

“I SEE WHAT IS RIGHT AND APPROVE, BUT I DO WHAT IS WRONG”: PSYCHOPATHY AND PUNISHMENT IN THE CONTEXT OF RACIAL BIAS IN THE AGE OF NEUROIMAGING

by
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In this Article, we first consider the relevant differences between antisocial personality disorder (ASPD) and psychopathy. Then, we look at the meager cohort of federal sentencing cases in which the issue of psychopathy is even raised, and consider decision-making in this context from the perspective of implicit racial bias. Next, we present some background on the controversy of “psychopathy” diagnosis; here, we share what we call the “inside baseball” about the debate—on the differences between psychopathy and ASPD—that has rocked the world of the psychology academy. We will also analyze how our current ideas about punishment and recidivism could change by using psychopathy research as a case study, and consider how this new research creates extra responsibilities for both lawyers and expert witnesses in their representation of criminal defendants in such cases. Specifically, we will focus on how the use of these terms has a disproportionately negative impact on persons of color, looking closely at the way the instruments that are used to assess these conditions are subject to significant racial bias. Finally, we unpack these issues through the lens of therapeutic jurisprudence, a school of thought that considers the extent to which the legal system can be a therapeutic agent.

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I. INTRODUCTION

Criminology and psychology research have devoted significant attention to individuals diagnosed with either antisocial personality disorder (ASPD), psychopathy, or both.¹ While in the past the terms ASPD and psychopathy were used somewhat interchangeably, and still are by some judges, expert witnesses, and lay people,² researchers today are starting to see that they in fact represent two very different personality types and offending patterns.³

In this Article, we examine this development from a legal perspective, considering what it might mean in terms of punishment for these two personality types based on the different characteristics they display in their actual offenses, their responses to punishment and rehabilitation,⁴ and the extent to which this has any significance for sentencing decisions under the Federal Sentencing Guidelines,⁵ or

¹ See, e.g., Bruce A. Arrigo & Stacey Shipley, *The Confusion Over Psychopathy (I): Historical Considerations*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 325, 327 (2001). Psychopaths make up roughly 1% of the general male adult population. Kent A. Kiehl & Morris B. Hoffman, *The Criminal Psychopath: History, Neuroscience, Treatment, and Economics*, 51 JURIMETRICS 355, 377 (2011).

² 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, 522 (2013).

³ E.g., L.E. Drislane et al., *Reduced Cortical Call to Arms Differentiates Psychopathy from Antisocial Personality Disorder*, 43 PSYCHOL. MED. 825, 832 (2013).

⁴ E.g., Wayland & O'Brien, *supra* note 2, at 526–27. For what is apparently the first mention in the legal literature, see Abe Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 926, 945–46 (1961).

⁵ The Guidelines were formerly mandatory, *see* *Mistretta v. United States*, 488 U.S. 361, 367 (1989), but are now advisory, *see* *United States v. Booker*, 543 U.S. 220, 245–46 (2005). A lower sentence “may be warranted” to reflect the extent to which the reduced mental capacity contributed to the commission of the offense, as long as the defendant’s criminal history does not “indicate[] a need to incarcerate the defendant to protect the public[.]” U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 5k2.13 (2011) [hereinafter MANUAL 2011]. See generally Michael L. Perlin, *“I Expected It to Happen/I Knew He’d Lost Control”: The Impact of PTSD on Criminal Sentencing After the Promulgation of DSM-5*, 2015 UTAH L. REV. 881, 884–85 (2015); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*, § 16-2 (3d ed. 2016) (2020 update).

state laws that have adopted, in large part, the Guidelines.⁶ We also seek to unpack the ways that implicit racial bias can have an impact on sentencing decision making.

Current research estimates that one in five violent offenders can be classified as a psychopath,⁷ a term fraught with controversy,⁸ and one excluded from the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM V).⁹ However, this category of offenders presents dramatically different characteristics than the category of individuals with antisocial personality disorder, a characterization that is often incorrectly conflated with psychopathy.¹⁰ Emerging research using neuroimaging¹¹ is demonstrating that the brain of a psychopath responds differently to punishment than the brains of other non-psychopathic criminal offenders.¹² As

⁶ See, e.g., Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 697 (1995); Robert P. Mosteller, *New Dimensions in Sentencing Reform in the Twenty-First Century*, 82 OR. L. REV. 1, 17–18 (2003). Some states have adopted the Federal Sentencing Guidelines almost verbatim, some have created other guidelines, and some have no guidelines. See, e.g., Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 679–82 (1992) (describing differences between the state guideline systems and the Federal Sentencing Guidelines).

⁷ Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1223 n.91 (2000).

⁸ On the impact of media stigma on cases involving individuals characterized as “psychopaths,” see Bang Thi, *The Psychopath’s Double-Edged Sword: How Media Stigma Influences Aggravating and Mitigating Circumstances in Capital Sentencing*, 26 S. CAL. REV. L. & SOC. JUST. 173, 175–78 (2017).

⁹ This exclusion is discussed in Deborah W. Denno, *What Real-World Criminal Cases Tell Us About Genetics Evidence*, 64 HASTINGS L.J. 1591, 1596–99 (2013).

¹⁰ See, e.g., Jennifer L. Skeem & David J. Cooke, *Is Criminal Behavior a Central Component of Psychopathy? Conceptual Directions for Resolving the Debate*, 22 PSYCHOL. ASSESSMENT 433, 441–42 (2010).

¹¹ See, e.g., Hannah L. Bedard, *The Potential for Bioprediction in Criminal Law*, 18 COLUM. SCI. & TECH. L. REV. 268, 283 (2017); see also Elizabeth Ford & Neil Aggarwal, *Neuroethics of Functional Neuroimaging in the Courtroom*, in NEUROIMAGING IN FORENSIC PSYCHIATRY: FROM THE CLINIC TO THE COURTROOM 325, 334 (Joseph R. Simpson ed., 2012) (“One can easily imagine the introduction of neuroimaging evidence about psychopathy to aid in the prediction of future dangerousness. Will the police request a warrant to search your brain?”) (footnote omitted); Stephen J. Morse, *Brain Overclaim Redux*, 31 L. & INEQ. 509, 512 (2013) (“Despite the astonishing advances in neuroimaging and other neuroscientific methods, we still do not have sophisticated causal knowledge of how the brain works generally, and we have little information that is legally relevant.”).

¹² E.g., R.J.R. Blair, *Subcortical Brain Systems in Psychopathy: The Amygdala and Associated Structures*, in HANDBOOK OF PSYCHOPATHY 296, 298 (Christopher J. Patrick ed., 2006). One must be aware of the limitations of neuroimaging. “[A] person’s brain and his environment work together to form his behavior—the brain alone is not determinative.” Ellen G. Koenig, *A Fair Trial: When the Constitution Requires Attorneys to Investigate Their Clients’ Brains*, 41 FORDHAM URB. L.J. 177, 198 (2013); see also *id.* at 198–99 (“[A] fully functioning ‘normal’ person may have a brain that looks the same as a sociopath’s.”). There is still so much not known about the

the philosophers Luca Malatesti and John McMillan have noted, “psychopaths appear to have deficits in a type of instrumental learning that involves learning both to respond to stimuli that give rise to reward and to avoid responding to stimuli that give rise to punishment.”¹³

As research continues, it is critical for attorneys, mental health professionals, judges, forensic witnesses, criminologists, and criminal justice scholars to begin thinking about the extent to which brain science should affect our modern views of punishment, and whether individuals should be punished in different ways based on their diagnosis or neurophysiology.¹⁴ This is not a topic that has been the subject of substantial contemporaneous legal analysis, and we hope that this Article invigorates the conversation.¹⁵

relationship between psychopathy and certain behaviors. See, e.g., Kevin S. Douglas et al., *Relation of Antisocial and Psychopathic Traits to Suicide-Related Behavior Among Offenders*, 32 L. & HUM. BEHAV. 511, 512 (2008) (“Scant empirical work has examined the relation between psychopathy and suicidal behavior.”).

¹³ Luca Malatesti & John McMillan, *Defending PCL-R*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY 79, 85 (Luca Malatesti & John McMillan eds., 2010). Psychopaths also are impaired in some forms of associative learning, particularly stimulus-reinforcement learning. See D.G.V. Mitchell et al., *Instrumental Learning and Relearning in Individuals with Psychopathy and in Patients with Lesions Involving the Amygdala or Orbitofrontal Cortex*, 20 NEUROPSYCHOLOGY 280, 287–88 (2006).

¹⁴ See, e.g., Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 127 (2009) (noting “most adult-punishment challenges referencing brain science have failed”). On the use of recent developments in brain science in juvenile policy reform, see generally Jennifer Skeem et al., *Justice Policy Reform for High-Risk Juveniles: Using Science to Achieve Large-Scale Crime Reduction*, 10 ANN. REV. CLINICAL PSYCHOL. 709 (2014). In an earlier article, Skeem and other colleagues noted that, “[i]n U.S. and Canadian courts, diagnoses of psychopathy also are being used to justify decisions to try and sentence juvenile offenders in the adult criminal justice system, typically based on the presumption that psychopathy is untreatable.” Jennifer Skeem et al., *Psychopathic Personality and Racial/Ethnic Differences Reconsidered: A Reply to Lynn (2002)*, 35 PERSONALITY & INDIVIDUAL DIFFERENCES 1439, 1455 (2003) [hereinafter Skeem et al., *Psychopathic Personality*] (citing, *inter alia*, Ivan Zinger & Adelle E. Forth, *Psychopathy and Canadian Criminal Proceedings: The Potential for Human Rights Abuses*, 40 CAN. J. CRIMINOLOGY 237, 255 (1998)).

¹⁵ Beyond the scope of this Article, but of great significance, is the way that the psychopathy construct is increasingly being applied as a predictor of dangerousness. See, e.g., John R. Anderson et al., *Psychopathy, Self-Identified Race/Ethnicity, and Nonviolent Recidivism: A Longitudinal Study*, 42 L. & HUM. BEHAV. 531, 532 (2018); David DeMatteo & John F. Edens, *The Role and Relevance of the Psychopathy Checklist—Revised in Court: A Case Law Survey of U.S. Courts (1991–2004)*, 12 PSYCHOL. PUB. POL’Y & L. 214, 219–20, 226 (2006); Lisa Ells, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 COLUM. L. REV. 158, 182–83 (2005); Zach Walsh, *Psychopathy and Criminal Violence: The Moderating Effect of Ethnicity*, 37 L. & HUM. BEHAV. 303, 303 (2013); Wayland & O’Brien, *supra* note 2, at 545.

This has been most prominent in assessments of whether certain individuals convicted of sex

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The title of this Article comes from Anthony Burgess’s *A Clockwork Orange*.¹⁶ There, Burgess captured the mindset of someone who could “fit” the psychopath profile: an individual who very clearly can make determinations about right and wrong and can understand his behavior in the context of society, but consciously chooses to do the opposite.¹⁷ In practice, this is the type of defendant for whom punishment becomes a difficult task. Can this kind of person be rehabilitated? In Burgess’s novel, the main character, Alex, is subject to a series of brutal “re-education” techniques to try and “set him straight.”

We emphatically are *not* advocating for any dystopian retributivist schemes, but we are interested in questions of whether new scientific discoveries can help devise a way to treat individuals who present with Alex-like psychopathic tendencies. Can we teach someone to know what is right and act on that instead? And can we do it in a way that is free of racial bias?

offenses are likely to be “sexually violent predators.” See, e.g., John Q. La Fond, *Washington’s Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 655 (1992); Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota’s Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1283 (1998). Importantly, psychopathic traits are required to be assessed in some states during civil commitment evaluations of sexually violent predators. See Daniel C. Murrie et al., *Does Interrater (Dis)Agreement on Psychopathy Checklist Scores in Sexually Violent Predator Trials Suggest Partisan Allegiance in Forensic Evaluations?*, 32 L. & HUM. BEHAV. 352, 354 (2008). On the use of the Psychopathy Checklist-Revised (PCL-R) in such cases, see *infra* text accompanying note 122.

¹⁶ ANTHONY BURGESS, *A CLOCKWORK ORANGE* (1962).

¹⁷ *Id.* at 8–13.

II. BACKGROUND ON CONTROVERSY OF “PSYCHOPATHY” DIAGNOSIS

Psychopathy does not appear in any iteration of the DSM.¹⁸ The DSM *does* include a diagnosis for antisocial personality disorder (ASPD). One key diagnostic threshold for ASPD according to the DSM is habitually violating the rights of others without remorse,¹⁹ but again, the DSM does not include a definition of “psychopathy.” Importantly, however, psychopathy as a diagnosis is often conflated with antisocial personality disorder by laypeople, expert witnesses, judges and lawyers.²⁰ A commentary on the most recent version of the DSM, by way of example, notes: “The terms psychopathy or sociopathy are also used, in some contexts synonymously, in others, sociopath is differentiated from a psychopath, in that a sociopathy is rooted in environmental causes, while psychopathy is genetically based.”²¹ However, the two descriptors actually imply different offending styles and mindsets.

¹⁸ See *supra* note 9 and accompanying text.

¹⁹ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 559 (5th ed. 2013) [hereinafter DSM-5]; see Gillian Bendelow, *Ethical Aspects of Personality Disorders*, 23 CURR. OPINION PSYCHIATRY 546, 547 (2010) (noting personality disorders lie “on the contested boundaries between mental illness and social deviance”).

²⁰ See, e.g., State v. Donald DD., 21 N.E.3d 239, 245 n.3 (N.Y. 2014) (“[B]oth experts opined that Donald DD. suffered from an extreme form of ASPD known as psychopathy.”). For an in-depth discussion of this case, see generally Kaitlyn Walsh, *Antisocial Personality Disorder and Donald DD.: Distinguishing the Sex Offender from the Typical Recidivist in the Civil Commitment of Sex Offenders*, 44 FORDHAM URB. L.J. 867 (2017). For other examples of psychopathy/antisocial personality disorder conflation, see also State v. Williams, 31 N.Y.S.3d 362, 364–65 (2016) (“Petitioner’s experts also diagnosed respondent with psychopathy, which they described as a condition wherein respondent has the traits of ASPD to an extreme degree.”); State v. Kareem M., No. 30006/2014, slip op. at *32 (N.Y. Sup. Ct. Mar. 29, 2016) (explaining “the diagnosis of ASPD with psychopathy is not materially different from the diagnosis of ASPD alone”).

²¹ David Porter, *Antisocial Personality Disorder DSM-5 301.7 (F60.2)*, THERAVIVE, [https://www.theravive.com/therapedia/antisocial-personality-disorder-dsm--5-301.7-\(f60.2\)](https://www.theravive.com/therapedia/antisocial-personality-disorder-dsm--5-301.7-(f60.2)) (last visited May 26, 2021). On the improper conflation of psychopathy and sociopathy, see generally Stephen H. Dinwiddie, *Psychopathy Versus Sociopathy*, 45 PSYCHIATRIC ANNALS 165 (2015). For examples differentiating sociopathy and psychopathy, see William Waller, “*Criminal Insanity, Diagnosis, and Public Morality*,” 4 WASH. U. JURIS. REV. 183, 184 n.3 (2011) (quoting Maya Meital, *The Criminal Responsibility of Psychopathic Offenders*, 36 ISR. L. REV. 103, 105 (2002)) (“Some of the psychiatric literature notes different connotations for sociopathy and psychopathy: for instance, sociopathy describes a behavioral disorder found in the DSM, whereas psychopathy ‘emphasizes personality traits, such as lack of empathy.’”); see also Anthony Walsh & Huei-Hsia Wu, *Differentiating Antisocial Personality Disorder, Psychopathy, and Sociopathy: Evolutionary, Genetic, Neurological, and Sociological Considerations*, 21 CRIM. JUST. STUD. 135, 135 (2008) (“[P]sychopaths are a stable proportion of any population, can be from any segment of society, may constitute a distinct taxonomical class forged by frequency-dependent natural selection, and that the muting of the social emotions is the proximate mechanism that enables psychopaths to

Also, any discussion of these descriptors must confront the nature/nurture dilemma that has befuddled scholars and mental health professionals for decades.²²

A. Differences Between Conduct Disorder/ASPD and Psychopathy

While not often discussed publicly in the context of cases, convictions, or lay-person analysis of the interplay between law and mental health, there are distinctions that must be made between the DSM-5 diagnosis of sociopathy, and the less clinically-recognized labeling of psychopathy.

Both are a form of antisocial personality disorder, according to the American Psychiatric Association in its DSM-5 manual.²³ These disorders share the following traits: propensity for violence, a remorseless mind, indifference to others' rights and not caring about ethical behavior or laws.²⁴ But, there are differences,²⁵ and per Professor Stephen Morse, "[p]sychopathy must be distinguished from Antisocial Personality Disorder."²⁶ The terms "represent distinct concepts that are frequently (and erroneously) used interchangeably."²⁷

As we have noted in a recent article, "the term 'psychopath' has a confusing, muddled history in clinical psychology and psychiatry[,] [and is] [o]ften conflated

pursue their self-centered goals without feeling the pangs of guilt. Sociopaths are more the products of adverse environmental experiences that affect autonomic nervous system and neurological development."). On how sociopaths do have "a sense of morality," see Jack Pement, *Psychopathy Versus Sociopathy: Why the Distinction Has Become Crucial*, 18 AGGRESSION & VIOLENT BEHAV. 458, 459 (2013).

²² For a sampling of the literature, see, for example, Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less when Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811 (2004); Jane Rutherford, *Juvenile Justice Caught Between The Exorcist and A Clockwork Orange*, 51 DEPAUL L. REV. 715 (2002); Justin Schwartz, *It Ain't Necessarily So: The Misuse of "Human Nature" in Law and Social Policy and the Bankruptcy of the "Nature-Nurture" Debate*, 21 TEX. J. WOMEN & L. 187 (2012); Robert Plomin & Kathryn Asbury, *Nature and Nurture: Genetic and Environmental Influences on Behavior*, 600 ANNALS AM. ACAD. POL. & SOC. SCI. 86 (2005).

²³ Richard P. Conti, *Psychopathy, Sociopathy, and Antisocial Personality Disorder*, 2 FORENSIC RES. & CRIMINOLOGY INT'L J. 53, 53 (2016).

²⁴ Kristy A. Fisher & Manassa Hany, *Antisocial Personality Disorder*, STATPEARLS (Dec. 8, 2020), <https://www.ncbi.nlm.nih.gov/books/NBK546673/>.

²⁵ See, e.g., Abraham L. Halpern, *The Insanity Verdict, the Psychopath, and Post-Acquittal Confinement*, 24 PAC. L.J. 1125, 1140 n.68 (1993) ("Antisocial Personality Disorder criteria do not distinguish the callous, remorseless, and manipulative psychopath from other antisocial individuals."). Dr. Halpern wrote this when a prior version of DSM was being used.

²⁶ Stephen J. Morse, *Protecting Liberty and Autonomy: Desert/Disease Jurisprudence*, 48 SAN DIEGO L. REV. 1077, 1095 (2011).

²⁷ Wayland & O'Brien, *supra* note 2, at 547; see also Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 566 (1995) ("People with what is now known as antisocial personality disorder previously were called *sociopaths*, *psychopaths*, or *moral imbeciles*.").

with antisocial personality disorder.”²⁸ This conflation has created much of the dilemma we face today. We explore this confusion in the next Section.

B. Clinical Presentations of Sociopathy and Psychopathy

There is a great deal more known about the diagnosis of sociopathy, since it has appeared in past iterations of the DSM, all the way up through and including the current edition. While there is some conflation between sociopathy and psychopathy in clinical literature, the DSM is very clear about what it requires in order for the diagnosis of antisocial personality disorder to be made.

Antisocial Personality Disorder is defined as:

a deeply ingrained and rigid dysfunctional thought process that focuses on social irresponsibility with exploitive, delinquent, and criminal behavior with no remorse. Disregard for and the violation of others’ rights are common manifestations of this personality disorder, which displays symptoms that include failure to conform to the law, inability to sustain consistent employment, deception, manipulation for personal gain, and incapacity to form stable relationships.²⁹

Antisocial personality disorder falls into Cluster B in DSM-5’s categorization of personality disorders.³⁰ Others included in that cluster are borderline, narcissistic, and histrionic.³¹ Tellingly, all of these disorders characteristically present with “dramatic, emotional, and unpredictable interactions with others.”³² Of particular interest for purposes of this Article, antisocial personality disorder is the only one that cannot be diagnosed in childhood.³³ This may be due to research about the organic locus of many behaviors that can manifest as part of ASPD, and a better understanding of the changes that a juvenile brain goes through (potentially even mimicking criteria for an ASPD diagnosis) before full frontal lobe development around age 25.³⁴ In fact, recent examination of what is known about the neurological correlates

²⁸ See Michael L. Perlin & Alison J. Lynch, “*In the Wasteland of Your Mind*”: *Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM L. 304, 336 n.105 (2016). On this conflation, see also Norman Poythress et al., *Identifying Subtypes Among Offenders with Antisocial Personality Disorder: A Cluster-Analytic Study*, 119 J. ABNORMAL PSYCHOL. 389, 390 (2010).

²⁹ Fisher & Hany, *supra* note 24; see also Donald W. Black, *The Natural History of Antisocial Personality Disorder*, 60 CAN. J. PSYCHIATRY 309, 309 (2015).

³⁰ Fisher & Hany, *supra* note 24.

³¹ *Id.*

³² *Id.*; see also Darryl A. Regier et al., *The DSM-5: Classification and Criteria Changes*, 12 WORLD PSYCHIATRY 92, 94 (2013).

³³ Denise Schipani, *Conduct Disorder in Children*, EVERYDAY HEALTH (Feb. 28, 2020), <https://www.everydayhealth.com/antisocial-personality-disorder/conduct-disorder-children/>.

³⁴ On juvenile brain development in the context of criminal sentencing, see Michael L. Perlin & Alison J. Lynch, “*Some Mother’s Child Has Gone Astray*”: *Neuroscientific Approaches to a*

of ASPD have led some researchers to argue that individuals with ASPD must be characterized both biologically and cognitively in order to ensure a more accurate and appropriate diagnosis and treatment.³⁵

As this research continues to develop, it appears clear that many agree both genetic and environment factors have been found to have a part in the development of ASPD. There have been studies on heritability—some estimating that it could be up to 69% heritable³⁶—as well as environmental factors such as abuse, neglect, and other adverse childhood experiences.³⁷

Biological research has picked up on pinpointing potentially contributing genes, with some studies reviewing genetic and environmental interactions as a factor,³⁸ and others looking more towards specific genetic factors.³⁹ Research has begun to parse out more specific characteristics for both groups, finding that there are important distinctions to be made, both based on diagnosable symptoms as well as neurology. Importantly, research devoted to studying psychopathy has branched out on its own and has separated from research on ASPD,⁴⁰ so it is important to understand these distinctions that have emerged.

The DSM-V states that “deceit and manipulation are [also] central features” of ASPD, which is further characterized by a pervasive pattern of disregard for the

Therapeutic Jurisprudence Model of Juvenile Sentencing, FAM. CT. REV. (forthcoming 2021).

³⁵ Inti A. Brazil et al., *Classification and Treatment of Antisocial Individuals: From Behavior to Biocognition*, 91 NEUROSCI. & BIOBEHAV. REV. 259, 273 (2018).

³⁶ Amy Smith, *What is Antisocial Personality Disorder?*, MED. NEWS TODAY (Sept. 29, 2020), <https://www.medicalnewstoday.com/articles/320142>.

³⁷ Matt DeLisi et al., *The Etiology of Antisocial Personality Disorder: The Differential Roles of Adverse Childhood Experiences and Childhood Psychopathology*, 92 COMPREHENSIVE PSYCHIATRY 1, 1 (2019).

³⁸ David E. Comings, *Both Genes and Environment Play a Role in Antisocial Behavior*, 15 POL. & LIFE SCI. 84, 84 (1996).

³⁹ Research has turned toward the 2p12 region of chromosome 2, and variation within AVPR1A as specific genetic contributions. Iro Fragkaki et al., *Oxytocin Receptor Gene (OXTR) and Deviant Peer Affiliation: A Gene-Environment Interaction in Adolescent Antisocial Behavior*, 48 J. YOUTH & ADOLESCENCE 86, 86 (2019). There has been a great amount of research focused on the environmental factors that might lead to a propensity to develop ASPD. See, e.g., Tom Rosenström et al., *Genetic and Environmental Structure of DSM-IV Criteria for Antisocial Personality Disorder: A Twin Study*, 47 BEHAV. GENETICS 265, 272 (2017). However, in order to embrace a fuller, complete understanding of the diagnosis and its exact effects, both through neurology and observable behavior, it is equally important to understand the genetic predispositions that may be at play. See, e.g., M-R Rautiainen et al., *Genome-Wide Association Study of Antisocial Personality Disorder*, TRANSLATIONAL PSYCHIATRY, 2016, at 8.

⁴⁰ See, e.g., Kate Kelland, *Study Finds Psychopaths Have Distinct Brain Structure*, REUTERS (May 7, 2012, 1:05 PM), <https://www.reuters.com/article/us-brains-psychopaths/study-finds-psychopaths-have-distinct-brain-structure-idUSBRE8460ZQ20120507>.

rights of other people that often manifests as hostility and/or aggression.⁴¹ However, while the psychopath does not experience feelings of remorse for these behaviors, someone with ASPD may be capable of feeling guilt or regret (even though he will continue to violate social norms without hesitation if it serves his own desire or purpose).⁴² Someone with true psychopathic traits has these characteristics “and more.”⁴³ Features of psychopathic personality also include a strong need for stimulation, a complete lack of remorse or guilt (rather than a lack of respect for the recognized rights of others that may be violated), cunning and manipulateness, and a “[p]arasitic lifestyle.”⁴⁴ Psychopaths are impulsive, self-centered, aggressive, and opportunistic. Tedium and routine are “unendurable,” which leads to increasingly risky behaviors in order to alleviate boredom and find pleasure in the thrill of potentially dangerous consequences.⁴⁵

Some describe a sociopath as the rudimentary or undeveloped psychopath.⁴⁶ Psychopaths, by this view, simply cannot form emotional bonds with other humans.⁴⁷ They lack empathy entirely,⁴⁸ but they can trick people into thinking they are capable of making complex emotional connections based on their intelligence

⁴¹ DSM-5, *supra* note 19, at 659.

⁴² Pamela R. Perez, *The Etiology of Psychopathy: A Neuropsychological Perspective*, 17 *AGGRESSION & VIOLENT BEHAV.* 519, 520 (2012).

⁴³ *Id.*

⁴⁴ DAVID T. LYKKEN, *THE ANTISOCIAL PERSONALITIES* 126 (1995).

⁴⁵ Laurence Miller, *Neuropsychology of the Aggressive Psychopath: An Integrative Review*, 13 *AGGRESSION & VIOLENT BEHAV.* 119, 119 (1987).

⁴⁶ See, e.g., Robert Siciliano, *Psychopath vs. Sociopath: What's the Difference?*, HUFFPOST (Nov. 24, 2014), https://www.huffpost.com/entry/what-is-a-sociopath_b_5877160.

⁴⁷ On the ways that prosecutors label defendants as psychopaths so as to convey to jurors that they are somehow not “fully human,” see Robert J. Smith, *Forgetting Furman*, 100 *IOWA L. REV.* 1149, 1190 n.251 (2015).

⁴⁸ “[Psychopaths] possess an acute lack of empathy, as well as a diminished capacity for aversive conditioning that would ordinarily suppress aggressive behavior.” Adam R. Fox et al., *Psychopathy and Culpability: How Responsible Is the Psychopath for Criminal Wrongdoing?*, 38 *L. & SOC. INQUIRY* 1, 7 (2013) (citing R.J.R. Blair, *Applying a Cognitive Neuroscience Perspective to the Disorder of Psychopathy*, 17 *DEV. & PSYCHOPATHOLOGY* 865, 875 (2005)); see also M. Eve Hanan, *Remorse Bias*, 83 *MO. L. REV.* 301, 311 (2018) (citing RICHARD WEISMAN, *SHOWING REMORSE: LAW AND THE SOCIAL CONTROL OF EMOTION* 60 (2014)) (“A psychopathic person is characterized, in part, as someone who does not feel ‘[r]emorse, shame, empathy, or guilt’ for his misdeeds.”). For the neurological perspective on empathy, see Elayne E. Greenberg, *Bridging Our Justice Gap with Empathic Processes that Change Hearts, Expand Minds About Implicit Discrimination*, 32 *OHIO ST. J. ON DISP. RESOL.* 441, 458 (2017).

and ability to manipulate.⁴⁹ Similar to the protagonist of the Burgess book, they see what is right, but choose to do the opposite.⁵⁰

Recent research reveals some other subtle differences. A study by Dr. N.C. Venables and his colleagues found that *boldness* is central to diagnostic conceptions of psychopathy and distinguishes psychopathy from the more prevalent diagnosis of ASPD.⁵¹ Dr. James Blair and his colleagues distinguish between those who suffer from Conduct Disorder or Antisocial Personality Disorder (also known as “functional psychopaths”) and the smaller class of “real” psychopaths, whose disorder has a neurobiological underpinning.⁵² At least one study has concluded that the “boldness concept is viewed as an important component of psychopathy, particularly among professionals who work directly with offender populations.”⁵³

Additionally, research into psychopathy has shown that psychopaths have reduced gray matter in their frontal lobes,⁵⁴ increased striatal volume,⁵⁵ abnormal asymmetry in the hippocampus,⁵⁶ a larger corpus callosum,⁵⁷ abnormal activity in

⁴⁹ On “[a]wareness of psychopaths’ purported skills at deceiving people in the community,” see Norman G. Poythress et al., *The Relationship Between Psychopathic Personality Features and Malingering Symptoms of Major Mental Illness*, 25 L. & HUM. BEHAV. 567, 568 (2001).

⁵⁰ BURGESS, *supra* note 16, at 13.

⁵¹ N.C. Venables et al., *Differentiating Psychopathy from Antisocial Personality Disorder: A Triarchic Model Perspective*, 44 PSYCHOL. MED. 1005, 1012 (2014); see also Jason R. Hall et al., *Development and Validation of Triarchic Construct Scales from the Psychopathic Personality Inventory*, 26 PSYCHOL. ASSESSMENT 447, 458 (2014) (noting “boldness may play a role in differentiating psychopathy from ASPD”); Tina D. Wall et al., *Boldness Explains a Key Difference Between Psychopathy and Antisocial Personality Disorder*, 22 PSYCHIATRY PSYCHOL. & L. 94 (2015) (same).

⁵² Lene Bomann-Larsen, *Revisionism and Desert*, 4 CRIM. L. & PHIL. 1, 13, n.20 (2010) (citing JAMES BLAIR ET AL., *THE PSYCHOPATH EMOTION AND THE BRAIN* 16–17 (2005)).

⁵³ Karolina Sörman et al., *Boldness and Its Relation to Psychopathic Personality: Prototypicality Analyses Among Forensic Mental Health, Criminal Justice, and Layperson Raters*, 40 L. & HUM. BEHAV. 337, 337 (2016).

⁵⁴ Jürgen L. Müller et al., *Gray Matter Changes in Right Superior Temporal Gyrus in Criminal Psychopaths. Evidence from Voxel-Based Morphometry*, 163 PSYCHIATRY RES. 213 (2008); Yaling Yang et al., *Morphological Alterations in the Prefrontal Cortex and the Amygdala in Unsuccessful Psychopaths*, 119 J. ABNORMAL PSYCHOL. 546 (2010).

⁵⁵ Andrea L. Glenn et al., *Increased Volume of Striatum in Psychopathic Individuals*, 67 BIOLOGICAL PSYCHIATRY 52 (2010).

⁵⁶ Mikko P. Laakso et al., *Psychopathy and the Posterior Hippocampus*, 118 BEHAV. BRAIN RES. 187 (2001).

⁵⁷ Adrian Raine et al., *Corpus Callosum Abnormalities in Psychopathic Antisocial Individuals*, 60 ARCHIVES GEN. PSYCHIATRY 1134 (2003).

the anterior cingulate cortex,⁵⁸ and deformations within the amygdala.⁵⁹ Many of these abnormalities are associated with interruptions to development in early stages of life.

Many theories already exist for development of antisocial behavior patterns based on childhood abuse and trauma. However, researchers are still investigating how and why individuals develop psychopathic, rather than sociopathic, patterns of behavior.

While some researchers believe that psychopathy is the result of faulty brain “wiring,” more and more experts are beginning to claim that sociopathy is the result of “bad upbringing.”⁶⁰ Since “genetics” is not responsible for sociopathy, these individuals do possess the ability to empathize and love, but with more limited capacity. As more is learned about the differences between the two disorders, it is even more important to continue distinguishing them in research and in devising appropriate punishment structures for these individuals.

A discussion of the technical neurological differences, however, must be contextualized in the background about the history of psychopathy as a diagnosis, and the tension that has played out behind the scenes in the research that now centers around how psychopathy is to be assessed.

In the next Section, we turn to the interrelationship between the designation of psychopathy, sentencing standards, and questions of racial bias.

III. PSYCHOPATHY, FEDERAL SENTENCING, AND ISSUES OF RACE⁶¹

There can no longer be any question that issues of race are essential in efforts to understand criminal sentencing. A slew of studies make clear that, despite federal sentencing guidelines intended to eliminate disparities in sentencing,⁶² unexplained disparities in sentencing lengths exist between defendants of different races,⁶³ and

⁵⁸ Kent A. Kiehl et al., *Limbic Abnormalities in Affective Processing by Criminal Psychopaths as Revealed by Functional Magnetic Resonance Imaging*, 50 SOC'Y BIOLOGICAL PSYCHIATRY 677 (2001).

⁵⁹ *Id.*

⁶⁰ E.g., Mary Elizabeth Putnick, *The State as Parent: Using Attachment Theory to Develop Child Welfare Policy in the Best Interest of the Child*, 24 N.Y.U. REV. L. & SOC. CHANGE 419, 439 (1998) (stating that attachment researchers have found “that the disruption of relationships in childhood is a significant predictor of . . . sociopathic personality”); Leona D. Jochnowitz, *Missed Mitigation: Counsel's Evolving Duty to Assess and Present Mitigation at Death Penalty Sentencing*, 43 CRIM. L. BULL. 3, 15 (2007) (“Counsel should not accept a psychological designation that his client is sociopathic, without further investigation of his childhood history.”).

⁶¹ Text accompanying notes 66–90 *infra* is partially adapted from PERLIN & CUCOLO, *supra* note 5, § 16-2.

⁶² See *infra* note 70.

⁶³ See, e.g., David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence*

that the guidelines may even contribute to racial disparities.⁶⁴ As Professor Mark Osler has pointed out, “racial bias moves freely and unobserved, abetted by the operation of mandatory minimums and sentencing guidelines triggered by prosecutors’ choices.”⁶⁵ What, then, is the “back story” on the creation of these guidelines, and how does all this relate to the designation of a criminal defendant as a “psychopath”?

In response to criticisms of indeterminate sentencing,⁶⁶ Congress passed the 1984 Sentencing Reform Act,⁶⁷ in an attempt to bring about a measure of regularity and uniformity in federal sentencing procedures.⁶⁸ Under this law, a Sentencing Commission was created,⁶⁹ which was mandated to promulgate Sentencing Guidelines in accordance with the Act.⁷⁰ The constitutionality of these Guidelines—a binding set of rules that courts must use in imposing sentences⁷¹—was initially upheld by the Supreme Court in *Mistretta v. United States*.⁷²

Under the Guidelines, a sentencing court initially was allowed to depart from the prescribed ranges where “the defendant committed the offense while suffering from significantly reduced mental capacity” not resulting from voluntary use of

from the U.S. Federal Courts, 44 J.L. & ECON. 285 (2001).

⁶⁴ See, e.g., Jennifer Skeem et al., *Impact of Risk Assessment on Judges’ Fairness in Sentencing Relatively Poor Defendants*, 44 L. & HUM. BEHAV. 51, 52 (2020) (citing Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations?*, 38 CRIME & JUST. 201 (2009)); Ryan D. King & Michael T. Light, *Have Racial and Ethnic Disparities in Sentencing Declined?*, 48 CRIME & JUST. 365, 416–17 (2019) (“Mandatory minimum statutes and sentencing guidelines may encode racial biases[.]”).

⁶⁵ Mark Osler, *Short of the Mountaintop: Race Neutrality, Criminal Law, and the Jericho Road Ahead*, 49 U. MEM. L. REV. 77, 79 (2018).

⁶⁶ See *Mistretta v. United States*, 488 U.S. 361, 365–66 (1989) (discussing sentencing disparities).

⁶⁷ See 18 U.S.C. §§ 3551(b), 3742 (1988); 28 U.S.C. §§ 991, 998 (1988). See generally Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

⁶⁸ Subsequently, Congress has passed the First Step Act to reduce federal prison sentences for certain types of nonviolent offenses by curbing the use of mandatory-minimum sentences and expanding early-release options for prisoners who complete rehabilitative programs in prison. See generally First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified in scattered sections of 21 U.S.C.). This law has been characterized—we believe in an accurate way—by a retired appellate court judge in Massachusetts as “modest in its reach.” See James F. McHugh III, *A Smarter Path to Public Safety*, 100 MASS. L. REV. 81, 82 (2019).

⁶⁹ See 28 U.S.C. § 991.

⁷⁰ See 28 U.S.C. § 994(a)(1) (1988).

⁷¹ See *id.* Under the Act, a series of permissible sentencing ranges is created for each federal criminal offense. See 28 U.S.C. § 994(b)(1)–(2) (1988).

⁷² *Mistretta v. United States*, 488 U.S. 361, 412 (1989). See generally, e.g., Ilene H. Nagel, *Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990).

drugs or other intoxicants.⁷³ In such cases, a lower sentence “may be warranted” to reflect the extent to which the reduced mental capacity contributed to the commission of the offense, as long as the defendant’s criminal history does not indicate a need for incarceration to protect the public.⁷⁴

In April 1998, the Guidelines were amended to read:

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant’s criminal history indicates a need to incarcerate the defendant or protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.⁷⁵

The 1998 amendments also re-defined “reduced mental capacity” to include volitional as well as cognitive impairments. Under the amended Guidelines: “Significantly reduced mental capacity” means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason, or (B) control behavior that the defendant knows is wrongful.”⁷⁶

The Feeney Amendment further limited the circumstances under which a court can depart from the range of sentences prescribed in the Guidelines.⁷⁷ Among other restrictions, the amendment limits departures based on aberrant behavior and physical impairment.⁷⁸ The amendment also prohibits departures based on diminished capacity in cases involving crimes against children and sexual offenses.⁷⁹ In general,

⁷³ MANUAL 2011, *supra* note 5, at 5k2.13.

⁷⁴ U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 5k2.13 (1998) [hereinafter MANUAL 1998]. See generally Kirk D. Houser, *Downward Departures: The Lower Envelope of the Federal Sentencing Guidelines*, 31 DUQ. L. REV. 361, 387 n.207 (1993); Donald C. Wayne, *Chaotic Sentencing: Downward Departures Based on Extraordinary Family Circumstances*, United States v. Johnson, 964 F.2d 124 (2d Cir. 1992), 71 WASH. U. L.Q. 443, 447 (1993).

⁷⁵ MANUAL 1998, *supra* note 74, at 5k2.13.

⁷⁶ *Id.* at 5k2.13 n.1.

⁷⁷ See generally Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295 (2004).

⁷⁸ U.S. SENTENCING GUIDELINES §§ 5K2.20, 5K2.22 (U.S. SENTENCING COMM’N, 2003) [hereinafter MANUAL 2003].

⁷⁹ 18 U.S.C. § 3553(b)(2) (2003); MANUAL 2003, *supra* note 78, §§ 5K2.0(b).

the amendment prohibits departures based on factors that are not enumerated in the Guidelines or on combinations of factors which would not independently warrant a departure.⁸⁰ Great discretion is vested in the trial courts in determining when a sentence reduction is appropriate under the Guidelines,⁸¹ and decisions not to depart from the Guidelines are generally not appealable.⁸² Only where it appears that the District Court misunderstood its authority to reduce the defendant's sentence will appellate courts be willing to disturb sentencing determinations.⁸³

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

In its next term, a deeply-divided Supreme Court then ruled in *United States v. Booker* and *United States v. Fanfan*,⁸⁷ that the Federal Sentencing Guidelines were subject to jury trial requirements of the Sixth Amendment, and that the Sixth Amendment's requirement that the jury find certain sentencing facts were incompatible with the Federal Sentencing Act, thus requiring severance of the Act's provisions that made guidelines "mandatory."⁸⁸ Sentencing judges must consider (1)

⁸⁰ 18 U.S.C. § 3553(b)(2) (2003); MANUAL 2003, *supra* note 78, §§ 5K2.0(b).

⁸¹ See, e.g., *United States v. Yellow Earrings*, 891 F.2d 650, 654–55 (8th Cir. 1989); *United States v. White*, 71 F.3d 920, 922 (D.C. Cir. 1995); *United States v. Organek*, 65 F.3d 60, 63 (6th Cir. 1995); *United States v. Moreland*, No. 96-30164, slip op. (9th Cir. July 21, 1997), *cert. denied*, 522 U.S. 962 (1997); *United States v. Volpe*, 78 F. Supp. 2d 76, 87–88, 93 (E.D.N.Y. 1999), *aff'd in part & dismissed in part*, 224 F.3d 72 (2d Cir. 2000).

⁸² See, e.g., *United States v. Ghannam*, 899 F.2d 327, 328 (4th Cir. 1990); *United States v. Follett*, 905 F.2d 195, 197 (8th Cir. 1990), *cert. denied*, 501 U.S. 1204 (1991). Compare *id.* at 197 (Heaney, J., dissenting), with *United States v. Patterson*, 15 F.3d 169, 170 (11th Cir. 1994), and *United States v. Schechter*, 13 F.3d 1117, 1120 (7th Cir. 1994).

⁸³ See, e.g., *United States v. Ruklick*, 919 F.2d 95, 97 (8th Cir. 1990) (reversing the trial court's refusal to depart from Guidelines in case where the defendant had the mental capacity of 12-year-old). On the need for specific findings in Guideline decision-making, see, e.g., *United States v. Perkins*, 963 F.2d 1523, 1527–28 (D.C. Cir. 1992); *United States v. Zackson*, 6 F.3d 911, 923–24 (2d Cir. 1993).

⁸⁴ *Blakely v. Washington*, 542 U.S. 296 (2004).

⁸⁵ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁸⁶ *Blakely*, 542 U.S. at 305.

⁸⁷ *United States v. Booker*, 543 U.S. 220, 225 (2005).

⁸⁸ *Id.* at 245. Compare *United States v. Sam*, 467 F.3d 857, 860–61 (5th Cir. 2006) (noting *Booker* requires court to consider and apply the Guidelines, but Guidelines are no longer mandatory), with *United States v. Brewer*, 520 F.3d 367, 371 (4th Cir. 2008) (Under *Booker*, the

offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely, (a) “just punishment” (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution.⁸⁹ At least one commentator has read *Booker* to make it “incumbent upon judges to consider the physical or mental health of a defendant during the sentencing phase, where it ordinarily would not have been allowed pre-*Booker* when the Guidelines were mandatory.”⁹⁰

What impact do these developments have on the sentencing of defendants deemed to be “psychopaths”?⁹¹ To our amazement, only a handful of federal cases discuss the categorization,⁹² and some merely in passing.⁹³

Court of Appeals held, “[w]e lack authority to review a sentencing court’s denial of a downward departure unless the court failed to understand its authority to do so”).

⁸⁹ 18 U.S.C. § 3553(a) (2003), as discussed in *Rita v. United States*, 551 U.S. 338, 338 (2007).

⁹⁰ Natalie Hinton, *Curing the BOP Plague with Booker: Addressing Inadequate Medical Treatment in the Bureau of Prisons*, 41 J. MARSHALL L. REV. 219, 228 (2007).

⁹¹ Similarly, adult offenders have been denied admission into treatment programs because they have been deemed psychopathic. See, e.g., Skeem et al., *Psychopathic Personality*, *supra* note 14, at 1455; *United States v. Stitt*, 250 F.3d 878, 895 (4th Cir. 1998) (quoting transcript of the death penalty phase of the trial).

⁹² State cases generally make no significant distinction between ASPD and psychopathy. E.g., *State v. Michael R.*, No. 30237-2012, slip op. at *6 (N.Y. Sup. Ct. Feb. 7, 2014) (An expert testified that the defendant “was psychopathic which he defined using many of the characteristics of a person with ASPD.”); see also, e.g., *Commonwealth v. Lungin*, 77 Pa. D. & C.4th 267, 330 (2005); *Allred v. State*, 186 So. 3d 530, 536 (Fla. 2016). Cf. *State v. Jerome A.*, No. 30261-2014, slip op. at 1, 151 (N.Y. Sup. Ct. Sept. 8, 2015), *rev’d*, 27 N.Y.S.3d 150 (N.Y. App. Div. Mar. 15, 2016) (“[Examining psychologist] interviewed Mr. A. for three hours on October 3, 2014 by video teleconference. She prepared a report of her evaluation dated October 17, 2014. She concluded that Mr. A. suffers from a Mental Abnormality under Article 10 and diagnosed him with ASPD with psychopathy. Dr. Charder opined that although the courts had found that ASPD alone was not a qualifying condition, disease or disorder under Article 10, it was such a qualifying condition. She said that psychopathy was a ‘condition’ and believed it would eventually be categorized as a disease. Dr. Charder outlined the diagnostic criteria for each condition in her written report.”).

⁹³ For example, in *Kozohorsky v. United States*, No. 1:14CV00046 SNLJ, 2014 WL 4681315, at *5 (E.D. Mo. Sept. 19, 2014), a re-sentencing application, the court merely noted that the defendant—convicted of failing to register as a sex offender—treated the categories of psychopathy and anti-social jointly: “According to a Sex Offender Screening and Risk Assessment . . . ‘this offender appears to have a deviant sexual preoccupation or paraphilia (rape) and other personality characteristics (psychopathic, antisocial, sadistic) predisposing him to repeated, wanton, disregard of major social norms as well as violent sexual assault of others.’”; see also *United States v. Irey*, 612 F.3d 1160, 1171 (11th Cir. 2010) (An expert testified that defendant was “not generally anti-social or psychopathic in his psychological makeup[.]”). In *United States v.*

Only one subsequent case appears to be relevant to the focus of this Article: in *United States v. Fell*,⁹⁴ an expert witness (retained by the government to assess the defendant's state of mind at the time of the murders with which he was charged) had administered the Psychopathy Checklist-Revised (PCL-R),⁹⁵ the Violent Risk Appraisal Guide (VRAG), and the Historical/Clinical/Risk Management (HCR-20)⁹⁶ to assess Fell's capacity for future violence, concluding that the defendant was

Chischilly, 30 F.3d 1144, 1161 (9th Cir. 1994), *overruled on other grounds*, *United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014), the court ruled that the grounds upon which a sentencing judge deemed to disfavor downward departure—the trial judge's extensive comments on the defendant's "recidivism and psychopathic tendencies"—may not invariably be equated with those that would merit such an upward departure. More recently, in *Dallas v. Dunn*, No. 2:02-CV-777-WKW, 2017 WL 3015690, at *12 n.57 (M.D. Ala. July 14, 2017) the court denied the petitioner's application for a reconsideration of a *habeas corpus* petition, in which it was alleged that trial counsel was ineffective for failing to "present expert testimony showing the likely causes of Petitioner's emotional and physical problems [(serious psychopathology including confused thinking, distorted perceptions, and other psychotic processes)]."

⁹⁴ *United States v. Fell*, 531 F.3d 197, 226 (2d Cir. 2008), *post-conviction relief granted on other grounds*, *United States v. Fell*, No. 2:01-cr-12, 2014 WL 3697810, at *40 (D. Vt. July 24, 2014).

⁹⁵ See *infra* text accompanying notes 124–46.

⁹⁶ The use of such risk assessment tools in general is not without controversy. See, e.g., Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 678–79 (2008). See generally Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 233 (2015). Recently, significant attention has been paid to the role of algorithms—in many ways, the heart of these risk assessment tools. See Cassie Deskus, *Fifth Amendment Limitations on Criminal Algorithmic Decision-Making*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 237, 237 (2018); see also Kevin S. Douglas & Jennifer L. Skeem, *Violence Risk Assessment: Getting Specific About Being Dynamic*, 11 PSYCHOL. PUB. POL'Y & L. 347, 352 (2005) (demonstrating how actuarial instruments use a mechanistic algorithm to combine heavily weighted static variables relevant to making ultimate determination of risk); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 671 (2016) ("Data is frequently imperfect in ways that allow these algorithms to inherit the prejudices of prior decision makers.")—in both sentencing and bail decisions; see, e.g., Mirko Bagaric & Gabrielle Wolf, *Sentencing by Computer: Enhancing Sentencing Transparency and Predictability, and (Possibly) Bridging the Gap Between Sentencing Knowledge and Practice*, 25 GEO. MASON L. REV. 653, 654 (2018); Laurel Eckhouse et al., *Layers of Bias: A Unified Approach for Understanding Problems with Risk Assessment*, 46 CRIM. JUST. & BEHAV. 185 (2019).

There is no disputing the conclusion of Professors Janus and Prentky that "[t]o a greater or lesser extent, all ARA [actuarial risk assessment] instruments have shortcomings, and these shortcomings detract from the reliability of the instruments." 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, 1472 (2003). As we discuss below, there are significant concerns regarding racial bias in the use of predictive algorithms; see, e.g., Ric Simmons, *Quantifying Criminal Procedure: How to Unlock the Potential of Big Data in Our Criminal Justice System*, 2016 MICH. ST. L. REV. 947, 980 (2016) ("[I]f the underlying data is discriminatory, then the results that are based on that data will be discriminatory, and the supposedly color-blind algorithms will be doing

“a psychopath.”⁹⁷ But in no case is there any consideration of the discriminations between the categories of ASPD and psychopathy.

Our research has unearthed only one trial level, state case, in which an expert witness’s testimony reflects such discrimination. In *Willie Y. v. State*,⁹⁸ an expert witness explained “that psychopathy overlaps to a degree with ASPD, but is different in that it can be quantified through PCL-R scoring and is less common.”⁹⁹ Clearly, the distinctions that we are discussing in this Article are not relevant to most decisions in this area of the law.

It is also important to consider how prosecutors can and do regularly “latch on” to psychopathy and/or ASPD as a rationale for seeking the death penalty in capital cases.¹⁰⁰ As Professor O. Carter Snead has noted, jurors are likely to be receptive to such arguments because of the correlation between these diagnoses and recidivist violence.¹⁰¹ This labeling has proven to be a highly effective strategy for prosecutors given that the diagnostic criteria for each sound to the lay juror essentially like a straightforward description of “irreparable corruption” and “that no rehabilitation is possible and that future criminal violence is inevitable.”¹⁰² The use of

nothing more than reinforcing the existing racial bias in the criminal justice system.”).

⁹⁷ *Fell*, 531 F.3d at 226. Because defendant ultimately chose not to introduce a mental health expert, this testimony was not presented to the jury during the penalty phase of the defendant’s murder trial. *Id.*

⁹⁸ *Willie Y. v. State*, No. CA2015-001060, slip op. at *6 (N.Y. Sup. Ct. July 15, 2016).

⁹⁹ *Id.* As of the writing of this Article, the *Willie Y.* case has only been cited in one other case, and that on a different point. See *Glenn T. v. State*, No. CA2015-001819, slip op. at *3 (N.Y. Sup. Ct. Dec. 20, 2016). It has not been discussed at all in the scholarly literature.

¹⁰⁰ As a result, counsel may decline to present an expert witness in such a case for fear of this precise result “as the prejudice seems to outweigh any benefit.” Thi, *supra* note 8, at 178; see also *United States v. Barnette*, 211 F.3d 803, 825 (4th Cir. 2000) (finding failure to allow defendant’s expert to testify in rebuttal as to psychopathy evidence was not harmless error because error may have a “devastating effect on a defendant”); *Reed v. Sec’y, Fla. Dep’t of Corr.*, 593 F.3d 1217, 1248 (11th Cir. 2010) (explaining evidence of an antisocial personality disorder or narcissistic personality disorder is more harmful than mitigating).

Empirical evidence suggests that it is relatively rare for the defense to call an expert mental health witness to proactively introduce PCL-R evidence in criminal cases. 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. & L. 239, 248 (2012).

¹⁰¹ O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1326–27 (2007). In cases involving Black defendants, this may be heightened. Smith, *supra* note 47, at 1200–02.

¹⁰² Snead, *supra* note 101, at 1327 (quoting Mark D. Cunningham & Thomas J. Reidy, *Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations*, 16 BEHAV. SCI. & L. 333, 333 (1998)); see also Wayland & O’Brien, *supra* note 2, at 530 (“[N]o competent capital defense attorney would ever

these labels is part of a “pathway of dehumanization”;¹⁰³ as Kathy Wayland and Sean O’Brien have noted, “[i]f left unchallenged in a capital case, ASPD and related constructs are quite literally the ‘kiss of death.’”¹⁰⁴ In fact, the most recent research confirms that individuals who rated a criminal defendant as more psychopathic (regardless of his mental condition) were more likely to support death verdicts.¹⁰⁵

This is especially important when we look at this in the context of racism in the criminal justice system and at the question of how statistical algorithms have been charged with the perpetuation of racial bias.¹⁰⁶ There are significant concerns about racial bias in the use of predictive algorithms in the criminal justice system in general.¹⁰⁷ And this is not new. Almost 50 years ago, a prominent forensic psychologist concluded (in a study of referrals for competency to stand trial evaluations) that

pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment.”).

On the question of counsel’s judgment in calling or not calling an expert witness in such cases, see, for example, *Allred v. State*, 186 So. 3d 530, 535 (Fla. 2016) (holding no error under *Strickland v. Washington*, 466 U.S. 668, 699 (1984) (constitutional standard for determining effectiveness of counsel) where counsel declined to call mental health expert whose diagnosis would have been antisocial personality disorder “or possibly” that defendant was “a psychopath or sociopath”); *Hampton v. Ryan*, No. CV-14-02504-PHX-ROS, 2019 WL 979896, at *3–4 (D. Ariz. Feb. 28, 2019) (finding counsel’s decision to not introduce evidence of defendant’s antisocial personality disorder not violative of *Strickland*). *But compare* *Clark v. Chappell*, 936 F.3d 944, 976 (9th Cir. 2019) (noting “trial counsel’s tactical decision to put on a witness who had diagnosed Clark with ASPD, rather than stress a possible borderline personality disorder, is entitled to great deference”), *with* *Carter v. Bogan*, 900 F.3d 754, 778 (6th Cir. 2018) (finding counsel not per se ineffective, at penalty phase of capital murder trial, in presenting evidence of antisocial personality disorder (ASPD), as part of catchall statutory mitigating factor).

¹⁰³ See Smith, *supra* note 47, at 1190 n.251 (discussing Susan T. Fiske, *From Dehumanization and Objectification, to Rehumanization: Neuroimaging Studies on the Building Blocks of Empathy*, 1167 ANNALS N.Y. ACAD. SCI. 31 (2009)).

¹⁰⁴ Wayland & O’Brien, *supra* note 2, at 526–27.

¹⁰⁵ Tiffany N. Truong et al., *Does Psychopathy Influence Juror Decision-Making in Capital Murder Trials? “The Devil Is in the (Methodological) Details,”* CRIM. JUST. & BEHAV. (forthcoming 2021) (abstract accessible at <https://journals.sagepub.com/doi/abs/10.1177/0093854820966369>).

¹⁰⁶ Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J.L. & PUB. POL’Y 257, 282–83 (2019); *see also* Joseph J. Avery, *An Uneasy Dance with Data: Racial Bias in Criminal Law*, 93 S. CAL. L. REV. POSTSCRIPT 28, 31 n.21(2020) (citing Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671, 680 (2016)); Jessica M. Eaglin, *Predictive Analytics’ Punishment Mismatch*, 14 I/S: J.L. & POL’Y FOR INFO. SOC’Y 87, 102–03 (2017); Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1520–21 (2013) (arguing that “automated prediction can lead to illegal discrimination” based on personal attributes such as race).

¹⁰⁷ See Elizabeth E. Joh, *Feeding the Machine: Policing, Crime Data, & Algorithms*, 26 WM. & MARY BILL RTS. J. 287, 289 n.11 (2017) (“The concern about racial bias in algorithmic software is becoming prevalent.”). For the most recent research, see Vincent Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. (forthcoming 2021),

psychopathology was overestimated in cases involving Black defendants.¹⁰⁸ Although the issue of racial bias in the context of expert testimony on ASPD and psychopathy has not been well researched,¹⁰⁹ available research suggests there are important differences in the performance of African Americans and Caucasians on the PCL-R, and that certain PCL-R items appear to be particularly subject to race bias.¹¹⁰ Thus, Professor Sean O'Brien and Dr. Kathleen Wayland note that "[i]t is difficult to imagine that implicit racial bias does not come into play when the defendant is labeled 'antisocial' or 'psychopathic.'"¹¹¹ And this is not new: More than 25 years ago, researchers studying the PCL-R concluded that "the numerous sources of potential differences between Black and White subjects strongly indicates the need for further investigation."¹¹²

Consider also the role of neuroimaging in the context of the presence of racial bias. The late Professor Andrew Taslitz, by way of example, has pointed out that neuroimaging has revealed that the amygdala, "a brain structure activated by threats, increases activity when white observers, especially those harboring high levels of racial bias, observe [B]lacks but not whites."¹¹³ Multiple neuroimaging experiments "seek to identify neural correlates of unconscious racial bias."¹¹⁴ Scholars have yet

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797102.

¹⁰⁸ Gerald Cooke et al., *A Comparison of Blacks and Whites Committed for Evaluation of Competency to Stand Trial on Criminal Charges*, 2 J. PSYCHIATRY & L. 319 (1974).

¹⁰⁹ As specifically noted in Sean D. O'Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751, 768 n.97 (2015).

¹¹⁰ David Freedman, *Premature Reliance on the Psychopathy Checklist-Revised in Violence Risk and Threat Assessment*, 1 J. THREAT ASSESSMENT 53, 58–59 (2001). Cf. Jennifer L. Skeem et al., *Are There Ethnic Differences in Levels of Psychopathy? A Meta-Analysis*, 28 L. & HUM. BEHAV. 505, 516 (2004) (in relation to core interpersonal and affective traits of psychopathy, there is no evidence that Black people are more psychopathic than whites).

¹¹¹ O'Brien & Wayland, *supra* note 109, at 767; *see also id.* at 768 ("[E]xperimental evidence supports concerns that jurors are more likely to perceive a black defendant as having 'antisocial' or 'psychopathic' traits.").

¹¹² Carl B. Gacono & Heidi E. Hutton, *Suggestions for the Clinical and Forensic Use of the Hare Psychopathy Checklist-Revised (PCL-R)*, 17 INT'L J. L. & PSYCHIATRY 303, 314 (1994).

¹¹³ Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315, 355 (2012). On how neuroimaging data can measure racial bias, see, for example, Harrison A. Korn et al., *Neurolaw: Differential Brain Activity for Black and White Faces Predicts Damage Awards in Hypothetical Employment Discrimination Cases*, 7 SOC. NEUROSCIENCE 398, 407 (2012).

¹¹⁴ Adam J. Kolber, *Pain Detection and the Privacy of Subjective Experience*, 33 AM. J. L. & MED. 433, 452 (2007), citing Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2006); Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. SCI. 56, 57 (2005); William A. Cunningham et al.,

to explore the connection between these findings and the issues of prediction and punishment that are at the core of this Article.¹¹⁵

Related to this is the occurrence of racial bias in psychiatric diagnoses in general. We have known for decades that, by way of example, patients with a psychotic affective disorder are more likely to be misdiagnosed as having schizophrenia if they are Black rather than if they are white.¹¹⁶ Of special relevance to the topic we are discussing: “behavior by African-Americans is more often interpreted as ‘dangerous’ than *identical behavior* by whites.”¹¹⁷ These racial disparities extend to evaluations of whether Blacks in inpatient settings are malingering.¹¹⁸ Similarly, when controlling for other factors, Black defendants were more likely to be evaluated by forensic examiners as having a mental disease or defect.¹¹⁹

It is important to stress that there is valid and reliable evidence showing that jurors are more likely to perceive a Black defendant as having “antisocial” or “psychopathic” traits.¹²⁰ Given the powerful and pervasive effect of implicit racial bias,

Separable Neural Components in the Processing of Black and White Faces, 15 PSYCHOL. SCI. 806, 806 (2004).

¹¹⁵ There are other not insignificant findings about the *use* of neuroimaging that may be collaterally relevant to the racial bias issues explored in this Article. *See, e.g.*, Am. Acad. of Neurology, *Researchers Find Racial Disparities in Care for Epilepsy at Hospitals*, NEUROLOGY TODAY (Jan. 6, 2011), https://journals.lww.com/neurotodayonline/Fulltext/2011/01060/Researchers_Find_Racial_Disparities_in_Care_for.1.aspx (reporting a finding that “blacks and Hispanics were less likely to receive neuroimaging or to be admitted to the hospital when seen in their tertiary care emergency department (ED) for an epileptic seizure”).

¹¹⁶ Howard N. Garb, *Race Bias, Social Class Bias, and Gender Bias in Clinical Judgment*, 4 CLINICAL PSYCHOL. 99, 101, 104 (1997); Thomas W. Pavkov et al., *Psychiatric Diagnoses and Racial Bias: An Empirical Investigation*, 20 PROF. PSYCHOL. 364, 364, 368 (1989).

¹¹⁷ Michael L. Perlin & Heather Ellis Cucolo, “*Tolling for the Aching Ones Whose Wounds Cannot Be Nursed*”: *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUST. 431, 439 (2017) (citing Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 483, 500 (2004) and James W. Hicks, *Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind?*, 32 J. AM. ACAD. PSYCHIATRY & L. 21, 23 (2004)).

¹¹⁸ Sade Udoetuk et al., *Racial and Gender Disparities in Diagnosis of Malingering in Clinical Settings*, 7 J. RACIAL & ETHNIC HEALTH DISPARITIES 1117, 1118 (2020) (malingering diagnosis was twice as prevalent among Blacks compared with whites); *see also* Dewey G. Cornell & Gary L. Hawk, *Clinical Presentation of Malingerers Diagnosed by Experienced Forensic Psychologists*, 13 L. & HUM. BEHAV. 375, 382 (1989) (same).

¹¹⁹ Ann Dirks-Linhorst et al., *The Role of Race in Court-Ordered Pretrial Psychiatric Evaluations*, 16 J. ETHNICITY CRIM. JUST. 225, 228 (2018).

¹²⁰ *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 212–13 (2001).

the use of prejudicial psychiatric labels to a minority defendant is especially dangerous.¹²¹ As one commentator has noted, “[e]vidence that psychopathy may not manifest itself the same way in every race is similarly troubling because it raises questions about the PCL-R’s ability to consistently measure the underlying construct of psychopathy across different populations.”¹²²

IV. THE PSYCHOPATHY VS. ASPD DEBATE—THE “INSIDE BASEBALL”

In this context, it is critical to consider efforts undertaken by Robert Hare to suppress scholarly papers that have taken issue with his use of his self-created psychopathy checklist.¹²³ Hare’s Psychopathy Checklist Revised (PCL-R) is a widely recognized diagnostic tool that identifies three areas in which psychopaths manifest personality traits: interpersonal defects like grandiosity and deceitfulness, affective deficits like lack of empathy, and impulsive and criminal behaviors.¹²⁴ Antisocial personality disorder, on the other hand, overlaps to some extent with psychopathy but is characterized by a history of criminal, often violent, behavior, which is not seen to the same extent in Hare’s construct of psychopathy.¹²⁵

Legally, this is of great significance. PCL scores have been used to “justify harsher sentences, transfers of youth to adult court, longer parole ineligibility periods, and capital sentencing.”¹²⁶ Research suggests that the mere introduction of the

¹²¹ O’Brien & Wayland, *supra* note 109, at 768 n.97.

¹²² Ells, *supra* note 15, at 190 (footnotes omitted).

¹²³ John Travis, *Paper on Psychopaths, Delayed by Legal Threat, Finally Published*, SCIENCE (June 10, 2010, 2:08 PM), <https://www.sciencemag.org/news/2010/06/paper-psychopaths-delayed-legal-threat-finally-published>.

¹²⁴ The PCL-R is far from the only diagnostic tool used in these contexts; *see, e.g.*, Jay P. Singh et al., *A Comparative Study of Violence Risk Assessment Tools: A Systematic Review and Meta-regression Analysis of 68 Studies Involving 25,980 Participants*, 31 CLINICAL PSYCHOL. REV. 499, 502 (2011) (listing it as one of *nine* tools “used most often in the context of forensic risk assessment”). There are hundreds of risk assessment tools available, *see* Jay P. Singh, *Five Opportunities for Innovation in Violence Risk Assessment Research*, 1 J. THREAT ASSESSMENT & MGMT. 179, 179 (2014), and it is estimated that there are, on average, 17 new such articles about the use of such tools monthly. *Id.*

¹²⁵ For more on the distinctions between psychopathy and ASPD, *see* Robert D. Hare, *Hare Psychopathy Checklist-Revised (2nd Edition) (PCL-R)*, in 1 ENCYCLOPEDIA OF PSYCH. & L. 348 (Brian L. Cutler ed., 2008); R.J.R. Blair, *Neurocognitive Models of Aggression, the Antisocial Personality Disorders, and Psychopathy*, 71 J. NEUROLOGY NEUROSURGERY & PSYCHIATRY 727, 727 (2001) [hereinafter Blair, *Neurocognitive Models*].

The most recent research has found that, in a sample of female offenders, higher levels of impulsivity are associated with ASPD, whereas lower levels of impulsivity was associated with psychopathy. *See* Nicholas D. Thomson et al., *The Habitual Female Offender Inside: How Psychopathic Traits Predict Chronic Prison Violence*, 40 L. & HUM. BEHAV. 257, 258 (2016).

¹²⁶ *See, e.g.*, Mark D. Cunningham & Thomas J. Reidy, *Violence Risk Assessment at Federal*

PCL-R into evidence during a trial could cause undue prejudice against the defendant.¹²⁷ And, importantly, race—along with gender and age—can taint alleged objectivity in these circumstances.¹²⁸ There is little question that “racial bias plays a significant role in predictions of future dangerousness in capital cases for black defendants.”¹²⁹

The use of the PCL-R is also an issue in cases involving sex offender commitment statutes. Some states, by way of example, require that the PCL-R be given during psychological evaluations in determining whether the defendant meets statutory criteria.¹³⁰

Given the seriousness of these psycho-legal determinations, it is essential that clinicians and legal decision makers consider risk and protective factors *beyond* reliance on a score on one actuarial test that claims to accurately predict psychopathy

Capital Sentencing: Individualization, Generalization, Relevance, and Scientific Standards, 29 CRIM. JUST. & BEHAV. 512, 513 (2002); Ivan Zinger & Adelle E. Forth, *Psychopathy and Canadian Criminal Proceedings: The Potential for Human Rights Abuses*, 40 CANADIAN J. CRIMINOLOGY 237, 244–48 (1998) (as discussed in Anne-Marie R. Leistico et al., *A Large-Scale Meta-Analysis Relating the Hare Measures of Psychopathy to Antisocial Conduct*, 32 L. & HUM. BEHAV. 28, 40 (2008)). On the “guise of objectivity” in risk assessments, see Jereny Isard, *Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity*, 105 CALIF. L. REV. 1223, 1247 (2017).

¹²⁷ See, e.g., John F. Edens et al., *Effects of Psychopathy and Violence Risk Testimony on Mock Juror Perceptions of Dangerousness in a Capital Murder Trial*, 10 PSYCHOL. CRIME & L. 393, 396, 403 (2004).

¹²⁸ See Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again*, 48 CRIME & JUST. 439, 450 (2019); see also Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 318, 320 (2012) (citing Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1515 n.117 (2005)) (Subjects are more likely to interpret ambiguous expressions and gestures as aggressive and hostile when the expressions and gestures are performed by Black (as opposed to white) characters.). On the role of specific demographic variables in identifying high-risk groups of offenders in this context, see Ryan Botha et al., *Psychopathy and Its Association with Demographic Variables in a South African Female Offender Context*, 29 ACTA CRIMINOLOGICA 1, 2 (2016).

¹²⁹ Mary Marshall, *Miller v. Alabama and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1662 (2019).

¹³⁰ John F. Edens, *Misuses of the Hare Psychopathy Checklist-Revised in Court Two Case Examples*, 16 J. INTERPERSONAL VIOLENCE 1082, 1085 (2001), as discussed in Leistico et al., *supra* note 126, at 40. In Texas, by way of example, “[t]he expert [in a sexually violent predator commitment case] shall make a clinical assessment based on testing for psychopathy, a clinical interview, and other appropriate assessments and techniques to aid the department in its assessment.” TEX. HEALTH & SAFETY CODE ANN. § 841.023(a) (West 2015). For cases in which the PCL was administered to potential sex offenders, see, for example, *In re Commitment of Alvarado*, No. 09-13-00217-CV, 2014 WL 1285136, at *9 (Tex. App. Mar. 27, 2014); *In re Commitment of Smith*, No. 09-15-00091-CV, 2015 WL 7566577, at *4 (Tex. App. Nov. 25, 2015); *In re Commitment of Waite*, No. 09-15-00364-CV, 2016 WL 2594843, at *3 (Tex. App. May 5, 2016).

when attempting to predict future behaviors. As Professor Anne-Marie Leistico and her colleagues have concluded, “[g]iven the seriousness of these psycho-legal determinations, we must recommend that clinicians and legal decision makers consider risk and protective factors beyond psychopathy when attempting to predict future behaviors.”¹³¹ By way of example, more recently, the first study to examine the field reliability and validity of PCL-R scores in Belgium concluded that “the PCL-R in real world settings conducted by real world raters in Belgium is fairly unreliable.”¹³² The director of an Institute of Theoretical Psychiatry and Neuroscience in the Netherlands has thus written: “The Psychopathy Checklist-Revised appears not to be a reliable tool for prediction of future violent behavior and recidivism in psychopaths and should therefore be officially declared . . . an unsound instrument.”¹³³ Jaymes Fairfax-Columbo and Professor David DeMatteo are blunter: “[I]t is quite likely that PCL-R-based future dangerousness evidence is not ‘the product of reliable principles and methods.’”¹³⁴ The most recent systematic review agrees, noting that “[w]e

¹³¹ Leistico et al., *supra* note 126, at 40; *see also id.* (“Predicting recidivism or institutional maladjustment differs from many clinical predictions in the obvious implications for both the individual (e.g., abridgement of personal freedoms) and society (e.g., community safety).”). Leistico and her colleagues conclude that, at best, the PCL-R as an instrument was a “moderately” good predictor of future psychopathic behavior. *Id.* at 28. Beyond the scope of this Article is another critical issue: the extent to which the use of the PCL as a tool of predicting future behavior in the context of risk assessments “greatly increase[s]” the potential for imprecision in forensic evidence as it expands the gulf between inferences about groups and inferences about individuals. *See* David J. Cooke & Christine Michie, *Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice*, 34 L. & HUM. BEHAV. 259, 260 (2010).

¹³² Inge Jeandarme et al., *PCL-R Field Validity in Prison and Hospital Settings*, 41 L. & HUM. BEHAV. 29, 37 (2017). The authors of this study did concede, however, that there was some evidence of modest to moderate predictive validity for Factor 2 scores that relate to irresponsibility and poor behavioral controls. *Id.*; *see* David DeMatteo et al., *Statement of Concerned Experts on the Use of the Hare Psychopathy Checklist-Revised in Capital Sentencing to Assess Risk for Institutional Violence*, 26 PSYCHOL. PUB. POL’Y & L. 133, 143 (2020).

It is also important to stress that that adjusting actuarial risk with clinical judgment was taken into consideration by mock jurors only when it *increased* the risk estimate, not when it diminished it. *See* Nicholas Scurich & Daniel A. Krauss, *The Effect of Adjusted Actuarial Risk Assessment on Mock-Jurors’ Decisions in a Sexual Predator Commitment Proceeding*, 53 JURIMETRICS 395, 400–01 (2013) (discussed in this context in Jefferson C. Knighton et al., *How Likely Is “Likely to Reoffend” in Sex Offender Civil Commitment Trials?*, 38 L. & HUM. BEHAV. 293, 301 (2014)).

¹³³ Willem 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, 455 (2008); *see also id.* (“The conclusions that are drawn by Hare with regard to treatability on basis of the scores of his PCL-R are incorrect, unethical and harmful.”); DeMatteo et al., *supra* note 132, at 143 (“[T]he predictive validity of PCL-R scores is inadequate to support its use as a tool to assess risk for serious institutional violence.”).

¹³⁴ Jaymes Fairfax-Colombo & David DeMatteo, *Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing*, 25 WM. &

found that widespread beliefs about PCL psychopaths and treatment were not empirically justified[.]”¹³⁵ and adding: “We found no evidence of PCL psychopathy being predictive of treatment and rehabilitation outcomes. We found no evidence of PCL psychopathy being predictive of a lack of conscience.”¹³⁶

The authors of the just-quoted article, in fact, found that many reviewers of PCL psychopaths have more recently been “optimistic” about treatability, compared with older reviews.¹³⁷ Authors and researchers discussing treatability often looked at qualifier variables such as appropriate treatment strategies, sufficient resources, and staff training.¹³⁸ This basis for success plays directly into whether individuals are in a system with the appropriate resources to treat; many speculations can be made about how marginalized populations may be less likely to land in a system which diagnoses, treats, and rehabilitates with the appropriate resources and staffing.

Importantly, there continues to be debate about the components of a psychopathy diagnosis, with some researchers, such as Professors Jennifer Skeem and David Cooke, concluding that criminality is merely a correlate of psychopathy, rather than an ingrained component necessary for clinical diagnosis.¹³⁹ Central to Skeem’s criticism is her objection that the PCL-R does not actually measure what it purports to

MARY BILL RTS. J. 1047, 1070 (2017) (quoting FED. R. EVID. 702, and citing Murrie et al., *supra* note 15, at 352, and Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side that Retained Them?*, 24 PSYCHOL. SCI. 1889, 1895–96 (2013)) (finding that when rating the same offenders, evaluators who believed they were hired by the prosecution assigned higher PCL-R scores to the offender than did evaluators who believed they were hired by the defense). For Professor DeMatteo’s most recent research in the death penalty context, concluding that the “PCL-R cannot make predictions that an individual will engage in serious institutional violence with any reasonable degree of precision or accuracy and should not be used for this purpose in capital sentencing evaluations[.]” see David DeMatteo et al., *Statement of Concerned Experts on the Use of the Hare Psychopathy Checklist-Revised in Capital Sentencing to Assess Risk for Institutional Violence*, 26 PSYCHOL. PUB. POL’Y & L. 133, 134 (2020).

¹³⁵ Rasmus Rosenberg Larsen et al., *Are Psychopathy Checklist (PCL) Psychopaths Dangerous, Untreatable, and Without Conscience? A Systematic Review of the Empirical Evidence*, 26 PSYCHOL. PUB. POL’Y & L. 297, 305 (2020); see also Patrick J. Kennealy et al., *Do Core Interpersonal and Affective Traits of PCL-R Psychopathy Interact with Antisocial Behavior and Disinhibition to Predict Violence?*, 22 PSYCHOL. ASSESSMENT 569, 569 (2010) (The belief that psychopaths are “remorseless predators who use charm, intimidation and, if necessary, impulsive and cold-blooded violence to attain their ends,” is “more consistent with public perceptions of psychopathy . . . than empirical evidence.”).

¹³⁶ Larsen et al., *supra* note 135, at 305.

¹³⁷ *Id.* at 302.

¹³⁸ *Id.*

¹³⁹ Skeem & Cooke, *supra* note 10, at 439, 442. As a result of the work done by Professors Skeem and Cooke, there has been a movement to develop more varied instruments for use in community samples to assess variations in the core personality features of psychopathy among adolescents and adults. See, e.g., James V. Ray et al., *Correspondence Between the Psychopathic Personality Inventory and the Psychopathic Personality Inventory-Revised: A Look at Self-Reported*

measure—the mental disorder of psychopathy.¹⁴⁰ Rather, it measures nothing more than a tendency toward criminal behavior,¹⁴¹ and “overemphasizes” the role of such behavior.¹⁴² She has elsewhere concluded that “contemporary measures of psychopathy, including the PCL-R, *appear to evidence no special powers* in predicting violence or other crime.”¹⁴³

Hare adamantly opposed this criticism and demanded that Skeem and Cooke eliminate this point (among others) from a draft of their article before publishing it. When Skeem and Cooke refused to comply with Hare’s demand, he threatened to sue them—and the editor of the journal that accepted their article—for defamation.¹⁴⁴

Personality Traits, 38 CRIM. JUST. & BEHAV. 375, 376 (2011). Hare’s work has also been criticized elsewhere. See, e.g., Martens, *supra* note 133, at 455.

The PCL-R has also been criticized because of its alleged inapplicability to nonincarcerated populations. See, e.g., Scott O. Lilienfeld, *Methodological Advances and Developments in the Assessment of Psychopathy*, 36 BEHAV. RES. & THERAPY 99, 103 (1998), as discussed in Tasha R. Phillips et al., *Further Development and Construct Validation of MMPI-2-RF Indices of Global Psychopathy, Fearless-Dominance, and Impulsive-Antisociality in a Sample of Incarcerated Women*, 38 L. & HUM. BEHAV. 34, 103 (2014).

¹⁴⁰ Astonishingly, to our thinking, this article by Skeem and Cooke has only, until now, been cited once in a law review article. See Wayland & O’Brien, *supra* note 2, at 549 n.177. On the other hand, it has apparently been cited a staggering 680 times in other scholarly articles. See GOOGLE SCHOLAR, https://scholar.google.com/scholar?cites=4066424898217515480&cas_sdt=5,31&scioldt=0,31&hl=en (last visited May 26, 2021) (showing citations).

¹⁴¹ Skeem & Cooke, *supra* note 10, at 442; see also Nicole Sherretts et al., *Exposure to Criminal Environment and Criminal Social Identity in a Sample of Adult Prisoners: The Moderating Role of Psychopathic Traits*, 40 L. & HUM. BEHAV. 430, 437 (2016) (noting “antisocial tendencies may be a consequence rather than an integral part of a psychopathic personality”) (quoting among others, Skeem & Cooke, *supra* note 10).

¹⁴² Shannon Toney Smith et al., “So, What Is a Psychopath?” *Venireperson Perceptions, Beliefs, and Attitudes About Psychopathic Personality*, 38 L. & HUM. BEHAV. 490, 491 (2014); see also Phillips et al., *supra* note 139, at 34–35 (discussing concerns raised by the Hare scale “focus on criminal behavior”).

¹⁴³ Jennifer L. Skeem et al., *Psychopathic Personality: Bridging the Gap Between Scientific Evidence and Public Policy*, 12 PSYCHOL. SCI. PUB. INTEREST 95, 96 (2011) (emphasis added); see also Glen D. Walters, *Psychopathy and Crime: Testing the Incremental Validity of PCL-R-Measured Psychopathy as a Predictor of General and Violent Recidivism*, 36 L. & HUM. BEHAV. 404, 409 (2012) (reporting on research that “lend[s] support to Skeem and Cooke’s . . . contention that antisociality may be more a consequence than a core feature of psychopathy”); *id.* (“Findings from the current study bring into serious question long-standing assumptions about psychopathy and the PCL-R.”); Kennealy et al., *supra* note 135, at 569 (noting research challenges “common assumptions about the interactive relationship assumed to exist between the PCL-R factor scores and violence”).

¹⁴⁴ Ken Levy, *Dangerous Psychopaths: Criminally Responsible but Not Morally Responsible, Subject to Criminal Punishment and to Preventive Detention*, 48 SAN DIEGO L. REV. 1299, 1315 (2011).

As Professor Levy has noted, “this move itself spawned a flurry of literature over not only the merits of the PCL-R but also academic freedom more generally.”¹⁴⁵

So, there is more at stake here than dueling professors expressing differing points of view.¹⁴⁶

V. THE BRAIN, PUNISHMENT, RECIDIVISM, AND RACIAL BIAS

While research continues to uncover both differences and similarities in the neurological and genetic factors that may predispose individuals to exhibit either sociopathic or psychopathic diagnostic traits,¹⁴⁷ it is important to take a step back and review how these criteria have been, and are currently, being used. It is even more important to focus on how these criteria have been *misused* in order to perpetuate dangerous race-based stereotypes, disadvantage already-marginalized populations, and contribute to the growing prison and jail figures disproportionately dominated by Black and brown men.¹⁴⁸

Much of the research done in this area has not taken these factors into account, and now must be revisited in order to review findings with a more nuanced gaze that recognizes racial and socioeconomic factors underlying environment and learned behavior that may have been used in the past to perpetuate stereotypes.

Consider, for example, the differences between reactive and instrumental aggression. In 2001, Dr. James Blair began writing about the neurocognitive differences between psychopathy and sociopathy.¹⁴⁹ He noted that there were key differences in what type of violent behavior was manifested in the two groups, and identified two forms of aggression that are distinguished in individuals who commit violent acts: reactive aggression elicited in response to frustration/threat and goal directed, instrumental aggression.¹⁵⁰ Some researchers argue that different forms of neurocognitive model are necessary to explain the emergence of these different forms

¹⁴⁵ *Id.* See also, e.g., Norman Poythress & John P. Petrila, *PCL-R Psychopathy: Threats to Sue, Peer Review, and Potential Implications for Science and Law. A Commentary*, 9 INT’L J. FORENSIC MENTAL HEALTH 3, 4 (2010), discussed in this context in Wayland & O’Brien, *supra* note 2, at 558 n.234 (noting “litigation threats can have chilling effects on academic freedom”).

¹⁴⁶ To the best of our knowledge, no reported case has, as of yet, considered the Skeem and Cooke article (WESTLAW search last conducted Mar. 26, 2021).

¹⁴⁷ See, e.g., Omer Faruk Demirel et al., *Neurological Soft Signs in Antisocial Men and Relation with Psychopathy*, 240 PSYCHIATRY RES. 248, 249 (2016).

¹⁴⁸ See, e.g., Emma Luttrell Shreefter, *Federal Felon-In-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation’s Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 157–58 (2018); Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Have Brought*, 11 J. INST. JUST. INT’L STUD. 87, 92 (2011).

¹⁴⁹ Blair, *Neurocognitive Models*, *supra* note 125, at 727.

¹⁵⁰ *Id.*

of aggression.¹⁵¹ Impairments in executive emotional systems (the somatic marker system or the social response reversal system) are related to reactive aggression shown by patients with “acquired sociopathy” due to orbitofrontal cortex lesions.¹⁵² Impairment in the capacity to form associations between emotional unconditioned stimuli, particularly distress cues, and conditioned stimuli (the violence inhibition mechanism model) is related to the instrumental aggression shown by persons with developmental psychopathy.¹⁵³

At this point in time, no one can seriously dispute that unconscious racial stereotypes may influence judgments about offenders’ “negative traits, culpability, risk of recidivism and deserved punishment[,]”¹⁵⁴ including their propensity to commit certain kinds of offenses. In one astounding study, probation officers who were exposed to subliminal messages (words such as “homeboy” and “rap”), judged alleged offenders “to be less immature and more violent . . . more culpable, more likely to reoffend, and more deserving of punishment,” with more negative global trait ratings.¹⁵⁵ And consider how what we know about attitudes towards “psychopathy” and “anti-social personality disorder” relates to punishment: How do we punish

¹⁵¹ For a more recent review of cognitive neuroscience models of psychopathy, including findings on decreased amygdala responses and orbitofrontal cortex responses, see R.J.R. Blair, *Neuroimaging of Psychopathy and Antisocial Behavior: A Targeted Review*, 12 CURRENT PSYCHIATRY REP. 76 (2012) [hereinafter Blair, *Neuroimaging of Psychopathy*]. On brain development, cognitive functioning and psychopathy, see James H. Fallon, *The Relationship Between Brain Development, Cognitive Functioning, and Accountability Under the Law: Neuroanatomical Background to Understanding the Brain of the Young Psychopath*, 3 OHIO ST. J. CRIM. L. 341, 350 (2006). For the most recent review of the relationship between legal and moral judgments in the neurocognitive context, see Qun Yang et al., *When Morality Opposes the Law: An fMRI Investigation into Punishment Judgments for Crimes with Good Intentions*, 127 NEUROPSYCHOLOGIA 195, 195–96 (2019).

¹⁵² Blair, *Neuroimaging of Psychopathy*, *supra* note 151, at 728.

¹⁵³ Blair, *Neurocognitive Models*, *supra* note 125.

¹⁵⁴ Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 NW. J.L. & SOC. POL'Y 428, 437 (2011). Although Prof. Soung’s article focuses on young offenders, there can be little question that these insights apply to all. Graham & Lowery, *supra* note 117, at 499.

¹⁵⁵ Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 311 (2012) (citing Graham & Lowery, *supra* note 117, at 496 (alteration in original)).

people differently based on perceived propensity to commit certain types of offenses, a perception of propensity that may be race based?¹⁵⁶

The DSM, and clinical judgment, has long been viewed as a potentially inherently racist system of classifying mental illness.¹⁵⁷ This may be particularly true for Black men diagnosed with ASPD and thus “written off” as too violent or dangerous for any path other than maximum prison sentences.¹⁵⁸ This diagnosis, compounded by stereotyping, will continue to divert marginalized individuals from therapeutic, treatment-focused programs if not recognized and addressed by judges and prosecutors. Clinical professionals must also recognize their own biases in how they make their diagnoses and clinical judgments.¹⁵⁹

VI. THERAPEUTIC JURISPRUDENCE¹⁶⁰

One of the most important legal theoretical developments of the past three decades has been the creation and dynamic growth of therapeutic jurisprudence

¹⁵⁶ See, e.g., Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018) (discussing how prosecutors may be using race as a proxy for a defendant’s latent criminality (such as propensity to commit a severe offense in the future) in cases involving low-level offenses).

¹⁵⁷ Harold W. Neighbors et al., *Racial Differences in DSM Diagnosis Using a Semi-Structured Instrument: The Importance of Clinical Judgment in the Diagnosis of African Americans*, 43 J. HEALTH & SOC. BEHAV. 237, 237 (2003).

¹⁵⁸ See, e.g., Colleen M. Berryessa & Barclay Wohlstetter, *The Psychopathic “Label” and Effects on Punishment Outcomes: A Meta-Analysis*, 43 L. & HUM. BEHAV. 9, 20 (2019) (noting “antisocial personality disorders . . . [are] traditionally associated with negative stigma, such as dangerousness, lack of treatability, and punitive judgments similar to psychopathy”) (citing, *inter alia*, Terrie E. Moffitt et al., *Research Review: DSM-V Conduct Disorder: Research Needs for an Evidence Base*, 49 J. CHILD PSYCHOL. & PSYCHIATRY 3 (2008)).

¹⁵⁹ See, e.g., Chloë FitzGerald & Samia Hurst, *Implicit Bias in Healthcare Professionals: A Systematic Review*, BMC MED. ETHICS, 2017, at 5.

¹⁶⁰ See, e.g., Michael L. Perlin & Alison J. Lynch, “All His Sexless Patients”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 277 (2014) [hereinafter Perlin & Lynch, “All His Sexless Patients”]; Michael L. Perlin & Naomi Weinstein, “Friend to the Martyr, a Friend to the Woman of Shame”: *Thinking About the Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC. JUST. 1, 9 (2014); Michael L. Perlin & Alison J. Lynch, “Had to be Held Down by Big Police”: *A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities*, 43 FORD. URB. L.J. 685, 695 (2016); Michael L. Perlin & Alison J. Lynch, “Toiling in the Danger and in the Morals of Despair”: *Risk, Security, Danger, the Constitution, and the Clinician’s Dilemma*, 5 IND. J.L. & SOC. EQUALITY 409, 421 (2017) [hereinafter Perlin & Lynch, *Toiling*]. It also distills the work that one of the co-authors (Michael L. Perlin) has done on this topic for the past 27 years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993). See generally Michael L. Perlin, “Have You Seen Dignity?”: *The Story of the Development of Therapeutic Jurisprudence*, 27 U.N.Z. L. REV. 1135 (2017); Michael L. Perlin, “Changing of the Guards”: *David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship*, 63 INT’L J.L. & PSYCHIATRY

(TJ).¹⁶¹ Therapeutic jurisprudence recognizes that the law—potentially a therapeutic agent—can have therapeutic or anti-therapeutic consequences for individuals involved in both the civil and criminal justice systems.¹⁶² It asks this question: can or should legal rules, procedures, and lawyer roles be reshaped to enhance their therapeutic potential while, at the same time, not subordinating principles of due process?¹⁶³ From the outset, one of the creators of this field of scholarship/theory has been clear: “the law’s use of ‘mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns[,]”¹⁶⁴ a position with which we entirely agree.¹⁶⁵

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives,”¹⁶⁶ focusing on the law’s influence on emotional life and psychological well-being.¹⁶⁷ TJ seeks to inform lawyering practices and influence policy “by using social science data and methodology to study the extent to which a legal rule, procedure,

3 (2019).

¹⁶¹ See, e.g., DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 8–11 (1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 606 (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 6–7 (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 17 (2008).

¹⁶² See 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, 912 (2009); see Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian Freckelton & Kate Peterson eds., 2006).

¹⁶³ Michael L. Perlin, “*And My Best Friend, My Doctor! Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005); Michael L. Perlin, “*Everybody Is Making Love/Or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 510 n.139 (2008).

¹⁶⁴ Perlin & Lynch, “*All His Sexless Patients*”, *supra* note 160, at 262 (quoting David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993)); see also, e.g., David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179, 184 (1996).

¹⁶⁵ “[A]n inquiry into therapeutic outcomes does *not* mean that therapeutic concerns ‘trump’ civil rights and civil liberties.” Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice, “Us” and “Them”*, 31 LOY. L.A. L. REV. 775, 782 (1998).

¹⁶⁶ Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

¹⁶⁷ David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in DANIEL P. STOLLE, DAVID B. WEXLER & BRUCE J. WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45, 45 (Dennis P. Stolle eds., 2000).

or practice promotes the psychological and physical well-being of the people it affects.”¹⁶⁸ It suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness.”¹⁶⁹

Therapeutic jurisprudence has been described as “a sea-change in ethical thinking about the role of law, a movement towards a more distinctly relational approach to the practice of law which emphasises psychological wellness over adversarial triumphalism.”¹⁷⁰ That is, therapeutic jurisprudence supports an ethic of care.¹⁷¹

Therapeutic jurisprudence and its practitioners place great importance on the principle of a commitment to dignity.¹⁷² Professor Amy Ronner describes the “three Vs”: voice, validation and voluntariness,¹⁷³ arguing:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at

¹⁶⁸ Keri K. Gould & Michael L. Perlin, “*Johnny’s in the Basement/Mixing Up His Medicine*”: *Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339, 535–34 (2000); see also Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L. 193, 197 (1995) (TJ “adopt[s] a preference for laws that promote well-being”).

¹⁶⁹ Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

¹⁷⁰ Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); see also Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 341, 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006).

¹⁷¹ See, e.g., Gregory Baker, *Do You Hear the Knocking at the Door? A “Therapeutic” Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); Brookbanks, *supra* note 170, at 329–30; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007).

¹⁷² WINICK, *supra* note 161, at 606. See generally Michael L. Perlin, “*There Are No Trials Inside the Gates of Eden*”: *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: RIGHTS, LAW AND POLICY 193 (Bernadette McSherry & Ian Freckleton eds., 2013).

¹⁷³ Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of “voice,” see also Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 THOMAS JEFFERSON L. REV. 575, 588 (2008).

peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive.¹⁷⁴

This leads to a question, not addressed before in this context: To what extent are the ways that brain science affects our modern views of punishment consonant or dissonant with therapeutic jurisprudence?¹⁷⁵ Do they best insure that these principles written about by Professor Ronner—the principles of voluntariness, voice, and validation—be fulfilled in matters sentencing a population that is simultaneously feared, hated, and misunderstood? To what extent are *any* of Professor Ronner's factors even relevant in a universe in which punishment is the *sine qua non* of any policy judgments regarding this population?¹⁷⁶

Professor Ken Levy sets out the issue:

It seems that there is at least one way in which we can have our cake and eat it too—one way in which we can *both* preventively commit psychopaths whom we find to be dangerous (pre-crime) *and* criminally punish them if they are found guilty of crimes. The key is to recognize that psychopathy may very well be regarded as a *mental illness* and therefore a condition that makes psychopaths eligible for preventive commitment (as long as they are also dangerous) but is not severe enough to be regarded as insanity (that is, is not severe

¹⁷⁴ Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002). See generally AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE (2010).

¹⁷⁵ The therapeutic jurisprudence literature has been virtually silent about this issue. But see Perlin & Lynch, *supra* note 28, on the interrelationship between neuroscience and punishment decisions in juvenile cases, and Michael L. Perlin, “*I’ve Got My Mind Made Up*”: *How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 91 (2017) (noting “consider how courts regularly ignore the reality that there is scientific evidence that instrumental violence may stem from uncontrolled, biologically based psychopathology (amygdala dysfunction) and/or controlled decision making that is based on anticipated environmental consequences (observational and enactive learning of external reinforcers)”).

¹⁷⁶ For one of the few relevant considerations, see Emily R. Murphy, *Paved with Good Intentions: Sentencing Alternatives from Neuroscience and the Policy of Problem-Solving Courts*, 37 L. & PSYCHOL. REV. 83, 117 (2013) (“With opportunities for invasive, long-lasting, and highly-impacting treatments coming soon from neuroscience, drug courts must revisit the true roots of a therapeutic jurisprudence framework: a focus on empirically verifiable results with respect for due process protections for personal liberty and autonomy.”). On the relationship between therapeutic jurisprudence and neuroscience on the question of competency to stand trial, see Michael L. Perlin & Alison J. Lynch, “*My Brain Is So Wired*”: *Neuroimaging’s Role in Competency Cases Involving Persons with Mental Disabilities*, 27 BOSTON U. PUB. INT. L.J. 73 (2018). On this relationship in the context of the insanity defense, see Perlin, *supra* note 162, at 913–14.

enough to be considered an inability to know/appreciate right and wrong or to act in conformity with this knowledge/appreciation).¹⁷⁷

Of course, this is precisely the formula that courts follow in cases involving so-called sexually violent predators. Following the lead of the U.S. Supreme Court's decision in *Kansas v. Hendricks*,¹⁷⁸ a case about as antithetical to therapeutic jurisprudence principles as one can imagine,¹⁷⁹ such an approach—preventive detention *and* punishment—makes a mockery of the concepts of voice, validation, and voluntariness in every way imaginable. Some scholars acknowledge the ambiguities we face; by way of example, Adam Fox and his colleagues have concluded, “some punitive recourse is in order for the wrongdoing psychopath, but it does not resolve the debate as to what may or should be done about the psychopath who has fulfilled the retributive mandate but persists in presenting a chronic, serious danger to others.”¹⁸⁰

TJ also requires individualization.¹⁸¹ That is, it demands that persons subject to legal regulation be considered as individuals, and not simply as a labeled group. By way of example in her article about how TJ can be the “kickstart” factor in exploring how the legal process can become a medium for creating novel and effective intervention with individuals subject to legal regulation,¹⁸² Professor Claire Steinberger has looked to the New York state right-to-refuse treatment case of *Rivers v. Katz*,¹⁸³ as an example of a case that implicitly endorsed TJ values in its criticism of

¹⁷⁷ Levy, *supra* note 144, at 1379; Shanée Brown, *Impunity for the Incurable Psychopath?: Neurobiological Abnormalities Do Not Exempt Psychopaths from Criminal Responsibility*, 7 CHARLOTTE L. REV. 239, 247, 253 (2016). On psychopathy and outpatient commitment, see Bruce J. Winick et al., *Should Psychopathy Qualify for Preventive Outpatient Commitment?*, in 2 INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW 61, 70 (Alan Felthous & Henning Saß eds., 2007).

¹⁷⁸ *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

¹⁷⁹ See, e.g., Michael L. Perlin, “*There’s No Success Like Failure/and Failure’s No Success at All: Exposing the Pretextuality of Kansas v. Hendricks*,” 92 NW. U. L. REV. 1247, 1248–49 (1998); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION 28–29, 145–46 (2017); Keri K. Gould, *If It’s a Duck and Dangerous—Permanently Clip Its Wings or Treat It Till It Can Fly?: A Therapeutic Perspective on Difficult Decisions, Short-Sighted Solutions and Violent Sexual Predators After Kansas v. Hendricks*, 31 LOY. L.A. L. REV. 859, 882 (1998); Michael L. Perlin et al., “*On Desolation Row: The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means for All of Us*,” 24 TEX. J. ON C.L. & C.R. 59, 96 (2018).

¹⁸⁰ Fox et al., *supra* note 48, at 24.

¹⁸¹ See, e.g., Thomas F. Asbury, *Spiritual Outputs Approach to Rehabilitation: Alternative Sentencing Theory*, 3 FLA. COASTAL L.J. 41, 45 (2001) (noting TJ “deals with people . . . on a more personal, individualized basis”).

¹⁸² Claire B. Steinberger, *Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 L. & PSYCHOL. REV. 55, 56 (2003).

¹⁸³ *Rivers v. Katz*, 504 N.Y.S. 2d 74 (Ct. App. 1986). *Rivers* is discussed extensively in

the absence of individualization of medication orders that did not incorporate the patients' perspective into the review process.¹⁸⁴

Although over 20 years ago, the late Professor Bruce Winick noted that “concern for avoiding or ameliorating psychopathology in a traditional sense . . . has been the subject of much of the therapeutic jurisprudence literature dealing with mental health law[,]”¹⁸⁵ the TJ literature has been virtually totally bereft of analyses of the issues that we are focusing on in this Article.¹⁸⁶ We hope that this Article will jog interest and “kickstart” consideration of this important topic, and optimally, might lead to a more individualized rehabilitative effort for the individuals under discussion here.¹⁸⁷

Concepts from TJ that would recognize the need for such individualized treatment could contribute to enhanced, less biased screening processes,¹⁸⁸ and less automatic discipline for individuals in jail and prison settings who may, due to a mental health diagnosis, be more likely to show violent or aggressive behavior.¹⁸⁹ This could also include a different system of transfers between units or facilities,¹⁹⁰ so people with a greater likelihood of using reactive aggression as a coping strategy would have less opportunity to be placed in situations exacerbating this propensity.¹⁹¹

PERLIN & CUCOLO, *supra* note 5, § 8-6.3.1.

¹⁸⁴ Steinberger, *supra* note 182, at 68 n.79.

¹⁸⁵ Bruce Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 192 (1997).

¹⁸⁶ *But see* Bruce J. Winick, *A Therapeutic Jurisprudence Assessment of Sexually Violent Predator Laws*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 317, 318 (Bruce J. Winick & John Q. LaFond eds., 2003) (observing that sex offender policy “has fluctuated between two polar approaches,” subjecting sex offenders to criminal punishment under a criminal model and labeling them as “sexual psychopaths” under an illness model), as discussed in Shelley Ross Saxe, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397, 1442 n.284 (2009).

Apparently, the only other scholarship ever done in this area is David Carson & Christopher Heginbotham, *Therapeutic Jurisprudence and Psychopathy: A Philosophical Exploration*, in PHIL. PSYCHIATRY & PSYCHOPATHY 131 (Christopher Heginbotham ed., 2000).

¹⁸⁷ Consider Chief Judge David Bazelon's admonition that we need to be vigilant about not “overgeneraliz[ing] about citizens whom it is easy to overgeneralize about.” David L. Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897, 909 (1975).

¹⁸⁸ There is surprisingly virtually nothing about this in the literature. *But see* Steven L. Proctor et al., *Response Bias in Screening County Jail Inmates for Addictions*, 1 J. DRUG ISSUES 117, 119 (2011).

¹⁸⁹ For an example, see *People v. Parker*, 395 P.3d 208, 225 (Cal. 2017).

¹⁹⁰ *See generally* Perlin & Lynch, *Toiling*, *supra* note 160.

¹⁹¹ *See generally* Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847, 855 (2020) (commenting on reactive aggression in this context). *See also* Rachael A. Lickley & Catherine L.

Again, a parallel consideration of how we deal with sexual violent predators might be instructive. In a book on that topic, in discussing community monitoring, one of the co-authors (Michael L. Perlin) and a colleague concluded, “[i]f we choose to still have some form of community monitoring, it must be done through an *individualized* assessment of risk, likelihood, and danger based on credible, peer-reviewed studies and ethical evaluations.”¹⁹² The characterizations of a criminal defendant as a “psychopath”¹⁹³ is as *unindividualized* as any legal characterization can possibly be, and thus frontally violative of all therapeutic jurisprudence principles. It is mandatory that we rethink these harmful and counterproductive practices.

VII. CONCLUSION

The difference between antisocial personality disorder and psychopathy has been muddled by courts and commentators alike, a muddling that has great significance to those of us who are seeking to unpack *why* we punish and *how* advances in neuroscience might give us some tentative answers as to what we should do. We have hoped, in this Article, to try to resolve some of the ambiguities that appear omnipresent, and, by doing so, we hope that we also have been able to shed some light on a series of other interrelated issues that cannot be avoided in this conversation. The significance of implicit racial bias appears in all aspects of the ongoing inquiries, including the use of purportedly-objective actuarial instruments and in diagnostic labeling by clinicians. The recent valid and reliable evidence forces (or, rather, *should* force) courts to reconsider their slavish reliance on the use of the PCL-R test. It is imperative for counsel to understand the complexity of the issues we preliminarily discuss here, and the correlative need for counsel to apply these findings to representation of criminal defendants. It is essential to consider the application of therapeutic jurisprudence principles to all of the questions we consider in this Article. We hope that this Article sheds some light on some of the complex issues we face in considering these important and confounding issues, especially those that arise in racially-explosive situations. We also hope it encourages lawyers, judges, and expert witnesses to more judiciously consider claims made on behalf of the PCL-R.¹⁹⁴

Sebastian, *The Neural Basis of Reactive Aggression and Its Development in Adolescence*, 24 PSYCHOL. CRIME & L. 313, 313 (2018).

¹⁹² PERLIN & CUCOLO, *supra* note 179, at 169 (emphasis added).

¹⁹³ See, e.g., *Turner v. State*, 87 S.W.3d 111, 117–18 (Tex. Crim. App. 2002) (affirming capital murder conviction where prosecutor referred to defendant as a psychopath and a sociopath); *Wrinkles v. State*, 749 N.E.2d 1179, 1189 (Ind. 2001) (finding counsel for capital murder defendant were not ineffective in failing to object to prosecutor’s description of defendant as a “psychopath” and “sociopathic” during closing argument).

¹⁹⁴ Caleb D. Lloyd et al., *Psychopathy, Expert Testimony, and Indeterminate Sentences: Exploring the Relationship Between Psychopathy Checklist-Revised Testimony and Trial Outcome in*

Stanley Kubrick directed a movie adaptation of Anthony Burgess's novel, *A Clockwork Orange*, and has famously said, "There's something in the human personality which resents things that are clear, and conversely, something which is attracted to puzzles, enigmas, and allegories."¹⁹⁵ Paradoxically, as a society, we have sought to simplify this whole topic, and resist the puzzles that remain. The quote from *Clockwork Orange* with which we begin our title—"I See What Is Right and Approve, But I Do What Is Wrong"—is the essence of the ambiguity that confronts us. We hope that this Article will be a modest step on the road towards resolution of this ambiguity.

Canada, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 323, 326, 334 (2010).

¹⁹⁵ Jasun Horsley, *There's Something About Stanley: Kubrick's Strange Science of Obsession*, QUIETUS (Dec. 13, 2014, 10:19 AM), <https://thequietus.com/articles/16888-stanley-kubrick-article>.