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DIAGNOSIS DANGEROUS: WHY STATE LICENSING BOARDS
SHOULD STEP IN TO PREVENT MENTAL HEALTH PRACTITIONERS
FROM SPECULATING BEYOND THE SCOPE OF PROFESSIONAL
STANDARDS

Jennifer S. Bard*

Abstract

This Article reviews the use of mental health experts to provide testimony on the future dangerousness of individuals who have already been convicted of a crime that qualifies them for the death penalty. Although this practice is common in many states that still retain the death penalty, it most frequently occurs in Texas because of a statute that makes it mandatory for juries to determine the future dangerousness of the defendant they have just found guilty. Both the American Psychiatric Association and the American Psychological Association have protested the use of mental health professionals in this setting because there are no scientifically valid methods to make these predictions for people who face long periods of incarceration in maximum-security prisons. Existing models of prediction consider the behavior of individuals in the free world. Moreover, the Supreme Court has upheld these predictions of dangerousness in capital sentencing hearings on the grounds that neither of the protesting professional organizations actually license mental health professionals. Therefore, this Article suggests that these state licensing boards be held responsible for assuring mental health professionals do not testify beyond the scope of medical support or evidence. In so doing, it analyzes cases in which health care professionals, in general, have been held responsible by state licensing boards for testimony that is beyond what is acceptable practice in that profession.

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I. INTRODUCTION

Although individuals diagnosed with a mental disability are no more likely to commit violent crime than anyone else,¹ they are far more likely to have encounters with law enforcement that result in prosecution followed by conviction and incarceration.² These individuals are disproportionately represented in juvenile detention facilities and prisons,³ and on death row,⁴ and, while incarcerated, they

¹ Virginia Aldige Hiday, *Putting Community Risk in Perspective: A Look at Correlations, Causes and Controls*, 29 INT'L J.L. & PSYCHIATRY 316, 316–19 (2006) (criticizing studies finding correlations between mental illness and violent crime as flawed for failing to control for confounding factors such as substance abuse); see also INST. OF MED., *IMPROVING THE QUALITY OF HEALTH CARE FOR MENTAL AND SUBSTANCE-USE CONDITIONS* 92–93 (2006) (disputing commonly held beliefs that individuals with mental illnesses are inherently violent); Urara Hiroeh et al., *Death by Homicide, Suicide, and Other Unnatural Causes in People with Mental Illness: A Population-Based Study*, 358 LANCET 2110, 2110 (2001) (finding that people with psychiatric disabilities are far more likely to be victims than perpetrators of violent crime).

² DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES I* (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>, archived at <http://perma.cc/4UKR-846D> (stating 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates suffer from a mental illness). This is especially true of juveniles who become involved in the criminal justice system. See Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 397–98 (2012); Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 587–89 (1988) (studying 40% of the juvenile death-row population in the United States and finding a tendency to suffer from psychotic symptoms or the effects of abuse).

³ In many U.S. cities, so many people with mental illness end up in the criminal justice system that city jails become the largest providers of mental health services. See Jennifer S. Bard, *Re-arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. HEALTH L. & POL'Y 1, 14–16 (2005) (asserting that the mentally ill are guaranteed treatment only when imprisoned).

⁴ See *Thompson v. Oklahoma*, 487 U.S. 815, 835 n.42 (1988) (plurality opinion). “A report on a professional evaluation of 14 juveniles condemned to death in the United States, which was accepted for presentation to the American Academy of Child and Adolescent Psychiatry,” stated:

Adolescence is well recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive. These findings

spend a disproportionate amount of time in solitary confinement because their disabilities make it difficult for them to comply with prison rules.⁵

A. Overview of How Individuals with Mental Illness Interact with the Criminal Justice System

Individuals who exhibit signs of what appear to be mental illness are often evaluated immediately after they encounter the front lines of law enforcement, the police.⁶ Depending on the results of this evaluation, they may be immediately committed to a secure mental health facility or they may receive treatment that allows them to be confined in a prison or jail until they face trial.⁷ During this time, legal counsel representing individuals diagnosed with or suspected of having a serious mental illness should arrange for further assessment of their capacity to be held in a jail cell, questioned, and, as events proceed, tried.⁸ Mental health professionals also often play a role at trial where the issue is not the defendant's

raise questions about the American tradition of considering adolescents to be as responsible as adults for their offenses and of sentencing them to death.

Id. (quoting Lewis et al., *supra* note 2, at 588–89); *see also* Dorothy Otnow Lewis et al., *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas*, 32 J. AM. ACAD. PSYCHIATRY L. 408, 415–22 (2004) (outlining the psychiatric findings of juveniles sentenced to death); Joanne M. McGee, *Traumatic Brain Injury in Prisons: A Review*, BRAINLINE.ORG, http://www.brainline.org/content/2009/05/traumatic-brain-injury-in-prisons-a-review_pageall.html, archived at <http://perma.cc/H7VA-P64B> (last visited May 18, 2015).

⁵ E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 169–74 (2013) (citing social science research documenting the experiences of individuals with mental disabilities while incarcerated); Sal Rodriguez, *Mentally Ill Utah Prisoner Sentenced to 20 Days in Solitary for Not Moving Cup Fast Enough*, SOLITARY WATCH (Dec. 13, 2012), <http://solitarywatch.com/2012/12/13/mentally-ill-utah-prisoner-sentenced-to-20-days-in-solitary-for-not-moving-cup-fast-enough/>, archived at <http://perma.cc/V7ZM-LSV5>.

⁶ *See* H. Richard Lamb et al., *The Police and Mental Health*, 53 PSYCHIATRIC SERVICES 1266, 1266–67 (2002) (explaining the background for police intervention in the lives of individuals with mental illness).

⁷ *See, e.g.*, MICH. COMP. LAWS § 330.2028 (LexisNexis 2005 & Supp. 2014) (outlining commitment to a mental health facility under analogous state law); *see also* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-2.5 (1989) (outlining rules for the custodial processing of mentally ill inmates).

⁸ *See* Caldwell, *supra* note 2, at 411–12, 420–23 (encouraging attorneys to research and present mitigating evidence to protect clients with mental illness); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 7, § 7-3.3.

current state of mental health, but rather how the defendant's mental disability affected his actions at the time of the crime.⁹

Once a defendant is convicted of a crime and faces sentencing, whether diagnosed as having a mental disability or not, mental health professionals take on a different role. At this stage, mental health professionals do not determine how mental disability affected the defendant's culpability, but rather how the defendant should be punished.¹⁰ Often state law mandates testimony of a mental health professional at this stage if the defendant is diagnosed with a mental disability.¹¹ This Article focuses on one particular kind of testimony by mental health professionals in capital cases: predictions about a defendant's future dangerousness to the community in which the defendant will be living—in a maximum-security prison. Allowing testimony about the future dangerousness of a defendant who has been convicted of a serious crime as evidence during the capital sentencing process is a regular practice in almost every jurisdiction—including the federal system and the majority of states.

As Meghan Shapiro succinctly summarizes, “Despite its popularity . . . the American Psychiatric Association has maintained for over twenty years that such predictions of future threats are ‘wrong in at least two out of every three cases.’”¹² Yet, although admitting such unreliable testimony appears to violate basic principles of the laws governing admission of expert testimony, the U.S. Supreme Court has

⁹ Stephen J. Morse, *Criminal Law: Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 10–13 (1984); see ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 7, § 7-6.4.

¹⁰ If a defendant has been diagnosed with a mental disability, then both the defense and the state are likely to introduce testimony from mental health professionals. In some states, such testimony is required if the defendant's mental health is at issue. See *State v. Clinton*, 311 P.3d 283, 285–86 (Idaho 2013) (holding that although Idaho law requires the appointment of a mental health professional to examine the defendant, because the defendant “did not request a mental health evaluation . . . and did not object to the failure to have that evaluation,” it was not a fundamental error for the court to uphold—without such expert testimony—the district court's determination that the defendant's diagnosis of dementia “should be [an] aggravating factor because his sexual desires will continue while his dementia will reduce his ability to understand his actions”).

¹¹ For example, Idaho's statute is similar to laws in many states requiring that a “psychiatrist or licensed psychologist . . . examine and report upon the mental condition of the defendant” if “there is reason to believe the mental condition of the defendant will be a significant factor at sentencing.” IDAHO CODE ANN. § 19-2522 (2004 & Supp. 2014).

¹² Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 146–47 (2008) (quoting Brief Amicus Curiae for the American Psychiatric Association at 3, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080), available at <http://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/amicus-briefs/amicus-1982-barefoot.pdf>, archived at <http://perma.cc/MV2W-L7CH> [hereinafter *Barefoot* APA Amicus Brief]).

specifically and repeatedly refused to prohibit expert testimony on future dangerousness.¹³

This Article brings together literature that is highly critical of admitting future dangerousness testimony as evidence in capital punishment cases.¹⁴ Part II of this Article reviews the criticisms of admitting this testimony in any sentencing proceeding. Part III reviews the specific criticisms of how future dangerousness testimony is used in Texas. Part IV considers the role of state licensing boards in overseeing expert testimony by mental health professionals that falls outside the boundaries of accepted practice.

Finally, Part V concludes that, since testimony about future dangerousness is not supported by scientific data, professional licensing boards have an obligation to discipline psychologists, psychiatrists, or other mental health professionals for offering this form of expert testimony to jurors.

II. WHAT IS WRONG WITH MENTAL HEALTH PROFESSIONALS MAKING PREDICTIONS OF DANGEROUSNESS IN THE SENTENCING PHASE OF A CAPITAL TRIAL

There are two core criticisms of allowing mental health professionals to testify as to the future dangerousness of defendants convicted of capital crimes: (1) it suggests to the jury that the “doctor” is testifying based on expertise when in fact there is no data to support these predictions, and (2) it suggests to the jury that the defendant will be interacting with a community made up of the public when in fact the “community” referred to is that of a maximum-security prison. The testimony about future dangerousness is particularly vulnerable to these criticisms because (1) there is no scientific or medical basis for predicting future dangerousness, (2) there is no diagnosis dangerous, and (3) the prediction evidence is arbitrary for those sentenced to maximum-security prison.

¹³ See, e.g., *Barefoot*, 463 U.S. at 896 (noting that not allowing the jury to hear testimony about future dangerousness would be like “disinvent[ing] the wheel”); William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 921–22 (2010) (providing an overview of admitting expert testimony about future dangerousness based on constitutional grounds under the federal rules of evidence). Texas has adopted an evidentiary standard similar to the federal rules. See Eric F. Citron, Note, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Penalty*, 25 YALE L. & POL’Y REV. 143, 143 (2006).

¹⁴ See Shapiro, *supra* note 12, at 146 (“‘Future dangerousness’ is a very non-technical name for a particularly problematic capital sentencing factor used in nearly every capital jurisdiction in the United States, directly underlying at least half of all modern era executions and likely playing some role in the rest.” (citations omitted)); *Barefoot* APA Amicus Brief, *supra* note 12, at 3 (“The large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases.”).

A. *There Is No Scientific or Medical Basis for Making Predictions of Future Dangerousness After Sentencing*

Although presented through testimony by mental health professionals as matters of professional opinion, there is in fact no scientific support that mental health professionals can predict future dangerousness of an individual who has been convicted of a capital crime any better than a lay jury member.¹⁵ In a series of “friend of the court” briefs filed with the Supreme Court, the American Psychiatric Association (APA) has firmly stated that mental health professionals are no more able to predict future dangerousness in this context than the general public.¹⁶

¹⁵ A core confusion of terminology in the field of predicting future dangerousness is that such predictions are made in many different contexts, including for purposes of treatment and civil commitment as well as sentencing. This Article considers only those predictions made after a defendant is found guilty of a capital crime and the issue is his likelihood to be a danger within the setting of a maximum-security prison. For an overview comparing the different kinds of predictions psychiatrists are asked to make, see Robert T.M. Phillips, *Predicting the Risk of Future Dangerousness*, 14 VIRTUAL MENTOR 472, 474–75 (2012). Dr. Phillips’s article states, in part:

Actuarial approaches attempt to assess individual risk using information derived from group data rather than from an individualized assessment of dangerousness. Its accuracy in predicting rare events is low because its prediction is limited to those who are similar to the population from which the actuarial data were drawn. No clinical input is required to calculate the risk score mathematically, only translation of relevant material from the records. Proponents contend that actuarially derived decisions should replace existing clinical approaches because the former are devoid of clinician bias. Others argue, however, that risk assessment based solely upon actuarial methods raises concerns about public safety, compliance with peer-accepted standards of practice, inconsistency with evidence-based medical practice, and exposure to liability.

Id. at 474–75; see also Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481, 482 (2011) (arguing that it is possible to predict the risk of future dangerousness of a criminal offender if released into society).

¹⁶ See TEX. DEFENDER SERV., DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 12 (2004), available at http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf, archived at <http://perma.cc/6PW7-AQLX> (describing the “aura of authority” a testifying “doctor” has with a jury of lay people); Barefoot APA Amicus Brief, *supra* note 12, at 4 (“Contrary to the claims of the prosecution who testified in this case, psychiatric predictions of long-term future dangerousness—even under the best conditions and on the basis of complete medical data—are of fundamentally low reliability.”). Of course not all individual mental health professionals act in accordance with the generally accepted standards set by their professional organizations. See M. Neil Browne & Ronda R. Harrison-Spoerl, *Putting Expert Testimony in Its Epistemological Place: What Predictions of Dangerousness in Court Can Teach Us*, 91 MARQ. L. REV. 1119, 1136–37 (2008) (discussing concerns about mental health experts serving as “hired guns” willing to testify to “junk science”).

One of the strongest objections to the practice of offering expert testimony by a mental health professional predicting future dangerousness to their community in a capital case is that these individual defendants will either be executed or will face long prison sentences. Therefore, their community will be a maximum-security prison. Yet there are no laws or rules of procedure requiring experts to base their testimony on the community where the defendant will actually be located.¹⁷ Instead, the existing literature on future dangerousness comes from other areas where mental health professionals are asked to predict future behavior, such as the likelihood of patients to be violent in the future or for convicted sex offenders to offend again.¹⁸ The evidence available for predictions in these contexts is also frequently criticized; it is different from the predictions of dangerousness considered in this Article for two reasons. First, there is a significant body of scientifically obtained evidence concerning these other contexts that supports predictions about future dangerousness for these specific defendants. Second, the evidence that does exist about violence in a prison setting uniformly finds the risk to the community within the prison from violent offenders very low. This is not surprising given that one body of predictions considers the actions of individuals in the free world and the other the actions within the highly secure and structured confines of a maximum-security prison.¹⁹

In contrast, there is more evidence of the accuracy of predictions in populations, such as sex offenders, because these predictions are based on studies of individuals who were convicted of a crime, such as sexual violence, and then released back into the community.²⁰ Because there is generally accepted data on future dangerousness

¹⁷ Amicus Brief for Amici Curiae American Psychological Association and Texas Psychological Association in Support of Petition for a Writ of Certiorari at 13, *Coble v. Texas*, 131 S. Ct. 3030 (2011) (No. 10-1271) [hereinafter *Coble* APA Amicus Brief] (“These structured approaches, grounded in science and empirical data, have proven more reliable than unstructured clinical approaches and can validly assess future dangerousness in appropriate cases.” (internal quotation marks omitted)).

¹⁸ See e.g., *id.* at 15 (describing the Violence Risk Appraisal Guide (VRAG), which “assesses the risk of future violence in the community among mentally ill offenders upon their release from prison or forensic hospitalization”).

¹⁹ Jay P. Singh et al., *Reporting Guidance for Violence Risk Assessment Predictive Validity Studies: The RAGEE Statement*, 39 *LAW & HUM. BEHAV.* 15, 19–21 (2015) (“Mental health professionals are routinely called upon to assess the violence risk presented by their clients, frequently aided by structured instruments. Though a considerable literature exists on the predictive validity of these instruments, such studies are often plagued by inconsistent methodological reporting, limiting their reproducibility and clinical utility.”).

²⁰ See Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 *AM. CRIM. L. REV.* 1443, 1465 (2003). Professors Janus and Prentky describe one common instrument, the VRAG, which

was developed to assess violent recidivism. The initial development was based on a sample of 618 men (about 15% of whom were sex offenders) who had been committed—and later released—as mentally disordered offenders to the maximum security psychiatric hospital in Penetanguishene, Ontario, for

of sex offenders, the majority of state laws “authorize long-term confinement in secure treatment centers [after completion of their prison sentence] for individuals who have a . . . risk of future criminal sexual misconduct,” before being released into the community.²¹ These laws have been upheld based on a finding that the methods of predicting future risk of sexual misconduct are based on reliable scientific evidence. Moreover, in contrast to predictions of future dangerousness in a prison setting, there is an existing *Diagnostic and Statistical Manual of Mental Disorders* (DSM) diagnosis for an individual who has a “mental abnormality” that makes it more difficult for him to control his unlawful sexual urges.²² There is no DSM diagnosis to bolster future dangerousness predictions in the context of prisoners sentenced for life.

The refutations by both the APA and Texas Psychological Association about prisoners with death sentences are not global repudiations of all predictions of dangerousness. Specifically, both organizations distinguish among “structured” methodologies and the “unstructured” methodologies used by experts in capital sentencing cases.²³ The organizations have expressed qualified support for “structured” methods of predicting future dangerousness but have decried “unstructured clinical testimony” as “not based on science” and have submitted amicus briefs in a number of death penalty cases on the basis that “the integrity of the legal system and the mental health profession are undermined if unscientific, unreliable, but purportedly expert testimony about future dangerousness is deemed constitutionally admissible in capital sentencing.”²⁴ Regardless, courts routinely allow expert testimony on future dangerousness even though there is substantial information to support a conclusion that mental health professionals are not better able to do this than ordinary jurors.²⁵

assessment or treatment. The men were followed after release to determine which engaged in any ‘violent’ recidivism, an outcome variable that included, *inter alia*, all ‘hands-on’ sexual offenses.

Id. (citation omitted)).

²¹ *Id.* at 1446–47; see Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1597–1600 (2014).

²² See Michael B. First & Robert L. Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases*, 36 J. AM. ACAD. PSYCHIATRY L. 443, 445 (2008).

²³ See *Coble* APA Amicus Brief, *supra* note 17, at 4 (“Studies have long established that unstructured clinical assessments . . . are not grounded in scientific principles and are less reliable than structured risk-assessment approaches.”); see also Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1254–56, 1268–1270 (2000) (“Several factors in the decision-making process encourage jurors to overestimate the threat of violence posed by capital murderers. Foremost among these is the lack of objective information regarding the likelihood of repeat violence.”).

²⁴ *Id.* at 2.

²⁵ See *supra* note 17 and accompanying text.

It is therefore important, early on, to distinguish between predictions of the future dangerousness of defendants already sentenced to capital crimes and other settings where there is considerably more research on which to base assessments of future behavior.²⁶ As in many cases when law and science intersect, it is not surprising that the difference between predictions of future behavior, based on methodologically sound studies, are not always clear or appropriate. Here, however, where the confusion results in the introduction of evidence supporting a death sentence, it is especially important for everyone involved to understand the limits of mental health professionals to predict the risk of future violence in the case of an individual facing a long prison sentence in contrast to predicting the risk of future violence of an individual about to be released into the community. The predictions made about individuals who have committed violent acts while in the community are based on studies of others with similar characteristics. While these studies are not perfect, they are at least an “apples to apples” comparison of large groups of individuals released into the community. Here, the individuals being evaluated are not being released into the community where they committed their crime. Rather, they are being incarcerated in maximum-security prisons. The relevant database, then, is not the behavior of free individuals but rather those of inmates in maximum-security prisons. Therefore, if, indeed, the question is whether the individual poses such a great risk to the other prisoners and guards that the only alternative is a death penalty, then the relevant statistics should be from criminology, not psychology.

B. There Is No Recognized Diagnosis “Dangerous”

The APA, the organization that defines the criteria for diagnosing a mental illness, has consistently objected to using any diagnosis as the basis for predicting future violent behavior in a forensic proceeding.²⁷ Predictions of future dangerousness in capital sentencing are made for all defendants, whether they are diagnosed with a recognized mental illness or not. During sentencing of capital offenders, mental health professionals are asked to predict the future behavior of individuals who have no diagnosis of mental illness, as well as of those who do. However, the difference between the predictions mental health professionals make about the behavior of defendants sentenced to long prison terms and the behavior of those facing release into the community is that the latter predictions are usually supported by evidence of a preexisting mental illness that increases the risk of reoffending. Still, there is a substantial body of literature criticizing the ability of mental health professionals to predict future violent behavior even when an individual has been diagnosed with a mental illness. And the criticism of predictions of dangerousness at sentencing go beyond that, because even if there is a correlation

²⁶ See *Coble* APA Amicus Brief, *supra* note 17, at 11–12 (discussing the importance of determining base rates of prison violence compared to base rates of violence outside of the prison context when assessing future dangerousness).

²⁷ See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTIC MANUAL OF MENTAL DISORDERS 25 (5th ed. 2013) [hereinafter AM. PSYCHIATRIC ASS’N, DSM-5] (cautioning against forensic use of the DSM-5).

between a diagnosis of a condition associated with violence and actual future violent behavior, none can exist in the absence of any defined mental disability.

Diagnosis of mental illness in the United States is based on criteria established by the APA, which the organization publishes and frequently updates in the DSM.²⁸ The DSM catalogs, describes, and numerates the deviations from health that manifest as what they describe as mental illness.²⁹ The latest version, the DSM-5,³⁰ has just gone into effect this year and reflects at least ten years of preparation.³¹ What the DSM does and does not recognize as a diagnosis is important because it is used not only for insurance reimbursement purposes, but also has a much larger role in determining the eligibility of individuals for a wide array of services such as special education, disability insurance, and employment accommodation.

Psychiatric diagnosis is relevant at four distinct phases of the U.S. criminal justice system: pretrial investigation, prosecution, sentencing, and corrections.³² In each of these phases, the diagnosis may be of the defendant at the present time and of the defendant at the time the crime was committed. Psychiatric diagnosis plays a different role in sentencing than in other phases of the trial.³³ The diagnosis is

²⁸ *About DSM-5*, AM. PSYCHIATRIC ASS'N, <http://www.dsm5.org/about/Pages/Default.aspx>, archived at <http://perma.cc/5DBA-54M6> (last visited May 20, 2015).

²⁹ Dr. David Kupfer, chair of the APA's DSM-5 Task Force stated, "DSM, at its core, is a guidebook to help clinicians describe and diagnose the behaviors and symptoms of their patients. It provides clinicians with a common language to deliver the best patient care possible." Press Release, David Kupfer, M.D., Am. Psychiatric Ass'n, Chair of DSM-5 Task Force Discusses Future of Mental Health Research (May 3, 2013) [hereinafter Kupfer Press Release], available at <http://www.psychiatry.org/advocacy--newsroom/newsroom/statement-from-dsm-chair-david-kupfer-md>, archived at <http://perma.cc/L2DL-AUQN>.

³⁰ AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 27.

³¹ *Timeline*, AM. PSYCHIATRIC ASS'N DSM-5 DEVELOPMENT, <http://www.dsm5.org/about/Pages/Timeline.aspx>, archived at <http://perma.cc/BC22-BXF5> (last visited May 20, 2015).

³² *Criminal Justice System Flowchart*, BUREAU JUST. STAT., <http://www.bjs.gov/content/largechart.cfm>, archived at <http://perma.cc/LU4R-GUX9> (last updated May 19, 2015). Of course psychiatric diagnosis is also a factor in criminal sentencing outside the United States. See *What the Law Says*, ASB HELP, <http://asbhelp.co.uk/what-the-law-says/>, archived at <http://perma.cc/VSB3-BWFC>.

³³ According to the American Bar Association, "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase." Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 956 (2003) (citation omitted). Counsel must "[c]reat[e] a competent and reliable mental health evaluation consistent with prevailing standards Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary." *Id.* (citation omitted).

conveyed to a decision maker—either judge or jury—depending on the stage of the trial.³⁴ Although a diagnosis, on its own, should not have evidentiary weight.³⁵

U.S. courts have differed in the rationale for allowing testimony about psychiatric diagnosis—often floundering on whether it is an “excuse” or merely an “explanation” for criminal behavior.³⁶ In general, the U.S. legal system has a complicated relationship with evidence about mental disability because it conflicts with a fundamental cultural belief in free will and individual responsibility.³⁷ Confused rationales for the purpose of criminal sentencing also create cognitive dissonance. If the purpose is to punish individuals for bad acts, then is it inappropriate to imprison a defendant whose behavior is affected by factors outside of his control?³⁸ This raises a related question of who “deserves” punishment.³⁹

Critics of psychiatric testimony in the courtroom have questioned the value of testimony about the defendant’s diagnosis. Samantha Godwin writes, “Psychiatrists do not . . . help a court understand the evidence before it because . . . their methodology assumes the truth of unverifiable relationships between the data and psychiatric hypotheses.”⁴⁰ She further explains:

To describe a set of behaviors as symptoms of mental illness does nothing to bridge the explanatory gap as to the cause of the behaviors. Instead, it impresses the court with a sense of false necessity where judges and jurors are likely to feel compelled to defer to “expert” opinions of psychiatrists, often to a court’s detriment.⁴¹

³⁴ Samantha Godwin, *Bad Science Makes Bad Law: How the Deference Afforded to Psychiatry Undermines Civil Liberties*, 10 SEATTLE J. FOR SOC. JUST. 647, 647–48 (2012).

³⁵ *United States v. Donelli*, 747 F.3d 936, 940 (7th Cir. 2014) (stating that, because the defendant’s bipolar II disorder diagnosis was not a principal argument at sentencing, and instead was simply an explanation for why she committed the crimes, the sentencing court was not required to address the diagnosis); *Lawrence v. Sec’y, Fla. Dep’t of Corr.*, 700 F.3d 464, 482 (11th Cir. 2012) (holding defense counsel was not ineffective by failing to seek a competency hearing at the penalty phase of defendant’s trial, and the defendant’s schizophrenia diagnosis was not itself sufficient to establish that the defendant was incompetent at the time he entered his guilty plea); Paul S. Appelbaum, *Reference Guide on Mental Health Evidence*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 813, 865–69 (3d ed. 2011).

³⁶ *Donelli*, 747 F.3d at 939–40.

³⁷ Emad H. Atiq, *How Folk Beliefs About Free Will Influence Sentencing: A New Target for the Neuro-Determinist Critics of Criminal Law*, 16 NEW CRIM. L. REV. 449, 452–53 (2013) (“A large body of empirical evidence suggests that people tend to ignore the ways in which human behavior is causally influenced by factors like social deprivation and mental defect because of exaggerated beliefs about the causal significance of ‘free will.’”).

³⁸ Robert F. Schopp, *Mental Illness, Police Power Interventions, and the Expressive Functions of Punishment*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 99, 99 (2013).

³⁹ Johnston, *supra* note 5, at 193–95.

⁴⁰ Godwin, *supra* note 34, at 680.

⁴¹ *Id.*

Another concern about the role that diagnosis plays in sentencing is that the diagnostic system created in the DSM is not intended to predict future behavior. If it were, judges and juries might consider imprisoning individuals based on their likelihood to commit crimes rather than waiting to see if they actually commit those crimes.⁴² As it is, prosecutors frequently use diagnosis as a basis for arguing to the jury that a defendant is likely to commit a violent crime again if released.⁴³ Often this is through a diagnosis that the defendant has an “antisocial personality disorder” (APD) that prevents the defendant from feeling remorse or empathy.⁴⁴ Although APD is one of the most common “negative diagnoses” in terms of predicting future dangerousness, any diagnosis suggesting a propensity toward violence can serve the purpose of predicting future dangerousness, including Post Traumatic Stress Disorder (PTSD)⁴⁵ and Dementia.⁴⁶

Crimes involving sexual violence or abuse often invoke psychiatric testimony by both prosecution and defendants. The prosecution uses the lack of effective treatments for sexual disorders as an aggravating factor supporting long sentences.⁴⁷ This is especially true in sexual crimes against minors where courts, whether supported by expert testimony or not, cite the inability to control paraphilic disorders

⁴² See Schopp, *supra* note 38, at 131–32 (explaining that the criminal justice system punishes those who engage in conduct that harms or endangers the protected interests of others).

⁴³ Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 803 (2014) (critiquing the practice of “basing criminal sentences on actuarial recidivism risk prediction instruments that include demographic and socioeconomic variables”).

⁴⁴ Kathleen Wayland & Sean D. O’Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 526–27 (2013) (“[P]rosecutors often use expert testimony that the defendant is antisocial to accomplish specific strategic purposes. For example, [APD] is commonly used to imply that the defendant is ‘a dangerous individual, incapable of rehabilitation in the prison system.’”).

⁴⁵ A diagnosis of PTSD has become a double-edged sword. It is increasingly raised by veterans who offer the trauma they suffered in combat as evidence of lack of responsibility for criminal acts and as mitigating evidence in sentencing. *State v. Belew*, 17 N.E.3d 515, 520–21 (Ohio 2014) (Lanzinger, J., dissenting); Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 55 (2012) (“Although courts and legislatures generally have not embraced PTSD claims as a mitigating factor, they have shown greater sympathy to defendants who claim they acquired PTSD in the military or as victims of Battered Woman Syndrome (BWS).”); 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).

⁴⁶ *State v. Clinton*, 311 P.3d 283, 286 (Idaho 2013) (holding that the trial court properly considered the defendant’s dementia diagnosis at sentencing because the diagnosis increased the likelihood of the defendant reoffending).

⁴⁷ See *e.g.*, *id.*

as grounds to “deny bail pending trial” as well as “to justify a prison sentence as opposed to community supervision.”⁴⁸

C. There Is No Data Supporting Predictions of Future Dangerousness Among Those Convicted of Capital Offenses

Another persistent criticism of allowing testimony about future dangerousness into capital sentencing hearings is the lack of evidence specific to the setting of a maximum-security prison. Proposing a comprehensive set of rules for introducing evidence at a capital penalty-phase hearing, Professor David McCord and Judge Bennett note that such evidence should be “limited to the context of the jurisdiction’s most secure prison or prisons.”⁴⁹ Referencing the practice in Texas, they explain:

The Rule adopts the minority position that the only realistic context in which the jury should be allowed to assess the possibility of the defendant’s future dangerousness is prison. It is logically insupportable to allow, as some jurisdictions do, a jury thought-experiment about whether the defendant would be dangerous in society at large. In every jurisdiction life-without-parole is an option so that the jury can assure that such a defendant will never again live in society at large unless the defendant escapes, or his sentence is commuted, both of which possibilities are so vanishingly small as to warrant ignoring them. Further, the Rule limits the context not just to prison, but to the jurisdiction’s most secure prison or prisons on the almost certainly true assumption that a capital murderer will spend the rest of his life in such a prison.⁵⁰

Evidence that prisoners convicted of crimes equally serious to those that draw the death penalty in Texas consistently shows that these individuals are not violent in prison. A 1989 study that “examined the level of violent behavior over fourteen years by Texas offenders whose death sentences were reversed” when the Supreme Court held the death penalty unconstitutional in *Furman v. Georgia*,⁵¹ found that “the death row releasees” were not “more violently assaultive or predatory, or a disproportionate threat to other inmates and staff.”⁵² The Texas Defender Service’s more recent study of inmates sentenced to death after *Furman* based on a finding of future dangerousness had very similar results.⁵³ The Texas Defender Service is a

⁴⁸ Melissa Hamilton, *Adjudicating Sex Crimes as Mental Disease*, 33 PACE L. REV. 536, 537 (2013).

⁴⁹ David McCord & Mark W. Bennett, *The Proposed Capital Penalty Phase Rules of Evidence*, 36 CARDOZO L. REV. 417, 477 (2014).

⁵⁰ *Id.* at 477–78 (citations omitted).

⁵¹ 408 U.S. 238 (1972) (per curiam).

⁵² James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC’Y REV. 449, 452, 461 (1989).

⁵³ Called the “Trial Project,” the study reviewed records of individuals “who, since reinstatement of the death penalty: (1) were the subject of state expert testimony at trial

nonprofit organization committed to preventing executions of the mentally ill in Texas.⁵⁴ Frustrated with the large number of defendants sentenced to death based on testimony of future dangerousness, the Texas Defender Service conducted a study of what happened to individuals about whom mental health professionals predicted future dangerousness and then self-published the results in a report called *Deadly Speculation*.⁵⁵ They reviewed “155 cases in which prosecutors used experts to predict a defendant’s future dangerousness” though, for a variety of reasons, 67 of those defendants were actually executed while some defendants either spent a considerable period of time incarcerated or had their sentences reduced.⁵⁶ They found that of the 155 cases they reviewed, the “experts were wrong 95% of the time.”⁵⁷ Many of these inmates proved to be “non-assaultive, compliant inmates.”⁵⁸

Another discovery of the Texas Defender Service’s study was that jurors were more likely to find African American defendants to be a future danger than Caucasian or Hispanic defendants.⁵⁹ Indeed, prosecutors in Texas had on retainer a psychologist who routinely testified to his belief that being black “increases the

declaring them a ‘continuing threat to society’ and, (2) received a death sentence at the time of their trial.” TEX. DEFENDER SERV., *supra* note 16, at 21.

⁵⁴ *See id.* at iii.

⁵⁵ *See id.* at xi.

⁵⁶ *Id.* at xiii, 23.

⁵⁷ *Id.*

⁵⁸ *Id.* at xiv, 5.

⁵⁹ *See id.* at 41–42. Dr. Walter Quijano, a medical expert on future dangerousness, has testified in several murder trials that blacks and Hispanics are more likely to be a future danger. *See id.* Dr. Quijano’s testimony came to public attention when Victor Hugo Saldano’s sentence was vacated in 2000. *Saldano v. Texas*, 530 U.S. 1212 (2000). Shortly afterwards, then-attorney general and now-senator, John Cornyn, announced he was going to dismiss five of the six cases in which Dr. Quijano testified concerning race and future dangerousness on the State’s behalf. *Buck v. Thaler*, 132 S. Ct. 32, 36 (2011) (Alito, J., dissenting). However, he refused to dismiss a sixth case, that of Duane Buck, because Dr. Quijano offered the same testimony while testifying for the defense. *Id.* at 38. Although the U.S. Supreme Court stayed Buck’s execution in 2011, *Buck v. Thaler*, 132 S. Ct. 69, 69 (2011), it refused to grant certiorari to review his sentence, *Buck*, 132 S. Ct. at 32. Buck’s subsequent motion to the Texas Court of Criminal Appeals to set aside his sentence was denied in November 2013, *Ex parte Buck*, 418 S.W.3d 98, 98 (Tex. Crim. App. 2013), *cert. denied sub nom.* *Buck v. Texas*, 134 S. Ct. 2663 (2014), and he remains on death row. *See* Charles J. Ogletree, Jr., *Condemned to Die Because He’s Black*, N.Y. TIMES, July 31, 2013, <http://www.nytimes.com/2013/08/01/opinion/condemned-to-die-because-hes-black.html>, *archived at* <http://perma.cc/5Z4W-Z8CR>. Dr. Quijano’s contract with the Texas Youth Commission was terminated in 2011 after his testimony, which had occurred over a period of ten years, became public. *See* Brandi Grissom, *Texas Ends Deal with Psychologist over Race Testimony*, TEX. TRIB. (Oct 31, 2011), <http://www.texastribune.org/2011/10/31/tyc-ends-contract-doctor-who-gave-race-testimony/>, *archived at* <http://perma.cc/V765-LYPM>; Leonard Pitts, Jr., *In Texas, Black Means Future Danger*, CHI. TRIB. (May 5, 2013), http://articles.chicagotribune.com/2013-05-05/opinion/sns-201305031300--tms--lpittsctnwl-a20130505-20130505_1_duane-buck-walter-quijano-linda-geffin, *archived at* <http://perma.cc/F68K-VSKF>.

future dangerousness.”⁶⁰ This belief is consistent with criminology literature finding black inmates are more likely to be a future danger to society than white or Hispanic inmates.⁶¹

III. WHY IS THE ROLE THAT PREDICTIONS OF DANGEROUSNESS PLAY IN THE TEXAS DEATH PENALTY STATUTE PARTICULARLY INAPPROPRIATE?

As discussed in Part II, testimony by a mental health professional about a defendant’s “future dangerousness” is a common method of supporting the prosecution’s aggravating factors in the death penalty statutes of all states who still have capital punishment. For example, in Texas, the role of testimony by mental health professionals is a significant factor in determining whether a defendant convicted of a capital crime will be imprisoned.⁶² Essentially, once a defendant is convicted of a capital crime, the court is required by statute to conduct a separate sentencing proceeding at which both the defense and the prosecution are allowed to present evidence “as to any matter that the court deems relevant to sentenc[ing].”⁶³ Once that hearing is concluded, the jury is presented with two questions: “(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,” and (2) if the defendant was convicted for his role in a crime that resulted in another’s death, rather than taking the life directly, “whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.”⁶⁴

⁶⁰ *Buck*, 132 S. Ct. at 34, 36 (Alito, J., dissenting) (citation omitted).

⁶¹ See Kathryn Roe Eldridge, *Racial Disparities in the Capital System: Invidious or Accidental?*, 14 CAP. DEF. J. 305, 317 (2002).

⁶² See TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2006 & Supp. 2014); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion) (upholding the constitutionality of the Texas statute). For an excellent history of the Texas “future dangerousness statute,” see Ana M. Otero, *The Death of Fairness: Texas’s Future Dangerousness Revised*, 4 U. DENV. CRIM. L. REV. 1, 1–4 (2014).

⁶³ TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (West 2006 & Supp. 2014).

⁶⁴ *Id.* art. 37.071, § 2(b)(1)–(2). This clause addresses the Supreme Court’s holding in *Enmund v. Florida*, which stated death is a disproportionate sentence when an individual plays only a minor role in a crime that results in death and therefore did not have intent to kill. 458 U.S. 782, 796, 801 (1982). The Supreme Court has subsequently upheld a state’s right to impose the death penalty on an individual who, although not the actual killer, participated in the crime and “appreciated that their acts were likely to result in the taking of innocent life.” *Tison v. Arizona*, 481 U.S. 137, 152 (1987). *Tison* additionally provided that “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.” *Id.* at 158.

The Texas statute has faced criticism on constitutional grounds since the day it was passed, yet in *Barefoot v. Estelle*,⁶⁵ the U.S. Supreme Court upheld the statute's constitutionality even while acknowledging the APA's objections.⁶⁶ Justice White, for the majority, wrote:

We are no more convinced now [than in an earlier case, *Estelle v. Smith*,] that the view of the APA should be converted into a constitutional rule barring an entire category of expert testimony. We are 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.⁶⁷

Since the Court's decision in 1983, Texas has executed 528 men and women,⁶⁸ all based on a finding by the jury that they that "there was a probability" they "would commit criminal acts of violence that would constitute a continuing threat to society."⁶⁹ The Texas Defender Service, whose "aim" is "to improve the quality of representation afforded to those facing a death sentence and to expose and eradicate the systemic flaws plaguing the Texas death penalty,"⁷⁰ describes the statute as having "backfired."⁷¹ Rather than reserving the death penalty for the "worst of the worst," "[t]he present system pressures juries to choose death for inmates who are able to peaceably co-exist in an institutional setting with other inmates and guards, regardless of the nature of their crime."⁷²

⁶⁵ 463 U.S. 880 (1983).

⁶⁶ *Id.* at 901 ("Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time."). More recently, the Court upheld predictions of future dangerousness in a proceeding to justifying committing pedophiles. *See Kansas v. Hendricks*, 521 U.S. 346, 351, 371 (1997) (finding it permissible for psychiatrists to testify about the likelihood of a convicted sex offender to engage in sexual violence again).

⁶⁷ *Id.* at 899 (citation omitted).

⁶⁸ *Executions*, TEX. DEP'T CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_executions_by_year.html, archived at <http://perma.cc/U9V2-85TW> (last updated Oct. 14, 2015).

⁶⁹ TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2006 & Supp. 2014).

⁷⁰ *About*, TEX. DEFENDER SERV., <http://texasdefender.org/about/>, archived at <http://perma.cc/2UWM-HL46> (last visited May 20, 2015).

⁷¹ TEX. DEFENDER SERV., *supra* note 16, at 3.

⁷² *Id.* at xv, 3. Jurors in Texas hear testimony from both the prosecution and defense about the conditions in which capital offenders are kept if not sentenced to death. *See* A.P. Merillat, *The Question of Future Dangerousness of Capital Defendants*, 69 TEX. B.J. 738, 738–39 (2006). The following is a testimonial account of a criminal investigator working for the state of Texas regarding the risk capital offenders face in prison:

[I]t is a fact that the Texas prison system is a place where the opportunities to be violent are presented to any inmate, regardless of the sentence or type of conviction he or she has received. We who do the work of prosecuting prison

The most consistent criticism of the Texas statute requiring the jury to make a conclusion about future dangerousness is that it asks them to assess a “probability”⁷³ and to do this out of context.⁷⁴ Jurors are not told that they are considering the likelihood of dangerousness in the context of a lengthy prison sentence. Nor are they told accurate statistics about the relatively low rate of violence in prisons housing long-term offenders. An article by Professor Jonathan R. Sorensen and Rocky L. Pilgrim, which reports actuarial statistics collected about capital murder defendants, notes that murderers whose death sentences were commuted and murderers who were not sentenced to death both have the same 0.002% rate of subsequent killings.⁷⁵ Moreover, many commentators have noted that the statute is flawed in that it lacks definitions of its key terms and that it was hastily drafted in response to the Supreme Court’s decision in *Furman v. Georgia*, which allowed the resumption of the death penalty.⁷⁶ The Texas statute therefore reflects “circumstances rather than the considered judgment of the legislators.”⁷⁷

crimes have insight into the dark side of Texas prison life that even many in the prison hierarchy don’t have.

Id. at 738.

⁷³ See Grace Witsil, *An Epistemological Look at the Standard of Proof for Future Danger Predictions Under the Texas Sentencing Scheme*, 41 AM. J. CRIM. L. 209, 229 (2014) (“A more logical jury instruction would require the jury to be certain, to a specified percentage, that the defendant *will* commit future acts of violence. This percentage should be determined with a consideration of the current 85–95% false positive prediction rate of future violence.”); see also Sorensen & Pilgrim, *supra* note 23, at 1255 (“Jurors also overestimate the opportunity inmates will have to commit acts of violence in the outside community. Texas jurors who have served on capital murder trials consistently underestimate the number of years that must be served by a capital murderer receiving a life sentence, with the average juror believing a person sentenced to life in prison will be paroled after 15 years . . . [even though] capital murderers must serve at least 40 years of flat time before becoming eligible for parole.” (citations omitted)).

⁷⁴ Witsil, *supra* note 73, at 230 (“[I]nstructions should more precisely define ‘society,’ clarifying to jurors that a convicted capital defendant will never be released into general civil society unless he successfully appeals his case. Notwithstanding this possibility, he will most likely spend the rest of his life in a controlled prison environment, a likelihood that the statutory language should reflect. Most jurors would probably agree that a defendant is less likely to commit a serious assault when he is in a highly controlled environment with less access to drugs, alcohol, weapons, and contact with others.”).

⁷⁵ Sorensen & Pilgrim, *supra* note 23, at 1256.

⁷⁶ 408 U.S. 238, 239–40 (1972) (per curiam).

⁷⁷ Citron, *supra* note 13, at 175. For a history of how the statute was passed, see *id.* at 171–73 (“The thirty-three-year-old work of the 63rd Legislature was the product of circumstances rather than the considered judgment of the legislators, and yet over and over again, in courtrooms from Lubbock to Laredo, defendants are condemned to die by predictions of future dangerousness made by the most dubious of possible ‘experts.’ . . . The time is ripe for reform, and the chance to do better by confronting the issue more democratically should encourage conscientious legislators to heed the call.”). For a history of how death penalty statutes changed after *Furman v. Georgia*, see John W. Poulos, *The*

Texas went in a different direction compared to other states by making future dangerousness not merely a factor, but the dispositive factor.⁷⁸ The state also established a penalty phase, but it did so with vary narrow criteria. Texas's statute requires that in order to impose a death sentence, the jury had to unanimously agree that the defendant was at risk of committing crimes in the future.⁷⁹ So far only Oregon, which rarely imposes the death penalty, has adopted a similar statute.⁸⁰

In a 1992 article in *Law and Human Behavior*, prominent forensic psychiatrists Thomas Grisso and Paul S. Appelbaum (who was at that time president of the APA), explained why so many states have chosen not to adopt similar statutes.⁸¹ Drs. Grisso and Appelbaum reviewed the literature on predicting dangerousness and identified three criteria for using research data to predict future dangerousness.⁸² They are that the individual involved is "similar to the research subjects in the studies from which the predictive model is derived," that "the estimate of risk must be based on types of data comparable to those available in the studies that are being relied upon," and that "the expert's evaluation process and methods by which data are gathered must be sufficiently reliable to assure accurate identification of the relevant characteristics of the individual in question."⁸³ In other words, there had to be a factual basis of comparison between the defendant being evaluated and the participants in the research study.

Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment, 28 ARIZ. L. REV. 143, 148–153 (1986) (explaining how Tennessee's capital sentencing changed after the *Furman* decision).

⁷⁸ See Otero, *supra* note 62, at 3 ("Although *Furman*'s plurality opinion lacked clarity, its effect was enormous—invalidating the death penalty statutes of over thirty-five states and sending legislative bodies into a frenzied scramble to revamp their statutes to meet *Furman*'s mandate.").

⁷⁹ TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2006 & Supp. 2014) ("[The jury determines] whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . .").

⁸⁰ Arizona's governor, Jan Brewer, recently vetoed a bill adding a prediction of future dangerousness as a factor, stating it was a "serious threat to the state's death penalty." Howard Fischer, *Brewer Vetoes Bill Expanding Reasons for Death Penalty*, AZDAILY SUN.COM (Apr. 25, 2014, 5:00 AM), http://azdailysun.com/news/local/govt-and-politics/brewer-vetoes-bill-expanding-reasons-for-death-penalty/article_b84dc4e0-cc3e-11e3-9718-0019bb2963f4.html, archived at <http://perma.cc/V5XW-46BD>.

⁸¹ Thomas Grisso & Paul S. Appelbaum, *Is It Unethical to Offer Predictions of Future Violence?*, 16 LAW & HUM. BEHAV. 621, 628, 629 (1992).

⁸² *Id.* at 628. Both Dr. Grisso and Dr. Appelbaum were at that time leading figures in the field of forensic psychiatry as professors in the University of Massachusetts Medical School's Law and Psychiatry Program. See *Selected Works of Thomas Grisso*, U. MASS. MED. SCH., http://works.bepress.com/thomas_grisso/, archived at <http://perma.cc/4PHH-4LD3> (last visited May 20, 2015). Dr. Appelbaum has been a past president of the APA and the American Academy of Psychiatry and currently is the director of the Division of Law, Ethics and Psychiatry at Columbia University. See *Paul Appelbaum, MD*, COLUM. U. MED. CENTER, http://asp.cumc.columbia.edu/facdb/profile_list.asp?uni=psa21&DepAffil=Psychiatry, archived at <http://perma.cc/3JV9-K4EV> (last visited May 20, 2015).

⁸³ Grisso & Appelbaum, *supra* note 81, at 628.

Predictions of future dangerousness in Texas fail the Grisso and Appelbaum test. To the author's knowledge, there is no peer-reviewed, published research based on a study of defendants who have been convicted of a capital crime and are facing the death penalty. Thus, although Drs. Grisso's and Appelbaum's conclusions support the use of predictions in cases where there is a congruence between the population studied and the individual for whom the prediction is being made, the ethics of making such a prediction "of future violence" in the context of a capital sentencing "are questionable" because they are not based on evidence.⁸⁴

Moreover, the court has rejected recent appeals to review the Texas statute in light of the growing line of cases based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁸⁵ which require those seeking to introduce scientific evidence in both criminal and civil cases to first convince the judge that it is based on a method that can be tested, has been submitted to peer review and publication, has a known error rate, has standards for being done correctly, and is "generally accepted by the scientific community."⁸⁶

IV. HOW CAN MENTAL HEALTH PROFESSIONALS BE STOPPED FROM PROVIDING UNSUBSTANTIATED TESTIMONY ABOUT FUTURE DANGEROUSNESS?

As discussed in Part III, the U.S. Supreme Court has allowed mental health professionals to testify as to future dangerousness of capital defendants despite the strong objections of the APA and American Psychological Association. They have done so because these organizations do not directly regulate professionals, they merely establish standards and guidelines. The professional licensing boards of each state do, however, have the power to determine what is and is not within the boundaries of acceptable professional practice, as well as to discipline the individuals they license who practice outside of these boundaries.

⁸⁴ *Id.* at 628–29.

⁸⁵ 509 U.S. 579 (1993).

⁸⁶ *Id.* at 584, 593–94. Texas has adopted evidentiary standards similar to *Daubert*, although the Texas Court of Criminal Appeals has limited the factors to three: that "the field of expertise is a legitimate one," that "the subject matter of the expert's testimony is within the scope of that field," and that "the expert's testimony properly relies upon and/or utilizes the principles involved in the field." *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998).

A. *Who Regulates the Professional Activities of Mental Health Practitioners?*

In the United States, the right to regulate professionals is reserved to the individual state where the professional works.⁸⁷ That is because a state's power to license mental health providers comes from its "Police Powers" granted by the Tenth Amendment to the U.S. Constitution.⁸⁸ As the Supreme Court explained in *Lawton v. Steele*,⁸⁹ "It is universally conceded to include everything essential to the public safety, health, and morals"⁹⁰

States usually delegate this power to licensing boards made up of professionals but reserve the right to set standards through legislation and regulation.⁹¹ Licensing boards play a role both in overseeing the process of granting licensing and in maintaining them. The decisions of these boards, like all administrative entities, receive significant deference by the courts.⁹² This includes the right to limit the practice of professions to those the board has certified as qualified.⁹³ Texas law is representative in giving licensing boards power to "revoke or suspend a license,"

⁸⁷ See *King v. Governor of N.J.*, 767 F.3d 216, 227, 229, 246–47 (3d Cir. 2014) (upholding a state's right to prohibit counselors from engaging in sexual orientation change efforts) ("The authority of the States to regulate the practice of certain professions is deeply rooted in our nation's jurisprudence. Over 100 years ago, the Supreme Court deemed it 'too well settled to require discussion' that 'the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health.'" (quoting *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910))); see also *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("[I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely").

⁸⁸ U.S. CONST. amend. X.

⁸⁹ 152 U.S. 133 (1894).

⁹⁰ *Id.* at 136 ("Under this power it has been held that the State may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards").

⁹¹ See, e.g., William P. Gunnar, *The Scope of a Physician's Medical Practice: Is the Public Adequately Protected by State Medical Licensure, Peer Review, and the National Practitioner Data Bank?*, 14 ANNALS HEALTH L. 329, 332 (2005) (explaining that the individual states regulate the practice of medicine within their jurisdiction).

⁹² *Id.* at 340–341 ("In sum, state medical licensing boards require a minimal qualification . . . to establish and maintain a medical license. In contrast, a high threshold exists for revocation or suspension of a[n] . . . established medical license." (citations omitted)).

⁹³ For an overview of the justifications for licensing health care providers, see John Lunstroth, *Voluntary Self-Regulation of Complementary and Alternative Medical Practitioners*, 70 ALB. L. REV. 209, 224–26 (2006).

“place on probation a person whose license is suspended,” or “reprimand a license holder” “for any cause for which the board may refuse to admit a person to its examination or to issue or renew a license.”⁹⁴

While a licensing board’s main task is to oversee actions involving patient care, there are exemplary cases of licensing boards disciplining physicians based on expert testimony.⁹⁵ However, given that medical licensure is a matter of state law subject to a widely varying form of “medical practice act,” there is tremendous diversity in the criteria for doing so.⁹⁶ Also, a medical board’s decision to discipline is usually subject to judicial review.⁹⁷ A recent article reviewing the diversity of situations in which physicians have been subject to discipline for testimony, notes that the determining factor is often whether testimony is considered “unprofessional conduct” or “immoral conduct.”⁹⁸ In some instances, the standard of “unprofessional conduct” has been found to be failure to comply with the profession’s ethical standards.⁹⁹

B. The Role of Professional Associations as Compared to Licensing Boards

Professional associations, like the APA, do not play a direct role in licensure. They are affiliative, voluntary organizations whose mission is to set policy and best practices. Many professional associations have standards of conduct for expert

⁹⁴ TEX. OCC. CODE ANN. § 164.001(a) (West 2012).

⁹⁵ Jennifer A. Turner, *Going After the ‘Hired Guns’: Is Improper Expert Witness Testimony Unprofessional Conduct or the Negligent Practice of Medicine?*, 33 PEPP. L. REV. 275, 277 (2006) (concluding, based on a brief review of reported cases, that “medical boards may properly discipline physicians who provide improper testimony in medical malpractice suits,” and defining “improper testimony” as “testimony not based on generally accepted theories about medical science”).

⁹⁶ See Barbara J. Safriet, *Closing the Gap Between Can and May in Health-Care Providers’ Scopes of Practice: A Primer for Policy Makers*, 19 YALE J. ON REG. 301, 306–311 (2002) (reviewing the history of how states became involved in regulating medical practice); see also Gunnar, *supra* note 91, at 357 (reviewing current licensure revocation procedures for physicians and concluding that the current system of regulation is inadequate to prevent the incompetent practice of medicine because “physicians are unable to adequately police themselves” and that “[p]hysicians do not uniformly acknowledge, investigate, and reprimand incompetent physician behavior, despite the immunity and confidentiality extended to peer review activities by state and federal statute”).

⁹⁷ See Gunnar, *supra* note 91, at 340–341 (“[D]ecisions brought against physician under the broad authority of the state medical licensing boards are subject to judicial review.”).

⁹⁸ Turner, *supra* note 95, at 293.

⁹⁹ See Jess Alderman, *Ethical Implications of Physician Involvement in Lawsuits on Behalf of the Tobacco Industry*, 35 J.L. MED. & ETHICS 692, 696–97 (2007) (“While high standards should apply to all expert witnesses, the statements of physicians are of special interest to medical associations because they have implications for the medical profession as a whole. Occupying an ambiguous realm somewhere between obviously unethical falsehoods and objective scientific contributions, doctors’ statements on behalf of the tobacco industry demand the attention of the medical profession.”).

testimony.¹⁰⁰ For example, the American Medical Association (AMA) has an official policy cautioning that “the medical witness must not become an advocate or a partisan in the legal proceeding,” but it is difficult to track how often violations of these codes result in discipline.¹⁰¹ Moreover, being expelled from a professional organization does not affect a medical or mental health professional’s ability to practice. The AMA itself notes that violation of this policy will result in a report “to the appropriate licensing authority.”¹⁰²

In a 2001 case, a neurologist, Dr. Donald C. Austin, challenged the ability of the American Association of Neurological Surgeons (AANS) to discipline him based on expert testimony in which, the AANS concluded, he supported the side who was paying him by telling the jury that a minority view represented the opinion of the majority of neurosurgeons.¹⁰³ This violated a provision of the AANS’s ethical code stating that “an expert witness should testify prudently, must identify as such, personal opinions not generally accepted by other neurosurgeons, and should provide the court with accurate and documentable opinions on the matters at hand.”¹⁰⁴

Upholding the AANS’s right to expel Dr. Austin, Chief Judge Posner of the Seventh Circuit Court of Appeals rejected the defendant’s argument that it was inappropriate for AANS to criticize testimony because the trial judge admitted the testimony. He wrote:

It is no answer that judges can be trusted to keep out such testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field, such as neurosurgery. When a member of a prestigious professional association makes representations not on their face absurd, such as that a majority of neurosurgeons believe that a particular type of mishap is invariably the result of surgical negligence, the judge may have no basis for questioning the belief, even if the defendant’s expert testifies to the contrary.¹⁰⁵

¹⁰⁰ 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 3:14 (2014).

¹⁰¹ Jeff L. Lewin, *Interface with the Legal System Before Trial*, in 1 THE PHYSICIAN’S PERSPECTIVE ON MEDICAL LAW 33, 34 (Howard H. Kaufman & Jeff L. Lewin eds., 1997); Alderman, *supra* note 99, at 697.

¹⁰² Alderman, *supra* note 99, at 697 (citation omitted); *see also* AM. PSYCHIATRIC ASS’N, THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY 1, 22, 23 (2013) (noting that if a member of the APA is found to have violated one of the association’s ethical principles, the finding will be reported “[t]o the medical licensing authority in all states in which the member is licensed”).

¹⁰³ Austin v. Am. Ass’n of Neurological Surgeons, 253 F.3d 967, 970 (7th Cir. 2001).

¹⁰⁴ *Id.* at 971 (internal quotation marks omitted); *see also* Matthew Passen, *Professional-Self Regulation or Witness Intimidation?*, CBA REC., May 2008, at 50, 50–54 (providing an overview of suits by physicians against peer review organizations for disciplinary actions associated with expert testimony).

¹⁰⁵ *Austin*, 253 F.3d at 972–73.

The APA has reported repeatedly that predictions of future dangerousness in the context of a death penalty sentencing hearing are not within the scope of mental health practice.¹⁰⁶ Testimonies about these predictions are therefore not statements of professional opinion even though they are being made by a mental health professional. In terms of evidence, these predictions should not be admitted because though they appear clothed in the guise of expert opinion, they offer the jury no assistance. Courts have repeatedly made just this distinction when barring testimony by mental health professionals about the credibility of witnesses.¹⁰⁷

C. *Looking to the Future of Diagnosing Dangerousness*

Given how little traction defense counsels have achieved in blocking introduction of mental health professional's testimony on the future dangerousness of capital offenders, it will be distressing for them to hear of efforts to bolster such findings through scientific research. Mental health professionals in general, and the authors of the DSM-5 in particular, have often stated: "In the future, we hope to be able to identify disorders using biological and genetic markers that provide precise diagnoses that can be delivered with complete reliability and validity. Yet this promise, which we have anticipated since the 1970s, remains disappointingly distant."¹⁰⁸

Research scientists have eagerly taken on the challenge of finding biomarkers to better predict future dangerousness with the hope of some day making reliable diagnoses. Writing about the efforts to find genetic markers, Professors Erica Beecher-Monas and Edgar Garcia-Rill noted that "predictions of future dangerousness now dominate death penalty sentencing determinations," and expressed "surprise" that "although the stakes are high for their subjects, the predictions receive little judicial or legislative scrutiny. Courts and legislatures are well aware of the unscientific nature of these predictions; nonetheless, they continue to demand them."¹⁰⁹

Dr. David Kupfer, the chair of the DSM-5 Committee, referred to the National Institute of Mental Health's Research Domain Criteria (RDoC) that put a high priority on diagnosing mental illness, as not being able to "[s]erve us in the here and

¹⁰⁶ Otero, *supra* note 62, at 31.

¹⁰⁷ See *United States v. Beasley*, 72 F.3d 1518, 1528 (11th Cir. 1996) (per curiam) ("Absent unusual circumstances, expert medical testimony concerning the truthfulness or credibility of a witness is inadmissible . . . because it invades the jury's province to make credibility determinations."); *United States v. Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1995) ("[A]n expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility." (quoting *United States v. Candoli*, 870 F.2d 496, 506 (9th Cir. 1989))).

¹⁰⁸ Kupfer Press Release, *supra* note 29.

¹⁰⁹ Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 *LAW & CONTEMP. PROBS.* 301, 301-02 (2006).

now” but rather “is a complementary endeavor to move us forward, and its results may someday culminate in the genetic and neuroscience breakthroughs that will revolutionize our field.”¹¹⁰

Many of the most promising areas of scientific research for finding biomarkers to predict human behavior are already being used in criminal trials and the likelihood is this will become much more prevalent. These areas include neuroimaging,¹¹¹ genetics,¹¹² and hormone analysis.¹¹³ However, it is still too early to assess their future impact. As Professors Teneille Brown and Emily Murphy point out in *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant’s Past Mental States*, neurologic testing has not yet reached a point where it may reliably determine a defendant’s past state of mind.¹¹⁴ In the same way, so far genetic evidence has been used as a matching technique, much like fingerprinting, not as a prediction of future behavior.¹¹⁵ At the present, there is no “genetic basis for executing or locking up a violent individual and throwing away the key” because “[g]enetic determinism [finding a genetic characteristic that makes humans violent] is simply unfounded when it comes to complex behavior.”¹¹⁶

A concern common to all of these efforts to find biological indicia of future dangerousness is the unfortunate tendency of forensic science to adopt technologies that purport to predict human behavior but end up being completely discredited.¹¹⁷

¹¹⁰ Kupfer Press Release, *supra* note 29.

¹¹¹ See Abram S. Barth, *A Double-Edged Sword: The Role of Neuroimaging in Federal Capital Sentencing*, 33 AM. J.L. & MED. 501, 506 (2007); Tanneika Minott, *Born This Way: How Neuroimaging Will Impact Jury Deliberations*, 12 DUKE L. & TECH. REV. 219, 219, 228 (2014) (reporting a review of criminal cases in which neuroimaging evidence had been introduced, and concluding “there is a high likelihood that neuroimages can end up having a prejudicial impact on criminal defendants” because it will present them to the jury as “damaged beyond repair”); 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, 899–900 (2009).

¹¹² See Beecher-Monas & Garcia-Rill, *supra* note 109, at 301.

¹¹³ *Id.* at 326–32 (discussing different hormones that could contribute to aggression and a prediction of future dangerousness).

¹¹⁴ Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant’s Past Mental States*, 62 STAN. L. REV. 1119, 1206 (2010) (“[U]ntil fMRI is able to reliably capture past mental states, this evidence should not be admissible for such purposes either under [Federal Rule of Evidence] 403 or under local standards for admissibility of scientific evidence.”).

¹¹⁵ See Lisa G. Aspinwall et al., *The Double-Edged Sword: Does Biomechanism Increase or Decrease Judges’ Sentencing of Psychopaths?*, 337 SCIENCE 846, 846 (2012) (testing whether biomechanism evidence mitigates or aggravates sentencing); Deborah W. Denno, *What Real-World Criminal Cases Tell Us About Genetics Evidence*, 64 HASTINGS L.J. 1591, 1593 (2013) (evaluating a University of Utah study that found psychopathic criminal offenders are more likely to receive a lighter sentence if a judge was aware of genetic and neurobiological explanations for the offender’s psychopathy).

¹¹⁶ Beecher-Monas & Garcia-Rill, *supra* note 109, at 340.

¹¹⁷ See Jennifer S. Bard, *Learning from Law’s Past: A Call for Caution in Incorporating New Innovations in Neuroscience*, 7 AM. J. BIOETHICS 73, 73 (2007).

These predictions of future dangerousness in the absence of any supporting data from similar defendants held in similar conditions are no more credible than claims based phrenology.

V. CONCLUSION

It is difficult to understand why courts continue to admit the testimony of mental health professionals who claim to be able to predict whether or not defendants convicted of capital crimes will be of such a great danger to their community within a maximum-security prison that the only way of ensuring that community's safety is to execute the individual. As this Article has shown, many have suggested that laws such as the one in Texas, which make these predictions a mandatory part of every death penalty hearing, are not really concerned about the community of the maximum-security prison, but are actually intended to suggest to juries that the defendant will be a danger in the free world. Regardless of the intent of these statutes, they are foundationally unconstitutional under contemporary standards of admitting expert testimony since they present the jury with opinion testimony that is outside the scope of mental health practice. The APA is not a mere interest group or professional affiliation society. It plays a substantive role in determining what aspects of human behavior are and are not products of mental illness. Mental health professionals have adopted its taxonomy, codified most recently in the DSM-5, and conduct their practice according to its terms. While individual practitioners may disagree with the standards of their profession, they cannot cloak themselves in its authority. There is no recognized diagnosis associated with future dangerousness, nor is there a recognized method of making such a prediction in a prison population.

In the United States, the licensing of health professionals is left to the states. It is therefore a matter for state licensing boards to step in and sanction testimony by mental health professionals about future dangerousness just as they would sanction treatment that falls outside the bounds of accepted medical practice. Even though these mental health professionals are not providing direct patient care, they are testifying under the authority of their license and therefore should be subject to professional discipline when they do so outside the boundary of professional standards.

So long as there are licensed mental professionals willing to claim an ability to predict future dangerousness of defendants facing long sentences in maximum-security prisons, it is up to state licensing boards to penalize those making these claims just as they would penalize a health care professional who claimed to predict future events through phrenology, voodoo, or mental telepathy.¹¹⁸ For licensing boards to shy away from holding individual practitioners to accepted standards of care while testifying as experts is to shirk the responsibility that the U.S. Constitution

¹¹⁸ See *England v. La. State Bd. of Med. Exam'rs*, 263 F.2d 661, 664 (5th Cir. 1959) (recognizing that "the State has the right to regulate the practice of medicine, and can bar such cults as witch doctors, voodoo queens, bee-stingers, and others" (emphasis omitted)).

delegates to them. And to do so when such testimony is the sole factor between a sentence of death and one of life in prison is an unconscionable dereliction of duty.