1995

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

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

John A. Henderson

Carolyn Kay Poff believed her deceased father, who sexually abused her for years,[1] directed her from beyond the grave to write threatening letters to public figures.[2] In 1989, Ms. Poff was convicted for writing threatening letters to President Ronald Reagan[3] and sentenced to fifty-one months imprisonment.[4] The trial court concluded Ms. Poff's crime was violent,[5] rendering her ineligible for a downward sentencing departure under the diminished capacity provision of the United States Sentencing Guidelines ("Guidelines"),[6] and imposed the minimum sen-

1. United States v. Poff, 723 F. Supp. 79, 83 (N.D. Ind. 1989), *aff'd*, 926 F.2d 588 (7th Cir.) (en banc), *cert. denied*, 502 U.S. 827 (1991). Ms. Poff had psychological problems for years, resulting in several stays in psychiatric institutions. United States v. Poff, 926 F.2d 588, 590 (7th Cir.) (en banc), *cert. denied*, 502 U.S. 827 (1991).

2. *Poff*, 723 F. Supp. at 83. Poff had been convicted of making two bomb threats, first in 1970 and again in 1973, and threatening a county prosecutor in 1978. *Id.* at 81. Her federal probation was revoked in 1979 for writing several threatening letters to President Jimmy Carter. *Id.* These prior convictions rendered her eligible for an upward departure under the career offender provision. United States Sentencing Commission, Guidelines Manual § 4B1.1 (1994) [hereinafter U.S.S.G.]; *see infra* notes 47-57 (discussing the Guidelines' definition of a career offender); *see also infra* notes 74, 81-83 (describing the use of Poff's career offender status by both the majority and dissent in *Poff*).

3. Ms. Poff was convicted of six counts of threatening the life of the President under 18 U.S.C. § 871 (1988). *Poff*, 723 F. Supp. at 82-83.

4. *Id.* at 85.

5. The trial court stated, "The offense of threatening the life of the President is a crime of violence within the meaning of the [career offender provision of the Sentencing Guidelines]." *Id.* at 84. The court reasoned that this rendered the crime violent under the diminished capacity provision, which allows courts to reduce an offender's sentence in certain cases. *Id.*

6. U.S.S.G., *supra* note 2, § 5K2.13; *see infra* notes 58-105 (explaining the requirements and interpretation of the diminished capacity provision). The Guidelines, effective 1987, have provoked substantial debate in both judicial

tence allowed under the presumptive range.[7] The Seventh Circuit Court of Appeals affirmed the trial court.[8] Although all interested parties agreed that Ms. Poff never intended to carry out her threats,[9] the court of appeals defined violence based solely on the elements of the substantive offense, disregarding the actual behavior of the defendant.[10]

The Guidelines' diminished capacity provision permits a downward departure from the sentencing range only if the offender[11] committed a "non-violent offense."[12] The majority of courts hold that "non-violent offense" means the opposite of the term "crime of violence" in the Guidelines' career offender provi-

---

and academic circles. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687-1726 (1992) (criticizing the Guidelines as unworkable because of inappropriate policy decisions); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 185-90 (1991) (arguing Guidelines usurp Article III powers of judges); Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 773-82 (1992) (claiming Guidelines cause more disparity and place discretion in prosecutors' hands); Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 370-73 (1989) (arguing the Commission failed to adopt a consistent penal theory that renders them unworkable); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 465-73 (1992) (claiming the Commission failed to adequately consider the purposes of punishment).

Courts have debated the meaning of a number of provisions in the Guidelines. One strongly disputed issue is the standard of review for departures under the residual departure clause, which permits departure for circumstances not adequately considered by the Commission. U.S.S.G., *supra* note 2, § 5K2.0; *see infra* note 46 (discussing the residual exception). *Compare* United States v. Correa-Vargas, 860 F.2d 35, 37 (2d Cir. 1988) (stating the sentencing court had "wide discretion in determining which circumstances to take into account in departing from the guidelines") *with* United States v. Diaz-Villafane, 874 F.2d 43, 49 (1st Cir.) (scrutinizing the *reasonableness* of the departure on appeal), *cert. denied*, 493 U.S. 862 (1989).

7. *Poff*, 727 F. Supp. at 85.

8. United States v. Poff, 926 F.2d 588, 593 (7th Cir.) (en banc), *cert. denied*, 502 U.S. 827 (1991).

9. In the Seventh Circuit's decision both the majority and the dissent state that no one believed Ms. Poff posed a real danger of carrying out her threats. *Id.* at 590, 593 (Easterbrook, J., dissenting).

10. *Id.* at 592. In Ms. Poff's case, the court examined whether threatening the life of the President included, "as an *element*[,] the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G., *supra* note 2, § 4B2.2 (emphasis added); *see infra* notes 52-57 and accompanying text (defining "crime of violence").

11. This Note uses the term offender, rather than defendant, because at the sentencing stage the criminal justice system has already made a guilt determination.

12. U.S.S.G., *supra* note 2, § 5K2.13.

sion.[13] The definition of "crime of violence" focuses on whether an element of the statutory offense includes violence or the threat of violence.[14] By contrast, two circuit courts interpret "non-violent offense" to mean the actual risk of violence posed by the offense and the actual danger of the offender.[15]

The limited definition of "non-violent offense" that the majority of courts use prevents departure for an offender who merits less punishment, raising substantive due process and equitable concerns.[16] Some offenders, like Ms. Poff, are unlikely to *use* violence. Yet, the majority of courts do not reduce the sentences of these individuals.

These due process and equitable concerns take on increased significance with trial courts' growing use of the diminished capacity departure. In 1989, courts made 699 downward departures; eight of these departures were under the diminished capacity provision.[17] In 1992, courts made 7653 downward departures; of these, 122 came under the diminished capacity provision.[18] Leaving aside departures that occur through plea bargaining, diminished capacity accounted for almost eight percent of downward departures in 1992.[19]

---

13. *See id.* § 4B1.2; *infra* notes 71-105 and accompanying text (exploring the courts' attempts to define "non-violent offense").

14. The Guidelines' text supports this interpretation. The first clause of the definition refers to violence or threats of violence "as an element," U.S.S.G., *supra* note 2, § 4B1.2, clearly invoking the statutory offense.

15. 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); *see infra* notes 91-105 and accompanying text (describing the facts and reasoning of these cases).

16. The purposes of punishment—retribution, incapacitation, deterrence, and rehabilitation—support leniency in sentencing offenders suffering from a diminished mental capacity, who pose a minimal risk of actual violence. *See infra* notes 164-176 and accompanying text (analyzing how the purposes of punishment should impact the definition of violence in the diminished capacity provision).

17. UNITED STATES SENTENCING COMMISSION, 1989 ANNUAL REPORT 50 (1990). In 1989, the Commission provided departure statistics on 5128 cases. *Id.* at 47. Diminished capacity accounted for eight of 699 (or 1.1%) of all downward departures. *Id.*

18. In 1992 diminished capacity accounted for 122 of 7653 (1.6%) downward departures. UNITED STATES SENTENCING COMMISSION, 1992 ANNUAL REPORT 125 (1993) [hereinafter 1992 ANNUAL REPORT].

19. Leaving aside substantial assistance departures, U.S.S.G., *supra* note 2, § 5K1.1, which function as plea bargaining tools, and departures pursuant to plea agreements, diminished capacity departures accounted for 122 of 1566 departures, or nearly eight percent. 1992 ANNUAL REPORT, *supra* note 18, at 125. Only adequacy of criminal history, U.S.S.G., *supra* note 2, § 4A1.3, family ties, *id.* § 5H1.6, and the residual exception, *id.* § 5K2.0, accounted for more departures. 1992 ANNUAL REPORT, *supra* note 18, at 73.

This Note addresses whether, under the diminished capacity provision, the "violence" of an offense should depend on the elements of the substantive offense, as in the career offender provision. This Note argues that using the career offender provision to define "non-violent offense" in the diminished capacity provision ignores the conflicting purposes of these provisions and inappropriately limits the sentencing court's discretion to tailor sentences to individual offenders. Part I enumerates the purposes of the Guidelines and, specifically, of the diminished capacity and career offender provisions. Part I also describes the circuit courts' attempts to define "non-violent offense." Part II analyzes the text, legislative history, and purposes of the diminished capacity and career offender provisions. Part III analyzes both the existing Guidelines and the policies of punishment and concludes that they support making a fact-specific inquiry to determine an offender's "violence." This Note urges either the Supreme Court to interpret or the Commission to amend the diminished capacity provision so that the offender's actual likelihood of violence determines the definition of a non-violent offense. Finally, this Note proposes a two-step analysis for determining whether an offense was violent. Courts should ask, first, whether the offender intended to use or threaten the use of force and, second, whether the offender's actions constituted a substantial step towards the use of force.[20]

I. POLICIES UNDERLYING THE FEDERAL SENTENCING GUIDELINES

The goals of the penal system and the role of punishment in the United States have evolved over the past two centuries.[21]

20. Ms. Poff's conduct fulfills the first step of this analysis: she intended to threaten the use of force against President Reagan. Ms. Poff's conduct does not fulfill the second step, however, because she failed to take a substantial step towards the use of force. *See infra* notes 193-194 and accompanying text (applying this proposed analysis to *Poff*).

21. Before 1870, "the primary purposes of incarceration in the United States were retribution and punishment." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893 (1990) (citing United States v. Grayson, 438 U.S. 41, 46 (1978)). "For [utilitarian writers], the ethical merit of a punishment depended on how well it worked to produce a balance of pleasure over pain . . . ." JAMES HEATH, EIGHTEENTH CENTURY PENAL THEORY 57 (1963). Fredrick Wines argued, however, that the policies of "retribution and repression" were discredited by the beginning of the 18th century. FREDRICK H. WINES, PUNISHMENT AND REFORMATION 122-23 (1919). In any case, "[i]n 1870 . . . the rehabilitative theory of prisons and punishment was brought to the forefront of the nation's attention by the National Congress of Prisons." Nagel, *supra*, at 893; *see also*

Before the Guidelines were in effect, the federal courts used indeterminate sentencing,[22] and judges possessed virtually unlimited discretion in sentencing offenders.[23] Scholars' criticism of the indeterminate sentencing system increased in the 1970s.[24] Disparate sentences for offenders with similar criminal histories

---

WINES, *supra*, at 199-207 (discussing the reformation efforts leading up to the National Congress, and Wines's efforts to construct a prison in New York State to accommodate rehabilitory goals); Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 393 (1991) (restating Nagel, *supra*). This rehabilitative theory remained a central sentencing consideration until the Sentencing Reform Act of 1984. Congress intended the Guidelines to incorporate deterrence, incapacitation, retribution, *and* rehabilitation. *See infra* notes 28-30 and accompanying text (discussing Congressional intent).

22. 18 U.S.C. § 4205, *repealed by* Pub. L. No. 98-473, Ch. 58, §§ 218(a)(5), 235(b)(1), 98 Stat. 1837, 2032 (1984). Wines, in *Punishment and Reform*, traced the history of indeterminate sentencing in the early 19th century. WINES, *supra* note 21, at 23-227. Wines argued that determinate sentencing either punishes too much or too little. *Id.* at 221. He asserted determinate sentences can account only for the offender at the time of sentencing and, therefore, cannot determine when the offender may safely reenter society. *Id.*

23. Freed, *supra* note 6, at 1687 ("[J]udges received wide ranges within which to sentence, but no anchoring point from which to begin."); Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 1 (1991) (citing United States v. Tucker, 404 U.S. 443, 447 (1972)).

The breadth of judges' discretion virtually eliminated the appeal process from criminal sentencing. In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court affirmed the trial court's imposition of the death penalty over the jury's unanimous recommendation of life imprisonment. *Id.* at 252. The Court held the sentencing court's use of evidence "obtained outside the courtroom from persons whom a defendant has not been permitted to confront or cross examine," *id.* at 245, did not violate due process. *Id.* at 252. In addition to such broad discretion, in the pre-Guidelines era the sentencing court had no obligation to enumerate reasons for a particular disposition. Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 602 (1992); William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 571 (1992).

Despite this broad discretion, the possibility of parole removed much of a judge's control over the period of incarceration and the offender seldom served the entire imposed sentence. Karle & Sager, *supra* note 21, at 414. After an offender served one-third of the imposed sentence, the parole board took control of the determination of the actual period of incarceration, or "real time." 18 U.S.C. § 4163, *repealed by* Pub. L. No. 98-473, ch. 58, § 218(a)(4)-(5), 98 Stat. 1837, 2027 (1984).

24. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES 88 (1973) (claiming indeterminate sentencing causes more "cruelty and injustice" than good); Leonard Cargan & Mary A. Coates, *The Indeterminate Sentence and Judicial Bias*, 20 CRIME & DELINQ. 144, 147-56 (1974) (reporting the results of a study and concluding indeterminate sentencing failed to eliminate bias in sentencing); Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 303-04 (1974) (arguing indeterminate sentencing involves a lack of proportionality).

who committed similar crimes drew the strongest criticism.[25] Congress responded to this criticism[26] by creating the United States Sentencing Commission (the Commission).[27]

In its charge to the Commission, Congress rejected basing sentencing on retribution alone.[28] It mandated that the Commission ground any sentencing reform in retribution, deterrence, incapacitation, and rehabilitation[29] and required the

25. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, § 217(a), 98 Stat. 1837, 2018 (1984) (codified at 28 U.S.C. § 991(b)) ("The purposes of the United States Sentencing Commission are to . . . provide 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 . . . .") (emphasis added); S. REP. No. 225, 98th Cong., 2d Sess. 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 ("Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."); Nagel, *supra* note 21, at 895-99 (examining various scholarly and empirical criticisms of indeterminate sentencing).

Indications that status characteristics, such as race, gender, religion, and education, influenced the offender's sentence particularly troubled many commentators. *See id.* at 895; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988) (discussing the evidence of disparity before Congress while deliberating the Sentencing Reform Act of 1984). Congress's other major concern was creating "certainty" in sentencing, rather than allowing a parole board to cut short the sentences of some offenders. 28 U.S.C. § 991(b)(1)(B)); S. REP. No. 225, *supra* note 25, at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221.

26. S. REP. No. 225, *supra* note 25, at 38, *reprinted in* 1984 U.S.S.C.A.N. at 3221.

27. 28 U.S.C. § 993(a).

28. The Senate Judiciary Committee Report on the Sentencing Reform Act of 1984 stated:

> It has been suggested that one aspect of this purpose of sentencing, "just deserts," should be the sole purpose of sentencing. . . . While the Committee obviously believes that a sentence should be "just[ ]"; and that the punitive purpose is important, it also believes that it is consistent with that purpose to examine the other purposes of sentencing set forth in section 3553(a)(2) [of Title 18] in determining the type and length of sentence to be imposed in a particular case.

S. REP. No. 225, *supra* note 25, at 75 n.162, *reprinted in* 1984 U.S.C.C.A.N. at 3258 n.162.

29. "The purposes of the United States Sentencing Commission are to . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code . . . ." 28 U.S.C. § 991(b). Section 3553 states that a court, in sentencing, shall consider:

> [T]he need for the sentence imposed
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

Commission to create guidelines implementing these policies.[30] The Commission responded to this mandate by creating a sentencing scheme centered around a 258-box grid called the "Sentencing Table."[31] Each box contains a presumptive sentencing range the Commission considered "a 'heartland,' a set of typical cases embodying the conduct that each guideline describes."[32]

A. Balancing Between Charge and Real Offense Sentencing: An Attempt to Straddle Unworkable Extremes

In creating the Guidelines, the Commission attempted to reflect the strengths of both the charge offense- and real offense-based systems.[33] A charge offense system imposes punishment

---

18 U.S.C. § 3553(a)(2) (1988). These four sub-sections correspond, respectively, to retribution, deterrence, incapacitation, and rehabilitation. *See* S. Rep. No. 225, *supra* note 25, at 75-76, *reprinted in* 1984 U.S.C.C.A.N. at 3258-59 (discussing the need for sentencing to reflect retribution, deterrence, incapacitation, *and* rehabilitation).

30. 28 U.S.C. § 991(b).

31. U.S.S.G., *supra* note 2, § 5A. The grid contains 43 "Offense Levels" and six "Criminal History Categories." *Id.* Each substantive crime under federal law has a "base offense level," demarking the relative severity of the offense. *See id.* § 2, 1A4(h). Chapter two of the Guidelines provides a base offense level for each statutory crime followed by "specific offense characteristics," which are crime specific factors that may warrant an increase in the offense level. The criminal history category depends on the offender's prior sentences (including their length), *id.* § 4A1.1(a)-(c), whether the current offense was committed "while under any criminal justice sentence," *id.* § 4A1.1(d), the period of time between the current offense and the most recent prior offense, *id.* § 4A1.1(e), and whether the offender's prior crimes were "crimes of violence." *Id.* § 4A1.1(f). For each combination of offense level and criminal history category the Commission determined a sentencing range. *Id.* § 5A. For a clear example of a calculation of the presumptive range for a hypothetical bank robber, see John F. Jackson, *Departure from the Guidelines: The Frolic and Detour of the Circuits - How the Circuit Courts are Undermining the Purposes of the Federal Sentencing Guidelines*, 94 Dick. L. Rev. 605, 607-09 (1990).

For a discussion of the policies the sentencing grid implicates, see Miller, *supra* note 23, at 590-604. Miller argues that the complexity of the grid obscures the policies responsible for particular choices. *Id.* at 604. Miller concludes that the Guidelines' complexity engenders disrespect and distrust. *Id.* at 605.

32. U.S.S.G., *supra* note 2, § 1A4(b). If a court sentences an offender within this sentencing range, an appellate court should only "review the sentence to determine whether the guidelines were correctly applied." *Id.* § 1A2. In other words, the sentencing judge has virtually unlimited discretion to sentence within the range established by the Commission.

33. The Commission believed one of the most important issues it faced was whether real offense or charge offense sentencing served its mandate. U.S.S.G., *supra* note 2, § 1A4(a). After exploring a pure real offense system and finding it

based on the substantive statutory offense of the conviction.[34] The charge offense paradigm disregards any harms or mitigating circumstances not accounted for in the elements of the statutory offense.[35] By contrast, the real offense system focuses on the behavior of the offender.[36] This paradigm attempts to achieve proportionality to the offender's culpability, measured by the offender's actual conduct.[37] In its pure form, the real offense system considers any behavior that increases or reduces the likelihood of future criminal behavior.[38]

---

unworkable, the Commission moved to a largely charge-based system that incorporated a number of real offense elements. *Id.*

34. At least one commentator criticizes this term as a misnomer because the court will sentence the offender based on the offense of *conviction*, not the offense charged. David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 406 n.8 (1993).

35. Yellen refers to systems that consider some factors other than the offense of conviction, such as the Minnesota Sentencing Guidelines' consideration of the defendant's criminal history, as "modified charge offense" systems. Yellen, *supra* note 34, at 407 n.10. In its pure form, charge offense sentencing would not reflect an offender's criminal history unless it constituted part of the offense, such as possession of a firearm by a convicted felon. While incorporating these factors means the system is not a pure charge offense system, it still follows the basic principle of charge offense systems: the statutory offense controls the sentence, not the actual conduct of the offender. *See* Breyer, *supra* note 25, at 9 ("Such a system would tie punishments directly to the offense for which the defendant was convicted.") (footnotes omitted); Selya & Kipp, *supra* note 23, at 10 ("Reminiscent of a 'charge offense' system, a key determinant of the defendant's ultimate sentence . . . is tied to the charged offense.").

36. Breyer, *supra* note 25, at 10.

37. No real agreement exists on an exact definition of real offense. Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 526 n.15 (1993). Broadly defined, a real offense characteristic is any factor not included in the definition of the offense. Yellen, *supra* note 34, at 408; *see also* Selya & Kipp, *supra* note 23, at 9 (stating that a real offense system "would calibrate a defendant's sentence on the basis of all identifiable conduct . . . [and] insures greater proportionality in sentencing").

38. Part of Reitz's "working definition" of real offense sentencing includes "[a]ll behaviors of the offender, including all harms ever caused by the offender." Reitz, *supra* note 37, at 527. Although Reitz acknowledges that this definition is expansive, it does describe the *paradigm* real offense system. *Id.*

This paradigm clearly influenced the definition of "relevant conduct" in the Guidelines. Section 1B1.3 defines relevant conduct as "all acts . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. U.S.S.G., *supra* note 2, § 1B1.3(a)(1). While this definition does not encompass all conduct by the defendant, it considers factors well beyond the charged offense.

Neither paradigm works as the sole basis of sentencing.[39] A pure charge offense-based system fails to consider whether an offender's conduct presented a harm or deserves leniency for a reason the statute has not contemplated.[40] On the other hand, scholars criticize real offense systems for considering "inappropriate" factors, such as alleged offenses for which the defendant was never charged or for which the defendant was acquitted.[41] A pure real offense-based system also must account for so many factors that it becomes impossible to apply efficiently.[42] Therefore, the factors the Commission deemed relevant in sentencing (and the weight assigned to these factors) reflect a compromise between a charge offense system and a real offense system. Many scholars and judges nevertheless criticize the balance the Commission struck as improper and unworkable.[43]

B. Departure Under the Guidelines: Incorporating Real Offense Policies in Sentencing

Because of the Commission's consideration of real offense concerns, the Guidelines permit upward or downward depar-

---

39. Breyer, *supra* note 25, at 8-12. Breyer asserts that "[t]he first inevitable compromise which faced the Commission concerned the competing rationales behind a 'real offense' sentencing system and a 'charge offense' system. It is a compromise forced in part by a conflict inherent in the criminal justice system itself: the conflict between procedural and substantive justice." *Id.* at 8-9 (footnote omitted); *see also* Selya & Kipp, *supra* note 23, at 9-11 (discussing the Commission's effort to combine charge offense and real offense paradigms and policies served).

40. A particular statutory offense cannot account for all harms that an offender may inflict in the course of the particular offense. Although the bank robber who simply holds up a pistol has committed the same offense in a charge offense system as one who repeatedly points it at customers and cocks the hammer, we consider the second offender more culpable. *See* Breyer, *supra* note 25, at 9.

41. Selya & Kipp, *supra* note 23, at 9. In pure form, the real offense system considers the offender's entire life and circumstances. Yellen, *supra* note 34, at 408.

42. *See, e.g.*, Reitz, *supra* note 37, at 542-47 (arguing the United States Supreme Court too readily accepts real offense sentencing); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. Crim. L. & Criminology 1550, 1566-67 (1981) (arguing that the Model Sentencing Act violates the "most rudimentary due process" requirements by considering uncharged conduct related to the offense).

43. *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 908-15 (1991) (arguing that the Guidelines focus too heavily on harms rather than people); Freed, *supra* note 6, at 1708 (arguing that the policies the Commission followed lead to an inappropriate loss of discretion in sentencing). *But see* Selya & Kipp, *supra* note 23, at 10 ("This hybrid approach is both workable and equitable.").

tures from the presumptive range when circumstances warrant.[44] The departure provisions allow the sentencing court to tailor the sentence to fit an individual offender.[45] The Guidelines enumerate specific circumstances warranting departure, and include a residual or "catch all" exception.[46]

---

44. *See* U.S.S.G., *supra* note 2, §§ 5H, 5K. Section 5H enumerates specific characteristics of the offender relevant in sentencing. *Id.* § 5H. Section 5K provides specific circumstances surrounding the offense that warrant departure. *Id.* § 5K. The Commission, however, excluded many offender characteristics as not normally relevant or irrelevant in sentencing. The Commission determined characteristics such as the age, education, and mental and emotional condition of the offender are not ordinarily relevant in sentencing. *Id.* § 5H1. The Guidelines explicitly state that status characteristics such as race, gender, and religion are irrelevant in sentencing. *Id.* § 5H1.10. Because the Commission incorporated those factors relied on most often for pre-Guideline sentencing in determining the Guidelines' presumptive range, it believed that courts would not depart often. *Id.* § 1A4(b). The Commission used empirical studies of existing sentencing practices to formulate ranges and specific offense characteristics, but deviated in several instances for specific policy reasons. *See, e.g.*, *id.* § 1A3. The percentage of cases in which the court departed from the presumptive range, however, has increased each year, with the courts departing in 22.6% of the cases in 1992. 1992 ANNUAL REPORT, *supra* note 18, at 121.

45. The Commission provided a number of specific situations that may warrant upward or downward departure. The grounds for upward departure include conduct such as the use of a weapon or dangerous instrumentality not included in the statutory offense, U.S.S.G., *supra* note 2, § 5K2.6 (increasing sentence proportionally to dangerousness of weapon, manner used, and extent endangered others), or unusually heinous conduct by the offender. *Id.* § 5K2.8 (including torture of victim and gratuitous infliction of injury). The Commission provided downward departures for circumstances including the offender's substantial assistance to the authorities. *Id.* § 5K1.1. This provision permits departure only "[u]pon motion of the government." *Id.*

Prosecutorial discretion controls the decision to move for departure under section 5K1.1. Wade v. United States, 112 S. Ct. 1840, 1843-44 (1992) (holding prosecutor's refusal to move for departure reviewable only if based on unconstitutional motivations). For a critique of how the substantial cooperation provision impacts plea bargaining, see Julie Gyurci, Note, *Prosecutorial Discretion To Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253, 1272-83 (1994). The Commission also provided downward departures for circumstances such as significant provocation by the victim, U.S.S.G., *supra* note 2, § 5K2.10 (authorizing a decrease if wrongfully provoked), or the offender's significantly diminished capacity. *Id.* § 5K2.13.

46. U.S.S.G., *supra* note 2, § 5K2.0. The residual departure authorizes departure when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." *Id.* Determining the bounds of a court's discretion under this general exception has precipitated much litigation and scholarly debate. *See, e.g.*, Judy Clarke & Gerald McFadden, *Departures from the Guideline Range: Have We Missed the Boat, or Has the Ship Sunk?*, 29 AM. CRIM. L. REV. 919, 921-26 (1992) (arguing that courts have interpreted the departure provisions too narrowly); Selya & Kipp, *supra* note 23, at 18-27 (identifying several trends in de-

1. The Career Offender Provision: An Upward Departure

The Guidelines permit a significant sentencing increase if the offender is a "career offender," as defined under section 4B1.1.[47] The Guidelines increase an offender's sentence

> if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a *crime of violence* or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[48]

The Commission framed this section to comply with 28 U.S.C. § 994(h), which mandated that certain career offenders receive "a sentence to a term of imprisonment at or near the maximum term authorized."[49] Congress targeted these offenders because they demonstrate repeated refusals to conform to societal norms and, statistically, will continue to commit offenses.[50] Although some believe that incarcerating these individuals for long periods of time may not effectively address the problem of career criminals,[51] Congress unequivocally mandated that these offenders receive harsh treatment.

---

parture under § 5K2.0); Owen S. Walker, *Litigation-Enmeshed Sentencing: How the Guidelines Have Changed the Practice of Federal Criminal Law*, 25 U.C. DAVIS L. REV. 639, 646 (1992) (arguing that departure provisions have led to more complicated litigation over sentencing).

47. U.S.S.G., *supra* note 2, § 4B1.1.

48. *Id.* (emphasis added).

49. 28 U.S.C. § 994(h) (listing criteria for offenders Congress determined merited longer sentences).

50. A seminal study tracked the delinquency of all males born in 1945 in Philadelphia. MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT 5 (1972). Of all offenses committed by this group, 84.2% were committed by recidivists, who constituted 53.6% of all delinquents. *Id.* at 88. More significantly, 18% of the delinquent population in the cohort committed five or more offenses and accounted for *51.9%* of the delinquent acts of the cohort. *Id.*; *see also* KRISTEN M. WILLIAMS, THE SCOPE AND PREDICTION OF RECIDIVISM II, at 10 (1978) (finding that seven percent of offenders having at least four arrests in a four year period accounted for 24% of all arrests in a 56-month period in Washington, D.C.); David F. Greenberg, *The Incapacitative Effect of Imprisonment: Some Estimates*, 9 LAW & SOC'Y REV. 541, 550 (1975) (stating that of all males paroled in 1969, 27% were incarcerated again in two years); Shlomo Shinnar & Reuel Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 LAW & SOC'Y REV. 581, 594 (1975) (finding 37.3% of individuals arrested in New York had three or more previous charges).

51. *See, e.g.*, DANIEL GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 36-37 (1964); Gray Cavender & Michael C. Musheno, *The Adoption and Implementation of Determinate-Based Sanctioning Policies: A Critical Perspective*, 17 GA. L. REV. 425, 446-58 (1983) (arguing determinate sentencing functions more as a symbolic action than an effective reform); Daniel Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99, 106-08 (1972); George C. Thomas III & David Edelman, *An Evaluation of Conservative Crime*

Courts interpret the career offender provision consistently. The Guidelines explicitly define "crime of violence," under the career offender provision, as any offense punishable by imprisonment for greater than one year that

> (i) has as an *element*, the use, attempted use, or threatened use of physical force against the person of another, or
> (ii) ... involves conduct that presents a serious potential risk of physical injury to another.[52]

Thus, the Commission used a charge offense definition, based on the *elements* of the crime the offender committed, to address the real offense concern with the offender's recidivism.[53] By focusing on the statutory or abstract risk of violence, the Commission's definition arguably encompasses the largest group of offenders.

If the offender's conduct included violent actions, the statutory offense most likely incorporates it as an element. By focusing on the statutory offense, both violent offenders and offenders who risked violence fall within the provision's definition. If an offender's conduct posed a risk of violence, regardless of whether it materialized, the career offender provision will apply. In addition, the Application Notes to the career offender provision outline examples of offenses constituting crimes of violence, including murder, forcible sex offenses, robbery, and extortion.[54]

Control Theology, 63 NOTRE DAME L. REV. 123 (1988) (studying violent crime in Tennessee and concluding legislative attempts to increase punishment to reduce the crime rate are ineffectual).

52. U.S.S.G., *supra* note 2, § 4B1.2 (emphasis added). The career offender provision initially defined "crime of violence" by referencing 18 U.S.C. § 16, which differed from the current definition only by including force against the "property of another" within the meaning of "crime of violence." 18 U.S.C. § 16 (1987). This presented the bizarre possibility noted by one commentator that tipping over garbage cans constituted a crime of violence. Albert W. Alschuler, *Departure and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 464 (1988). The Commission deleted the cross reference to Title 18 in 1989, and included an almost identical definition, except it removed offense against property from the definition. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 4B1.2 (1989).

53. For comparison, the definition of "relevant conduct" under the Guidelines includes acts occurring "during the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. U.S.S.G., *supra* note 2, § 1B1.3(a)(1). This provision considers the actions of the offender, apart from actions included in the charged crime.

54. *See, e.g.*, United States v. Gosling, 39 F.3d 1140, 1142-43 (10th Cir. 1994) (escape from jail); United States v. Salemi, 26 F.3d 1084, 1087 (11th Cir.) (kidnapping), *cert. denied*, 115 S. Ct. 612 (1994); United States v. Dailey, 24 F.3d 1323, 1325 (11th Cir. 1994) (interstate travel with intent to carry on the unlawful activity of extortion); United States v. Payton, 28 F.3d 17, 19 (4th Cir.) (involuntary manslaughter), *cert. denied* 115 S. Ct. 452 (1994); United States v.

In addition, courts have determined that numerous offenses constitute crimes of violence.[55]

Furthermore, when the elements of the statutory offense include the use, attempted use, or threatened use of physical force, most courts hold that sentencing courts may not consider the offender's actual conduct.[56] If the elements of the statutory offense do *not* involve force, the Application Notes state that subsection (ii) of the "crime of violence" definition, referring to the offender's conduct, permits conduct specifically included in the *indictment* to qualify the offense as a "crime of violence."[57] The inclusion of this conduct deviates somewhat from the charge offense paradigm, but the definition of "crime of violence" remains firmly rooted in the charge offense scheme.

2. Downward Departure Under the Diminished Capacity Provision

By contrast to the career offender provision, the diminished capacity provision (notwithstanding the undefined "non-violent offense") plainly uses a real offense examination of the offender's mental capacity.[58] Although the Guidelines provide that mental

---

Mitchell, 23 F.3d 1, 3 (1st Cir. 1994) (aiding and abetting arson, conspiracy to commit arson); United States v. DeLuca, 17 F.3d 6, 10 (1st Cir. 1994) (extortion); United States v. Carpenter, 11 F.3d 788, 790-91 (8th Cir. 1993) (conspiracy to commit second-degree burglary, attempted breaking and entering of a dwelling), *cert. denied*, 114 S. Ct. 1570 (1994); United States v. Weinert, 1 F.3d 889, 891 (9th Cir. 1993) (shooting at an inhabited building); United States v. Lonczak 993 F.2d 180, 182 (9th Cir. 1993) (child-stealing); United States v. Bauer, 990 F.2d 373, 375 (8th Cir. 1993) (per curiam) (statutory rape); United States v. DeJesus 984 F.2d 21, 25 (1st Cir. 1993) (larceny from the person); United States v. Gonzalez-Lopez, 911 F.2d 542, 548 (11th Cir. 1990) (robbery), *cert. denied*, 500 U.S. 933 (1991); United States v. Left Hand Bull, 901 F.2d 647, 649 (8th Cir. 1990) (mailing threatening communication).

55. U.S.S.G., *supra* note 2, § 4B1.2 application note 2.

56. *Gonzalez-Lopez*, 911 F.2d at 548 (rejecting the defendant's argument that his prior offenses were not "crimes of violence" without considering whether his robbery and burglary convictions involved actual violent conduct). *Contra* United States v. Baskin, 886 F.2d 383, 389-90 (D.C. Cir. 1989) (holding that the sentencing court retains discretion to determine whether *actual* violence occurred in the offender's conduct, although the statutory crime requires the use, attempted use, or threatened use of force), *cert. denied*, 494 U.S. 1089 (1990).

57. The text of the career offender provision supports this interpretation. U.S.S.G., *supra* note 2, § 4B1.2. The Commission limited the examination of the violence the offender committed by the phrase "expressly charged." *Id.*

58. *See infra* notes 161-166 and accompanying text (asserting that the requirements of the diminished capacity provision contemplate the actual offense and offender).

conditions normally should not affect sentencing,[59] the Commission allowed the offender's impaired mental condition to trigger a downward departure in certain circumstances.[60] The diminished capacity provision provides that:

> 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.[61]

Courts consider a variety of mental disorders sufficient to qualify an offender for reduced mental capacity.[62] Despite the courts' recognition of such mental disorders, the Guidelines disqualify offenders whose diminished capacity results *solely* from voluntary use of intoxicants.[63] A court may depart, however,

---

59. U.S.S.G., *supra* note 2, § 5H1.3. The Commission explicitly stated that mental and emotional conditions ordinarily should not merit sentencing outside the guideline range, except as provided in § 5K2. *Id.*

60. *Id.* § 5K2.13.

61. *Id.* (emphasis added).

62. Diminished capacity encompasses impairments of both intellect and emotional stability. United States v. Cantu, 12 F.3d 1506, 1512 (9th Cir. 1993) ("Treating emotional illnesses in the same way that we do mental abnormalities furthers the purpose of § 5K2.13."). Courts implicitly recognize that distinguishing between "organic syndromes" and "emotional disorders" is artificial and contrary to modern psychological research and understanding. *Id.* In *Cantu*, the court held that post-traumatic stress disorder may constitute a "reduced mental capacity." *Id.* at 1513. In United States v. Ruklick, 919 F.2d 95 (8th Cir. 1990), the court determined a schizoaffective disorder constituted a diminished mental capacity. *Id.* at 97. The offender functioned at a 12-year-old level at the age of 21. *Id.* United States v. McMurray, 833 F. Supp. 1454 (D. Neb. 1993), *aff'd*, 34 F.3d 1405 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1164 (1995), determined that a manic depressive disorder satisfied the diminished capacity provision. *Id.* at 1483. United States v. Speight, 726 F. Supp 861 (D.D.C. 1989), held a schizophreniform disorder constituted diminished capacity. *Id.* at 867. A jury's rejection of a defendant's insanity defense does not constrain the sentencing court's discretion to depart if it concludes that the offender's mental capacity was significantly reduced. United States v. Spedalieri, 910 F.2d 707, 711 (10th Cir. 1990).

63. U.S.S.G., *supra* note 2, § 5K2.13. If the offender's reduced capacity was caused in part by the voluntary use of intoxicants, the sentencing court may depart. *Cantu*, 12 F.3d at 1514; *Speight*, 726 F. Supp at 868 ("Consequently, that defendant's mental illness and drug addiction may both have contributed to the commission of the offense does not bar application of 5K2.13 . . . ."). This reflects both that mental or emotional ailments frequently are multi-causal and that these ailments may cause an individual to use intoxicants. *See Cantu*, 12 F.3d at 1514-15; *Speight*, 726 F. Supp. at 868 (diminished capacity need not be a "but-for" cause of offense).

In Traynor v. Turnage, 485 U.S. 535 (1988), however, the Supreme Court discussed whether alcoholism constituted "willful misconduct" under the Rehabilitation Act of 1973. The Court determined that a veteran's drinking consti-

only to the extent that the offender's diminished capacity contributed to the offense.[64] Finally, the provision applies only to offenses that are "non-violent."[65]

Attempting to define "non-violent offense" under the diminished capacity provision has precipitated an arduous debate on the Seventh Circuit Court of Appeals[66] and a disagreement among the circuits.[67] Surprisingly, the Guidelines do not define or provide examples of a non-violent offense.[68] Early cases resolved this issue by concluding, with little discussion, that "non-violent offense" must be the opposite of "crime of violence" as defined in the career offender provision.[69] Such a conclusion

---

tuted "willful misconduct" under the Act, unless it resulted from a mental illness. *Id.* at 551.

64. U.S.S.G., *supra* note 2, § 5K2.13. This language limits the extent to which a court may depart but expands the circumstances to which the section applies. The text plainly mandates that courts limit the departure based on the strength of its causal connection. To accomplish this, the sentencing court must determine the extent to which the offender's reduced mental capacity influenced the offender's behavior. *Id.* Accordingly, one circuit court held that the sentencing court committed reversible error by failing to determine whether the offender's diminished capacity contributed to the commission of the offense. United States v. Perkins, 963 F.2d 1523, 1528 (D.C. Cir. 1992). The court further that if the trial court finds grounds for departure, it must specifiy the "reasons for the extent of its departure." *Id.*

This limitation expands the class of cases warranting departure because the offender's diminished capacity need not be the sole cause of the offense. By allowing a range of diminution, the Commission implicitly contemplated departure when the offender's diminished capacity "comprised a *contributing* factor in the commission of the offense." United States v. Ruklick, 919 F.2d 95, 98 (8th Cir. 1990).

The Guidelines do not limit the extent to which a sentencing court may depart from the presumptive range. The first draft of the diminished capacity provision limited departure to four offense levels. UNITED STATES SENTENCING COMMISSION, REVISED DRAFT SENTENCING GUIDELINES § Y218 (1987). The effective version of the Guidelines contained no limitation on the number of levels to which a court could depart. UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES AND POLICY STATEMENTS § 5K2.13 (1987).

65. U.S.S.G., *supra* note 2, § 5K2.13.

66. United States v. Poff, 926 F.2d 588 (7th Cir.) (en banc), *cert. denied*, 502 U.S. 827 (1991).

67. *Compare* United States v. Russell, 917 F.2d 512, 517 (11th Cir. 1990) (holding that robbery is a crime of violence regardless of whether offender intended to carry out or was capable of carrying out threats), *cert. denied*, 499 U.S. 953 (1991), *and* United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989) (using "crime of violence" to define "non-violent offense"), *cert. denied*, 502 U.S. 882 (1991) *with* United States v. Chatman, 986 F.2d 1446, 1453 (D.C. Cir. 1993) (holding that a robbery could constitute a "non-violent offense").

68. *See* U.S.S.G., *supra* note 2, § 5K2.13; *Poff*, 926 F.2d at 589; United States v. Borrayo, 898 F.2d 91, 94 (9th Cir. 1990).

69. United States v. Rosen, 896 F.2d 789, 791 (3d Cir. 1991); *Borrayo*, 898 F.2d at 94; *Russell*, 917 F.2d at 515; *Maddalena*, 893 F.2d at 819. The Ninth

precludes a diminished capacity departure for any offender who commits a crime requiring the use, attempted use, or threatened use of physical force against another, regardless of the actual likelihood of violence.[70]

a. *The Seventh Circuit Approach: "Non-Violent Offense" Means the Opposite of "Crime of Violence"*

In *United States v. Poff*,[71] the Seventh Circuit Court of Appeals applied the above analysis when it defined "non-violent offense" as the opposite of "crime of violence."[72] Ms. Poff was convicted for writing threatening letters to President Reagan.[73] Because she had committed several earlier offenses, Ms. Poff qualified for an upward departure under the career offender provision.[74] There was no evidence, however, that Ms. Poff intended to carry out her threats.[75] Ms. Poff suffered from a mental disorder causally linked to her commission of the offenses, possibly qualifying her for a downward departure under the diminished capacity provision.[76] Evidence demonstrated that Ms. Poff's mental illness was likely controllable.[77]

The majority reasoned that, reading the Guidelines as a whole,[78] the "intentional" use of the term "violence" in both the

---

Circuit, in *Borrayo*, simply stated because the Commission did not include a definition of "non-violent offense," the court would apply the definition of "crime of violence" as its opposite. *Borrayo*, 898 F.2d at 94. Similarly, the 11th Circuit, in *Russell*, used the definition of "crime of violence" in constructing a narrow definition of "non-violent offense." *Russell*, 917 F.2d at 517. For a discussion of the meaning of the term "crime of violence," see *supra* notes 52-57 and accompanying text.

70. *See infra* notes 161-163 and accompanying text (discussing the application of the abstract definition of "crime of violence" to the diminished capacity provision).

71. 926 F.2d 588 (7th Cir.), *cert. denied*, 502 U.S. 827 (1991).

72. *Id.* at 591.

73. *Id.* at 590. Ms. Poff was convicted under 18 U.S.C. § 871.

74. *Id.* at 590; *id.* at 593 (Easterbrook, J., dissenting).

75. Courts had previously found Ms. Poff guilty of making two bomb threats, of threatening a county prosecutor, and of arson for setting fire to a hotel room. *Id.* at 590.

76. Ms. Poff's father sexually abused her until she was 20. *Id.* at 590. This led to a mental illness that caused her to threaten public officials under what she believed was the direction of her dead father. *Id.*

77. Her post-trial psychiatric evaluation described her as "undergoing a recurrent major depression." United States v. Poff, 723 F. Supp. 79, 83 (N.D. Ind. 1989), *aff'd*, 926 F.2d 588 (7th Cir.), *cert. denied*, 502 U.S. 827 (1991). This report concluded that psycotropic medication could control her episodes. *Id.*

78. *Poff*, 926 F.2d at 592 ("[I]t will be presumed that if the same word be used in both [provisions], and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act.")

career offender and diminished capacity provisions indicated that the Commission meant it to hold the same meaning in both.[79] If the Commission intended otherwise, the majority reasoned, it would have included a definition in the diminished capacity provision.[80]

In his dissent,[81] Judge Frank Easterbrook questioned the application of the career offender provision's definition of violence to the diminished capacity provision.[82] The dissenters considered Ms. Poff's qualification as a career offender coincidental[83] and concluded that if the Commission intended these two terms as opposites, it would have included a cross reference.[84] The dissenters also argued that the four general policies of punishment warrant a different definition for "non-violent offense."[85]

The dissent concluded that the policy of "just deserts" supports leniency in sentencing individuals with a diminished capacity.[86] The *Poff* dissenters considered Ms. Poff a victim of her father's abuse.[87] The dissenters further stated that individuals

---

(quoting Reiche v. Smythe, 80 U.S. (13 Wall.) 162, 165 (1871)) (quotation marks omitted).

79. *Poff*, 926 F.2d at 591. The court noted minor grammatical differences between the two provisions, but determined these differences did not influence the analysis. *Id.*

80. *Id.* at 592. The majority also concluded, with cursory analysis, that Ms. Poff's criminal history indicated "a need for incarceration to protect the public" under § 5K2.13, and that therefore Ms. Poff was ineligible for departure under the diminished capacity provision. 926 F.2d at 593. The court, however, based its holding on the "violence" of Ms. Poff's offense. *Id.* at 593.

81. Judges Coffey, Cudahy, Manion, and Posner joined Judge Easterbrook in dissent. *Id.* (Easterbrook, J., dissenting).

82. *Id.* at 594. Such an application would exclude first-time offenders from the diminished capacity departure, although the career offender provision would not apply to them.

83. *Id.* The dissent criticized the majority for basing its argument, in part, on a perceived contradiction between Ms. Poff's eligibility for upward departure under the career offender provision and her alleged availability for a downward departure under the diminished capacity provision. *Id.* at 593-94.

84. *Id.* at 593. The Commission drafted the Guidelines with many cross references, and has amended them to include more references. *See infra* notes 148-150 (discussing amendments referencing the definition of "crime of violence"). Easterbrook thus asserts that the Commission's failure to cross reference raises the implication that it did not consider the provisions related. *Poff*, 926 F.2d at 594 (Easterbrook, J., dissenting).

85. The dissent considered some punishment necessary, but argued that Poff was "all bark and no bite," and therefore deserved leniency. *Id.* at 595.

86. *Id.* at 595.

87. *Id.* They asserted that the majority could have accepted the testimony of Ms. Poff's expert witness that her mental illness caused her to commit these crimes. *Id.*

who have difficulty controlling their behavior warrant less punishment than "those who act maliciously or for gain,"[88] and that incapacitation should relate to the violence of the offender's conduct.[89] Finally, the dissenters noted that punishing an offender for criminal actions caused in part by a diminished mental capacity will not deter the offender from future crimes, because these offenders exercise only limited control over their behavior.[90]

b. *Finding that "Non-Violent Offense" Calls for a Fact-Specific Inquiry*

By contrast, in *United States v. Chatman*,[91] the District of Columbia Court of Appeals held that "non-violent offense" did not mean the opposite of "crime of violence."[92] Mr. Chatman had pled guilty to bank robbery.[93] Alone and unarmed, Mr. Chatman robbed a bank by giving a threatening note to a teller.[94] The elements of bank robbery involve the use or threatened use of force[95] and, therefore, the robbery constitutes a "crime of violence."[96]

The court of appeals concluded that a fact-specific inquiry yields the most accurate determination of the offender's danger-

88. *Id.*

89. *Id.* ("When the disturbed person's conduct is non-violent, however, incapacitation is less important."). The dissenters also argued that by requiring the sentencing judge to consider the need for incarceration pursuant to § 5K2.13 the Commission arguably obviated the need to determine dangerousness based on the statutory offense. *Poff*, 926 F.2d at 595 (Easterbrook, J., dissenting); *see* U.S.S.G., *supra* note 2, § 5K2.13.

90. 926 F.2d at 594-95. Easterbrook implies that deterrence requires offenders to possess control of their behavior. *Id.*

91. 986 F.2d 1446 (D.C. Cir. 1993).

92. *Id.* at 1453.

93. Mr. Chatman pled guilty to violating 18 U.S.C. § 2113(a). *Id.* at 1447.

94. *Id.* at 1447. The note claimed there were four robbers and that they would hurt anyone who interfered. *Id.* Chatman submitted a psychological evaluation describing his diminished mental capacity. *Id.* at 1448. The court does not mention Chatman's particular disability or how it manifested itself. The court noted, however, that the district court refused to depart downward under the diminished capacity provision because the offense was a "crime of violence." *Id.* at 1448. The District Court stated that "the threatening note itself is an act of violence, making this a crime of violence, and the downward departure for diminished capacity is therefore inapplicable." *Id.* (quoting Transcript of Sentencing Hearing 11-12 (Oct. 28, 1991)) (quotation marks omitted).

95. The federal bank robbery offense applies to "[w]hoever, by force and violence, or by intimidation, takes . . . any property or money . . . belonging to . . . any bank." 18 U.S.C. § 2113(a) (1988).

96. *See Chatman*, 986 F.2d at 1449; United States v. Jones, 932 F.2d 624, 625 (7th Cir. 1991).

ousness for the purpose of the diminished capacity provision.[97] The court argued that the Commission intended the career offender provision to deprive habitual offenders of the benefit of the doubt by including crimes with " 'an unrealized prospect of violence' "[98] an inappropriate goal in diminished capacity cases.[99]

In *United States v. Weddle*,[100] the Fourth Circuit Court of Appeals also followed the *Poff* dissenters. Mr. Weddle pleaded guilty to mailing threatening communications to his wife's lover.[101] The district court concluded Mr. Weddle's actions resulted from a "major depressive episode,"[102] and the court departed from the Guidelines under the diminished capacity provision,[103] even though the crime Mr. Weddle was convicted of had, as an element, the use or threatened use of force.[104] The Fourth Circuit affirmed the district court's departure, emphasizing that the disparate purposes of the two provisions warrant a fact-specific inquiry of the offender's "violence."[105]

---

97. *Chatman*, 986 F.2d at 1449. The court of appeals traced the arguments made in *Poff* by both the majority and the dissent. *Id.* at 1449-53. Judge Ginsburg noted in concurrence that United States v. Baskin, 886 F.2d 383 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1089 (1990), controlled this issue in the D.C. Circuit. *Chatman*, 986 F.2d at 1454 (Ginsburg, J., concurring). *Baskin* held that the sentencing court may look beyond the elements of the statutory offense to determine if the offense constituted a "crime of violence." 886 F.2d at 389-90. Ginsburg stated that "non-violent offense" ought to mean the opposite of "crime of violence," but he felt bound by precedent. *Chatman*, 986 F.2d at 1454 (Ginsburg, J., concurring).

98. *Id.* at 1451 (quoting United States v. Poff, 926 F.2d 588, 594 (7th Cir.) (en banc), *cert. denied*, 502 U.S. 827 (1991)).

99. The court examined the policies of the two provisions and concluded that the policies conflicted. *Id.* at 1451-52. The court observed that the career offender provision seeks to impose longer sentences on offenders who commit repeat offenses involving the risk of violence, *id.* at 1451, and that the diminished capacity provision focuses on the culpability of and danger posed by the offender. *Id.* at 1452.

100. 30 F.3d 532 (4th Cir. 1994).

101. *Id.* at 533. The prosecution charged Weddle under 18 U.S.C. § 876. *Id.*; *see* 18 U.S.C. § 876 (criminalizing mailing threatening communications).

102. 30 F.3d at 540.

103. *Id.* at 537.

104. The district court concluded that Mr. Weddle's one act of violence, attempting to run his wife's lover off the road and then chasing him on foot, *id.* at 534, did not render his threatening letters violent. *Id.* at 540. The court's determination that Mr. Weddle's action did not demonstrate actual violence is questionable. Mr. Weddle's actions demonstrated a reasonable possibility that he would continue to commit violent acts.

105. *Id.* at 539-40. The court also explored the arguments made in *Poff*. *Id.* at 538-39. The court concluded that the Commission intended the diminished capacity provision to provide leniency to those who suffer from a mental disabil-

II. A DIALECTICAL STATUTORY INTERPRETATION OF THE DIMINISHED CAPACITY PROVISION

The Commission proposes the Guidelines, which go into effect if Congress fails to act.[106] They are, therefore, a form of statute.[107] Courts and commentators currently debate the appropriate form of inquiry in interpreting and analyzing legislation.[108] This Note adopts the interpretive model advocated by Professors William N. Eskridge, Jr. and Philip P. Frickey. The Eskridge and Frickey model establishes a coherent, comprehensive, and practical means of analyzing legislation.[109]

Eskridge and Frickey reject using a foundational approach to statutory interpretation,[110] such as the "New Textualism" of Justice Scalia.[111] They argue, as many other scholars argue,[112]

---

ity, while the career offender provision focused on harshly treating the habitual offender. *Id.* at 539-40; *see infra* notes 165-167 and accompanying text (exploring the purpose of the career offender provision).

106. 28 U.S.C. § 994(p) (1988) (providing for proposed Guidelines to become effective at least 180 days after submission, but no later than November 1 of the effective year).

107. They are similar, in this respect, to the Federal Rules of Civil Procedure, which also take effect unless Congress acts to prevent it. *See* 28 U.S.C. § 2074 (1988).

108. *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861-74 (1992) (recognizing problems with legislative history, but arguing against abandoning its use); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 782-91 (1991) (arguing courts "overenforce" legislation and apply it in contexts not desired by the legislature); Lawrence C. Marshall, *The Cannons of Statutory Construction and Judicial Constraints: A Response to Macey and Miller*, 45 VAND. L. REV. 673, 675 (1992) (arguing judicial interpretation is constrained both by judges' understanding of their role and because they must enumerate reasons for a particular interpretation); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 870-78 (1994) (arguing in favor of textual originalism).

109. Eskridge and Frickey concisely describe their view of statutory interpretation in William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990). Eskridge and Frickey argue that the United States Supreme Court, as an empirical matter, interprets statutes by considering the factors the authors systematize in their article. *Id.* at 345-62.

110. *Id.* at 321. The authors define foundationalism as "a theory that identifies a single primary legitimate source of interpretation . . . and adheres to the statutory meaning that source suggests, regardless of the circumstances or consequences." *Id.* at 321 n.2.

111. Justice Scalia spearheaded a reevaluation of the method of statutory interpretation on the Supreme Court. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (arguing the court should look to context, ordinary usage, and the surrounding body of law in

that foundationalism cannot achieve the "objectivity" it purports as its chief good.[113] Instead of one foundational source of interpretation, Eskridge and Frickey base their model on Aristotle's notion of practical reasoning.[114] They assert that "one can determine what is right in specific cases, even without a universal theory of what is right."[115] This determination does not descend into relativism because the relation between the interpreter and the text and the norms of the interpreter's society establishes the boundaries of viable interpretation.[116]

Eskridge and Frickey advocate a dialectical inquiry using what they have labeled the "funnel of abstraction."[117] This model begins with the most concrete and persuasive source—the text of the statute.[118] This textual interpretation is aided, at the

---

interpreting statutes). Professor Eskridge asserts that Scalia's argument has value, but does not support abandoning legislative history as an interpretive tool. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990). *See also* Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 402-03 & n.9 (1994) (asserting Scalia's approach is a "counterrevolution" that selectively applies interpretive techniques the Court has rejected that results in narrowing the application of statutes).

112. *See generally* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 849-63 (1990) (criticizing the objectivity of foundational interpretive approach); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 737-90 (1991) (same); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2107-20 (1989) (same); Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 280-304 (1993) (same); Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 1009-32 (1994) (same); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 695-719 (1994) (same); Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 GEO. L.J. 1785, 1815-29 (1990) (same).

113. Eskridge and Frickey advance three basic arguments against foundationalism as objective: the link between foundational analysis and majoritarian political preferences is tenuous, foundational theories break down in hard cases so the results are not objectively predictable, and no foundational theory can effectively exclude evolutive considerations. Eskridge & Frickey, *supra* note 109, at 379.

114. *Id.* at 323.

115. *Id.*

116. *Id.* at 382.

117. The funnel is a schematization of the various considerations in legislative interpretation. *Id.* at 353. The narrow base of the funnel is the least abstract and most persuasive consideration—the text. *Id.* The farther up the funnel one goes, the more abstract and the less weighty the factor. *Id.* at 353-54.

118. The text receives great weight because the power to determine policy resides with the enactors. *Id.* at 354-56 (discussing the primacy and method of textual analysis).

second level of abstraction, by an examination of the legislative history of the provision.[119] At the third level, the legislature's purpose in enacting the statute enters the analysis.[120] The penultimate portion of the analysis is "evolutive," exploring the social and legal circumstances the drafters did not consider.[121] Finally, and most abstractly, the interpretation of a statute should consider notions of current public policy.[122] This model accurately describes the Supreme Court's analysis of legislation[123] and, by straddling the false dichotomy between foundationalism and relativism, establishes a normatively sound methodology.

A. Textual Disparities Rendering the "Crime of Violence" Definition Inappropriate in the Diminished Capacity Provision

An analysis of the text of the diminished capacity and career offender provisions indicates that "crime of violence" and "non-violent offense" are not opposites. The Commission created a term of art when it defined "crime of violence," which differs significantly from an ordinary understanding of violence. The *Poff* majority inappropriately applied this term of art in the di-

119. Eskridge and Frickey divide legislative history into specific and general forms. *Id.* at 357. Specific legislative history includes reports or statements concerning the specific issue the interpreter is addressing. For a criticism of the use of legislative history see Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (Scalia, J., concurring in the judgment).

120. This inquiry focuses on the statutory context and the goals of the legislature. Eskridge & Frickey, *supra* note 109, at 358.

121. *Id.* at 358-59. Evolutive interpretation stems primarily from problems arising in implementation. *Id.* at 359. Eskridge and Frickey use United Steelworkers of American v. Weber, 443 U.S. 193 (1979), as an example of the Supreme Court relying on evolutive concerns. The Court, Eskridge and Frickey assert, relaxed the requirement of color-blindness under Title VII to correct for the "ongoing effects of past discrimination." Eskridge & Frickey, *supra* note 109, at 359.

A separate, evolutive examination of the diminished capacity and career offender provisions provides no real insights. Unlike in *Weber*, where, Eskridge and Frickey argue, the Court considered the failure of outlawing race-conscious employment practices to remedy racial disparity in the work-place, no articulable policy of the Guidelines has failed. *Id.* The values of punishing only dissimilar offenders differently, *see supra* notes 25-27 and accompanying text (asserting this was Congress's main goal in reforming sentencing), and permitting departure from the presumptive range when an offender merits leniency, *see supra* notes 44-46 (describing the purpose of departures), have not changed.

122. Eskridge & Frickey, *supra* note 109, at 359. This inquiry focuses on notions of fairness, other statutory policies, and constitutional values. *Id.*

123. Eskridge and Frickey discuss several cases and argue the Court considers these factors, even if not overtly. *Id.* at 345-62.

minished capacity provision.[124] The rule of lenity, a tool of statutory interpretation, supports this conclusion.

Furthermore, the *Poff* majority erred in its application of the "whole act" canon of statutory interpretation. This canon states that a word appearing in two distinct, but related, provisions should *ordinarily* receive the same meaning in both.[125] The *Poff* majority ignored the significance of cross references to the career offender provision in other sections of the Guidelines. These cross references undermine the core of the majority's analysis. In light of the other textual considerations, the text of the career offender provision should not control the diminished capacity provision.

1. The Term of Art "Crime of Violence" Differs From an Ordinary Meaning of Violence

When interpreting a statute, courts should begin with an ordinary meaning of the words in the provision.[126] As the *Poff* dissent argued, the Commission created a term of art in defining "crime of violence."[127] This definition looks to the elements of the statutory offense and the conduct with which the state charged the offender. Ordinarily, "violence" refers to the offender's actual violence, rather than an abstract element of a

---

124. *See supra* notes 78-80 and accompanying text (describing the *Poff* majority's application of the whole act canon).

125. The "whole act" or "statutes in pari materia" canon of statutory interpretation is very well established. *See, e.g.*, Reiche v. Smythe, 80 U.S. (13 Wall.) 162, 165 (1871) ("Both acts are *in pari materiâ*, and it will be presumed that if the same word be used in both . . . that it was intended it should receive the same interpretation in the later act, in the *absence* of anything to show a contrary intention.") (emphasis added) (citing DWARRIS ON STATUTES 701-66); Bishop v. Linkway Stores, Inc., 655 S.W.2d 426, 428 (Ark. 1983) (applying the whole act canon to the Arkansas Constitution).

126. Justice Blackmun noted that "[a]n interpreting court must 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" Cipollone v. Liggett Group, Inc., 112 S. Ct. 2609, 2625 (1992) (Blackmun, J., concurring in part, dissenting in part) (quoting FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990)) (citations omitted). Blackmun later stated that "consideration of a treaty's ordinary meaning must be the first step in its interpretation." Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2570 n.5 (1993) (Blackmun, J., dissenting) (arguing the Refugee Act of 1980 did not apply to the turning back of Haitian refugees by the Coast Guard on the High Seas).

127. United States v. Poff, 926 F.2d 588, 594 (7th Cir.) (Easterbrook, J., dissenting), *cert. denied*, 502 U.S. 827 (1991); *see supra* notes 52-57 and accompanying text (discussing the specificity of the definition of "crime of violence").

statutory charge.[128] The Commission, however, clearly mandated consideration of the abstract risk of violence in the career offender provision.[129] This penalizes offenders engaged in potentially dangerous conduct, without regard to the likelihood of violence.[130]

Regardless of the wisdom of using this definition in the career offender provision,[131] the text of the diminished capacity provision does *not* mandate an abstracted definition of violence because it fails to define "non-violent offense."[132] The Commission did not indicate any intent to create a term of art when it drafted the diminished capacity provision. Courts should, therefore, interpret "non-violent offense" in light of an ordinary meaning of the term "violence."

2. Preventing Arbitrarily Harsh Sentences: The Rule of Lenity

The rule of lenity essentially states that courts should interpret criminal statutes strictly in favor of the defendant.[133] This rule incorporates commonly expressed apprehen-

128. *See infra* notes 188-192 and accompanying text (attempting to define violence). This raises the issue of real offense versus charge offense systems. *See supra* notes 33-43 and accompanying text (explaining the differences between, and policies underlying, charge and real offense paradigms). The other elements of the diminished capacity provision stem from a real offense system, while the definition of crime of violence draws primarily on charge offense notions. *See infra* notes 178-187 and accompanying text (arguing these competing policies and frameworks make it inappropriate to use the definition of "crime of violence" as the opposite of "non-violent offense").

129. *See supra* notes 54-57 and accompanying text (discussing the interpretation of "crime of violence").

130. *See supra* note 52 and accompanying text (describing how the Commission's focus on the elements of the statutory offense does not consider the likelihood of violence). As a result, this provision deprives the offender of the benefit of the doubt and assumes the offender's conduct will likely result in physical harm in the future.

131. *See supra* note 51 (listing articles criticizing longer incarceration as a means of addressing career criminality).

132. U.S.S.G., *supra* note 2, § 5K2.13.

133. "[W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952). Some scholars argue the rule stems from concern with imposing capital punishment in ambiguous cases. PETER S. LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES 238 (12th ed. 1969). Maxwell notes that many offenses that seem petty to modern observers warranted a death sentence, such as cutting down a cherry tree in an orchard. *Id.* Common law courts interpreted criminal statutes to avoid these harsh results.

sions about arbitrary enforcement of penal sanctions.[134] The penal system generally reflects a greater concern with the loss of liberty and stigma attached to criminal sanctions than losses associated with civil sanctions.[135] This greater stigma supports a deeper inquiry into the meaning of a statutory provision before imposing a criminal penalty.

Thus, in light of the rule of lenity, it is significant that the Commission failed to define "non-violent offenses" in the diminished capacity provision. Such a failure demonstrates that the Commission may not have considered what definition ought to apply to offenders suffering from a diminished mental capacity.[136] Therefore, courts should interpret the diminished capacity provision strictly against the government, to prevent an arbitrary and unconsidered imposition of a longer sentence.

This argument carries particular weight in determining whether the Commission intended "crime of violence" to mean the converse of "non-violent offense." The Commission defined a crime of violence mechanistically, by basing it on the elements of

---

The rule also serves several important contemporary policies. One principle derived from the rule is that the state should not punish individuals for conduct not plainly illegal. Keppel v. Tiffin Sav. Bank, 197 U.S. 356, 362 (1905) (stating the "elementary rule" that courts should not impose criminal penalties without clear language by the drafters). Sentencing provisions only tenuously implicate notice, as the offender violated a substantive crime. If the statute provides "notice" of *some* criminal liability for the act, lack of knowledge of the *severity* of the liability is unlikely to affect an offender's actions.

Sentencing provisions, however, do raise concerns with arbitrary enforcement. The rule of lenity existed at English common law, LANGAN, *supra*, at 238, but also reinforces policies underlying due process requirements. The Due Process Clauses of the Fifth and 14th Amendments stem from a desire to limit arbitrary government action. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 (2d ed. 1988). The core of the Due Process Clause also includes guarantees of an opportunity to be heard and notice. *Id.* § 10-15.

134. 3 JAJEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 59.03 (3d ed. 1943).

135. This concern manifests itself in many aspects of criminal law and procedure, perhaps most noticeably in the requirement of proof beyond a reasonable doubt. Requiring this higher standard of proof for criminal cases reflects a desire for more certainty before the imposition of criminal penalties. We provide procedural protections not available to civil litigants in order to make the state prove its case, such as the Fifth Amendment privilege against self-incrimination.

136. The Commission focused on the congressional mandate in 28 U.S.C. § 994(h) (1988) in drafting the career offender provision. The Commission attempted to include as many repeat offenders as possible within the definition of "crime of violence." The Commission may not have considered the impact of these policies on the diminished capacity provision. *See infra* notes 164-176 and accompanying text (discussing the policies of the diminished capacity and career offender provisions).

the statutory offense.[137] Blindly defining these two phrases as opposites prevents departure for dissimilar offenders.[138] Given the language of the statute, courts should interpret the undefined "non-violent offense" in favor of the defendant.

3. Application of the Whole Act Canon: The Significance of a Failure to Cross Reference

Finally, the "whole act" canon of interpretation provides little support for defining "crime of violence" and "non-violent offense" as opposites. The failure to cross reference the two provisions, in light of the explicit cross references in other provisions of the Guidelines, arguably reveals that the Commission intended the terms to have different meanings.

The *Poff* majority argued that the word "violence" should carry the same meaning in both the career offender and diminished capacity provisions.[139] The majority's three main arguments stem from application of the whole act canon. The *Poff* majority correctly noted that the grammatical differences between "non-violent offense" and "crime of violence" are minimal.[140] It argued that the word "violence" should, therefore, receive the same meaning in both provisions.[141] The majority also argued that the Commission made a decision that threats were dangerous by including them in the career offender provision, and that an offender's threats of violence therefore prohib-

---

137. *See supra* notes 52-57 and accompanying text (discussing the definition of "crime of violence").

138. *See infra* notes 197-198 (asserting that offenders who abstractly risked violence are differently situated than those who used or risked actual violence). The definition of "crime of violence" deprives the sentencing court of discretion. Congress created the Commission to eliminate *unwarranted* disparity in sentencing. *See supra* note 25. Congress recognized, however, that sentencing courts must possess the discretion to treat dissimilar offenders differently by passing the Sentencing Reform Act of 1984.

139. United States v. Poff, 926 F.2d 588, 591 (7th Cir.), *cert. denied*, 502 U.S. 827 (1991); *see supra* note 125 (citing cases applying the whole act canon). Eskridge and Frickey explain how both the majority and dissent in one of the seminal voluntary affirmative action cases, United Steelworkers of America v. Weber, 443 U.S. 193 (1979), relied on the whole act canon. Eskridge & Frickey, *supra* note 109, at 355. The Court, they argue, was inquiring "which interpretation best 'fits' into the 'whole statute'?" *Id.* (footnote omitted).

140. The court specifically stated that "non-violent offense" differs from "crime of violence" only in the negative formulation and in its use of "violent" as an adjective rather than the noun "violence" in a prepositional phrase. *Poff*, 926 F.2d at 591.

141. *Id.*

ited leniency in the diminished capacity provision.[142] This, however, requires a determination that the Commission intended a relation between the provisions, which is the fundamental basis of the whole act canon. Finally, the majority argued that it was illogical to permit an upward departure for Ms. Poff under the career offender provision and a downward departure under the diminished capacity provision.[143] As the dissent noted, this ignores that Ms. Poff's qualification as a career offender was a coincidence.[144] This also presumes a relation between the provisions. Significantly, the majority noted that offenders like Ms. Poff may merit leniency, but that the meaning of violence was obvious.[145] The majority's argument, therefore, shatters without the whole act canon.

This application of the whole act canon has facial appeal, but the court arguably misapplied the canon. As the *Poff* dissent noted, it is significant that the Commission failed to reference the career offender provision in the diminished capacity provision.[146] At the time *Poff* was decided, the Guidelines contained two explicit cross references to the definition of "crime of violence" in other provisions.[147] The most recent version of the Guidelines contains seven explicit references to the definition of "crime of violence."[148] Yet, the diminished capacity provision

142. *Id.* at 592; *see supra* notes 56-57 and accompanying text (explaining the career offender provision's inclusion of crimes with threats as a statutory element).

143. *Poff*, 926 F.2d at 592.

144. *Id.* at 594; *see supra* notes 82-83 and accompanying text (discussing dissent's argument that interpretation of the diminished capacity provision should not be influenced by Ms. Poff's qualification as a career offender).

145. *Poff*, 926 F.2d at 593. The majority felt there was "an argument in favor of permitting downward departures for those with diminished mental capacity when the prospect that they will carry through with threats seems nil." *Id.*

146. *Id.* at 594. For a discussion of the dissenter's argument, see *supra* notes 81-90 and accompanying text.

147. The Commission added § 4B1.4 in 1990 to further increase the penalty for armed career criminals. U.S.S.G., *supra* note 2, § 4B1.4. The Commission noted the section used the term "violent felony," which is defined by 18 U.S.C. § 924(e)(2) (1988). U.S.S.G., *supra* note 2, § 4B1.4 application note. The Commission stated that the meaning of "violent felony" differs from "crime of violence." *Id.* The Commission also added § 7B1.1 regarding the classification of offenses for probation. *Id.* § 7B1.1. The Commission explicitly used the term "crime of violence" and referenced the definition in the career offender provision. *Id.*

148. In 1991 the Commission amended the Guidelines to increase an offender's Criminal History Category for committing crimes of violence, although the offender does not qualify for departure under the career offender provision. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL §§ 4A1.1, 4A1.2

still contains no such cross-reference. Because the definition of "crime of violence" is a term of art,[149] explicitly cross referencing *some* provisions, but not the diminished capacity provision, implies the Commission did not intend a relation between the definition of "crime of violence" and "non-violent offense."[150]

Thus, although a strong presumption exists that a word means the same thing in two related statutory provisions, the Commission's explicit cross references in some provisions, but not in the diminished capacity provision, support the opposite conclusion. The whole act canon is, therefore, a weak basis for the *Poff* majority's decision. Had the court considered other factors besides the whole act canon, it would likely have held that

---

(1991). The Commission referenced the definition of "crime of violence" in the career offender provision. *Id.* In 1991 the Commission also amended the Guidelines to set the base offense level of two provisions higher for offenders with previous convictions for crimes of violence. The Commission modified the guidelines for the Unlawful Receipt, Possession, or Transportation of Explosive Materials provision, *id.* § 2K1.3, and the Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition provision, *id.* at § 2K2.1. Both changes reference the definition of crime of violence in the career offender provision. Finally, the Commission added a potential downward departure for a controlled substance offense if the base offense level over represents the offender's culpability. U.S.S.G., *supra* note 2, § 2D1.1 application note 16. The Commission precluded departure if the offender "has one or more prior felony convictions for a crime of violence." *Id.* The Commission referenced the definition in the career offender provision. *Id.*

149. *Poff*, 926 F.2d at 594.

150. The Commission issues yearly amendments to the Guidelines and clearly keeps abreast of developments in sentencing law. The Commission periodically publishes a volume of Guideline decisions. *E.g.*, UNITED STATES SENTENCING COMMISSION, SELECTED GUIDELINE APPLICATION DECISIONS: JANUARY-JUNE 1992 (1992). The Commission knew of the debate about whether "non-violent offense" meant the opposite of "crime of violence" and failed to resolve it, although it amended the Guidelines four times since the *Poff* decision. *See supra* note 148.

The argument that a failure to cross reference means these provisions are not contrapositives, however, loses impact because of the explicit distinction made by the Commission in § 4B1.4 between "violent felony" and "crime of violence." This counter-argument essentially states that the Commission demonstrated it would make explicit cross references to distinguish terms from "crime of violence" and, therefore, would have also done so in the diminished capacity provision. This counter-argument, however, is also flawed. The explicit reference distinguishing § 4B1.4 from the career offender provision occurred in 1990, before the division on the Seventh Circuit in *Poff*. U.S.S.G., *supra* note 2, app. C, amendment 355 (effective Nov. 1, 1990). Some courts had held "crime of violence" meant the opposite of "non-violent offense," but without any real debate. *See supra* note 69 and accompanying text (discussing the early cases addressing the meaning of "non-violent offense"). No serious debate drew the diminished capacity provision to the Commission's attention. The Commission, therefore, had no reason to consider the meaning of "non-violent offense."

"non-violent offense" means something apart from the converse of "crime of violence."

B. The Legislative History of the Sentencing Reform Act and The Guidelines

The Congressional deliberations on the Guidelines do not provide a specific definition of "non-violent offense." They do, however, establish a conceptual framework that guides the interpretation of the diminished capacity provision.[151] While drafting the 1984 Sentencing Reform Act and considering the promulgated Guidelines in 1987, Congress primarily discussed the two overarching goals of the Act: reducing disparity in sentencing of *similar* offenders[152] and eliminating the indefinite time offenders served because of parole.[153] The only statements Congress made specifically regarding departure occurred in the discussion of the Guidelines in 1987 and concerned the residual or "catch all" exception.[154] Because Congress's debates fail to provide a specific definition of "violence" for the diminished ca-

151. The concerns expressed in the Senate report flush out the policies enumerated in 28 U.S.C. § 991 (1988) and 18 U.S.C. § 3553(a)(2) (1988). Congress desired to eliminate the seemingly arbitrary differences in sentencing, not remove the sentencing court's discretion to punish each offender individually. S. Rep. No. 225, *supra* note 25, at 41, *reprinted in* 1984 U.S.C.C.A.N., at 3224.

152. The Senate report on the Sentencing Reform Act focuses primarily on the problems with the parole system and disparity among similar offenders. S. Rep. No. 225 *supra* note 25, at 38-49, *reprinted in* 1984 U.S.C.C.A.N., at 3221-32. Congress specifically directed the Commission to avoid unwarranted disparity in sentencing. 28 U.S.C. § 991(b)(1)(B); *see supra* notes 28-30 and accompanying text (discussing Congress's mandate to the Commission). The Senate report includes statistics regarding the disparity in the sentencing of similar offenders, and Congress's specific concerns raised by this disparity. S. Rep. No. 225 *supra* note 25, at 41-46, *reprinted in* 1984 U.S.C.C.A.N., at 3224-29. The statistics cited show radical differences in sentences for the same offense. *Id.* at 43-45, *reprinted in* 1984 U.S.C.C.A.N. at 3225-28.

These statistics may overstate the problem. They merely compare the sentences of offenders committing the same offense; they do not isolate other factors that appropriately contribute to different sentences, such as the criminal history and the particular harm the offender created. The pattern of disparity plainly indicates some arbitrary distinctions, such as which judge sentences the offender, influence the sentence of many offenders. It is suspect, however, to attribute this entirely to these arbitrary factors.

153. S. Rep. No. 225, *supra* note 25, at 46-49, *reprinted in* 1984 U.S.C.C.A.N., at 3229-32.

154. *See, e.g., Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 38 (1987) (statement of Stephen Breyer, Judge and Sentencing Commissioner) (stating that judges will depart for unusual circumstances not accounted for in the guidelines).

pacity provision, it should be interpreted to further the goal of treating dissimilar offenders differently.

At one of the Commission's hearings on the Guidelines, a Commissioner stated that a *non-violent* crime could involve the threatened use of force.[155] A witness at the proceeding[156] expressed misgivings concerning the severity of punishment for "first offenders,"[157] using the example of an unarmed first time bank robber, whom he believed usually has some mental disorder.[158] One of the Commissioners attempted to determine whether the witness believed these offenders warranted probation, referring to "first offense *non-violent* bank robbers" who used notes or other means to effectuate the crime.[159] Bank robbery involves the threatened use of force and, therefore, would constitute a crime of violence under the career offender provision.[160]

These statements made during the Commission's hearing support an interpretation of "non-violent offense" that focuses on the facts of the offense rather than an abstract definition based on the charged conduct or the elements of the statutory offense.[161] A bank robber suffering from a diminished mental ca-

155. These hearings included specific topical hearings and general hearings on the Sentencing Guidelines. The Commission held hearings on several specific issues including offense seriousness, *United States Sentencing Commission, Public Hearing on Offense Seriousness* (Apr. 15, 1986), the use of an offender's prior criminal record in sentencing, *United States Sentencing Commission, Public Hearing on the Treatment of Prior Criminal Record* (May 22, 1986), and how to penalize organizations for crimes, *United States Sentencing Commission, Public Hearing on Organizational Sanctions* (June 10, 1986).

156. The witness was Terence F. MacCarthy, the director of the Federal Defender Program in Chicago. *United States Sentencing Commission, Transcript of Proceedings Held in the Ceremonial Courtroom of the Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois* 29 (Oct. 17, 1986) [hereinafter *Ceremonial Courtroom Hearing*].

157. *Ceremonial Courtroom Hearing*, *supra* note 156, at 29-32.

158. *Id.* at 32. MacCarthy's statement seems to refer to offenders suffering from a mental disorder, but is somewhat ambiguous. He refers to most of these offenders as "listening to radio stations that you and I do not hear." *Id.* MacCarthy expressed concern that these offenders faced a five-year mandatory minimum sentence. *Id.*

159. *Id.* at 47 (emphasis added).

160. The Commission used robbery as an example of a crime of violence. U.S.S.G., *supra* note 2, § 4B1.2; *see supra* notes 51-56 and accompanying text (discussing the definition of "crime of volence").

161. The conceptual framework established by the Congressional record bolsters the conclusion that "crime of violence" is not the converse of "nonviolent offense." Congress desired to reduce disparity among *similar* offenders. *See supra* notes 26-30 and accompanying text (discussing Congress's motivations for creating the Commission). This general goal frames the analysis and, there-

pacity who uses threatening notes to effectuate the crime bears a striking resemblance to the offender in *United States v. Chatman*.[162] In *Chatman*, the District of Columbia Court of Appeals held that robbery could constitute a non-violent offense.[163] The Commission's comments reveal that the Commission believed that a von-violent offense could involve the threatened, though improbable, use of force.

C. The Disparate Purposes of the Career Offender and Diminished Capacity Provisions

The next step in the funnel of abstraction, examining the purposes of the legislation, further supports the conclusion that "non-violent offense" does not mean the opposite of "crime of violence."[164] An examination of the goals or purposes of the diminished capacity and the career offender provisions reveals that they are contradictory. The career offender provision stems from a belief that certain offenders are statistically more dangerous and warrant harsher treatment.[165] By contrast, the diminished capacity provision focuses on the actual danger of the offender and contemplates leniency for a specific group of offenders.[166] These antithetical goals make it inappropriate to apply the definition of "crime of violence" in the diminished capacity provision.

---

fore, one of the key questions is whether offenders suffering from a diminished mental capacity are different from other offenders. The Commission's inclusion of a diminished capacity departure, as well as the policies of punishment, support concluding they are different. *See infra* notes 178-187 and accompanying text (arguing the policies of punishment support a fact-specific determination of violence).

162. 986 F.2d 1446 (D.C. Cir 1993). Chatman, alone and unarmed, committed a bank robbery while suffering from a diminished mental capacity. *See supra* notes 91-94 and accompanying text (discussing facts and reasoning of *Chatman*).

163. *Chatman*, 986 F.2d at 1453.

164. Professors Eskridge and Frickey note some problems with a purpose-oriented approach, but adopt it as part of the process of contextualizing the statute to yield a clearer understanding. Eskridge & Frickey, *supra* note 109, at 358. They note that many statutes were drafted to serve a number of purposes that point the interpretation in different ways. *Id.* Eskridge and Frickey, however, still consider it a valid interpretive tool to consider "[w]hat problem was Congress . . . trying to solve, and what general goals did it set forth in trying to solve it?" *Id.*

165. *See supra* notes 49-51 and accompanying text (exploring the treatment specified by Congress and the Commission's response).

166. *See infra* notes 178-87 and accompanying text (considering the purposes of punishment and arguing they support leniency for offenders suffering from a diminished capacity).

The career offender provision, which requires judges to sentence certain repeat offenders at or near the maximum term, emphasizes retribution and incapacitation. Through both the use of criminal history in establishing the base offense and an upward departure for "career offenders,"[167] the Commission expressed its concern that repeat offenders are more dangerous and more culpable than other offenders.

Given the purposes of the career offender provision, it is hardly surprising that the definition of "crime of violence" uses an abstract notion of violence to include both offenders who committed violent actions and those who risked using violence.[168] This definition complies with Congress's desire to impose the maximum punishment on these offenders.[169]

The diminished capacity provision, by contrast, attempts to ascertain the actual culpability of and danger demonstrated by the offender. Apart from the "non-violent offense" requirement, the requirements of the diminished capacity provision are patently fact specific. This focus embodies the Commission's conclusion that, given certain circumstances, an offender suffering from a diminished mental capacity merits leniency. Consistent with this policy, courts must specifically determine the extent to which the offender's mental capacity led to the commission of the offense when departing under this provision.[170]

The exclusion of diminished mental capacity induced by voluntary use of intoxicants also focuses on the actual offense and offender.[171] Requiring that the offender's criminal history not

167. The Commission's commentary on the criminal history section of the Guidelines states that repeat offenders are more culpable than first time offenders and merit greater punishment. U.S.S.G., *supra* note 2, § 4A. While the Commission made no such remarks in the career offender provision, the argument applies with even greater force when the offender demonstrates a propensity to commit crimes posing a risk of violence.

168. *Id.* § 4B1.2; *see supra* notes 52-57 and accompanying text (discussing the theoretical and actual violence considerations in the career offender provision).

169. *See supra* notes 48-51 and accompanying text (examining Congress's specific command to the Commission regarding "career offenders").

170. United States v. Perkins, 963 F.2d 1523, 1528 (D.C. Cir. 1992); *see supra* notes 62-65 (elaborating on the sentencing court's ability to depart to the extent of an offender's diminished mental capacity).

171. *See supra* note 63 and accompanying text (discussing the "voluntariness" of intoxication). While the offender's culpability for voluntary intoxication may be debatable, this issue concerns the offender's actual conduct. Voluntary intoxication generally constitutes a defense only when it negates a "specific intent." *See* People v. Hood, 462 P.2d 370, 373 (Cal. 1969) (en banc). Alcoholism does not render intoxication involuntary, per se. *See, e.g.*, Evans v. State, 645 P.2d 155, 160 (Alaska 1982) (holding intoxication only involuntary if unknow-

indicate a need for incarceration before allowing departure also considers the actual danger posed by the offender, based on prior criminal actions.[172] Whether an offense was "non-violent," and, therefore, whether the offender deserves leniency, should depend on the specifics of the offense and the offender.

The existing provision also allows the court to decline departure when the offender's criminal history indicates incarceration is necessary to protect the public.[173] The judge has substantial discretion to determine the extent of the impact of the offender's diminished capacity and the need for incarceration to protect the public. This residual consideration obviates any need to incarcerate based on a risk of violence contained in the abstract, charge offense definition of "crime of violence." The abstract definition of "crime of violence" assumes that a risk of violence, no matter how tenuous,[174] demonstrates a need for incarceration.

The relevant issues in the diminished capacity provision are the actual offender and offense, rather than a broad, abstract notion of risk based on a statutory definition. Thus, using the definition of "crime of violence" as the converse of "non-violent offense" injects a policy contrary to the purpose of the diminished capacity provision. It inappropriately deprives the trial court of the discretion granted under the diminished capacity provision.

Congress considered a certain category of offenders, specifically repeat offenders, more dangerous than others.[175] The definition of "crime of violence," used in the diminished capacity provision, works against the Commission's intent to permit leniency when the offender is less culpable and less dangerous due to a diminished mental capacity.[176]

---

ingly or externally compelled); State v. Palacio, 559 P.2d 804, 806 (Kan. 1977) (accord). This stems from the notion that these offenders caused their condition in some respects and therefore merit punishment.

172. *See infra* notes 179-181 and accompanying text (discussing the need for incarceration).

173. U.S.S.G., *supra* note 2, § 5K2.13.

174. *See supra* notes 54-57 and accompanying text (discussing cases defining "crime of violence").

175. 28 U.S.C. § 991(b); *see supra* notes 48-51 and accompanying text (describing Congress's mandate to the Commission).

176. The use of this abstract definition leads to disturbing results forbidding leniency for the offender who writes threatening letters with no intent to carry out the threat or who robs a bank by using a threatening note, but poses little danger to the public. *See supra* notes 71-99 and accompanying text (discussing *Poff* and *Chatman*).

III. A CALL TO INTERPRET OR AMEND THE DIMINISHED CAPACITY PROVISION

Either the Supreme Court should interpret or the Commission should define "non-violent offense" in the diminished capacity provision to require a fact-specific inquiry. Both the existing provision and the policies underlying a departure for diminished mental capacity support this definition. Thus, in determining whether an offense was non-violent, the Commission and the Court should determine whether the offender intended to use or threaten the use of force and whether the offender took a substantial step towards the use of force.[177]

A. POLICIES OF PUNISHMENT AND THE DEFINITION OF NON-VIOLENT OFFENSE

The policy goals of deterrence, incapacitation, and retribution support defining "non-violent offense" to require a fact-specific inquiry.[178] Deterrent justifications for punishment carry less weight for offenders with reduced mental capacities. Deterrence presumes the ability to control one's actions, and thus also presumes that the offender chose, on some level, to commit the offense. To the extent incarceration can deter criminal behavior,[179] individuals suffering from a diminished mental capacity warrant less punishment, because their mental capacities are insufficient to control their acts. Because the diminished capacity provision requires that the offender's capacity causally relate

177. This definition is modeled after the Model Penal Code's definition of criminal attempt. *See infra* note 192 and accompanying text (deriving a rule for violence from the definition of criminal attempt).

178. Rehabilitory concerns, the fourth major justification for punishment, do not suggest what definition of "non-violent offense" is appropriate. Rehabilitation primarily concerns the form of the offender's sentence, not the length. Rehabilitation attempts to achieve ends similar to deterrence, preventing the offender from committing additional offenses. JACOB ADLER, THE URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT 53 (1991). Rehabilitory punishment attempts to change the offender, rather than make the penalty of crime outweigh the benefit. Rehabilitating an offender suffering from a diminished mental capacity, when possible, requires psychological assistance.

179. No conclusive empirical data demonstrate that punishment deters crime. JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 9 (1974). Problems with establishing causation might be endemic to deterrence. At least one scholar argues that the variables in empirical study of the deterrent effect of punishment cannot be controlled to demonstrate causality. PHILIP BEAN, PUNISHMENT 29 (1981).

to the commission of the offense,[180] punishment will have only a limited effect on the future behavior of such offenders.[181]

The policies of incapacitation also support basing the meaning of "non-violent offense" on a fact-specific inquiry. By isolating the offender, incapacitation essentially functions to prevent the offender from committing more offenses against the public. Under an incapacitation paradigm, the severity of the sentence depends on the danger of recidivism and the severity of the potential future offense.[182] If the offender poses an abstract risk of violence, but no *actual* risk of violence, the sentence should reflect this with leniency. This is especially true of offenders suffering from a diminished capacity.[183] The definition of "crime of violence," by contrast, assumes that if the offender threatened or risked violence, violence was likely.[184] "Violence" in the diminished capacity provision should, therefore, involve a fact-specific inquiry.

Finally, applying notions of retribution to the diminished capacity provision indicates "non-violent offense" should involve a fact-specific inquiry of the offender's violence. Retribution, in a criminal context, contemplates some level of moral blameworthiness for the actions committed.[185] Because the offender's diminished capacity must contribute to causing the offense,[186] leniency is warranted. The offender may not have made an en-

180. The offender's diminished capacity alone need not cause the offense, but it must influence the offender's conduct significantly. *See supra* note 64 and accompanying text (discussing the causal connection).

181. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1223 (asserting that deterrence will not impact insane offenders). Punishing Ms. Poff will not effectively deter future criminality. As her psychological evaluation found, psycotropic drugs could effectively prevent her depressive episodes. *See supra* notes 76-77 (discussing Ms. Poff's mental illness). Barring this, it is unlikely Ms. Poff will stop threatening people. It is, therefore, inconsistent to refuse to reduce her sentence in order to "deter" her from committing future crimes.

182. ALAN M. DERSHOWITZ, BACKGROUND PAPER, *reprinted in* FAIR AND CERTAIN PUNISHMENT 68, 71 (1976).

183. The diminished capacity provision precludes departure when the offender's criminal history demonstrates a need to incarcerate. U.S.S.G., *supra* note 2, § 5K2.13. This indicates the offender should receive leniency unless proven actually dangerous.

184. *See supra* notes 52-53 (explaining how an abstract meaning of "violence" presumes the risk of violence).

185. John Kleinig makes a clear and insightful argument for retribution as a basis of punishment. JOHN KLEINIG, PUNISHMENT AND DESERT 65-92 (1973). He addresses the notion of responsibility and how it justifies punishment. *Id.* at 1-9.

186. While the offender's diminished capacity need not constitute a but for cause, it must bear some substantial causal connection. *See supra* note 64.

tirely voluntary choice to commit the offense and, therefore, may be less blameworthy.

This is especially true when the offender poses little actual risk of violence. Crimes involving violence generally receive greater punishment than proprietary or other non-violent crimes[187] because society considers violent offenses more harmful. When actual violence is extremely unlikely and the offender suffers from a diminished capacity, the culpability of the offender, the urge for retribution, and the basis for blame are diminished.

B. Defining a Violent Offense: Searching for Clarity

Any attempt to adopt a fact-specific definition of "non-violent offense" must begin by establishing criteria for determining what constitutes violence.[188] We may recognize violence when we see it, but providing a specific definition that encompasses what constitutes violence is problematic. Violence must encompass a notion of both actual and intended physical force.[189] A result- or harm-oriented inquiry would only include violent ac-

187. For example, a "Minor Assault" (including any misdemeanor assault or felonious assault not covered by § 2A2.2) involving physical contact has a base offense level of 6. U.S.S.G., *supra* note 2, § 2A2.3. A conviction for Property Damage or Destruction has a base offense level of 4. *Id.* § 2B1.3. If an offender had two previous sentences over 60 days (yielding a Criminal History Category of four), *id.* § 4A1.1, the property offense might result in probation while the assault requires incarceration. *Id.* § 5A. The punishment for burglary also indicates violent crime receives greater punishment. The base offense level for burglary of a residence is 17. *Id.* § 2B2.1. The base offense level for burglary of a non-residence is 12. *Id.*

188. Violence is a rather ambiguous term. John C. Gunn describes violence as "an emotive word, and not a particularly satisfactory one - it means several different things at the same time and sparks off different areas of understanding and interest in different people." John C. Gunn, Violence 13 (1973). John Harris argues that "[i]f a man is stabbed to death, we do not doubt that he has been the victim of a violent assault." John Harris, Violence and Responsibility 17 (1980). We recognize this as violence, but what is violent other than sudden physical force? Harris presents a hypothetical fact pattern of an individual sneaking up and pouring acid on a victim. *Id.* at 15. The acid pourer has committed an act many would deem violent, but it was slow, painstaking, and sneaky, rather than sudden force.

189. Violence is defined variously as "exertion of physical force so as to injure or abuse," Merriam-Webster Inc., Webster's Ninth New Collegiate Dictionary 1316 (1990), and "[u]njust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury." Black's Law Dictionary 1570 (6th ed. 1990) (citation omitted). John Harris defines an act of violence as "occur[ing] when injury or suffering is inflicted upon a person or persons by an agent who knows (or ought to have known), that his actions would result in the harm in question." Harris, *supra* note 188, at 19.

tions, leaving any real and dangerous threats of violence out of the definition.[190] An intent- or purpose-oriented inquiry ignores the actual likelihood of harm.[191] A combination of the *intent* to use or threaten use of force and the *actual use* or *likelihood* of the use of physical force yields the best understanding of a violent offense.

Courts can apply this understanding of violent offense by modeling their analysis of the violence of an offense on the Model Penal Code's definition of criminal attempt.[192] Employing a two-step analysis, the sentencing court should first examine whether the offender intended to use or threaten the use of force. Second, the sentencing court should examine whether the offender's actions constituted a substantial step towards the use of force. This serves both to establish the likelihood of the use of force (if none actually occurred) and to corroborate the offender's intent to use force. A substantial step should demonstrate a willingness to use force.

---

190. For example, if the harm or injury to the "victim" is the only criteria, an individual who shoots at another but misses has not committed a violent act.

191. If the offender actually used force, the question of likelihood is irrelevant. Likelihood becomes important when the offender threatens the use of force. Mr. Chatman's note was likely intended to threaten the use of force, but any actual use of force was highly unlikely. *See supra* notes 94-96 and accompanying text (explaining the circumstances of Mr. Chatman's robbery).

192. The Model Penal Code defines an individual as guilty of an attempt if:

> (1) . . . acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
>
> (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in the course of the conduct planned to culminate in his commission of the crime.
>
> (2) . . . . Conduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose.

MODEL PENAL CODE § 5.01 (Official Draft and Revised Comments 1985) [hereinafter MPC]. Sections 1(c) and 2 are pertinent to a determination of violence. While a mistake of fact, under § 1(a), might prevent injury, it would not reduce the violence. Examining the intent to use or threat of use of force and requiring a substantial step towards the use of force will define an offender who fails to cause harm due to a mistake of fact as violent. Section 1(b) collapses into § 1(c) when the inquiry focuses on the use of force. The offender would have to do something to cause the use of force. This equates, functionally, with requiring intent and a substantial step.

For example, Ms. Poff wrote a letter threatening President Reagan's life. This clearly satisfies the first part of the analysis—an intent to use or threaten the use of force. Ms. Poff, however, fails the second part of the analysis—a substantial step towards the use of force. Ms. Poff would have taken a substantial step towards harming the President if she learned the President's itinerary and made plans to follow him.[193] She would have demonstrated her willingness to go beyond threats. This does *not* mean that because Ms. Poff made no preparations, she should not be punished. Threats of violence merit some level of criminal liability. A lack of preparation only means that her offense was not violent and, therefore, merits a lesser sentence when considered in light of her diminished mental capacity.[194]

C. Justified Discretion in Determining the Violence of an Offense

A fact-specific definition of "non-violent offense" grants discretion to the sentencing court, which facially seems to contradict the Guideline's purpose of reducing disparity in sentencing.[195] The Guidelines, after all, attempt to reduce disparity by limiting discretion.[196] Congress and the Commission, however, crafted the Guidelines intending to eliminate *unwarranted* disparity in sentencing.

Congress's mandate to the Commission specifically stated that dissimilar offenders should continue to receive different treatment.[197] The Commission, in response, provided a series of

193. Ms. Poff apparently made no preparations, as all agreed she posed no danger of acting on her threats. United States v. Poff, 926 F.2d 588, 590 (7th Cir.), *cert. denied*, 502 U.S. 827 (1991).

194. *See supra* notes 76-77 (explaining the source and manifestation of Ms. Poff's mental illness).

195. *See supra* notes 25-27 (discussing Congress's concerns in sentencing reform and criticism of indeterminate sentencing).

196. U.S.S.G., *supra* note 2, § 1A3. The application of the various adjustments and specific offense characteristics defined by the Commission yield a fairly narrow presumptive range. Compared with the practices of indeterminate sentencing, where the judge could choose from no imprisonment to the statutory maximum, the presumptive ranges severely limit a judge's discretion. The Guidelines clearly limit discretion; in fact, some argue they limit discretion too much. *See, e.g.*, Alschuler, *supra* note 43 (arguing the Guidelines ignore the individuality of the offender); Freed, *supra* note 6 (criticizing the Guidelines as an unworkable, unacceptable limitation on discretion).

197. Congress stated that one of the purposes of the Commission was to "avoid[ ] *unwarranted* sentencing disparity among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b) (emphasis added).

departures from the presumptive range in an attempt to allow sentencing judges the discretion to treat dissimilar offenders differently.[198] The issue, therefore, is not whether a fact-specific inquiry grants discretion to the sentencing court. Instead, the issue is whether an offender, suffering from a diminished mental capacity, who posed no actual risk of violence, is materially dissimilar from one who uses violence in the commission of an offense. The analysis above demonstrates that these offenders are not similar and, therefore, merit different treatment. Allowing courts to make a fact-specific inquiry to determine whether an offender's crime was non-violent is consistent with the Guidelines' overarching purpose and best serves the policies underlying the diminished capacity provision.

CONCLUSION

The majority of courts define "non-violent offense" as the opposite of "crime of violence." This prevents departure for an offender's diminished mental capacity if the offense involved the use or threatened use of force. Reliance on the statutory definition thus treats *dissimilar* offenders identically. Even if an offender poses no risk of actual violence, the trial court must impose the same sentence as it would for an offender who actually used violence.

The text, legislative history, and purposes of the Guidelines, as well as the purposes of punishment generally, support determining the violence of an offense, for purposes of the diminished capacity provision, by examining the specific facts and circumstances of the offense and the offender. Individuals suffering from a diminished mental capacity differ significantly from offenders who commit the same offense without diminished capacity. An offender suffering from a diminished mental capacity should receive a reduced sentence, provided the offender poses a minimal danger to society. A fact-specific inquiry best achieves this end by examining the actual risk of the offender's actions.

The Court should interpret or the Commission should amend the diminished capacity provision to provide a fact-specific definition of "non-violent offense." This inquiry should examine whether the offender intended to use or threaten the use of force, and whether the offender's actions constituted a sub-

198. The Commission adopted the departure provisions in part because "it is difficult to prescribe a single set of guidelines that encompass the vast range of human conduct potentially relevant to a sentencing decision." U.S.S.G., *supra* note 2, § 1A4(b).

stantial step towards the use of force. Defining violence in this manner will improve the fairness of the Guidelines and serve the Congressional purpose in creating the Commission by ensuring that dissimilar offenders will not receive similar sentencing under the diminished capacity provision.