DRIFTING AWAY FROM TERRORISM: DOWNWARD DEPARTURE FROM THE TERRORISM ENHANCEMENT IN CASES OF MENTAL ILLNESS

INTRODUCTION

Without understating the gravity of the 9/11 attacks on the Twin Towers of the World Trade Center, today, over fifteen years later, the threat of terrorism is frequently overestimated.[1] Including 9/11, the probability of an American being killed by a terrorist in the United States, is about one in four million per year.[2] Using only post-9/11 data, the probability changes to about one in ninety million per year.[3] For perspective, an American's chance of dying in a car crash is about one in 8,000 a year, the chance of being murdered is about one in 22,000, and the chance of being killed by a deer is one in two million.[4] Regardless of these statistics, roughly forty percent of the public claim that they worry that either they or a family member will become a terrorist victim.[5]

Granted, many Americans may not be aware of the probability of all these events. However, even if they were aware, there is psychological research which explains why the risks of unlikely but frightening events are often overestimated. Maia Szalavitz, a neuroscience journalist, writes that: "Because fear strengthens memory, catastrophes such as earthquakes, plane crashes, and terrorist incidents completely capture our attention. As a result, we overestimate the odds of dreadful but infrequent events and underestimate how risky ordinary events are."[6] Szalavitz notes that the drama and repetition of news coverage of improbable events make them seem more common,[7] thus increasing the perceived risk and its associated fear. When public fears increase, there is a risk

1. *See* John Mueller, *Getting Real on the Terrorism Threat to the United States*, WAR ON THE ROCKS (Aug. 23, 2016), https://warontherocks.com/2016/08/getting-real-on-the-terrorism-threat-to-the-united-states/ [https://perma.cc/S3QS-JNGT]; *see also* John Mueller & Mark G. Stewart, *American Public Opinion on Terrorism Since 9/11: Trends and Puzzles*, Presentation at the Nat'l Convention of the Int'l Studies Ass'n 1 (Mar. 8, 2016), http://politicalscience.osu.edu/faculty/jmueller/tpoISA16.pdf [https://perma.cc/98NR-H62T].

2. Mueller & Stewart, *supra* note 1, at 5.

3. *See id.*

4. *See id.* at 56.

5. *See id.* at 6.

6. Maia Szalavitz, *10 Ways We Get the Odds Wrong*, PSYCHOL. TODAY (updated June 9, 2016), https://www.psychologytoday.com/articles/200801/10-ways-we-get-the-odds-wrong [https://perma.cc/CGH5-LHQB].

7. *See id.*

of falling "victim to the politics of fear,"[8] which may result in irresponsible policymaking. When fears remain at high levels, even over fifteen years after a traumatic event, then there is an even greater risk: continued irresponsible policymaking.[9]

As John Mueller and Mark G. Stewart write: "9/11 clearly has achieved perpetual resonance in the American mind."[10] As a result, Mueller and Stewart contend, the American public suffers from "long-term, routinized, mass anxiety" causing them to live in a false sense of insecurity.[11] Because the threat of terrorism cannot be entirely eliminated and because terrorism has a "special formlessness" and volatility that makes this threat difficult to define, "it may be exceptionally difficult to get people to believe that the threat has really been extinguished—or at least is no longer particularly significant."[12]

With that difficulty comes more problems, particularly the risk that the inability to define terrorism will lead to a vague, over-encompassing definition whose application brings non-traditional terrorism offenders under the "terrorism" umbrella. It has already been seen with environmental activists being labeled "eco-terrorists"[13] and now it can be seen with offenders suffering from mental illness.[14]

This Article argues that mental illness should be a required factor to consider during sentencing when applying the Terrorism Enhancement, and if a defendant suffering from mental illness is found to have been a "vulnerable victim" of another in committing the offense, there should be downward departure. Part I discusses the historical background of the Federal Sentencing Guidelines ("Guidelines") and how they have evolved to their current form. Part II discusses the enactment of the Terrorism Enhancement, how it changed after 9/11, and the specifics of its application as part of such Guidelines. Part III analyzes the use of the Guidelines, including common critiques of the Guidelines and

8. AVIVA STAHL, CAGEPRISONERS, TOO BLUNT FOR JUST OUTCOMES: WHY THE U.S. TERRORISM ENHANCEMENT SENTENCING GUIDELINES ARE UNFAIR, UNCONSTITUTIONAL, AND INEFFECTIVE IN THE FIGHT AGAINST TERRORISM 5 (2016), https://cage.ngo/wp-content/uploads/cp_too_blunt_for_just_outcomes.pdf [https://perma.cc/JL6H-TL5Y].

9. *See* John Mueller, *Getting Real on the Terrorism Threat to the United States*, WAR ON THE ROCKS, (Aug. 23, 2016), https://warontherocks.com/2016/08/getting-real-on-the-terrorism-threat-to-the-united-states/ [https://perma.cc/3EE8-YXCJ].

10. Mueller & Stewart, *supra* note 1, at 1.

11. *Id*. at 1–2.

12. *Id*. at 1.

13. *See* Shane Harris, *The Terrorism Enhancement: An Obscure Law Stretches the Definition of Terrorism, and Metes Out Severe Punishments*, NAT'L J., July 13, 2007, http://shaneharris.com/magazinestories/terrorism-enhancement-obscure-law-stretches-the-definition-of-terrorism-and-metes-out-severe-punishments/ [https://perma.cc/TT3B-A8LJ].

14. *See* Nicole Hong, *Terror Case Highlights Mental-Health Issues Among Suspected ISIS Recruits*, WALL STREET J. (Sept. 7, 2016), http://www.wsj.com/articles/terror-case-highlights-mental-health-issues-among-suspected-isis-recruits-1473270174 [https://perma.cc/97HT-3FDR].

specifically, the Terrorism Enhancement, and identifies provisions for departure. Part III highlights a case with model sentencing dealing with the Terrorism Enhancement and a defendant with mental illness. Lastly, Part IV argues for required consideration of a defendant's mental illness and more relaxed treatment in sentencing for defendants with mental illness identified as a "vulnerable victim" to another in committing the offense.

I. HISTORICAL BACKGROUND: FEDERAL SENTENCING GUIDELINES

A. Procedure

Procedurally, federal sentencing is a multi-step process with many elements at play. First, all federal crimes are grouped according to general offense characteristics and then assigned a base offense level, which serves as a starting point for determining the seriousness, and coinciding sentence, of a particular offense.[15] The guidelines provide forty-three levels of offense seriousness, with higher offense levels indicating more serious crimes.[16] The sentences range from zero-to-six months to life.[17] The forty-three levels are broken into four uneven zones, Zone A through Zone D, with Zone D encompassing the most serious offenses.[18]

In determining a sentence, the Guidelines take into account both the seriousness of an offense and the characteristics of the offender, including criminal history.[19] A base level may change depending on "specific offense characteristics."[20] Specific offense characteristics are offense-dependent factors that can increase or decrease a base offense level.[21] For example, using a firearm during a robbery is an enhancement characteristic that brings along a five-level increase, and if that firearm was discharged during a robbery, it carries a seven-level increase.[22] Additionally, "adjustments" may increase or decrease a base level.[23] Unlike specific offense characteristics, adjustments are not offense-specific; they can apply to any offense.[24]

15. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1 (2016) [hereinafter U.S. SENTENCING COMM'N OVERVIEW], http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf [https://perma.cc/PEK7-AMEV].

16. *Id*.

17. *Id*.

18. U.S. SENTENCING GUIDELINES MANUAL § 5.A (U.S. SENTENCING COMM'N 2016).

19. 18 U.S.C. § 3553(a) (2012).

20. U.S. SENTENCING COMM'N OVERVIEW, *supra* note 15.

21. *Id*. at 1.

22. *Id*.

23. *Id*. at 2.

24. *Id*.

After any addition or subtraction from specific offense characteristics and/or adjustments, the final offense level is determined and it is aligned with the criminal history of an offender to determine the offender's sentencing guideline range.[25] There are six criminal history categories, with the sixth, Category VI, being the most serious and including offenders with serious criminal records.[26] The sentencing guideline range is listed by months of imprisonment.[27]

Once this range is determined, the court may depart downward or upward from the range if aggravating or mitigating circumstances exist.[28] If a judge chooses to depart, he or she must state in writing the reason for doing so.[29]

B. Inception

The Sentencing Reform Act of 1984,[30] played an important role for federal sentencing. Prior to the Sentencing Reform Act, judges had "nearly unfettered" discretion in sentencing and the system was critiqued as "lawless."[31] In response, Congress sought to add more structure to the sentencing system.[32]

Among other things, the Sentencing Reform Act created the U.S. Sentencing Commission ("Commission"), which is an independent agency within the Judicial Branch.[33] The general purpose of the Commission is to establish sentencing guidelines for the federal criminal justice system.[34] In doing so, the Commission's specific purpose is to (1) provide certainty and fairness while meeting the purposes of sentencing,[35] (2) avoid unwarranted sentencing disparities among similar defendants, (3) maintain flexibility to permit individualized sentences, and (4) reflect, to a reasonable extent, advancement in knowledge of human behavior as it relates to the criminal justice process.[36] The creation of the Commission "rested on Congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise

25. U.S. SENTENCING COMM'N OVERVIEW, *supra* note 15, at 2.

26. *Id*.; U.S. SENTENCING GUIDELINES MANUAL § 5.A (U.S. SENTENCING COMM'N 2016).

27. U.S. SENTENCING COMM'N OVERVIEW, *supra* note 15.

28. *Id*.

29. 18 U.S.C. § 3553(c) (2012); U.S. SENTENCING COMM'N OVERVIEW, *supra* note 15.

30. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

31. John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 551 (1993).

32. *Id*.

33. U.S. SENTENCING GUIDELINES MANUAL § 1A.2 (U.S. SENTENCING COMM'N 2016).

34. U.S. SENTENCING GUIDELINES MANUAL § 1A.1(1).

35. Generally speaking, the primary purposes of sentencing are to punish criminals and prevent crimes. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 10 (2006). Beyond that, sentencing has many other specific purposes, including denunciation of wrongful behavior, reinforcement of basic social norms, promoting respect for the law, protecting the public from further crimes, and to provide an offender with effective correctional treatment. *See id.* at 13. *See generally* 18 U.S.C. § 3553(a) (2012).

36. 28 U.S.C. § 991(b)(1) (2012).

sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior."[37]

Even at the outset of the Sentencing Reform Act, Congress recognized that it would be unmanageable for the Commission to anticipate every possible relevant circumstance for sentencing in any case and then provide for them in general, rule-based guidelines.[38] As such, it laid out what a court must consider in sentencing while giving courts an opportunity to consider other extenuating factors. Section 3553(a) explains that:

The court, in determining the particular sentence to be imposed, *shall* consider—

(1) the nature and circumstances of the offense and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote the 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;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established…;

(5) any pertinent policy statement…;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.[39]

Under 28 U.S.C. § 994(d), in establishing categories of defendants for use in the Guidelines, the Commission considers whether the following matters, with respect to a defendant, have any relevance to the nature or extent of an appropriate sentence.[40] If any are relevant, the Commission shall take them into account, but only to the extent that they have relevance.[41] These matters, in relevant part, include: "(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant . . . . ; (9) role in the offense; and (10)

37. UNITED STATES SENTENCING GUIDELINES MANUAL § 1A.2.
38. *Id.* § 1A.1(4)(c).
39. 18 U.S.C. § 3553(a) (emphasis added).
40. 28 U.S.C. § 994(d) (2012).
41. *Id.*

criminal history . . . ."[42] In regard to race, sex, national origin, creed, and socioeconomic status, the Commission and its promulgated Guidelines must remain "entirely neutral."[43]

Additionally, Congress included a provision in the Sentencing Reform Act which said that courts *may* depart from the Guidelines if an aggravating or mitigating circumstance exists, either in kind or degree, that the Commission did not adequately consider and should result in a different sentence.[44] The original Commission intended courts to view the Guidelines as carving out a "heartland" of typical cases which embody the conduct specific to each guideline.[45] When a court is faced with an atypical case—where a particular guideline linguistically applies but the case-specific conduct significantly differs from the norm of the "heartland" cases—the court may consider whether a departure is warranted.[46]

The Guidelines specifically provide that mental and emotional conditions may be relevant factors justifying departure.[47] Such conditions *may* be relevant if, they "individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the [G]uidelines."[48] Additionally, a court may depart if it determines that a circumstance, although already taken into consideration in determining the sentencing range, is present to a degree substantially in excess of or below the typical amount for that kind of offense.[49] Although the Guidelines provide specific guidance for departures in certain circumstances, departure on grounds not mentioned in the Guidelines also is permitted.[50]

C. Evolution

1. *United States v. Booker*

In the 2005 case, *United States v. Booker*, the Supreme Court struck down the then-mandatory Federal Sentencing Guidelines, instead making them advisory.[51] As originally written, the Guidelines were binding on all judges.[52] Before *Booker*, courts held that the Guidelines were mandatory, thus limiting

42. *Id*.
43. *Id*.
44. U.S. SENTENCING COMM'N, *supra* note 15, at 3.
45. U.S. SENTENCING GUIDELINES MANUAL § 1A.1(4)(b) (U.S. SENTENCING COMM'N 2016).
46. *Id*.
47. *Id*. § 5H1.3.
48. *Id*.
49. *Id*. § 5K2.0(a)(3).
50. U.S. SENTENCING GUIDELINES MANUAL § 1A.4(b).
51. 543 U.S. 220, 226 (2005).
52. *Id*. at 233. The Court in *Booker* wrote, "[w]e do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system." *Id.* at 266.

the severity of a sentence that a judge could lawfully impose.[53] Even though in their original form the Guidelines permitted departures from a prescribed sentencing range, in *Booker*, the Court found that, "[i]n most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible."[54] The Commission itself even believed, "that despite the courts' legal freedom to depart from the [G]uidelines, they will not do so very often."[55]

In finding the ability to depart from the Guidelines limited in opportunity, *Booker* examined whether mandatory sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial.[56] The Court recognized that the Guidelines' systematic application brought efficiency and expediency, but it noted that such systemic application was at the cost of a defendant's Sixth Amendment rights.[57] If mandatory, the sentencing scheme would interfere with a defendant's right to a jury trial because a judge could impose a sentence that is not solely based on jury-found facts or those the defendant admits.[58]

Further, *Booker* concluded that although Congress intended the Guidelines to be mandatory, it would have preferred a system that was not mandatory over a system that simply consisted of similar sentences for those convicted of violation of the same statute.[59] The Court explained that the uniformity that Congress aimed for in passing the Federal Sentencing Act was not merely in similar sentences for those convicted of violations of the same statute, but rather should emanate with similar relationships between sentences and real conduct.[60]

Under *Booker*, since the Guidelines became advisory, a court is not bound to apply them even though it still must consult the Guidelines and take them into account.[61] This has given courts more discretion to depart from the previously mandatory Guidelines. However, while courts have the ability to depart from the Guidelines, in doing so, they also depart from the uniformity and ease that comes from a straightforward, almost mathematical, application of the Guidelines, instead vying with the grey cloud that hovers above discretion. This discretion is not unchecked; an appellate court can review a trial court's departure from the Guidelines, thereby subjecting it to a review for unreasonableness.[62]

The *Booker* Court found that because a trial court must still consult the Guidelines and its decision is subject to a review for unreasonableness, the

53. *Id*. at 226.
54. *Id*. at 234.
55. U.S. SENTENCING GUIDELINES MANUAL § 1A.4(b).
56. *See Booker*, 543 U.S. at 233.
57. *Id*. at 244.
58. *Id*. at 232.
59. *Id*. at 253–54.
60. *Id*.
61. *Booker*, 543 U.S. at 264.
62. *Id*. at 264.

Guidelines, while lacking the mandatory status as enacted, still furthered the objectives that Congress originally intended.[63] The Court wrote that these two checks "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."[64] The Commission itself has noted a similar rationale, saying that an advisory Guidelines system continues to ensure transparency and to promote certainty and predictability in sentencing, which enables parties to better anticipate a likely sentence.[65]

In the wake of *Booker*, before any further interpretation,[66] chaos ensued in the courtroom—both at trial and appellate levels.[67] At the trial level, judges once again could utilize their judicial discretion to either follow the Guidelines to enhance the goals of uniformity and fairness or to opt for a more nuanced approach, pushing toward the creation of a "common law of sentencing."[68]

At the appellate level, *Booker* created uncertainty about the respective roles of appellate and trial courts.[69] Because the trial courts now possessed greater discretion, albeit not completely unfettered, the role of appellate review had the potential to decrease significantly. Therefore, it was left to the Supreme Court in post-*Booker* cases to more precisely carve out the role for appellate review.

2. Supreme Court Cases Post-*Booker*: 2007

After *Booker*, in a trio of 2007 cases, the Supreme Court continued to stress the importance of considering the Guidelines, while maintaining the position that the Guidelines were not mandatory. *Rita v. United States* explained that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.[70] Additionally, in *Rita*, the Court held that an appellate court may apply a presumption of reasonableness when reviewing a district court sentence which "reflects a proper application of the Sentencing Guidelines."[71]

In *Kimbrough v. United States*, the Court concluded that a judge "must include the Guidelines range in the array of factors warranting consideration."[72] However, *Kimbrough* maintained the advisory notion of the Guidelines in saying

63. *Id*.

64. *Id*. at 264–65.

65. U.S. SENTENCING GUIDELINES MANUAL § 1A.2 (U.S. SENTENCING COMM'N 2016).

66. *See supra* Section I.C.2.

67. George D. Brown, *Notes on a Terrorism Trial: Preventive Prosecution, "Material Support" and the Role of the Judge After* United States v. Mehanna, 4 HARV. NAT'L SECURITY J. 1, 45 (2012).

68. *Id.*

69. *Id.*

70. 551 U.S. 338, 347 (2007).

71. *Id*.

72. 552 U.S. 85, 91 (2007).

that a "judge may determine whether, in a particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing."[73]

Gall v. United States explained, "[T]o secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."[74] *Gall* also held that the district judge should consider all of the statutory factors of 18 U.S.C. § 3553(a) to determine if a sentence is supported.[75] *Gall* further explained that a district court should not presume that the sentencing range from the Guidelines is reasonable.[76] Rather, a district court judge must make an "individualized assessment based on the facts presented."[77] After doing so, a judge can sentence outside the Guidelines, but must consider the "extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variance."[78] The Court found it "uncontroversial" that the larger the departure from the Guidelines, the more support needed to justify it.[79]

Gall specifically showed strong support for the importance of the Guidelines, while keeping them advisory. In discussing an appellate court's review, *Gall* held that a sentence is procedurally unreasonable if the sentencing court committed such errors as "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence."[80] If the appellate court finds the district court's sentencing decision to be procedurally sound, then it considers the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.[81]

Although it is well-recognized that the Guidelines are advisory, post-*Booker* cases have maintained the significant influence of the Guidelines, both in sentencing at the trial level and at the appellate level.[82] The fact that a trial judge must begin the sentencing process with the Guidelines and an appellate judge can declare a sentence procedurally unsound based on Guidelines calculations illustrates mandatory-like characteristics. However, there are advisory-like characteristics to offset these, such as an appellate judge's ability to declare a sentence procedurally unsound if a trial judge treats the Guidelines as mandatory. Overall, the Guidelines have sustained a position as well-regarded

73. *Id*. (quoting 18 U.S.C. § 3553(a) (2012)).
74. 552 U.S. 38, 49 (2007).
75. *Id*. at 49–50.
76. *Id*. at 50.
77. *Id*.
78. *Id*.
79. *Gall*, 552 U.S. at 50 (2007).
80. *Id*. at 51.
81. *Id*.
82. George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J. L. & PUB. POL'Y 517, 529 (2014).

and play a key role in sentencing, while remaining advisory. The sentencing system appears to be in a cloudy, substantial state of flux.[83]

II. CONTINUING ON POST-*BOOKER*: FOLLOW-UP AFTER 2007

In 2013, *Peugh v. United States*[84] continued to push back on the advisory nature of the Guidelines, swinging toward the viewpoint of the Guidelines as mandatory in nature.[85] Although support for mandatory Guidelines was not directly on the face of the case,[86] the *Peugh* decision supported the view that the Guidelines are very close to law, and it enhanced the already significant role that they play.[87] It elevated the pro-mandatory theme illustrated in the trio of post-*Booker* Supreme Court cases from 2007.[88] In summarizing the post-*Booker* era, the Court in *Peugh* wrote that: "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."[89]

The *Peugh* Court highlighted the vital role of the Guidelines, downplaying their advisory status.[90] *Peugh* held that since previous opinions established a district court must begin sentencing by correctly calculating the applicable guidelines range,[91] even if the eventual sentence varies from the Guidelines, *the Guidelines are "in a real sense the basis for the sentence" because they were used from the outset.*[92] Even though a district court can ultimately sentence a defendant outside the Guidelines range, this does not deprive the Guidelines of their role as the primary force behind the framework for sentencing.[93] Additionally, the Court in *Peugh* noted that the appellate review for reasonableness continues to use the Guidelines as a benchmark in order to promote uniformity and "iron out sentencing differences."[94]

In *Peugh*, Justice Sotomayor, writing for the majority, highlighted the background for the Guidelines in saying that: "The Commission produced the now familiar Sentencing Guidelines: a system under which a set of inputs

83. *Id*.

84. 133 S. Ct. 2072 (2013).

85. Brown, *supra* note 82, at 531.

86. In fact, the Court notes that treating the Guidelines as mandatory is a procedural error. *Peugh*, 133 S. Ct. at 2080.

87. Brown, *supra* note 82, at 529 (quotations omitted).

88. *Id.* at 532.

89. *Peugh*, 133 S. Ct. at 2083.

90. *Id.*

91. Rita v. United States, 551 U.S. 338, 347 (2007).

92. *Peugh*, 133 S. Ct. at 2083 (emphasis added) (quoting Freeman v. United States, 564 U.S. 522, 529 (2011)).

93. *Peugh*, 133 S. Ct. at 2083.

94. *Id.* (quoting Booker v. United States, 543 U.S. 220, 264 (2005)).

specific to a given case (the particular characteristics of the offense and offender) yielded a predetermined output (a range of months within which the defendant could be sentenced)."[95] The Guidelines are categorized as a relatively simple mathematical equation with inputs and outputs. While the Court in *Peugh* noted that the particular characteristics of an offense and offender are inputs, the output is described as "predetermined,"[96] because the inputs of particular characteristics of offenses and offenders come from the Guidelines themselves, which, by nature, cannot account for all possible applicable particular characteristics unique to the defendant or the circumstances of the offense.[97]

Overall, *Peugh* supported the notion that the Guidelines represent an "authoritative view of the appropriate sentences for specifics crimes"[98] and that the federal sentencing system itself implements measures intended to make the Guidelines the "lodestone of sentencing."[99] Between *Peugh* and the other post-*Booker* cases, the proposition that the Guidelines are "advisory" in nature appears questionable.

III. THE TERRORISM ENHANCEMENT

A. Original Enactment

In the Violent Crime Control and Law Enforcement Act of 1994, Congress instructed the Commission to "amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime."[100] In response, the Commission enacted § 3A1.4 of the Guidelines.[101]

Section 3A1.4, known as the Terrorism Enhancement, is a sentencing enhancement which applies if "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism."[102] A federal crime of terrorism is defined in two parts.[103] First, the definition requires an offense that is "calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct."[104] Second,

95. *Peugh*, 133 S. Ct. at 2079.
96. *Id.*
97. 18 U.S.C. § 3553(a) (2012).
98. *Peugh*, 133 S. Ct. at 2085.
99. *Id.* at 2084.
100. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022.
101. Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 499 (2014).
102. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (U.S. SENTENCING COMM'N 2016).
103. 18 U.S.C. § 2332b(g)(5)(B) (2012).
104. *Id*.

the offense must be a violation of at least one of a lengthy list of specifically enumerated statutes.[105]

B. The Patriot Act Amendment

Upon passing the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), Congress authorized a noteworthy amendment to § 3A1.4.[106] Under the Patriot Act amendment, the Terrorism Enhancement became applicable to crimes that involved terrorism, but otherwise did not fall within the federal crime of terrorism definition.[107] As a result, even if an offense is not listed in the second part of the definition of a federal crime of terrorism under § 2332b(g)(5)(B), the defendant can still be subject to the Terrorism Enhancement so long as "the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[108] Essentially, the amendment made it possible for the Terrorism Enhancement to apply to *any* criminal act so long as the requisite intent was present.

Even more so, the Patriot Act amendment stretched the Terrorism Enhancement to encompass more crimes. Following the Patriot Act amendment, the Terrorism Enhancement covered offenses from the list of offenses under § 2332b(g)(5)(B) although such offenses are not calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, but rather are calculated to, "intimidate or coerce a civilian population."[109]

C. Applying the Terrorism Enhancement

If a court applies the § 3A1.4 Terrorism Enhancement, the minimum sentencing range a convicted defendant would face is 210–262 months, which is the Guidelines' sentencing table calculation for a Level 32 offense with a Category VI criminal history.[110] To visualize, consider this: after the Terrorism Enhancement is applied, the sentencing range for a Level 12 base offense jumps from ten–sixteen months (at most a little over a year) to 210–262 months (at most almost twenty-two years).[111] Although the *Booker* decision categorizes the Guidelines as advisory and therefore provides the courts with the potential to blunt the sharp effect of a § 3A1.4 enhancement, the sentencing still remains

105. *Id*.; *see also* Said, *supra* note 101, at 499.
106. Said, *supra* note 101, at 500.
107. *Id*.; *see also* U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.4.
108. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n. 4.
109. *Id*. (emphasis added).
110. U.S. SENTENCING GUIDELINES MANUAL § 5A.
111. *Id*.

subject to the discretion of district court judges[112] and Supreme Court trends, which uphold strong support for the Guidelines.[113]

If the Terrorism Enhancement under § 3A1.4 applies, the convicted defendant's sentencing level is subject to a twelve level enhancement and if, after such enhancement, the resulting offense level is less than thirty-two, it is automatically adjusted upward to Level 32.[114] In other words, if an offender's crime is initially a base offense level less than 20, then, in applying the Terrorism Enhancement, the offense level is immediately increased to Level 32; if the offender's crime has a base level at or above 20, twelve levels are added.[115] Although it is possible for this calculation to result in less than a life sentence, practically speaking, the application of the Terrorism Enhancement is likely to result in life imprisonment.[116]

Additionally, under the Terrorism Enhancement, the defendant's criminal history is automatically a Category VI, the highest category, regardless of the defendant's actual criminal history.[117] Ironically, in making the Guidelines, the Commission must take criminal history into account, to the extent it is relevant,[118] but, in applying the Terrorism Enhancement, since criminal history is automatically Category VI, criminal history cannot be a factor at all for a sentencing judge, regardless of its relevancy.

IV. ANALYZING THE USE OF THE SENTENCING GUIDELINES

A. Evaluating Both Sides of the Guidelines

From the outset, critics have described the Guidelines as "administrative handcuffs" for judges.[119] Before the introduction of the Guidelines, sentencing lacked uniformity. The Guidelines aspired to create uniformity and eradicate the effects of "discrimination, judicial idiosyncrasies, and biases in order to promote fairness and justice."[120] Although aimed at uniformity, the Guidelines have been criticized as taking "away the human element from the sentencing process," and instead inserting "clean, sharp edges of a sentencing slide rule."[121] The Guidelines, while aimed at the valiant goal of uniformity in sentencing, have

112. Said, *supra* note 101, at 501.

113. *Peugh*, 133 S. Ct. at 2084.

114. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4.

115. STAHL, *supra* note 8, at 9.

116. Brown, *supra* note 67, at 48.

117. STAHL, *supra* note 8, at 9.

118. 28 U.S.C. § 994(d) (2012).

119. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1697 (1992).

120. Rachael A. Hill, *Character, Choice, and "Aberrant Behavior": Aligning Criminal Sentencing with Concepts or Moral Blame*, 65 U. CHI. L. REV. 975, 975 (1998).

121. Walker, Jr., *supra* note 31, at 552.

seemed to overstep their bounds into tight rigidity, giving similar sentences to cases with important distinctions.[122] The legal norms that the Guidelines purport to implement cannot, and do not, perfectly represent moral intuitions because, by their very nature, moral intuitions vary according to facts and circumstances.[123] Therefore, the Guidelines can inherently result in sentences more severe than society's moral intuitions call for in certain situations.[124]

"Critics contend that the Guidelines virtually abolish consideration of the defendant's character and, instead, require judges to sentence based largely upon the offense rather than the offender."[125] On the other hand, supporters maintain that some elimination of a defendant's personal characteristics—such as race and economic status—contribute to making the Guidelines fair.[126] Remaining neutral toward these characteristics helps to limit sentencing disparities.[127] In initially creating the Guidelines, the Commission sought to narrow judges' discretion and "eliminate the disparities in sentencing that seemed to plague federal courts."[128] While a plaguing amount of disparities in sentencing can certainly pose an issue, the Guidelines have caused judges and prosecutors to lose their ability to effectuate justice in individual cases due to their "allegiance to rigid rules."[129] Overall, the Guidelines aimed to meet aspirational goals; however, in attempting to do so, they contemporaneously created many additional problems which judges grapple with today.

B. Critiquing the Application of the Terrorism Enhancement

Many elements of the Terrorism Enhancement create reason for alarm. It is well noted, and in fact fundamental to the purpose of an enhancement in general, that it can drastically increase a sentence. Over seven percent of terrorism cases result in life sentences, which is three times the rate of generic criminal cases.[130] The automatic Category VI criminal history plays an important role in the resulting high sentences. Since criminal history is automatically Category VI, an offender's actual criminal history cannot be a factor at all, regardless of

122. Hill, *supra* note 120, at 975.

123. *Id.* at 977–81.

124. *Id.* at 975.

125. Walker, Jr., *supra* note 31, at 558.

126. 28 U.S.C. § 994(d) (2012); Ken LaMance, *Advantages of Federal Sentencing*, LEGALMATCH L. LIBRARY (July 8, 2015), http://www.legalmatch.com/law-library/article/advantages-of-federal-sentencing-guidelines.html [https://perma.cc/B26Q-NUMH].

127. LaMance, *supra* note 126.

128. STAHL, *supra* note 8, at 7.

129. Freed, *supra* note 119, at 1684.

130. Joanna Baltes et al., *Convicted Terrorists: Sentencing Considerations and Their Policy Implications*, 8 J. NAT'L SECURITY L. & POL'Y 347, 356 (2016).

relevancy, for a sentencing judge.[131] Offenders without a criminal history must suddenly be credited with one.

Judges have found the criminal history impact of the Terrorism Enhancement troublesome. For example, Judge George O'Toole, a U.S. District Court Judge for the District of Massachusetts, was concerned about the unfairness of the predetermined criminal history.[132] Judge O'Toole expressed his concern saying that, "the automatic assignment of the defendant to a Criminal History Category VI . . . is not only too blunt an instrument to have genuine analytical value, it is fundamentally at odds with the design of the Guidelines. It can, as it does in this case, import a *fiction* into the calculus."[133] As a result, Judge O'Toole chose to disregard the Terrorism Enhancement in sentencing.[134] Similarly, Judge Daniel Crabtree, a U.S. District Court Judge for the District of Kansas, has found the automatic criminal history element of the Terrorism Enhancement to be unsettling, especially for offenders without any prior criminal history.[135] Beyond that, Judge Clay D. Land, a U.S. District Court Judge for the Middle District of Georgia, observed that a three category increase from the offender's actual Category III criminal history to Category VI was still worrisome.[136] Judge Land found that the automatic increase under the Terrorism Enhancement "ignores the individual 'history and characteristics' of the Defendant, and instead places too much weight on a questionable interpretation of what constitutes a federal crime of terrorism under the Guidelines."[137] As such, he opted not to apply the Terrorism Enhancement because he could not justify its application, instead finding it "excessive."[138]

In summary, the Terrorism Enhancement reflects Congress's effort to accurately compensate for the severity that society associates with terrorism.[139] However, this "one size fits all" approach, which grants one criminal history to all offenders, risks backlash from judges who choose to refuse to consider the Terrorism Enhancement because it is too severe.[140] While some judges recognize the propensity for the automatic criminal history to create overly harsh sentences and take measures to avoid such a result, not all judges may feel this way or even feel willing to disagree with the Guidelines, although it is in their

131. 28 U.S.C. § 994(d) (2012).

132. Baltes et al., *supra* note 130, at 356 (citing United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013)).

133. *Id.* (emphasis added).

134. Brown, *supra* note 67, at 5 (citing Transcript of Disposition at 69, United States v. Mehanna, 735 F.3d 32 (D. Mass. 2012), No. 09—cr-10017-GAO). The Circuit Court affirmed Judge O'Toole's holding. *Mehanna*, 735 F.3d at 69.

135. *See infra* notes 217–19.

136. United States v. Garey, 383 F. Supp. 2d 1374, 1379 (M.D. Ga. 2005).

137. *Id.*

138. *Id.* at 1380.

139. Brown, *supra* note 67, at 8.

140. *Id.*

power to do so. There is a risk that judges will feel obligated to apply the Terrorism Enhancement anyways or decide that the problematic nature of the criminal history element is not enough to disregard the Terrorism Enhancement all together.

Additionally, critics contend that the use of the automatic Category VI criminal history undermines the fundamental purposes for which the Guidelines were established in the first place: fairness and equality.[141] Without recognizing an offender's actual criminal history and instead imputing a level of criminality, an offender with a serious criminal history is treated the same as one with a clean past. It is unfair that someone who has managed to stay out of trouble is treated the same as someone who has not only failed to do so, but has failed multiple times to do so. Also, as a result of the automatic criminal history component of the Terrorism Enhancement, criminal history is not given equal opportunity for consideration in sentencing. In some contexts, such as diminished capacity, the seriousness of a defendant's criminal history can prohibit a judge from departure.[142] Therefore, a serious actual criminal history can hurt an offender, however, in the context of the Terrorism Enhancement, a less serious, sometimes non-existent, criminal history cannot help an offender.

Critics of the Terrorism Enhancement also fear that consistent application would essentially create a mandatory minimum sentence for terrorism offenses,[143] of which there are many, with some not even statutorily terrorism but still falling under the purview of the Terrorism Enhancement.[144] Mathematically, the combination of a high base offense level (Level 32) and the highest criminal history category (Category VI) ensures this minimum sentence result.[145] In response, legal scholars have described the Terrorism Enhancement as "draconian" and as a cause of disproportionate sentencing because it treats a wide range of crimes alike.[146] In doing so, the Terrorism Enhancement compromises the "gradation of offenses" in that a terrorist is a terrorist regardless of the underlying crime.[147] Essentially, it takes away the ability to differentiate among terrorists who commit different crimes.[148]

141. STAHL, *supra* note 8, at 16.

142. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (U.S. SENTENCING COMM'N 2016); *infra* Section III.C.2.

143. U.S. SENTENCING GUIDELINES MANUAL § 5A; Brown, *Punishing Terrorists*, *supra* note 82, at 533.

144. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.4; Said, *supra* note 101, at 499.

145. U.S. SENTENCING GUIDELINES MANUAL § 5A; Brown, *Punishing Terrorists*, *supra* note 82, at 533.

146. Brown, *Notes on a Terrorism Trial*, *supra* note 67, at 48 (citing James P. McLaughlin, *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 L. & INEQ. 51, 51, 54 (2010)).

147. *Id.* at 54.

148. *Id.*

More critiques arise beyond the Terrorism Enhancement's automatic criminal history feature and its potential for a high mandatory minimum sentence, both of which contribute to its ability to drastically increase a sentence. For one, as a result of the Patriot Act amendment, sentencing judges can apply the Terrorism Enhancement even if a defendant was not convicted of a terrorism act per se.[149] Thus, judges maintain wide-ranging power and expanded discretion in sentencing because even if a defendant cannot be linked to a specific act of terrorism, the Terrorism Enhancement and its heightened sentence can still apply.[150]

With that, the already vague and broad definition of a "federal crime of terrorism" became vaguer and far more expansive. Congress attempted to turn terrorism into a legal term "operationalized through precise legal provisions," but in doing so, it may have taken on a near impossible challenge because no consensus on the definition of terrorism exists.[151] In defining "federal crime of terrorism" in 18 U.S.C. § 2332b(g)(5)(B), Congress chose its own challenge, and instead of truly identifying what it sought to punish, Congress opted to vaguely seek "tougher sentences for a range of existing crimes when they were motivated by terrorist impulses."[152]

Critics have also observed that the Terrorism Enhancement has problematic purposes behind its problematic effects.[153] It has been noted that the drastically enhanced sentences in terrorism cases are problematic because they are often used to send overly harsh messages, more so than the deterrence message illustrated in typical criminal cases.[154] Additionally, critics of the Terrorism Enhancement have discerned that it can be used as a "bargaining chip" to strong-arm a desired result.[155] At times, the government will recommend a reduced sentence because of cooperation, and at other times, if a defendant defaulted on his/her agreement to cooperate, then the government chooses to seek the Terrorism Enhancement.[156] Such a use poses a major issue because in determining who is and who is not treated as a terrorist, policy and principle may not always be at the forefront of the government's decision.[157] The government's motive behind such use of the Terrorism Enhancement does not squarely aim to

149. Harris, *supra* note 13.

150. STAHL, *supra* note 8, at 10.

151. Michael Buchhandler-Raphael, *What's Terrorism Got to Do with It? The Perils of Prosecutorial Misuses of Terrorism Offenses*, 39 FLA. ST. U. L. REV. 807, 813 (2012).

152. Harris, *supra* note 13.

153. Baltes et al., *supra* note 130, at 358; Harris, *supra* note 13.

154. Baltes et al., *supra* note 130, at 358.

155. Harris, *supra* note 13.

156. *Id.*

157. *Id.*

punish terrorism,[158] it puts conditions on doing so and, at times, is punishing a lack of cooperation more so than punishing terrorism.

C. Accounting for Vulnerability and Mental Condition in the Guidelines

Knowing that the rules provided for in the Guidelines could not possibly account for every situation, the Guidelines were supplemented with potential deviations from explicit sentences and the judicial discretion to execute them.[159] As such, it is evident that the Guidelines, alongside its quest for uniformity, sought to accomplish more than punishment for criminal conduct.[160] Numerous provisions of the Guidelines account for vulnerability, mental capacity, blameworthiness, and mental and emotional conditions.

1. The Vulnerable Victim Enhancement

The Terrorism Enhancement of § 3A1.4 is not the only enhancement of the sentencing guidelines; it is one of many. Under § 3A1.1, another enhancement, known as the Vulnerable Victim Enhancement, allows for a two-level increase in an offense level if a defendant "knew or should have known that a victim of the offense was a vulnerable victim."[161] Under the enhancement, "vulnerable victim" is defined as a person "who is a victim of the offense of conviction and any conduct for which the defendant is accountable," and who is "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct."[162] However, there is nothing in the Guidelines that specifically calls for the downward departure or reduction in sentence for *offenders* who are "unusually vulnerable due to age, physical or mental condition, or . . . otherwise particularly susceptible to the criminal conduct" and are not the main perpetrator of an offense.[163]

2. Diminished Capacity

Another circumstance for which the Guidelines warrant deviance from the base level sentencing is for diminished capacity.[164] The Guidelines provide that "a downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense."[165] The Guidelines define "significantly reduced

158. *Id.*
159. Hill, *supra* note 120, at 980.
160. *Id.*
161. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (U.S. SENTENCING COMM'N 2016).
162. *Id.* § 3A1.1 cmt. n.2.
163. *Id.*
164. *Id.* § 5K2.13.
165. *Id.*

mental capacity" to mean that a defendant has a "significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful."[166] If a judge finds that a departure is warranted for diminished capacity, the extent of the departure should reflect the degree to which the reduced mental capacity contributed to the commission of the offense.[167]

The four exceptions[168] for downward departure for diminished capacity preclude departure in many cases, and, within the limited number of cases where departure is not precluded by such limitations, trial courts have not often departed downward.[169] Moreover, some courts have maintained that considering the diminished capacity departure is evidence that the Commission has adequately considered circumstances for downward departure relating to mental conditions, and thus disqualifying mental conditions from consideration for departure under § 5K2.0 of the Guidelines.[170] Such a holding raises the concern that mental conditions will not receive adequate consideration on their own without being linked to an explicit provision of the Guidelines which account for them, such as the provision for diminished capacity.

3. Aberrant Behavior

The Guidelines also allow for departure in cases of aberrant behavior.[171] In order to qualify for the departure for aberrant behavior, a defendant must have committed a single criminal offense that "(1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life."[172] The aberrant behavior departure does not apply to certain named offenses.[173] It also does not apply if

166. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13. cmt. n.1.

167. *Id.* § 5K2.13.

168. *Id.*

169. Andrew M. Campbell, Annotation, *Downward Departure Under § 5K2.13 of United States Sentencing Guidelines (U.S.S.G.) Permitting Downward Departure for Defendants with Significantly Reduced Mental Capacity Convicted of Nonviolent Offenses*, 128 A.L.R. Fed. 593 Art. 1 § 2(a) (1995).

170. *See* United States v. Dillard, 975 F.2d 1554, 1555 (8th Cir. 1992). Section 5K2.0 of the Guidelines allows a court to depart if it determines that a circumstance, although already taken into consideration in determining the sentencing range, is present to a degree substantially in excess of or below the typical amount for that kind of offense. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(3).

171. U.S. SENTENCING GUIDELINES MANUAL § 5K2.20.

172. *Id.* § 5K2.20(b).

173. *Id.* § 5K2.20(a). The named offenses include offenses involving a minor victim, sex trafficking of children, and all offenses in the following chapters: Chapter 71 (Obscenity), Chapter 109A (Sexual Abuse), Chapter 110 (Sexual Exploitation and Other Abuse of Children), and Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes). *Id. See generally* 18 U.S.C. §§ 1460–70 (2012) (Obscenity); 18 U.S.C. §§ 2241–48 (2012) (Sexual Abuse); 18 U.S.C.

certain offense characteristics are present under the circumstances, including serious bodily injury, death, use of a firearm, and drug trafficking.[174] Lastly, the departure cannot apply if certain offender characteristics are present, including criminal history level and past convictions.[175]

In determining whether or not to depart under the Guidelines' aberrant behavior departure, a sentencing judge may consider aspects of a particular defendant, including mental and emotion conditions, employment record, record of prior good works, motivation for committing the offense, and efforts to mitigate the effects of the offense.[176] In part, mental conditions are factored into aberrant behavior departures because many mental conditions cause those affected to be unable to perceive the consequences or likely outcome of their actions. Logically, the inability to perceive consequences may be present in the commission of a crime which "(1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life."[177] The aberrant behavior departure allows for departure based on mental condition and indicates another area in which the Guidelines provide for lessening in sentencing where vulnerability and lack of moral culpability may be present.

4. Inadequacy of Criminal History Category

Section 4A1.3, which allows for departure based on criminal history, indicates that the Guidelines concede that a particular defendant's criminal history may be an inadequate indicator of either the seriousness of the defendant's criminal history or the defendant's likelihood to commit other crimes.[178] For example, a defendant who was previously sentenced under lenient treatment but has a record with an extensive record of serious, assaultive conduct might have the same criminal history category as a defendant with a record of less serious conduct.[179] The inadequacy in criminal history may be remedied by an upward departure or a downward departure, depending on if the defendant's criminal history is under-representative or over-representative of seriousness and likelihood to recidivate.[180]

Prohibitions on downward departure for this basis exist if the defendant is an armed career offender or a repeat and dangerous sex offender.[181]

§§ 2251–60A (2012) (Sexual Exploitation and Other Abuse of Children); 18 U.S.C. §§ 2421–28 (2012) (Transportation for Illegal Sexual Activity and Related Crimes).

174. U.S. SENTENCING GUIDELINES MANUAL § 5K2.20(c).

175. *Id.*

176. *Id.* § 5K2.20 cmt. n.3.

177. *Id.* § 5K2.20(b).

178. *Id.* § 4A1.3.

179. U.S. SENTENCING GUIDELINES MANUAL § 4A1.3.

180. *See id.*

181. *Id.* § 4A1.3(b)(2)(B).

Additionally, it is prohibited to downward depart below Category I, the lowest criminal history category.[182] However, under the Guidelines, a court can technically depart upward from Category VI, even though Category VI is the highest criminal history category.[183] In doing so, a court structures the departure by moving along the sentencing table to the next higher offense level, while staying in the Category VI column, until it reaches an appropriate guideline range.[184]

Overall, the policy behind § 4A1.3 supports the notion that sentencing should adequately and accurately reflect the blameworthiness of the offender. As such, if a defendant's criminal history—which plays a vital role in determining a sentence, especially with regard for the Terrorism Enhancement—does not adequately and accurately reflect the offender's blameworthiness, a court has the means to adjust accordingly in order to reach just punishment.

V. THE TERRORISM ENHANCEMENT IN CASES WITH MENTAL ILLNESS: *UNITED STATES V. BLAIR*

A. Facts and Outcome

In *United States v. Blair*,[185] the twenty-nine-year-old defendant, Alexander Blair ("Blair"), pled guilty to conspiracy[186] after lending $100 to friend and prospective terrorist, John Booker, Jr. ("Booker"), so that Booker could rent a storage locker to hold what Booker believed were bomb-making materials.[187] Blair suffered from a genetic condition called Williams syndrome.[188] Blair's attorney, Christopher Joseph, commented that the condition made him "easily manipulated and unable to appreciate the gravity of his conduct."[189] In explaining the effects of Williams syndrome, the defense expert testified that it caused Blair to function at the level of an eleven-year-old.[190] In their statement, the Blair family explained that Williams syndrome affects many aspects of

182. *Id.* § 4A1.3(b)(2)(A).

183. *Id.* § 4A1.3(a)(4)(B).

184. U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(a)(4)(B).

185. Criminal Complaint at 1–3, United States v. Blair, No. 5:15-cr-40031-DDC, (D. Kan. Oct. 20, 2016), ECF 1.

186. Judgment in a Criminal Case at 1, United States v. Blair, No. 5:15-cr-40031-DDC (D. Kan. Oct. 20, 2016), ECF 61.

187. Hong, *supra* note 14.

188. *Id.*

189. United States vs. Alexander Blair *Sentencing*, JOSEPH, HOLLANDER, & CRAFT, LLC: LAWYERS AND COUNSELORS (Oct. 18, 2016), https://josephhollander.com/united-states-vs-alexander-blair/ [https://perma.cc/TE7L-YJ9X].

190. *Id.*

physical health, mental health, and decision making.[191] The U.S. National Library of Medicine concurs, saying that Williams syndrome affects many parts of the body, and it also notes that affected individuals tend to take an extreme interest in other people.[192]

Going back to as early as October 2014, Booker had been communicating his desire to join the Islamic State of Iraq and the Levant ("ISIL") to a person who, unbeknownst to Booker, was an FBI informant.[193] Booker was committed to carrying out an act of violence in support of Jihad and even took steps to build a bomb, planning to detonate it on the Fort Riley Military Institution.[194] Blair first met Booker in early 2015 after he began attending the Islamic Center of Topeka.[195] After developing a friendship, Blair became aware of Booker's radical beliefs and plan to commit an act of violence.[196] In March 2015, Blair loaned Booker $100 to rent a storage unit, which Booker used for storing what he believed to be bomb materials.[197] FBI informants, whose real motives and alliance were still unbeknownst to Booker, worked with him to build what Booker believed to be a workable bomb and then even accompanied him to a place to detonate the inert device, where Booker was subsequently arrested.[198] Immediately following his arrest, FBI agents contacted and interviewed Blair.[199] In the interview, Blair explained that he did not like what Booker was doing and made it clear to Booker that he would not personally participate—he simply thought of his $100 loan as helping out a friend in need.[200]

At trial, the Assistant U.S. Attorney urged the district court judge, Judge Daniel D. Crabtree, to sentence Blair to five years in prison,[201] the statutory maximum for conspiracy.[202] Contrarily, Blair's attorney urged for Judge

191. *Blair Family Statement*, JOSEPH, HOLLANDER, & CRAFT, LLC: LAWYERS AND COUNSELORS (Oct. 18, 2016), https://josephhollander.com/wp-content/uploads/2016/10/Blair-Family-Statement-If-Sentenced-to-Prison.pdf [https://perma.cc/76GZ-4RPL].

192. *Williams Syndrome*, U.S. NAT'L LIBR. OF MED.: GENETICS HOME REFERENCE (Feb. 14, 2017), https://ghr.nlm.nih.gov/condition/williams-syndrome [https://perma.cc/MRB6-CJLZ].

193. Factual Basis for Plea to Count One at 1, United States v. Blair, No. 5:15CR40031-DDC (D. Kan. May 5, 2016), ECF 40.

194. *Id.* at 1–2.

195. *Id.* at 2.

196. *Id.* at 2–3.

197. *Id.* at 3.

198. Hong, *supra* note 14.

199. Factual Basis for Plea to Count One at 3, U.S. v. Blair, No. 5:1515CR40031-DDC (D. Kan. May 5, 2016), ECF 40.

200. *Id.* at 7. Blair commented, in relation to Booker's plan, "Did I like it, no, I didn't. But, he asked me for help, I helped him." *Id.* at 5.

201. *Topeka Man Sentenced for Conspiracy in Fort Riley Bomb Plot*, U.S. DEP'T OF J. DIST. KAN. (Oct. 18, 2016), https://www.justice.gov/usao-ks/pr/topeka-man-sentenced-conspiracy-fort-riley-bomb-plot [https://perma.cc/5E64-CYYK].

202. 18 U.S.C. § 371 (2012).

Crabtree to sentence Blair to probation.[203] Blair's attorney argued that a prison sentence would "exacerbate his developmental issues and do little to deter future terrorist acts."[204] Data shows that life behind bars is likely to exacerbate conditions of the mentally ill, like Blair.[205] Additionally, conditions may deteriorate as a result of inadequate treatment.[206] The Blair family advocated for a non-prison sentence because "placing him in prison will expose him to a life that could seriously harm him, take away his loving, empathetic nature and good heart that he now possesses."[207]

In the end, Judge Crabtree sentenced Blair to fifteen months in prison, followed by two years of supervised release.[208] Judge Crabtree struggled with the decision, which he finally made in October 2016 after previously delaying the sentencing twice.[209] He called it "one of the most unique, nuanced decisions" of his career[210] because of the aspects at play—including Blair's mental illness. While Judge Crabtree did ultimately sentence Blair to prison, he did so with the effect it would have on Blair in mind. In his judgment, Judge Crabtree recommended that Blair be designated to Springfield MCFP to serve his imprisonment, in part so that Blair could "receive the care and treatment necessary to address the limitations and concerns raised by his mental health."[211]

After dealing with the Guidelines and the Terrorism Enhancement, Judge Crabtree opined his displeasure with the Guidelines, calling them unfair and claiming that they made no sense.[212] Particularly, Judge Crabtree took issue with the criminal history aspect of the Terrorism Enhancement.[213] Although Blair lacked any prior arrest or conviction and Judge Crabtree found that Blair did "not represent a future danger to the community," he still classified Blair's criminal history as a Category VI, the highest level, because Blair's offense furthered a crime of terrorism—that crime being Booker's crime, not Blair's own.[214] Even though Judge Crabtree disagreed with the application of the

203. Justin Wingerter, *Topekan Alexander Blair Sentenced to 15 Months in Prison for $100 Loan to John Booker Jr*., TOPEKA CAP.-J., Oct. 18, 2016 (on file with author).

204. Hong, *supra* note 14.

205. *Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription*, SENT'G PROJECT 9 (Jan. 2002), http://www.sentencingproject.org/wp-content/uploads/2016/01/Mentally-Ill-Offenders-in-the-Criminal-Justice-System.pdf [https://perma.cc/2B2J-UTBG].

206. *Id.*

207. Wingerter, *supra* note 203.

208. *Id.*

209. *Id.*

210. *Id.*

211. Judgment in a Criminal Case at 2, U.S. v. Blair, No. 5:15CR40031-001 (D. Kan. Oct. 20, 2016), ECF 40.

212. Wingerter, *supra* note 203.

213. *Id.*

214. *Id.*

Terrorism Enhancement to Blair's criminal history, he claimed he felt obligated to enforce it.[215]

The interrelation between manipulation, Blair's condition, and his crime were well documented through the trial and sentencing. During sentencing, Judge Crabtree commented on the role that Blair's genetic condition played, saying, "I have no doubt this condition made Mr. Blair more susceptible to Mr. Booker's manipulation."[216] Blair's lawyers contended that because Williams syndrome results in an inability to process social cues and a compulsion to maintain friendships, Blair was more vulnerable to manipulation from people like Booker.[217] Regarding the connection between Blair's condition and Booker's manipulation, the Blair family believed that Blair's condition was the only reason he committed the crime.[218] Throughout its statement, the Blair family explained that Booker manipulated Blair throughout their friendship, claiming that "Booker called the shots and [Blair] followed like a puppy."[219]

B. Post-Sentencing Analysis

The *Blair* case exemplifies a step in the right direction toward sentencing offenders with mental illness who play a limited role in the commission of crimes that can fall under the Terrorism Enhancement. In sentencing Blair to fifteen months in prison and two years of supervised release,[220] Judge Crabtree struck a balance between the government's desired sentence of five years in prison and Blair's lawyer's plea for probation.[221] In recommending a specific prison that he believed would get Blair the necessary treatment,[222] Judge Crabtree also did his best to account for what was most worrisome about prison to Blair's family and lawyers—exacerbation of his condition.[223] He did not diminish the importance of the rehabilitation in punishment and implemented a character-based sentencing scheme which maintained a retributive focus in requiring just punishment that also reflected the offender's desert.[224] Judge Crabtree's sentence properly reflects the extent to which Blair was deserving of punishment. It acknowledges the fact that Blair played a very limited role and made it clear he would not participate further. Overall, Judge Crabtree took into

215. *Id.*
216. *Id.*
217. Hong, *supra* note 14.
218. *Blair Family Statement*, *supra* note 191.
219. *Id.*
220. Wingerter, *supra* note 203.
221. *Id.*
222. Judgment in a Criminal Case at 2, U.S. v. Blair, No. 5:15CR40031-001 (D. Kan. Oct. 20, 2016), ECF 61.
223. Hong, *supra* note 14; Wingerter, *supra* note 203.
224. *See* Hill, *supra* note 120, at 984.

consideration all of the unique elements of the *Blair* case and tailored the sentence appropriately.

Judge Crabtree's criticism of the Terrorism Enhancement[225] encourages other judges to not hide behind the ease and uniformity of the Guidelines, but instead analyze their elements with a forward-thinking perspective—one which accounts for the mental conditions of an offender. The complexity of the situation could have incentivized Judge Crabtree to favor the ease and efficiency of the Guidelines, but he did not. He took his time to contemplate how to handle "one of the most unique, nuanced decisions" of his career.[226]

While the *Blair* case may not shed light on the treatment of the Guidelines overall, with regards to the Terrorism Enhancement, it illustrates that its severity catches the eye of judges and is often met with concern. As such, even though trends from Supreme Court cases indicate that the Guidelines are positioned as close to law,[227] the core advisory nature of the Guidelines is not lost on judges dealing with the Terrorism Enhancement and seeing its ability to drastically increase a sentence.[228] That is not to say that the Guidelines are not of assistance to sentencing judges. In some cases, such as with the Terrorism Enhancement, being forced to consider the Guidelines first may point out alarming severity in sentencing and, from there, work as a benchmark.[229]

C. The Future for Cases with Mental Illness and the Terrorism Enhancement

In the case of the Terrorism Enhancement, especially in differentiating between offenders with mental illness and those without, inordinate consistency comes at too high a cost. Although terrorism is perceived as more serious than other crimes and accordingly more deserving of more severe sentences, such a contention cannot universally apply to the myriad of offenses which are capable of getting caught in the sentencing wrath of the Terrorism Enhancement. At a certain point, the punishment needs to fit more than just the crime; it needs to fit the criminal. Currently, under the Guidelines, there is a focus on departure when conduct does not fit the norm, but a lack of focus on when the *offender* does not fit the norm.

1. Factoring in Mental Illness to Sentencing

In the future, as mental health becomes less stigmatized, courts more and more will be forced to consider the role it plays in the commission of crimes. Policy initiatives are already reevaluating how offenders with mental illness should be treated. In early 2013, then-mayor of New York City, Michael

225. Wingerter, *supra* note 203.
226. *Id.*
227. Brown, *Punishing Terrorists*, *supra* note 82, at 529.
228. *See infra* Section III.B.
229. *See* Gall v. United States, 552 U.S. 38, 49 (2007).

Bloomberg, asked judges to consider the defendant's mental health status and prioritize treatment over prison where possible.[230] Bloomberg's initiative came following a report that found the mentally ill were costing New York City three times as much as other inmates.[231] However, cost is not the only concern with sentencing the mentally ill to prison. The susceptibility of the mentally ill to harm in prison has also raised concerns.[232] It is well noted that individuals with mental illness are vulnerable to victimization in the outside world, but they are also more susceptible than people without mental illness to physical and sexual assault in prison.[233]

As a means to decrease the cost and harm of imprisonment for offenders with mental illness, mental illness should be a required factor to consider during sentencing. Currently, mental conditions *may* be taken into account if relevant, and then, only to the extent that they are relevant.[234] The Guidelines contend that mental conditions *may* be relevant if, "individually or in combination with other offender characteristics, they are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[235] Given that mental illness often affects many aspects of decision making[236] and creates vulnerability, mental illness should always be relevant in sentencing, regardless of whether it is present to an unusual degree or not. The degree of relevancy will likely change for each offender and each circumstance, however, in any case, its relevancy will always be a basis to warrant consideration of mental illness as a factor in sentencing. The vulnerability resulting from mental illness needs to factor into the severity of a contemplated sentence to ensure that an offender is not over-punished[237] and has the opportunity for rehabilitation.

In considering mental illness in sentencing, judges may look to other provisions of the Guidelines that account for and allow departures for mental conditions, mental capacity, and moral culpability, such as the provisions for vulnerable victims, diminished capacity, and aberrant behavior.[238] These

230. Editorial Board, *Treatment, Not Jail, for the Mentally Ill*, N.Y. TIMES (Jan. 31, 2013), http://www.nytimes.com/2013/02/01/opinion/treatment-not-jail-for-the-mentally-ill-in-new-york-city.html?_r=2& [https://perma.cc/36G4-PA32].

231. *Id.*

232. E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 150–51 (2013).

233. *Id.* at 151.

234. 28 U.S.C. § 994(d)(4) (2012) (emphasis added).

235. U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (U.S. SENTENCING COMM'N 2016).

236. *See* Ricardo Cáceda, Charles B. Nemereoff & Philip D. Harvey, *Toward an Understanding of Decision Making in Severe Mental Illness*, 26 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 196, 196 (2014) ("Arguably, the greatest functional impact of these illnesses on the lives of the mentally ill and society are not related to the symptoms of delusions, hallucinations, or depressed mood, but simply to making poor decisions.").

237. Johnston, *supra* note 232, at 151.

238. U.S. SENTENCING GUIDELINES MANUAL § 5H1.3.

provisions are based on a lack of blameworthiness because of a lack of understanding of the situation or consequences of the conduct involved.[239] The same policy supports considering mental illness in sentencing. Consideration of mental illness is not a guarantee for departure, but it opens the doors for departure. Opportunity for departure is much needed, and thus should be required, when sentences have opportunity for severe enhancement, as with the Terrorism Enhancement.

2. Departing Based on a Mentally Ill Offenders' Role in an Offense

Currently, under the Guidelines, a defendant's role in an offense cannot be a basis for departing from a particular guideline range.[240] In the context of the Terrorism Enhancement and offenders with mental illness, this is particularly troublesome. A severe sentence can be placed on an offender whose vulnerability was exploited, and even if the offender played a small role in an offense, it is irrelevant.

In *Booker*, the Court explained that the intended uniformity of the Guidelines was not merely in similar sentences for those convicted of violations of the same statute, but rather should emanate with similar relationships between sentences and real conduct.[241] In the context of the over-encompassing grasp of the Terrorism Enhancement, the harmfulness of conduct or the blameworthiness of a particular defendant who has mental health issues is more important than the fact that the offense can fall under the wide net cast by the vague definition of a "federal crime of terrorism." The "real conduct," including the role of the offender, should play a bigger role in sentencing than the implicated statute.

People with mental illness carry the burden of a dangerous risk of being exploited, even slightly, for the commission of a crime. Following this, in the context of the Terrorism Enhancement, offenders with mental illness run the risk of having such exploitation lead to a severe sentence for a crime stretched to meet the vague definition of a federal crime of terrorism. To mitigate these risks, the role of an offender with mental illness should be available as a means for departure.

In particular, if a defendant suffering from mental illness is found to have been a "vulnerable victim" of another, making the defendant a vulnerable *offender* in committing the offense, there should be an opportunity for downward departure. In the Guidelines' definition of "vulnerable victim," the victim must be unusually vulnerable "due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct."[242] People with mental illness are unusually vulnerable under this standard.

239. Johnston, *supra* note 232, at 185.

240. U.S. SENTENCING GUIDELINES MANUAL § 5H1.7.

241. United States v. Booker, 543 U.S. 220, 253–54 (2005).

242. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) cmt. 2.

In the definition provided of a vulnerable victim, the Guidelines acknowledge that mental conditions result in unusual vulnerability which makes a person particularly susceptible to criminal conduct.[243] This holds true regardless of whether the person is a victim of a crime or an offender; the situation of the person may change, but the effect of his or her mental condition does not. Even as an offender, mental conditions create a special degree of vulnerability which often leads to manipulation. The vulnerability associated with people afflicted with mental conditions can lead them to be targeted not only as victims, but also as accomplices or conspirators. However, the Guidelines only provide a possible enhancement to account for the former,[244] but no such reciprocal downward adjustment to account for the latter. When an offender afflicted with mental illness is vulnerable and another offender preys on this vulnerability to involve the mentally ill offender in his or her offense, particularly when the role is minor, there needs to be room for downward departure.

VI. CONCLUSION

The Guidelines are evolutionary in nature,[245] and reflect, "congressional awareness that sentencing is a dynamic field that requires continuing review."[246] The Guidelines, in their current state, require review and adaptation. Public concern about terrorism is reflected in the severity of the Terrorism Enhancement, but it drastically overstates the reality of the threat of terrorism in America. Accordingly, the Terrorism Enhancement has been built to be broad and vague enough to combat this fear with severe sentencing for almost any crime. In many cases, the Terrorism Enhancement drastically overstates fair and necessary punishment for defendants and their conduct. Although this is generally concerning, it is particularly concerning for offenders with mental illness because they have the propensity to struggle with decision making and lack a full understanding of the situation and its consequences.

There's an elephant in the room: no one wants to appear weak on terrorism.[247] However, in recognizing the reality of terrorism and moving toward managing, rather than defeating,[248] it, judges need to appropriately consider an

243. *Id.*

244. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1.

245. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpt. 2.

246. U.S. SENTENCING GUIDELINES MANUAL § 1A.2.

247. *See, e.g.*, BRUCE HOFFMAN, INSIDE TERRORISM (1998), ("On one point, at least, everyone agrees: terrorism is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one's enemies and opponents, or to those with whom one disagrees and would otherwise prefer to ignore."), http://www.nytimes.com/books/first/h/hoffman-terrorism.html [https://perma.cc/88ZZ-7STW].

248. Rosa Brooks, *The Threat Is Already Inside*, FOREIGN POL'Y (Nov. 20, 2015), http://foreignpolicy.com/2015/11/20/the-threat-is-already-inside-uncomfortable-truths-terrorism-

offender's mental illness in sentencing. The *Blair* case presents an example for properly factoring mental illness into sentencing in that it accounts for treatment and rehabilitation and departed both from the Terrorism Enhancement and the statutory maximum for the offense. At the outset, one specific purpose of the Commission was to develop sentences that reflect advancement in knowledge of human behavior as it relates to the criminal justice process.[249] Advancements in knowledge of human behavior have led to the conclusion that mental illness creates susceptibility to harm and vulnerability to manipulation. The Commission needs to create sentences to reflect this conclusion. In the meantime, courts have the ability to rectify the risks of harm, vulnerability, and manipulation that mental illness causes, both in the real world and in prison, but they cannot do so without considering mental illness as a factor in sentencing.

As the Supreme Court acknowledged in *Rita v. United States*, "[t]he Commission's work is ongoing."[250] Any work not done yet is left in the hands of the court, which, after *Booker*, is armed with the discretion to make a difference—the discretion to combat unrealistic public fears of terrorism, to adequately address the stigma of mental illness, and to accurately account for unique aspects of conduct that come with it. It is left to the courts to use this discretion to consider mental illness in sentencing and when sentencing a defendant with mental illness, whose vulnerability was exploited by another in committing the offense, depart downward from the possibly severe results of the Terrorism Enhancement.

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isis/ [https://perma.cc/4YAH-DKNT] ("If we want to reduce the long-term risk of terrorism—and reduce its ability to twist Western societies into unrecognizable caricatures of themselves—we need to stop viewing terrorism as shocking and aberrational, and instead recognize it as an ongoing problem to be managed, rather than 'defeated.'").

249. 28 U.S.C. § 991(b)(1) (2012).

250. 551 U.S. 338, 350 (2007).

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