photograph from a girl who was of the age of consent in New York--surely the least of the evils that Congress could have contemplated when it drafted the statute.

A substantively unreasonable sentence is rarely encountered. The standard is tough, as it ought to be. The sentence must do damage to the administration of justice because the sentence imposed was "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." United States v. Rigas, 583 F.3d 108, 123 (2d Cir. 2009). But though rare, there are instances that justify

1 vacatur. E.g., United States v. Stewart, 590 F.3d 93 (2d
2 Cir. 2009), reh'g denied, 597 F.3d 514 (2d Cir.), cert.
3 denied sub nom., Sattar v. United States, 130 S. Ct. 1924
4 (2010). Here, the administration of justice is damaged
5 because the layers between mandatory minimum and statutory
6 maximum have been foreshortened and flattened to a pancake.
7 Thus, in a case in which the offense of conviction would
8 seem to barely justify the minimum, the maximum has been
9 made the minimum. Cf. United States v. Dorvee, 616 F.3d
10 174, 186-87 (2d Cir. 2010) (as amended) (observing that, due
11 to enhancements that "are all but inherent to" offenses
12 involving child pornography, "[a]n ordinary first-time
13 offender" is likely to receive a sentence "approaching the
14 statutory maximum," which leaves "virtually no distinction
15 between the sentences" for relatively run-of-the-mill
16 offenders and "the most dangerous offenders").

18 II

19 How did this happen? First, several enhancements were
20 imposed to increase the base offense level (this Section);
21 then a pattern enhancement was applied to the adjusted
22 offense level (Section III).

23 The one-level enhancement for grouping the two offenses
24 of conviction is sound. All the others have no more than

1 hyper-technical validity. In reviewing these enhancements,
2 it helps to keep in mind that Broxmeyer was convicted of
3 attempt only because, though he encouraged K.T. to
4 photograph herself without clothes, the single photo that
5 became the subject of the prosecution was a snapshot she
6 took of herself in her underwear.⁴ I will take the
7 enhancements one by one.

8 * * *

9 A two-point enhancement was imposed for "using a minor"
10 because K.T. took the photo of herself. But the most
11 natural reading of the enhancement is that it punishes the
12 enlistment of *another* minor in the production end of the
13 offense. In any event, one would think it is less harmful
14 that the victim took the photograph herself, privately, than
15 if it had been taken by somebody else.

16 * * *

17 A two-point enhancement for abuse of trust was imposed
18 because Broxmeyer was K.T.'s coach. This enhancement has a
19 particular irony because no law--state or federal--was
20 offended by his abuse of trust in entering into a sexual
21 relationship with her. Abuse of trust is surely a

⁴ On the possession count, the other images were unambiguously pornographic.

1 consideration of diminished force when the victim is of the
2 age of consent. Comparatively speaking, his exercise of
3 that trust and influence to have her take a photograph is
4 arguably trivial "under the totality of circumstances in the
5 case." See United States v. Cavera, 550 F.3d 180, 191 (2d
6 Cir. 2008) (in banc).

7 * * *

8 The district court imposed a two-point enhancement for
9 distribution. However, nothing was posted on the internet,
10 or multiplied, or sold. The image was transmitted to a man
11 with whom K.T. was lawfully privileged to cohabit, and by
12 him to a single additional person, who was also classed as
13 an adult under state law. Broxmeyer is not one of those
14 "most dangerous offenders" who "distribute child pornography
15 for pecuniary gain." See Dorvee, 616 F.3d at 187.

16 The district court applied the enhancement entirely on
17 the bases that [i] K.T. sent the image of herself in her
18 underwear to Broxmeyer at his urging, and [ii] Broxmeyer
19 transmitted the image to one other minor, A.W. (who was also
20 17).

21 K.T.'s sending of the (underclothed) image of herself
22 to Broxmeyer arguably satisfies the requisites for a
23 distribution enhancement--technically. But the transmission
24 is no appreciable increment to the evil of the offense: Why

1 indeed would Broxmeyer solicit a self-photograph from K.T.
2 unless he wished to receive it?

3 The majority sustains the distribution enhancement
4 solely on the basis of Broxmeyer's re-transmission to A.W.
5 As the majority opinion explains, an offense includes "'all
6 relevant conduct under [U.S.S.G.] § 1B1.3 (Relevant Conduct)
7 unless a different meaning is specified or is otherwise
8 clear from the context.'" Maj. Op. at 32 n.19 (quoting
9 U.S.S.G. § 1B1.1 cmt. n.1(H)). However, Broxmeyer's re-
10 transmission to A.W. is not "relevant conduct" under § 1B1.3
11 because it did not occur "during the commission of the
12 offense of conviction, in preparation for that offense, or
13 in the course of attempting to avoid detection or
14 responsibility for that offense" and was not "harm that
15 resulted from [such] acts or omissions . . . [nor] harm that
16 was the object of such acts and omissions." U.S.S.G.
17 § 1B1.3(a)(1), (a)(3). The application of that test was
18 recently reaffirmed and emphasized in United States v.
19 Wernick, -- F.3d --, No. 10-2974-cr, 2012 WL 3194244, at *4
20 (2d Cir. Aug. 8, 2012). It therefore matters that the
21 offense itself was getting K.T. to make the picture, and was
22 over when she made it or when she sent it to Broxmeyer.

23 The majority opinion attempts to elide this
24 considerable impediment by expanding the offense of

1 conviction temporally so that it is still ongoing when the
2 re-transmission to A.W. takes place. The majority opinion
3 does this by relying on Broxmeyer's later--successful--
4 efforts to induce K.T. to take and send a nude photo of
5 herself. Maj. Op. at 33. The wording of the indictment
6 does not allow the expansion that the majority opinion
7 undertakes. The indictment for attempted production is
8 limited to Broxmeyer's

9 attempt[] to . . . induce . . . a minor female to
10 create and produce a photograph of herself engaged
11 in sexually explicit conduct and whereby th[at]
12 minor female created and produced a photograph of
13 herself wearing only her underwear
14

15 Indictment, United States v. Broxmeyer, at 2.

16 By definition, Broxmeyer's successful effort was not an
17 "attempt," and the nude photograph Broxmeyer elicited and
18 re-transmitted was not one of a person "wearing
19 . . . underwear."

20 * * *

21 The majority opinion dilates upon the applicability of
22 each of these enhancements. I don't doubt that they may
23 apply, but in no more than a literal, textual, mechanical,
24 formalistic way. In my view the majority and the district
25 court fail adequately to consider whether these enhancements
26 "can bear the weight assigned to [them] . . . under the
27 totality of circumstances in the case." Cavera, 550 F.3d at

1 191. In this instance, each enhancement is for conduct or a
2 circumstance that only arguably falls within the fuzzy edge
3 of the outer reaches of the Guidelines.

4 Considered separately or cumulatively, these three
5 considerations form no basis for escalating the sentence
6 from the base offense level of 32 (below the 15-year
7 mandatory minimum) to an offense level of 39 (with
8 grouping), at which the Guidelines suggest imprisonment for
9 262 to 327 months.

11 III

12 This already-inflated adjusted offense level was
13 boosted by a five-point enhancement for a pattern of
14 prohibited sexual misconduct, U.S.S.G. § 4B1.5(b), because
15 attempted production is a "covered sex crime," *id.* § 4B1.5
16 cmt. n.2. The circumstances of this case, however, do not
17 begin to bear the weight of that five-level enhancement.

18 The majority sustains the pattern enhancement on the
19 basis of two predicates: [i] the attempted production that
20 is the very offense of conviction, plus [ii] the facts
21 underlying a now-reversed conviction under the Mann Act.⁵

⁵ The majority could not count the conviction for possession of child pornography because that offense is not a predicate to this enhancement. *See* U.S.S.G. § 4B1.5 cmt. n.4(A).

1 A pattern of prohibited sexual conduct requires "at
2 least two separate occasions[on which] the defendant
3 engaged in prohibited sexual conduct with a minor."
4 U.S.S.G. § 4B1.5 cmt. n.4(B)(i). "An occasion of prohibited
5 sexual conduct may . . . occur[] during the course of the
6 instant offense." Id. § 4B1.5 cmt. n.4(B)(ii). However, it
7 is more than dubious for the prohibited sexual conduct to be
8 the very offense that is being enhanced.⁶ Absent that
9 piling on, there is no pattern, even under the majority's
10 analysis.

⁶ Leaving aside that a pattern usually is more than two and that a normal reading of "pattern" is best supported by a pattern enhancement when there are two predicates (which may occur during the commission of the enhanced offense) plus the offense itself, the majority opinion contends that "during the course of the instant offense," U.S.S.G. 4B1.5 cmt. n.4(B)(ii), invites counting the very offense being enhanced. Maj. Op. at 37-39 & n.22-23. The majority relies on two out-of-circuit opinions that are unpersuasive: the quoted passages, consigned to footnotes, are dicta. In those cases, each defendant committed at least two (and, in one case, more than one hundred) predicate acts actually counted to establish a pattern, separate from the offense of conviction. See United States v. Al-Cholan, 610 F.3d 945, 955 (6th Cir. 2010); United States v. Rothenberg, 610 F.3d 621, 625-27 (11th Cir. 2010).

The wording of the commentary is that a predicate "may be considered whether the occasion [inter alia] occurred during the course of the instant offense." U.S.S.G. § 4B1.5 cmt. n.4(B)(ii) (emphasis added). If a pattern enhancement was meant to be applied to count a predicate *that is the instant offense*, the Guidelines would allow the enhancement if the instant offense is a "covered sex crime" and the defendant has committed one other predicate act.

1 It is therefore hardly worth dealing with the sole
2 remaining predicate (Broxmeyer's conviction for interstate
3 transportation of a minor with intent to engage in criminal
4 sexual activity), except to observe briefly that such a
5 predicate is also dubious. The Mann Act conviction was
6 reversed by this Court for want of the interstate transport
7 element. Broxmeyer I, 616 F.3d at 127-30. The majority
8 opinion therefore relies on what it thinks is left of the
9 jury verdict,⁷ coupled with the principle that a pattern
10 enhancement to a federal offense can be composed of state
11 offenses that would be federal offenses if done on the high
12 seas or in a post office. Maj. Op. at 37, 40 (citing 18
13 U.S.C. § 2426(b)(1)(B)). This analysis did not occur to the
14 district court. No wonder.

⁷ The majority opinion emphasizes that this Court in Broxmeyer I identified no problem with the sufficiency of evidence. Maj. Op. at 9-10. That is correct insofar as we reversed on another basis. But Broxmeyer did not concede that the evidence was sufficient, and we had no occasion to consider yet another reason to reverse his Mann Act conviction. See Broxmeyer Br., Broxmeyer I, No. 09-1457-cr, at 38-39 ("Although *perhaps* producing sufficient evidence to prove the second and third elements of the offense, the government failed to prove that Broxmeyer transported her across state lines." (emphasis added)). Broxmeyer certainly had no obligation to pile on additional arguments beyond that for which he prevailed in having his conviction reversed, just so he could argue upon re-sentencing that he had not conceded what may have been other bases for attacking his conviction had the conviction not already been fatally flawed.

1 Instead the district court relied on the several
2 untried offenses detailed in the fact sections of the
3 majority opinion--and not used in the majority's analysis.
4 See Pre-Sentencing Report at ¶ 48; Re-Sentencing Tr. at
5 5:14-19 (adopting Probation Department's calculation), 24:3-
6 4 (referencing Broxmeyer's "extensive history of sexually
7 abusing children"). The majority is cautious enough to
8 avoid relying on those incidents because of the vexing
9 constitutional questions such reliance would raise. See
10 Gall v. United States, 552 U.S. 38, 60 (2007) (Scalia, J.,
11 concurring) (discussing United States v. Rita, 551 U.S. 338,
12 371-75 (2007) (Scalia, J., concurring)). Thus the majority
13 has substituted one pattern, which it perceives, for the
14 pattern relied on by the district court. That substitution
15 runs counter to the theme, passim in the majority opinion,
16 that sentencing is a matter of the district judge's
17 discretion, not ours. I am left in considerable doubt as to
18 whether the district judge would have imposed the pattern
19 enhancement relying on the majority's analysis, and not on
20 the facts found in sentencing.⁸

⁸ It seems to me that the most an appellate court should do in that circumstance is to reject or cast doubt on the basis for the district court's ruling, identify possible alternative predicates, and remand.

1 Like the majority, I will forgo discussion of the
2 procedural and constitutional problems that beset the
3 district court's approach. But it is surely remarkable that
4 virtually the whole vast differential, between the 15-year
5 mandatory minimum and the 30-year statutory maximum sentence
6 imposed, is attributable to conduct that is no federal
7 offense: the conduct that formed the defective basis for the
8 (now reversed) Mann Act charge was a state conviction on
9 which Broxmeyer is serving a concurrent four-year state
10 sentence.

11
12 **IV**

13 The five-level "pattern" enhancement raised Broxmeyer's
14 offense level to 44--an upper limit automatically reduced to
15 43 for a sentence of life imprisonment. That calculation--
16 if not actually procedural error--is sound only as a matter
17 of arithmetic and accounting. But it proves too much:
18 something needs to be re-thought when in a case like this,
19 the Guidelines calculation yields a life sentence. That is
20 the sentence imposed on Jeffrey Dahmer, who killed people,
21 and ate them.

22 The life sentence was automatically reduced to the
23 statutory maximum of 30 years. A statutory maximum is
24 appropriate only for the worst offenders. Unfortunately, we

1 have seen such defendants. They are people who force small
2 children to engage in sexual and sadomasochistic acts, who
3 photograph or video the scene, and who broadcast it to the
4 world, leaving the children with the pain of the experience
5 and the anguish of knowing that degenerates are gloating
6 over their abuse and humiliation.

7 Broxmeyer's offense would seem to be at the other end
8 of the continuum. I therefore believe that a sentence
9 exceeding 15 years is substantively unreasonable.

10 The majority opinion responds that there were no
11 procedural errors in applying enhancements that reached a
12 Guidelines sentence of imprisonment for life. But the tests
13 for procedural and substantive reasonableness should be
14 cross-checks; here, the first operates as the enemy of the
15 second. The majority never really gauges whether the
16 enhancements can truly "bear the weight assigned to [them]
17 . . . under the totality of circumstances in the case."
18 Cavera, 550 F.3d at 191.

19 The majority floats the idea that the 30-year sentence
20 is some kind of indulgence. Thus the majority opinion
21 claims that Broxmeyer received a below Guidelines sentence
22 because the range resulting from the enhancements was
23 imprisonment for life. Maj. Op. at 31 n.18, 58, 62. This
24 is not even technically sound, because a statutory maximum

1 caps any Guidelines sentence. U.S.S.G. § 5G1.1(a). The
2 majority opinion also suggests that 40 years of
3 incarceration would have been substantively reasonable, and
4 treats as a mercy the district court's decision to make
5 concurrent the ten-year sentence for possession because the
6 district court itself concluded that continuous sentences
7 amounting to 40 years of incarceration was excessive. See
8 U.S.S.G. § 5G1.2(c)-(d). I suppose I must concede that the
9 majority opinion would as well support a 40-year sentence as
10 it does a sentence of 30 years. But the majority opinion is
11 as extreme in its way as the arbitral decision in which a
12 teacher who molested students was returned to the classroom.
13 In re Unadilla Valley Cent. Sch. v. McGowan, -- N.Y.S. 2d --
14 , 97 A.D. 3d 1078 (3d Dep't 2012) (affirming the arbitral
15 award).

16 I cannot see how Broxmeyer's offense can justify a
17 sentence above the stiff, 15-year mandatory minimum. The
18 majority opinion responds that Broxmeyer's offense is not
19 absolutely the most innocuous conceivable offense, and
20 posits the hypothetical case of a "defendant [who] succumbed
21 to temptation on one occasion to use one girl in an attempt
22 to produce one image of child pornography." Maj. Op. at 51.
23 Even assuming (as I must) that this hypothetical offender
24 would be less culpable than Broxmeyer, the majority

1 opinion's error of law is to hold that only such a
2 hypothetical offender can claim that a sentence above the
3 mandatory minimum is substantively unreasonable. Maj. Op.
4 at 47 ("[A district court] hardly abuses its discretion" by
5 "impos[ing] a sentence of more than 15 years whenever it
6 identifies aggravating factors in the commission of a
7 § 2251(a) crime"). If any sentence between the minimum and
8 the maximum is substantively reasonable as a matter of law
9 unless the offense borders on innocence itself, there is no
10 such thing as substantive unreasonableness in this area.

11 The assumption that any offense other than the most
12 innocuous deserves a sentence above the mandatory minimum
13 runs counter to the Sentencing Commission's approach. For
14 many child pornography offenses, the Commission sets the
15 base offense level *below* the mandatory minimum (knowing that
16 the usual enhancements will raise the Guidelines range to
17 the minimum). U.S. Sent'g Comm'n, *The History of the Child
18 Pornography Guidelines* 45-46 (2009). Accordingly, the
19 mandatory minimum is not reserved only for the minimal
20 offense, but includes a considerable range of bad conduct
21 that certainly includes Broxmeyer's offense of conviction.

22 * * *

23 The majority opinion likens the substantive
24 unreasonableness standard to the "shocks-the-conscience"

1 standard used in substantive due process analysis. I accept
2 the analogy. I don't claim that my aging conscience is
3 especially tender, but it is still capable of shock; and it
4 is shocked by a 30-year term of incarceration for the
5 offense of attempting to persuade a woman who is of the age
6 of consent to take a lewd photograph of herself and send it.

7
8 **v**

9 The factors listed at 18 U.S.C. § 3553(a) do not
10 support a sentence at the 30-year maximum, which means that
11 Broxmeyer's sentence is substantively unreasonable. United
12 States v. Jass, 569 F.3d 47, 65 (2d Cir. 2009); see also
13 Cavera, 550 F.3d at 189. A 30-year prison sentence is far
14 "greater than necessary[] to comply with the purposes set
15 forth in [§ 3553(a)(2)]." 18 U.S.C. § 3553(a). Fifteen
16 years in prison is a sentence more than sufficient to
17 reflect the seriousness of the offense for which Broxmeyer
18 was *convicted*. Such a lengthy term of incarceration, taken
19 together with the collateral consequences of his conviction
20 (including a life term of supervision upon his release, and
21 an obligation to register as a sex offender, Amended
22 Judgment), ensure that Broxmeyer is adequately deterred and
23 that the public is sufficiently protected. I see no
24 prospect that Broxmeyer will again coach young women.

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Thus it is that, in a case in which the underlying offense is attempted sexting, a Guidelines analysis that exceeds life in prison is deemed flawless; the imposition of a maximum sentence is treated as a downward departure; 40 years is suggested in dicta to be reasonable; a 30-year maximum sentence is affirmed, with the seemingly wistful misgiving that a 40 year sentence--achievable by piling maximum upon maximum--was a missed opportunity; and 15 years of imprisonment is deemed minimal because it has been set as the mandatory minimum.