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I Expected It to Happen/I Knew He'd Lost Control: The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5

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"I EXPECTED IT TO HAPPEN/I KNEW HE'D LOST CONTROL": THE IMPACT OF PTSD ON CRIMINAL SENTENCING AFTER THE PROMULGATION OF DSM-5

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I. INTRODUCTION

To a significant extent, this Article flows from my experiences as a public defender and mental health advocate in the 1970s and 1980s. I first was a rookie public defender in Trenton, New Jersey (1971–74), where, by coincidence, the state's maximum-security institution for the "criminally insane," the mellifluously-named Vroom Building, was located. In addition to the typical felony caseload, I also represented people at that institution in both individual and class actions.[1] During those years, the American Psychiatric Association's (APA) second Diagnostic and Statistical Manual of Mental Disorders ("DSM-II") prevailed.[2] I then spent eight years as director of the New Jersey Division of Mental Health Advocacy (DMHA) (1974–82), the first state-wide, state-funded public interest law office tasked with the representation of persons facing commitment to hospitals, seeking release, or complaining about their conditions of confinement.[3] During these years, the next DSM volume, the DSM-III, was used.[4] I have now been teaching and writing about mental disability law and criminal procedure for over thirty years. And during this time, we have gone from DSM-III to DSM-IV to DSM-IVR to, now, DSM-5.[5]

In my days as a public defender, and in my representation of individual clients in the DMHA at commitment and periodic review hearings, everyone referred to the DSM frequently, but solely as a characterization tool by expert witnesses ("Your

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[1] *See, e.g.*, Michael L. Perlin, *Mental Patient Advocacy by a Public Advocate*, 54 PSYCHIATRIC Q. 169, 169, 173–74 (1982) [hereinafter Perlin, *Mental Patient Advocacy*].

[2] *See, e.g.*, 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2A-3.1, at 64 n.130 (2d ed. 1998) [hereinafter PERLIN, MENTAL DISABILITY LAW] (discussing the full history of the DSM). The term "mental disability" subsumes both mental illness and intellectual disability. I use "mental disability" wherever I can, but I sometimes use the term "mental illness" when I am referring to the usage in a case or statute.

[3] *See, e.g.*, Stanley C. Van Ness & Michael L. Perlin, *Mental Health Advocacy: The New Jersey Experience*, *in* MENTAL HEALTH ADVOCACY: AN EMERGING FORCE IN CONSUMERS' RIGHTS 62, 62 (Louis E. Kopolow & Helene Bloom eds., 1977).

[4] PERLIN, MENTAL DISABILITY LAW, *supra* note 2, § 2A-3.1, at 64 n.130.

[5] *Id.* at 66 n.132.

honor, I have diagnosed the patient as having [name of condition], defined in DSM as [listing criteria]"). I represented many criminal defendants who served in Vietnam, but no one uttered the phrase "Post-Traumatic Stress Disorder" (PTSD). Occasionally, in the case of a DMHA client, someone would say to me—when I was visiting my clients on hospital wards—"The war made him crazy." But I cannot recall the phrase PTSD, or even as it was often called then, "Vietnam Stress Syndrome," ever being uttered.

But I had a very different experience in the DMHA when we began to investigate conditions, pursuant to our statutory grant of power to do affirmative class action and law reform cases, at Lyons VA Hospital in New Jersey. At Lyons we investigated clients' complaints about their treatment there, and what we found was this: there appeared to be a profound difference between the way World War II veterans and Korean War veterans were treated and, on the other hand, the way Vietnam War veterans were treated. These differences were also apparent in the ways these two cohorts responded to their treatment and, simply, being hospitalized.[6] The first group appeared, by and large, to be grateful to the VA for providing any services at all. The second group, the Vietnam veterans, were angry—angry at being in the hospital, *and* angry at the way they were being treated, *especially* as compared to the first cohort. Here, for the first time, I came across PTSD diagnoses.[7]

After I became a professor, although I ran a live-client clinic for six years and an out-placement clinic (called a "workshop") for about ten, I basically stopped otherwise representing individual and class clients, and I turned my attention to teaching and writing. In 1989, I published a three-volume treatise on Mental Disability Law, and by 2002, I had expanded that into a five-volume second edition.[8] And in this treatise, in the unit on the insanity defense, I included a section on Vietnam Stress Syndrome, in which I had discussed PTSD.[9] There was also a chapter on sentencing, but I did not include that syndrome or PTSD in general in that discussion.[10]

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[6] *See* Michael L. Perlin, *"John Brown Went Off to War": Considering Veterans' Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445, 447 (2013) [hereinafter Perlin, *John Brown Went Off to War*].

[7] I discuss this litigation (*Falter v. Veterans Admin.*, 502 F. Supp. 1178 (D.N.J. 1980)) and its implications in Michael L. Perlin & John Douard, *"Equality, I Spoke That Word/As If a Wedding Vow": Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y.L. SCH. L. REV. 9, 10–14 (2008–09).

[8] I am now, with Professor Heather Ellis Cucolo, at work on a third edition that was submitted to the publisher in May 2015.

[9] PERLIN, MENTAL DISABILITY LAW, *supra* note 2, § 9A-9.3b, at 271–74.

[10] *See generally id.* § 11-1 to -4.5 (discussing mental disability at and after sentencing).

I update the treatise annually and always note a few new reported cases dealing with this issue,[11] but until two years ago, that was pretty much it. Then, in January 2013, I wrote an article about veterans courts—a new sort of problem-solving court—now growing exponentially.[12] I have been writing about mental health courts regularly,[13] but this was the first time I turned my attention to *these* courts. And my research for that article led me to confront, for the first time, the incidence of PTSD among veterans of the wars in Iraq and Afghanistan. The numbers were appalling. Already, between 10% and 20% of all veterans returning from the wars in Iraq and Afghanistan exhibit characteristics of PTSD, and estimates of the percentage of those who have sought treatment for this condition range from 23% to 40%.[14]

In short, PTSD has become a much more important issue in the law, especially in the context of that generation significantly likely to commit crimes and

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[11] *See, e.g.*, 4 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 9A-93b, at 110 n.940 (2d ed. Supp. 2014) [hereinafter PERLIN & CUCOLO, MENTAL DISABILITY LAW] (discussing State v. Bottrell, 14 P.3d 164, 166 (Wash. Ct. App. 2000), in which the court reversed a conviction for first degree murder because the court failed to admit evidence of PTSD while affirming a conviction for felony murder on other grounds); *id.* § 12-3.7, at 156 (discussing Johnson v. Luebbers, 532 U.S. 934 (2001)); *see also James R. Johnson*, CLARK CNTY. IND. PROSECUTING ATTORNEY, http://www.clarkprosecutor.org/html/death/US/johnson750.htm, *archived at* http://perma.cc/EC88-HV55 (last visited Mar. 1, 2015) (discussing James R. Johnson, the defendant and a Vietnam War veteran, who unsuccessfully alleged ineffective assistance of counsel on appeal for failure to interview prosecution witnesses and present accurate evidence in support of his PTSD defense).

[12] *See* Perlin, *John Brown Went Off to War*, *supra* note 6, at 457. There are over two hundred such courts in existence now and several hundred in the planning stage. *See, e.g.*, William H. McMichael, *The Battle on the Home Front*, 97 A.B.A. J. 42, 44 (2011) (discussing veterans treatment courts like in Buffalo, New York, that address the needs of troubled veterans); *The History*, JUSTICE FOR VETS, http://www.justiceforvets.org/vtc-history, *archived at* http://perma.cc/HS34-6WJK (last visited Feb. 23, 2015).

[13] *See, e.g.*, Michael L. Perlin, *"The Judge, He Cast His Robe Aside": Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL'Y J. 1, 1–5 (2013) [hereinafter Perlin, *His Robe*]; Michael Perlin, *"There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, *in* COERCIVE CARE: RIGHTS, LAW AND POLICY 193 (Bernadette McSherry & Ian Freckelton eds., 2013) [hereinafter Perlin, *Gates of Eden*].

[14] *See, e.g.*, F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 11–12 (2010) (providing percentages exhibiting PTSD); Cathy Ho Hartsfield, Note, *Deportation of Veterans: The Silent Battle for Naturalization*, 64 RUTGERS L. REV. 835, 851 (2012) (providing percentages seeking treatment). *See generally* Perlin, *John Brown Went Off to War*, *supra* note 6, at 461–63 (discussing PTSD and veterans courts as problem-solving courts).

subsequently to be sentenced.[15] The significance of this reality is heightened further by the APA's adoption of the new DSM-5, which greatly expands the definition of PTSD and raises multiple questions that need to be considered carefully by lawyers, mental health professionals, advocates and policy makers.[16]

My thesis is that the expansion of the PTSD criteria in DSM-5[17] has the potential to make significant changes in legal practice in all aspects of criminal procedure, but none more so than in criminal sentencing.[18] I believe that if courts treat DSM-5 with the same deference with which they have treated earlier versions

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[15] Approximately 40% of all felony defendants are typically arrested between the ages of twenty-five and thirty-nine. *See* THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 4 (2010), *available at* http://www.bjs.gov/content/pub/pdf/fdluc06.pdf, *archived at* http://perma.cc/JC2U-E24X.

[16] *See infra* text accompanying notes 182–190. Although this Article is limited to issues involving the criminal justice system, the changed diagnostic definition of PTSD also has vast potential implications for other areas of the law, including, but not limited to, correctional and asylum law, disability law, employment law and tort litigation based on emotional distress. *See* Andrew P. Levin et al., *DSM-5 and Posttraumatic Stress Disorder*, 42 J. AM. ACAD. PSYCHIATRY & L. 146, 154–56 (2014). These topics are beyond the scope of this Article. Also beyond the scope of this Article are PTSD cases in the criminal law context in which the disorder arises from other external behaviors (e.g., domestic violence, *observation* of domestic violence, or providing legal or mental health services to trauma victims). *See, e.g.*, Jennifer Brobst, *The Impact of Secondary Traumatic Stress Among Family Attorneys Working with Trauma-Exposed Clients: Implications for Practice and Professional Responsibility*, 10 J. HEALTH & BIOMEDICAL L. 1, 2 (2014); Richard Famularo et al., *Child Maltreatment and the Development of Posttraumatic Stress Disorder*, 147 AM. J. DISEASES CHILD. 755 (1993); Evan R. Seamone, *Sex Crimes Litigation as Hazardous Duty: Practical Tools for Trauma-Exposed Prosecutors, Defense Counsel, and Paralegals*, 11 OHIO ST. J. CRIM. L. 487, 487–88 (2014).

[17] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271–80 (5th ed. 2013) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-5]. *See generally* Levin et al., *supra* note 16 (discussing the expansion of PTSD in the DSM). The authors of DSM-5 note this manual is *not* a resource designed to meet "all the technical needs of the legal system." AM. PSYCHIATRIC ASS'N, DSM-5, *supra*; *see also* Cheryl D. Wills & Liza H. Gold, *Introduction to the Special Section on DSM-5 and Forensic Psychiatry*, 42 J. AM. ACAD. PSYCHIATRY & L. 132, 133 (2013) (acknowledging that the "DSM-5 is not a resource designed to meet 'all of the technical needs' of the legal system" (citation omitted)).

[18] On its potential impact on other areas of criminal law practice, see, for example, Kate Janse van Rensburg, *The DSM-5 and Its Potential Effects on* Atkins v. Virginia, 3 MENTAL HEALTH L. & POL'Y J. 61, 100 (2013), and Levin et al., *supra* note 16. For a list of pre-2012 cases in which PTSD was offered as a criminal defense, and specifically where PTSD was used in cases involving the unconsciousness defense, self-defense, and to refute mens rea, see Omri Berger et al., *PTSD as a Criminal Defense: A Review of Case Law*, 40 J. AM. ACAD. PSYCHIATRY & L. 509, 511, 515, 517 (2012).

of that Manual,[19] it will force them to seriously confront—in a wide variety of cases—the impact of PTSD on sentencing decisions. And this, I believe, might lead to more robust debates over the impact of mental disability *generally* on sentencing outcomes.

It is necessary to consider all of this in the context of the Federal Sentencing Guidelines ("Guidelines") and the Supreme Court's interpretations of those Guidelines. As I discuss below,[20] the Supreme Court, in *Mistretta v. United States*,[21] held that those Guidelines—a series of grids listing, inter alia, specific aggravating and mitigating factors,[22] and using a mathematical calculation to arrive at the presumptive sentence[23]—were mandatory.[24] Sixteen years later, in *United States v. Booker*,[25] the Court modified *Mistretta* by making the Guidelines advisory, not mandatory.[26] In the aftermath of *Booker*, some courts appeared more receptive to

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[19] Expert witnesses regularly have referred to earlier versions of DSM, for diagnostic purposes, as the "gold standard." *See, e.g.*, Castaldi v. Sec'y of Health & Human Servs., No. 09-300V, 2014 WL 3749749, at *9 (Fed. Cl. June 25, 2014) *aff'd sub nom.* Castaldi v. Sec'y of Dep't of Health & Human Servs., No. 09-300V, 2014 WL 7475228 (Fed. Cl. Dec. 19, 2014); Hokkanen v. Sec'y of Health & Human Servs., No. 03-1753V, 2009 WL 4857386, at *10 (Fed. Cl. Dec. 1, 2009); People v. Crosby, No. 5-10-0224, 2011 IL App (5th) 100224-U, at *3, *5 (Ill. App. Ct. 2011). Or, instead of the "gold standard," it has also been referred to as the "bible." *See, e.g.*, United States v. Liu, 267 F. Supp. 2d 371, 374 (E.D.N.Y. 2003) (noting that the DSM-IV is "the psychiatric profession's diagnostic bible." (quoting United States v. Harris, No. S192 Cr. 455(CSH), 1994 WL 683429 (S.D.N.Y. Dec. 6, 1994)) *aff'd*, 79 F.3d 223 (2d Cir. 1996). *But see* Wills & Gold, *supra* note 17, at 133 ("The DSM is often mischaracterized in court and by the popular press as the Bible of mental health professionals.").

[20] *See infra* text accompanying notes 21–28.

[21] 488 U.S. 361, 412 (1989).

[22] On mental disability as a potential mitigator, see *infra* notes 120–124.

[23] *See, e.g.*, Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 836 n.7, 850 (1993); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883, 941 n.303 (1990).

[24] *Mistretta*, 488 U.S. at 367–68.

[25] 543 U.S. 220 (2005).

[26] *Id.* at 233 (2005) (noting that the Guidelines are advisory, not mandatory); Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process* 4 (Nov. 21, 2014) (paper presented at the American Society of Criminology annual conference) (on file with Utah Law Review). *See generally* PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 11, § 11-2.2, at 144–45 (noting that the Court's ruling in *Booker* required that the Federal Sentencing Act's provision, making the sentencing guidelines "mandatory," must be severed). According to Federal Judge Mark W. Bennett, "*Booker* clearly gave federal sentencing judges more discretion, but not much clarity . . . ." Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases In Federal Sentencing: A Modest Solution for Reforming a*

mental disability evidence at this stage.[27] But the best evidence is that a significant number of federal judges have backpedalled away from *Booker* in dramatic fashion, making sentencing decisions as if they were still under the thrall of *Mistretta v. United States*.[28] This is troubling on many levels, not the least of which is the courts' sorry history of ignoring or misusing mental disability under the Guidelines, and in some instances, using it as an *aggravating* rather than *mitigating* factor.[29]

My optimism is tempered by one additional reality: the teleological ways courts deal with mental disability evidence in general, subordinating it when it is introduced by the defendant, and privileging it when introduced by the state,[30] a device that parallels courts' treatment of *Daubert* evidence,[31] disproportionately granting

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Fundamental Flaw, 104 J. CRIM. L. & CRIMINOLOGY 489, 514 (2014). I discuss *Booker* more fully *infra* in text accompanying notes 94–106.

[27] *See, e.g.*, United States v. MacKinnon, 401 F.3d 8, 9–11 (1st Cir. 2005) (finding that a remand is warranted where, in light of *Booker*, the court denied defendant's request for downward departure based on mental illness because the judge felt the sentencing guidelines allowed no departure); United States v. Pallowick, 364 F. Supp. 2d 923, 926–30 (E.D. Wis. 2005) (ruling a non-Guidelines sentence was appropriate in light of *Booker* having made Guidelines advisory). *See generally Summary U.S. Supreme Court Actions*, MENTAL & PHYSICAL DISABILITY L. REP., Jan./Feb. 2005, at 137, 137 [hereinafter *Supreme Court Summary*] (discussing the capabilities of jurors and judges to consider evidence of mental disabilities in sentencing).

[28] *See, e.g.*, Alison Siegler, *Rebellion: The Courts of Appeals' Latest Anti*-Booker *Backlash*, 82 U. CHI. L. REV. 201, 201–03 (2015) ("Since *Booker*, the circuit courts—abetted by the DOJ—have repeatedly rebelled against the Supreme Court by overpolicing below-Guidelines sentences and underpolicing within-Guidelines sentences."). Judge Bennett argues in a recent article that sentences are "subconsciously anchored" by the Guidelines range. Bennett, *supra* note 26, at 490.

[29] *See generally* Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 433–36, 441–44 (1995) (discussing the inconsistency of courts in considering mental disability under the sentencing guidelines); Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 291–92 (1989) (discussing aggravating and mitigating factors in sentencing, and noting that aggravating factors "may be the result of a defendant's mental illness").

[30] *See* Michael L. Perlin, *"Baby, Look Inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 599–600 (2008) [hereinafter Perlin, *Baby, Look Inside Your Mirror*] (citing JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 156 (1992)) ("Judges' refusals to consider the meaning and realities of mental illness cause them to act in what appears, at first blush, to be contradictory and inconsistent ways, and teleologically, to privilege (where that privileging serves what they perceive as a socially-beneficial value) and subordinate (where that subordination serves what they perceive as a similar value) evidence of mental illness.").

[31] Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 579–80 (1993) (holding that jurors may hear evidence and weigh facts from experts whose testimony included novel scientific theories, if the case warranted—even if those theories had not gained "general

Daubert motions when offered by the state and disproportionately denying them when offered by criminal defendants.[32] It is also necessary to consider the courts' unfortunate tradition of pretextuality in cases involving defendants with mental disabilities.[33] This reality must be kept in mind as well.

It is also important to consider the power of sanism in this entire inquiry. Sanism is an irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry.[34] Sanism's corrosive effects have warped

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acceptance" in the scientific community—as long as the testimony was "relevant" and "reliable"). There is no question that the PTSD diagnosis meets the *Daubert* standards. *See* Erica Beecher-Monas & Edgar Garcia-Rill, *The Law and the Brain: Judging Scientific Evidence of Intent*, 1 J. APP. PRAC. & PROCESS 243, 270–274 (1999); Berger et al., *supra* note 18, at 510. On the potential interplay between *Daubert* and the DSM-5 in the context of cases involving defendants with developmental disabilities potentially facing the death penalty, see van Rensburg, *supra* note 17, at 91 (noting the DSM's increasing presence "in the courtroom is likely due" to *Daubert*).

[32] *See* D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 105-08 (2000). In sixty-seven cases of challenged government expertise, the prosecution prevailed in sixty-one of these. *Id.* at 105. Out of fifty-four complaints by criminal defendants that their expertise was improperly excluded, the defendant lost in forty-four of these. *Id.* at 106. Contrarily, in civil cases, 90% of *Daubert* appeals were by the defendants, who prevailed two-thirds of the time. *Id.* at 108. For a thoughtful analysis of Professor Risinger's findings, see Déirdre Dwyer, *(Why) Are Civil and Criminal Expert Evidence Different?*, 43 TULSA L. REV. 381, 382–84 (2007). Professor Susan D. Rozelle is blunter: "The game of scientific evidence looks fixed." Susan D. Rozelle, Daubert, *Schmaubert: Criminal Defendants and the Short End of the Science Stick*, 43 TULSA L. REV. 597, 598 (2007). I discuss this, *inter alia*, in Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 906–07, 907 n.139 (2009) [hereinafter Perlin, *His Brain*].

[33] "Pretextuality" means that "courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making," specifically where witnesses, especially expert witnesses, show a high propensity "to purposely distort their testimony in order to achieve desired ends." Michael L. Perlin, *"Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 621 (2009); *accord* Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133 (1991); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 627 n.3 (1993); Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 272 n.62 (2014).

[34] Perlin & Lynch, *supra* note 33, at 259. *See generally* Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 3–4 (1999) (discussing how sanism permeates all mental disability law). On the way that sanism affects lawyers'

all aspects of the criminal process, including that of sentencing.[35] We must keep this in mind when we approach this issue.

Finally, notwithstanding the pessimism that I have already expressed, we must also consider the impact of therapeutic jurisprudence on the question at hand. Therapeutic jurisprudence (TJ) presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.[36] Although some scholars have considered TJ in the context of the Guidelines,[37] it remains mostly an under-the-radar topic.[38] As I explore below, it is essential we give TJ a new and urgent focus.

I am convinced that, if courts take seriously the new treatment of PTSD in DSM-5, and couple that with an understanding of sanism and an application of TJ, it will lead to an important change in the ways that defendants with that condition—especially those who are veterans of the wars in Iraq and Afghanistan—are sentenced. My Article will proceed in this way. First, I will review the law of sentencing as it relates to persons with disabilities, focusing on pre- and post-*Booker* developments and the role of sanism. Then, I will look at how courts have variably, until this moment, treated PTSD in sentencing decisions. I will then look at DSM-5 to highlight its definitional changes. I will then discuss TJ and try to "connect the dots" to show how DSM-5 demands changes in sentencing practices, and I will explain how this change can be consonant with the principles of TJ. I will end with some modest conclusions, urging lawyers representing the population in question and judges to take seriously the issues raised here.

My title draws on a lyric from Bob Dylan's remarkable song, *Stuck Inside of Mobile with the Memphis Blue Again*, best known for its chorus line, "Oh, mama,

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representation of clients, see Michael L. Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 689–90 (2003).

[35] *See, e.g.*, Michael L. Perlin, *"I Might Need a Good Lawyer, Could Be Your Funeral, My Trial": Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases*, 28 WASH. U. J.L. & POL'Y 241, 259 (2008).

[36] *See* Michael L. Perlin & Alison Lynch, *"Toiling in the Danger and in the Morals of Despair": Risk, Security, Danger, the Constitution, and the Clinician's Dilemma*, 27 STAN. L. & POL'Y REV. (forthcoming 2016) (manuscript at 48–52) (on file with Utah Law Review); *see also* Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, *in* DISPUTES AND DILEMMAS IN HEALTH LAW 91, 91–92 (Ian Freckelton & Kerry Peterson eds., 2006) (for a transnational perspective). *See generally infra* text accompanying notes 191–208.

[37] *See, e.g.*, Heather Ellis Cucolo, *Hebephilia and Pedohebephilia: Implications for Law and Policy*, 12 SEX OFFENDER L. REP. 55, 55–56 (2011) (examining the debate over hebephilia and arguing that its integration into the DSM will change the "legal lens through which such designations may be viewed," including by vilifying homosexual males who have a strong interest in post-pubescent teenagers); Gould, *supra* note 23, at 842–53 (analyzing the guidelines through a therapeutic jurisprudence perspective).

[38] I address this issue preliminarily in MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW 210–12 (2013) [hereinafter PERLIN, PRESCRIPTION FOR DIGNITY].

can this really be the end."[39] Michael Gray, one of the great Dylan historians, concludes this song demonstrates "hope and despondency, potential and restraint."[40] The lines preceding the ones I use are these: "[H]e built a fire on Main Street/And shot it full of holes."[41] To a great extent, some of the actions of veterans with PTSD appear as pointless to the onlooker as the crime described by Dylan. Given what we know about the impact of PTSD, society should not at all be surprised by the events I discuss in this Article, for we certainly should have "expected it to happen," "[knowing the defendant had] lost control."[42] I write this Article in hopes that this (the current state of affairs) is "really" not "the end."[43]

II. MENTAL DISABILITY AND SENTENCING[44]

A. Introduction

Remarkably little has been written about the impact of mental disability on the sentencing process.[45] Intuitively, this is surprising as the percentage of sentenced defendants with some sort of mental disability is significant.[46] But, for whatever reason, this issue appears to be under the radar for most scholars writing about the relationship between mental disability and sentencing decision-making.

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[39] *Stuck Inside of Mobile with the Memphis Blues Again*, BOBDYLAN.COM, http://www.bobdylan.com/us/songs/stuck-inside-mobile-memphis-blues-again, *archived at* http://perma.cc/T9QN-RXDM (last visited Feb. 27, 2015) [hereinafter *Stuck Inside of Mobile*].

[40] MICHAEL GRAY, THE BOB DYLAN ENCYCLOPEDIA 644 (2006).

[41] *Stuck Inside of Mobile*, *supra* note 39.

[42] *Id.*

[43] *Id.*

[44] This section is generally adapted from PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 11, §§ 11-2 to 11-2.1, at 441–58.

[45] *But see* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 71–73 (1985) (identifying a range of factors, including the actor's mental state in an assessment of culpability, both his motives and any significant mental disability, and the presence of mitigating or aggravating circumstances such as necessity or duress).

[46] *See, e.g.*, Robin Fretwell Wilson, *Mental Health and the Law*, 14 WASH. U. J.L. & POL'Y 315, 319 (2004) (as many as one-third of prisoners have mental disabilities). The percentage of prisoners in state high security or segregated units ranges from 23% to 50%. *See* SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 147–49 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/usa1003.pdf, *archived at* http://perma.cc/3ADU-UD93; Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 392 (2006). *See generally* Christina Canales, Note, *Prisons: The New Mental Health System*, 44 CONN. L. REV. 1725 (2012) (discussing the movement of persons with mental disabilities from state hospitals to community-based programs and the gap prisons fill in this process).

Before I turn to an analysis of the impact of DSM-5 on sentencing in the context of persons with PTSD (or asserting PTSD claims), I will briefly review the impact of the Federal Sentencing Guidelines, the significance of subsequent Supreme Court decisions interpreting the Guidelines, and the impact of sanism and these cases on litigation involving defendants with serious mental disabilities.

B. Impact of the Federal Sentencing Guidelines: The Early Years[47]

In response to criticisms of indeterminate sentencing,[48] Congress[49] passed the 1984 Sentencing Reform Act[50] in an attempt to bring about a measure of regularity and uniformity in federal sentencing procedures. Under this law, a Sentencing Commission was created[51] and was mandated to promulgate Guidelines in accordance with the Act.[52] The constitutionality of these Guidelines—a binding set of rules that courts must use in imposing sentences[53]—was initially upheld by the Supreme Court in *Mistretta v. United States*.[54]

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[47] *See generally* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 245–58, 287–88 (2000) [hereinafter PERLIN, HIDDEN PREJUDICE] (discussing mental disability and the Federal Sentencing Guidelines); PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 11, § 11-2.2, at 145 (discussing early courts' application of the Federal Sentencing Guidelines); Perlin & Gould, *supra* note 29, at 431–33, 436–40 (discussing mental disability and the Federal Sentencing Guidelines).

[48] *See* Mistretta v. United States, 488 U.S. 361, 361, 374, 379 (1989) (discussing sentencing disparities).

[49] Some states similarly adopted determinate sentencing laws. *See, e.g.*, State v. Sepulvado, 655 So. 2d 623 (La. Ct. App. 1995), *writ denied*, 662 So. 2d 465 (La. 1995) (upward departure not excessive); State v. Allert, 815 P.2d 752 (Wash. 1991) (combination of depression, personality disorder, and alcoholism did not justify exceptional sentence). For a careful opinion considering the appropriate scope of discretion in such cases, see People v. Watters, 595 N.E.2d 1369 (Ill. App. Ct. 1992), *appeal denied*, 602 N.E.2d 473 (Ill. 1992). For a representative opinion from a *non-Guidelines* state, see e.g., State v. Chase in Winter, 534 N.W.2d 350 (S.D. 1995) (200-year sentence of mentally ill defendant not cruel and unusual punishment).

[50] *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2011 (codified at 18 U.S.C. §§ 3551–742 and 28 U.S.C. §§ 991–98 (1988)). *See generally* Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (reviewing Judge Heaney's criticisms and proposed solutions of the sentencing process).

[51] *See* 28 U.S.C. § 991 (1988).

[52] *See* 28 U.S.C. § 994(a)(1) (2012).

[53] *See id.* Under the Act, a series of permissible sentencing ranges is created for each federal criminal offense. *See id.* § 994(b)(2).

[54] 488 U.S. 361 (1989). *See generally* Ira Bloom, *The Aftermath of* Mistretta*: The Demonstrated Incompatibility of the United States Sentencing Commission and Separation of Powers Principles*, 24 AM. J. CRIM. L. 1, 1–5 (1996) (explaining the court's decision and constitutionality from the case); Frank O. Bowman, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996

Under the Guidelines, a sentencing court initially was allowed to depart from the prescribed ranges where "the defendant committed a non-violent offense[55] while suffering from significantly reduced mental capacity[56] not resulting from voluntary

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WIS. L. REV. 679, 690 (explaining how Congress was able to create guidelines that the Supreme Court validated); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 906–13 (1990) (explaining the difficult constitutional challenges of *Mistretta*).

[55] On the meaning of "non-violent offense," see, for example, Chambers v. United States, 555 U.S. 122, 130 (2009) (failure to report a crime is not a violent felony); Begay v. United States, 553 U.S. 137, 148 (2008) (driving under the influence a nonviolent crime); United States v. Jones, 752 F.3d 1039, 1043 (5th Cir. 2014) (escaping from a halfway house is not a crime of violence); United States v. Carthorne, 726 F.3d 503, 507 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1326 (2014) (assault and battery of a police officer is not a "crime of violence"); United States v. Coronado, 603 F.3d 706, 708 (9th Cir. 2010) (grossly and negligently discharging a firearm is not a "crime of violence"); United States v. Gomez-Leon, 545 F.3d 777, 795 (9th Cir. 2008) (vehicular manslaughter while intoxicated without gross negligence is not a "crime of violence"); United States v. Clements, 144 F.3d 981, 983–84 (6th Cir. 1998) (extortion is a "crime of violence" under terms of the Guidelines); United States v. Shannon, 94 F.3d 1065, 1071 (7th Cir. 1996) (statutory rape is not a crime of violence); compare United States v. Anderson, 755 F.3d 782, 802 (5th Cir. 2014) (prior burglary is a "crime of violence"); United States v. Herrera-Alvarez, 753 F.3d 132, 136 (5th Cir. 2014) (crime of aggravated battery is a "crime of violence"); United States v. Hernandez-Galvan, 632 F.3d 192, 195 (5th Cir. 2011) (attempted robbery is a crime of violence); United States v. Smith, 329 F. App'x 109, 111 (9th Cir. 2009) (sexual abuse of a minor is a crime of violence); United States v. Almenas, 553 F.3d 27, 30 (1st Cir. 2009) (resisting arrest is a crime of violence); United States v. Williams, 529 F.3d 1, 5 (1st Cir. 2008) (transporting a minor for prostitution was a "violent crime").

[56] On the question of whether a compulsive gambling disorder satisfies the Guidelines, see United States v. Rosen, 896 F.2d 789, 792 (3d Cir. 1990) (holding the defendant's compulsive gambling did not warrant downward departure), *reh'g & reh'g en banc denied*, *abrogated by* United States v. Askari, 159 F.3d 774 (3rd Cir. 1998); United States v. Carucci, 33 F. Supp. 2d 302, 303 (S.D.N.Y. 1999) (holding compulsive gambling did not warrant downward departure in case of stockbroker who had pled guilty to unlawful securities trading practices); United States v. Katzenstein, No. 90 CR 272 (KMW), 1991 WL 24386, at *2–3 (S.D.N.Y. Feb. 20, 1991) (stating unless the defendant could demonstrate that total rehabilitation had been achieved, it would be necessary for her to introduce evidence showing lack of correlation between compulsive gambling disorder and increased propensity for criminal activity); compare United States v. Liu, 267 F. Supp. 2d 371, 376–77 (E.D.N.Y. 2003) (granting defendant a four-point downward departure for his gambling addiction because his addiction led to his crime); United States v. Checoura, 176 F. Supp. 2d 310, 316 (D.N.J. 2001) (holding that a gambling disorder was considered diminished capacity and warranted a downward departure under the Guidelines); United States v. Martinez, 978 F. Supp. 1442, 1454 (D.N.M. 1997) (holding that a downward departure is appropriate in a case of a compulsive gambler convicted of robbery of an illegal casino operating on an Indian reservation). *See generally* Lawrence S. Lustberg, *Sentencing the Sick: Compulsive Gambling as the Basis for a Downward Departure Under the Federal Sentencing Guidelines*, 2 SETON HALL J. SPORT L. 51 (1992) (examining whether compulsive gambling is a proper

use of drugs or other intoxicants."[57] In such cases, a lower sentence "may be warranted" to reflect the extent to which the reduced mental capacity contributed to the commission of the offense, as long as "the defendant's criminal history [does not] indicate[] a need to incarcerate the defendant to protect the public."[58]

In April 1998, the Guidelines were amended to read:

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

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basis for a downward departure under the Federal Sentencing Guidelines). *See supra* text accompanying note 56 (determining that gambling dependence statutorily eliminated as a potential grounds for downward departures).

[57] *Clements*, 144 F.3d at 982; *see* U.S. SENTENCING GUIDELINES MANUAL § 5k2.13 (2011) [hereinafter SENTENCING GUIDELINES MANUAL]; *see, e.g.*, United States v. Parris, 741 F.3d 919 (8th Cir. 2014) (holding that alcoholism forbids basis for downward sentencing departure); United States v. Rybicki, 96 F.3d 754, 759–60 (4th Cir. 1996) (same); United States v. Watson, 385 F. Supp. 2d 534, 540 (E.D. Pa. 2005), *aff'd*, 482 F.3d 269 (3d Cir. 2007) (holding that mental health, cognitive limitations, or substance addiction were not grounds for a downward departure); United States v. Webb, 134 F.3d 403, 409 (D.C. Cir. 1998) (holding that drug addiction could not form basis for downward departure); United States v. Hunter, 980 F. Supp. 1439, 1451 (M.D. Ala. 1997) (same), *aff'd*, 172 F.3d 1307 (1999); *cf.* United States v. Cani, 545 F. Supp. 2d 1235, 1243 (M.D. Fla. 2008) (stating that drug addiction cannot be used as a downward departure under the Guidelines, but can be considered when looking at other factors, such as history and characteristics of the defendant, when determining the sentence).

[58] SENTENCING GUIDELINES MANUAL, *supra* note 57, § 5k2.13, at 477; Kirk D. Houser, Comment, *Downward Departures: The Lower Envelope of the Federal Sentencing Guidelines*, 31 DUQ. L. REV. 361, 374 (1993). *See generally* Donald C. Wayne, Case Comment, *Chaotic Sentencing: Downward Departures Based on Extraordinary Family Circumstances*, 71 WASH. U. L.Q. 443, 444 (1993) (finding that a single parent has more need to be home than locked up in a facility for an extended time). For relevant early cases, see, for example, United States v. Mitchell, 113 F.3d 1528, 1536 (10th Cir. 1997) (holding that downward departure could be warranted if it is not needed to protect the public), *reh'g denied* (1997), *cert. denied*, 522 U.S. 1063 (1998); United States v. Atkins, 116 F.3d 1566, 1571 (D.C. Cir. 1997) (holding that a cumulative of facts can make downward departure not available for a defendant), *cert. denied*, 522 U.S. 975 (1997); United States v. Bradshaw, No. 96 CR 485-1, 1999 WL 1129601, at *4–5 (N.D. Ill. Dec. 3, 1999) (holding acceptance of responsibility can lead to a downward departure in sentencing).

> warranted . . . the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.[59]

The 1998 amendments also redefined "reduced mental capacity" to include volitional as well as cognitive impairments. Under the amended Guidelines: "'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful."[60]

The Feeney Amendment, effective 2003, further limited the circumstances under which a court could depart from the range of sentences prescribed in the Guidelines.[61] Among other restrictions, the Amendment limits departures based on aberrant behavior and physical impairment.[62] The Amendment also prohibits departures based on diminished capacity in cases involving crimes against children and sexual offenses.[63] In general, the Amendment prohibits departures based on factors that are not enumerated in the Guidelines or on combinations of factors that would not independently warrant a departure.[64]

On the other hand, a more recent amendment to the Guidelines has, at least on its face, made federal sentencing more hospitable to PTSD claims by military veterans. The recent amendment notes that military service may be an appropriate mitigating factor "in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by

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[59] SENTENCING GUIDELINES MANUAL, *supra* note 57, § 5k2.13, at 477. The amendments also eliminated addiction to gambling as a reason for a downward departure. *Id.* Relying on this new language, the Third Circuit found that its earlier decision in *United States v. Rosen* was thus superseded. *See* 896 F. 2d 789 (3d Cir. 1990) (ruling defendant's compulsive gambling did not warrant downward departure), *reh'g & reh'g en banc denied* (3d Cir. 1990), *abrogated by* United States v. Askari, 159 F.3d 774 (3d Cir. 1998).

[60] SENTENCING GUIDELINES MANUAL, *supra* note 57, § 5K2.13, at 477 cmt. 1 (amended 1998).

[61] Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295 (2004).

[62] SENTENCING GUIDELINE MANUAL, *supra* note 57, §§ 5K2.20, 5K2.22(2), at 479–81 (amended 2003).

[63] 18 U.S.C. § 3553 (b)(2) (amended 2003); SENTENCING GUIDELINES MANUAL, *supra* note 57, § 5K2.0(b), at 466–67 (amended 2003).

[64] *Id.*

the guideline."[65] But, of course, not all states use guidelines modeled on the Federal law.[66]

Trial courts have great discretion to determine when a sentence reduction is appropriate under the Guidelines,[67] and decisions not to depart from the Guidelines generally are not appealable.[68] Appellate courts are willing to disturb sentencing

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[65] *See* Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 70 (2012) (discussing SENTENCING GUIDELINES MANUAL, *supra* note 57, § 5H1.11). For a discussion of this amendment's potential value in this context, see Jeffrey Lewis Wieand, Jr., *Continuing Combat at Home: How Judges and Attorneys Can Improve Their Handling of Combat Veterans with PTSD in Criminal Courts*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 227, 255–56 (2012).

[66] *See* Kay A. Knapp & Denis J. Hauptly, *State* and *Federal Sentencing Guidelines*: *Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 679–82 (1992) (describing differences between the state guideline systems and the Federal Sentencing Guidelines).

[67] *See, e.g.*, United States v. Osborn, 679 F.3d 1193, 1196 (10th Cir. 2012) (ruling the lower court did not abuse its discretion when denying a reduction in defendant's sentence under the Guidelines); United States v. Fennell, 592 F.3d 506, 510 (4th Cir. 2010) (ruling the district court can use its discretion in determining sentences); United States v. Smith, 595 F.3d 1322, 1323 (5th Cir. 2010) (ruling the district court did not abuse its discretion when it considered post-conviction disciplinary records when considering a reduction in defendant's sentence); United States v. Goldberg, 295 F.3d 1133, 1138 (10th Cir. 2002) (ruling the district court abused its discretion by awarding downward departure because it did not want to incarcerate the defendant); United States v. Moreland, No. 96-30164, slip op. at *3 (9th Cir. July 21, 1997); United States v. Organek, 65 F.3d 60, 63 (6th Cir. 1995); United States v. White, 71 F.3d 920, 923 (D.C. Cir. 1995); United States v. Yellow Earrings, 891 F.2d 650, 654–55 (8th Cir. 1989); United States v. Volpe, 78 F. Supp. 2d 76, 83 (E.D.N.Y. 1999).

[68] *See, e.g.*, United States v. Guerrero, 510 F. App'x 87, 89 (2d Cir. 2013); United States v. Frankel, 443 F. App'x 603, 607 (2d Cir. 2011); United States v. Siegel, 271 F. App'x 115, 117–18 (2d Cir. 2008); United States v. Ogman, 535 F.3d 108, 111 (2d Cir. 2008); United States v. Beckett, 169 F. App'x 643, 644 (2d Cir. 2006); United States v. McDaniel, 175 F. App'x 456, 458 (2d Cir. 2006); United States v. Stinson, 465 F.3d 113, 114 (2d Cir. 2006); United States v. Langhorn, 30 F. App'x 358, 360 (6th Cir. 2002); United States v. Marin-Mayorga, 8 F. App'x 520, 521 (6th Cir. 2001); United States v. Romero, No. 98-229, slip op. at *3 (6th Cir. Mar. 28, 2000); United States v. Timbana, 222 F.3d 688, 689 (9th Cir. 2000); United States v. Mikaelian, 168 F.3d 380, 390 (9th Cir. 1999); United States v. Watkins, 179 F.3d 489, 503 (6th Cir. 1999); United States v. Steele, 178 F.3d 1230, 1237 (11th Cir. 1999); United States v. Helmling, 116 F.3d 1489, 1489 (10th Cir. 1997); United States v. Black, 116 F.3d 198, 201–02 (7th Cir. 1997); United States v. Walker, Nos. 96-3049, 96-3064, 96-3065, slip op. at *8 (10th Cir. Dec. 20, 1996); States v. Wilson, No. 95-3197, slip op. at *1 (D.C. Cir. Sept. 26, 1996) (per curiam); United States v. Nugent, No. 95-3481, slip op. at *1 (6th Cir. June 14, 1996) (per curiam); United States v. Estergard, No. 95-30047, slip op. at *2 (9th Cir. Feb. 8, 1996); United United States v. Chigbo, 38 F.3d 543, 546 (11th Cir. 1994) (per curiam); United States v. Patterson, 15 F.3d 169, 171 (11th Cir. 1994); United States v. Schechter, 13 F.3d 1117, 1119–20 (7th Cir. 1994); United States v. Turner, No. 92-5687, slip op. at *2 (4th Cir. Oct. 12, 1993) (per curiam); United States v. Ghannam, 899 F.2d 327, 328 (4th Cir. 1990). *Compare* United States v. Follett, 905 F.2d 195, 197 (8th Cir. 1990), *cert. denied*, 501 U.S. 1207 (1991) (upholding the district court's

determinations only where it appears the District Court misunderstood its authority to reduce the defendant's sentence.[69]

In several cases, courts have invoked the Guidelines to reduce a defendant's sentence based on his reduced mental capacity.[70] In *United States v. Speight*,[71] for instance, the court found a defendant, convicted of drug and firearm offenses, who suffered from schizophrenia and other emotional disturbances had met all the Guidelines' criteria, and thus a sentence reduction was warranted.[72] In *United States*

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refusal to make a downward departure for defendant with a diminished mental capacity), *with* 905 F.2d 195, 197 (Heaney J., dissenting) (arguing that the majority should not have placed defendant in a minimum security prison that does not have the resources to meet the defendant's mental health needs).

[69] *See, e.g.*, United States v. Ruklick, 919 F.2d 95, 97–98 (8th Cir. 1990) (reversing the trial court's refusal to depart from the Guidelines in case where the defendant had the mental capacity of a twelve-year old). On the need for specific findings in Guideline decision making see, for example, *United States v. Zackson*, 6 F.3d 911, 923 (2d Cir. 1993); *United States v. Perkins*, 963 F.2d 1523, 1529 (D.C. Cir. 1992).

[70] *See* United States v. Lighthall, 389 F.3d 791 (8th Cir. 2004) (allowing downward departure for diminished capacity under the Guidelines because of the defendant's bi-polar disorder); United States v. Cantu, 12 F.3d 1506, 1516–17 (9th Cir. 1993) (determining PTSD is type of mental disorder that can support mental-disability-based downward departure); United States v. Lara, 905 F.2d 599, 605 (2d Cir. 1990) (upholding departure from the Guidelines based on the defendant's likely "extreme vulnerability" in a correctional facility); United States v. Cotto, 793 F. Supp. 64, 67 (E.D.N.Y. 1992) (recognizing that a defendant's near retardation, vulnerability, efforts at rehabilitation and incompetence warranted downward departure). *But see* United States v. Valdez, 426 F.3d 178, 186 (2d Cir. 2005) (holding defendant's IQ did not warrant a downward departure for diminished capacity under the Guidelines); United States v. Sheehan, 371 F.3d 1213, 1218–19 (10th Cir. 2004) (holding a downward departure was not granted for diminished capacity under the Guidelines even though he had been diagnosed with substance dependence and anti-social personality disorder); United States v. Greenfield, 244 F.3d 158, 163 (D.C. Cir. 2001) (recognizing that depression does not warrant a downward departure).

[71] 726 F. Supp. 861 (D.D.C. 1989).

[72] *Id.* at 867–68; *see also* United States v. Riggs, 370 F.3d 382, 391 (4th Cir. 2004), *vacated*, 543 U.S. 1110 (2005) (remanding for further consideration in light of *United States v. Booker*, 543 U.S. 220 (2005)), *opinion reinstated*, 410 F.3d 136 (4th Cir. 2005) (finding *Booker* inapplicable, reinstating the prior opinion, and remanding the case for resentencing); *Cantu*, 12 F.3d at 1517 (allowing a finding of PTSD to be considered diminished capacity leading to a downward departure); United States v. Soliman, 954 F.2d 1012, 1014–15 (5th Cir. 1992) (affirming the sentencing court's denial of defendant's request for a downward departure where the defendant's mental condition was not a "contributing cause of the crime"); United States v. Glick, 946 F.2d 335, 339 (4th Cir. 1991) (upholding a downward departure on the grounds that the defendant "was suffering from significantly reduced mental capacity"); United States v. Doering, 909 F.2d 392, 394–95 (9th Cir. 1990) (per curiam) (prohibiting an *upward* departure from the Guidelines where the upward departure is based on the defendant's need for psychiatric care); *Ruklick*, 919 F.2d at 97–98 (allowing a downward departure where the "defendant's diminished capacity comprised a contributing factor in the commission of the offense"); United States v. Brown, No. 97-6809, slip op. at

v. Ruklick,[73] the court emphasized that under the Guidelines it was not necessary to find the defendant's reduced mental capacity amounted to "but-for causation" in order to reduce a sentence, as long as his diminished mental capacity "comprised a contributing factor in the commission of the offense."[74]

Other cases have ruled the "precise degree" to which the defendant's mental illness contributed to his criminal activity need not be "pinpoint[ed] or quantif[ied],"[75] a defendant's assertion of the insanity defense did not preclude a downward departure,[76] and a defendant's post-arrest efforts in drug rehabilitation

*7 (N.D. Ill. Dec. 18, 1997) (granting downward departure for diminished mental capacity); United States v. Chambers, 885 F. Supp. 12, 14 (D.D.C. 1995) (holding that a "significant downward departure is warranted" in light of the defendant's "diminished capacity"); United States v. Adonis, 744 F. Supp. 336, 342–43 (D.D.C. 1990) (finding a reduced sentence permissible due to the defendant's mental incapacity). For cases involving defendants with other mental disabilities, see, for example, United States v. Follette, 990 F. Supp. 1172, 1174 (D. Neb. 1998) (suffering from bipolar disorder and PTSD); *Brown*, No. 97-6809 at *1 (experiencing severe depression and PTSD).

[73] 919 F. 2d 95 (8th Cir. 1990).

[74] *Id.* at 97–98; *see also Valdez*, 426 F.3d at 187 (denying defendant's request for a downward departure); United States v. Perry, No. 98-4265, slip op. at *2–3 (4th Cir. Feb. 17, 1999) (per curiam) (unpublished table decision) (affirming the district court's decision to grant defendant's request for a downward departure due to mental incapacity); United States v. Leandre, 132 F.3d 796, 803 (D.C. Cir. 1998) (declining to use a but-for-causation test to decide whether to grant a downward departure); United States v. McBroom, 124 F.3d 533, 548 (3d Cir. 1997) (noting that a downward departure "should reflect the extent to which the offender's reduced mental capacity contributed to the commission of the offense"), *vacated*, 991 F. Supp. 445 (D.N.J. 1998) (downward departure granted); United States v. Boutot, 480 F. Supp. 2d 413, 418 (D. Me. 2007) (deciding that the defendant qualified for a downward departure based on mental incapacity); United States v. Boeka, No. 8:06CR115, 2006 WL 3780400, at *7 (D. Neb. Dec. 20, 2006) (granting defendant's request for a downward departure based on extraordinary family circumstance, but denying downward departure based on diminished capacity); United States v. Shore, 143 F. Supp. 2d 74, 84 (D. Mass. 2001) (granting downward departure); United States v. Fluehr, Crim. No. 93-00376-01, 1995 WL 37527, at *5–7 (E.D. Pa. Jan. 27, 1995) (granting downward departure because the defendant accepted responsibility and lacked moral culpability), *amended by* No. CRIM. 93-00376-01, 1995 WL 106878 (E.D. Pa. Mar. 14, 1995), *aff'd*, No. 95-1226, slip op. at 1 (3d Cir. Dec. 7, 1995).

[75] United States v. Royal, 902 F. Supp. 268, 272 (D.D.C. 1995); *see* United States v. Dyer, 216 F.3d 568, 570 (7th Cir. 2000) (noting a defendant's mental incapacity does not need to be the "but-for cause" or "sole cause" of the crime); United States v. Sutherland, Nos. 1:00CR00052, 1:01CR00009, 2001 WL 1502913, at *9 (W.D. Va. Nov. 27, 2001) (noting that there is no "foolproof method" to determine how *much* diminished capacity is needed to contribute to an offense).

[76] *See* United States v. Taylor, 483 F. App'x 992, 997 (6th Cir. 2012); United States v. Waldman, 310 F.3d 1074, 1079 (8th Cir. 2002); United States v. Barris, 4 F.3d 33, 35 (8th Cir. 1995). *But see* United States v. Sam, 467 F.3d 857, 862–63 (5th Cir. 2006) (finding that "an insanity defense precludes an acceptance-of-responsibility reduction" in most cases); United States v. Gorsuch, 404 F.3d 543, 546 (1st Cir. 2005) (holding that a defendant may

might warrant such a departure.[77] But generally, appellate courts uphold determinations *not* to depart from the Guidelines.[78]

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not use an insanity defense and subsequently request a downward departure when the defense fails).

[77] United States v. Whitaker, 152 F.3d 1238, 1239 (10th Cir. 1998); United States v. Workman, 80 F.3d 688, 701 (2d Cir. 1996), *cert. denied*, *sub nom.* Rodgers v. United States, 519 U.S. 938 (1996), *and sub nom.* Green v. United States, 519 U.S. 955 (1996); United States v. Eisinger, 321 F. Supp. 2d 997, 1007 (E.D. Wis. 2004) (granting defendant a horizontal departure for overcoming her drug addiction and becoming a lower risk of reoffending); United States v. Rutherford, 323 F. Supp. 2d 911, 916 (E.D. Wis. 2004) (granting defendant downward departure for drug rehabilitation); United States v. Perella, 273 F. Supp. 2d 162, 168–69 (D. Mass. 2003) (granting downward departure for defendant's extraordinary drug rehabilitation); United States v. Jones, 233 F. Supp. 2d 1067, 1073 (E.D. Wis. 2002) (granting downward departure based upon defendants extraordinary drug rehabilitation); United States v. Wilkes, 130 F. Supp. 2d 222, 240 (D. Mass. 2001) (granting defendant a downward departure for post-arrest efforts to rehabilitate himself from his drug addiction); United States v. Kane, 88 F. Supp. 2d 408, 408–09 (E.D. Pa. 2000) (granting downward departure for defendant's extraordinary rehabilitation).

[78] Thus, determinations not to depart have been upheld in cases in which the underlying crimes were violent and the defendant's violent criminal record raised the possibility that he would be a threat to public safety. *See e.g.*, United States v. Santos, 131 F.3d 16 (1st Cir. 1997) (identifying underlying crime of sending threatening letter to President of United States); United States v. Jones, No. 94-1948 (7th Cir. Mar. 2, 1995) (discussing four counts of bank robbery); United States v. Braxton, 19 F.3d 1385 (11th Cir. 1994) (discussing armed robbery and carrying a firearm during commission of a felony), *cert. denied*, 513 U.S. 935 (1994); United States v. Dailey, 24 F.3d 1323 (11th Cir. 1994) (determining interstate travel with intent to extort did not warrant downward departure but finding provocation that could); United States v. Premachandra, 32 F.3d 346 (8th Cir. 1994) (discussing defendant's armed bank robberies), *aff'd*, 101 F.3d 68 (8th Cir. 1996); United States v. Salemi, 26 F.3d 1084 (11th Cir. 1994) (assessing a kidnapping conviction), *cert. denied*, 513 U.S. 1032 (1994); United States v. Lombardi, 5 F.3d 568 (1st Cir. 1993) (discussing money laundering, conspiracy, and mail fraud counts against defendant), *aff'd*, No. 94-1865 (1st Cir. Mar. 13, 1995); Norflett v. United States, 981 F. Supp. 718, 719 (D. Mass. 1997) (considering bank robbery); United States v. Moore-Bey, 981 F. Supp. 688, 688 (D.D.C. 1997) (describing six counts of bank robbery), *aff'd*, United States v. Moore, 159 F.3d 638 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 918 (1998); Halmos v. United States, 872 F. Supp. 762, 768 (D. Haw. 1995) (considering bank robbery); United States v. Marquez, 827 F. Supp. 205 (S.D.N.Y. 1993) (identifying conspiracy to distribute and possess with intent to distribute heroin), *aff'd*, 41 F.3d 1502 (2d Cir. 1994).

Determinations to not depart have also been upheld in cases in which the court did not find the defendant's disability so significant as to warrant such a reduction. *See, e.g.*, United States v. Annoreno, 713 F.3d 352, 353 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 335 (2013); United States v. Sammoury, 74 F.3d 1341 (D.C. Cir. 1996); United States v. Withers, 100 F.3d 1142 (4th Cir. 1996), *cert. denied*, 520 U.S. 1132 (1997); United States v. Johnson, 71 F.3d 539 (6th Cir. 1995), *cert. denied*, 517 U.S. 1113 (1996); United States v. Jackson, 56 F.3d 959 (8th Cir. 1995); United States v. Benson, No. 93-5204 (4th Cir. 1993) (unpublished table decision); United States v. Tucker, 986 F.2d 278 (8th Cir. 1993), *cert. denied*, 510 U.S.

820 (1993); Samra v. Price, No. 2:07-cv-1962-LSC, 2014 WL 4452676 (N.D. Ala. Sept. 5, 2014); Sims v. United States, Civ. No. 11-2267 (WHW), 2012 WL 1207202, at *1 (D.N.J. Apr. 11, 2012) *reconsideration denied*, Civ. No. 11-2267 (WHW), 2012 WL 3000461 (D.N.J. July 23, 2012); *Fluehr*, 1995 WL 37527, at *3 (finding the defendant's behavior was not sufficiently aberrant). *See, e.g.*, United States v. DeVegter, 439 F.3d 1299, 1305 (11th Cir. 2006); United States v. Orrega, 363 F.3d 1093, 1098 (11th Cir. 2004); United States v. Dickerson, 381 F.3d 251 (3d Cir. 2004); United States v. Constantine, 263 F.3d 1122 (10th Cir. 2001); United States v. Benally, 215 F.3d 1068 (10th Cir. 2000); Aleman v. United States, No. 2:11cr1168-1, 2013 WL 4677781 (S.D. Tex. Aug. 30, 2013); United States v. Bailey, 377 F. Supp. 2d 268, 272 (D. Me. 2005); Thompson v. United States, No. 99 C 1778, 2000 WL 821711 (N.D. Ill. June 23, 2000).

Determinations not to depart have also been upheld in cases in which the court did not find defendant's "extraordinary post-arrest efforts" at drug rehabilitation sufficient to warrant such a reduction. *See, e.g.*, United States v. Barton, 76 F.3d 499 (2d Cir. 1996); United States v. Williams, 37 F.3d 82 (2d Cir. 1994), *appeal after remand*, 65 F.3d 301 (2d Cir. 1995); United States v. Ziegler, 1 F.3d 1044 (10th Cir. 1993), *appeal after remand*, 39 F.3d 1058 (10th Cir. 1994).

Determinations not to depart have also been upheld in cases in which there was no appeal after remand and it was demonstrated that there was no connection between the defendant's diminished capacity and the commission of the crime. *See, e.g.*, United States v. Dyer, 216 F.3d 568, 568–69 (7th Cir. 2000); United States v. Cyprowski, No. 98-4172, slip op. at *1 (4th Cir. Feb. 19, 1999), *cert. denied*, 527 U.S. 1030 (1999); United States v. Sassani, No. 97-4011 (4th Cir. Mar. 4, 1998) (unpublished table decision), *cert. denied*, 525 U.S. 921 (1998); United States v. Barajas-Nunez, 91 F.3d 826 (6th Cir. 1996); United States v. Johnson, 49 F.3d 766 (D.C. Cir. 1995); United States v. White, 71 F.3d 920 (D.C. Cir. 1995); United States v. Vasquez, No. 94 Cr. 839(RPP), 1997 WL 187315 (S.D.N.Y. Apr. 16, 1997); United States v. Shaoul, No. 95 Civ. 5268 (DLD), 1996 WL 120713 (S.D.N.Y. Mar. 18, 1996), *aff'd*, 104 F.3d 351 (2d Cir. 1996); *see also* United States v. Portman, 599 F.3d 633 (7th Cir. 2010) (deciding defendant's diminished capacity could not have led to the crime committed); United States v. Schneider, 429 F.3d 888 (9th Cir. 2005) (deciding diminished capacity cannot be considered with acceptance of responsibility); United States v. Kimes, 246 F.3d 800 (6th Cir. 2001) (deciding evidence of diminished capacity not admissible in case of general intent crime); United States v. Goldstein, No. 2:10-cr-00525-JAD-PAL, 2014 WL 1168969 (D. Nev. Mar. 21, 2014) (deciding diminished capacity evidence was admissible); United States v. Bissell, 954 F. Supp. 841 (D.N.J. 1996), *aff'd*, 142 F.3d 429 (3d Cir. 1998) (deciding diminished mental capacity based on "personality flaw" that made defendant "placid, unquestioning and compliant" insufficient to require downward departure); State v. Marchi, 243 P.3d 556, 562 (Wash. Ct. App. 2010) (deciding intoxication and diminished capacity did not add an additional element to the offense); State v. Guilliot, 22 P.3d 1266, 1267 (Wash. Ct. App. 2001) (finding no connection between hypoglycemia symptoms and defendant's mental capacity at time of shooting).

Determinations to not depart have also been upheld in cases in which the court felt that the defendant did not take sufficient responsibility for his role in the criminal offenses in question. *See, e.g.*, United States v. White, 675 F.3d 1106, 1109–10 (8th Cir. 2012); United States v. Moore, 322 F. App'x 78, 84 (2d Cir. 2009); United States v. Gordon, 64 F.3d 281 (7th Cir. 1995), *cert. denied*, 516 U.S. 1062 (1996); United States v. Haddad, 10 F.3d 1252 (7th Cir. 1993); United States v. Artim, 944 F. Supp. 363, 369 (D.N.J. 1996) (citing United

Courts have split on the impact of childhood abuse and neglect on a defendant and on the likelihood of victimization following potential incarceration.[79] Courts have also split on the question of whether a defendant's "dangerous mental state" would make an *upward* departure appropriate,[80] with at least one appellate court vacating an upward departure sentence and concluding the appropriate mechanism for protecting the public in such a case was a commitment proceeding, not an extended sentence.[81] Another court rejected a request for a downward departure based on the defendant's alleged susceptibility to undue influence by a codefendant who emotionally and sexually abused her.[82]

States v. Lieberman, 971 F.2d 989, 996 (3d Cir. 1992)); United States v. Amerson, 864 F. Supp. 458 (M.D. Pa. 1994).

[79] *Compare* United States v. Ayers, 971 F. Supp. 1197, 1201 (N.D. Ill. 1997) (defendant entitled to downward departure), *with* United States v. Vela, 927 F.2d 197, 199 (5th Cir. 1991) (defendant not entitled to such a departure), *and* United States v. Rosa, No. 96-1268, slip op. at *1 (2d Cir. Nov. 25, 1996) (affirming district court's denial of downward departure), *and* United States v. Rivera, 192 F.3d 81, 88 (2d Cir. 1999) (affirming district court's denial of downward departure). *See generally* United States v. Walking Eagle, 553 F.3d 654, 659 (8th Cir. 2009) (court did not abuse its discretion by sentencing the defendant after considering childhood abuse and mental illnesses); United States v. Brady, 417 F.3d 326, 336 (2d Cir. 2005) (remanding to district court for factual finding to determine if a downward departure was appropriate); United States v. Nowicki, 252 F. Supp. 2d 1242, 1255 (D.N.M. 2003) (downward departure was granted because defendant suffered from diminished capacity and childhood abuse).

On the question of victimization, see *United States v. Thornberg*, 326 F.3d 1023, 1027 (8th Cir. 2003) (defendant received an increased departure because he was likely to victimize others in the future); *United States v. Coates*, 996 F.2d 939, 942–43 (8th Cir. 1993); *United States v. Poff*, 926 F.2d 588, 595–96 (7th Cir. 1991); *United States v. Lauzon*, 938 F.2d 326, 333 (1st Cir. 1991); *United States v. Hamilton*, 949 F.2d 190, 193–94 (6th Cir. 1991) (per curiam); *United States v. Fairman*, 947 F.2d 1479, 1480, 1482 (11th Cir. 1991).

[80] United States v. Hines, 26 F.3d 1469, 1472, 1479 (9th Cir. 1994), *aff'd mem., after remand*, Nos. 94-30397, 94-30398 (9th Cir. Oct. 23, 1995) (remanding for further explanation by the trial court); *see also* United States v. Carson, 377 F. App'x 257, 259–60 (3d Cir. 2010) (acknowledging defendant's mental status, but affirming lower courts upward variance); United States v. Pinson, 542 F.3d 822, 839 (10th Cir. 2008) (affirming upward variance for a person with mental illness); United States v. Barnes, 125 F.3d 1287, 1293–94 (9th Cir. 1997) (determining upward departure was appropriate).

[81] *See, e.g.*, United States v. Moses, 106 F.3d 1273, 1275–76 (6th Cir. 1997) (discussing availability of the commitment mechanism found in 18 U.S.C. § 4246 (2012)); *see also Pinson*, 542 F.3d at 838 (expressing concern as to the trial court's use of upward variances and failure to consider civil commitment).

[82] United States v. Rouse, 168 F.3d 1371, 1372 (D.C. Cir. 1999).

C. Subsequent Supreme Court Developments

Later judicial developments radically altered Guidelines practice. First, in *Blakely v. Washington*,[83] the Supreme Court struck down the Washington state sentencing guidelines as unconstitutional.[84] In *Blakely*, the Supreme Court applied its earlier ruling in *Apprendi v. New Jersey*,[85] to hold that a defendant's Sixth Amendment right to a jury trial was violated by a sentencing scheme that allowed a judge to impose a sentence above the statutory maximum based on facts neither admitted by the defendant nor found beyond a reasonable doubt by a jury.[86]

Justice Scalia, writing for the majority, ruled Washington's scheme, as applied to Blakely, ran afoul of the Court's ruling in *Apprendi*.[87] The *Blakely* Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[88] The majority noted it was not holding determinate sentencing per se unconstitutional[89] and that the Guidelines were not before the Court.[90]

In its next term, a deeply divided Supreme Court ruled in *United States v. Booker*[91] that the Guidelines were subject to jury trial requirements of the Sixth Amendment, and the Sixth Amendment's requirement that the jury find certain facts during sentencing was incompatible with Federal Sentencing Act, requiring severance of the Act's provisions that had made guidelines "mandatory."[92] Sentencing judges must consider:

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[83] 542 U.S. 296 (2004).

[84] *Id.* at 305.

[85] 530 U.S. 466 (2000).

[86] *Blakely*, 542 U.S. at 304–05.

[87] *Id.* at 308–14.

[88] *Id.* at 301 (quoting *Apprendi*, 530 U.S. at 525).

[89] *Id.* at 309.

[90] *Id.* at 305 n.9.

[91] 543 U.S. 220 (2005).

[92] *Id.* at 245; *see, e.g.*, United States v. Sam, 467 F.3d 857, 860–61 (5th Cir. 2006) (determining *Booker* requires court to consider and apply the Guidelines, but the Guidelines are no longer mandatory); *cf.* United States v. Brewer, 520 F.3d 367, 371 (4th Cir. 2008) (stating that under *Booker*, the court of appeals "lack[s] the authority to review a sentencing court's denial of a downward departure unless the [trial] court failed to understand its authority to do so").

> (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely, (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution.[93]

At least one commentator has read *Booker* to make it "incumbent upon judges to consider the physical or mental health of a defendant during the sentencing phase, where it ordinarily would not have been allowed pre-*Booker* when the Guidelines were mandatory."[94] In a thoughtful early analysis, John Parry, Director of the Commission on Mental & Physical Disability Law at the American Bar Association, who believes the impact of *Booker* and the other judicial developments referred to in this section on mental disability law will most likely be "limited,"[95] has observed:

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[93] Rita v. United States, 551 U.S. 338, 347–48 (2007) (outlining the statutory factors set out in 18 U.S.C. § 3553(a) (2000 & Supp. IV 2004)).

[94] Natalie Hinton, Comment, *Curing the BOP Plague with* Booker*: Addressing Inadequate Medical Treatment in the Bureau of Prisons*, 41 J. MARSHALL L. REV. 219, 228 (2007). Following *Booker*, the Supreme Court approved the application of a presumption of substantive reasonableness for sentencing within the Guidelines. *Rita*, 551 U.S. at 347. For a careful critique of *Rita* in the context of *Booker*, see Benjamin J. Priester, Apprendi *Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 22–35 (2011); *see also Rita*, 551 U.S. at 366 (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*."); *id.* at 390 (Souter, J., dissenting) (expressing concerns about district court judges' "substantial gravitational pull" to the Guidelines, even after *Rita* and *Booker*); Bennett, *supra* note 26, at 515–16 (discussing the practical implications of *Booker* and *Rita*).

A debate rages as to the impact of *Booker* discretion on the disparity in sentences given to white and African American defendants. *Compare* U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER REPORT'S* MULTIVARIATE REGRESSION ANALYSIS 3 (2010), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf, *archived at* http://perma.cc/NDW6-32EJ (demonstrating that *Booker* quadrupled the black-white sentencing gap among otherwise similar cases), *with* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 78 (2013) (showing sentencing commission's conclusions are "based on deeply flawed methods" and showing sentencing disparities are the result if prosecutors filing "mandatory minimums twice as often against black men as against comparable white men"). This becomes significant for the questions addressed in this Article, as it is estimated that 30% of all American soldiers who have fought in Afghanistan are African American. *See* Larry J. Pittman, *A Thirteenth Amendment Challenge to Both Racial Disparities in Medical Treatments and Improper Physicians' Informed Consent Disclosures*, 48 ST. LOUIS U. L.J. 131, 131 (2003).

[95] *Supreme Court Summary*, *supra* note 27, at 137.

> *Booker* and other recent cases—e.g., *Blakely* . . . *Apprendi* . . .—create the impression that in sentencing matters juries are sacrosanct, or close to it. The good aspect for defendants is that they have a Sixth Amendment right to have juries decide sentencing matters. This gives defense lawyers an important constitutional card to play in defending their clients, which is particularly important when mitigating circumstances are to be presented.[96]

Continuing, Parry expressed concern that "this trend . . . helps fuel the misimpression that juries are somehow better suited to assess expert evidence related to sentencing than are judges,"[97] adding that

> one of the critical problems in the criminal justice system for defendants with mental and other disabilities is that jurors are not particularly competent in dealing with complex expert evidence, and like many people in society, tend to have a bias against such defendants, who tend to be stigmatized by their disabilities.[98]

Parry continued, "The notion that expert evidence regarding a person's mental status—which even in the best circumstances engenders considerable doubts in terms of its relevance and accuracy—can be made more relevant and accurate after being 'weighed' by a jury is not only naive but is also incredible."[99]

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*

D. Impact of Booker

Slowly courts have begun to consider the impact of *Booker* on cases involving defendants with mental disabilities.[100] In *United States v. Anderson*,[101] while interpreting *Booker* in a case vacating the defendant's sentence, the court specifically noted, "the government fail[ed] to account for the district court's consideration and discussion of Anderson's 'serious mental health issues,' presented in support of his request for a downward departure."[102] Elsewhere, courts have relied on *Booker* as authority for imposing non-Guidelines sentences in cases of defendants seeking downward departures based on diminished mental capacities,[103] specifically

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[100] *See Developments in the Law – Mental Illness:* Booker, *The Federal Sentencing Guidelines, and Violent Mentally Ill Offenders*, 121 HARV. L. REV. 1133, 1133–35 (2008); *see also* Jeffrey T. Ulmer & Michael T. Light, *The Stability of Case Processing and Sentencing Post-*Booker, 14 J. GENDER RACE & JUST. 143, 175 (2010). Relying upon Paul Hofer, Ulmer and Light note that:

> [P]revious employment, drug and alcohol dependence, age, family and community ties, and mental and emotional conditions are cited in a larger portion of cases after the *Booker* decision than they were before, which suggests that the Guideline commentary making these characteristics 'not ordinarily relevant' is more frequently being disregarded by judges or given a more restricted reading.

Id. (quoting Paul Hofer, United States v. Booker *as a Natural Experiment: Using Empirical Research to Inform the Federal Sentencing Policy Debate*, 6 CRIMINOLGY & PUB. POL'Y 433, 450 (2007)).

[101] 452 F.3d 87 (1st Cir. 2006).

[102] *Id.* at 93.

[103] *See, e.g.*, United States v. MacKinnon, 401 F.3d 8, 11 (1st Cir. 2005) ("Here, we believe that this record, in light of the judge's comments and the numerous grounds presented by MacKinnon for departure that could not be considered under a mandatory Guidelines system, presents a case for remand."); United States v. Pallowick, 364 F. Supp. 2d 923, 926 (E.D. Wis. 2005) ("In the present case, defendant moved for a downward departure based on his diminished mental capacity and vulnerability to abuse in prison. However, this was before *Booker* made the guidelines advisory. . . . Consistent with [defendant's] argument[,] . . . I concluded that a non-guideline sentence was appropriate . . . ."); United States v. Jones, 352 F. Supp. 2d 22, 23–24, 26 (D. Me. 2005) (ruling sentence would have been impossible before *Booker* because neither mental and emotional conditions, diminished capacity, nor efforts toward rehabilitation would have entitled the defendant to a downward departure); *see also* United States v. Jackson, 547 F.3d 786, 790 (7th Cir. 2008) (explaining that *Booker* has made considering Guidelines an "additional element within the §3553 factors"); United States v. Stinson, 465 F.3d 113, 114 (2d Cir. 2006) (ruling that refusal to downwardly depart is not generally appealable under *Booker*); United States v. Villanueva, No. 07-CR-149, 2007 WL 4410378, at *3 (E.D. Wis. Dec. 14, 2007) ("But if *Booker* means anything at all, it must mean that the court can give further weight to factors covered by the guidelines, and consider personal characteristics deemed disfavored or discouraged by the guidelines." (citations

looking, in some cases, at the effects of combat trauma and military service.[104]

As indicated above,[105] a significant number of federal judges have backpedalled away from *Booker* in dramatic fashion, making sentencing decisions as if *Mistretta v. United States* was still the law.[106] What is not clear is the extent to which judges will consider the DSM-5's expanded definition of PTSD in subsequent litigation in light of their demonstrated reluctance to embrace the right to be discretionary.

E. The Impact of Sanism

1. The Meaning of Sanism

I have written extensively about what I call "sanism"—"an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry."[107] Sanism permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, and expert and lay witnesses.[108] It affects the administration of the process to determine

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omitted)); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 726–27 (2005) (explaining that courts post-*Booker* are using broad latitude in selecting sentencing criteria and citing *Jones* as an example).

[104] Wieand, *supra* note 65, at 251–55 (discussing combat trauma and military service in the context of United States v. Brownfield, Criminal Case No.08-cr-00452-JLK, at 2 (D. Colo. Dec. 18, 2009), *available at* http:// graphics8.nytimes.com/packages/pdf/us/20100303brownfield-opinion-order.pdf, *archived at* http://perma.cc/Q8CZ-W95E).

[105] *See supra* text accompanying note 28.

[106] *See, e.g.*, Siegler, *supra* note 28, at 103 and accompanying text. In this context, Professor Siegler discusses and sharply criticizes cases that routinely ignore mitigating factors and impose sentences as if the Guidelines were still mandatory, such as *United States v. Tahzib*, 513 F.3d 692, 695 (7th Cir. 2008) and *United States v. Chapman*, 694 F.3d 908 (7th Cir. 2012). *See* Siegler, *supra* note 28, at 106–09.

For an important recent opinion sharply criticizing the government's efforts to enhance criminal sentences by seeking enhanced sentences under the rubric of "relevant conduct" under the Guidelines (conduct involving crimes that have not been charged (or, if charged, have led to an acquittal) and have not been proven beyond a reasonable doubt), see *United States v. St. Hill*, 768 F.3d 33, 39 (1st Cir. 2014) (Torruella, J., concurring). My thanks to my friend and colleague David Wexler for alerting me to this opinion.

[107] Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159, 1180 (2013).

[108] Multiple sanist myths are applied to persons with mental disabilities. *See, e.g.*, Michael L. Perlin, *"My Sense of Humanity Has Gone Down the Drain": Stereotypes, Stigma and Sanism*, *in* STEREOTYPING AS A HUMAN RIGHTS ISSUE (Eva Brehms & Alexandra Timmer eds., 2015) (in press), manuscript at 7 (describing the primary myth: "Mentally ill individuals are 'different,' and, perhaps, less than human. They are erratic, deviant, morally weak, sexually uncontrollable, emotionally unstable, superstitious, lazy, ignorant and

competency to stand trial,[109] adjudication of the insanity defense,[110] and ruling on death penalty determinations.[111] In similar ways, it has a pernicious impact on criminal sentencing.[112]

Sanism must also be considered in the context of what I have frequently referred to as false "ordinary common sense" (OCS), a "powerful unconscious animator of legal decision making."[113]

> It is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities. OCS is self-referential and non-reflective: "I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is."[114] "It is supported by our reliance on a series of heuristics and cognitive-simplifying devices that distort our abilities to consider information rationally."[115]

Because it is pre-reflexive and self-evident, it is also susceptible to precisely the type of idiosyncratic, reactive decision making that has contaminated all of mental

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demonstrate a primitive morality. They lack the capacity to show love or affection. They smell different from 'normal' individuals, and are somehow worth less."). I discuss the impact of these myths on the justice system in, inter alia, PERLIN, PRESCRIPTION FOR DIGNITY, *supra* note 38, at 202–07; PERLIN, HIDDEN PREJUDICE, *supra* note 47, at 243–44; Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373, 375 (1992).

[109] *See, e.g.*, Michael L. Perlin, *"Dignity Was the First to Leave":* Godinez v. Moran, *Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61, 75 (1996); Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 213–14, 234 (2001) [hereinafter Perlin, *For the Misdemeanor*].

[110] *See, e.g.*, Perlin, *His Brain*, *supra* note 32.

[111] *See, e.g.*, Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J. L. ETHICS & PUB. POL'Y 239, 241–42 (1994) [hereinafter Perlin, *The Sanist Lives*].

[112] *See generally* Perlin & Gould, *supra* note 29, at 442–44 (describing sanism and arguing "[i]n this environment, it is easy to understand how evidence of mental illness—ostensibly introduced for mitigating purposes—can instead be construed by judges as an aggravating factor").

[113] *See, e.g.*, Michael L. Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, The Insanity Defense, and the Irrelevance of "Ordinary Common Sense,"* 10 WM. & MARY J. WOMEN & L. 1, 25 (2004) [hereinafter Perlin, *She Breaks*]; Michael L. Perlin, *"Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 621–22 (2009) [hereinafter Perlin, *Simplify You*].

[114] *Id.* at 365.

[115] Michael L. Perlin, *"Wisdom Is Thrown into Jail": Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, 17 MICH. ST. U. J. MED. & L. 343, 365 n.127 (2013) (quoting PERLIN, PRESCRIPTION FOR DIGNITY, *supra* note 38, at 31).

disability law.[116] OCS underlies much of our sanist behavior. "[W]here defendants do not conform to popular images of 'craziness,' the notion of a handicapping mental disability is flatly and unthinkingly rejected."[117] Just as it is essential to understand OCS and sanism if we are to understand why attitudes toward the insanity defense have developed as they have,[118] it is equally necessary to understand them if we wish to understand why sentencing decisions in the cohort of cases I discuss have developed as they have.

2. Sanism and Sentencing

How is it possible that people should be punished more harshly because of mental illness?[119] Cases decided under the Guidelines reflect a lack of understanding by federal judges of the meaning of mental disability and its role as a potential sentencing mitigator.[120] In sentencing decision making, judges all too frequently conceptualize mental disability as an "all or nothing" construct; demand a showing of mental disability that approximates the amount needed for an exculpatory insanity defense; continue to not "get" distinctions between mental illness, insanity, and incompetency; repeat sanist myths about mentally disabled criminal defendants; and engage in pretextual decision making.[121]

The ominous spirit of Justice Scalia's partial dissent in *Penry v. Lynaugh*[122]—castigating the majority for allowing an "outpouring . . . [of] unfocused sympathy"[123]—looms over many of these cases. Most of the few cases in which

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[116] *Id.*; *see also* Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 29 (1990) [hereinafter Perlin, *Psychodynamics*] (describing OCS's effect on the criminal justice system). On the impact of the anchoring heuristic on sentencing decisions in general, see Bennett, *supra* note 26, at 491.

[117] Perlin, *Psychodynamics*, *supra* note 116, at 24 (internal quotation marks removed) (quoting Harold D. Lasswell, *Foreword* to RICHARD ARENS, INSANITY DEFENSE at xi (1974).

[118] Perlin, *She Breaks*, *supra* note 113, at 25–26.

[119] J. C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1395 (2011).

[120] Perlin & Gould, *supra* note 29, at 452–55.

[121] *See* PERLIN, PRESCRIPTION FOR DIGNITY, *supra* note 38, at 202.

[122] 492 U.S. 302 (1989).

[123] *Id.* at 359–60 (Scalia, J., concurring in part and dissenting in part) (rejecting defendant's argument that the death penalty was cruel and unusual punishment in cases of defendants with mental retardation). The majority in *Penry* had concluded that evidence as to the defendant's mental retardation was relevant to his culpability and that, without such information, jurors could not express their "reasoned moral response" in determining the appropriateness of the death penalty. *Id.* at 321. I discuss *Penry* extensively in PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 11, § 12-3.3, at 493–500, and in Michael L. Perlin, *"The Executioner's Face Is Always Well-Hidden": The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 213–14 (1997). Although *Penry's* holding on the cruel and unusual punishment question was abrogated by *Atkins v.*

mental disability is seen as a mitigator eerily track the fact pattern of the few situations in which jurors grudgingly sanction the use of the insanity defense: when a defendant, especially one who has previously sought counseling, commits a nonplanful crime.[124]

The attitudes expressed in these cases are frequently sanist. For example, in a Sixth Circuit case the court rejected the defendant's "suicidal tendencies" as a possible basis for a downward departure on a conviction of embezzlement.[125] The court held departure would never be permissible on this basis because any consideration of such an argument would lead to "boilerplate" claims and force courts to "separate the wheat of valid claims from the chaff of disingenuous ones," a "path before which we give serious pause."[126] This argument tracks, nearly verbatim, the reasoning of the Fourth Circuit, which refused to grant a downward departure for a defendant who had suffered severe childhood sexual abuse, referring to the "innumerable defendants" that could plead "unstable upbringing" as a potential departure grounds.[127]

Just as evidence of organic disorder appears more "real" to judges in insanity cases than does evidence of psychological disability[128] because it is more "visible" (via an X-ray or fMRI scan) and appears less likely to be falsified,[129] so does such evidence appear more "real" in Guidelines cases. In *United States v. Hamilton*,[130] the Sixth Circuit affirmed a trial court's refusal to enter a downward departure in the

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Virginia, 536 U.S. 304, 321 (2002) (execution of defendant with mental retardation is unconstitutional as "cruel and unusual punishment"), Justice Scalia's line of thought certainly lives on. On the relationship between *Penry* and *Atkins* generally, see James W. Ellis, *Disability Advocacy and the Death Penalty: The Road from* Penry *to* Atkins, 33 N.M. L. REV. 173 (2003). *Atkins* has since been modified and strengthened by *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (in the aftermath of *Atkins*, Florida defined intellectual disability to require an IQ test score of seventy or less; such a rigid rule created an unacceptable risk that persons with intellectual disability will be executed and, thus, was unconstitutional).

[124] Perlin, *The Sanist Lives*, *supra* note 111, at 267. In the small universe of successful insanity-defense cases, jurors more grudgingly sanction the defense's use. *See, e.g.*, *id.* at 245–49. Using OCS, jurors assume a defendant who could plan a crime must not be legally insane. *See* Perlin & Gould, *supra* note 29, at 435 n.14.

[125] United States v. Harpst, 949 F.2d 860, 863–64 (6th Cir. 1991).

[126] *Id.*

[127] United States v. Daly, 883 F.2d 313, 319 (4th Cir. 1989). Other jurisdictions have reiterated the rationale articulated in *Daly*. *See, e.g.*, United States v. Perry, No. 91-3665 (8th Cir. May 26, 1992); United States v. Vela, 927 F.2d 197, 199 (5th Cir. 1991); United States v. Lucas, No. 91-3047 (D.C. Cir. Nov. 22, 1991); United States v. Desormeaux, 952 F.2d 182, 185 (8th Cir. 1991).

[128] MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 252–58 (1994).

[129] I discuss this in the context of the use of neuroscience evidence in insanity cases in Perlin, *His Brain*, *supra* note 32.

[130] 949 F.2d 190 (6th Cir. 1991).

case of a defendant suffering a "major depressive episode,"[131] on the theory that the Commission was "talking about things such as a borderline mental intelligence capacity."[132] The court concluded that, because the "defendant was able to absorb information in the usual way and to exercise the power of reason," he did not suffer from a "significantly reduced mental capacity."[133]

The District of Columbia Circuit has explicitly rejected the admission of expert testimony on an individual defendant's potential for successful rehabilitation on two grounds. First, another defendant without access to such expert testimony might be able to make a similar case for leniency.[134] Second, reliance on "scientific" predictions could transform sentencing hearings into an inappropriate "battle of experts."[135] But as Professor Schulhofer noted in his critique of *United States v. Harrington*,[136] a district court always has the capacity to appoint expert witnesses to aid a defendant at sentencing, an option made explicitly constitutional in a different context in *Ake v. Oklahoma*.[137]

A powerful current of *blame* underlies many of the Guidelines cases: the defendant *succumbed to temptation* by not resisting drugs or alcohol, by not overcoming childhood abuse, and so forth. This sense of blame mirrors courts' sanist impatience with mentally disabled criminal defendants in general, attributing their problems in the legal process to "weak character or poor resolve."[138] Thus, we should not be surprised to learn that a trial judge, responding to a National Center for State Courts survey, indicated that defendants who are incompetent to stand trial could have understood and communicated with their counsel and the court "if they [had] only wanted."[139] Again, one of the leading texts on sentencing of white-collar crimes stresses:

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[131] *Id.* at 191.

[132] *Id.* at 191–93.

[133] *Id.* at 193.

[134] United States v. Harrington, 947 F.2d 956 (D.C. Cir. 1991).

[135] *Id.* at 960.

[136] *Id.*

[137] 470 U.S. 68, 82 (1985); *see also* Schulhofer, *supra* note 50, at 869 (discussing *Ake*).

[138] Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 MIAMI L. REV. 625, 670–71 (1993). *See generally* Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1422 (1997) ("Because of sanism, society blames mentally ill individuals for their own plight . . . ."); Bernard Weiner, *On Sin Versus Sickness: A Theory of Perceived Responsibility and Social Motivation*, 48 AM. PSYCHOLOGIST 957 (1993) (proposing a conceptual system of social motivation to balance societal tendencies that tend to encourage punishment for those who demonstrate a "lack of effort" or who are "responsible" for their failure).

[139] PERLIN, HIDDEN PREJUDICE, *supra* note 47, at 256–57 (quoting Keri A. Gould et al., Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance 90 (1993) (unpublished manuscript) (on file with author)).

> Judges consider[] two major concepts pertinent to individual attributes of the offender: blameworthiness and consequence . . . . Certain characteristics of offenders relate to the culpability of or degree of blameworthiness of the particular defendant. Illustrations include mental competency . . . .[140]

I now turn to the history of PTSD in the DSM, and how the new definition in DSM-5 may potentially augur some changes in the patterns and practices I have just discussed.

III. PTSD HISTORY[141]

A. PTSD Initially

Until the publication of the DSM-IV, post-traumatic stress disorder (PTSD) was seen as a disorder that often follows "a psychologically traumatic event that is generally outside the range of usual human experience."[142] In the DSM-IV, it was characterized as a condition under which a person "experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others" and, "the person's response involved intense fear, helplessness, or horror."[143]

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[140] PERLIN, PRESCRIPTION FOR DIGNITY, *supra* note 38, at 204 (quoting STANTON WHEELER ET AL., THE SENTENCING OF WHITE COLLAR CRIMINALS 20–21 (1988)).

[141] Some of this section is adapted from PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 11, § 9A-9.3b, at 271–74.

[142] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3d ed. 1980) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-III]; *see, e.g.*, C. R. JEFFERY, ATTACKS ON THE INSANITY DEFENSE: BIOLOGICAL PSYCHIATRY AND NEW PERSPECTIVES ON CRIMINAL BEHAVIOR 94 (1985); Stephen Joseph et al., *Post-Traumatic Stress: Attributional Aspects*, 6 J. TRAUMATIC STRESS 501, 501 (1993); Richard J. Ross et al., *Sleep Disturbance as the Hallmark of Posttraumatic Stress Disorder*, 146 AM. J. PSYCHIATRY 697, 697 (1989); Wilbur J. Scott, *PTSD in DSM-III: A Case in the Politics of Diagnosis and Disease*, 37 SOC. PROBS. 294, 294 (1990). It has been suggested that Samuel Pepys developed PTSD as a result of the London Fire of 1666. *See* R. J. Daly, *Samuel Pepys and Post-Traumatic Stress Disorder*, 143 BRIT. J. PSYCHIATRY 64, 64–66 (1983). References to symptoms of PTSD in the literature (e.g., "combat neurosis," "battle fatigue," and "shell shock") date to the time of the Revolutionary War. *See* JEFFERY, *supra*, at 94 (citing Geraldine L. Brotherton, Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91, 93 (1981)). For a helpful historical perspective, see Brotherton, *supra*, at 92–100. For a discussion on the use of the phrases "battle fatigue" and "operational fatigue" during World War II, see DARYL S. PAULSON & STANLEY KRIPPNER, HAUNTED BY COMBAT: UNDERSTANDING PTSD IN WAR VETERANS INCLUDING WOMEN, RESERVISTS, AND THOSE COMING BACK FROM IRAQ, at 8–9 (2007).

[143] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 426–28 (4th ed. 1994) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-IV]. On why

PTSD has been in the public's consciousness since at least World War II in the context of what has been called "the slap around the world"[144]—the "legendary"[145] story of General George Patton slapping a soldier in a battlefield hospital.[146] One of the first law review articles to discuss PTSD characterized this slap as an "extreme example of military intolerance for warrior weakness."[147] There is little question

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the DSM-IV definition may have reduced the prevalence rate of PTSD diagnoses, see Lisa Richardson et al., *Prevalence Estimates of Combat-Related PTSD: A Critical Review*, 44 AUSTL. & N.Z. J. PSYCHIATRY 4, 7–8 (2010). Dr. Robert Spitzer, the primary author of the DSM-III, has concluded that with the exception of Dissociative Identity Disorder, no other DSM diagnosis "has generated so much controversy in the field as to the boundaries of the disorder, diagnostic criteria, central assumptions, clinical utility and prevalence in various populations." Robert L. Spitzer et al., *Saving PTSD from Itself in DSM-V*, 21 J. ANXIETY DISORDERS 233, 233 (2007). Spitzer and his colleagues further argued that some of the diagnostic criteria in DSM-IV were of "questionable validity," *id.* at 234, and urged the drafters of DSM-5 "to formulate more stringent criteria" to "dispel[] . . . confusion" in this area. *Id.* at 240.

[144] Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars"*, 73 GEO. L.J. 931, 972 n.284 (1985).

[145] Perlin, *John Brown Went Off to War*, *supra* note 6, at 459.

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> During the action in Sicily, General Patton visited an evacuation hospital. He was conducted to the receiving tent, where [fifteen] casualties had just come in from the front.
>
> "Where Were You Hurt?" The General went down the line, asking each patient where he had been hurt. On the edge of the fourth bed sat a soldier with no visible wounds. He had been sent back by his divisional medical officer, tentatively diagnosed as a severe case of psychoneurosis. He was still in battle dress.
>
> The General asked him the routine question. The soldier answered: "It's my nerves. I can hear the shells come over but I can't hear them burst."
>
> Patton turned to the medical officer and asked, "What's this man talking about? What's wrong with him--if anything?" Patton began to shout at the man. His high voice rose to a scream, in such language as: "You dirty no-good------! You cowardly--! You're a disgrace to the Army and you're going right back to the front to fight, although that's too good for you. . . ." Patton reached for his white-handled single-action Colt.
>
> The man sat quivering on his cot. Patton slapped him sharply across the face, turned to the commanding medical officer who had come in when he heard Patton's high-pitched imprecations. "I want you to get that man out of here right away. I won't have these other brave boys seeing such a bastard babied."

Id. (citing Michael McCarthy, Essay, *Diversionary Tactics: Alternative Procedures for the Prosecution of Military Veterans*, 50 DUQ. L. REV. 475, 477–78 (2012)).

[147] Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 434 n.151 (1988).

that, "before Vietnam, no single event contributed more to public awareness of PTSD" than this incident.[148]

PTSD globally became part of the public's consciousness following the return of Vietnam War veterans[149] as a result of their Vietnam experiences.[150] Symptoms of Vietnam Stress Syndrome (as it was popularly known) included re-experiencing the traumatic event, numbing of responsiveness to the outside world, hyperalertness or exaggerated "startle response," sleep disturbance, and memory impairment.[151] Individuals who suffer from this syndrome often show increased irritability, impulsive behavior, and unpredictable explosions of aggression with little or no provocation.[152]

When I presented a draft of this paper to a seminar of veteran forensic psychiatrists, some in the audience wondered whether there was still a reluctance on the part of veterans with PTSD to "admit" (quotation marks essential) to a "weakness" such as this disorder, and that whether that reluctance might lead some to deny their disability, thus making it impossible for their lawyers to raise PTSD as a mitigating factor. I know of no such cases in which this has happened, but it is certainly plausible that it has. *Cf.* Godinez v. Moran, 509 U.S. 389, 392 (1993) (evaluating whether a defendant may seek to represent himself *pro se* to prevent his lawyer from presenting mitigating evidence at the punishment phase of his death penalty trial).

[148] John Lockman, *The Thousand Yard Stare: Post Traumatic Stress Disorder, the Invisible Casualty of War*, THE ERNEST BECKER FOUND., http://ernestbecker.org/news-archives/the-thousand-yard-stare-post-traumatic-stress-disorder-the-invisible-casualty-of-war.html, *archived at* http://perma.cc/YF5H-NFKA (last visited Mar. 29, 2015).

[149] There were an inordinately high number of Vietnam veterans in federal prison in the 1970s and 1980s. *See* Elizabeth J. Delgado, Comment, *Vietnam Stress Syndrome and the Criminal Defendant*, 19 LOY. L.A. L. REV. 473, 478 (1985).

[150] *Id.* at 475; *see, e.g.*, C. Peter Erlinder, *Post-Traumatic Stress Disorder, Vietnam Veterans and the Law: A Challenge to Effective Representation*, 1 BEHAV. SCI. & LAW 25, 30 (1983); John O. Lipkin et al., *Post-Traumatic Stress Disorder in Vietnam Veterans: Assessment in a Forensic Setting*, 1 BEHAV. SCI. & LAW 51, 64–65 (1983); J. Ingram Walker & Jesse O. Cavenar, *Vietnam Veterans: Their Problems Continue*, 170 J. NERVOUS & MENTAL DISEASE 174 (1982); John P. Wilson & Sheldon D. Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 BEHAV. SCI. & LAW 69, 71–76 (1983). The National Vietnam Veterans Readjustment Study reported that over 30.9% of all men who served in Vietnam developed PTSD. *See* Richard J. McNally, *Can We Solve the Mysteries of the National Vietnam Veterans Readjustment Study?*, 21 J. ANXIETY DISORDERS 192, 193 (2007). The Vietnam War was especially "traumatogenic," because the war was unpopular, leadership and morale were poor, boundaries and military objectives were unclear, atrocities were common, and America lost. *Id.* at 194.

[151] Delgado, *supra* note 149, at 476.

[152] *See* AM. PSYCHIATRIC ASS'N, DSM-IV, *supra* note 143, at 424–26. For a comprehensive consideration of how PTSD influences behavior, see Constantina Aprilakis, Note, *The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD*, 3 GEO. J. L. & PUB. POL'Y 541, 552–56 (2005).

B. After Iraq and Afghanistan

More recently, in the ongoing wars in Iraq and Afghanistan, veterans have been diagnosed with PTSD at frightening rates,[153] and they continue to bear the "invisible wounds" of battle.[154] As indicated previously, it is estimated that between 10% and 20% of all veterans returning from the wars in Iraq and Afghanistan exhibit characteristics of mental illness, including PTSD.[155] These veterans' war experiences have been significantly different from the experiences of veterans in other wars.[156] By way of example, in Iraq and Afghanistan, there have been significantly greater lengths of time leading to deployment and eventual combat and

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[153] These wars have resulted in the largest wave of returning veterans with disabilities in recent history. *See* Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1082 (2010). The Iraqi and Afghanastani war experiences have been significantly different from the experiences of veterans in other wars.

> First, individual service-members have been subjected to more frequent and longer deployments to the front than in previous conflicts. Second, the counterinsurgency type of warfare blurs periods of battle and periods of rest, prompting the stressful constant vigilance that can lead to psychological ailments. Third, improvements in protective equipment and battlefield medicine have allowed more victims of battlefield trauma to survive but often with lingering effects from their injuries. And, fourth, the signature weapon of the opposition—the improvised explosive device—often causes traumatic brain injuries that are difficult to diagnose and treat and may not present symptoms until well after the injury.

Steven Berenson, *The Movement Toward Veterans Courts*, J. L. & POL'Y, May/June 2010, at 37, 38 (citations omitted); *see, e.g.*, Daniel Burgess et al., *Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 60, 78 (2010); Richard L. Frierson, *Combat-Related Posttraumatic Stress Disorder and Criminal Responsibility Determinations in the Post-Iraq Era: A Review and a Case Report*, 41 J. AM. ACAD. PSYCHIATRY & LAW 79, 79 (2013); Mark A. McCormick-Goodhart, Note, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PENN ST. L. REV. 895, 898–99 (2013).

[154] *See* Berenson, *supra* note 153, at 37–38. War may be the "most abiding cause of disability in human history." David A. Gerber, *Disabled Veterans and Public Welfare Policy: Comparative and Transnational Perspectives on Western States in the Twentieth Century*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 77, 78 (2001).

[155] Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 13 (2004); Peter W. Tuerk et al., *Combat-Related PTSD: Scope of the Current Problem, Understanding Effective Treatment, and Barriers to Care*, 29 DEV. MENTAL HEALTH L. 49, 49 (2010).

[156] Berenson, *supra* note 153, at 37–38.

a greater attachment to the unit with which soldiers have served. Both of these factors have contributed to significantly enhanced stress levels.[157]

The stressors faced by soldiers in Iraq and Afghanistan far outnumber the stressors faced by soldiers in previous wars.[158] More veterans of the wars in Iraq and Afghanistan are afflicted with physical injuries and complex challenges than veterans of the war in Vietnam.[159] By way of example, the average infantryman in the South Pacific Theater in World War II saw approximately 40 days of combat per year; the average infantryman in Vietnam saw approximately 240 days of combat in a year, and troops in Iraq and Afghanistan experienced 310 days of combat in the same amount of time.[160] The data is sobering; 30% of all veterans of the wars in Iraq

[157] *See* Allison Adrienne Whitesell, Unit Cohesion, Attachment, Personality Factors, and Mental Health in Veterans of Iraq and Afghanistan (Dec. 29, 2012) (unpublished Ph.D. dissertation, University of Tennessee, Knoxville), *available at* http://trace.tennessee.edu/cgi/viewcontent.cgi?article=2178&context=utk_graddiss, *archived at* http://perma.cc/M9ZD-WV9L; *Mental Health Effects of Serving in Afghanistan and Iraq*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.ptsd.va.gov/public/PTSD-overview/reintegration/overview-mental-health-effects.asp, archived at http://perma.cc/5CWR-UFK5 (last updated Jan. 3, 2014).

[158] *See, e.g., Mental Health Effects of Serving in Afghanistan and Iraq, supra note* 157.

Combat Stressors		**Seeing dead bodies**	**Being shot at**	**Being attacked/ ambushed**	**Receiving rocket or mortar fire**	**Know someone killed/ seriously injured**
Iraq	Army	95%	93%	89%	86%	86%
Iraq	Marines	94%	97%	95%	92%	87%
Afghanistan	Army	39%	66%	58%	84%	43%

[159] Wayne Kinney, *Comparing PTSD Among Returning War Veterans*, J. MIL. & VETERANS HEALTH, Aug. 2012, at 21, 21.

[160] *See e.g.*, Matthew Gregory, *A Response to the Washington Post's "I'm an Army Veteran, and My Benefits Are Too Generous"*, HUFFINGTON POST (June 10, 2014, 3:21 PM), http://www.huffingtonpost.com/matthew-gregory/a-response-to-the-washing_b_5474712.html, *archived at* http://perma.cc/2NLM-7JXN; *Our Warriors Today and "Combat Trauma"*, AM. ASS'N OF CHRISTIAN COUNSELORS, http://www.aacc.net/2011/5/17/our-warriors-today-and-"combat-trauma", *archived at* http://perma.cc/RS9T-ETGH (last visited May 7, 2015); *Statistics About the Vietnam War*, HISTORY.COM, http://www.vhfcn.org/stat.html, *archived at* http://perma.cc/4FUW-4ZJE (last visited May 7, 2015). Importantly, a collateral lesson of WWII was that it was more likely that inexperienced troops would suffer from combat stress than seasoned soldiers, that more intense combat increased the likelihood of a stressful reaction, and that group morale was a huge factor in preventing war trauma. *See* ILONA MEAGHER, MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA'S RETURNING TROOPS 18 (2007). For the first contemporaneous study of what was initially called "combat neurosis," see Roy L. Swank & Walter E. Marchand, *Combat Neurosis: Development of Combat Exhaustion*, 55 ARCHIVES NEUROLOGY & PSYCHIATRY 236 (1946).

and Afghanistan have thought of committing suicide, and 45% of them *know* a veteran of one of those wars who has attempted suicide (37% know someone whose attempt was successful).[161]

As symptoms of PTSD are similar to other disorders, there is a relatively high chance of misdiagnosing the syndrome as an anxiety or depressive disorder, an antisocial personality disorder, or hysterical neurosis.[162] Further, the relatively high frequency of alcohol and drug abuse among those who are diagnosed with PTSD may exacerbate the problems caused by such misdiagnoses.[163] Because the symptomatology of PTSD and antisocial personality disorder are so similar, there is a greater concern that PTSD appears to be "an easy defense to fabricate,"[164] especially because diagnosis is so dependent upon the defendant's self-reporting of symptoms.[165] Critics have argued, however, that the use of new neuroscience techniques in the development of external measures of assessment should obviate most of these concerns.[166]

C. PTSD in the Courts

While it would appear that war-related PTSD could be used to support a reduced sentence, fact finders generally have been reluctant to accept the validity of such arguments,[167] and in parallel circumstances, they have ruled that failure of

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[161] 2013 MEMBER SURVEY, IRAQ & AFGHANISTAN VETERANS OF AM. 3 (2013), *available at* http://s3.documentcloud.org/documents/743176/iavamembersurvey2013.txt, *archived at* http://perma.cc/5PPN-GSBL.

[162] Delgado, *supra* note 149, at 477–78 (citations omitted).

[163] Walker & Cavenar, *supra* note 150, at 176.

[164] Delgado, *supra* note 149, at 505 (citation omitted); *see, e.g.*, United States v. Whitehead, 896 F.2d 432, 435 (9th Cir. 1990); Lowery v. Cummings, No. 3:05CV303/LAC/MD, 2006 WL 2361929, at *16 (N.D. Fla. July 17, 2006), *aff'd*, 255 F. App'x 409 (11th Cir. 2007); Commonweath v. Delaney, 616 N.E.2d 111, 115–16 (Mass. App. Ct. 1993); State v. Simonson, 669 P.2d 1092, 1097 (N.M. 1983); People v. Lockett, 468 N.Y.S.2d 802, 804 (N.Y. Crim. Ct. 1983).

[165] Delgado, *supra* note 149, at 505 n.227 (citation omitted).

[166] Grey, *supra* note 65, at 104; *see infra* notes 189–190. On the new uses of neuroscience in criminal law in general, see, e.g., Michael L. Perlin, *"And I See Through Your Brain": Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process*, 2009 STAN. TECH. L. REV. 4; Michael L. Perlin & Valerie McClain, *Unasked (and Unanswered) Questions About the Role of Neuroimaging in the Criminal Trial Process*, 28 AM. J. FORENSIC PSYCHOLOGY 5 (2009); Perlin & Lynch, *supra* note 26.

[167] People v. Scharf, No. C074251, 2014 WL 1316683, at *3–4 (Cal. Ct. App. Apr. 2, 2014) (holding that the jury was allowed to consider testimony regarding defendant's PTSD and his treatment at the VA); State v. Walker, 235 P.3d 766, 770 (Utah Ct. App. 2010) (holding that the failure to call an expert was not prejudicial because the expert was not essential to the defendant's case).

counsel to pursue a PTSD defense did not deny effective assistance of counsel.[168] Also, they have narrowly ruled on the scope of expert witnesses who may permissibly testify as to the syndrome's effects.[169] In one of the most poignant examples, a jury explained to a trial judge why it rejected an insanity defense plea in the case of a Vietnam veteran charged with murder:

> We, the Jury, recognize the contribution of our Viet Nam veterans and those who lost their lives in Viet Nam. We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans. . . . Through long and careful deliberation, through exposure to all evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thompkins' life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans.[170]

In a few cases, however, the district courts' exclusion of PTSD testimony has led to reversals or remands.[171] *Some* defendants have been successful in their

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[168] Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998), *as amended* Aug. 27, 1998, (finding that counsel was not ineffective for not consulting with PTSD experts or presenting a PTSD defense); Miller v. State, 338 N.W. 2d 673, 678 (S.D. 1983) (characterizing Vietnam stress syndrome as a "novel theory of defense" which need not be explored by counsel). *But see id.* at 682 (Henderson, J., dissenting) ("The post-conviction judge refused to recognize, in his entire review of this case, Vietnam stress syndrome as a mental illness factor. Conclusion of Law number 5 states: 'The entire record as presented to this court fails to present a sufficient evidentiary basis to support a mental illness defense.' With this conclusion, I take exception and would hold that it is clearly erroneous."). On the adequacy or inadequacy of counsel in cases involving mentally disabled defendants facing the death penalty, see MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 123–38 (2013).

[169] United States v. Crosby, 713 F.2d 1066, 1076–77 (5th Cir. 1983).

[170] State v. Felde, 422 So. 2d 370, 380 n.9 (La. 1982); *see also* Aprilakis, *supra* note 152, at 565 ("*Felde* suggests that where violent crime is alleged, a jury will be hesitant or perhaps unwilling to find a defendant not guilty by reason of insanity if there is *any possibility* the defendant will be free to recreate his crime." (emphasis added)).

[171] *See, e.g.*, United States v. Rezaq, 918 F. Supp. 463, 467–68 (D.D.C. 1996) (finding that reports by defendant's experts indicated defendant's diagnosis of PTSD satisfied insanity test); State v. White, 943 P.2d 544, 545 (N.M. Ct. App. 1997) (holding that exclusion of testimony about PTSD manifestations was reversible error); State v. Phipps, 883 S.W.2d 138, 143 (Tenn. Crim. App. 1994), *rev'd on other grounds*, 959 S.W.2d 538 (Tenn. 1997) (reversing conviction where court refused to instruct jury that PTSD evidence could be considered in determining whether defendant had specific intent necessary for first-degree murder conviction). *But see* Lambright v. Schriro, 485 F.3d 512 (9th Cir.), *amended and superseded on denial of reh'g*, 490 F.3d 1103, 1106 (9th Cir. 2007) (remanding the case on the ineffective assistance of counsel claim for failure to investigate and present evidence on PTSD); Morgan v. Krenke, 72 F. Supp. 2d 980, 1020 (E.D. Wis. 1999) (holding that wholesale exclusion of relevant testimony on PTSD in guilt phase violated defendant's fair

arguments that evidence of PTSD should be admissible at sentencing;[172] however, a student author has concluded the courts' decisions in admitting the evidence appear to be based on "the nature of the crime itself and the individual defendant's success at rehabilitation," rather than the underlying syndrome.[173]

Interestingly, the Supreme Court has relatively recently ruled in a death penalty case that attorneys are required to present evidence of PTSD when it is available.[174] There, although the defendant had been a decorated Korean War veteran, his court-appointed counsel presented no evidence whatsoever of his military service to the jury.[175] The Court noted that, had such evidence been presented, the jury might have found mitigating "the intense stress and mental and emotional toll that combat took on Porter."[176] The Court added, in especially relevant language, "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did."[177]

"Veterans who suffer from PTSD may face criminal charges because the symptoms that they suffer from can consequently lead them to commit criminal offenses,"[178] and it has been noted that "[t]he relationship between PTSD and criminal offending is considered to be so significant that the president of the National Veterans Federation . . . warns that the criminal justice system is facing an epidemic of veterans with PTSD being charged with crimes."[179] This relationship is "well-

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trial rights), *rev'd,* 232 F.3d 562, 569 (7th Cir. 2000) (holding that exclusion of expert opinion testimony on ultimate issue of capacity to form intent in guilt phase did not deprive petitioner of her due process right to present a defense).

[172] *See, e.g.*, State v. Spawr, 653 S.W.2d 404, 405–06 (Tenn. 1983). *But see* State v. Watson, 316 S.E.2d 293, 296 (N.C. 1984) ("The evidence is both conflicting and inconclusive with respect to any connection."); *see also* Styers v. Ryan, No. CV-98-2244-PHX-JAT, 2013 WL 1149919, at *22 (D. Ariz. Mar. 20, 2013) (giving little weight to PTSD as a mitigating factor); State v. Sullivan, 695 A.2d 115, 116–17 (Me. 1997) (holding that defendant was deprived of a fair trial because the jury was not instructed to consider self-defense because of his PTSD); State v. Petit, 661 P.2d 767, 769 (Idaho Ct. App. 1983) ("His claim of a post-traumatic stress disorder also may merit further clinical evaluation."); Brotherton, *supra* note 142, at 91 n.1 (listing unreported cases in which PTSD asserted as a sentence-mitigation factor).

[173] Delgado, *supra* note 149, at 503.

[174] Porter v. McCullum, 558 U.S. 30, 42–44 (2009) (per curiam) (holding that evidence must be presented when it would balance the sides of mitigating for and mitigating against).

[175] *Id.* at 43.

[176] *Id.* at 44.

[177] *Id.* at 43. I discuss this case in this context in Perlin, *John Brown Went Off to War*, *supra* note 6, at 462.

[178] Jillian M. Cavanaugh, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 468 (2011).

[179] Melissa Hamilton, *Reinvigorating* Actus Reus*: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 BERKELEY J. CRIM. L. 340, 341 (2011).

recognized by researchers and psychologists,"[180] and, increasingly, by the courts.[181]

The question then is this: To what extent will considering PTSD diagnosis as a mitigating factor during sentencing change with the adoption of DSM-5?

IV. DSM-5

Scholars of forensic psychiatry have been quick to label this version of the DSM as being of "immense importance to the mental health professions,"[182] and of "particular importance to forensic psychiatrists"[183] and forensic psychologists.[184] The new version of DSM markedly expands the definition of PTSD, and lists these five criteria:

> A. Exposure to actual or threatened death, serious injury, or sexual violence . . . .
> B. Presence of one (or more) . . . intrusion symptoms associated with the traumatic event(s) . . . .
> C. Persistent avoidance of stimuli associated with the traumatic event(s) . . . .
> D. Negative alterations in cognitions and mood associated with the traumatic event(s) . . . .
> E. Marked alterations in arousal and reactivity associated with the traumatic event(s) . . . .[185]

These criteria must be met for at least one month, and, in the case of "delayed expression," criteria may not be met for six months after the event.[186] The previous requirement of the DSM IV-R that "the person's response involved intense fear,

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[180] Samantha Walls, *The Need for Special Veterans Courts*, 39 DENV. J. INT'L L. & POL'Y 695, 712 (2011).

[181] *Id.* at 712, n.159 (citing Erin M. Gover, *Iraq as a Psychological Quagmire: The Implications of Using Post-Traumatic Stress Disorder as a Defense for Iraq War Veterans*, 28 PACE L. REV. 561, 562–63, 570–81 (2008)).

[182] Paul S. Appelbaum, *Commentary: DSM-5 and Forensic Psychiatry*, 42 J. AM. ACAD. PSYCHIATRY & LAW 136, 136 (2014).

[183] Wills & Gold, *supra* note 17, at 132.

[184] *See generally* Kristine M. Jacquin, *Changes in the Diagnostic and Statistical Manual of Mental Disorders that Impact Forensic Psychology* (March 2014) (paper presented to the American College of Forensic Psychology) (on file with author).

[185] AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 17, at 271–72. On the significance of the symptom clusters and the retained inclusion of a "delayed-onset" specifier in DSM-5, see Levin et al., *supra* note 16, at 150–51. On the significance of delayed-onset PTSD in cases not involving soldiers in combat, see, e.g., Matt J. Gray et al., *A Longitudinal Analysis of PTSD Symptom Course: Delayed-Onset PTSD in Somalia Peacekeepers*, 72 J. CONSULTING & CLINICAL PSYCHOLOGY 909 (2004).

[186] AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 17, at 272.

helplessness, or horror"[187] has been eliminated. Now, predisposing and postevent factors "play a significant role" in the development of PTSD.[188]

Although there has traditionally been skepticism about cases involving PTSD, "especially because assessing the disorder involves in large part a self-report by the person seeking treatment,"[189] more recent research has revealed that certain psychophysiological testing involving measurement of facial electromyograms, heart rate, and skin conductance were statistically significant, and thus concluded that PTSD was "clearly associated with altered psychophysiological measures as compared with non-affected individuals."[190]

V. THERAPEUTIC JURISPRUDENCE[191]

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).[192] TJ theories were initially employed in cases involving individuals with mental disabilities, but they have been subsequently expanded far beyond that narrow area. TJ presents a new model for assessing the impact of case law and

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[187] AM. PSYCHIATRIC ASS'N, DSM-IV, *supra* note 143, at 428.

[188] Levin et al., *supra* note 16, at 148.

[189] Craig M. Kabatchnick, *PTSD and Its Effects on Elderly, Minority, and Female Veterans of All Wars*, 10 MARQ. ELDER'S ADVISOR 269, 299 (2009). *See also supra* notes 164–165 and accompanying text.

[190] Mark B. Hammer, *The Role of PTSD in Adjudicating Violent Crimes*, 42 J.L. MED. & ETHICS 155, 158 (2014).

[191] This section is generally adapted from Perlin & Lynch, *supra* note 26; Perlin, *supra* note 115; and Michael L. Perlin, *"Yonder Stands Your Orphan with His Gun": The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH L. REV. 301 (2013); *see also,* Michael L. Perlin & Meredith R. Schriver, *"You That Hide Behind Walls": The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients*, *in* TORTURE IN HEALTHCARE SETTINGS: REFLECTIONS ON THE SPECIAL RAPPORTEUR ON TORTURE'S 2013 THEMATIC REPORT 195 (2014);

[192] *See, e.g.*, PERLIN, MENTAL DISABILITY LAW, *supra* note 2, § 2D-3, at 534–41; DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE, at xvii (1996); DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 154–62 (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 17 (2008). Professor Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 L. & HUM. BEHAV. 27, 27, 32–33 (1992) (defining therapeutic jurisprudence as "the study of the role of the law as a therapeutic agent" and discussing its task and scope).

legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or antitherapeutic consequences.[193]

A. Therapeutic Jurisprudence Defined

The ultimate aim of TJ is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential without subordinating due process principles.[194] There is an inherent tension in this inquiry, but Professor David Wexler clearly identifies how it must be resolved: the law's use of "mental health information to improve therapeutic functioning [cannot] imping[e] upon justice concerns."[195] Importantly, "[a]n inquiry into therapeutic outcomes does *not* mean that therapeutic concerns 'trump' civil rights and civil liberties."[196]

TJ "asks us to look at law as it actually impacts people's lives"[197] and focuses on the law's influence on emotional life and psychological well-being.[198] It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values

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[193] *See* Perlin, *His Brain*, *supra* note 32, at 912; *see also* Diesfeld & Freckelton, *supra* note 36, at 97–108 (providing a transnational perspective).

[194] Michael L. Perlin, *"And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005); Michael L. Perlin, *"Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 510 n.139 (2008). On how therapeutic jurisprudence "might be a redemptive tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade,'" see Perlin, *Baby, Look Inside Your Mirror*, *supra* note 30, at 591 (quoting, in part, PERLIN, HIDDEN PREJUDICE, *supra* note 47, at 301). *See also* Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585–86 (2008); Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.111 (2005) (describing lessons on "how to avoid succumbing to paternalistic attitudes and disempowering practices in representing . . . clients").

[195] David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & LAW 17, 21 (1993); *see also* David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTATIVE PSYCHOL. 179 (1996) (explaining that psychologists "can suggest reforms in the law that would serve justice and yet better promote mental health").

[196] Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them"*, 31 LOY. L.A. L. REV. 775, 782 (1998).

[197] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

[198] David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45, 45 (Dennis P. Stolle et al. eds., 2000).

served by law, should attempt to bring about healing and wellness."[199] "TJ seeks to inform lawyering practices and influence policy 'by using social science data and methodology to study the extent to which a legal rule, procedure, or practice promotes the psychological and physical well-being of the people it affects.'"[200]

TJ "is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."[201] It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[202] In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as "a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law. . . . which emphasise psychological wellness over adversarial triumphalism."[203] That is, TJ supports an ethic of care.[204]

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[199] Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, *in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

[200] Perlin & Lynch, *supra* note 36, manuscript at 48 (quoting Keri K. Gould & Michael L. Perlin, *"Johnny's in the Basement/Mixing up his Medicine": Therapeutic Jurisprudence & Clinical Teaching*, 24 SEATTLE U. L. REV. 339, 353–54 (2000)). *See also* Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 197 (1995) (stating TJ "adopt[s] a preference for laws that promote well-being").

[201] Diesfeld & Freckelton, *supra* note 36, at 576.

[202] Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, *supra* note 198, at 465.

[203] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); *see also* Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 342 (Marjorie A. Silver ed., 2006) (exploring the role of a lawyer representing a client and their role as a therapeutic agent); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006) (describing how TJ can be used in legal education and practice). The concept of the "relational approach" dates to CAROL GILLIGAN, IN A DIFFERENT VOICE 24–32 (1982).

[204] Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); Brookbanks, *supra* note 203, at 328–30, 333–35; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Winick & Wexler, *supra* note 203, at 605–07.

One of the central principles of TJ is a commitment to dignity.[205] Professor Amy Ronner illustrates this central principle as the "three Vs": voice, validation and voluntariness.[206] She argues,

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[207]

B. Therapeutic Jurisprudence and Sentencing of PTSD Defendants

The question to be posed here is this: to what extent do our criminal sentencing practices in cases of defendants with PTSD comport with TJ principles?[208] To what extent do they comply with Professor Ronner's aspirations that the "three V's" be present in all matters? To what extent can TJ be better applied to sentencing decisions in the cases of veteran defendants with PTSD?

One of the basic premises of TJ is that "a rigid, inflexible sentencing scheme, especially one characterized by mandatory incarcerative penalties" is antitherapeutic.[209] Former Magistrate Michael King has underscored that a TJ

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[205] *See* PERLIN, PRESCRIPTION FOR DIGNITY, *supra* note 38, at 214–15 (discussing dignity in the sentencing process generally); WINICK, CIVIL COMMITMENT, *supra* note 192, at 161 (2005).

[206] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008); *see also* Freckelton, *supra* note 194, at 588 (addressing the importance of "voice").

[207] Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence,* Miranda *and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002); *see also* AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE 23–24 (2010) (explaining the "three Vs" and the importance of participation in the decision-making process).

[208] PERLIN, PRESCRIPTION FOR DIGNITY, *supra* note 38, at 212–14 (discussing the role of procedural justice and restorative justice in the sentencing context).

[209] David B. Wexler, *A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice, in* REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 11, 15 (David B. Wexler ed., 2008) [hereinafter REHABILITATING LAWYERS]; *see also* David B.

approach towards criminal defense practice "is changing the dynamics of courtrooms, particularly in the context of sentencing."[210] The late Professor Bruce Winick wrote extensively about the need for criminal defense lawyers to rethink their traditional roles at sentencing and to infuse their work with a significant measure of TJ, urging them to seek judicial enforcement of "relapse prevention methods," involving the "fashioning of creative community alternatives."[211]

Professor Winick focused on the case of *United States v. Flowers*,[212] in which District Court Judge Jack Weinstein recognized "that sentencing judges enjoy broad discretion to postpone or defer sentencing in appropriate cases in order to allow the defendant to commence a rehabilitative program that, if successful, might provide the basis for a downward departure" from the Sentencing Guidelines.[213] Embracing TJ principles, Professor Winick continued, requires new visions on the part of defense attorneys:

> Not only do these attorneys need to develop new skills, but they need to think of themselves in new ways. They need to understand the vocabulary and techniques of these new rehabilitative approaches. They need to develop techniques for dealing with their clients about the issue of rehabilitation with a higher degree of psychological sensitivity. They need to understand that, whether they know it or not, they are functioning as therapeutic agents in their interactions with their clients, particularly in the

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Wexler, *Therapeutic Jurisprudence and Family-Friendly Criminal Law Practice*, 17 BARRY L. REV. 7, 8 (2011) (examining TJ in the criminal law system from a family-sensitive point of view). The text accompanying notes 208–213 is generally adapted from PERLIN, PRESCRIPTION FOR DIGNITY, *supra* note 38, at 210–12.

[210] Michael S. King, *Therapeutic Jurisprudence, Criminal Law Practice, and the Plea of Guilty*, *in* REHABILITATING LAWYERS, *supra* note 209, at 230, 238.

[211] Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & LAW 1034, 1036 (1999).

[212] 983 F. Supp. 159 (E.D.N.Y. 1997).

[213] Winick, *supra* note 211, at 1037 (discussing *Flowers*, 983 F. Supp. at 163); *see also* Michael Crystal, *The Therapeutic Sentence: Chicken Soup for an Ailing Criminal Court*, *in* REHABILITATING LAWYERS, *supra* note 209, at 183, 184 (discussing the multiple stages of the "construction of a TJ sentence"); Robert Ward, *Criminal Defense Practice and Therapeutic Jurisprudence: Zealous Advocacy Through Zealous Counseling: Perspectives, Plans and Policy*, *in* REHABILITATING LAWYERS, *supra* note 209, at 206, 206–07 (discussing the "value in welcoming the perspective of therapeutic jurisprudence in . . . sentencing advocacy"). Paul Marcus and Vicki Waye have pointed out other benefits of an individualized sentencing approach: "The retention of judicial discretion enables the sentencing judge to take account of the offender's personal situation and the circumstances of the offending, encourages guilty pleas to appropriate charges, and enables a creative and customized sentence more likely to incorporate therapeutic or restorative elements." Vicki Waye & Paul Marcus, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, Part 2, 18 TUL. J. INT'L & COMP. L. 335, 399 (2010).

> plea and sentencing process. They need to recognize the opportunities that these new developments provide to offer new modes of assistance to their clients that can promote both their interests in maintaining their liberty and in achieving a higher degree of psychological well-being.[214]

Interestingly, while there is robust TJ literature on the question of criminal sentencing *in general*,[215] and while there has been some preliminary work on the implications of the potential use of veterans courts as a means of diverting some cases involving veterans from the "regular" criminal justice system[216] and on the dramatically-under-considered question of where prisoners with serious mental disabilities should be housed,[217] there is little in the specific context of PTSD. Major Evan Seamone has done—and continues to do—a heroic job of articulating how and why TJ should be employed in cases involving the prosecution of individuals in the

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[214] Winick, *supra* note 211, at 1038.

[215] *E.g.*, Dana Segev, *The TJ Mainstreaming Project: An Evaluation of the Israeli Youth Act*, 7 ARIZ. SUMMIT L. REV. 527 (2014); David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78 (2008); David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463 (2014) [hereinafter Wexler, *New Wine*]; David B. Wexler, *Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion*, 10 FLA. COASTAL L. REV. 361 (2009). Professor Wexler is clear that U.S. sentencing practices are often antithetical to TJ aspirations. *See* Wexler, *New Wine*, *supra* at 470–75; Wexler, *A Tripartite Framework*, *supra* note 209, at 96–102.

[216] *E.g.*, Julie Marie Baldwin & Joseph Rukus, *Healing the Wounds: An Examination of Veterans Treatment Courts in the Context of Restorative Justice*, 26 CRIM. J. POL'Y REV. 183 (2014); Perlin, *John Brown Went Off to War*, *supra* note 6.

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> At sentencing, a judge can often foresee that an individual, because of his major mental disorder and other vulnerabilities, will experience serious psychological or physical harm in prison. These harms may include psychological deterioration and mental distress, attempted suicide, and victimization by staff or other inmates. In response, some jurisdictions allow a judge to commit a disordered offender for treatment in lieu of incarceration, and others designate the defendant's need for treatment and likely undue hardship in prison as mitigating factors at sentencing. However, these measures do not go far enough to protect vulnerable prisoners. To prevent anticipated and unjust harms, legislatures should authorize judges to tailor the conditions of vulnerable, disordered offenders' sentences when specific conditions of confinement are integral to the judge's sentencing aims or the humaneness of the punishment. Under one possible model, if correctional officials find a condition to be inappropriate, unnecessary, or infeasible, the government could move to reopen the sentence.

E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625, 676–77 (2014).

military whose criminality may be related to PTSD.[218] But, other than his work, the literature is scant.[219] Consider the range of questions a TJ-savvy lawyer should ask about this matter:

- What was the defendant's experience in the war? For how long was the defendant in a combat zone? Or in a zone of danger? Had the defendant ever been fired upon? Had the defendant fired their weapon? What were the results?
- Did the defendant ever see anyone killed? If yes, was that person someone the defendant knew or knew well? Or share a barracks or tent with? Was this death the result of a gunshot, an explosion, or something else?
- Which of the criteria in DSM-5 does the defendant meet? How have these criteria been manifested?
- (In those jurisdictions in which sentencing guidelines similar to the Federal Sentencing Guidelines apply) To what extent did the defendant's war service have an impact on the purposes of and rationales for punishment so as to "reflect the basic aims of sentencing"?[220]
- Is the case in question being heard in a traditional criminal court or a Veterans Court? If the latter, how is it equipped to deal with PTSD cases?

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[218] *See, e.g.*, Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 145–48 (2009); Evan Seamone, *Dismantling America's Largest Sleeper Cell: The Imperative to Treat, Rather Than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479, 485 (2013); Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 2 (2011); Evan R. Seamone, *The Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 186–88 (2009).

[219] *See* Wieand, *supra* note 65, 258–59 (citing David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 132 (2000)) ("The judge's discussion with the veteran about the root cause of his criminal activity and combat trauma parallels the idea of a broad and open guilty plea colloquy. This type of cognitive behavioral treatment allows a judge to dig out and make aware to the veteran the chain of events that brought him to court, and encourages him to stop and think in advance 'when similar situations arise.' Through this process, the veterans treatment court serves as a "reasoning and rehabilitation" program that in combination with mental health services can help veterans unearth the sources of their criminal activity and readjust their lifestyle to avoid potential recurrence of their criminal activity."); *see also id.* at 257–61 (relying on the work of TJ "founder" David Wexler, in endorsing the creation of "behavioral contracts" to provide guidance for treatment of the cognitive disorders of offenders).

[220] Rita v. United States, 551 U.S. 338, 347–48 (2007) (discussing 18 U.S.C. § 3553(a)). This is discussed in the *supra* text note 93.

- How does the diagnosis of PTSD affect the defendant's ability to "absorb information and reason" in the defendant's daily life?
- Was the PTSD diagnosis (and any resulting treatment) found when the defendant was still in the service, when he returned home, or after he was arrested for the crime in question? If it manifested when the defendant was in the service, was the defendant treated in the service for it? What sort of treatment? What were the results of that treatment?
- Was the defendant exhibiting symptoms of PTSD at the time of the alleged crime?
- Are there alternative dispositional possibilities that, consonant with safety and security issues, would result in meaningful treatment for the defendant's PTSD?
- Are lawyers fulfilling the mandate sketched out fifteen years ago by Professor Winick (have they developed techniques for dealing with their clients about the issue of rehabilitation with a higher degree of psychological sensitivity)?[221]

I believe all actors in the criminal justice systems, military and civilian—defense counsel, government attorneys, and judges—need to familiarize themselves with the basic TJ concepts so that they can incorporate TJ principles in their representation, prosecution, and adjudication decisions. I believe that if lawyers incorporated these questions into their interviewing and counseling processes, this would lead to case strategizing that would more comport with the spirit and letter of TJ and result in a situation more consonant with what Professor Ronner discusses in her writings, referred to above.[222]

VI. CONCLUSION

Given the limited definition of PTSD in earlier versions of DSM, the pernicious roles of sanism and OCS, and judges' reluctance to embrace mental disability as a mitigator within the Federal Sentencing Guidelines, PTSD diagnoses have had little positive impact on the criminal sentencing process. The expanded definition of PTSD in DSM-5 may have profound effects on all criminal sentencing. By expanding the range of symptom clusters,[223] DSM-5 makes more defendants

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[221] Winick, *supra* note 211, at 1038.

[222] Ronner, *supra* note 207. I suggest a parallel set of questions for lawyers representing individuals in incompetency hearings and insanity defense trials in Michael L. Perlin, *"Too Stubborn To Ever Be Governed By Enforced Insanity": Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases*, 33 INT'L J.L. & PSYCHIATRY 475 (2010).

[223] Levin et al., *supra* note 16, at 147–48.

"eligible" to seek sentence reductions based on the 2011 amendments to the Guidelines[224] and the statutory criteria for such reduction.[225]

As discussed earlier, courts have not been overwhelmingly receptive to PTSD-based arguments, whether offered in support of an insanity defense or in support of a lesser sentence. To a significant extent, I believe, this flows from the tired and banal sanist myths that infect both judicial and juror behavior. Even when some awareness is shown, it is often as a coda to a decision that, basically, ignores the diagnostic realities. The jurors' statement in *Felde*[226] and the Supreme Court's language in *Porter v. McCollum*[227] both tell us we still fail to acknowledge the reality of mental illness in this context.

A serious and critical focus on DSM-5's expanded PTSD definition—through a TJ filter—gives us some hope for the future and makes it more likely that sanist decision-making may be reduced. This aspiration, though, is contingent on multiple factors:

1. Courts must "get" the significance of the expanded PTSD definition in DSM-5.[228]
2. Fact finders must understand how experiences of soldiers in current wars may have been dramatically different from what their "ordinary common sense"[229] has led them to believe is how soldiers "should have reacted" to battlefield conditions.
3. Fact finders must, finally, acknowledge how sanist thinking has distorted their decision-making in this area.[230]
4. Fact finders must embrace TJ as a "redemptive" means of "stripping bare the law's sanist façade" of such decision-making.[231]
5. Lawyers need to understand the vocabulary and techniques of these new rehabilitative approaches.[232] They must ask the questions listed in the prior

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[224] Grey, *supra* note 65, at 61; *see supra* text accompanying notes 65–78.

[225] *Rita*, 551 U.S. at 347–48; *see supra* text accompanying note 93.

[226] State v. Felde, 422 So. 2d 370, 380 n.9 (La. 1982); *see supra* text accompanying 170.

[227] "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did." 558 U.S. 30, 43 (2009); *see supra* text accompanying notes 174–181.

[228] As of the time this Article was written (October 2014), there have been only two reported cases that considered PTSD in the context of DSM-5, and both of those were VA benefit claims cases: *Creech v. Astrue*, No. 2:12-cv-0591, 2013 WL 5182848 (S.D. Ohio Sept. 13, 2013) and *Bunton v. Shinseki*, No. 12-1869, 2013 WL 3934225 (Ct. App. Vets. Claims July 31, 2013).

[229] *See supra* text accompanying notes 113–115.

[230] Perlin & Gould, *supra* note 29, at 442–47.

[231] Perlin, *Baby, Look Inside Your Mirror*, *supra* note 30, at 591.

[232] Winick, *supra* note 211, at 1038.

section and consider incorporating their clients' answers into their advocacy strategies.

6. Judges, lawyers and all those who interact with the criminal justice system or defendants with PTSD need to understand the true consequences of failing to acknowledge the impact of PTSD, and the contingent benefits—as to lowering recidivism rates, enhancing behavioral changes—of actually incorporating the PTSD issues.

These changes would all more firmly ground this entire process in the "real life" consequences and benefits of embracing therapeutic jurisprudence, beyond simply questions of theory. They would optimally ensure that the judicial process acknowledges the scope of the underlying issues and consequently adjust sentencing practices to comply with these insights. If and only if, we begin to incorporate these perspectives can we expect there to be any genuine ameliorative change in this area of law and social policy.

Bob Dylan's song, *Stuck Inside of Mobile*, seeks to sort out "hallucinations, reality, experiences, allusions and delusions."[233] My sense is that many of the defendants before the courts in the cases cited in this article have experienced all of these perceptions since their return from the wars. My hopes are that we will take seriously the insights into the roots of behavior that are contained in this new section of DSM-5 and begin to treat war veterans with the dignity[234] to which they are entitled.

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[233] OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 589–91 (2004).

[234] PERLIN, PRESCRIPTION FOR DIGNITY, *supra* note 38; Perlin, *Gates of Eden*, *supra* note 13; Perlin, *His Robe*, *supra* note 13.