Michigan Law Review

Volume 94 | Issue 4

1996

Are Threats Always "Violent" Crimes?

Jeremy D. Feinstein
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Criminal Law Commons

Recommended Citation

Jeremy D. Feinstein, *Are Threats Always "Violent" Crimes?*, 94 MICH. L. REV. 1067 (1996).
Available at: https://repository.law.umich.edu/mlr/vol94/iss4/5

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Are Threats Always "Violent" Crimes?

Jeremy D. Feinstein

Introduction

You are enjoying a quiet evening at home in Michigan when you receive a phone call. An unfamiliar voice says, "I know where you live, and I'm coming to kill you." Upset by this incident, you report it to the police. A short time later the police tell you that they have traced the call and identified the perpetrator: a patient confined to a mental hospital in Hawaii, who apparently called your number either by mistake or at random. The police inform you that even though the threatener is already committed to a psychiatric facility, they intend to prosecute him for the crime of making threats.[1]

Does this threat constitute a "violent" crime? If not, what if the threatener had turned out to be a disgruntled former employee of your company, twice convicted of committing violent crimes, who lived nearby? In other words, is the answer influenced by the apparent likelihood — or lack thereof — of the threat being carried out? If the Hawaii mental patient's threat *is* a "violent" crime, does this mean that a statement of intent to do something "violent" is always an act "of violence"?

It is important to think about the answers to these questions because, under the *United States Sentencing Guidelines* (*Guidelines*),[2] the characterization of a crime as "violent" or "non-violent" is significant for a defendant in two ways. First, if a crime is consid-

1. 18 U.S.C. § 875(c) (1994) prohibits any interstate transmission of a threat to kidnap or injure the person of another. For a discussion of the elements of threat offenses, see *infra* Part I.

Chapter 41 of 18 U.S.C., 18 U.S.C. § 871 et seq. (1994), contains a number of statutes criminalizing various types of threats. *See, e.g.*, 18 U.S.C. § 871 (1994) (making it a crime to convey through the mail a threat to kill, injure, or kidnap the President); 18 U.S.C. § 876 (1994) (prohibiting the transmission of threats by mail); 18 U.S.C. § 878 (1994) (prohibiting threats against foreign officials); 18 U.S.C. § 879 (1994) (prohibiting threats against former presidents). Courts considering cases brought under one of these statutes usually feel free to apply precedent from any of the other statutes. *See, e.g.*, United States v. Gordon, 974 F.2d 1110, 1117 (9th Cir. 1992) (looking to 18 U.S.C. § 871 (1982) for guidance even though the instant case was brought under § 879). Consequently, when this Note refers to "punishable threats," the particular statute under which the threats would be punished is not important.

2. United States Sentencing Commission, *Guidelines Manual* (Nov. 1994). Federal courts are required to impose sentences within the range stipulated by the *Guidelines* for a particular crime, except when unusual aggravating or mitigating circumstances are present. *See* 18 U.S.C. § 3553(b) (1994).

At the time this issue of the *Michigan Law Review* went to press — January 1996 — the revised *Guidelines Manual* from November 1994 was the latest available edition. The Sentencing Commission customarily revises the *Guidelines* every November, but the November 1995 revisions were not yet available.

ered a "non-violent offense" and the defendant committed it while suffering from "reduced mental capacity," he may be entitled to a sentence reduction under section 5K2.13 (the "reduced mental capacity provision") of the *Guidelines*.[3] Second, if a crime is considered a "crime of violence" and the defendant previously has been convicted of two other "crimes of violence," he may be considered a "career offender" under section 4B1.1 (the "career offender provision") and receive a more severe sentence than he otherwise would.[4] Thus, the violent or non-violent nature of an offense may have substantial impact on the length of a defendant's sentence.

Characterization of an offense as "violent" or "non-violent" can be difficult,[5] especially with respect to threats,[6] which do not seem to fall squarely within either the violent or non-violent category of

---

3. *See* USSG § 5K2.13, p.s. As a general matter, the *Guidelines* prescribe sentences based on the nature of the offense committed and the defendant's criminal history, *see* USSG § 1B1.1, and the mental or emotional state of the defendant is not a consideration, *see* USSG § 5H1.3, p.s. The reduced mental capacity provision is an exception to this approach. It states:

> 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.

USSG § 5K2.13, p.s.

Section 5K2.13 does not provide a definition or a cross-reference for the term *non-violent offense*. There is also no definition provided for the term *reduced mental capacity*, but this omission does not seem to have created as much controversy.

4. USSG § 4B1.1. Section 4B1.1 effectuates the congressional desire that "career" offenders be sentenced " 'at or near the maximum term authorized.' " USSG § 4B1.1, comment. (backg'd.) (quoting 28 U.S.C. § 994(h) (1994). Hence, a defendant is likely to receive a very severe sentence if he qualifies as a career offender.

Career offenders are criminals who have committed either a *crime of violence* or a *controlled substance offense* and previously have been convicted of two other such crimes. USSG § 4B1.1. Both of these terms are defined in USSG § 4B1.2. The meaning and significance of the crime of violence definition are discussed at length *infra* section III.C. The definition of *controlled substance offense* is not relevant to this Note.

5. Judges and professors alike have noted the difficulty of assigning meaning to the term *violence*. For instance, in Rosales-Lopez v. United States, 451 U.S. 182 (1981), the majority held that voir dire questions regarding racial prejudice are permitted when the crime involved was a "violent crime." Justice Rehnquist responded to this holding by commenting that "knowing the contentiousness of our profession, the suggestion that a precise definition of 'violent crime' . . . will ever be arrived at leaves me unwilling to lay down the flat rule . . . proposed [by the majority]." 451 U.S. at 194-95 (Rehnquist, J., concurring).

A similar perspective can be found in the work of John Harris, who comments:

> Despite its pervasive interest, there is surprisingly little agreement on the question of what violence in fact *is*, and what is in fact *violence*. . . .
>
> . . . [T]he champions of various definitions are not even able to agree to differ, but are all evangelists in the cause of their own conception of violence. This disagreement has seemed so intractable and pointless to one philosopher that he has gone so far as to recommend that the word "violence" be abandoned altogether, as far too confused a notion for consistent use.

JOHN HARRIS, VIOLENCE AND RESPONSIBILITY 11-12 (1980) (citing Robert Paul Wolff, *On Violence*, 66 J. PHIL. 602 (1969)).

6. A threat is "[a] communicated intent to inflict physical or other harm on any person or property." BLACK'S LAW DICTIONARY 1480 (6th ed. 1990).

crimes. Reflecting this difficulty, the federal courts of appeals have split regarding whether threats ever may be considered "non-violent offenses" for purposes of deciding whether a defendant should be eligible for a sentence reduction under the reduced mental capacity provision.[7] Some say that whether an offense is "non-violent" depends on the particular facts and circumstances of the case and that consequently at least *some* threats may be considered "non-violent offenses."[8] Others look at the definition of "crime of violence" in the career offender provision, and, because this definition appears to characterize all threats as "crimes of violence," they conclude that threats should *never* be considered "non-violent offenses."[9]

This Note argues that because the generally accepted legal meaning of *violence* is the use — or the risk of the use — of physical force so as to injure, damage, or abuse, threats only should be considered violent if they involve a risk of the use of physical force. Part I examines the substantive law of threats to determine if they inherently involve a risk of the use of physical force, and concludes that they do not. Part II studies the meaning of the term *violence,* and argues that both courts and dictionaries understand the term to mean the use — or the risk of the use — of physical force so as to injure, damage, or abuse. Part III then draws on the analysis of Parts I and II and concludes that courts should consider threats violent offenses only when they involve the risk of the use of force; riskless threats should qualify as "non-violent offenses" under the reduced mental capacity provision and should not be considered "crimes of violence" for purposes of the career offender provision.

---

7. Recall that offenders are not eligible for a sentence reduction under the reduced mental capacity provision unless their crime was a "non-violent offense."

8. *See* United States v. Premachandra, 32 F.3d 346, 348 (8th Cir. 1994) (agreeing with the district court's decision to consider the facts and circumstances of the case in order to determine whether the defendant's offense was "non-violent"); United States v. Weddle, 30 F.3d 532, 540 (4th Cir. 1994) (looking at the facts and circumstance of the offense); United States v. Chatman, 986 F.2d 1446, 1452-53 (D.C. Cir. 1993) (considering all the facts and circumstances surrounding the offense). The Tenth Circuit also may endorse this view, though its analysis is difficult to follow. *See* United States v. Spedalieri, 910 F.2d 707, 711 (10th Cir. 1990) (holding that even though the defendant committed a "violent act," the trial judge properly "exercised his *discretion* not to depart downward" and that the judge "could consider the mental capacity" of the defendant (emphasis added)).

9. This approach thus involves "cross-applying" the crime of violence definition from the career offender provision to the reduced mental capacity provision. The leading case taking this approach is United States v. Poff, 926 F.2d 588, 592 (7th Cir.) (holding that "crime[s] of violence" as defined by § 4B1.2 — the career offender provision — and "non-violent offense[s]" as defined by § 5K2.13 — the reduced mental capacity provision — are mutually exclusive categories), *cert. denied,* 502 U.S. 827 (1991). Other circuits have used the same or similar reasoning. *See* United States v. Kyles, 40 F.3d 519, 525 (2d Cir. 1994), *cert. denied,* 115 S. Ct. 1419 (1995); United States v. Dailey, 24 F.3d 1323, 1326-27 (11th Cir. 1994); United States v. Cantu, 12 F.3d 1506, 1513-14 (9th Cir. 1993); United States v. Rosen, 896 F.2d 789, 791 (3d Cir. 1990); United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989), *cert. denied,* 502 U.S. 882 (1991).

Finally, Part IV considers how courts should determine whether a threat created risk and argues that courts should consider a threat to have created risk — and therefore to be violent — whenever they find two facts: (1) the defendant had a genuine intent to carry out the threat, and (2) the defendant had the ability to carry out the threat.

I. The Harm Caused by Threats

To begin to evaluate whether threats should always be considered violent crimes, it is necessary first to develop an understanding of the nature of criminal threats. The conduct involved in a threat is simple; all that is required is a communicated intent to kill or injure.[10] The harm caused by a threat, however, is more complicated and requires some analysis.

In theory, threats are capable of causing two types of harm: they can create fear in the recipient of the threat, and they can create a risk that the threatened conduct actually will take place. The Supreme Court has described the harms caused by threats as "the fear of violence . . . [and] the possibility that the threatened violence will occur."[11] In practice, however, courts eschew consideration of risk creation when determining whether a threat is criminal.[12] All that is required is that the threat reasonably could have induced fear in the recipient. The fact that threats do not al-

10. At the most general level, threats are simply statements of the speaker's present intention to do something in the future. Hence, the word *threat* includes both statements of intent to cause physical harm *and* statements of intent to do other unpleasant things — for example, one can threaten to go public with embarrassing information about a person or threaten to withhold one's business from a company that will not meet one's demands.

This Note uses the term *threat* to refer only to those threats that are encompassed by 18 U.S.C. § 871 et seq. (1994) — in other words, those that involve a statement of intent to kill or inflict bodily harm on someone. *See supra* note 1. Other kinds of threats may run afoul of laws prohibiting extortion or blackmail, but they are beyond the scope of this Note.

11. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (stating that these harms — along with "the disruption that fear engenders" — are the reason why threats are not speech protected by the First Amendment); *see also* Rogers v. United States, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring) (construing 18 U.S.C. § 871 (1962) and stating that "[p]lainly, threats may be costly and dangerous to society in a variety of ways. . . . [A] serious threat on the President's life is enormously disruptive and involves substantial costs . . . . § 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself").

12. Courts' refusal to consider risk creation at the criminal-liability stage contrasts sharply with the central role that risk creation plays at the sentencing stage. At sentencing, the risk created by a threat is an important determinant of the length of the convicted threatener's sentence. For instance, the sentencing guideline that applies to threats specifically states that the "seriousness" of a threat "depends upon . . . the likelihood that the defendant would carry out the threat." USSG § 2A6.1 comment. (backg'd.); *see infra* section III.A. But in deciding whether a threat is punishable at all, courts ignore risk creation and focus exclusively on fear creation.

ways create risk raises serious questions regarding the propriety of categorically characterizing them as "violent crimes."[13]

Section I.A looks at federal threat cases and observes that federal courts are indifferent to whether a threatener had the intention or the ability to carry out his threat. Because these are the two most important indicators of whether a threat created any genuine risk of harm, this section concludes that the creation of risk is not an essential element of a punishable threat under existing law. Section I.B observes that federal courts regard fear as an essential element of a punishable threat because the creation of fear distinguishes "true threats" from nonpunishable jokes, hyperbole, and political speech.

A. *The Irrelevance of Risk for Determining Criminal Liability*

Notwithstanding the fact that the utterance of a threat theoretically creates a risk that the threatener will act in accordance with his stated intent, courts are indifferent to this risk when they decide whether or not a particular speech act is a punishable threat. Courts adamantly refuse to consider either of the two factors that could help them determine the degree of risk created by a threat:[14] the threatener's objective ability to carry out his threat and his subjective intent to carry out his threat.[15]

---

13. *See infra* Part II (arguing, based on the definition of the word *violence,* that riskless threats should not be considered violent).

14. These two factors are the most important risk indicators because a threat could not actually be carried out unless both are satisfied. For further discussion of this point, see *infra* section IV.A.

15. *See* United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994) ("The district court correctly determined that . . . [t]he government bore no burden of proving that Himelwright intended his calls to be threatening or that he had an ability at the time to carry out the threats."); United States v. Darby, 37 F.3d 1059, 1064 n.3 (4th Cir. 1994) ("[I]n a prosecution under section 875(c), the government need not prove intent (or ability) to carry out the threat."), *cert. denied,* 115 S. Ct. 1826 (1995); United States v. Bellrichard, 994 F.2d 1318, 1324 (8th Cir.) ("Sections 871 and 876 'recognize . . . that it is the making of the threat that is prohibited without regard to the maker's subjective intention to carry out the threat.' " (quoting United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991))), *cert. denied,* 114 S. Ct. 337 (1993); United States v. Cox, 957 F.2d 264, 266 (6th Cir. 1992) ("[T]he government need not prove Cox's subjective intent . . . ."); United States v. Orozco-Santillion, 903 F.2d 1262, 1265 n.3 (9th Cir. 1990) ("The only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat."); United States v. Hoffman, 806 F.2d 703, 707 (7th Cir. 1986) ("[T]he government is not required to establish that the defendant actually intended to carry out the threat."), *cert. denied,* 481 U.S. 1005 (1987); *see also* 2 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 33.04, at 305 (4th ed. 1990) ("The government is not required to prove that the defendant actually intended to carry out any threat or even that the defendant was then able to carry out any such threat."); FEDERAL JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 95 (1988) ("It is not necessary that [the defendant] intended to carry out the threat.").

The Ninth Circuit's approach in *United States v. Mitchell*[16] provides an apt example of the irrelevance of risk in determining criminal liability for a threat. Mitchell was detained at the Honolulu International Airport by customs officials and, while in detention, identified himself as Mahatma Gandhi and the son of Nehru and also boasted that he had a guerrilla army in the Philippines.[17] Mitchell then threatened to kill President Reagan by drowning him in the Atlantic Ocean, which led to his conviction under 18 U.S.C. § 871 for threatening the President.[18] In sustaining the conviction, the Ninth Circuit rejected Mitchell's claims that his threat was " 'ludicrous and made in jest' " and that he was incapable of carrying it out.[19] The court noted that "[t]he agents who heard the statements apparently took them quite seriously,"[20] and — notwithstanding the formidable logistical barriers to Mitchell's presidential-drowning scheme — disregarded his inability to carry out the threat by observing that " 'the threat itself is the crime.' "[21] The degree of risk posed by the threat was not a factor in the decision.

B. *The Importance of Fear*

Although it is not necessary for a threat to create risk, courts have held that threats must have a reasonable tendency to create fear in the recipient in order to be punishable.[22] The creation-of-

16. 812 F.2d 1250 (9th Cir. 1987).

17. *See* 812 F.2d at 1252.

18. *See* 812 F.2d at 1253.

19. 812 F.2d at 1256.

20. 812 F.2d at 1255. The agents were obviously unfamiliar with the non-violent teachings of Mahatma Gandhi.

21. 812 F.2d at 1256 (quoting United States v. Merrill, 746 F.2d 458, 462 (9th Cir. 1984)), *cert. denied*, 469 U.S. 1165 (1985).

22. *See, e.g.*, United States v. Bellrichard, 994 F.2d 1318, 1324 (8th Cir.) (noting that threats are " 'disruptive of the recipient's sense of personal safety and well-being' " and asserting that this harm " 'is the true gravamen of the offense' " (quoting United States v. Manning, 923 F.2d 83, 86 (8th Cir.), *cert. denied*, 501 U.S. 1234 (1991))), *cert. denied*, 114 S. Ct. 337 (1993); United States v. Cox, 957 F.2d 264, 266 (6th Cir. 1992) (reasoning that "a threat is not to be construed as conditional if it had a reasonable tendency to create apprehension"); United States v. Kelner, 534 F.2d 1020, 1025 (2d Cir. 1976) ("In order to convict . . . the jury had to . . . find that the statements . . . were 'an expression of an intent to inflict' injury, of 'such a nature as could reasonably induce fear.' "), *cert. denied*, 429 U.S. 1022 (1978); United States v. Bozeman, 495 F.2d 508, 510 (5th Cir. 1974) ("[Defendant's] statement meets the test of what amounts to a threat under 18 U.S.C. § 875(c), *i.e.*, '[this] communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor.' " (quoting United States v. Holder, 302 F. Supp. 296, 301 (D. Mont. 1969), *affd.*, 427 F.2d 715 (9th Cir. 1970))); *see also* Romualdo P. Eclavea, Annotation, *Validity, Construction, and Application of 18 USCS § 875(c) Prohibiting Transmission in Interstate Commerce of Any Communication Containing Any Threat to Kidnap Any Person or Any Threat to Injure the Person of Another*, 34 A.L.R. FED. 785, 793 (1977) ("[T]he test for determining whether a communication contains a 'threat' within the meaning of 18 U.S.C. § 875(c) is whether such communication . . . could reasonably have induced fear in its recipient.").

fear requirement is essential to distinguish "true threats" from jokes, hyperbole, and political speech, all of which are protected by the First Amendment.[23] Some courts do not refer specifically to the fear or apprehension experienced by the recipient of a threat, but they emphasize that the characterization of speech as a threat may depend on whether the recipient reasonably perceived it as such.[24] At any rate, it is clear that the reasonable or actual reaction of the recipient of threatening speech is an important consideration for courts trying to decide whether to punish a defendant for making threats.

The Sixth Circuit's approach in *United States v. Cox*[25] is a good example of the importance of fear creation in threat cases. Cox, who was delinquent in his truck loan payments, telephoned the bank that had ordered the repossession of his truck and stated, "I tell you what, you all better have my personal items to me by five o'clock today or it[']s going to be a lot of hurt people there."[26] After being convicted of knowingly transmitting in interstate commerce a communication containing a threat,[27] Cox challenged his

---

23. *See, e.g.,* R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (stating that threats are distinguishable from speech protected by the First Amendment because they create fear, and this fear engenders disruption); Watts v. United States, 394 U.S. 705, 707-08 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech. . . . [18 U.S.C. § 871(a) (1962)] initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term."); *Kelner,* 534 F.2d at 1025 (rejecting a First Amendment challenge to a threat conviction in a case where the jury found that the defendant's statements were of " 'such a nature as could reasonably induce fear' ").

Commonly used jury instructions for threat cases confirm the importance of distinguishing threats from protected speech. Juries are instructed:

> A threat is a statement expressing an intention to kill or injure . . . as distinguished from a political argument, or talk, or jest.
>
> . . . .
>
> The government must prove . . . that the defendant . . . made a statement in such a way and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing it . . . as a serious expression of an intention to kill, kidnap, or inflict bodily harm . . . .

2 DEVITT ET AL., *supra* note 15, § 33.04; *see also* FEDERAL JUDICIAL CTR., *supra* note 15, at 95 ("For you to find [the defendant] guilty of this crime, you must be convinced that . . . [the defendant communicated] words intending them to be taken as a serious threat and not merely as a joke or exaggeration.").

24. *See, e.g.,* United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994) ("[T]he government bore only the burden of proving that Himelwright acted knowingly and willfully when he placed the threatening telephone calls and that those calls were *reasonably perceived as threatening* bodily injury." (emphasis added)); United States v. Lincoln, 462 F.2d 1368, 1369 (6th Cir.) (" 'This Court therefore construes [18 U.S.C. § 871(a) (1962)] . . . to require only that the defendant intentionally make a statement . . . under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of an intention to inflict bodily harm . . . .' " (quoting Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969))), *cert. denied,* 409 U.S. 952 (1972).

25. 957 F.2d 264 (6th Cir. 1992).

26. 957 F.2d at 265.

27. *See* 957 F.2d at 265. The statute under which Cox was convicted was 18 U.S.C. § 875(c) (1986).

conviction on the ground — among others — that his threat was conditional and equivocal. The court noted that there was some authority for the proposition that conditional statements were protected by the First Amendment.[28] The court held, however, that "a threat is not to be construed as conditional if it had a reasonable tendency to create apprehension that its originator will act in accordance with its tenor." The court then concluded that the people at the bank who had been the targets of Cox's threat "reasonably would be apprehensive" and "had reason to feel threatened."[29] Because Cox's threat created reasonable fear, his conviction was affirmed.

II. The Meaning of *Violence*

At sentencing, the *Guidelines* require courts to decide whether a criminal act was a non-violent offense or a crime of violence. These determinations govern the applicability of the reduced mental capacity and career offender provisions to the defendant. In order to decide whether a threat fits within the meaning of either of these formulations of the word *violence,* its meaning must first be ascertained.[30] Accordingly, this Part examines the meaning of *violence* as that term is used by dictionaries, courts, and statutes.

Section II.A argues that despite the theoretical debate about the meaning of *violence,* dictionaries, both lay and legal, and courts agree on a general definition: the use of physical force so as to injure, damage, or abuse. Section II.B demonstrates that courts have expanded the dictionary definition to include acts that create *risk* of the use of physical force because statutes defining the terms *violent felony* and *crime of violence* have focused on risk as a key determinant of whether an act was violent.

A. *The General Definition of* Violence

1. *Dictionaries*

Although it is customary for scholars writing about violence to bewail the lack of a precise definition of the word *violence,*[31] and

28. *See* 957 F.2d at 265-66 (citing Watts v. United States, 394 U.S. 705 (1969)).

29. 957 F.2d at 266.

30. The reduced mental capacity provision — § 5K2.13 — provides no definition or cross-reference for its use of the term *non-violent offense,* so this analysis of the general legal meaning of *violence* is an essential starting point.

The career offender provision — § 4B1.2 — provides a definition of the term *crime of violence,* which the Note analyzes at length *infra* in section III.C. While this statutory definition obviously controls the meaning of *violence* for purposes of the career offender provision, to the extent that the definition is ambiguous, the general legal meaning of *violence* may provide helpful interpretive guidance.

31. One commentator states:

even to despair of the possibility of adequately defining the term,[32] dictionaries — both lay and legal — provide a clear and fairly uniform definition: violence is the use of physical force so as to injure, damage, or abuse. *Black's Law Dictionary* uses precisely this formulation.[33] *The Oxford English Dictionary* defines *violence* as "[t]he exercise of physical force so as to inflict injury on, or cause damage to, persons or property."[34] *Webster's Third New International Dictionary* likewise views *violence* as the "exertion of any physical force so as to injure or abuse."[35]

2. *How Courts Apply the Dictionary Definition*

The dictionary definition of *violence* is obviously only a starting point. Lawyers and judges have long condemned overreliance on dictionaries in attempting to define legal terms.[36] Courts rarely are

---

> Violence is the nemesis of law-makers, for violence has a law of its own. Violence resists definition because it is protean, a thing of many forms . . . . Even when some definition is arrived at, violence evades the snares of law. The subtler, psychological forms of violence are difficult to place before the courts, requiring as they do some overt act; violence, for us, must be at least minimally apparent.

Wilson Carey McWilliams, *On Violence and Legitimacy,* 79 YALE L.J. 623, 627 (1970).

For similar comments, see WILLIAM IAN MILLER, HUMILIATION 54, 91 (1993) (describing *violence* as "a problematic analytical category" and as "an easy conceptual dumping ground for everything ranging from sport to child abuse"); JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 23-25 (1981) (describing some of the various ways in which *violence* has been defined); and Thomm Kevin Roberts et al., *Psychological Aspects of the Etiology of Violence, in* VIOLENCE AND THE VIOLENT INDIVIDUAL 10 (J. Ray Hays et al. eds., 1981) ("The first thing one is struck by is the ambiguity of the term *violence* . . . . '[N]o definition of violence has ever proved completely successful.' " (citation omitted)); see also HARRIS, *supra* note 5, at 11-12 (expressing surprise at the lack of agreement about the meaning of *violence*).

Interestingly, several of these — and other — commentators overcome the conceptual difficulty of defining the term *violence* and offer definitions that, like the dictionary definitions, are focused on the use of physical force to injure. *See, e.g.,* MILLER, *supra,* at 59-60 (asserting that "[m]ost violent interaction falls into the category of the easy case, about which no sane person would dispute the appropriateness of the interaction being labeled violent . . . . Violence is force, but force characterized variously by suddenness, uncertain warrant, the capacity to induce terror." (footnote omitted)); Marvin E. Wolfgang, *Sociocultural Overview of Criminal Violence, in* VIOLENCE AND THE VIOLENT INDIVIDUAL, *supra,* at 97, 98 ("I shall use the term violence to refer to the intentional use of physical force on another person . . . .").

32. *See, e.g.,* HARRIS, *supra* note 5, at 12 (citing Robert Paul Wolff, *On Violence,* 66 J. PHIL. 602 (1969)).

33. *See, e.g.,* BLACK'S LAW DICTIONARY 1570 (6th ed. 1990) (defining *violence* as "[u]njust or unwarranted exercise of force . . . . Physical force unlawfully exercised . . . . The exertion of any physical force so as to injure, damage or abuse").

34. OXFORD ENGLISH DICTIONARY 654 (2d ed. 1989).

35. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2554 (unabridged 1986).

36. *See, e.g.,* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (Hand, J.) (stating that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary"), *affd.,* 326 U.S. 404 (1945).

On the other hand, it is hardly an irrational response to a lexical ambiguity to start by looking at the dictionary definition of the word in question. This approach has been endorsed by the Supreme Court, in deed if not explicitly in word. *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation,* 107 HARV. L. REV. 1437, 1438 (1994) (discussing

confronted with a need to provide a definition for *violence*, so even though judicial opinions use the term with astonishing frequency,[37] few cases explain what it means.[38] When the courts do so, however, they have assigned it the same basic meaning as the dictionaries: the use of physical force so as to injure or abuse.[39]

An example of a court that adhered rather strictly to the dictionary definition is *Abernathy v. Conroy*.[40] In *Abernathy*, the Fourth Circuit confronted a void-for-vagueness challenge to South Carolina's common law definition of *riot*. The common law defined a riot as " 'a tumultuous disturbance of the peace, by three or more persons assembled together . . . putting their design into execution in a terrific and violent manner.' "[41] In response to the allegation that the reference to "violent" conduct was impermissibly vague, the court stated that " 'violence' is defined as the 'exertion of physical force so as to injure or abuse,' " and asserted that the average citizen would understand the term *violence* in this way.[42]

---

the Court's increasing use of dictionaries and observing that dictionary definitions were used in 28% of the cases decided by the Court during its 1992 Term).

37. A search in the ALLFEDS database on Westlaw reveals that in the first six months of 1995, 19,098 cases used the words *violence* or *violent*, excluding uses of the terms of art "crime of violence" and "violent felony"; the search terms for this were: violen! % "crime of violence" % "violent felony" and da(aft 1-1-95) and da(bef 7-1-95).

38. One particularly egregious example of this failure to define *violence* is NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), which made 86 references to "violence" or "violent" without ever explaining what either meant.

39. A number of state cases that have had to define *violence* based their definitions on those employed by dictionaries, or focused on the importance of physical force to the meaning of the term, or both. *See, e.g.*, State v. Szymkiewicz, 652 A.2d 523, 525 (Conn. App. Ct. 1995) ("We have construed the words 'violent or threatening behavior' in this statute to mean 'conduct which actually involves physical violence or portends imminent physical violence.' "); Eby v. State, 290 N.E.2d 89, 97 (Ind. Ct. App. 1972) (using *Webster's New International Dictionary* to define *violence* as " 'the exertion of any physical force considered with reference to its effect on another"); Conroy v. City of Boston, 465 N.E.2d 775, 777 & n.3 (Mass. 1984) (referring to both *Webster's Third New International Dictionary* and *Black's Law Dictionary* in defining *violence* as the "exertion of any physical force so as to injure or abuse"); Utica Fire Ins. Co. v. Teschner's Tavern, No. 66942, 1995 WL 106128, at *2 (Ohio Ct. App. Mar. 9, 1995) (quoting *Webster's New Collegiate Dictionary* as defining *violence* as the "exertion of physical force so as to injure or abuse"); Smith v. State, 737 P.2d 1206, 1215 (Okla. Crim. App. 1987) (relying on *Webster's New World Dictionary* and holding that a rape committed with the use of force or fear is a "violent crime"), *cert. denied*, 115 S. Ct. 673 (1994); State v. O'Connell, 510 A.2d 167, 171 (Vt. 1986) (using *Webster's New International Dictionary* to conclude that " 'unjust or improper force' may also constitute violence").

While this Note is concerned primarily with federal law regarding threats and violence, given the paucity of federal cases discussing the meaning of *violence*, the foregoing state cases are helpful in showing how courts typically understand the word *violence*. They also demonstrate that *Abernathy v. Conroy*, a case discussed *infra* in the text accompanying notes 40-42, is not an aberration.

40. 429 F.2d 1170 (4th Cir. 1970).

41. 429 F.2d at 1174-75 (quoting State v. Connolly, 18 S.C.L. (3 Rich.) 337, 338 (1832)).

42. 429 F.2d at 1175 (quoting *Webster's Seventh New Collegiate Dictionary* and stating that "violence is a term with which twentieth century Americans are particularly well-acquainted. . . . When the terms are seen in the context of the whole definition, they plainly

Other federal courts using the term *violence* likewise have articulated a view of violence that reflects the centrality of physical force to its meaning. For instance, in an involuntary servitude case where "physical force" was an element of the offense, the First Circuit upheld a jury instruction stating that " '[p]hysical force includes restraint, physical restraint . . . . It includes the notion of compulsion, coercion, *power,* violence.' "[43] In another particularly colorful example, *United States v. Jennings,*[44] the court had to evaluate the conduct of a defendant who had punched his court-appointed counsel, knocking him to the floor.[45] The court commented: "Having decided that the use of physical force within the walls of the courthouse simply is unacceptable, the question remains how to react to the use of violence . . . ."[46] These statements do not prove conclusively that *violence* is limited to the use of physical force or the risk thereof, but they do reveal that courts, like the dictionaries, think of *violence* as directly related to physical force.

B. *Risk Creation as a Type of Violence*

Not many federal courts besides the *Abernathy* court have had occasion to offer a complete definition of *violence.* This void has been filled to some extent by statutory definitions of the term *violent felony* — added to the Armed Career Criminal Act (ACCA) by amendment[47] — and the term *crime of violence* in the career offender provision of the *Guidelines.* These statutory definitions have firmly established *risk* of the use of physical force as a type of violence.[48]

---

suggest to the average citizen noisy, frightening conduct accompanied by harmful physical force").

43. United States v. Alzanki, 54 F.3d 994, 1001 (1st Cir. 1995).

44. 855 F. Supp. 1427 (M.D. Pa. 1994).

45. *See* 855 F. Supp. at 1440. The defendant further provoked the wrath of the court by informing the U.S. Marshalls who were restraining him that his original plan had been "to lean close for a whispered consultation, then to bite counsel's ear off." 855 F. Supp. at 1440 n.9.

46. 855 F. Supp. at 1444. For another example of a linkage between physical force and violence, see the *Federal Pattern Jury Instruction* for "excessive force," which says: "[E]very person has the right not to be subjected to unreasonable or excessive force while being arrested . . . . Whether or not the force used in making an arrest was unnecessary, unreasonable or violent is an issue to be determined by you . . . ." 3 DEVITT ET AL., *supra* note 15, § 103.08, at 961.

47. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(b), 100 Stat. 3207, 3207-39 to -40 (codified at 18 U.S.C. § 924(e)(2)(B) (1994)).

48. In a sense, the inclusion of risk creation within the meaning of *violence* is implicit in the more general definition as well. All of the dictionary definitions discussed *supra* emphasize the link between the actor's conduct and the harmful outcome — the conduct must be undertaken "*so as*" to cause injury or damage. This linkage provides some justification for considering risk-creating conduct, which has a tendency to result in injury or damage, as within the scope of the term *violence.*

The ACCA and the career offender provision are both designed to impose particularly severe penalties on certain classes of criminals: the ACCA focuses on those who committed violent felonies while armed,[49] while the career offender provision applies more generally to anyone convicted of three crimes of violence.[50] The definitions of these two terms are nearly identical, and both expressly include "conduct that presents a serious potential risk of physical injury to another."[51] In light of these definitions, courts consider various crimes to be violent felonies for purposes of the ACCA or crimes of violence for purposes of the career offender provision, if they involve physical force or the risk thereof.[52] A circuit split that arose regarding the status of attempted burglary as a

The inclusion of risk creation within the meaning of *violence* also prevents some conceptual absurdities. If risk creation were *not* included, for instance, the placement of a bomb in a public place would not be a violent act if the bomb were detected and disarmed before it exploded — there would have been no use of physical force. The bomber's conduct, however, is the same whether the bomb is detected and disarmed or whether it explodes with great physical force. It makes little sense to classify his attempted bombing as "non-violent" simply because it was unsuccessful. Similarly, if a threat creates risk of the use of force but does not result in any force actually being used, the risk itself may be enough to characterize the threat as "violent."

49. *See* 18 U.S.C. § 924(e)(1) (1994) (prohibiting courts from suspending sentences or granting probation to offenders with three previous convictions for "violent felonies" and setting 15-years imprisonment as the minimum sentence for such offenders).

50. *See* USSG §§ 4B1.1 to .2.

51. *See* 18 U.S.C. § 924(e)(2)(B) (1994); USSG § 4B1.2(1)(ii). For a discussion of the importance of risk creation to the crime of violence definition, *see infra* section III.C.

52. With respect to the ACCA, see, for example, United States v. Mack, 8 F.3d 1109, 1112 (6th Cir. 1993) ("[D]efendant's prior convictions for sexual battery are not 'violent felonies' ... because they do not necessarily involve physical force.... We decline to hold that sexual conduct with someone ... unaware of the nonconsensual nature of the act 'involves conduct that presents a serious potential risk of physical injury to another.' "), *cert. denied*, 116 S. Ct. 153 (1995); United States v. Thomas, 2 F.3d 79, 80 (4th Cir. 1993) (adopting an earlier holding "that attempted breaking and entering under Maryland law qualified as a violent felony because the risk of confrontation, and physical harm, created when someone interrupts an intruder in the process of breaking in is nearly as great as the risk created when an interruption occurs after access is gained"), *cert. denied*, 114 S. Ct. 1194 (1994); United States v. King, 979 F.2d 801, 804 (10th Cir. 1992) (holding that a conspiracy to commit armed robbery is not a "violent felony" because, unlike a completed armed robbery, conspiracy does " 'not necessarily present circumstances which [create a] high risk of violent confrontation' " (quoting United States v. Strahl, 969 F.2d 980 (10th Cir. 1992))); United States v. Payne, 966 F.2d 4, 9 (1st Cir. 1992) (holding that attempted breaking and entering is a "violent felony" because "the defendant will have [to] come close enough to someone else's premises to risk a confrontation likely to result in violence"); and United States v. Martinez, 954 F.2d 1050, 1054 n.3 (5th Cir. 1992) (holding that attempted burglary is *not* a "violent felony" because "the crime of attempted burglary simply cannot be said to present the sort of categorical danger of serious risk of injury to others that is required to count an offense as a 'violent felony' ").

With respect to the career offender provision, see, for example, United States v. Rutherford, 54 F.3d 370, 376 (7th Cir.) (holding that drunk driving is a "crime of violence" because it inherently creates a risk of physical injury), *cert. denied*, 116 S. Ct. 323 (1995); United States v. Weinert, 1 F.3d 889, 891 (9th Cir. 1993) (holding that shooting at a dwelling is a "crime of violence" because it presents a risk); United States v. McDougherty, 920 F.2d 569, 574 (9th Cir. 1990) (holding that robbery is a "crime of violence" because it presents a risk), *cert. denied*, 499 U.S. 911 (1991).

"violent felony" under the ACCA is illustrative in this regard. Although the circuits came to different results, they both analyzed the issue in terms of whether the crime created risk of the use of physical force and injury to others.[53]

III. The Meaning of *Violence* in the Reduced Mental Capacity and Career Offender Provisions

Under the definition of *violence* favored by both the courts and the dictionaries — the use or risk of the use of physical force so as to injure, damage, or abuse[54] — it is clear that not all threats are violent because threats do not involve physical force,[55] and some threats do not even create *risk* of the use of physical force.[56] This Part considers whether this understanding of when threats are violent should be applied to the reduced mental capacity and career offender provisions. Section III.A argues that it is desirable to distinguish risk-creating threats from riskless threats when deciding whether they are violent for sentencing purposes. Risk-creating threats cause a different and greater harm than riskless threats, so it makes sense to impose greater punishment on those making risk-creating threats. Section III.B contends that the language and purposes of the reduced mental capacity provision indicate that courts should consider riskless threats "non-violent offenses." Section III.C asserts that the career offender provision's definition of "crime of violence" should be understood to exclude riskless threats because the provision was designed to include crimes that *inherently* create risk of the use of physical force, and threats do not inherently create such risk.

A. *The Desirability of Distinguishing Between Risk-Creating and Riskless Threats*

Characterizing riskless threats as "non-violent" and risk-creating threats as "violent" is not just a matter of definitional accuracy. It also achieves the *Guidelines*'s goal of prescribing different punishments for crimes that result in different harms.[57] Threats are

53. *Compare Thomas,* 2 F.3d at 80 (holding that attempted burglary is a "violent felony" because it creates a risk of physical harm) *with Martinez,* 954 F.2d at 1054 n.3 (holding that attempted burglary is not a "violent felony" because it does not present a serious risk of injury).

54. *See supra* Part II.

55. Threats are speech acts, which in themselves involve no use of force. *See supra* note 6.

56. *See supra* Part I.

57. *See, e.g.,* USSG § 1B1.3(a)(3) (stating that the "relevant conduct" for purposes of deciding the base offense level for a crime includes "all harm that resulted from the acts and omissions . . . and all harm that was the object of such acts and omissions").

The *Guidelines* also refer to the objective of tailoring the punishment of crimes to the degree of harm caused by reference to the more general goal of "proportionality." *See, e.g.,*

punishable because, irrespective of risk creation, they cause a harm that society desires to prevent: fear.[58] Sometimes, but not always, threats also cause a second harm — risk of the use of physical force. Consequently, a definition of *violence* that enables courts to impose different sentences on these two classes of threats — those that are merely frightening and those that are both frightening and risky — is desirable because the latter causes a different and greater harm.[59]

Furthermore, the *Guidelines* specifically recognize that different degrees of risk creation are important in imposing sentences on threateners. In section 2A6.1, which prescribes sentences for "Threatening Communications," the Commission commented: "[Threat] statutes cover a wide range of conduct, the seriousness of which depends upon the defendant's intent and the likelihood that the defendant would carry out the threat."[60]

B. *The Reduced Mental Capacity Provision*

The reduced mental capacity provision permits a court to grant a sentence reduction to a defendant suffering from reduced mental capacity only if the defendant committed a "non-violent offense."[61] The *Guidelines* do not provide a definition for the term "non-

---

USSG Ch.1, Pt.A (3), p.s. ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.").

Achieving proportionality in criminal sentences is not discretionary: it is constitutionally mandated. *See* Solem v. Helm, 463 U.S. 277, 284 (1983) ("The Eighth Amendment declares: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.").

58. *See supra* section I.B. The harm of fear creation encompasses a number of related harms, such as illnesses that may be caused by anxiety, and the cost of inefficient behavior that threat recipients engage in as a response to a threat. *See* Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery,* 141 U. PA. L. REV. 1877 (1993) (describing the anxiety and inefficient conduct that threats induce). For example, a threat recipient might become clinically depressed as a result of prolonged anxiety or might quit his job if the threat related to his workplace conduct. These kinds of harms — in addition to simple anxiety — are among those that we seek to prevent by criminalizing threats.

59. For an endorsement of this reasoning, see *Solem,* 463 U.S. at 292, which states:

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense . . . .
>
> Application of [this] factor[ ] assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts have traditionally made these judgments — just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender.

See also Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes,* 93 MICH. L. REV. 320, 354 (1994) ("Two elements of a crime describe its seriousness: the culpability of the offender and the harm caused to society. Murder, for example, is a more serious crime than intentional assault because of the harm caused." (footnotes omitted)).

60. USSG § 2A6.1, comment. (backg'd.).

61. *See* USSG § 5K2.13, p.s.

violent offense," which seems to suggest that the term should be given its ordinary legal meaning[62] — an offense not involving the use or risk of the use of force.[63]

This interpretation is reinforced by other language in the provision denying sentence reductions to defendants whose criminal histories "indicate a need for incarceration to protect the public."[64] The decision to include this limitation indicates that the reduced mental capacity provision as a whole is concerned about risk presented by the defendant. Defendants whose *past* offenses demonstrate risk creation are barred from sentence reductions by the "criminal history" limitation. Defendants whose *instant* offenses involved risk are denied sentence reductions based on the "non-violent offense" requirement. Understood in this way, the two provisions work toward a common goal, and the reduced mental capacity provision sends a consistent message: leniency is appropriate when a person committed a crime while suffering from reduced mental capacity but did not create any real risk to anyone.[65] Under this approach, therefore, a riskless threat should qualify as a "non-violent offense."

The only reason that has been suggested for understanding *non-violent offense* to have other than its customary legal meaning is that the *Guidelines* provide a definition for "crime of violence" in the career offender provision. Some courts have decided that because both terms contain the same root word — *violence* — a "non-violent offense" should be understood as anything that is not a crime of violence.[66] Because courts generally assume that all

62. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.28, at 248 (5th ed. 1992) ("Many cases hold that words in a statute are to be given their common meaning .... Many cases state the rule in terms of a presumption favoring the common meaning in the absence of evidence that some other meaning was intended or manifested." (footnotes omitted)).

63. *See supra* Part II.

64. USSG § 5K2.13, p.s.

65. *See* 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) ("[T]he term 'non-violent offense' in section 5K2.13 refers to those offenses that, in the act, reveal that a defendant is not dangerous . . . ."); *see also* United States v. Poff, 926 F.2d 588, 595 (7th Cir. 1991) (Easterbrook, J., dissenting) ("[T]he Commission has not required judges to treat the innocuous threatener and the murderous one identically.... When prison is not justified by the need to incapacitate the defendant, § 5K2.13 is available.").

66. The leading case taking this approach is *Poff;* other cases are collected *supra* in note 9. The *Poff* court focused on the fact that the Sentencing Commission used the same root word — *violence* — in both the career offender and reduced mental capacity provisions. The court then concluded that the defendant could not meet her burden of showing that the Commission meant something different by the two uses of *violence* because "when the same word appears in different, though related sections, that word likely bears the same meaning in both instances." 926 F.2d at 591. The court never explains how the career offender and reduced mental capacity provisions are "related."

threats to use physical force are crimes of violence,[67] cross-applying the crime of violence definition to the reduced mental capacity provision would mean that a threat never could be considered a nonviolent offense. This cross-application of the crime of violence definition, however, is inappropriate in light of the structure and text of the *Guidelines* and the different policy goals of the two provisions.

First, the structure and text of the *Guidelines* suggest that the Sentencing Commission's decision to use different terms in the two provisions means that different meanings were intended.[68] At the beginning of the *Guidelines*, the Commission specifies some definitions that it intends to have "general applicability."[69] The crime of violence definition is not among these. The *Guidelines* then provide explicit cautionary language regarding the cross-application of other definitions that were not designated for "general applicability": "Definitions of terms also may appear in other sections. *Such definitions are not designed for general applicability;* therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis."[70] This language seems to place the burden of persuasion squarely upon those who advocate the cross-application of a definition in an instance where the Sentencing Commission has declined to do so.[71]

67. *See, e.g.*, United States v. Butt, No. 92-5701, 1994 WL 4671, at *4 (4th Cir. Jan. 6) (stating that "courts have held threats to be crimes of violence under § 4B1.2"), *cert. denied*, 114 S. Ct. 1861 (1994); *Chatman*, 986 F.2d at 1450 ("According to some courts . . . a crime [should] be characterized as one 'of violence' within the meaning of section 4B1.2 if any one of the crime's statutory elements involves merely the 'threatened use of physical force' against a person, *regardless* of the specific facts of the crime." (citing United States v. Wilson, 951 F.2d 586, 588 (4th Cir. 1991))), *cert. denied*, 112 S. Ct. 2294 (1992); United States v. Hunter, 985 F.2d 1003, 1007 (9th Cir. 1993) (asserting that threats to kill and assault are crimes of violence); *Poff*, 926 F.2d at 590 ("Appellant admitted that she threatened President Reagan . . . and her prior convictions required the trial judge to apply the career offender provision of the Guidelines . . . ." (citing United States v. McCaleb, 908 F.2d 176, 178 (7th Cir. 1990) (stating that threats are crimes of violence))).

The assumption that all threats are crimes of violence arises from the language of the crime of violence definition, which appears to include "any offense . . . that has as an element the . . . threatened use of physical force." USSG § 4B1.2(1). This Note challenges this assumption *infra* in section III.C.

68. *Cf.* Pittston Coal Group v. Sebben, 488 U.S. 105, 115 (1988) (concluding that Congress's decision to use different wording in two "simultaneously adopted" subsections of an act reflects an intent to convey different meanings).

In an ordinary statute, one might argue that Congress's choice of slightly different formulations is indicative of mere oversight rather than a deliberate distinction. But as the *Chatman* court observes, the *Guidelines* " 'were written as a unit . . . and with greater than customary attention to the relation among sections. . . . Amendments numbering [473] over [five] years attest to a continuous effort to make the text and notes an integrated whole.' " *Chatman*, 986 F.2d at 1450 (alterations in original) (quoting *Poff*, 926 F.2d at 594 (Easterbrook, J., dissenting)).

69. *See* USSG § 1B1.1, comment. (n.1).

70. USSG § 1B1.1, comment. (n.2) (emphasis added).

71. The dissent in *Poff* employed similar reasoning:

> It would have been easy to write § 5K2.13 to say that the judge may depart unless the defendant committed a 'crime of violence' as § 4B1.2 defines it; instead the Commission

Second, the policy goals of the career offender and reduced mental capacity provisions are different, suggesting that cross-application of the crime of violence definition to the reduced mental capacity provision is inappropriate. The career offender provision gives effect to the congressional mandate that career offenders be punished harshly — that their sentences be "at or near the maximum term authorized" by statute.[72] Moreover, this provision is an essential part of the sentencing process. The sentencing court *must* consider whether the defendant qualifies as a career offender when imposing a sentence.[73] The reduced mental capacity provision, by contrast, seeks to enable courts to give more lenient sentences to defendants who suffered from reduced mental capacity during the commission of their offense.[74] It is also a purely discretionary provision: courts may refuse to consider it if they so desire.[75] Thus, the differences between the career offender and reduced mental capacity provisions encompass both distinctive policy objectives and distinctive usage by courts. These differences outweigh the mere fact that cognates of the word *violence* are used in both provisions and render cross-application of the crime of violence definition to the reduced mental capacity provision inappropriate.[76]

> selected different formulations. Although it laid out a detailed meaning for 'crime of violence' in § 4B1.2, it did not provide so much as a cross-reference in § 5K2.13, a curious omission if the Commission meant to link these phrases so tightly that they are mutually exclusive.

926 F.2d at 594 (Easterbrook, J., dissenting). This reasoning was adopted by *Chatman*. *See* 986 F.2d at 1450 (quoting the above passage and further stating: "The lack of a cross-reference is all the more significant because so many of the Guidelines use explicit cross-referencing. For instance, the definition of 'crime of violence' in section 4B1.2 is expressly adopted by section 4A1.1 . . . .").

72. *See* USSG § 4B1.1, comment. (backg'd.) (citing S. REP. No. 225, 98th Cong., 1st Sess. 175 (1983)).

73. *See* USSG § 1B1.1(f) (instructing the sentencing court to "[d]etermine from Part B of Chapter Four [which includes the career offender provision] any other applicable [sentence] adjustments").

74. *See Chatman*, 986 F.2d at 1452 ("In contrast to the purposes of section 4B1.2, the point of section 5K2.13 is to treat with lenity those individuals whose 'reduced mental capacity' contributed to commission of a crime."); *cf. Poff*, 926 F.2d at 595 (Easterbrook, J. dissenting) (stating that "[s]ection 5K2.13 read as a whole . . . says that when incapacitation is not an important justification for punishment, mental condition may be the basis of a departure").

75. The introduction to the chapter in which the reduced mental capacity provision is found states: "[T]his subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. . . . Presence of any such factor *may* warrant departure from the guidelines . . . *in the discretion of the sentencing court*." USSG § 5K2.0, p.s. (emphases added).

76. *See generally* John A. Henderson, Note, *A Square Meaning for a Round Phrase: Applying the Career Offender Provision's "Crime of Violence" to the Diminished Capacity Provision of the Federal Sentencing Guidelines*, 79 MINN. L. REV. 1475, 1496-503 (1995) (presenting a number of arguments against cross-applying the crime of violence definition to the reduced mental capacity provision).

Even if one does not accept the argument presented in this section, however, and chooses to cross-apply the crime of violence definition to the reduced mental capacity provision, the next section demonstrates that not all threats are crimes of violence. Consequently, regardless of which definition of *violence* one prefers — the ordinary legal definition or the crime of violence definition — at least *some* threats should qualify as non-violent offenses.

C. *The Career Offender Provision*

Courts that disagree with the argument presented in section III.B and hold that threats cannot be non-violent offenses generally do so based on two premises: (1) they believe that the definition of *crime of violence* controls the meaning of *non-violent offense,* and (2) they believe that *all* threats are crimes of violence, and therefore no threat can be a non-violent offense.[77] Even if one accepts the first premise — in spite of the arguments presented in section III.B — this section contends that the second premise is erroneous.

This section argues that the crime of violence definition should be understood to exclude *riskless* threats because risk of physical harm is an essential element of crimes of violence. This section demonstrates the centrality of risk of physical harm to the crime of violence definition[78] by examining the language of the definition, its history, and the interpretation of the definition by courts.

Section 4B1.2 defines *crime of violence* as follows:

> The term "crime of violence" means any offense under federal or state law . . . that — (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*[79]

One reasonably could argue, based on a simple examination of the language of section (i), that this definition includes *all* "threatened use[s] of physical force."[80] Courts that have applied the career of-

77. *See supra* note 9 (collecting cases).

78. The crime of violence definition appears in three places: § 4B1.2 of the *Sentencing Guidelines,* 18 U.S.C. § 16 (1994) — from which the § 4B1.2 definition was drawn — and 18 U.S.C. § 924(e)(2)(B) (1994) — which defines the term *violent felony* but uses a definition very similar to the other two provisions. Given that the definitions set forth in these provisions are identical in all respects relevant to this Note, it generically refers to "the" crime of violence definition.

79. USSG § 4B1.2(1) (emphasis added).

80. This "plain meaning" approach to statutory interpretation has long been considered appropriate as a starting point. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."); *see also* 2A SINGER, *supra* note 62, § 46.01, at 81 (quoting *Caminetti*).

fender provision to threat offenses generally have assumed, without much analysis, that this interpretation is correct and that therefore all threats to use physical force are crimes of violence.[81]

Despite the apparent plausibility of this "plain language" approach, the language of the definition as a whole, its legislative history, and the way in which courts have interpreted the definition indicate that the better understanding is that the definition only includes crimes that *inherently* involve risk.[82] The language of the "otherwise" clause in section (ii) provides insight into what the drafters were trying to accomplish in the crime of violence definition. Although the "otherwise" clause is attached to section (ii) and therefore does not *directly* control section (i), statutory language should be read in the context of the entire statute in which it is found,[83] so the "otherwise" clause is relevant to understanding the meaning of section (i) as well.[84]

The "otherwise" clause provides a guide to what the drafters sought to accomplish by enumerating specific offenses in section (ii): it indicates that they were listing offenses that they felt created a serious potential risk of physical injury. The presence of the phrase "or *otherwise* involves . . . serious potential risk" reflects the drafters' belief that the specific offenses listed in section (ii) were all examples of offenses involving serious potential risk. The list of specific offenses in section (ii), in turn, is simply a continuation of the project started in section (i), which was to identify categories of crimes that generally involve risk.[85] The "otherwise" clause and the

---

Singer cautions, however, against unthinking reliance on the plain language. "Judicial frustration, if not usurpation, of legislative authority, may be the result of reflexive judicial construction arrived at exclusively by considering the language of the statute . . . without regard for the purpose of the act and other aids to interpretation." *Id.* § 45.09, at 42.

81. *See supra* note 9 (collecting cases that assume all threats are crimes of violence).

82. Departure from the apparent "plain meaning" of a statute is clearly permissible under these conditions. *See* National R.R. Passenger Corp. v. National Assn. of R.R. Passengers, 414 U.S. 453, 458 (1974) (stating that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent"); Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) ("[W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination."); *see also* 2A SINGER, *supra* note 62, § 46.07, at 126-27 ("The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature . . . . The intention prevails over the letter, and the letter must if possible be read to conform to the spirit of the act.").

83. *See* 2A SINGER, *supra* note 62, § 46.05, at 103 ("An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context . . . and the purpose or intention . . . of the body which enacted or framed the statute . . . ."); *id.* at 105 (referring to "the cardinal rule that the general purpose, intent or purport of the whole act shall control").

84. *See* United States v. Rutherford, 54 F.3d 370, 373 (7th Cir. 1995) (stating that "[s]ections 4B1.2(i) and (ii) work together").

85. This is demonstrated by the fact that the two sections are disjunctive: if an offense does not qualify as a crime of violence under § (i), the sentencing court then considers

list of specific offenses in section (ii) demonstrate the drafters' desire to ensure that all *other* crimes involving serious potential risk that section (i) overlooked still will qualify as crimes of violence.

That the "otherwise" clause indicates the statute's intent to encompass crimes that create a risk of physical injury is supported by the Supreme Court's reasoning in *Taylor v. United States.*[86] In *Taylor,* the Court analyzed the purpose of the crime of violence definition[87] as a prelude to determining the meaning of the term *burglary.* The Court first quoted a passage from the legislative history of the provision indicative of the importance of risk of injury to the drafters: "The . . . major question involved in these hearings was as to what violent felonies involving physical force against property should be included in the definition . . . . The Subcommittee agreed to add the crimes . . . that involve conduct that presents a serious potential risk of physical injury to others."[88] The Court then described the addition of the word "otherwise" — along with the newly enumerated specific offenses — as "critical" to its discussion of the definition,[89] and concluded that "Congress focused its efforts on career offenders — those who . . . present at least a potential threat of harm to persons."[90]

Moreover, the *Taylor* Court's analysis demonstrates that the drafters of the crime of violence definition did not merely seek to include crimes that *might* involve a risk of the use of physical force; rather, they sought to include in the definition those crimes that *inherently* create such risk. The Court noted in its analysis of the legislative history of the provision that an unenacted predecessor of the current definition explicitly had indicated the drafters' desire to include *inherently* risk-creating crimes. The predecessor statute had included any felony "that, *by its nature,* involves a substantial risk that physical force against the person or property of another may be used."[91] When an alternative bill was introduced that omitted language of this kind — it included only "the use, attempted use, or threatened use of physical force" — it was criticized sharply for

whether it might still qualify as one of the specific offenses listed in § (ii). If this fails, the court may then consider whether the crime "otherwise involved" risk of physical injury.

86. 495 U.S. 575 (1990).

87. The Court actually was analyzing the definition of *violent felony* in 18 U.S.C. § 924(e)(2)(B) (1994) — a provision of the ACCA. The definition of *violent felony* is exactly the same as the crime of violence definition in the career offender provision. *See supra* note 78 and accompanying text.

88. *Taylor,* 495 U.S. at 587 (quoting H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986)) (emphasis omitted).

89. *See* 495 U.S. at 587.

90. 495 U.S. at 587-88.

91. 495 U.S. at 583 (emphasis added) (quoting S. 2312, 99th Cong., 2d Sess. 2-3 (1986); and H.R. 4639, 99th Cong., 2d Sess. 2 (1986)).

omitting inherently risky property offenses.[92] One critic asserted that "[i]t is these crimes against property — *which are inherently dangerous* — that we think should be considered as predicate offenses."[93] Based on this legislative background — and Congress's ultimate decision to include inherently dangerous offenses and the "otherwise" clause — the *Taylor* Court concluded:

> [T]hroughout the history of the enhancement provision, Congress focused its efforts on career offenders — those who commit a large number of fairly serious crimes as their means of livelihood, and who . . . present at least a potential threat of harm to persons. . . .
>
> The legislative history also indicates that Congress singled out burglary . . . for inclusion as a predicate offense . . . because of its *inherent* potential for harm to persons. . . . Congress apparently thought that *all* burglaries . . . shared this potential for violence . . . .[94]

The lower courts that addressed the status of burglary prior to *Taylor* likewise focused on the inherent nature of the risk created by the crime,[95] and courts have applied this focus to other crimes as well when deciding whether they should be considered crimes of violence.[96]

---

92. 495 U.S. at 584 (describing the criticism of H.R. 4768, 99th Cong., 2d Sess. (1986) proposing the narrower definition of *crime of violence*).

93. 495 U.S at 585 (quoting *Armed Career Criminal Legislation: Hearings on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 99th Cong., 2d Sess. 15 (1986) (testimony of James Knapp, Deputy Assistant Attorney General)) (emphasis added).

94. 495 U.S. at 587-88 (emphases added). The legislative history of the crime of violence definition addresses burglary similarly, saying that burglary is a "crime of violence" because "offenses such as burglary . . . involve the substantial risk of physical force against another person or against the property." S. REP. No. 225, 98th Cong., 2d Sess. 307 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3487.

95. *See, e.g.,* United States v. Becker, 919 F.2d 568, 571 (9th Cir. 1990) ("[A] 'crime of violence' is any felony that *inherently* involves 'a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.' First degree burglary . . . involves just such a risk." (emphasis added) (quoting 18 U.S.C. § 16(b) (1988))), *cert. denied,* 499 U.S. 911 (1991); United States v. Davis, 881 F.2d 973, 976 (11th Cir. 1989) ("[W]e conclude that the burglary of a dwelling *by its nature* creates a substantial risk of physical force. . . . The district court, therefore, did not err in concluding that appellant's conviction for burglary . . . constituted a crime of violence . . . ." (emphasis added)), *cert. denied,* 493 U.S. 1026 (1990); United States v. Flores, 875 F.2d 1110, 1113 (5th Cir. 1989) (holding that burglary of a dwelling is a "crime of violence" because "[w]henever a private residence is broken into, there is *always* a substantial risk that force will be used" (emphasis added)).

96. *See, e.g.,* United States v. Rutherford, 54 F.3d 370, 375 (7th Cir.) (considering drunk driving and stating that " '[c]onjecture' or 'speculation' about possible harm is not sufficient to create a crime of violence under § 4B1.2; instead, there must be evidence that the crime, *by its nature,* presents a substantial risk" (emphasis added)), *cert. denied,* 116 S. Ct. 323 (1995); United States v. Weinert, 1 F.3d 889, 891 (9th Cir. 1993) ("Thus, it is the risk *inherent* in the act of shooting at an inhabited building, as opposed to the presence of a victim, that makes this particular offense a crime of violence." (emphasis added)); United States v. McDougherty, 920 F.2d 569, 574 (9th Cir. 1990) ("[R]obbery is '*inherently* dangerous' . . . . Clearly . . . robbery as defined in California falls under [the crime of violence definition] as a felony that '*by its nature,* involves substantial risk' that physical force may be used." (emphases added)), *cert. denied,* 499 U.S. 911 (1991); *see also* United States v. Telesco, 962 F.2d 165,

The Sentencing Commission clearly believes that the crime of violence definition is intended to encompass *inherently* risk-creating offenses. In its commentary to the career offender provision, the Commission expressly identified some crimes as crimes of violence, such as murder, manslaughter, and aggravated assault.[97] The Commission then echoed the language of the unenacted predecessor definition of *crime of violence* discussed in *Taylor,* stating: "Other offenses are included where . . . the conduct set forth (*i.e.* expressly charged) in the count of which the defendant was convicted . . . *by its nature,* presented a serious potential risk of injury to another."[98]

Given that the crime of violence definition seeks to encompass offenses that *inherently* involve a serious risk of the use of physical force, it would thwart this objective to interpret the definition to include *all* threats because threats do not inherently involve risk of the use of physical force.[99] The intent of the crime of violence provision would be served best if courts only applied it to those threats that create "a serious potential risk of physical injury to another." To apply the definition to *every* threatened use of physical force, risk-creating or not, extends the statute beyond its intended scope.[100]

---

166 (2d Cir. 1992) ("The Sentencing Commission has thus determined that certain crimes — regardless of the precise conduct — are *inherently* violent." (emphasis added)).

97. *See* USSG § 4B1.2, comment. (n.2).

98. USSG § 4B1.2, comment. (n.2) (emphasis added). Threats are notably absent from the Commission's list of crimes of violence, though the Commentary also repeats the passage in the text of the career offender provision stating that crimes that have as an element the "threatened use of physical force" are crimes of violence.

99. *See supra* Part I.

100. *Cf.* 2B SINGER, *supra* note 62, § 54.06, at 260-61 ("When the natural or literal meaning of statutory language embraces applications which would not serve the policy or purpose for which the statute was enacted . . . the courts may construe it restrictively in order not to give it an effect beyond its equity or spirit.").

Singer cites as an example of this principle Church of Holy Trinity v. United States, 143 U.S. 457 (1892), in which the Court employed reasoning nearly identical to that advocated by this Note. In *Holy Trinity,* the Court was forced to construe a statute making it unlawful for any business to pay the expenses of a foreigner to come to the United States "to perform labor or service of *any* kind." 143 U.S. at 458 (emphasis added). The church had hired a minister from abroad to come and preach to its congregation but argued that it should be excepted from the reach of the Act. Confronted with the Government's argument that the statute on its face permitted no exceptions, the Court stated:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation . . . makes it unreasonable to believe that the legislator intended to include the particular act.

143 U.S. at 459. The Court then looked at the legislative history and concluded that the evil the statute sought to remedy was the importation of cheap, unskilled labor. *See* 143 U.S. at 463-65. Hiring a minister to come and preach to a congregation did not contribute to this evil, so the Court held that the Church's acts were not punishable under the statute. *See* 143 U.S. at 472.

This view of the scope of the crime of violence provision effectuates the goal of distinguishing risk-creating from riskless threats in imposing sentences for them.[101] Only risky threats deserve to be singled out for the particularly severe punishment imposed on crimes of violence[102] because only risky threats create the harm that the career offender provision seeks to punish — risk of physical injury. To insist that *all* threats be considered crimes of violence prevents the *Guidelines* from achieving their goal of calibrating punishments to the degree of harm caused by the crime.[103]

A more recent example of this approach is United Housing Foundation v. Forman, 421 U.S. 837 (1975). In *Forman,* the Court had to determine whether "stock" sold by a nonprofit housing cooperative qualified as a "security" for purposes of the federal securities laws. The Court first noted that the statutory language defined a "security" as " 'any note, stock, treasury stock . . . or, in general, any interest or instrument commonly known as a 'security'. . . .' " 421 U.S. at 847 (quoting § 2(1) of the Securities Act of 1933). Despite this apparently clear statement that "any . . . stock" should be considered a security, the Court refused to interpret the statute in this manner because " '[a] thing may be within the letter of the statute and yet not within the statute, because not within its spirit.' " 421 U.S. at 849 (quoting *Church of Holy Trinity,* 143 U.S. at 459). Ultimately, the Court concluded that the stock at issue was not a security because "[the] shares have none of the characteristics that in our commercial world fall within the ordinary concept of a security." 421 U.S. at 851 (internal quotation marks omitted).

101. *See supra* section III.A.

102. *See supra* text accompanying note 59 (arguing that there should be different levels of punishment for threats that create risk and those that do not).

This approach has the additional advantage of making the crime of violence definition consistent with the general legal definition of *violence*: the use or risk of the use of physical force so as to injure, damage, or abuse. *See supra* Part II. While it is not necessary that the term of art *crime of violence* have a meaning that is consistent with the ordinary legal meaning of *violence,* in the interest of comprehensibility of the law, it is certainly desirable to achieve such consistency.

103. Another way to make the argument asserted in this section is to say that the lesser degree of harm caused by riskless threats, as compared with risk-creating threats, was a mitigating factor "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1994); *cf.* USSG § 5K2.0, p.s. (quoting the statutory language at the outset of its discussion of when departures from the *Guidelines* are appropriate).

The D.C. Circuit has used this language as a justification for looking at the facts of an offense to determine if it is a "crime of violence," even when the offense is clearly within the scope of § 4B1.2. *See* United States v. Baskin, 886 F.2d 383 (D.C. Cir. 1989), *cert. denied,* 494 U.S. 1089 (1990). *Baskin* states:

> Classifying Baskin as a career offender based on statutory characterizations of his previous crimes may be improper if an analysis of the facts demonstrates that they were not in fact crimes of violence.
>
> . . . A sentencing judge retains discretion to examine the facts of a predicate crime to determine whether it was a crime of violence . . . . Obviously, the guidelines' definitions, commentary, and the like provide a solid starting point for determining whether a prior conviction was in fact a crime of violence. However, it may be appropriate, as provided by the guidelines, for a district judge to depart from the guidelines' statutory definition . . . depending on the facts of the case.

886 F.2d at 389-90. Based on this reasoning, the *Baskin* court remanded the case to enable the trial court to determine whether the facts of the defendant's robbery justified a departure from the penalty enhancement stipulated by the career offender provision. *See* 886 F.2d at 390.

IV. The Assessment of Risk

Part III's argument that the status of a threat as violent or nonviolent depends on whether it created risk raises an obvious question: How should courts assess whether a threat created risk? The most obvious solution — for courts to examine in detail the conduct[104] involved in the offense — has been forbidden explicitly by the Supreme Court in the ACCA context.[105] Courts of appeals similarly have rejected a fact-specific, conduct-based inquiry in the context of the career offender provision.[106] But although it is impermissible to engage in elaborate factual investigations at the sentencing stage regarding the defendant's *conduct,* there are two ways courts may be able to assess risk created by a threat without violating this prohibition. First, the sentencing guideline applicable to threats explicitly *requires* courts to determine if a defendant intended to carry out his threat by examining conduct evidencing intent, so courts should make an exception to the prohibition when looking at conduct for this limited purpose. Second, courts can assess whether the defendant had the ability to carry out his threat by examining his personal characteristics and the nature of the situation in which the threat was made, thus avoiding any examination of the defendant's conduct.

This Part argues that courts should determine whether a threat created risk — and therefore was violent — by considering two factors: (1) whether the threatener had a genuine intent to carry out his threat and (2) whether he had the ability to carry out his threat.

---

104. Because the career offender provision only applies if the defendant has been convicted of two *previous* crimes of violence in addition to the instant offense, defendants sometimes ask courts to examine their *prior* criminal conduct as well as their conduct during the instant offense. Courts have refused to examine *any* specific conduct related to the defendant's offenses. *See infra* note 106 and accompanying text.

105. *See* Taylor v. United States, 495 U.S. 575, 600 (1990) ("The Courts of Appeals uniformly have held that § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions. We find the reasoning of these cases persuasive." (citations omitted)).

106. *See, e.g.,* United States v. Winter, 22 F.3d 15, 18 (1st Cir. 1994) (holding that under the career offender provision — § 4B1.2 — courts are "restricted to an examination of how the legislature has defined the crime, without any concomitant inquiry into the details of the defendant's actual criminal conduct"); United States v. Joshua, 976 F.2d 844, 856 (3d Cir. 1992) ("[W]e further hold that a sentencing court should look solely to the conduct alleged in . . . the indictment charging the offense of conviction in order to determine whether that offense is a crime of violence . . . ."); United States v. Telesco, 962 F.2d 165, 166 (2d Cir. 1992) ("When prior convictions are for crimes designated as 'crimes of violence' by the Sentencing Commission, the sentencing court is not permitted to examine the actual conduct underlying the convictions."); United States v. McDougherty, 920 F.2d 569, 573 (9th Cir. 1990) (citing *Taylor* and stating that, under § 4B1.2, "the court should not have to consider the specific conduct of the defendant . . . or sentencing hearings will turn into unmanageable mini-trials"); United States v. Gonzalez-Lopez, 911 F.2d 542, 547 (11th Cir. 1990) (holding that sentencing courts should not consider the underlying facts of conviction because "requiring sentencing courts to conduct factual inquiries into the specific conduct underlying an earlier conviction would present significant practical problems"), *cert. denied,* 500 U.S. 933 (1991).

Section IV.A argues that these two factors are prerequisites for the creation of risk and that it is permissible for courts to consider these factors in sentencing threateners. Section IV.B contends that focusing on the defendant's "dangerousness" in order to assess risk, as several circuits have elected to do, is not as satisfactory an approach as considering the two factors suggested by this Note.

A. *Intent and Ability as Risk Determinants*

In order for there to be genuine risk created by a threat — in other words, a real possibility that the threat will be carried out — it is clear that the threatener, at a minimum, must have the intent to carry out the threat and the ability to do so. A threat that the speaker has no intention of carrying out may create fear in the recipient,[107] but it does not create risk that physical force actually will be used. For example, a person might threaten someone solely for the purpose of frightening them, with absolutely no intent to carry out the threat. In such a case, there is no risk that force actually will be used, even though the recipient of the threat may not know this at the time.

Inquiring into a threatener's intent to carry out his threat sometimes may require courts to look at conduct evidencing intent.[108] Although this may appear to be at odds with the general rule against considering specific conduct at the sentencing stage, an exception should be made for threats because the Sentencing Commission explicitly requires courts to consider conduct evidencing intent in section 2A6.1 — the sentencing guideline stipulating the punishment level for "Threatening Communications."[109] In section 2A6.1, the Commission establishes a "base offense level"[110] for threatening communications but then specifically provides for an increase in the defendant's sentence "[i]f the offense involved any conduct evidencing an intent to carry out such threat."[111] Hence, a court imposing sentence on a defendant convicted of making threats is required to consider conduct evidencing intent even aside

107. *See supra* section I.B.

108. *Cf.* Marc Schuyler Reiner, Note, *The Public Safety Exception to* Miranda: *Analyzing Subjective Motivation*, 93 MICH. L. REV. 2377, 2386 (1995) (endorsing an examination of "objective, external evidence" as a means of determining subjective intent).

109. *See* USSG § 2A6.1.

110. The "base offense level" is the Commission's numerical indication of the seriousness of the crime. Once the base offense level for a crime is known, it may be subject to adjustment based on "specific offense characteristics" stipulated in the applicable guideline. *See* USSG § 1B1.1(b). The sentence enhancement provided for threateners who engage in "conduct evidencing an intent to carry out [their] threat" is an example of a "specific offense characteristic." The defendant's sentence is determined by plugging his offense level — adjusted as necessary — and his criminal history category into a matrix provided in the *Guidelines*. *See* USSG Ch.5, Pt.A Sentencing Table.

111. USSG § 2A6.1(b)(1).

from the need to assess risk.[112] Consequently, if courts consider this factor when deciding whether a threat was violent, no additional time or investigatory effort will be required.

The importance of the threatener's ability to carry out his threat is an even more fundamental indicator of risk than his intent to do so because, by definition, if the threatener is incapable of carrying out his threat, there is no risk that the threatened conduct actually will take place. For example, the defendant in *United States v. Mitchell*,[113] who threatened while in custody in Hawaii to drown President Reagan in the Atlantic Ocean, clearly did not have the capacity to carry out his threat, and thus there was no chance that the threatened conduct would occur.

The "Threatening Communications" sentencing guideline does not expressly *require* courts to consider the defendant's ability to carry out the threat, as it does with intent, but the propriety of such an inquiry is affirmed by the Sentencing Commission's commentary to section 2A6.1. The Commission stated: "These [threat] statutes cover a wide range of conduct, the seriousness of which depends on the defendant's intent *and the likelihood that the defendant would carry out the threat.*"[114] Given that the "likelihood" of a defendant carrying out his threat is a direct function of his ability to carry it out, this language is a strong invitation for courts to inquire into a defendant's ability at the sentencing stage.[115]

The defendant's ability to carry out his threat can be measured by the characteristics of the defendant himself — and the nature of the situation — rather than by looking at the defendant's *conduct.* For example, a court considering the ability of a defendant to carry out a bomb threat might consider any number of characteristics of the defendant himself: his technical knowledge of bomb manufacturing, his prior criminal record, his psychiatric condition, his access

112. It is worth observing that this Note's approach imposes a sort of "multiple penalty" on threateners who have an intent to carry out their threat. Such intent would subject a threatener to the sentence enhancement required by § 2A6.1, expose him to potential liability under the career offender provision, and deny him access to the reduced mental capacity provision — provided, with respect to the latter two, that he also had the ability to carry out the threat. Given the risk posed by threateners who intend to carry out their threats, this enhancement of punishment seems justified.

113. 812 F.2d 1250 (9th Cir. 1987); *see also supra* notes 16-21 and accompanying text (discussing *Mitchell*).

114. USSG § 2A6.1, comment. (backg'd.) (emphasis added).

115. In another part of the commentary to the Threatening Communications guideline, the Commission cautions that the variable nature of threats should cause courts to consider other available information about the offense at the sentencing stage. The Commentary states:

> The Commission recognizes that this offense includes a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted.

USSG § 2A6.1, comment. (n.1).

to explosive materials, and so on. The court also would consider situational variables such as the vulnerability of the target. Therefore, examining a defendant's ability to carry out his threat during sentencing is not barred by the proscription against inquiring into prior *conduct* because ability depends on the situation and the characteristics of the defendant himself, not his conduct in committing the offense.

B. *The "Dangerousness" Approach*

Several courts analyzing the reduced mental capacity provision have concluded that threats sometimes may qualify as non-violent offenses[116] and have held that "the term 'non-violent offense' in section 5K2.13 refers to those offenses that, in the act, reveal that a defendant is not dangerous."[117] This approach finds support in the language of the reduced mental capacity provision[118] and has the desirable effect of permitting some threateners suffering from reduced mental capacity to obtain sentence reductions. This section argues that despite these virtues, focusing on the defendant's "dangerousness" in the abstract is not as effective in assessing risk as focusing specifically on his intent and ability to carry out the threat and suggests that "dangerousness" is not a characteristic that can be discerned reliably by courts.

Although the court in *United States v. Chatman*[119] — and the courts that have followed it — advocated focusing on the defendant's "dangerousness" as the key determinant of whether he committed a non-violent offense, this standard is not precise enough for courts to apply effectively. In itself, the instruction to look at "dangerousness" is extremely ambiguous: Does the court mean the defendant's current dangerousness, future dangerousness, or dangerousness at the time the act was committed?[120] Should courts

116. *See supra* note 8 (collecting cases).

117. This language is from United States v. Chatman, 986 F.2d 1446, 1452 (D.C. Cir. 1993), and is quoted with approval by United States v. Weddle, 30 F.3d 532, 540 (4th Cir. 1994). The court in United States v. Premachandra, 32 F.3d 346, 348 (8th Cir. 1994), did not explicitly agree with the *Chatman* approach, but it did sustain the district court's decision — which relied on *Chatman* — to consider the "facts and circumstances" of the offense.

Note that there is no prohibition against looking at the underlying conduct of the offense with respect to § 5K2.13; this prohibition only applies to the crime of violence definition. *See supra* notes 105-06 and accompanying text.

118. The focus on dangerousness is probably derived from the final clause of § 5K2.13, which permits a downward departure from the *Guidelines* based on reduced mental capacity only if "the defendant's criminal history does not indicate a need . . . to protect the public." USSG § 5K2.13, p.s. While *Chatman* and its progeny are no doubt correct that § 5K2.13 seeks to prevent departures for dangerous *offenders,* this issue is separate from whether an *offense* was dangerous.

119. *Chatman*, 986 F.2d at 1446.

120. If the *Chatman* court was concerned with present or future dangerousness, its opinion did not explain exactly why characterizing an act committed in the *past* as "violent" or

focus on the general danger the defendant poses to society or just the specific danger he poses of actually carrying out his threat? Most importantly, by what criteria is dangerousness to be judged?

One illustration of the potential problems that can result from the vagueness of the "dangerousness" standard is the case of *United States v. Weddle.*[121] In *Weddle,* the defendant sent his wife's lover — Angleberger — three letters: one threatened to "hunt [Angleberger] down and eliminate him from the picture"; the second stated, "You are going to pay for what you did"; and the third contained three bullets with Angleberger's name and address affixed to them.[122] Weddle also attempted to run Angleberger off the road and then chased him to his home and attempted to assault him with a "slapjack."[123]

Weddle was convicted of mailing threatening communications in violation of 18 U.S.C. § 876 and, at sentencing, sought a downward departure under section 5K2.13 on the grounds that he had suffered a "depressive episode" that led to "reduced mental capacity" during his commission of the offense. The court allowed the downward departure on the theory that the behavior was non-violent because it was "attributable to the depressive episode, and highly unlikely to be repeated" — in other words, because Weddle was not dangerous.[124] Because the court believed Weddle was not dangerous, it determined that his offense was "non-violent" and granted him a sentence reduction under section 5K2.13.

Under the generally accepted legal definition of *violence* — which considers the creation of risk of the use of physical force to constitute *violence* — it is clearly inappropriate to characterize Weddle's threats as "non-violent offenses." Based on his attempted assault on Angleberger, it was apparent that Weddle had both the intent and the ability to carry out his threats — in short, that he presented a real risk to Angleberger. His repeated threats demonstrate that his assault was not the product of a sudden emotional response, but rather was part of a calculated program by which Weddle hoped to intimidate Angleberger into ending his affair with Weddle's wife. The only explanation for the court's characterization of Weddle's threats as non-violent is that it was swayed unduly

"non-violent" should depend on the defendant's present or future dangerousness. It is probably better, therefore, to read *Chatman* as requiring an assessment of the defendant's dangerousness at the time the act was committed. This would explain its statement that non-violent offenses are those that "*in the act,* reveal that the defendant is not dangerous." 986 F.2d at 1452 (emphasis added). But if this is what *Chatman* means, its use of the present tense — "the defendant *is* not dangerous" — is confusing.

121. *Weddle,* 30 F.3d at 532.

122. 30 F.3d at 534-355.

123. *See* 30 F.3d at 534.

124. 30 F.3d at 540.

by sympathy for Weddle: the court made reference to the fact that Weddle was a former police officer and that many members of the community had written letters attesting to his "exemplary" character.[125] But these admirable qualities cannot overcome the simple fact that there was genuine risk that Weddle would carry out his threat. In applying the "dangerousness" test, the *Weddle* court lost sight of the risk created by Weddle's conduct, and thus mischaracterized his threats as non-violent.

The opinion that created the "dangerousness" test — *United States v. Chatman*[126] — seems to recognize that the dangerousness test can be effective only if courts focus on the factors specified in this Note: the intent and ability of the threatener to carry out his threat. *Chatman*'s guidance regarding application of the "dangerousness" test begins with the rather vague instruction to "consider all the facts and circumstances surrounding the commission of the crime" in arriving at a determination of the defendant's dangerousness.[127] As *Chatman* discusses what particular facts and circumstances might be relevant, however, it becomes clear that what the court really considers important is the defendant's intent and ability to carry out his threat. This is revealed in *Chatman*'s criticism of *United States v. Poff*,[128] where it states: "The Seventh Circuit held that a downward departure under section 5K2.13 was unavailable to the defendant. . . . On the record of the case, however, it appeared that *the defendant neither intended nor was able to carry out her threats*, suggesting that, in fact, her crime was a 'non-violent offense.' "[129] Thus, in spirit *Chatman* seems to favor an approach similar to that advocated by this Note.[130] But by vaguely characterizing its test as one of "dangerousness," the *Chatman* approach creates a possibility that courts will focus on facts that are not probative of the risk created by the defendant's threat.

Moreover, the *Weddle* case is not the only proof of the problems with an unstructured inquiry into dangerousness. A substantial body of psychiatric and social science research indicates that if courts attempt to engage in generalized estimates of defendants' dangerousness, they are unlikely to make accurate judgments. The experts in the dangerousness-prediction field send a surprising clear

125. *See* 30 F.3d at 540 n.5.

126. 986 F.2d 1446 (D.C. Cir. 1993).

127. 986 F.2d at 1452.

128. 926 F.2d 588 (7th Cir. 1991).

129. *Chatman*, 986 F.2d at 1452-53 (emphasis added).

130. Indeed, it is hard to distinguish between an inquiry designed to determine whether an act created "risk" and one to determine whether an act created "danger." The approach advocated by this Note, however, gives precise instructions for how to assess whether risk was created; the *Chatman* "dangerousness" test provides no such guidance, forcing courts to attempt ad hoc character assessments of defendants.

message: given current knowledge and methodology, an accurate prediction of violence and dangerousness is nearly impossible, even for trained specialists.[131] One commentator observes:

> Rarely have research data been as quickly or nearly universally accepted by the academic and professional communities as those supporting the proposition that mental health professionals are highly inaccurate at predicting violent behavior. We shall consider prediction research in detail in subsequent chapters, but the reader had best be forewarned that stock in the predictive enterprise is going very cheaply.[132]

Another analyst surveyed a number of the empirical studies that attempted to assess the accuracy of dangerousness and violence predictions and concluded: "[W]e know . . . that there has been no empirical demonstration by any profession . . . of accuracy in the prediction of violence in either the criminal justice or mental health system beyond that attainable by chance itself."[133] Pretrial-risk-prediction studies indicate that assessments of dangerousness are correct "[a]t best . . . one time out of three."[134] Although it is true that the criminal justice process already incorporates "dangerousness" assessments at several stages — pretrial detention decisions and involuntary commitment decisions being notable examples[135] — this does not justify extending such a faulty analytical classifica-

131. One experienced researcher relates: "The prediction of violent behavior has occupied a major portion of my professional career . . . . Can we predict violence? In the beginning of my career I would have replied, of course. Twenty years later, my answer is, no." Edwin I. Megargee, *Methodological Problems in the Prediction of Violence, in* VIOLENCE AND THE VIOLENT INDIVIDUAL, *supra* note 31, at 179, 179.

Another analyst expresses a similar sentiment. At the beginning of a section entitled "Can Dangerousness Be Predicted," Saleem Shah states: "Given the considerable literature that has developed on the topic, many, if not most, persons may well respond to such a question with a flat, No!" Saleem A. Shah, *Dangerousness: Conceptual, Prediction, and Public Policy Issues, in* VIOLENCE AND THE VIOLENT INDIVIDUAL, *supra* note 31, at 151, 160.

132. MONAHAN, *supra* note 31, at 27. Monahan quotes a variety of other commentators expressing similar sentiments. One states: "Neither psychiatrists nor other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness." *Id.* at 28 (quoting Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness,* 123 U. PA. L. REV. 439, 452 (1974)).

133. Henry J. Steadman, *How Well Can We Predict Violence For Adults?: A Review of the Literature and Some Commentary, in* THE PREDICTION OF CRIMINAL VIOLENCE 5, 7 (Fernand N. Dutile & Cleon H. Foust eds., 1987).

Steadman offers the following grim assessment of the ability of experts to predict violence: "I fear that the current situation with regard to predicting criminal violence in our courts reflects . . . the 'Seersucker Theory' of experts. . . . 'No matter how much evidence exists that seers do not exist, suckers will pay for the existence of seers.' " *Id.* at 16 (quoting J. Scott Armstrong, *The Seer-Sucker Theory: The Value of Experts in Forecasting,* 82 TECH. REV. 18, 19 (1980)).

134. Mary A. Toborg & John P. Bellassai, *Attempts to Predict Pretrial Violence: Research Findings and Legislative Responses, in* THE PREDICTION OF CRIMINAL VIOLENCE, *supra* note 133, at 101, 104.

135. *See generally* MONAHAN, *supra* note 31, at 22-23 (collecting examples of points in the legal process where dangerousness is considered).

tion to other contexts. When the immediate safety of the public or the defendant himself is in jeopardy, it may be necessary for courts to make dangerousness estimates, but the sentencing of a convicted criminal presents no such exigency.

Conclusion

This Note has argued that threats should only be considered "violent" when they create risk and that the creation of risk should be determined by examining whether the threatener had the intent and ability to carry out his threat. As applied to the opening hypothetical, this approach means that the threat by the incarcerated mental patient in Hawaii should not be considered violent: even in the unlikely event that he had the intent to carry out his threat, he clearly did not have the ability to do so. Thus, although he could — and should — be punished for his crime of making threats, the mental patient should also be eligible for a reduced sentence based on his reduced mental capacity under section 5K2.13 because his offense was non-violent.

By contrast, the threat by the twice-convicted, disgruntled, former employee is a violent offense. His threat created risk because he had the intent to carry out his threat — if he was truly disgruntled — and, living nearby, he clearly had the ability to carry it out. Thus, his offense should qualify as a crime of violence for purposes of deciding if he is a career offender under section 4B1.2, and he should not be eligible for a sentence reduction based on reduced mental capacity under section 5K2.13.

These divergent results demonstrate the importance of the conclusion that creation of risk is what makes a threat violent: people who make threats that create risk *and* fear should be sentenced more harshly than those whose threats create only fear. This can happen, however, only if the *Sentencing Guidelines* are interpreted in a manner that distinguishes the risky threats from the riskless. Failure to make this distinction impairs the ability of the justice system to sentence offenders in proportion to the degree of harm they caused. Because courts readily can determine if threats are violent by examining the intent and ability of threateners to carry out their threats, they should do so and reduce or increase offenders' sentences accordingly.