Danger! The Defendant is "Disturbed." Risks of Using Psychiatric Assessments to Predict Future Dangerousness

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I. INTRODUCTION

The criminal justice system is responsible for responding to, preventing, and controlling crime. Crime prevention is partly predicated on the system's ability to predict and preempt existing risks of future criminal conduct. Successful preemption, therefore, may require agents of the system to evaluate a defendant's propensity for recidivism: the likelihood of whether the defendant will pose an ongoing danger to society.

To call a person "dangerous" is to pass judgment on an individual's disposition to potential violent behavior.[1] In an effort to understand the relationship between behavior and criminality, researchers have invented a variety of psychiatric risk assessment techniques designed to measure and predict the likelihood of future dangerous conduct, or "future dangerousness." These assessment methods generally require mental health experts to observe and identify, if possible, specific risk factors that indicate an increased disposition to aggression.[2]

Psychiatric assessments are relevant at four distinct phases of the U.S. criminal justice system: pretrial investigation, prosecution, sentencing, and corrections.[3] Prosecuting attorneys frequently use psychiatric evidence as a basis for persuading a jury that a defendant will likely pose an ongoing risk to society if released.[4] Mental health experts are regularly requested and

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[1] 1-2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2A-4 (1999).

[2] Robert D. Hare, *Psychopathy: A Clinical and Forensic Overview*, 29 PSYCHIATRY CLINICS N. AM. 709, 714 (2006) [hereinafter Hare, *Overview*]; *See generally*, Natalia L. Nikolova, Comprehensive Assessment of Psychopathic Personality Disorder-Institutional Rating Scale (CAPP-IRS) – Validation (Sept. 11, 2009) (unpublished thesis, Simon Fraser University).

[3] *Criminal Justice System Flowchart*, BUREAU JUST. STAT., http://www.bjs.gov/content/largechart.cfm (last visited April 28, 2016).

[4] Jennifer S. Brad, *Diagnosis Dangerous: Why State Licensing Boards Should Step in to Prevent Mental Health Practitioners from Speculating Beyond the Scope of Professional Standards*, 2015 UTAH L. REV. 929, 940.

permitted to furnish their assessments of future dangerousness to the factfinder. Although intuitively appealing and influential, such subjective clinical impressions have been largely debated and debunked as reliable methods of ascertaining a defendant's genuine risk for recidivism.[5] Studies indicate that medical knowledge has not yet advanced to the point where long-term predictions of future dangerousness can be made with a reasonable degree of medical certainty.[6]

It is concerning then, that the legal system regularly relies on psychiatric expert predictions of future dangerousness. Aggravating that concern is the fact that the Supreme Court has sanctioned expert testimony on future dangerousness in capital cases, despite the numerous strong objections of the American Psychiatric Association[7] ("APA") and the American Psychological Association.[8] Not only are these predictions laced with uncertainty, but for the purposes of a trial, they are more prejudicial than probative. In some cases, the likelihood of recidivism is *the* issue to be determined by the fact-finder. States that permit capital punishment, for example, list future dangerousness as an aggravating factor that requires fact-finders to pass judgment on the extent to which an individual will present a continuing risk to society if not put to death.[9] If due process and the right to a fair trial mean anything, it should mean that an individual shall not be deprived of his or her liberty based on a speculation about future conduct, no matter how qualified an expert is to provide that speculation.

II. UNDERSTANDING AGGRESSION

There is no recognized diagnosis of "dangerous." However, for the

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[5] John F. Edens & Jennifer Cox, *Examining the Prevalence, Role and Impact of Evidence Regarding Antisocial Personality, Sociopathy and Psychopathy in Capital Cases: A Survey of Defense Team Members*, 30 BEHAV. SCI. LAW 239, 241 (2012).

[6] *See* Brief Amicus Curiae for the American Psychiatric Association as Amici Curiae Supporting Defendant-Appellant, U.S. v. Fields, 483 F.3d 313 (2005) (No. 04-50393) [hereinafter Fields APA Amicus Brief].

[7] The APA is a voluntary, nonprofit, scientific and professional organization; and the leading association of psychologists within the United States. Its main responsibility is to "increase and disseminate knowledge regarding behavior and to foster the application of psychological learning to important human concerns. Brief Amicus Curiae for American Psychiatric Association as Amici Curiae Supporting Petitioner, Coble v. Texas, 564 U.S. 1020 (2011) (No. 10-1271), at 2 [hereinafter Coble APA Amicus Brief].

[8] *See, e.g.*, Fields APA Amicus Brief, *supra* note 6; Coble APA Amicus Brief, *supra* note 7; Brief Amicus Curiae for American Psychiatric Association, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080) [hereinafter Barefoot APA Amicus Brief]; AMERICAN PSYCHIATRIC ASS'N TASK FORCE ON CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL, AM. PSYCHIATRIC ASS'N (1974) [hereinafter APA TASK FORCE REPORT]; AMERICAN PSYCHOLOGICAL ASS'N TASK FORCE ON THE ROLE OF PSYCHOLOGY IN THE CRIMINAL JUSTICE SYSTEM, AM. PSYCHOLOGICAL ASS'N, 33 AM. PSYCHOLOGIST 1099 (1978) [hereinafter AMERICAN PSYCHOLOGICAL ASS'N TASK FORCE REPORT].

[9] Edens & Cox, *supra* note 5, at 240.

purposes of discussion, the concept of dangerousness is oftentimes analyzed within a framework of psychiatric descriptions and disturbances. Certain facets of an individual's personality may provide indicia as to that individual's predisposition to engage in dangerous behavior. For instance, aggressive personality disturbances ("APDs")[10] may influence an individual's increased tendency to engage in violent, criminal behavior. APDs can be broken down into a series of affective, interpersonal, and behavioral traits or lifestyle characteristics.[11]

In terms of affect, individuals with APDs typically experience difficulties with perceiving emotion.[12] They may have trouble with the concept of empathy, as they generally lack the ability to take on another's perspective.[13] Feeling empathy involves sharing emotions and showing concern for another's well-being.[14] Studies measuring empathetic deficits in overtly aggressive individuals reveal issues with identifying expressions of distress among others, which leads to an overall decreased response to emotion.[15]

With respect to interpersonal aptitude, individuals suffering from APDs generally manifest a detachment from other individuals. The inability to think outside of their own perspective cultivates a callous view of others as little more than objects.[16] Consequently, it is relatively easy for such individuals to victimize vulnerable persons and to use aggression or violence as a means to obtaining what they want.[17]

Despite extensive research, there exists no evidence of a single, global trait that predisposes an individual to aggressive, violent behavior.[18] Moreover, there is no simple way to define and measure violence.[19] Before

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[10] Throughout this paper, the phrase "aggressive personality disturbances" will be used in reference to an individual suffering from affective and behavioral deficiencies, and who, as a result of such disturbances, manifests aggressive and violent tendencies.

[11] Hare, *Overview*, *supra* note 2, at 714; Robert D. Hare, *Psychopathy as a Risk Factor for Violence*, 70 PSYCHIATRIC Q. 181, 183 (1999) [hereinafter Hare, *On Risk Factors*]; Nikolova, *supra* note 2, at 3; Liselotte Pederson et al., *Psychopathy as a Risk Factor for Violent Recidivism*, 9 INT'L J. FORENSIC MENTAL HEALTH 308 (2010).

[12] Pederson et al., *supra* note 11, at 308–09.

[13] *Id.*; Olga V. Berkout et al., *Behaving Badly: A Perspective on Mechanisms of Dysfunction in Psychopathy*, 18 AGGRESSION & VIOLENT BEHAV. 620, 623 (2013).

[14] Berkout et al., supra note 13, at 623; *See also* T. Singer & E. Fehr, *The Neuroeconomics of Mind Reading and Empathy*, 95 AM. ECON. REV. 340 (2005).

[15] Berkout et al., *supra* note 13, at 625.

[16] Hare, *On Risk Factors*, *supra* note 11, at 185.

[17] *Id.*

[18] David J. Cooke & Christine Michie, *Refining the Construct of Psychopathy: Towards a Hierarchical Model*, 13 PSYCHOL. ASSESSMENT 171 (2001); Stephen D. Hart, *The Role of Psychopathy in Assessing Risk for Violence: Conceptual and Methodological Issues*, 3 LEGAL & CRIM. PSYCHOL. 121, 123 (1998).

[19] Hart, *supra* note 18, at 123.

discussing the influences on one's proclivity to violence, however, it is important to first understand the behavioral concept of aggression. There are many forms of aggression, and each form displays a different pattern of behavior.

Medically-Related Aggression is aggression resulting from some type of identified medical disorder.[20] Violent acts falling under this category are generally explained by a neurological abnormality such as traumatic brain injury or psychosis.

Impulsive Aggression involves spontaneous, hair-trigger displays of aggression that cannot be connected to a neurological abnormality.[21] This aggression is reactive.[22] It is usually elicited in response to stimuli provoking fear, anger, or rage.[23] Frequently, feelings of remorse follow the act; yet given the individuals' poor behavioral control, such remorse does not necessarily reduce future similar occurrences.[24]

Instrumental Aggression consists of aggression driven by the expectation that a reward will follow the violent behavior.[25] In other words, this aggression is goal-oriented. Its purpose is to inflict harm on another in the pursuit of some desired reinforcement.

Affective Aggression includes that which is preceded by an intense autonomic arousal as well as a subjective experience of emotion, usually anger or fear.[26] Typically, aggression is expressed as an immediate response to provocation. As such, its purpose is usually to reduce or eliminate the threat and return to biological homeostasis, or a state of equilibrium.[27] Affective aggression includes the "garden variety" violence most often seen in society.[28]

Predatory Aggression refers to acts of violence that are carefully planned, tailored, and targeted towards particularly chosen individuals.[29] This aggression may be subjectively experienced as necessary behavior that would be clinically assessed as compulsive.[30] It involves minimal emotion, although any emotions that are present tend to have a positive effect on the perpetrator. By providing pleasure and self-confidence, predatory

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[20] Joseph E McEllistrem, *Affective and Predatory Violence: A Bimodal Classification System of Human Aggression and Violence*, 10 AGGRESSION & VIOLENT BEHAV 1, 9 (2004).

[21] *Id.* at 9.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] McEllistrem, *supra* note 20, at 8; Hare, *Overview*, *supra* note 2, at 714.

[26] McEllistrem, *supra* note 20, at 15.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 15–16.

[30] *Id.* at 16.

aggression leads to exhilaration and an increased self-esteem.[31]

III. THE "INGREDIENTS" FOR AGGRESSIVE BEHAVIOR

A. Biological Influences

1. Genetic Traits

Research indicates that there may be some genetic components to violent behavior.[32] Twin studies show that callous and unemotional traits may be inheritable.[33] One twin study testing aggression and criminality revealed that monozygotic pairs reported a higher concordance rate than dizygotic pairs.[34] In another study, following criminal offenders adopted as children, the results revealed that biological fathers were more likely to indicate criminal behavior than adoptive fathers. Moreover, higher rates of criminal behavior were observed amongst individuals born to criminally convicted parents. However, the science behind the research is still unclear. The exact genes or physical anomalies associated with aggression and criminal recidivism remain unidentified. What experts do know is that genetic influences make at least a partial contribution to an individual's tendency to act violently.[35]

2. Neurological and Developmental Explanations

Brain-imaging studies uncovered possible differences between the neurological makeup of individuals with aggressive tendencies and those not manifesting violent behavior. Studies indicate that violent behaviors are tied with having reduced grey matter in the frontal lobes.[36] This may explain a proclivity to antisocial behavior, since the prefrontal cortex plays a central role in fear conditioning. People with a defective fear response are more likely to develop characteristic APD traits, since they are more likely to seek

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[31] McEllistrem, *supra* note 20, at 16.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] The following articles provide further discussion on the neurological differences in people suffering from PPD. Reduced gray matter in frontal lobes. *See* J. Muller et al., *Gray Matter Changes in Right Superior Temporal Gyrus in Criminal Psychopaths. Evidence from Voxel-Based Morphometry*, 163 PSYCHIATRY RES.: NEUROIMAGING 213 (2008). Increased striatal volume. *See* A. Glenn et al., *Increased Volume of Striatum in Psychopathic Individuals*, 67 BIOLOGICAL PSYCHIATRY 52 (2010). Abnormal asymmetry in the hippocampus. *See* Laakso et al., *Psychopathy and the Posterior Hippocampus*, 118 BEHAV. BRAIN RES. 187 (2001). A larger corpus callosum. *See* A. Raine et al., *Corpus Callosum Abnormalities in Psychopathic Antisocial Individuals*, 60 ARCH. GEN. PSYCHIATRY 1134 (2003). Deformations within the amygdala. *See* Yang et al., *Localizations of Deformations Within the Amygdala in Individuals with Psychopathy*, 66 ARCH. GEN. PSYCHIATRY 986 (2009).

thrill and excitement and are less deterred by the fear of punishment.

Research on psychiatric disturbance and future dangerousness is difficult in part because some behaviors central to the psychology of aggression are also considered part of the normal developmental process. Studies in individuals who later manifest extreme aggression in adulthood suggest that indicators of temperamental and physiological defects may be detected as early as age three.[37] However, the processing abilities and skills needed for social cognition develop throughout adolescence.[38] Juveniles learn how to make decisions, control their impulses, and attribute mental states and intentions to other people; these faculties still developing well into the third decade of life. Accordingly, mental health professionals are confronted with the risk of misinterpreting normative adolescent behavior as being consistent with an aggression disorder.[39] For these reasons, many scholars suggest that overly aggressive traits are best viewed as existing on a continuum and have warned against impetuously applying a diagnostic label.

3. Gender Influences

While either males or females may exhibit extreme aggression, studies suggest there may be gender-specific differences in how violence is expressed.[40] Whereas crimes committed by males are typically associated with affective deficits, crimes perpetrated by females are more frequently related to behavioral or lifestyle inadequacies.[41] Additionally, males are more likely to engage in overt aggression. On the other hand, females who display violent aggressive behavior have a greater tendency to exhibit relational aggression and direct their violence towards individuals who are known to them.

B. Environmental Influences

1. Cultural Values

It is important to note that culture has the potential to shape the way that aggressive traits manifest. Specific cultural norms may place different values on certain behaviors, reinforcing some while discouraging others.[42]

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[37] Andrea L. Glenn & Adrian Raine, *The Neurobiology of Psychopathy*, 31 PSYCHIATRIC CLINICS N. AM. 463, 470 (2008).

[38] Jammie S. Rubio et al., *A Review of the Relationship Between Sociocultural Factors and Juvenile Psychopathy*, 19 AGGRESSION & VIOLENT BEHAV. 23, 24 (2014).

[39] *Id.* at 23.

[40] *Id.* at 24.

[41] *Id.*

[42] *Id.*

Despite these influences, cross-cultural comparisons measuring overall rates of aggressive personality disturbance present little, if any, variations among individuals from different cultures.[43] For the studies that do show differences, it is not clear whether the two studied populations are truly comparable or whether the inability to address environmental factors was properly accounted for.

2. Family Violence and Inadequate Influences

The quality of familial relationships, especially with one's parents, proves to have lasting impact. Studies show that children whose parents communicate poorly and have inconsistent parenting and disciplinary practices are more likely to exhibit extreme aggression.[44] Low parental supervision is specifically correlated with emotional detachment in children. Exposure to harsh physical discipline or violence is positively associated with the development of overly aggressive behavior. Behavior is learned, and learning takes place as an individual interacts with his or her environment.[45] Familial violence creates a ripple effect, reinforcing and passing on antisocial behavior from one family member to the next.[46] Parent-to-child, sibling-to-sibling, repeated exposure increases the child's susceptibility to aggressive personality disturbances.

Similar to familial influences, the quality of one's peer relationships can largely affect personality. Peer rejection, association with deviant peers, and isolation from peer involvement are all linked to aggressive behavior and delinquency.[47] When children are excluded, isolated, or choose to associate with deviant peers, their interactions (or lack thereof) invite aggressive traits by reinforcing antisocial attitudes and behavior. A study on peer relationships found that juveniles with at least one identifiable school friend displayed a decrease in delinquent and aggressive behavioral traits over time (for psychopathic).[48] Positive peer influences can thus encourage otherwise delinquent or antisocial children to abstain from inadequate behavior in favor of engaging in more normative socialization. Of course, this theory is more applicable to individuals who manifest behavioral deficits and lifestyle-related difficulties. On the other hand, individuals whose limitations arise from affective and interpersonal deficiencies will likely remain unaffected by peer relationships, regardless of their social

[43] Rubio et. al., *supra* note 38, at 24.

[44] Rubio et.al., *supra* note 38, at 27.

[45] McEllistrem, *supra* note 20, at 8.

[46] Rubio et al., *supra* note 38, at 27.

[47] *Id.* at 28.

[48] *Id.*; *see* L.C. Muñoz et al., *The Peer Relationships of Youths with Psychopathic Personality Traits: A Matter of Perspective*, 35 CRIM. JUST. & BEHAV. 212 (2008).

competence.

3. Prior Traumatic Experiences and Community Violence

As previously discussed, the development of aggressive personality traits is significantly influenced by childhood exposure to violence, abuse, or neglect.[49] Individuals with a history of child abuse evidence personality traits that are more reflective of extreme aggression than their non-abused counterparts. There is also a strong relationship between socioeconomic status and behavior consistent with aggressive personality disturbances. Children raised in unstable neighborhoods typically present higher rates of anxiety, avoidance, depression, and numbing.[50] This pattern might be explained by the lack of sufficient resources and parental supervision. Children in violent communities are chronically exposed to weapons, drugs, and shootings, and report higher rates of juvenile delinquency and violence. As a result, peer influence or peer isolation in high-risk environments may foster a propensity for violence and can encourage the development of behavioral difficulties.

However, not every individual who has suffered some kind of trauma or abuse goes on to develop such conduct, especially in the absence of a genetic predisposition to antisocial behavior. Positive familial influence is a significant protective factor, the crux being that familial stability can overcome community violence.

IV. APPROACHES TO RISK ASSESSMENT

Predictions of future dangerousness are typically derived from a series of psychiatric risk assessment methods that can be broken down into three main categories: unstructured clinical judgments, actuarial assessments; and structured clinical judgments.

A. Unstructured Clinical Judgment

Historically, unstructured clinical judgments are the most common approach to risk assessment.[51] The Diagnostic and Statistical Manual of Mental Disorders ("DSM") serves as a useful reference for clinicians in conducting clinical risk assessments, as it portrays itself as a "practical, functional, and flexible guide for organizing information that can aid in the

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[49] Rubio et al., *supra* note 38, at 26.

[50] *Id.* at 27.

[51] Hart, *supra* note 18, at 123; Michael Doyle & Mairead C. Dolan, *Psychopathy and Standardized Risk Assessment*, 3 PRINCIPLES OF FORENSIC PSYCHIATRY 5, 3 (2004).

accurate diagnosis and treatment of mental disorders."[52] In an unstructured clinical evaluation, clinicians are taught to ask the patient or subject a series of questions, the answers of which will hopefully rule out some possible explanations for behavior, or diagnoses, while highlighting others.[53] As the evaluation continues, the range of possible explanations gradually narrows and the questions become increasingly specific.[54] Ideally, this method leads to the identification of a single diagnosis that is both corroborated by the existing data and not disproved by the answers given.[55]

There are no restrictions on how evaluating professionals conduct risk assessments.[56] The risk factors—and how they are measured—vary from case to case depending on which seem most relevant to the professional administering the assessment.[57] Professionals combine the detected risk factors in an "intuitive" manner to then generate an opinion about the subject's risk of future violence.[58] Conclusions are therefore made at the evaluator's discretion, based on a personal impression of the assessed subject's character.

Unstructured clinical risk assessments attract many criticisms. First and foremost, they present a low inter-rater reliability.[59] In other words, there is an utter lack of consistency and agreement among clinicians with respect to how evaluations are conducted and what decisions are reached.[60] Evaluators may fail to specify why or how they came to a conclusion, making it difficult for others to question that conclusion or identify a reason for disagreement. Furthermore, unstructured clinical approaches often fail to account for the "base-rate" of violence within the subject's particular population.[61] Ignoring base-rates can seriously jeopardize the validity of unstructured clinical opinions.[62] The base rate of violence in a subject's relevant population (e.g., society, prison, institution) directly influences the accuracy of a predictive

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[52] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5].

[53] Hart, *supra* note 18, at 123.

[54] *Id.*

[55] J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR, NATIONAL INSTITUTE OF MENTAL HEALTH (1980).

[56] Hart, *supra* note 18, at 123-24; Doyle & Dolan, *supra* note 51, at 5.

[57] Coble APA Amicus Brief, *supra* note 7, at 8-9.

[58] *Id.* at 9.

[59] MONAHAN, *supra* note 55; Hart, *supra* note 18, at 123.

[60] MONAHAN, *supra* note 55; Hart, *supra* note 18, at 123.

[61] A base rate measures the statistical frequency with which a particular behavior occurs within a specified population over a fixed time period. Coble APA Amicus Brief, *supra* note 7, at 10.

[62] *Id*. "For example, if an individual is at twice the risk of having a particular disease, it matters whether that person belongs to a population with a base rate of one-in-ten chance or one-in-one-thousand chance of having that disease." *Id.* n. 9.

assessment on future dangerousness.[63] When base rates are disregarded, assessors are unable to compare the subject to the average population's risk of violence. Accordingly, the results of the assessment are skewed due to the inability to compare the subject to the average population's rate of violence.[64]

Early studies indicate that unstructured clinical assessments of future dangerousness are accurate in no more than one out of three predictions of violent behavior.[65] Since the publication of those studies, little has transpired to increase the ability of mental health experts to accurately predict future recidivism.[66] Clinical assessments are also criticized on the grounds that many of the diagnostic criteria for personality disturbances overlap with other disorders, raising doubts about the integrity of the criteria, and increasing the difficulty of accurate diagnoses. In light of the potential uncertain results, many assessors prefer algorithmic measures of risk prediction as opposed to clinical assessments.

B. Actuarial Assessments

Actuarial assessments are mechanical and algorithmic measures that are founded upon empirically-derived sets of predetermined risk factors.[67] Evaluators conduct an examination according to fixed and explicit rules using the information that is available to them. The assessment process resembles the way insurers determine insurance premiums, which depends on factors such as age, sex, and past claims. Decisions are generally based on specific assessment data that has been demonstrated to be empirically associated with violence in a predetermined, pre-coded manner.[68]

The Violence Risk Appraisal Guide ("VRAG") is a leading example of a standardized actuarial risk scale constructed specifically to predict violent recidivism. VRAG developed through a study of 618 men who reoffended following discharge from an institution where they were incarcerated for committing a serious or violent offense.[69] Its object is to predict the general propensity for violence among mentally disordered offenders who might be reintegrated into society.[70] To render a prediction, VRAG considers 50 pre-

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[63] *Id.* at 8-9; Kirk Heilbrun, *Evaluation for Risk of Violence in Adults* (2009) at 45-46.

[64] Coble APA Amicus Brief, *supra* note 7, at 9.

[65] Brief for Thomas, *supra* note 8, at 5; Thomas Regnier, *Barefoot in Quicksand: The "Future Dangerousness" Predictions in Death Penalty Sentencing in the World of Daubert and Kumho*, 37 AKRON L. REV. 469, 483 (2004).

[66] Coble APA Amicus Brief, *supra* note 7, at 11.

[67] Hart, *supra* note 18, at 124; Hare, *Overview*, *supra* note 2, at 715; Coble APA Amicus Brief, *supra* note 7, at 14.

[68] *See* Doyle & Dolan, *supra* note 51; Hart, *supra* note 18, at 124.

[69] Doyle & Dolan, *supra* note 51, at 7.

[70] Hart, *supra* note 18, at 125.

determined variables commonly associated with general or violent recidivism, and uses them as predictors of future dangerousness. Each of these variables are statistically weighted; the weighted scores are combined to yield a prediction of future dangerousness.[71] Examples of such variables include demographic information, criminal history, psychiatric history, childhood history, and an outcome variable of violent recidivism within a seven-year period.[72]

Although VRAG has demonstrated strong and consistent predictive accuracy for violent recidivism in *forensic populations*, it remains unclear whether accuracy transfers to non-forensic settings. There are also uncertainties regarding the accuracy of VRAG's predictions of violence in populations where there are few prior offenders. With respect to first-time offenders, VRAG is an especially weak tool for detecting recidivism and is essentially inapplicable.[73] It is further limited by its high-fidelity predictions because scale is optimized to predict a specific outcome, over a specific period of time, in a specific population. By focusing its evaluation on defined, static risk factors, VRAG ignores other factors that may be important to the particular case at hand. In doing so, it fails to exercise discretion and flexibility by considering the totality of the circumstances. Scientific theories that lead to inconsistent or arbitrary results are dangerous because they are unfairly prejudicial for use in legal contexts. A third method of risk prediction called structured clinical judgments provides slightly more consistent results.

C. Structured Clinical Judgments

A structured clinical judgment is a decision-making process assisted by guidelines developed to reflect the current state of discipline within professional practice. This form of risk assessment promotes systemization and consistency. It allows for sufficient flexibility to account for the diversities of human personality and the contexts in which assessments are conducted. Moreover, it provides for transparency and accountability, and is based on sound scientific knowledge.

Robert Hare made a critical contribution in the study of psychopathy by creating the Psychopathy Checklist (later the Psychopathy Checklist-Revised ("PCL-R")), an expert rater instrument used to assess the degree of psychopathic personality disturbance in adults.[74] By extension, PCL-R scores are used to measure character traits associated with aggression to

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[71] Coble APA Amicus Brief, *supra* note 7, at 15 (citations omitted).

[72] Doyle & Dolan, *supra* note 51, at 7.

[73] VERNON L. QUINSEY ET AL., VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK, 51 PSYCHIATRIC SERVICES 395 (2000) (explaining that VRAG is a cannot accurately predict violence and crime by individuals who have never been involved with the criminal justice system).

[74] *See generally* Hare, *Overview*, *supra* note 2.

ascertain degrees of risk. Highly similar instruments[75] have been developed for adults in non-correctional settings, including the Psychopathy Checklist: Screening Version ("PCL:SV"), and for juveniles, the Psychopathy Checklist: Youth Version ("PCL:YV").[76]

1. The Psychopathy-Checklist and its Derivatives

Hare founded the PCL-R on the notion that assessments must be based on the full range of psychopathic symptomology.[77] Accordingly, the PCL-R identifies twenty personality risk factors, or "items" (FIGURE 1)[78] that are assigned scores using a symptom-construct rating system.[79] The evaluation process requires an expert observer to conduct an extensive methodological appraisal, usually through a semi-structured interview and a review of case history materials (including psychiatric records; interviews with family members, friends, and employers; as well as supplemental behavioral observations when possible).[80]

FIGURE 1: PCL-R ITEMS

1	Glibness and superficial charm
2	Grandiose sense of self-worth
3	Pathological deception
4	Conning and manipulativeness
5	Lack of remorse or guilt
6	Shallow affect
7	Callousness and lack of empathy
8	Failure to accept responsibility for own actions
9	Need for stimulation/ proneness to boredom
10	Parasitic lifestyle
11	Lack of realistic long-term goals
12	Impulsivity

[75] The PCL-R, PCL:SV, and PCL:CV as mentioned herein will be collectively referred to as "PCL".

[76] Hare, *Overview*, *supra* note 2; Dennis E. Reidy et al., *Why Psychopathy Matters: Implications for Public Health and Violence Prevention*, 24 AGGRESSION & VIOLENT BEHAV. 214, 216 (2015); Nikos Theodorakis, *Psychopathy and its Relationship to Criminal Behaviour*, 1 IALS STUDENT L. REV. 47, 49 (2013); THE GUILFORD PRESS, SCIENCE IN THE COURTROOM: CONSENSUS AND CONTROVERSY (Jennifer L. Skeem, et al., eds., 2009).

[77] Hare, *Overview*, *supra* note 2, at 184; Pederson et al., *supra* note 11, at 309.

[78] Hare, *Overview*, *supra* note 2.

[79] *Id.*; Pederson et al., *supra* note 11, at 309; James F. Hemphill et al., *Psychopathy and Recidivism: A Review*, 3 LAW & CRIMINAL PSYCHOL. 139, 142 (1998).

[80] Hare, *Overview*, *supra* note 2; Hemphill et al., *supra* note 79, at 142; *see* Pederson et al., *supra* note 11, at 308; Theodorakis, *supra* note 76, at 50.

13	Irresponsibility
14	Poor behavioral control
15	Early behavioral problems
16	Juvenile delinquency
17	Revocation of conditional release
18	Criminal versatility
19	Many short-term marital relationships
20	Promiscuous sexual behavior

Specific scoring criteria are used to rate each of the twenty items on a three-point scale to represent the extent to which that particular item applies to a given individual.[81] Raters assign a "2" to items that definitely apply, a "1" to indicate that an item that may or may not apply, and a "0" to items that definitely do not apply.[82] Item values are then summed—the total score ranging from 0-40—to reflect the degree to which an individual fits prototypical characterizations. The greater the score, the closer the individual is to qualifying for a psychiatric diagnosis.[83]

For the sake of simplicity, PCL items may be separated into broad clusters of behavior to create a four-factor construct (FIGURE 2).[84] Under the Four-Factor Model, all of the twenty PCL items are organized according to the characteristic deficit they fall under (Interpersonal, Affective, Lifestyle, or Antisocial); with two additional items (nature of marital relationships and sexual behavior) also contributing to the total PCL score.[85]

FIGURE 2: FOUR-FACTOR MODEL OF PPD

Interpersonal	*Affective*	*Lifestyle*	*Antisocial*	*Other*
Glibness and superficial charm	Lack of remorse or guilt	Need for stimulation/ proneness to boredom	Poor behavioral control	Many short-term marital relation-ships
Grandiose sense of self-	Shallow affect	Parasitic lifestyle	Early behavioral	Promiscu-ous sexual

[81] Hare, *Overview*, *supra* note 2; Hemphill et al., *supra* note 79, at 142; Pederson et al., *supra* note 11, at 308; Theodorakis, *supra* note 76, at 49.

[82] Hare, *Overview*, *supra* note 2; Hemphill et al., *supra* note 79, at 142; Pederson et al., *supra* note 11, at 311; Theodorakis, *supra* note 76, at 50.

[83] Theodorakis, *supra* note 76, at 50.

[84] C.S. Neumann, R.D. Hare, & J.P. Newman, *The Super-Ordinate Nature of Psychopathy Checklist-Revised*, 21 J. PERSONALITY DISORDERS 1 (2007); Glenn D. Walters, *A Two-Dimensional Model of Psychopathy and Antisocial Behavior: A Multi-Sample Investigation Using Items from the Psychopathy Checklist-Revised*, 78 PERSONALITY & INDIVIDUAL DIFFERENCES 88, 88 (2015).

[85] Neumann et al., *supra* note 84.

worth			problems	behavior
Pathological deception	Callousness and lack of empathy	Lack of realistic long-term goals	Juvenile delinquency	
Conning and manipulative-ness	Failure to accept responsibility for own actions	Impulsivity	Revocation of conditional release	
		Irresponsibi-lity	Criminal versatility	

Even though the PCL was primarily created to measure the clinical construct of psychopathic personality disturbance ("PPD"), otherwise known as "psychopathy," its scores are frequently used as predictors of recidivism. Studies show that scores may be highly predictive of future violent behavior and treatment outcomes in criminal, forensic psychiatric, and civil psychiatric settings.[86] In terms of accuracy, the PCL is consistently described as one of the best tools for risk assessment when used by trained and experienced raters.[87] Moreover, the PCL instrument itself is recognized as being superior to actuarial risk scales designed specifically to predict recidivism.[88] Its success derives from the fact that the twenty risk factors capture most of the traits that contribute to criminal behavior.[89] This may be in part because the PCL appreciates that personality characteristics contribute to the development and maintenance of criminal attitudes by including measures of empathy and close affective ties—characteristics that actuarial risk scales neglect to recognize.

In light of its accuracy, it seems as though the PCL is the best primary instrument for guiding clinical assessments of recidivism and future dangerousness. Nevertheless the device is not without flaws. For instance, there exists little empirical support for measuring scores against recommended cut-offs, which are arbitrary and lack empirical justification.[90] An even bigger problem is the lack of consensus among experts regarding the criteria for formal diagnoses of APDs. The preponderance of literature and empirical evidence suggests that APDs are not distinct categories, but rather, dimensional constructions of traits.[91] Varying conceptualizations

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[86] Doyle & Dolan, *supra* note 51, at 7.

[87] Hemphill et al., *supra* note 79, at 139; Hare, *Overview*, *supra* note 2, at 712.

[88] Hemphill et al., *supra* note 79, at 162 ("Across studies, correlations between actuarial risk scales and violent recidivism were significantly smaller than correlations between PCL-R scores and violent recidivism.").

[89] Theodorakis, *supra* note 76, at 50.

[90] Devon L.L. Polaschek & Tadhg E. Daly, *Treatment and Psychopathy in Forensic Settings*, 18 AGGRESSION & VIOLENT BEHAV. 592, 594 (2013); Diana Moreira et al., *Psychopathy: A Comprehensive Review of its Assessment and Intervention*, 19 AGGRESSION & VIOLENT BEHAV. 191, 192 (2014).

[91] Moreira et al., *supra* note 90, at 193.

among professionals lead to different—and sometimes overlapping—descriptions. The range of presentations that typify the disorder thus expands, blurring the definitive boundaries even further. Consequently, certain elements of the PCL become subjective, which renders a diagnosis suspect if not useless.[92]

The PCL is quickly gaining popularity throughout the United States.[93] One review disclosed that out of thirteen legal cases involving challenges to the introduction of the PCL-R, courts excluded PCL evidence in only two.[94] In the thirty-one states that allow the death penalty, high PCL scores are often used as an "aggravating factor" in the penalty phase of a capital trial. Although a PCL score is a potent predictor of recidivism, its value should be limited to academic settings.[95] Robert Hare himself has expressed a preference that the test be used in a lab or classroom rather than a courtroom, pointing to cases where the mental health experts hired by the prosecution have testified to different results and opinions than those hired by the defense.[96] When PCL scores are used in the criminal justice contexts, the potential dangers of misuse are serious. This is especially true if the scores are used to either guide treatment or adjudicate legal matters. In such circumstances, it is more important for the fact-finder to use *all* the information necessary to provide a complete picture of the party in question.

V. EVIDENTIARY ANALYSIS

Despite the paucity of research affirming predictive validity, symptoms of APD are often introduced in legal settings as a risk factor for future dangerousness.[97] Doing so, however, presents many dangers to the judicial system as well as prejudice to the individual being evaluated. Professional literature has not demonstrated an established connection between aggressive personality disturbances and future dangerousness that is sufficiently reliable to meet the legal threshold of admissibility.[98] To describe a set of traits as recognized symptoms of a mental illness does

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[92] Theodorakis, *supra* note 76, at 50.

[93] John Seabrook, *Suffering Souls: The Search for the Roots of Psychopathy*, NEW YORKER (Nov. 10, 2011), http://www.newyorker.com/magazine/2008/11/10/suffering-souls.

[94] David DeMatteo & John F. Edens, *The Role and Relevance of the Psychopathy Checklist-Revised in Court*, 12 PSYCHOL. PUB. POL'Y & L. 214 (2006).

[95] Hare, *On Risk Factors*, *supra* note 11, at 193–94.

[96] Jack Pemment, *Psychopathy Versus Sociopathy: Why the Distinction Has Become Crucial*, 18 AGGRESSION & VIOLENCE 458, 459 (2013); *see Creator of Psychopathy Test Worries About Its Use*, National Public Radio (May 27, 2011), https://www.thisamericanlife.org/radio-archives/episode/436/transcript [hereinafter "NPR BROADCAST"].

[97] John F. Edens et al., *DSM-5 Antisocial Personality Disorder: Predictive Validity in a Prison Sample*, 39 LAW & HUM. BEHAV. 123 (2015) [hereinafter "EDENS & APD"].

[98] Barefoot APA Amicus Brief, *supra* note 8, at 5.

nothing to bridge the knowledge gap behind the cause of aggression and violent conduct. Instead, the admission of mental health evidence, particularly that which purports to predict future dangerousness, impresses the court with a false sense of accuracy. Factfinders are laypeople presented with complex information which has been designated as an "expert opinion." Many times, these factfinders feel compelled to defer to that expert opinion—all to the defendant's detriment.[99]

A. Legal Threshold of Admissibility

In a court of law, fact-finders are responsible for applying common sense and knowledge to evidence, whereas witnesses are tasked with providing the knowledge which becomes that evidence. Legal questions are often permeated with complicated issues reaching far beyond the scope of common knowledge. To assist the fact-finder in understanding complex material, the legal system allows expert witnesses to testify regarding specialized knowledge they learned through their training or experience.[100] Courts hold that such expert testimony, along with its derivative evidence, is admissible so long as it meets the proper test of reliability.[101]

Applying the test of reliability to scientific issues has been a consistently difficult task for courts. That various tests have been used in the past is indicative of the challenges involved in identifying reliable courtroom evidence. The first attempt to develop a coherent test of admissibility for scientific evidence occurred in 1923 with the decision in *Frye v. United Sates*.[102] The Court observed:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs.[103]

In other words, under the "general acceptance standard" (otherwise

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[99] Samantha Godwin, *Bad Science Makes Bad Law: How the Deference Afforded to Psychiatry Undermines Civil Liberties*, 10 SEATTLE J. FOR SOC. JUST. 647, 680 (2012).

[100] *See* FED. R. EVID. 702.

[101] *Id.*

[102] *Frye v. U.S.*, 293 F. 1013 (1923).

[103] *Id.* at 1014.

known as the "*Frye* test"), scientific evidence was admissible so long as it was founded upon a theory supported by a general acceptance within the relevant scientific community.[104] Nevertheless, the *Frye* test was deficient in that it created a lag between the development of novel scientific methodologies and their moment of judicial acceptance.[105] It was generally regarded as being ineffective and vague, and was therefore disparately applied. As a result, many began advocating for a new, more defined test. Eventually, Congress answered the demand.

A second attempt to standardize the test of reliability came in 1975 with Congress's promulgation of the Rule 702 of the Federal Rules of Evidence, providing that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[106] It is important to note that that as written, Rule 702 omits any references to the *Frye* test both in its text and commentary. On the contrary, the commentary of the Rule states that it applies to *all* forms of scientific evidence.[107] Many courts construe to indicate that unlike the *Frye* test, Rule 702 is limited in neither its scope nor application to evidence derived from a novel scientific technique.[108]

The Supreme Court eventually adopted this position by virtue of its 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[109] In interpreting Rule 702, the *Daubert* Court tasked trial courts with ensuring that any and all scientific evidence be both relevant *and* reliable. Evidence must be sufficiently reliable to assist factfinders in understanding factual issues beyond the scope of common knowledge.[110] If the evidence is unreliable or would have a tendency to confuse or mislead the factfinder, courts must bar its admission.[111] In considering the admissibility of such expert evidence, judges should focus solely on the principles and methodologies employed by the expert, and not on the concluding opinions.[112] The *Daubert* Court

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[104] *Id.*

[105] Thomas Michael Spitaletto, Symposium, *The Frye Standard Finally Fries: Daubert v. Merrell Dow Furthered the Use of Scientific Evidence in Our Legal System*?, 14 REV. LITIG. 315, 323 (1994).

[106] FED. R. EVID. 702, P.L. No. 93-595, § 1, 88 Stat. 1926 (effective January 2, 1975).

[107] FED. R. EVID. 702 advisory committee's note.

[108] Michael R. Sheldon, Hon., Law and Forensic Science Seminar Lecture at the University of Connecticut School of Law: From *Frye* to *Porter* and Beyond (Sept. 15, 2015).

[109] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[110] *Id.* at 589–90.

[111] *Id.* at 594–95; United States v. Bahena, 223 F.3d 797, 809 (8th Cir. 2000) ("*Daubert* serves the important purpose of allowing a judge to . . . screen out evidence that is unreliable and would have a tendency to confuse or mislead the jury.").

[112] *Daubert,* 509 U.S. at 589, at 595.

recommended that judges look to four factors as guidelines measuring the reliability of an expert's testimony:

> (1) whether the expert's theory or principle can be (and has been) tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential error rate of a particular scientific technique and the existence or maintenance of standards controlling that technique; (4) the technique's degree of general acceptance within the relevant scientific field. [113]

The Court was careful in warning that a "*Daubert* inquiry" is meant to be a flexible one. The four factors are representative of a judicial gate-keeping function and they are neither exclusive nor individually dispositive. Given the extensive variety of potentially relevant factors, the issue of whether expert testimony is admissible grants a judge considerable leeway in how to arrive at an appropriate decision.

B. Testing for Reliability

With *Daubert* in mind, the methods of actuarial, unstructured, and structured clinical judgment to predict future dangerousness do not pass the legal threshold of admissibility. In order to be admissible, expert testimony must be sufficiently reliable to assist the factfinder in understanding a factual issue.

1. Have the techniques been tested?

While it is true that methods of risk assessment have been extensively tested, research consistently reveals high rates of predictive error.[114]

2. Have the techniques been subjected to peer review and publication?

Once again, the answer is affirmative. An overwhelming amount of studies deem risk assessment techniques as insufficiently reliable for use in court.[115]

3. What are the techniques' known or potential error rate?

Error rates are unacceptably high. Psychiatrists and clinicians are more often wrong than right in predicting future violent behavior.[116] They are

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[113] *Id.* at 592–94.

[114] Regnier*, supra* note 65, at 495.

[115] *Id.*

[116] Barefoot APA Amicus Brief, *supra* note 8, at 5; Regnier*, supra* note 65, at 483.

widely known for making false positive predictions that are subsequently proven inaccurate.[117] More notable is the APA's open admission that mental health experts are accurate in no more than *one out of three* predictions of violent behavior.[118]

The error-rate of PCL evidence is equally alarming. Dr. Daniel Murray, a professor from the University of Virginia, researched the inter-rater reliability of the PCL in practice.[119] He reviewed court cases where mental health experts from both sides of a criminal case tested the same individual (usually the defendant), and looked to whether the experts had arrived at the same PCL score. His analysis revealed 10-, 15-, and even 20-point score differences among the expert raters' opinions.[120] He also found that experts for the prosecution consistently scored higher than those experts employed by the defense.[121] Dr. Murray's findings are a perfect example of how the absence of a chief over-arching standard for conceptualizing and measuring an APD leads to inaccurate and unreliable results.

There are many possible explanations for such a low degree of accuracy, although perhaps the most plausible cause is the absence of a principally accepted method of risk assessment. Mental health experts who take the stand might be basing their opinion on an actuarial assessment, a structured clinical evaluation, an unstructured clinical examination, or some combination of the three. Moreover, psychiatric diagnoses are fluid constructs, not defined concepts. There are no fixed diagnoses and there is no typical example of an individual with an extreme tendency to engage in criminal behavior. As discussed, the observation of affective and behavioral difficulties is largely subjective to the individual. There are many ways in which the traits are influenced and equally as many ways in which they manifests.[122]

4. Have the techniques been generally accepted in the relevant scientific community?

Academic and professional communities reject the idea that mental health professionals are able to accurately predict violent recidivism.[123] The APA consistently and publicly stands against offering predictions of future

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[117] MONAHAN, *supra* note 55 (concluding that no psychiatric procedures have succeeded in reducing the rate of "false positive" predictions on future dangerousness and recidivism).

[118] Barefoot APA Amicus Brief, *supra* note 8, at 5; Regnier, *supra* note 65, at 483.

[119] NPR BROADCAST, *supra* note 96.

[120] *Id.*

[121] *Id.*

[122] *See generally* Barefoot APA Amicus Brief, *supra* note 8, at 5; Hare, *Overview*, *supra* note 2. Hare, *On Risk Factors*, *supra* note 11.

[123] Regnier, *supra* note 65, at 483.

dangerousness through psychiatric testimony.[124] In countless briefs to the Supreme Court, the APA writes that psychiatric predictions of recidivism do not meet necessary threshold for admissibility.[125] Furthermore, task forces of psychiatric and psychological professional organizations admit that mental health experts are incompetent to predict future dangerousness.[126] The American Psychiatric Task Force on Clinical Aspects of the Violent Individual states that "[n]either psychiatrists nor anyone else have demonstrated an ability to predict future violence or 'dangerousness.' [Nor] has any special psychiatric 'expertise' in this area been established."[127] The American Psychological Association Task Force on the Role of Psychology in the Criminal Justice System echoes this position, reporting that "the validity of psychological predictions on future behavior . . . is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments."[128]

The APA is concerned with expert opinions that are presented without the psychiatrist first having an opportunity to properly examine the individual being assessed. A substantial body of literature exists criticizing the ability of a mental health expert to use mental health diagnosis to predict future violent behavior.[129] Additionally, the DSM-5 contains explicit language indicating that psychiatric diagnoses were developed for clinical and research purposes, *not* to meet the needs of courts or answer legal questions.[130] Its advisory statement reads:

> . . . it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health officials, and research investigators rather than all of the technical needs of the courts and legal professionals . . . . When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the question of ultimate concern

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[124] Brad, *supra* note 4, at 937. *See* Barefoot APA Amicus Brief, *supra* note 8; Fields APA Amicus Brief, *supra* note 6; Coble APA Amicus Brief, *supra* note 7.

[125] *See* Barefoot APA Amicus Brief, *supra* note 8. *See* Fields APA Amicus Brief, *supra* note 6.

[126] *See* APA TASK FORCE REPORT, *supra* note 8; AM. PSYCHOLOGICAL ASS'N TASK FORCE REPORT, *supra* note 8.

[127] APA TASK FORCE REPORT, *supra* note 8, at 28.

[128] AM. PSYCHOLOGICAL ASS'N TASK FORCE REPORT, *supra* note 8, at 1110.

[129] Brad, *supra* note 4, at 937.

[130] *Id.*; EDENS & APD, *supra* note 97, at 123; Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 CRIM. L. & CRIMINOLOGY 885, 889 (2011).

> to the law and the information contained in a clinical diagnosis.[131]

This warning is not new. It first appeared in 1980, with the DSM-III.[132] Unfortunately, many experts seem undeterred**.** The inaccuracy primarily stems from the enormous heterogeneity within each disorder category. Disorders are often confused with one another or used interchangeably.[133] Absent an in-depth psychiatric examination, an evaluator is unable to exclude alternative diagnoses, nor can he assure that the necessary criteria for making the diagnosis in question are appropriately met.[134] At the descriptive level, characteristics associated with aggressive personality disturbances are not specific to any one category of personality disorder proposed in current manuals.[135] For example, in both DSM-III and DSM-IV, published in 1980 and 1994, respectively, PCL-R traits can be found among the criteria for several personality disorders including the following: antisocial personality disorder (aggression, deceit, reckless disregard for others, remorselessness, behavioral disorders); histrionic personality disorder (manifesting superficial charm, insincerity, egocentricity, and manipulativeness); narcissistic personality disorder (presenting grandiosity, lack of empathy, and exploitiveness); borderline personality disorder (displaying impulsivity); and paranoid personality disorder (severe mistrust in others).[136]

It follows that, within the DSM framework, examiners might arrive at the same conclusion for different reasons. Failing to consider interpersonal and affective deficits may lead to an over-diagnosis of a psychiatric disturbance in criminal populations. For instance, antisocial personality disorder is strongly associated with lifestyle and antisocial factors displayed in risk assessment items, but is weakly associated with interpersonal and affective factors.[137] It seems increasingly unlikely then, that a psychiatric disturbance can be conceptualized as a single, coherent disorder.[138] By disguising clinical data and superficial personal knowledge as an *expert*

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[131] DSM-5, *supra* note 52, at 25.

[132] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. 1980); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000).

[133] McEllistrem, *supra* note 20, at 10; Morse, *supra* note 130, at 889.

[134] Barefoot APA Amicus Brief, *supra* note 8, at 4.

[135] Ronald Blackburn & Jeremy W. Coid, *Psychopathy and the Dimensions of Personality Disorder in Violent Offenders*, 24 PERSONALITY & INDIVIDUAL DIFFERENCES 129, 130 (1998).

[136] *Id.* at 129; EDENS & APD, *supra* note 97, at 123.

[137] Hare, *Overview*, *supra* note 2, at 715.

[138] Polaschek & Daly, *supra* note 90, at 594.

opinion, the evaluator's testimony is likely to receive undue weight.[139]

It is true that structured approaches to risk assessment are more reliable than actuarial or unstructured clinical assessments.[140] However, structured risk-assessments also fail to pass to pass muster. Studies show exceedingly large disparities in the PCL scores that are reported in criminal cases. More importantly, Robert Hare, the inventor of the PCL tool, has publicly objected to permitting PCL scores in court, warning that they cannot reliable predict criminality in a legal context.[141]

D. The Role of the Judiciary—Calling on Courts to Act

The evidence clearly shows that predictions of future dangerousness and recidivism do not meet the legal standards of admissibility, regardless of the method used. One would expect courts equipped with this knowledge to exercise their judicial gate-keeping functions and preclude such unreliable testimony. Nevertheless, courts continue to admit mental health expert testimony about the connections between personality disturbance and recidivism. That the governing body of psychiatric experts strongly objects to the use of risk assessments in court should be enough to support exclusion. When a profession presents overwhelming evidence of unpredictability, it is a sad miscarriage of justice for a jury to believe that an expert's prediction of future dangerousness carries any degree of certainty.

Judicial decisions to permit psychiatric predictions of future dangerousness are premised on the idea that such predictions are so essential to the functioning of the criminal justice system, they are admissible regardless of their scientific merit.[142] The most notable decisions reflecting this rationale are cases involving capital sentences. These cases are perhaps the most relevant to the discussion at hand, seeing as the issue of future dangerousness is at its highest potency.

Barefoot v. Estelle represents an early example of the Supreme Court's reluctance to impose a categorical exclusion of psychiatric expert predictions on future dangerousness.[143] In *Barefoot*, the psychiatrist retained by the prosecution, James Grigson (notoriously known as "Doctor Death"[144]), asserted that "whether [the defendant] was in society at large or

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[139] *Id.*

[140] Fields APA Amicus Brief, *supra* note 6 at 4–5.

[141] NPR BROADCAST, *supra* note 96.

[142] Jurek v. Texas, 428 U.S. 262, 275–76 (1976).

[143] Barefoot v. Estelle, 464 U.S. 880 (1983).

[144] A 1989 study on the post-commutation behavior of almost 100 former Texas death row inmates whose death sentences were reversed and commuted revealed that Dr. Grigson's predictions were extremely unreliable. Grigson was subsequently expelled from the APA for testifying in court as an expert witness that he "could predict with 100% certainty that individuals would engage in future violent acts," all without first having examined the individuals in question. Regnier, *supra*, note 65, at 481–82.

in a prison society there was a *one hundred percent and absolute* chance that [he] would commit future acts of violence that would constitute a continuing threat to society."[145] Upon review in the Supreme Court, the APA submitted an Amicus Brief reporting that predictions of future dangerousness are not within the scope of mental health practice.[146] In its brief, the APA informed the Court that

> medical knowledge has simply not advanced to the point where long-term predictions . . . may be made with even reasonable accuracy. The large body of research indicates that, even under the best of the conditions, psychiatric predictions of future dangerousness are wrong in at least *two out of every three cases*.[147]

Nevertheless, the majority in *Barefoot* ignored a mountain of research as well as the APA's plea, stating it was unconvinced

> that the view of the APA should be converted into a constitutional rule barring an entire category of expert testimony. [The court was also] not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.[148]

Despite the majority's opinion, neither the adversary system nor the fact-finders were able to adequately compensate for inaccuracies. Ten years later in *Daubert*, the Supreme Court narrowed the legal threshold of admissibility for expert evidence. Despite the heightened standard, however, courts rarely look to the four criteria enumerated in *Daubert* as a basis for excluding psychiatric predictions of future dangerousness.[149] *U.S. v. Fields* represents a second attempt in which the APA sought to have the Court revisit the issue.

In *Fields*, the prosecution called psychiatrist Dr. Richard Coons to give an expert opinion that the defendant would likely engage in future acts of

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[145] Barefoot v. Estelle, 464 U.S. 880, 919 (1983) (quotations omitted) (emphasis in original).

[146] *See* Barefoot APA Amicus Brief, *supra* note 8.

[147] *Id.* at 3.

[148] Barefoot v. Estelle, 464 U.S. 880, 899 (1983).

[149] David Shapiro et al., *Psychological Expert Witness Testimony and Judicial Decision Making Trends*, 42–43 INT. J. L. & PSYCHIATRY 149, 149 (2015).

violence if not executed.[150] Dr. Coons based his opinion on details from the defendant's background and criminal history as well as facts of the capital crime at issue.[151] Dr. Coons also testified that he was unaware of any standard psychiatric procedures used in conducting predictions of future dangerousness.[152] To make matters worse, Dr. Coons explicitly acknowledged the existence of a "considerable subjective element" in the practice of forensic psychiatry.[153]

Armed with the new, more stringent standard established in *Daubert*, the APA again urged the *Fields* court to address the danger of applying expert predictions of recidivism to legal contexts.[154] In its brief, replete with citations to a modern-day generation of research,[155] the APA reiterated that "even under the best circumstances . . . mental health professionals will *still* make a considerable number of incorrect predictions, with false- positives being the most common type of error."[156] The APA's efforts proved futile once again. The *Fields* court ultimately rejected the claim that Dr. Coon's testimony was unreliable, classifying it as probative to a capital sentencing decision.[157] Like *Barefoot*, the *Fields* court failed to uphold its gate-keeping function. Instead, it relied on the mistaken assumption that the adversarial system would be enough to reduce any prejudicial unreliability in future dangerousness expert testimony.[158]

Because *most* mental health experts are admittedly incompetent to predict future dangerousness in a legal setting, they cannot contradict the conclusions of the few who do.[159] Consequently, instead of offering a countervailing opinion on psychiatric disturbance and criminal propensity, opposing parties can only advance a challenge to the expert's asserted

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[150] U.S. v. Fields, 483 F.3d 313 (5th Cir. 2007), *cert. denied*, 552 U.S. 1144 (2008).

[151] *Id.* at 341. (Deriving opinion from a hypothetical posed by the prosecution).

[152] Fields APA Amicus Brief, *supra* note 6, at 2.

[153] *Id.* at 3.

[154] Fields APA Amicus Brief, *supra* note 6. The APA's requested rule in its *Fields* brief was specific to the context of death penalty sentencing hearings. Nevertheless, it is relevant in that it is a recent example of how courts continue to fail in their duties as judicial gate-keepers to filter out unreliable evidence.

[155] *Id.* at 11. The APA began its discussion by distinguishing the "first generation" research found in its 1982 amicus brief in *Barefoot* from modern research, which involves "rigorous scientific methods. However, it subsequently noted that this methodological change *did not* improve the ability to predict future dangerousness. *Id*. at 11–12, 13.

[156] *Id.* at 16 (quotations omitted) (emphasis added).

[157] U.S. v. Fields, 483 F.3d 313, 345 (5th Cir. 2007), *cert. denied*, 552 U.S. 1144 (2008) ("Dr. Coon's testimony was probative because Field's jury was required to make an assessment of future dangerousness and because the jury could benefit from the opinion of a psychological expert on that matter.").

[158] *Id.*

[159] *See generally id.*

expertise or credibility. As a result, the fact-finder is deprived of the traditional battle of experts that is preferred by the adversarial system.

E. The Danger of Prejudice

The adversarial system is further undermined by expert testimony regarding prototypically criminal characteristics. Not all individuals who exhibit affective or behavioral deficiencies qualify as having a psychiatric disturbance, and those who do qualify do not always commit a crime. By testifying as to what is, at best, only an assessment of statistical or medical probability, expert opinions unduly influence the fact-finder.[160] Terms denoting a psychiatric disturbance or APD convey an erroneous impression of an incurable affliction, bearing a cause-and-effect relationship to future violent behavior. An expert's role is to facilitate the task of evaluating dangerousness, but not to facilitate that conclusion itself. Introducing diagnostic labels risks turning the expert's testimony into psychiatric name-calling, rather than permitting the expert to genuinely facilitate the factfinder in its search for the truth.

Limited research exists to address the effects of branding individuals with traits that typify aggressive personality disturbance. What *is* known is that jurors are generally more hostile to individuals with mental disturbances.[161] One study tested the effects of expert testimony regarding the presence/absence of a mental disorder (psychopathy, psychosis, or no disorder) and violence risk (low or high) on mock jurors' sentencing dispositions in a capital murder trial.[162] The findings revealed that the defendants who were described as psychopathic were perceived as more dangerous than those whose evaluation results indicated no disorder.[163] Although the same pattern was true for those defendants who were labeled as psychotic, only in the psychopathic designation did the mock jurors strongly support a death sentence.[164] Another study examining judicial perceptions of personality disturbances reported that personality attributes of psychopathy had a significant impact on judges' opinions regarding defendants' propensity for violence. More specifically, judges were less likely to recommend deferred adjudication upon hearing expert testimony supporting psychopathic conditions.

The CSI effect further exacerbates the potential for prejudice. Psychiatric labels have been severely tainted by their long-term affair with

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[160] *See generally id.*

[161] THE GUILFORD PRESS, *supra* note 76, at 183.

[162] *Id.*; J.F. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?,* 23 BEHAV. SCI. & L. 603 (2005).

[163] *Id.*

[164] *Id.*

criminality and popular culture.[165] True-crime TV such as CBS's "Criminal Minds" and the works of authors like James Patterson feed into the idea that people labeled as "psychopaths" are by their very nature, cold and cruel, violent criminals. But not all individuals who qualify as having an aggressive personality disturbance come from the likes of Hannibal Lecter. Take, for example, Dr. James Fallon, a successful neuroscientist who inadvertently discovered that his brain scans showed consistencies with the neurological brain pattern of a "psychopathic murderer."[166] Not all people with psychopathic personality features will exhibit conduct that falls within the confines of the image assigned by society.

VI. CONCLUSION

Psychiatric labels are often thrown around nonchalantly in everyday conversation without much regard to their underlying meaning. When used by an expert on the stand, however, their use takes on a different, prejudicial significance. Designating someone as a psychiatrically disturbed individual carries considerable weight in court, as it often casts a dark cloud of prejudice over the individual being described. Mental health diagnoses present a peculiar challenge for the law since, in many ways, they are inextricably intertwined with a perceived proclivity for criminality. There are many gaps in knowledge that have yet to be filled, and the law cannot hasten the pace of science.

That psychiatric diagnoses are conceptualized pursuant to more than one model just creates further room for confusion. Aggressive personality disturbances are difficult concepts to define, and a predisposition to a qualified disorder does not always lead to criminal or violent behavior. Risk assessments that rely on personality disorders are not a useful due to the vague, subjective, and immeasurable factors that result in arbitrary, conclusory judgments.[167] It is dangerous to put too much weight on such assessments in a trial setting. Linking an aggressive personality disturbance to criminality may be useful for the purposes of studying human behavior in a scientific context; however, there is simply too much at stake to ask laypersons to consider such complex topics. Without a thorough presentation on the historical and etiological background, the long list of environmental influences, and the differences in school of thought, fact-finders lack the information necessary to properly accord credibility to an expert's opinion.

The proper avenue in psycho-legal jurisprudence is therefore to heed the

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[165] Seabrook, *supra* note 93.

[166] John Haltiwanger, *People with Traits of Psychopathy Actually Make the Best Leaders*, ELITE DAILY, Jul. 13, 2015, http://elitedaily.com/life/motivation/psychopaths-make-the-best-leaders/1108247/.

[167] William H.J. Martens, *The Problem with Robert Hare's Psychopathy Checklist: Incorrect Conclusions, High Risk of Misuse, and Lack of Reliability*, 27 MED. & L. 449 (2008).

warning of the APA and to cease reliance on predictions of future dangerousness that are linked to behavioral manifestations of an aggressive personality disturbance. It is possible for parties to present evidence on an individual's aggressive or criminal disposition without resorting to terminology that invokes such a high risk of prejudice.

An honest search for truth requires honest evidence. As officers of the court, lawyers should be sensitive to the concept of reliability. As advocates of the law, they must be prepared to challenge flawed, unreliable evidence. Nevertheless, where the adversarial system fails, it falls upon courts—as the ultimate gate-keepers—to preclude and exclude in the interest of justice.