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# Past Violence, Future Danger?: Rethinking Diminished Capacity Departures Under Federal Sentencing Guidelines Section 5K2.13

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PAST VIOLENCE, FUTURE DANGER?:  
RETHINKING DIMINISHED CAPACITY DEPARTURES  
UNDER FEDERAL SENTENCING GUIDELINES  
SECTION 5K2.13

*Eva E. Subotnik*

*Under section 5K2.13 of the Federal Sentencing Guidelines, a judge is permitted to reduce a defendant's sentence on the grounds of diminished capacity. Most courts construing this provision have ruled that defendants whose offenses involved violence or the threat of violence are ineligible for a reduction in sentence. This Note argues that such an interpretation, which makes past violence a proxy for predicting future dangerousness, is problematic. Medically or psychologically treated, defendants may no longer pose a danger to society. This Note urges that, in accordance with section 5K2.13's language and history, courts should focus more broadly on whether the facts underlying a defendant's offense, including his or her prospect for treatment or rehabilitation, indicate a need to protect the public. In addition, the Sentencing Commission should amend section 5K2.13 explicitly to direct the courts to address issues of public protection beyond a defendant's acts of violence.*

INTRODUCTION

The Federal Sentencing Guidelines (the Guidelines) impose a rigid method for sentencing federal defendants: The sentence must fall within the narrow range determined by the point on a grid where a defendant's Offense Level meets his or her Criminal History Category.<sup>1</sup> There are, however, factors that enable sentencing judges, exercising their discretion, to reduce or augment a sentence after a starting point has been determined through the grid. One of these factors is diminished mental capacity, which section 5K2.13 of the Guidelines establishes as a basis for downward departure:

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure

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1. See U.S. Sentencing Guidelines Manual ch. 5, pt. A (2001) (displaying the sentencing table).

should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.<sup>2</sup>

The current text of section 5K2.13 is the product of an amendment to the Guidelines in 1998 by the United States Sentencing Commission (the Commission).<sup>3</sup> Prior to this amendment, a circuit split had developed over the interpretation of the term “non-violent offense,” which was the only type of offense eligible for a downward departure under the then-existing section 5K2.13.<sup>4</sup> The Commission sought to resolve the split through its 1998 amendment.<sup>5</sup>

The new provision has solved few problems; indeed, it has caused others.<sup>6</sup> First, the Commission provided no guidance for interpreting the ambiguous language of the second clause, “the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence.”<sup>7</sup> This

2. *Id.* § 5K2.13.

3. *Id.* app. C, amend. 583.

4. The text of the old version of section 5K2.13 stated:

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant’s criminal history does not indicate a need for incarceration to protect the public.

U.S. Sentencing Guidelines Manual § 5K2.13 (1995) (amended 1998).

5. U.S. Sentencing Guidelines Manual app. C, amend. 583 (2001) (“This amendment addresses a circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a ‘crime of violence’ . . . . The amendment replaces the current policy statement with a new provision that essentially represents a compromise approach to the circuit conflict.”). The 1998 amendment also extended section 5K2.13 to both cognitive and volitional mental impairments. *Id.*

6. By papering over the circuit conflict, the Commission, while itself failing to endorse a clear position, likely deflected Supreme Court review and articulation of how a crime’s violent nature should factor into sentencing the mentally ill. This result would not be surprising given the Supreme Court’s rules on certiorari:

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter

. . . .

Sup. Ct. R. 10; see also *Braxton v. United States*, 500 U.S. 344, 348 (1991) (stating that Congress envisioned that the Commission “would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest” and that “[t]his congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts”).

7. U.S. Sentencing Guidelines Manual § 5K2.13(2) (2001). In practice, departures under section 5K2.13 have been granted for white collar crimes. E.g., *United States v. Sadolsky*, 234 F.3d 938, 940 (6th Cir. 2000) (sentencing for computer fraud); *United States v. Roach*, No. 00 CR 411, 2001 WL 664438, at \*5 (N.D. Ill. June 4, 2001) (sentencing for wire fraud). They have been denied in street crime cases. E.g., *United States v. Thames*, 214 F.3d 608, 615 (5th Cir. 2000) (sentencing for armed bank robbery). Certain crimes

clause will be referred to herein as the “current offense prong.”<sup>8</sup> As a result of the current offense prong’s ambiguity, most courts have seized exclusively on the presence or threat of violence in an offense to preclude downward departure under section 5K2.13(2), despite indications that the Commission wanted sentencing courts to take into account the future risk posed to the public by a mentally ill defendant. The courts’ interpretation is problematic since neither the Commission nor the courts have justified the notion that the presence or threat of violence in an offense necessarily indicates that the offender will be a risk to the public in the future.<sup>9</sup> The assumption underlying the distinction between mentally ill offenders who commit violent crimes and those who commit nonviolent crimes is that the former should be incapacitated for longer periods because they may be more dangerous.<sup>10</sup> That explanation was partly the basis for a circuit court’s dismissal of a constitutional challenge to the different treatment of violent and nonviolent offenses under the old section 5K2.13.<sup>11</sup>

This Note contends that there is no necessary connection between the danger a mentally ill defendant will pose to the public and the violent nature of her offense because, most significantly, medical treatment and rehabilitation may render her harmless to society. Consequently, courts should interpret the malleable language of section 5K2.13 to grant authority for downward departures even in cases of violence.<sup>12</sup> This judicial

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test these bounds. For example, there has been much debate over the appropriate classification of unarmed bank robbery. Compare *United States v. Houser*, No. 00-30235, 2001 WL 985713, at \*1 (9th Cir. Aug. 24, 2001) (unpublished opinion) (declaring defendant ineligible for departure), with *United States v. McFadzean*, No. 98 CR 754, 1999 WL 1144909, at \*5 (N.D. Ill. Dec. 8, 1999) (stating that a court may depart in such a case).

8. Although one commentator labeled at least part of this language the “violence prong of section 5K2.13,” Robert R. Miller, Comment, *Diminished Capacity—Expanded Discretion: Section 5K2.13 of the Federal Sentencing Guidelines and the Demise of the “Non-Violent Offense,”* 46 *Vill. L. Rev.* 679, 707 (2001), this Note argues that considerations broader than those of violence should guide the interpretation of this clause, and therefore declines to use that label.

9. Interestingly, many other bases for downward departure do not include an element of violence, let alone make it a preclusive factor. See, e.g., U.S. Sentencing Guidelines Manual § 5K1.1 (2001) (substantial assistance to authorities); *id.* § 5K2.11 (lesser harms); *id.* § 5K2.12 (coercion and duress); *id.* § 5K2.16 (voluntary disclosure of offense); *cf. id.* § 5K2.10 (victim’s conduct) (stating that victim’s misconduct “usually would *not* be relevant in the context of *non-violent* offenses”) (emphasis added). But see *id.* § 5K2.20 (aberrant behavior) (stating that downward departure is not available if, among other reasons, “the offense involved serious bodily injury or death” or “the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon”).

10. See, e.g., *United States v. Poff*, 926 F.2d 588, 595 (7th Cir. 1991) (Easterbrook, J., dissenting) (“When the disturbed person’s conduct is non-violent, . . . incapacitation is less important.”).

11. *United States v. Sullivan*, 75 F.3d 297, 300 (7th Cir. 1996). After agreeing with the argument that violent mentally ill offenders may be more dangerous, the court in *Sullivan* noted that “[i]n any event, this panel is bound by the *en banc* decision in *Poff*.” *Id.*

12. Indeed, one court has already done so. See *United States v. Blake*, 89 F. Supp. 2d 328 (E.D.N.Y. 2000), discussed *infra* Part II.D.1.

solution would ensure that the balancing of factors shifts toward considerations of public safety and lenity to individual defendants, and away from considerations solely of violence. In addition, this Note argues that the Commission should amend section 5K2.13 of the Guidelines by striking from the current offense prong the words “because the offense involved actual violence or a serious threat of violence.” Excising these words would alleviate the need to pinpoint the definitions of “actual violence” and “serious threat of violence.” Most importantly, removing these words would make it unmistakably clear that the focus of courts under section 5K2.13 should be on whether the facts and circumstances of a defendant’s offense, construed broadly to incorporate the prospect of the defendant’s treatment or rehabilitation, indicate a need to protect the public.

This Note recognizes that it is in the very nature of sentencing guidelines to narrow disparities in sentencing by limiting the discretion of judges. This Note nevertheless takes the position that judges should be trusted to make determinations of dangerousness, and that such liberalization is consistent with the language and purpose of the Guidelines.

Part I briefly describes the background of section 5K2.13 and the rationale for this section’s inquiry into the violence of an offense. Part II examines the problems arising under the current section 5K2.13. This Part also considers the problems inherent in relying on the violent character of an offense as a test for dangerousness. Part III proposes that section 5K2.13 better coordinate the goal of lenity toward the mentally ill with the correlative need to protect the public. It argues that this shift in emphasis, which should be effected through amendment by the Commission, and in the interim by the courts, is fully consistent with the role envisioned for the courts under the Guidelines. It further argues that this approach is especially important given the way in which the federal criminal justice system administers the sentences of the mentally ill at the present time.

## I. BACKGROUND TO DIMINISHED CAPACITY DEPARTURES AND THE CURRENT OFFENSE PRONG

### A. *General Background and Mechanics of the Guidelines*

The Commission was created by the Sentencing Reform Act (the Act) as part of the Comprehensive Crime Control Act of 1984.<sup>13</sup> Through the Act, Congress directed the Commission to “promulgate and distribute to all courts of the United States . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a [fed-

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13. Congress enacted the Sentencing Reform Act of 1984 as Chapter II of the Comprehensive Crime Control Act of 1984. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211–239, 98 Stat. 1837, 1987–2040 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. (1994)).

eral] criminal case.”<sup>14</sup> The Commission was charged with, among other things, reducing disparity in sentencing while allowing for consideration of individual circumstances.<sup>15</sup> Pursuant to the Act, the Commission issued the first set of Guidelines in 1987.<sup>16</sup> The Guidelines, including policy statements like section 5K2.13,<sup>17</sup> are binding on the federal courts.<sup>18</sup>

The Guidelines require a district court, when imposing a sentence, to “identif[y] the base offense level assigned to the crime in question, adjust[ ] the level as the Guidelines instruct, and determine[ ] the defendant’s criminal history category.”<sup>19</sup> The sentencing range that is arrived at is listed in months. “[T]he maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months . . . .”<sup>20</sup>

The district courts do, however, retain some discretion to take individual circumstances into account.<sup>21</sup> Congress permits a district court to depart from the applicable Guideline range in a particular case if “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”<sup>22</sup> The Guidelines reflect this mandate. Gener-

14. 28 U.S.C. § 994(a)(1); U.S. Sentencing Guidelines Manual ch. 1, pt. A(1) (stating that purpose of Commission is to “promulgat[e] detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes”); see also *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (suggesting that Congress delegated to the Commission “the power to promulgate sentencing guidelines for every federal criminal offense”).

15. 28 U.S.C. § 991(b)(1)(B) (stating that the Commission was charged with “provid[ing] certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors”).

16. U.S. Sentencing Guidelines Manual ch. 1, pt. A(2).

17. *Id.* § 5K2.13 (categorizing provision, in its title, as policy statement).

18. *Stinson v. United States*, 508 U.S. 36, 42 (1993) (“The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements.”); see also *Mistretta*, 488 U.S. at 391 (“[T]he Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases.”).

19. *Koon v. United States*, 518 U.S. 81, 88 (1996) (citing U.S. Sentencing Guidelines Manual § 1B1.1).

20. 28 U.S.C. § 994(b)(2).

21. 18 U.S.C. § 3553(b) (1994) (see *infra* text accompanying note 22); 28 U.S.C. § 991(b)(1)(B) (see *supra* note 15); *Koon*, 518 U.S. at 92 (“The Act did not eliminate all of the district court’s discretion, however. [Congress acknowledged] the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances . . .”).

22. 18 U.S.C. § 3553(b). Some have argued that the much higher percentage of downward compared to upward departures reveals the harshness of the sentences imposed under the Guidelines. See Federal Public Defenders, Submission to United States Sentencing Commission, March 10, 2000, 12 Fed. Sentencing Rep. 140, 140–41 (1999) (submitted by Jon Sand on behalf of the Federal Public and Community Defenders) (“Federal judges are sentencing at the bottom of the guideline range and below the guideline range far more often than they sentence at the top of the guideline range or above. . . . This means . . . that the federal judges who impose sentence find the guideline ranges to be too high.”).

ally, the courts are “to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”<sup>23</sup> Where the factors of a case make it atypical, however, those factors may provide potential bases for departure.<sup>24</sup>

Interpreting the Guidelines, the Supreme Court has identified four categories of departure factors: “unmentioned,” “forbidden,” “discouraged,” and “encouraged.”<sup>25</sup> According to the Court, the sentencing judge may depart on account of factors that are unmentioned by the Guidelines if, relying on the theory and structure of both the Guidelines as a whole and the applicable individual guidelines, the court deems them sufficient to take a case out of the heartland.<sup>26</sup> In contrast to unmentioned factors, forbidden, discouraged, and encouraged factors are specifically identified by the Guidelines. Certain factors, including race, sex, national origin, creed, religion, and socioeconomic status,<sup>27</sup> are forbidden from being used as grounds for departure by the sentencing court.<sup>28</sup> The Commission also produced a list of discouraged factors,<sup>29</sup> which are “not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range,”<sup>30</sup> such as a defendant’s family ties and responsibilities or education and vocational skills.<sup>31</sup> Finally, the Commission suggested encouraged factors,<sup>32</sup> which may serve as grounds for departure in sentencing.<sup>33</sup> Diminished capacity under section 5K2.13 is an encouraged factor.<sup>34</sup>

23. U.S. Sentencing Guidelines Manual ch. 1, pt. A(4)(b) (2001).

24. *Id.*

25. *Koon*, 518 U.S. at 94–96.

26. *Id.* at 96 (using term “unmentioned”); see U.S. Sentencing Guidelines Manual § 5K2.0 (“Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court.”). Under this rule, one district court held that a defendant’s susceptibility to treatment did not warrant a downward departure since that factor did not sufficiently differentiate his case from the heartland of other sex offender cases. *United States v. Lake*, 53 F. Supp. 2d 771, 786 (D.N.J. 1999).

27. U.S. Sentencing Guidelines Manual § 5H1.10.

28. *Id.* ch. 1, pt. A(4)(b); *Koon*, 518 U.S. at 95–96 (using term “forbidden”).

29. *Koon*, 518 U.S. at 95 (using term “discouraged”).

30. U.S. Sentencing Guidelines Manual ch. 5, pt. H, introductory cmt.

31. *Id.* §§ 5H1.6, 5H1.2.

32. *Koon*, 518 U.S. at 94 (using term “encouraged”).

33. See U.S. Sentencing Guidelines Manual § 5K2.0 (stating that “this subpart seeks to aid the court by identifying some of the factors” that “may warrant departure from the guideline range”).

34. See *id.* (implicitly including section 5K2.13 among factors referred to in section 5K2.0); see also *United States v. Neal*, 249 F.3d 1251, 1256 n.5 (10th Cir. 2001) (characterizing diminished capacity as an encouraged factor); *United States v. Leandre*, 132 F.3d 796, 805 (D.C. Cir. 1998) (same). For examples of other encouraged factors, see *supra* note 9.

B. *The Guidelines' Original Approach to Diminished Capacity and Violence*

In the Act, Congress directed the Commission to consider the relevance of certain offender characteristics, including a defendant's "mental and emotional condition to the extent that such condition mitigates the defendant's culpability."<sup>35</sup> The Commission subsequently determined that, in general, "[m]ental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."<sup>36</sup> From the start, however, the Commission conceived of the possibility that mitigation in sentence due to "a serious mental disability" might be warranted in limited circumstances.<sup>37</sup> In its initial statements about diminished capacity, the Commission indicated that mitigation should be available only to defendants who committed nonviolent offenses.<sup>38</sup> It explained that:

A reduction in sentence may be justified when a defendant suffers from a significantly reduced mental capacity so that he did

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35. 28 U.S.C. § 994(d)(4) (1994). See generally Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 *Am. Crim. L. Rev.* 833, 858-59 (1992) (describing statutory background of consideration of individual offender characteristics).

36. U.S. Sentencing Guidelines Manual § 5H1.3. See generally Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 *Am. J. Crim. L.* 431, 440 n.46 (1995) ("The Commission published no evidence to document or substantiate the 'not ordinarily relevant' language added to the policy statement."). The authors explain that:

[T]he legislative history of the Commission's policy statement on the influence of mental disability is spotty at best. The brevity of the policy statement seems to be due to Congress's failure to provide any coherent explanation of the weight due individual offender characteristics and a failure of the Commission to conduct or refer to any empirical studies or evidence regarding the effect of mental disability on sentencing patterns. Although this omission was initially recognized by the Commission, it was later deleted without any additional explanation.

*Id.* at 433 n.5 (citing Marc Miller & Daniel J. Freed, *Offender Characteristics & Victim Vulnerability: The Differences Between Policy Statements and Guidelines*, 3 *Fed. Sentencing Rep.* 3, 4 (1990)).

37. Preliminary Draft of Sentencing Guidelines for United States Courts, 51 *Fed. Reg.* 35,080, 35,131-33 (proposed Oct. 1, 1986) ("Examples of such mitigating factors might be the presence of a serious mental disability that did not rise to the level of a successful defense . . ."). Interestingly, the Commission's contemplation of a basis for mitigation in sentence on account of mental illness was somewhat in tension with the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1994), which has provided the standard for federal courts' application of a federal insanity defense since John Hinckley's acquittal for the attempted assassination of President Reagan. The Insanity Defense Reform Act suggests that mental illness other than "severe mental disease or defect" is insufficient to prevent the attribution of guilt. *Id.* § 17(a). Section 5K2.13 of the Guidelines, in contrast, implicitly acknowledges the reduced culpability of less acutely mentally impaired defendants by making available a downward departure in sentence for defendants deemed culpable and sane enough to be convicted. See *infra* Part 1.C (discussing issue of culpability with respect to sentencing of the mentally ill).

38. Proposed Sentencing Guidelines for United States Courts, 52 *Fed. Reg.* 3920, 3970 § Y218 (proposed Feb. 6, 1987) (proposing language nearly identical to that which would be used in original section 5K2.13, displayed *supra* note 4).



not fully appreciate the criminality of his conduct. This provision applies only when a defendant does not present a danger to the public. Thus, it may not be applied when the offense is a violent one, or a defendant's criminal history otherwise indicate[s] that he would present a danger to the public if released.<sup>39</sup>

By its use of the word "Thus," the Commission suggested that every violent offender poses a risk to the public sufficient to deny that offender a reduced sentence on account of diminished capacity. This violent/nonviolent distinction was codified in the original section 5K2.13, which stated that a downward departure could be available for a "non-violent offense."<sup>40</sup>

The Guidelines, however, did not provide standards for interpreting "non-violent offense" in the original section 5K2.13.<sup>41</sup> As a result, a circuit split developed over the issue of whether the term "non-violent offense" should be defined as the converse of the term "crime of violence" set forth in section 4B1.2 of the Guidelines (part of the career offender provision).<sup>42</sup> A majority of the circuits, including the Sixth, Seventh,

39. *Id.* at 3971. But cf. U.S. Sentencing Guidelines Manual § 5K2.13, cmt. n.1 (making downward departure available to those suffering from either cognitive or volitional ailments).

40. U.S. Sentencing Guidelines Manual § 5K2.13 (1995) (amended 1998); see *supra* note 4 (displaying full text). Virtually every court construed "non-violent offense" to be a threshold requirement for a downward departure under the old section 5K2.13. But see *United States v. Acosta*, 846 F. Supp. 278, 279 (S.D.N.Y. 1994) ("[Section 5K2.13] does not purport to exclude the possibility that there may be circumstances in which mental retardation of the defendant may be considered by the court, even in a case of a violent offense, in determining whether a departure downward is appropriate.").

41. See U.S. Sentencing Guidelines Manual § 5K2.13 (1995) (amended 1998); see also John A. Henderson, Note, A Square Meaning for a Round Phrase: Applying the Career Offender Provision's "Crime of Violence" to the Diminished Capacity Provision of the Federal Sentencing Guidelines, 79 *Minn. L. Rev.* 1475, 1503 (1995) ("The Congressional deliberations on the Guidelines do not provide a specific definition of 'non-violent offense.'"). This failure to provide a definition of violence can be contrasted with detailed articulations in other federal contexts. See, e.g., 18 U.S.C. § 924(c)(3) (2000) (defining "crime of violence" for penalty for using or carrying a firearm "during and in relation to any crime of violence or drug trafficking crime" under § 924(c)); U.S. Sentencing Guidelines Manual § 4B1.2 (2001) (defining term "crime of violence" as used in career offender provision section 4B1.1). For further discussion of the term "crime of violence" in the career offender provision, see *infra* note 42.

42. U.S. Sentencing Guidelines Manual app. C, amend. 583 (2001). Importing section 4B1.2's "crime of violence" to define the scope of the original section 5K2.13's "non-violent offense" requirement meant that a downward departure for diminished capacity was not available if the offense was punishable by a term of imprisonment of more than one year and

- (1) ha[d] as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) [was] burglary of a dwelling, arson, or extortion, involve[d] use of explosives, or otherwise involve[d] conduct that present[ed] a serious potential risk of physical injury to another.

*Id.* § 4B1.2. The commentary to section 4B1.2 also provides that:

Eighth, Ninth, and Eleventh Circuits,<sup>43</sup> and also, until just prior to the 1998 amendment, the Third Circuit,<sup>44</sup> held that the section 4B1.2 definition controlled. A consequence of this position was that a defendant could be automatically disqualified from downward departure for diminished capacity solely on the basis of the elements of her offense, even if her crime had only an “unrealized prospect of violence.”<sup>45</sup>

On the other hand, a minority view—adopted by the Fourth and District of Columbia Circuits, and argued forcefully by Judge Easterbrook in a dissenting opinion—held that a section 5K2.13 downward departure could be available if a court made its own evaluation that, based on the facts and circumstances, the offense was not violent.<sup>46</sup> According to this view, “[T]he term ‘non-violent offense’ in [old] section 5K2.13 refers to those offenses that, in the act, reveal that a defendant is not dangerous.”<sup>47</sup> Thus, for the courts in the minority, an offense might meet the criteria of a “crime of violence” under section 4B1.2 but still be deemed a “non-violent offense” under the old section 5K2.13.<sup>48</sup> The minority circuit courts drew on what they perceived as the divergent policies underlying, respectively, the sentencing of repeat criminal offenders and the sentencing of offenders with diminished capacity. “In short, section 4B1.2 can be read as depriving career offenders of the benefit of the doubt, and

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“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (*i.e.* expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

Id. § 4B1.2, cmt. n.1.

43. *United States v. Maddalena*, 893 F.2d 815, 819 (6th Cir. 1989); *United States v. Poff*, 926 F.2d 588, 591 (7th Cir. 1991); *United States v. Mayotte*, 76 F.3d 887, 889 (8th Cir. 1996); *United States v. Borrayo*, 898 F.2d 91, 94 (9th Cir. 1989); *United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994).

44. *United States v. Rosen*, 896 F.2d 789, 791 (3d Cir. 1990), overruled by *United States v. Askari*, 140 F.3d 536 (3d Cir. 1998) (en banc); see *infra* note 46 (discussing shift in Third Circuit’s position).

45. *Poff*, 926 F.2d at 594 (Easterbrook, J., dissenting); see *supra* note 42 (providing section 4B1.2’s crime of violence language).

46. *United States v. Weddle*, 30 F.3d 532, 540 (4th Cir. 1994); *United States v. Chatman*, 986 F.2d 1446, 1452 (D.C. Cir. 1993); *Poff*, 926 F.2d at 594 (Easterbrook, J., dissenting) (“A ‘non-violent offense’ in ordinary legal (and lay) understanding is one in which mayhem did not occur.”). The Third Circuit, which ultimately also rejected the majority view, developed a different standard. See *Askari*, 140 F.3d at 549 (“[N]on-violent offenses’ under USSG § 5K2.13 are those which do not involve a reasonable perception that force against persons may be used in committing the offense.”), vacated by 159 F.3d 774 (3d Cir. 1998).

47. *Chatman*, 986 F.2d at 1452.

48. *Id.* at 1453.

assuming the worst.”<sup>49</sup> In contrast, a definition of “non-violent offense” should be read so as “to treat with lenity those individuals whose ‘reduced mental capacity’ contributed to commission of a crime.”<sup>50</sup>

### C. *Judicial Arguments for Limiting Section 5K2.13 Eligibility to Nonviolent Offenders*

The courts have found that special considerations apply in sentencing the mentally ill.<sup>51</sup> Several courts referred to the Act in elaborating on the limited explanation provided by the Commission<sup>52</sup> for restricting section 5K2.13 departures to those mentally ill offenders who commit nonviolent crimes.<sup>53</sup> The Act lists a few basic principles the courts are to consider in imposing a sentence. These include: just punishment, adequate deterrence, and protection of the public.<sup>54</sup> Regarding the first, just punishment,<sup>55</sup> the courts have found that, although their mental impairments do not rise to the level of insanity, people suffering from mental illness are deserving of less punishment than ordinary defendants.<sup>56</sup> As Judge Easterbrook wrote, “Persons who find it difficult to control their

49. *Id.* at 1451.

50. *Id.* at 1452.

51. See, e.g., *United States v. Atkins*, 116 F.3d 1566, 1570 (D.C. Cir. 1997) (“Here [the defendant’s] history is the history of a mentally ill criminal and therefore his sentence must reflect the extent to which that additional characteristic, together with those normally taken into consideration, may increase or decrease the likelihood that he will be a danger to society.”).

52. See *supra* text accompanying note 39.

53. This elaboration, formulated in Judge Easterbrook’s dissent from *United States v. Poff*, 926 F.2d 588, 594–95 (7th Cir. 1991) (Easterbrook, J., dissenting), was cited with approval by both minority courts and at least one majority court. See *United States v. Weddle*, 30 F.3d 532, 539–40 (4th Cir. 1994) (minority court approving); *United States v. Cantu*, 12 F.3d 1506, 1516 (9th Cir. 1993) (majority court approving); *Chatman*, 986 F.2d at 1452 (D.C. Cir.) (minority court approving).

54. 18 U.S.C. § 3553(a)(2) (1994). Another factor listed, “the seriousness of the offense,” *id.* § 3553(a)(2)(A), would presumably be accounted for when the sentencing court initially arrived at the defendant’s Offense Level.

55. This Note interprets the consideration of just punishment to be the equivalent of a blameworthiness or desert theory of punishment.

56. See *Poff*, 926 F.2d at 595 (Easterbrook, J., dissenting) (“The criminal justice system long has meted out lower sentences to persons who, although not technically insane, . . . [lack] full command of their actions. The Sentencing Commission based its guidelines on the common practices of judges, which it attempted to make more uniform without fundamentally altering the criteria influencing sentences.”). For a discussion of reduced mental capacity as it relates to the distinct phases of conviction and sentencing, see *United States v. Ventrilla*, 233 F.3d 166, 169 (2d Cir. 2000) (stating that, for an insanity defense, a “defendant must persuade a jury by clear and convincing evidence” that she could not appreciate wrongfulness of her acts, whereas to demonstrate diminished capacity for purpose of sentencing, a defendant must only “persuade a judge by a preponderance of the evidence” that she suffers from impaired mental capacity and that that deficiency is causally linked to her commission of the crime); *United States v. Leandre*, 132 F.3d 796, 802 (D.C. Cir. 1998) (stating that diminished capacity normally “refers to situations where a defendant’s mental abnormality . . . negates the element of *mens rea* required for conviction for the charged offense,” while “[c]onsideration of a defendant’s mental

conduct do not—considerations of dangerousness to one side—deserve as much punishment as those who act maliciously or for gain.”<sup>57</sup> Similarly, deterring the future criminal behavior of the defendant or other mentally ill individuals may be a less justifiable basis for punishment since “legal sanctions are less effective with persons suffering from mental abnormalities.”<sup>58</sup> One court has argued, furthermore, that a reduction in sentence for the mentally disabled does not undermine the deterrence of “fully competent offenders” since the latter should “know that they would face the much harsher penalties required for them by the Guidelines.”<sup>59</sup>

On the other hand, with respect to protection of the public, “A hefty sentence [for a mentally ill offender] may be appropriate simply because it *incapacitates* and so reduces the likelihood of further offenses.”<sup>60</sup> This line of reasoning argues that a basis for distinguishing between violent and nonviolent offenders is their differing need for incapacitation: “When the disturbed person’s conduct is non-violent . . . incapacitation is less important.”<sup>61</sup> Courts and commentators have argued, therefore, that the purpose of section 5K2.13 is to allow for sentence reductions only in those cases where, along with diminished just punishment and deterrence justifications for lengthy imprisonment, there is also a reduced need for incapacitation because the offense was not violent.<sup>62</sup> If “violent”

condition in sentencing, on the other hand, is appropriately viewed as an extension of the concept of ‘diminished (or partial) responsibility’” (citations omitted)).

57. *Poff*, 926 F.2d at 595 (Easterbrook, J., dissenting).

58. *Id.*

59. *United States v. Speight*, 726 F. Supp. 861, 869 (D.D.C. 1989).

60. *Poff*, 926 F.2d at 595 (Easterbrook, J., dissenting) (emphasis added).

61. *Id.* Incapacitation was a partial justification for the Seventh Circuit’s rejection of a due process and equal protection challenge to the distinction between violent and nonviolent offenses under the old section 5K2.13. *United States v. Sullivan*, 75 F.3d 297, 300 (7th Cir. 1996). The defendant argued that it was unconstitutional to refuse to consider mitigation in sentence for violent offenders under section 5K2.13 when such mitigation was available both to nonviolent offenders under section 5K2.13 and to capital defendants as a basis for converting a death sentence to life imprisonment. *Id.* The Seventh Circuit found a rational basis for distinguishing violent offenders under section 5K2.13 in that a downward departure would “result in an individual’s earlier release into society,” and “physical danger to the public may be involved.” *Id.*

62. See *United States v. Cantu*, 12 F.3d 1506, 1516 (9th Cir. 1993) (“Incapacitation alone retains its full force against such [mentally impaired] offenders. . . . When defendants with reduced mental capacity do not exhibit violent conduct, however, incapacitation is not such an important goal [and downward departure may be available].”); *United States v. Chatman*, 986 F.2d 1446, 1452 (D.C. Cir. 1993) (“Section 5K2.13 must be interpreted in light of the fact that, with the decreased relevance of deterrence and desert, incapacitation becomes the primary rationale for incarcerating those whose crimes were committed as a result of ‘significantly reduced mental capacity.’”); *Poff*, 926 F.2d at 595 (Easterbrook, J., dissenting) (“Section 5K2.13 read as a whole . . . says that when incapacitation is not an important justification for punishment, mental condition may be the basis of a departure.”); see also Andrew Brown, *Limits on the Use of Diminished Capacity as a Basis for Departure*, 7 *Fed. Sentencing Rep.* 193, 193 (1995) (“[W]hy preclude departures . . . when the offense was violent both as defined and as executed? . . . The Commission apparently determined that anyone who commits a

is construed to mean reflective of dangerousness,<sup>63</sup> then this interpretation makes sense: The public should be protected from dangerous offenders. If, however, as is often the case, “violent” is construed to mean something approximating heinous,<sup>64</sup> then this interpretation may lead to both overinclusive and underinclusive outcomes. These issues are discussed in Parts II.C and II.D.

## II. THE PROBLEMS WITH THE VIOLENCE STANDARD

The circuit split over which offenses should preclude downward departure under the old section 5K2.13 raised the fundamental question of the role of violence in sentencing the mentally impaired. This Part will explore whether the 1998 revision succeeded in resolving that question and will also look at the problems inherent in any approach that focuses on past violence when determining whether a downward departure for diminished capacity should be granted. Given that the presence or threat of violence has been construed to foreclose downward departure under the revised section 5K2.13 in virtually every case, it is significant that the Commission provided no discussion of the role of violence in the new provision.

### A. *The Amended Section 5K2.13: An Unclear Role for Violence*

Although the amendment purported to “address[ ] a circuit conflict,”<sup>65</sup> it is not entirely clear how the conflict was to be settled.<sup>66</sup> It is true that the amendment resolves the disagreement about whether threats of violence, as well as actual violence, should be considered preclusive by a sentencing court.<sup>67</sup> The Commission failed, however, to

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violent offense necessarily poses a risk to the public.”); Miller, *supra* note 8, at 709 (“[T]ension has developed between the need to protect society from dangerous criminal offenders and the need to show leniency towards those offenders who suffer from diminished mental capacity and commit crimes devoid of either actual violence or a serious threat of violence.”).

63. See, e.g., *Chatman*, 986 F.2d at 1452 (interpreting “non-violent offense” under old version of section 5K2.13 to “refer[ ] to those offenses that, in the act, reveal that a defendant is not dangerous”); see also *United States v. Weddle*, 30 F.3d 532, 540 (4th Cir. 1994) (quoting *Chatman*).

64. See, e.g., *United States v. Thames*, 214 F.3d 608, 614–15 (5th Cir. 2000) (holding that “the record would not permit such a conclusion” of nonviolence “[u]nder any definition” where defendant “committed armed takeovers” of a bank’s “employees and customers in which everyone was ordered, at gunpoint, to lay [sic] on the floor while [defendant] collected money”); *infra* Part II.B (discussing *United States v. Bowe*, 257 F.3d 336 (4th Cir. 2001)).

65. U.S. Sentencing Guidelines Manual app. C, amend. 583 (2001).

66. See Miller, *supra* note 8, at 707 (“By failing to expressly adopt one view over the other, the Commission potentially fumbled its best chance to clarify the violence prong of section 5K2.13.”).

67. See U.S. Sentencing Guidelines Manual § 5K2.13(2) (addressing both “actual violence” and “a serious threat of violence”). Compare *Poff*, 926 F.2d at 594 (Easterbrook, J., dissenting) (“A ‘non-violent offense’ in ordinary legal (and lay) understanding is one in

define “violence” or “serious threat” for the purposes of “actual violence or a serious threat of violence.”<sup>68</sup> Among the options the Commission rejected in amending section 5K2.13 were: adopting the converse of the section 4B1.2 definition of “crime of violence” as the definition of “non-violent offense”; adopting a dangerousness test for the definition of “non-violent”; and striking the word “non-violent” entirely from the old version of section 5K2.13.<sup>69</sup> Thus, not only did the Commission reject two options that would have provided a definition of violence; it also failed to provide a definition for the option it ultimately selected.

Beyond omitting a definition of violence, the language of the amended version of section 5K2.13 does not clearly describe what role violence, however defined, should play in downward departures. Like section 5K2.13’s criminal history prong,<sup>70</sup> the current offense prong seeks to protect society from dangerous defendants. In amending the provision in 1998, the Commission could have revised section 5K2.13 to say that “the court may not depart below the applicable guideline range if . . . the facts and circumstances of the defendant’s offense indicate a need to protect the public”—without adding “because the offense involved actual violence or a serious threat of violence.” Indeed, during the course of the amending process, the Commission considered, but ultimately rejected, a virtually identical suggestion.<sup>71</sup> At the same time, it also rejected a focus on the violence of a defendant’s offense to the exclusion of consideration of the risk that particular defendant posed to the public.<sup>72</sup>

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which mayhem did not occur.”), with *Chatman*, 986 F.2d at 1454 (determining that “[s]ome offenses that never resulted in physical violence may, nonetheless, indicate that a defendant is exceedingly dangerous, and should be incapacitated,” and accordingly, that “an offense that involved a real and serious threat of violence . . . is not, in our view, within the compass of a ‘non-violent offense’”), and *United States v. Maddalena*, 893 F.2d 815, 819 (6th Cir. 1989) (holding defendant ineligible for downward departure because of his “threatened use of physical force against the person . . . of another” (citing career offender provision, U.S. Sentencing Guidelines Manual § 4B1.2 (1989))).

68. U.S. Sentencing Guidelines Manual § 5K2.13 (2001). Neither is the term “violence” listed among the terms of “general applicability.” *Id.* § 1B1.1, cmt. n.1. It could be argued that this failure to provide guidance for the interpretation of violence conflicts with Congress’s charge to the Commission to “avoid[] unwarranted sentencing disparities.” 28 U.S.C. § 991(b)(1)(B) (1994); see *supra* note 15 (displaying expanded text).

69. Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 63 Fed. Reg. 602, 632 (proposed Jan. 6, 1998).

70. U.S. Sentencing Guidelines Manual § 5K2.13(3) (2001); see *supra* text accompanying note 2 (displaying full text).

71. See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 63 Fed. Reg. at 632 (“Option Four defines the scope of the departure broadly by removing the ‘nonviolent offense’ limitation.”). The Commission ultimately chose “Option Three,” which uses the current offense prong language, *id.*

72. See *id.* (“Option One (the majority view) defines the scope of the departure narrowly to exclude all offenses that would be crimes of violence under the career offender guideline.”).

One interpretive problem is that the new section 5K2.13 is no longer introduced by the words, "If the defendant committed a non-violent offense."<sup>73</sup> Rather, the new violence inquiry instructs courts to consider whether the "facts and circumstances of the defendant's offense indicate a need to protect the public," followed by "because the offense involved actual violence or a serious threat of violence."<sup>74</sup> The word "because" in this context is ambiguous. May a court make a downward departure upon a determination that the facts and circumstances of a defendant's offense do not indicate a need to protect the public, even though there were violent aspects to the crime? Conversely, does this wording mean that if an offense is not violent, a court need not consider whether the facts of a defendant's case render him a threat to public safety such that he is precluded from a section 5K2.13 downward departure?

These issues are not addressed by the Commission.<sup>75</sup> Even the Commission's own description of what it did is unclear. Initially, in describing the options it was considering for what would become the new provision, the Commission explicitly characterized the option it eventually adopted as "a variation of the minority view."<sup>76</sup> Yet, in its commentary to the 1998 amendment, the Commission describes the new provision as a "compromise approach."<sup>77</sup>

In light of the amendment's history, the language used, and the Commission's characterizations of what it had done, it would seem that the current offense prong precludes departure only upon a finding of *both* future danger and past violence.<sup>78</sup> Significantly, this interpretation saves the phrase "the facts and circumstances of the defendant's offense indicate a need to protect the public" from being superfluous by indicating that both this condition and that of the presence or threat of violence

73. U.S. Sentencing Guidelines Manual § 5K2.13 (1995) (amended 1998); see *supra* note 4 (displaying full text).

74. U.S. Sentencing Guidelines Manual § 5K2.13(2) (2001); see *supra* text accompanying note 2 (displaying full text). For a discussion about the phrase "serious threat of violence," see *infra* Part II.D.2.

75. See U.S. Sentencing Guidelines Manual app. C, amend. 583 (2001).

76. Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 63 Fed. Reg. at 632 (describing "Option Three"); see also U.S. Sentencing Comm'n, *The Year In Review: 1997-1998*, 5 (1998) ("The amendment effectively overrides the interpretation that a departure categorically is not available for any defendant convicted of a 'crime of violence,' as that term is defined by the career offender guideline."), at <http://www.usc.gov/publicat/97YRREV.PDF> (on file with the *Columbia Law Review*).

77. See U.S. Sentencing Guidelines Manual app. C, amend. 583 ("The amendment replaces the current policy statement with a new provision that essentially represents a compromise approach to the circuit conflict.").

78. For a similar conclusion that the new section 5K2.13 envisions substantial inquiry into a defendant's dangerousness to the public, see Alan Ellis, *Answering the "Why" Question: The Powerful Departure Grounds of Diminished Capacity, Aberrant Behavior, and Post-Offense Rehabilitation*, 11 Fed. Sentencing Rep. 322, 322 (1999) ("Rather than focus on whether the offense qualifies as 'violent,' the new version of § 5K2.13 appears to make the 'need to protect the public' the key consideration in the departure inquiry.").

must each separately be satisfied in order to preclude a defendant from downward departure under the current offense prong. Thus, only this interpretation incorporates both the text of the new provision and the majority and minority views with respect to the old one. This is not, however, the way most courts have understood amended section 5K2.13.

### B. *Application of the Amended Section 5K2.13*

Courts have interpreted the amended language variously.<sup>79</sup> One circuit court has suggested that it has abandoned the majority view on account of the amendment.<sup>80</sup> On the other hand, at least one circuit court appears to have continued to invoke the majority circuits' "crime of violence" standard from section 4B1.2 in interpreting the current offense prong of the amended section 5K2.13.<sup>81</sup> Yet another circuit court remanded a case it had previously affirmed en banc for consideration in light of the new provision.<sup>82</sup>

After the amendment to section 5K2.13 went into effect on November 1, 1998, approximately 557 of the 115,403 defendants sentenced in

79. There is disagreement over whether the amendment to section 5K2.13 works a clarifying or substantive change. Compare *United States v. Askari*, 159 F.3d 774, 779 (3d Cir. 1998) (en banc) (referring to "Sentencing Commission's clarifying amendment to § 5K2.13" (quoting *United States v. Askari*, 151 F.3d 131, 132 (3d Cir. 1998))), with *United States v. Timbana*, 222 F.3d 688, 708 (9th Cir. 2000) (concluding that amendment to section 5K2.13 "substantially altered the guideline rather than merely clarifying it"), and *United States v. Allen*, No. 98-1480, 1999 WL 282674, at \*2 (6th Cir. Apr. 30, 1999) (unpublished table decision) ("[T]he Sentencing Commission indicated that it was making a substantive change . . ."). This distinction in characterizations could be significant in some cases since a court may only consider an amendment's effect on a defendant sentenced under an earlier edition of the Guidelines to the extent that it is a clarifying amendment. U.S. Sentencing Guidelines Manual § 1B1.1(b)(2).

80. *Allen*, 1999 WL 282674, at \*2 (reiterating that in the past it had applied majority courts' categorical approach to violence, and concluding that "the Sentencing Commission has indicated that the policy for future cases will be to look to the particular facts and circumstances present in an individual defendant's offense when determining whether a § 5K2.13 departure is possible"); see also *Miller*, supra note 8, at 708 ("[T]he Sixth Circuit acknowledged that the categorical approach that it had adopted previously was rejected by the Commission."); Carlos M. Pelayo, Comment, "Give Me a Break! I Couldn't Help Myself?": Rejecting Volitional Impairment as a Basis for Departure Under *Federal Sentencing Guidelines* Section 5K2.13, 147 U. Pa. L. Rev. 729, 763-64 (1999) (noting that "under the newly revised section 5K2.13, whether the offense disqualifies a defendant from the possibility of departure is . . . a fact-specific inquiry").

81. See *United States v. Houser*, No. 00-30235, 2001 WL 985713, at \*1 (9th Cir. Aug. 24, 2001) (unpublished opinion) ("Where an offense is a 'crime of violence,' this court has concluded that a diminished capacity departure under Section 5K2.13 is unavailable."); *United States v. Tayloe*, No. 99-30083, 2000 WL 234832, at \*1 (9th Cir. Feb. 24, 2000) (unpublished table decision) (affirming lower court's conclusion that section 5K2.13 is "inapplicable" because defendant "was convicted of a crime of violence"). But see *Miller*, supra note 8, at 709-10 (arguing that the Commission's amendment "implicitly reject[ed] the proposition that the crime of violence definition of section 4B1.2 applies to section 5K2.13").

82. *Askari*, 159 F.3d at 780.



fiscal 1999 and 2000 were granted sentence reductions at least partially on the grounds of diminished capacity.<sup>83</sup> In most cases, district courts have subordinated the concern about whether the defendant is a danger to the public to a concern about whether the defendant's conduct was violent or threatened violence.<sup>84</sup> Thus, despite the explicit inclusion of an inquiry into whether "the facts and circumstances of the defendant's offense indicate a need to protect the public," in virtually every case the courts have failed to make downward departure available under section 5K2.13 when they discern "actual violence or a serious threat of violence," however they define that phrase.<sup>85</sup> The circuit courts, without consider-

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83. The Commission's data on trends in the use of downward departure for diminished capacity are ambiguous. Recorded downward departures for diminished capacity were granted as follows: in fiscal 1996, in 148 out of 42,436 total cases, U.S. Sentencing Comm'n, 1996 Sourcebook of Federal Sentencing Statistics tbl.25 (1996), available at <http://www.ussc.gov/annrpt/1996/tab-2425.pdf> (on file with the *Columbia Law Review*); in fiscal 1998, in 192 out of 50,754 total cases, U.S. Sentencing Comm'n, 1998 Sourcebook of Federal Sentencing Statistics tbl.25 (1998), available at <http://www.ussc.gov/ANNRPT/1998/tab2425.pdf> (on file with the *Columbia Law Review*); in fiscal 1999, in 265 out of 55,557 total cases, U.S. Sentencing Comm'n, 1999 Sourcebook of Federal Sentencing Statistics tbl.25 (1999), available at <http://www.ussc.gov/ANNRPT/1999/table2425.pdf> (on file with the *Columbia Law Review*); in fiscal 2000, in 292 out of 59,846 total cases, U.S. Sentencing Comm'n, 2000 Sourcebook of Federal Sentencing Statistics tbl.25 (2000), available at <http://www.ussc.gov/ANNRPT/2000/table2425.pdf> (on file with the *Columbia Law Review*). The figures noted in the text are a compilation of the 1999 and 2000 statistics. But see *id.* app. A (describing in introduction the imperfect nature of reporting on federal sentencing statistics), available at [http://www.ussc.gov/ANNRPT/2000/AppA\\_00.htm](http://www.ussc.gov/ANNRPT/2000/AppA_00.htm) (on file with the *Columbia Law Review*). For an overview of the Commission's available Annual Reports and Statistical Sourcebooks, see <http://www.ussc.gov/research.htm>.

84. See, e.g., *United States v. Ramirez*, 154 F. Supp. 2d 774, 775 (S.D.N.Y. 2001) (holding that "[i]n this case § 5K2.13 would bar downward departure since the offense involved actual violence"); see also *infra* note 87 and accompanying text (citing four examples of circuit court cases in which district court had denied downward departure). But see *infra* Part II.D.1 (discussing *United States v. Blake*, 89 F. Supp. 2d 328 (E.D.N.Y. 2000)).

85. But see discussion of *Blake* *infra* Part II.D.1. Over the course of section 5K2.13's history, both prior to and since the 1998 amendment, some defendants and courts have invoked both section 5H1.3, discussed *supra* note 36, and section 5K2.0 (the umbrella policy statement governing "Grounds for Departure") in an attempt to circumvent the inferred preclusion of violent offenses under section 5K2.13. See U.S. Sentencing Guidelines Manual §§ 5H1.3, 5K2.0 (2001). Some circuits have held that sections 5H1.3 and 5K2.0 cannot independently authorize downward departure on account of mental problems. See, e.g., *United States v. Thames*, 214 F.3d 608, 615 (5th Cir. 2000) ("[T]he guidelines have already adequately taken into consideration a defendant's mental capacity with § 5K2.13, and thus § 5K2.0 is inapplicable to Thames's claim that his diminished mental capacity . . . entitles him to consideration for a downward departure."); *Premachandra v. United States*, 101 F.3d 68, 70 (8th Cir. 1996) (arriving at similar conclusion with respect to defendant's invocation of section 5H1.3); see also Thomas W. Hutchison et al., *Federal Sentencing Law and Practice* 1367 (2001) (arguing that section 5H1.3 should not be interpreted so as to render "meaningless" section 5K2.13's "exclusion of violent offenses"). *Contra United States v. Strain*, No. 97-30362, 1998 WL 708777, at \*2 (9th Cir. Oct. 6, 1998) (unpublished table decision) (holding that under section 5K2.0,

ing the ambiguities created by the current offense prong's phrasing, have approved this application. At least six circuit courts have declared that downward departures under section 5K2.13 are simply unavailable in the face of violence, without addressing the risk the defendant poses to the public.<sup>86</sup> Usually, the circuit courts have arrived at this conclusion in the process of affirming denials of sentence reductions by the district courts.<sup>87</sup>

This widespread emphasis on the violent nature of an offense can be seen in the circuit court's opinion in *United States v. Bowe*, an unusual case in which the district court had reduced the defendant's sentence for conduct that most people, though apparently not the district court, would regard as violent.<sup>88</sup> The Fourth Circuit—a circuit that had been among the minority of courts in the circuit split that had precipitated the 1998

"district court had discretion to depart downward on the basis of extraordinary mental or emotional condition" for violent offense); *United States v. Pullen*, 89 F.3d 368, 370–71 (7th Cir. 1996) ("Recall that section 5H1.3 has that weasel word 'ordinarily,' implying that in an extraordinary case a mental or emotional condition might warrant a lighter sentence even if it did not fit the express exception in 5K2.13."); *Schulhofer*, supra note 35, at 865 (drawing on sections 5H1.3 and 5K2.0 to conclude that "[m]ental and emotional conditions are *not* ordinarily relevant in sentencing *violent* offenders, but such conditions could become relevant under unusual circumstances").

86. *United States v. Petersen*, 276 F.3d 432, 437 (8th Cir. 2002) ("A defendant must have committed a nonviolent offense to be considered for a downward departure under USSG § 5K2.13."); *United States v. Pizzichiello*, 272 F.3d 1232, 1238 (9th Cir. 2001) ("The Guidelines thus prohibit departure where the offense involved actual violence."); *United States v. Constantine*, 263 F.3d 1122, 1126 (10th Cir. 2001) ("[T]his provision is not applicable to crimes 'involv[ing] actual violence or a serious threat of violence' . . . ." (second alteration in original)); *United States v. Bowe*, 257 F.3d 336, 347 (4th Cir. 2001) (holding that a "district court lacks the discretion to depart downward pursuant to section 5K2.13" because defendant's "conduct included violent acts and a serious threat of violence"); *Thames*, 214 F.3d at 614 (5th Cir.) ("[N]o departure may be given where the crime was violent in nature."); *United States v. Freeman*, No. 98-5474, 1999 WL 183454, at \*2 (6th Cir. Mar. 16, 1999) (unpublished table decision) ("Section 5K2.13 . . . specifically states that the sentencing court may not depart below the applicable guideline range if the facts of the defendant's offense involved actual violence or a serious threat of violence.").

87. E.g., *Pizzichiello*, 272 F.3d at 1234 (affirming denial of downward departure); *Constantine*, 263 F.3d at 1124 (same); *Thames*, 214 F.3d at 610 (same); *Freeman*, 1999 WL 183454, at \*3 (same). Though no circuit court since the 1998 amendment has confronted directly the granting of a sentence reduction under section 5K2.13 for an offense the district court deemed "violent," district courts have unsuccessfully granted downward departures for conduct that might be considered violent, but have avoided testing the language of section 5K2.13 by calling the conduct nonviolent, as in *Bowe*, or by inexplicably departing on an unclear basis, such as a nonexistent "temporary insanity" basis, as in *Petersen*. See *Bowe*, 257 F.3d at 341, 347–48 (vacating and remanding district court's sentencing decision, in which district court had concluded that defendant's conduct neither was violent nor threatened violence and had granted downward departure); *Petersen*, 276 F.3d at 437–38 (reversing, because defendant was convicted of violent crimes, district court's downward departure based on temporary insanity).

88. See 257 F.3d at 341 (noting district court's conclusions that "the stabbing incident did not evince actual violence" and that "Bowe's statement that if he had found his wife with a man he would have killed them" did not constitute a sufficiently serious threat of violence, and its consequent downward departure); see also supra note 87 and

amendment—reviewed the sentence of the professional boxer Riddick Bowe for deplorable crimes against his wife:

The undisputed record reveals that Bowe forced his way into his estranged wife's house by pushing aside her cousin. He then compelled Mrs. Bowe to leave with him by gesturing that he would hit her if she did not comply. . . . The record shows that Bowe displayed a buck knife, a flashlight, duct tape, pepper spray, and handcuffs to his wife during the trip from North Carolina to Virginia. He told Mrs. Bowe that he had come prepared to kill her if he had found her with another man. Bowe stabbed his wife through a heavy leather jacket. He also slapped her.<sup>89</sup>

The circuit court held that “[b]ecause Bowe’s course of conduct included violent acts and a serious threat of violence, Bowe is not eligible for a departure pursuant to U.S.S.G. § 5K2.13.”<sup>90</sup> Previously, the Fourth Circuit had explicitly adopted the approach to section 5K2.13 articulated in *United States v. Chatman*, which assesses a crime’s violence according to what that aspect reveals about a defendant’s dangerousness.<sup>91</sup> The circuit court in *Bowe*, however, focused exclusively on the atrociousness of the crimes that generated the defendant’s sentence and not, for example, on the nature of the diminished capacity found by the district court<sup>92</sup> or on what that mental state might indicate about his danger to the public. Certainly, the heinousness of Bowe’s actions cannot be denied, and perhaps it is not surprising that the crimes at issue in *Bowe* led the circuit court to substitute an assessment of heinousness for an assessment of dangerousness. This shortcut of relying on the graphic violence of an offense as a proxy for the future threat an offender poses to the public is, however, problematic. Specifically, such reasoning may produce both underinclusive and overinclusive results. These consequences are explored in the next two sections.

### C. *The Underinclusive Problem of a Violence Standard*

Relying on the violence of the crime generating the sentence to predict future danger to the public creates what might be considered a loophole: It leaves eligible for downward departure defendants who may be quite dangerous to society, but who have no criminal history, and whose

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accompanying text (describing usual posture of section 5K2.13 cases in which district court denies departure on grounds of violence and circuit court affirms).

89. *Bowe*, 257 F.3d at 347.

90. *Id.*

91. See *United States v. Weddle*, 30 F.3d 532, 539–40 (4th Cir. 1994) (determining that “the term ‘non-violent offense’ in section 5K2.13 refers to those offenses that, in the act, reveal that a defendant is not dangerous” (quoting *United States v. Chatman*, 986 F.2d 1446, 1452 (D.C. Cir. 1993))).

92. 257 F.3d at 341 (“The [district] court . . . found that Bowe suffered from diminished capacity.”).

present conviction is for a crime that involves no violence.<sup>93</sup> Such a case might be presented by a mentally impaired defendant convicted, like the undeniably dangerous Al Capone, for willfully attempting to evade and defeat income taxes and for failing to file tax returns.<sup>94</sup> The current offense prong is inherently vulnerable to this problem since it directs a court's consideration of whether the "facts and circumstances of the defendant's offense indicate a need to protect the public" to situations in which "the offense involved actual violence or a serious threat of violence."

Of course, the overall departure system set up by the Guidelines substantially mitigates this potential for underinclusion: Mentally impaired defendants are not entitled to sentence reductions, but rather, section 5K2.13 is available solely at the discretion of the court.<sup>95</sup> Thus, when a departure seems unwarranted, a court can simply deny a sentence reduction for a particular defendant under section 5K2.13 as it now stands. Nevertheless, there is an issue of emphasis: Modifying the current offense prong's language would emphasize to sentencing courts that their focus should be on public protection—not just on violence.

A more acute problem is the current offense prong's potential for overinclusion.

#### D. *The Overinclusive Problems of a Violence Standard*

Assuming future dangerousness from the presence of violence in an offense also creates the opposite problem, that of overinclusiveness. Defendants whose offenses involved violence may not present a future danger to society. The incapacitation rationale for denying such defendants a downward departure is thus unpersuasive. Because section 5K2.13 addresses offenses that involve "actual violence" or "a serious threat of violence,"<sup>96</sup> it is worth separately considering defendants who might fall into each of these categories. First, there are individuals suffering from diminished capacity who have committed violent acts but who do not pose a threat to society, or who would not pose a threat to society with the aid of proper psychiatric treatment.<sup>97</sup> Second, there are individuals who

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93. A sentence reduction in such a case would be reviewed by the circuit court for abuse of discretion. See *Koon v. United States*, 518 U.S. 81, 96–100 (1996) (setting out abuse of discretion standard of review).

94. See *Capone v. United States*, 56 F.2d 927, 934 (7th Cir. 1932) (affirming district court conviction).

95. U.S. Sentencing Guidelines Manual § 5K2.13 (2001) (providing that "[a] sentence below the applicable guideline range *may* be warranted") (emphasis added); see also *United States v. Dyer*, 216 F.3d 568, 569 (7th Cir. 2000) ("Even if the judge finds that the defendant committed the offense while afflicted by a significantly reduced mental capacity, he is not required to reduce the defendant's sentence; he is merely authorized to do so . . .").

96. U.S. Sentencing Guidelines Manual § 5K2.13(2).

97. These individuals may not qualify for downward departure under aberrant behavior, *id.* § 5K2.20, because of the nature of their crime or criminal history.

have threatened violence but who did not intend to carry it out or were unable to carry it out.

1. *Defendants Who Commit Violent Acts.* — Although it has become routine for courts to infer from a defendant's violent acts that he or she is a danger to society, this assumption is unwarranted. As one circuit court has noted, "Psychiatric treatment, for instance, may reduce the risk that the offender will continue to commit crimes that put the safety of others in jeopardy."<sup>98</sup> In *United States v. Blake*, the district court considered this possibility and assumed the authority to depart downward under section 5K2.13 in a sentence for a violent crime.<sup>99</sup> The defendant pled guilty to bank robbery and to assault during the commission of the robbery, in which she stabbed a bank employee in the hand, causing permanent damage.<sup>100</sup> The defendant, Summer Blake, was a young woman in her early twenties with a three year old daughter. Blake had lived a difficult life, with parents who had a history of drug abuse and with romantic partners who had abused her. Psychiatric problems had led to two suicide attempts. However, during the extended period of time between her release on bail after being arrested for the robbery and assault, and her sentencing for these offenses, Blake had made great progress in rehabilitating herself. She had received psychiatric counseling and spiritual guidance, had found work as a full-time receptionist, and had completed her first semester at Pace University.<sup>101</sup>

In analyzing its authority to depart, the court acknowledged that the violent nature of Blake's crime might have made her ineligible for downward departure if she had been a risk to the public.<sup>102</sup> It concluded, however, that "[b]ased on the facts and circumstances surrounding the crime and Blake's post-arrest behavior, Blake's incapacitation is not necessary to protect the public."<sup>103</sup> Accordingly, the court determined that the current offense prong did not preclude departure in Blake's case.<sup>104</sup> For the defendant, the consequences of this determination were drastic: it helped to make possible the court's reduction of her sentence from an otherwise mandatory range of 87–108 months to "time served plus five years of strictly supervised release."<sup>105</sup> The court explained that "[t]here is little doubt that if Blake continues along this path [of rehabilitation], she can and will be a peaceful and productive member of society."<sup>106</sup>

98. *United States v. Atkins*, 116 F.3d 1566, 1569 (D.C. Cir. 1997).

99. 89 F. Supp. 2d 328, 338–40 (E.D.N.Y. 2000).

100. *Id.* at 331–32.

101. For details about Blake's background and rehabilitation, see *id.* at 332–37.

102. *Id.* at 338.

103. *Id.*

104. See *id.* at 339 ("A departure pursuant to section 5K2.13 is authorized.").

105. See *id.* at 332, 353 (providing initial Guidelines calculation and then providing sentence the court in fact imposed as a result of its conclusion that downward departure was authorized and warranted in Blake's case).

106. *Id.* at 340.

The facts of *Blake* illustrate why denying district courts the discretion to depart downward under section 5K2.13 for violent offenses may lead to the overinclusion of certain defendants who, under the facts of their cases, do not represent a danger to the public. Medical and psychological treatment may negate the very reason—incapacitation—for which departure was denied.<sup>107</sup> Denial of downward departure in such cases would thereby unjustifiably conflict with section 5K2.13's policy of lenity toward mentally ill defendants.<sup>108</sup> Moreover, overinclusion of these defendants may well prove detrimental to society at large if it thwarts their rehabilitation.<sup>109</sup> As the court noted in *Blake*, "There is no doubt that returning Blake to prison would reverse the progress that she has made."<sup>110</sup>

2. *Defendants Who Make Empty Threats.* — The second category demonstrating the potential for overinclusion under the current offense prong consists of a subset of defendants who only threaten violence. The underlying reason for denying the possibility of downward departure to individuals who threaten violence is that they may be just as dangerous as those who succeed in perpetrating violence.<sup>111</sup> There are, however, mentally ill individuals who make threats of violence that they either do not intend to or are unable to carry out. Thus, although these individuals ostensibly do threaten violence, their threats are not real.<sup>112</sup> Such defendants therefore do not pose the kind of danger to society that warrants their preclusion from downward departure.<sup>113</sup> Section 5K2.13 itself appears to distinguish between different types of threats by using the adjective "serious" to modify the word "threat."<sup>114</sup> Still, this phrase is ambiguous and undefined in the Guidelines:<sup>115</sup> Should "serious threat" be

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107. See *supra* notes 60–64 and accompanying text (discussing incapacitation).

108. See, e.g., *United States v. Chatman*, 986 F.2d 1446, 1452 (D.C. Cir. 1993) ("[T]he point of section 5K2.13 is to treat with lenity those individuals whose 'reduced mental capacity' contributed to commission of a crime.").

109. For a discussion of the role of rehabilitation under the Guidelines, see *infra* Part III.B.

110. 89 F. Supp. 2d at 346.

111. See, e.g., *Chatman*, 986 F.2d at 1454 ("[I]n determining whether a particular crime qualifies as a 'non-violent offense,' the District Court need not limit itself to determining whether the offense 'entail[ed] violence.'" (second alteration in original)).

112. See Jeremy D. Feinstein, Note, *Are Threats Always "Violent" Crimes?*, 94 Mich. L. Rev. 1067, 1097 (1996) (arguing that "threats should only be considered 'violent' when they create risk and that the creation of risk should be determined by examining whether the threatener had the intent and ability to carry out his threat").

113. See *United States v. Poff*, 926 F.2d 588, 595 (7th Cir. 1991) (Easterbrook, J., dissenting) (remarking that "the Commission has not required judges to treat the innocuous threatener and the murderous one identically" while construing old version of section 5K2.13).

114. U.S. Sentencing Guidelines Manual § 5K2.13(2) (2001).

115. But see U.S. Sentencing Comm'n, *The Year In Review: 1997–1998*, 5 (1998) (reporting that "[a]mong the criteria specified in the amendment [to section 5K2.13] is a consideration of whether the offense involves actual violence or a substantial risk of violence"), at <http://www.ussc.gov/publicat/97YRREV.PDF> (on file with the *Columbia Law*

judged by the defendant's subjective intent, by the perception of those threatened, by a reasonable person standard, or by a predetermined categorical approach?

Consider a person engaging in an unarmed bank robbery. Dissenting in a case that drew a comprehensive evaluation of the old section 5K2.13 by members of the Third Circuit sitting en banc, Chief Judge Becker provided a poignant illustration.<sup>116</sup> He described how the mayor of a certain Pennsylvania town walked into a bank one day, saying to the teller, "This is a robbery. I have a bomb on me."<sup>117</sup> Taking \$1,500 without injuring anyone in the bank, the mayor, who never actually had a bomb in his possession, surrendered to the authorities shortly thereafter. According to those who knew him, the mayor's conduct was the result of "chronic depression related to personal and financial troubles."<sup>118</sup> The Chief Judge concluded that it would "make[ ] no sense" to preclude downward departure where a court "found beyond cavil that the defendant's actions were prompted by a deep psychological disturbance and that there was no real threat of violence."<sup>119</sup> Three circuit courts seem to agree with this principle.<sup>120</sup>

On the other hand, it could be argued that the adjective "serious" should not be judged according to the offender's intentions and capabilities because regardless of his intent and capacity to commit harm, his threat might cause fright and elicit a response that risks danger to bystanders. At least one circuit court has taken a categorical approach to characterizing certain kinds of threats as "serious."<sup>121</sup>

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*Review*). The term "substantial risk," though perhaps broader than section 5K2.13's own "serious threat" language, is arguably no more elucidating and, in any event, is not to be found in the text of the amendment to section 5K2.13. See U.S. Sentencing Guidelines Manual app. C, amend. 583.

116. The anecdote is drawn from *United States v. Askari*, 140 F.3d 536, 564 (3d Cir. 1998) (en banc) (Becker, C.J., dissenting), vacated by 159 F.3d 774 (3d Cir. 1998) (en banc).

117. *Id.*

118. *Id.*

119. *Id.*

120. See *United States v. Walter*, 256 F.3d 891, 895 (9th Cir. 2001) (finding no "serious threat of violence" where defendant "did not possess any real intent to cause physical harm"); *United States v. Sharp*, No. 99-4736, 2000 WL 962484, at \*4 (4th Cir. July 12, 2000) (unpublished table decision) (suggesting that a threat that is "frivolous or factually impossible" may not constitute "serious threat of violence" under section 5K2.13); *United States v. Chatman*, 986 F.2d 1446, 1454 (D.C. Cir. 1993) (construing prior version of section 5K2.13 and arguing that "an offense that involved a *real and serious* threat of violence—such as assault with a deadly weapon—" may "indicate that a defendant is exceedingly dangerous, and should be incapacitated" (emphasis added)).

121. See *United States v. Houser*, No. 00-30235, 2001 WL 985713, at \*1 (9th Cir. Aug. 24, 2001) (unpublished opinion). In *Houser*, the defendant was an unarmed bank robber who "wrote a note promising not to use a gun if the bank teller cooperated." *Id.* The circuit court categorically determined that "[t]he threat of gun use during a robbery . . . counts as a threat of death," and that a "defendant who threatens physical force cannot avail himself of Section 5K2.13." *Id.* (citing *United States v. Borrayo*, 898 F.2d 91, 94 (9th

An interpretation that would completely bar a downward departure for defendants who make threats they have no intention or ability to carry out is, however, problematic.<sup>122</sup> Such an interpretation is incompatible with the policy goal of section 5K2.13, which is “lenity, not harshness, toward those who are mentally or emotionally disabled.”<sup>123</sup> Moreover, two factors suggest that promoting the goal of lenity in such cases will not put society at risk. First, section 5K2.13 is not available when a “criminal history indicates a need to incarcerate the defendant to protect the public.”<sup>124</sup> As a result, even if a district court finds that a defendant made only empty threats of violence, it cannot depart from the Guidelines if it finds a sufficiently troubling criminal history.<sup>125</sup> Allowing the possibility of downward departure, therefore, may amount to no more than giving a mentally impaired first-time defendant a chance for a reduction in—not an elimination of—his or her sentence. This is compassion the system can afford.

Second, in some cases where a defendant lacks intent or capability, it is further possible that targets of, or witnesses to, a threat do not actually feel threatened. For example, public officials including the President regularly receive threatening communications from mentally disturbed people.<sup>126</sup> To be sure, in these cases the threats “may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out.”<sup>127</sup> Yet the President may not feel threatened at all. The perception of vulnerability by the President

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Cir. 1990)). The court sought to distinguish *Walter*, 256 F.3d at 895, as an “unusual case” in which an “indirect threat” to the President did not constitute a “serious threat of violence.” *Houser*, 2001 WL 985713, at \*1. The court in *Houser* remarked that in *Walter*, the facts indicated that the defendant did not intend to threaten the President, but only to cause trouble for the person whose signature he had forged in the letter to the President, whereas in *Houser*, the fact that the defendant was unarmed did “not diminish the seriousness of that threat.” *Id.*; see also *Walter*, 256 F.3d at 893 (providing details referred to in *Houser*).

122. See Feinstein, *supra* note 112, at 1097 (“[P]eople who make threats that create risk and fear should be sentenced more harshly than those whose threats create only fear.”).

123. *United States v. Cantu*, 12 F.3d 1506, 1516 (9th Cir. 1993).

124. U.S. Sentencing Guidelines Manual § 5K2.13(3) (2001); see text accompanying note 2 (displaying full text).

125. Clause (3) of section 5K2.13 does not specify that the criminal history must be “violent” or otherwise. See U.S. Sentencing Guidelines Manual § 5K2.13(3). For a pair of district court sentencing orders that recently held that, although the current offense prong would not preclude downward departures in cases where mentally impaired unarmed bank robbers made only empty threats, departures in any event were precluded by the defendants’ criminal histories, see *United States v. McFadzean*, No. 98 CR 754, 1999 WL 1144909, at \*5–\*6 (N.D. Ill. Dec. 8, 1999); *United States v. Bradshaw*, No. 96 CR 485-1, 1999 WL 1129601, at \*3 (N.D. Ill. Dec. 3, 1999).

126. See, e.g., *Walter*, 256 F.3d at 893 (threatening the President); *United States v. Poff*, 926 F.2d 588, 589–90 (7th Cir. 1991) (threatening the President).

127. *Poff*, 926 F.2d at 590 (quoting *Rogers v. United States*, 422 U.S. 35, 46–47 (1975) (Marshall, J., concurring)).



likely is not heightened, for instance, by the receipt of an occasional letter from a mentally disturbed individual with a “20-year history of empty threats” of this kind.<sup>128</sup> By one calculation, “[I]t is a tenacious myth that those who threaten public figures are the ones most likely to harm them[,] . . . as demonstrated by the fact that *not one successful public-figure attacker in the history of the media age directly threatened his victim first.*”<sup>129</sup> Accordingly, the argument that certain threats might provoke a dangerous response that risks the well-being of others is difficult to support *in every case*. Moreover, defendants who make threats of violence may likewise be cured of their impairments with therapy or medication, so that the same arguments made in Part II.D.1 apply here as well. Since, in the end, no one is physically harmed by the conduct of such defendants, an a priori interpretation of the phrase “a serious threat of violence” without a comprehensive evaluation of the facts and circumstances of a particular threat would be overinclusive.<sup>130</sup>

### III. A BETTER APPROACH TO DOWNWARD DEPARTURES FOR DIMINISHED CAPACITY

The foregoing theoretical and practical problems with the present version of section 5K2.13 lead to the conclusion that courts should read the current offense prong to permit downward departures, even in cases involving violence, when an individual poses insufficient risk to the public. To reinforce this shift in focus, the Commission should amend section 5K2.13 by striking from the current offense prong the words “because the offense involved actual violence or a serious threat of violence.”

#### A. *Emphasis on Public Protection by the Courts and the Commission*

Courts should interpret section 5K2.13, as *Blake* did, to emphasize the question of the risk imposed on the public by a mentally ill defendant, taking into account his or her potential for treatment. This reading can be justified by the plain meaning of section 5K2.13’s text: Although violence or a threat of violence was present, the facts surrounding a given offense simply might not “indicate a need to protect the public [just]

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128. See *id.* at 593, 595 (Easterbrook, J., dissenting) (describing defendant as “a pest, a gnat buzzing in the ear of the Secret Service” and determining that “[i]ronically, we may be sure that [defendant] is harmless because of her 20-year history of empty threats”). The court nevertheless affirmed defendant’s fifty-one month prison sentence. *Id.* at 593.

129. Gavin De Becker, *The Gift of Fear: Survival Signals That Protect Us from Violence* 117 (1997).

130. See *United States v. Askari*, 140 F.3d 536, 561 (3d Cir. 1998) (Becker, C.J., dissenting) (suggesting that, under old version of section 5K2.13, a mentally impaired defendant should not be precluded from downward departure when “(a) there was no actual violence; (b) there was no real chance of violence being carried out; and (c) no one in the bank at the time of the robbery actually felt threatened by the defendant”), vacated by 159 F.3d 774 (3d Cir. 1998).

because the offense involved actual violence or a serious threat of violence."<sup>131</sup>

As described above, this reading of section 5K2.13 is also consistent with the actions taken by the Commission in amending that section in 1998.<sup>132</sup> The fact that the Commission selected language that made protection of the public the initial inquiry and shifted away from the original threshold requirement of a "non-violent offense" implies that courts should not ignore the former in favor of the latter.<sup>133</sup> "Although the Commission falls far short of offering the courts a bright line rule here, th[e] commentary [accompanying the amendment to section 5K2.13] suggests that it intended the new language to have some effect."<sup>134</sup> The problem with an approach that focuses on violence is that it gives this new language no effect. Since the Commission explicitly characterized the new provision as "a compromise approach"<sup>135</sup> to a conflict that had divided two minority courts (which took a case-by-case approach to section 5K2.13 eligibility) from six majority courts (which assessed section 5K2.13 eligibility according to a fixed violence standard),<sup>136</sup> this must indicate a shift in sentencing policy away from exclusive reliance on violence.

The main drawback of depending on a judicial solution to the problems arising under the current section 5K2.13 is that the case law strongly suggests that courts are wedded to a construction of the section that makes past violence a proxy for future dangerousness, without concern for a defendant's potential for treatment.<sup>137</sup> Thus, action by the

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131. U.S. Sentencing Guidelines Manual § 5K2.13(2) (2001); see *supra* text accompanying note 2 (displaying full text).

132. See *supra* Part II.A.

133. See Ellis, *supra* note 78, at 322 (drawing a similar conclusion about the import of section 5K2.13's amended language).

134. *United States v. McFadzean*, No. 98 CR 754, 1999 WL 1144909, at \*5 (N.D. Ill. Dec. 8, 1999) (citing U.S. Sentencing Guidelines Manual app. C, amend. 583).

135. U.S. Sentencing Guidelines Manual app. C, amend. 583.

136. See *supra* notes 41–50 and accompanying text (describing circuit split). Although the commentary to the 1998 amendment depicts a circuit conflict dividing three circuits from five circuits, U.S. Sentencing Guidelines Manual app. C, amend. 583, that ratio reflects the eleventh-hour shift in the position of the Third Circuit, which abandoned the majority view one day after the Commission proposed the amendment to section 5K2.13, see *United States v. Askari*, 151 F.3d 131, 131 (3d Cir. 1998) (describing timing of Third Circuit's shift and Commission's proposal). Accordingly, although the amendment's commentary depicts a five to three split, it was in actuality a six to two split that had precipitated the proposed (and later adopted) amendment. See *supra* notes 44, 46 and accompanying text (describing Third Circuit's shifting positions on section 5K2.13).

137. See *supra* Part II.B (discussing court application of new section 5K2.13). A recent decision by the Seventh Circuit indicates an unwillingness to adopt the holistic approach to the current offense prong taken in *United States v. Blake*, 89 F. Supp. 2d 328 (E.D.N.Y. 2000). See *United States v. Cravens*, 275 F.3d 637, 640–41 (7th Cir. 2001) (determining that current offense prong, "by its plain language, [neither] refers to nor depends upon the defendant's mental health condition").

Commission may be necessary to ensure that the prime focus is on whether “the facts and circumstances of the defendant’s offense indicate a need to protect the public.” Accordingly, the Commission once again should amend section 5K2.13, to strike the words “because the offense involved actual violence or a serious threat of violence.”<sup>138</sup>

Changing the Guidelines to ensure that a defendant’s risk to the public is more determinative of his or her ability to receive a reduced sentence would be consistent with a district court’s role regarding sentence departures. The Supreme Court has noted that in assessing the facts that bear on a decision to depart from the Guidelines, the district courts have an “institutional advantage.”<sup>139</sup> Although this “advantage” is that of the district courts over the appellate courts, the district courts, with their “vantage point and day-to-day experience in criminal sentencing,”<sup>140</sup> can also better predict a defendant’s future danger to society than can the Commission. Moreover, in the legislation that gave birth to the Guidelines, Congress itself explicitly requires courts to consider “the nature and circumstances of the offense and the history and characteristics of the defendant” in imposing a sentence.<sup>141</sup>

Some might argue that unequivocally granting greater latitude to the district courts to decide who is a public safety risk would undermine the overall policy goals of the Guidelines, which include curtailing the almost limitless discretion sentencing courts enjoyed prior to the Act.<sup>142</sup> This argument fails to consider that under the Guidelines, the district courts are already entrusted with determining when a factor that is explicitly discouraged should nonetheless serve as a basis for departure in a given case because “such characteristic or circumstance is present to an unusual degree and distinguishes the case from the ‘heartland’ cases covered by the [G]uidelines.”<sup>143</sup> A fortiori, since diminished capacity is an encouraged basis for downward departure in sentencing, permitting the district courts to assess more freely the import of a defendant’s current offense (in the same way they assess the import of a defendant’s criminal

138. A version similar to that proposed by this Note, “Option Four,” discussed *supra* note 71, was advocated by the Federal Public and Community Defenders at the time the Commission was selecting the language for the 1998 amendment. Statement of Kathleen M. Williams, Fed. Puh. Defender, S. Dist. of Fla., on behalf of Fed. Pub. and Cmty. Defenders, concerning the Proposed Guideline Amendments, before the U.S. Sentencing Comm’n, Washington, D.C. 40 (Mar. 12, 1998) (“Not every defendant convicted of a violent offense . . . will present such a threat [to the safety of others].”), at [http://www.uscc.gov/agendas/3\\_12\\_98/williams.pdf](http://www.uscc.gov/agendas/3_12_98/williams.pdf) (on file with the *Columbia Law Review*).

139. *Koon v. United States*, 518 U.S. 81, 98 (1996).

140. *Id.*

141. 18 U.S.C. § 3553(a)(1) (1994).

142. See *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (noting that prior to the Guidelines, “great variation among sentences” posed serious problems for the “evenhanded and effective operation of the criminal justice system”).

143. U.S. Sentencing Guidelines Manual § 5K2.0 (2001); see also *Koon*, 518 U.S. at 98 (discussing departures based on discouraged factors).

history)<sup>144</sup> would hardly amount to a renewed opportunity for unbridled discretion.<sup>145</sup> Such explicit authority would complement the license district courts already have to rely on their own evaluation of a defendant's mental state in lieu of the opinion of a defendant's own expert<sup>146</sup> and to decide the extent of any departure granted.<sup>147</sup>

Moreover, there is little basis for another possible concern—that a case-by-case inquiry into who should be disqualified from section 5K2.13 on the grounds of risk to the public would open the floodgates of downward departures.<sup>148</sup> All departures are still subject to the requirement that “certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline.”<sup>149</sup> Sentencing without an explicit violence inquiry remains very much a task of relative evaluations, a “matter[ ] determined in large part by comparison with the facts of other Guidelines cases.”<sup>150</sup> It is also important to recall that the departure component of sentencing under the Guidelines is entirely at the dis-

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144. Even a traditionally majority circuit, the Ninth Circuit, has determined that an “individualized determination” is called for with respect to the criminal history prong of section 5K2.13. *United States v. Davis*, 264 F.3d 813, 816 (9th Cir. 2001) (citing *United States v. Cantu*, 12 F.3d 1506 (9th Cir. 1993)); see also *infra* text accompanying note 168 (describing *Cantu* requirements for applying the criminal history prong of old section 5K2.13).

145. But see Feinstein, *supra* note 112, at 1095 (discussing “the problems with an unstructured inquiry into dangerousness” by district courts). The Commission could address these problems, however, by providing some guidance for a district court's inquiry into a defendant's dangerousness. See *infra* text accompanying note 168 (outlining an example of guidance that could be offered to district courts in their application of section 5K2.13).

146. See, e.g., *United States v. Montague*, No. 00-1215, 2000 WL 1617975, at \*2 (2d Cir. Oct. 27, 2000) (unpublished table decision) (“[T]he court is not required to accept a determination concerning a defendant's mental state offered by his own expert, and may rely on the court's own assessment of the defendant.” (citation omitted)); *United States v. Leandre*, 132 F.3d 796, 807 (D.C. Cir. 1998) (noting that “[d]istrict court was not bound to accept” the psychologist's report provided by defendant as its “conclusion,” and that “[t]he government offered a contrary analysis that the court found persuasive”); see also *United States v. White*, 71 F.3d 920, 929 (D.C. Cir. 1995) (disregarding court appointed psychologist's conclusions).

147. See U.S. Sentencing Guidelines Manual § 5K2.0 (“The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis.”).

148. See, e.g., Pelayo, *supra* note 80, at 763–64 (noting that “fact-specific inquiry . . . will not only open the door to reductions in sentences in numerous cases where mitigation is unwarranted, but it is likely also to create an increased burden on the criminal justice system”).

149. *Koon v. United States*, 518 U.S. 81, 98 (1996); see also U.S. Sentencing Guidelines Manual § 5K2.0, cmt. (“In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized.” (citing 18 U.S.C. § 3553(b) (1994))); *Cantu*, 12 F.3d at 1511 (maintaining that mental and emotional conditions are relevant to sentencing decisions only in extraordinary cases).

150. *Koon*, 518 U.S. at 98.

cretion of the district courts;<sup>151</sup> defendants have no right to a reduced sentence on account of their diminished capacity. Given this reality, the Commission should amend the Guidelines to make explicit that district courts can be reasonably entrusted to consider all relevant facts in their diminished capacity departure decisions.

### B. *Experience of Courts in Focusing on Public Safety*

Courts have already demonstrated their competence at addressing diminished capacity beyond considerations of violence. In *Blake*, for example, the court “intentionally delayed the sentencing of Blake for six months in order to provide a practical test of rehabilitation,” a practice it deemed very useful since “Blake’s past and probability of future rehabilitation play a critical role in the departure analysis.”<sup>152</sup> The rehabilitative efforts undertaken by the defendant after her arrest in fact were the basis for both the court’s authority to depart<sup>153</sup> and its decision to do so<sup>154</sup> under section 5K2.13. Thus, instead of restricting its sentencing analysis to considerations of violence, the court found postponing the defendant’s sentencing to allow for evidence of rehabilitation to be most useful in determining the need to protect the public.<sup>155</sup>

One might object that this practice contravenes the congressional mandate that the “Commission shall ensure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant.”<sup>156</sup> However, while this directive may be construed to prohibit imprisonment in order to facilitate rehabilitation, rehabilitation can be a relevant factor for other aspects of the sentencing process, such as choice of sentence.<sup>157</sup> Furthermore, the

151. See *supra* note 95 and accompanying text.

152. *United States v. Blake*, 89 F. Supp. 2d 328, 340 (E.D.N.Y. 2000); see *supra* Part II.D.1 (discussing *Blake* case). For a more detailed description of this technique, see Jack B. Weinstein, *Adjudicative Justice in a Diverse Mass Society*, 8 J.L. & Pol’y 385, 409 (2000).

153. *Blake*, 89 F. Supp. 2d at 338–39.

154. *Id.* at 353.

155. *Id.* at 340.

156. 28 U.S.C. § 994(k) (1994).

157. See U.S. Sentencing Guidelines Manual ch. 1, pt. A(2) (2001) (noting that rehabilitation is to be an objective of sentencing under the Guidelines). As the Senate Judiciary Committee Report states,

[T]he Committee has retained rehabilitation and corrections as an appropriate purpose of a sentence, while recognizing, in light of current knowledge, that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”

....

[T]he purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case. S. Rep. No. 98-225, at 76–77 (1983) (footnotes omitted); see also *Blake*, 89 F. Supp. 2d at 345 (“Rehabilitation remains a fundamental consideration at sentencing.”); cf. *Mistretta v. United States*, 488 U.S. 361, 367 (1989) (noting that the Act “rejects imprisonment as a means of promoting rehabilitation”).

Act specifically states that a "court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."<sup>158</sup> If a court must take these factors into account in determining a sentence, it seems reasonable that a court may delay a defendant's sentencing in order to permit the defendant to demonstrate rehabilitation and pursuit of these goals. In fact, presentencing rehabilitation has been permitted as a departure factor by every circuit court that has decided the issue since *Koon v. United States*.<sup>159</sup> Presentencing rehabilitation, unlike postsentencing rehabilitation,<sup>160</sup> has also been accepted by the Guidelines as a basis for sentence departures.<sup>161</sup> Thus, courts may have some opportunity to evaluate defendants beyond the conduct generating their convictions, and courts should therefore not be limited to considering only the defendants' past acts of violence.

Furthermore, when courts are not confined to concerns about violence, important issues may emerge in clearer perspective. This conclusion is supported by two circuit court opinions under the old version of section 5K2.13.<sup>162</sup> In these cases, one in a majority court,<sup>163</sup> one in a minority court,<sup>164</sup> the defendants, Vietnam veterans suffering from post-traumatic stress disorder, had been convicted for being felons in possession of firearms.

From the start, it was somewhat fortuitous that violence did not preclude downward departure in either case: in the majority court because the crime was not a "crime of violence" under section 4B1.2,<sup>165</sup> in the minority court because the government had dropped its argument that the crime was not "non-violent" on appeal.<sup>166</sup> These features of the cases

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158. 18 U.S.C. § 3553(a)(2)(D) (1994). This instruction has been interpreted to include rehabilitation as a purpose of sentencing. See Schulhofer, *supra* note 35, at 860 (citing the instruction as evidence that in "ruling out personal circumstances and rehabilitative potential as factors in sentencing to *prison*, sections 994(e) and 994(k) [of 28 U.S.C.] are easily misinterpreted to mean that such factors are not relevant in decisions about *probation*, in other words that they are not relevant *at all*").

159. U.S. Sentencing Guidelines Manual app. C, amend. 602 (citing *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997)); *Koon v. United States*, 518 U.S. 81 (1996).

160. U.S. Sentencing Guidelines Manual § 5K2.19.

161. *Id.* app. C, amend. 602 (noting that section 5K2.19 "does not restrict departures based on extraordinary post-offense rehabilitative efforts prior to sentencing"). This possible source of departure is itself neither fertile nor broad enough to cover the kinds of changes in sentencing practice this Note seeks.

162. See U.S. Sentencing Guidelines Manual § 5K2.13 (1995) (amended 1998); *supra* note 4 (displaying full text).

163. *United States v. Cantu*, 12 F.3d 1506, 1509 (9th Cir. 1993).

164. *United States v. Atkins*, 116 F.3d 1566, 1568 (D.C. Cir. 1997).

165. *Cantu*, 12 F.3d at 1513-14 ("'[C]rime of violence' does not include the offense of unlawful possession of a firearm by a felon." (quoting U.S. Sentencing Guidelines Manual § 4B1.2, cmt. n.1 (formerly cmt. n.2) (2001))); see *supra* note 42 (describing "crime of violence" under section 4B1.2).

166. *Atkins*, 116 F.3d at 1569 n.4.

might have been different. That is, the Commission conceivably could have classified possession of firearms by felons as a crime of violence that applies to career offenders under section 4B1.2. In the minority court, if the government had challenged the nonviolence of the crime on appeal, the circuit court might have focused exclusively on the violent features of the defendant's crime, neglecting, as the Fourth Circuit did in *United States v. Bowe*,<sup>167</sup> considerations of the risk the defendant posed to the public and the effect psychiatric treatment might have on that risk.

Instead, the two courts developed criteria to determine when, under the old version of section 5K2.13, a mentally impaired defendant's criminal history indicated a need to protect the public. The courts focused on the relationship between a mentally impaired defendant's dangerousness and his or her possible medical treatment:

The court's decision must be precise and fact-specific, and must take into account any treatment the defendant is receiving or will receive while under sentence, the likelihood that such treatment will prevent the defendant from committing further crimes, the defendant's likely circumstances upon release from custody or its alternatives, the defendant's overall record, and the nature and circumstances of the offense that brings the defendant before the sentencing court.<sup>168</sup>

As this Note has attempted to demonstrate, this line of inquiry prescribed by the courts may well be more relevant in protecting society than the characterization of a defendant's crime as violent. Thus, by thinking outside the "violence" box, courts can promote protection of the public while displaying compassion toward the mentally ill.

### C. *An Urgency Given the Federal Criminal Justice System's Current Approach to Mental Health*

Encouraging the district courts to focus more broadly on public safety at the time of sentencing is also important given the way Congress and the Commission deal with mental illness at present.<sup>169</sup> Section 5K2.13 does acknowledge at sentencing that a mentally impaired defendant is less culpable than the average defendant on account of his or her

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167. 257 F.3d 336 (4th Cir. 2001). For a discussion of *Bowe*, see *supra* Part II.B.

168. *Cantu*, 12 F.3d at 1516; see also *Atkins*, 116 F.3d at 1570 (presenting its version of *Cantu* test).

169. See generally Perlin & Gould, *supra* note 36 (discussing problems in the treatment of mental disability under the Guidelines). In particular, they discuss the relationship between the Guidelines and a prejudice they term "sanism" that affects the legal system, making it "easy to understand how evidence of mental illness—ostensibly introduced for mitigating purposes—can instead be construed by judges as an aggravating factor." *Id.* at 442–44. But see *United States v. Doering*, 909 F.2d 392, 395 (9th Cir. 1990) (holding that "the need for psychiatric treatment is not a circumstance which justifies [upward] departure").

psychological or physiological disease.<sup>170</sup> An emphasis on the violence of an offense rather than on a defendant's potential for rehabilitative treatment, however, less adequately projects this notion to the administration of the sentence. If, for example, while serving time, the defendant's mental disease becomes treatable, then the purported basis for not departing downward under section 5K2.13—incapacitation to protect the public<sup>171</sup>—is no longer justifiable. The violence of the offense for which the defendant was sentenced in such a case becomes irrelevant since it should no longer serve as the most accurate predictor of the defendant's danger to society. Alternatively, a focus on the defendant's risk to the public, in light of his or her potential for treatment, at least offers a more flexible standard by which the court can make its initial sentencing judgment.

Such flexibility at sentencing is especially important because, as things stand now, the federal criminal justice system does not allow for modification of a sentence based on medical advances or treatments that render mentally ill prisoners no longer dangerous to society.<sup>172</sup> In general, the Act provides extremely limited opportunities for changing terms of imprisonment based on postsentencing events.<sup>173</sup> The Act abolished the parole system,<sup>174</sup> under which a prison term could be shortened when the Parole Commission decided "an offender was sufficiently rehabilitated to be released."<sup>175</sup> Moreover, section 5K2.19 of the Guidelines, adopted subsequently to section 5K2.13, explicitly provides that "[p]ost-

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170. See, e.g., *Cantu*, 12 F.3d at 1513, 1516 (holding that "[r]educd mental capacity" under section 5K2.13 "comprehends both organic dysfunction and behavioral disturbances that impair the formation of reasoned judgments" and that, as a rationale for sentencing the mentally impaired to incarceration, "[d]esert (blameworthiness) loses some bite because those with reduced ability to reason, or to control their impulses, are less deserving of punishment than those who act out of viciousness or greed"); see also *United States v. McBroom*, 124 F.3d 533, 546, 549 n.16 (3d Cir. 1997) ("While the term 'mental capacity' as used in section 5K2.13 is a legal, not a medical term, we believe that evaluation of a defendant's mental capacity must necessarily be informed by an appreciation and understanding of the defendant's medical condition.").

171. See *supra* notes 60–64 and accompanying text (discussing incapacitation).

172. This is so despite Congress's charge to the Commission to ensure that "sentencing policies and practices for the Federal criminal justice system . . . reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C) (1994).

173. See *infra* notes 177–179 and accompanying text (describing 18 U.S.C. §§ 3582(c), 3621(e)(2)(B), 3624(b)(1) (2000)); see also Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 *St. Louis U. L.J.* 299, 318 n.89 (2000) ("A few vestiges of the former power of correctional officials remain. The 'truth in sentencing' component of the Sentencing Reform Act mandated that federal prisoners serve virtually all of their stated sentences.").

174. U.S. Sentencing Guidelines Manual ch. 1, pt. A(2) (2001) ("The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments."); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 *Hofstra L. Rev.* 1, 4 (1988) ("Congress responded by abolishing parole.").

175. *United States v. Blake*, 89 F. Supp. 2d 328, 345 (E.D.N.Y. 2000).



sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense.”<sup>176</sup> Opportunities for sentence modification by courts are available only when “extraordinary and compelling reasons warrant such a reduction”; the defendant is at least seventy years old, has spent at least thirty years in prison, and is no longer a danger to the community; there is other express statutory permission; or the Commission has lowered the sentencing range under which the defendant was sentenced.<sup>177</sup> In addition, Congress has authorized the Bureau of Prisons to reduce sentences for “good time” served<sup>178</sup> and for the successful completion of substance abuse treatment programs.<sup>179</sup>

The weight of the restrictions on the reevaluation of imprisonment terms falls especially harshly on the mentally ill. For example, section 5K2.19’s prohibition against the consideration of postsentencing rehabilitation when resentencing a defendant may be applied to the mentally ill. But equating the rehabilitation of a typical inmate with the advancements made by a mentally ill inmate undergoing medical treatment would be unwarranted. While rehabilitation does not absolve the typical inmate of his or her crime, medical treatment may cure the mentally ill inmate of the condition that rendered him or her dangerous to society. Thus, unlike ordinary rehabilitation, medical treatment of mentally impaired prisoners may wholly negate the basis for their incarceration—incapacitation.<sup>180</sup> Furthermore, it is arguably unfair that an inmate who has completed the Bureau of Prisons’ substance abuse treatment program may have his or her sentence reduced by a maximum of one year,<sup>181</sup> whereas a mentally impaired inmate receives no similar reduction in sentence for commencing a behavior-improving drug regimen.<sup>182</sup> Inequities

176. U.S. Sentencing Guidelines Manual § 5K2.19. The Guidelines based this determination on the grounds of inequity to those who have no opportunity to be resentenced *de novo*, and of inconsistency with Congress’s policies under the Act, including 18 U.S.C. § 3624(b). *Id.* app. C, amend. 602; see also *infra* note 178 and accompanying text (describing briefly 18 U.S.C. § 3624(b)).

177. 18 U.S.C. § 3582(c); see also U.S. Sentencing Guidelines Manual § 1B1.10 (describing imprisonment term reductions as a result of amended Guideline range).

178. See 18 U.S.C. § 3624(b)(1) (providing possibility of credit toward service of sentence if “the prisoner has displayed exemplary compliance with institutional disciplinary regulations”). Interestingly, this provision has been amended to include application to those convicted of a crime of violence. Compare 18 U.S.C. § 3624(b)(1) (2000) (applying to “a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner’s life”), with 18 U.S.C. § 3624(b)(1) (1994) (amended 1996) (applying to a “prisoner (other than a prisoner serving a sentence for a crime of violence) who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of the prisoner’s life”).

179. 18 U.S.C. § 3621(e)(2)(B) (2000).

180. See *supra* notes 60–64 and accompanying text (discussing incapacitation).

181. 18 U.S.C. § 3621(e)(2)(B).

182. Although a reduced period of imprisonment based on the successful completion of a substance abuse treatment plan is only available to a prisoner convicted of “a

such as these make it critical that district courts have more power to consider all the facts and circumstances of a defendant's offense at the time of sentencing.

#### CONCLUSION

The Sentencing Reform Act established a mechanical federal sentencing system. While providing for some consideration of individual circumstances, the Guidelines ensure that downward departures in sentencing are available only under narrow and limited conditions. Special attention must be paid to the way the Guidelines affect the mentally ill since the justifications for their imprisonment differ from the justifications for imprisoning the typical defendant.

The Guidelines provide no compelling rationale for making nonviolence the conclusive factor in determining which defendants may benefit from a section 5K2.13 downward departure. Exclusive reliance on the violence of a defendant's actions or threats to predict his or her future danger to society is ill-conceived. Given that the courts are already entrusted to provide a downward departure for those with "significantly reduced mental capacity," they should also have the power to determine which defendants pose a risk to society and which do not. Therefore, the courts should take advantage of section 5K2.13's elastic formulation to make departure potentially available to any defendant who does not constitute a danger to society. The Commission should codify that approach: It should once again amend section 5K2.13, by striking the inquiry into violence.

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nonviolent offense," *id.*, this Note has sought to demonstrate that the federal criminal justice system should not necessarily attribute the same significance to the violence of an offense committed by a mentally impaired offender as it does to the violence of an offense committed by the average offender.