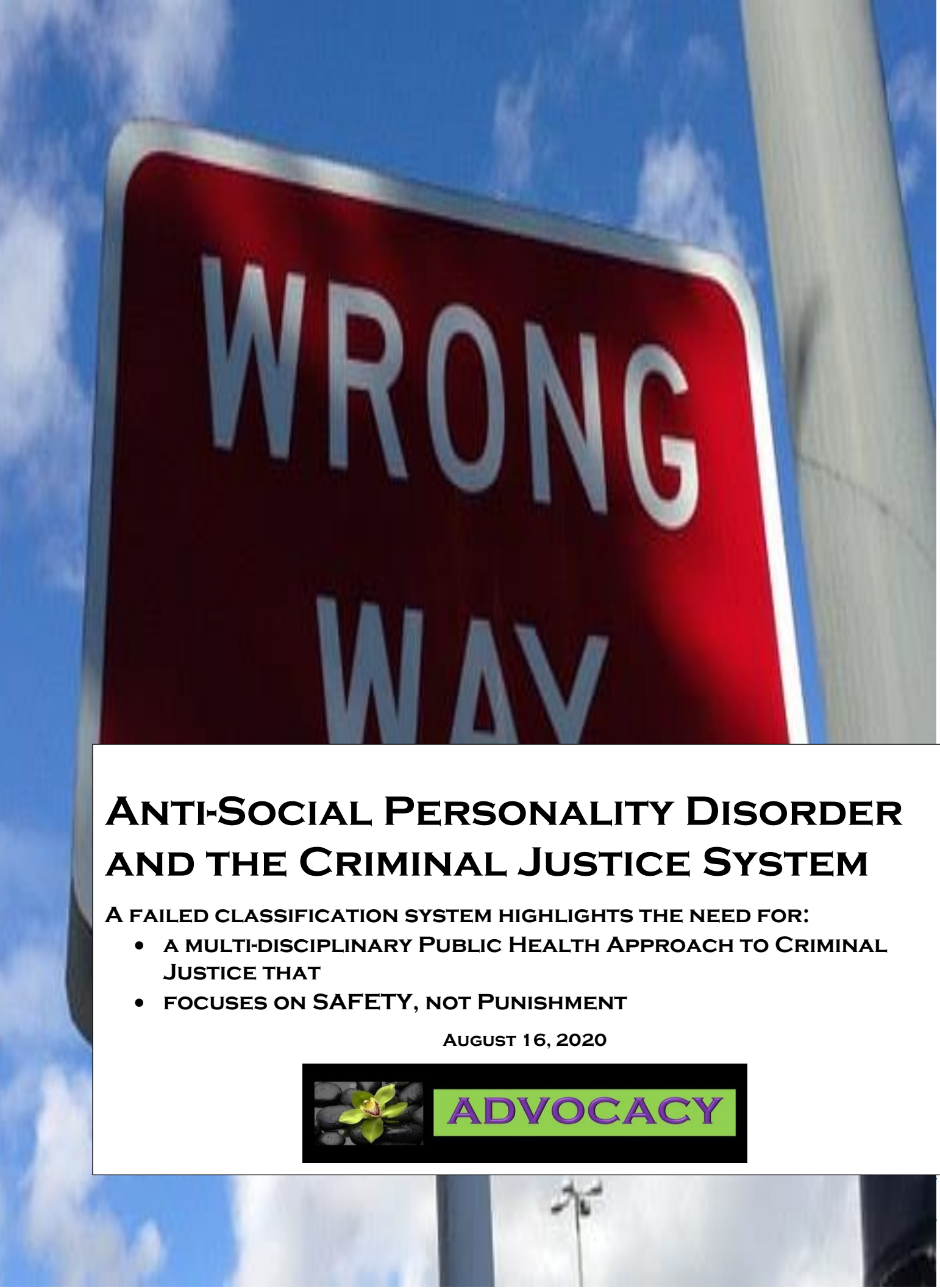

Anti-Social Personality Disorder and the Criminal Justice System

A failed classification system highlights the need for:

- a multi-disciplinary Public Health Approach to Criminal Justice that
- focuses on SAFETY, not Punishment

August 16, 2020

ADVOCACY

2014 Brief Clip of then US National Institute of Mental Health Director Thomas Insel

Why is this so significant?

- **It highlights Enormous Progress, and**
- **Enormous Gaps – "We don't even have a parts list for the brain," and**
- **Insel's Prediction of Discoveries beyond Imagination**

which seem to have already come true

This Challenging Landscape is NOT somehow IRRELEVANT to Criminal Justice or to an "invalid" Classification System or to one of its most problematic and over-used classifications: "Anti-Social Personality Disorder"

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1. Executive Summary

It appears that behavior associated with the pejorative label "anti-social personality disorder" is in fact biologically based.

Further, the DSM 5 diagnoses that are often relied upon in Criminal Courts and included in reports and testimony do not satisfy current scientific standards for medical classifications tying to the underlying biology, not just a description of symptomology.

We are recommending:

- **Federal Control over any Psychiatric Diagnostic Manual as proposed by Texas attorney Cia Bearden in her 2012 article in the Houston Health Law and Policy Journal.**
- **A Public Health Approach to Criminal Justice that is not limited to Psychiatry, but includes other relevant medical disciplines**
- **A prohibition to using "anti-social personality disorder" in any consideration of punishment**
- **Development and implementation of:**
    - **Services,**
    - **Housing, and/or**
    - **Placements**
      For people with long term behavior issues, including but not limited to those behavior issues associated with "anti-social personality disorder"

2. The DSM 5's Routinely Ignored and Ineffective Cautionary Statement for Forensic Use of the DSM 5.

This is not a consideration of civil liability for an alleged ineffective disclaimer.

This does briefly highlight the practical problems associated with the routine disregard of this "cautionary statement."

Cautionary Statement for Forensic Use of DSM-5

Excerpt

Although the DSM-5 diagnostic criteria and text are primarily designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning, DSM-5 is also used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders. As a result, it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals. It is also important to note that DSM-5 does not provide treatment guidelines for any given disorder.

This "Cautionary Statement" regarding the forensic use of the DSM 5 is probably better than nothing, but it fails to appreciate the large distinction in Western Jurisprudence between Criminal Law & PUNISHMENT and Civil or even Mental Health Certification Law.

Most importantly Criminal Law requires ---PROOF BEYOND A REASONABLE DOUBT regarding each of the elements of the crime, including the element of INTENT.

If we do not look too closely, maybe this is not a problem. BUT once we start asking the question, "What is causing the

bad intent?" with a backdrop of researchers finding all kinds of BIOLOGICAL EXPLANATIONS for "bad intent" – including BRAIN INJURY – the LAW has a BIG PROBLEM and psychiatry isn't always well positioned to help us solve it.

The issues are literally bigger than they are.

Further, our treatment of "intent" doesn't look RATIONAL anymore – and that violates DUE PROCESS – and raises all kinds of REASONABLE DOUBT regarding other situations that may not have that immediate biological answer, but there is reason to believe there is such an answer or at the very least the State can't carry its burden or shouldn't be able to.

This small report is mainly "ISSUE SPOTTING" but the issues are there to be spotted, further developed and remedied.

3. Summarized Science

A. Problems with the DSM 5

The DSM 5 Classifications deemed "invalid" by the US National Institute of Mental Health in 2013 are often relied upon in Criminal Justice Systems currently designed for Punishment and the Ultra-High Burden of PROOF BEYOND A REASONABLE DOUBT.

These classifications play complicated roles in outdated definitions of "competency" and "insanity" promulgated by State Legislatures.

Blog of then Director of the National Institute of Mental Health Dr. Thomas Insel **Transforming Diagnosis (2013)**	**"The weakness is its lack of validity. Unlike our definitions of ischemic heart disease, lymphoma, or AIDS, the DSM diagnoses are based on a consensus about clusters of clinical symptoms, not any objective laboratory measure.** **"In the rest of medicine, this would be equivalent to creating diagnostic systems based on the nature of chest pain or the quality of fever.** **"Indeed, symptom-based diagnosis, once common in other areas of medicine, has been largely replaced in the past half century as we have understood that symptoms alone rarely indicate the best choice of treatment.** **"Patients with mental disorders deserve better. NIMH has launched the Research Domain Criteria (RDoC) project to transform diagnosis by incorporating genetics, imaging, cognitive science, and other levels of information to lay the foundation for a new classification**

	system."
RDoC : Research Domain Criteria Initiative **National Institute of Mental Health (NIMH)**	**NIMH later after backlash from the American Psychiatric Association -- said it was "AGNOSTIC" on the DSM 5.** **"The RDoC framework is explicitly agnostic with respect to current definitions of disorders.** **"For instance, depression as a clinical syndrome has been related to abnormal activity in the amygdala, anterior cingulate cortex, nucleus accumbens, and multiple monoamine systems, while also strongly comorbid with multiple anxiety disorders, eating disorders, etc."**
Neuroscience News (2019) **Brains of People With Schizophrenia Related Disorders Aren't All the Same** **The American Journal of Psychiatry (2019)** **Separable and Replicable Neural Strategies During Social Brain Function in People With and Without Severe Mental Illness** **(Included US and Canadian Researchers)**	**Canadian researchers say:** **"It turned out that the relationship between brain function and social behaviour had nothing to do with conventional diagnostic categories in the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders)."** **Conclusions: The study findings demonstrate replicable differing patterns of neural activity among individuals during a socio-emotional task, independent of DSM diagnosis or scan site.** **The findings may provide**

	objective neuroimaging endpoints (biomarkers) for subgroups of individuals in target engagement research aimed at enhancing cognitive performance independent of diagnostic category.
Neuroscience News (2019) **Study finds psychiatric diagnosis to be 'scientifically meaningless'** **University of Liverpool**	**British researchers conclude many psychiatric diagnoses are scientifically worthless as tools for identifying discrete mental health disorders.** **Highlights** • **Theory and practice of diagnostic assessment is central yet contentious in psychiatry.** • **DSM-5 contains heterogeneous diagnostic categories.** • **Pragmatic criteria give clinical flexibility but undermine the diagnostic model.** • **Trauma has a limited causal role in DSM-5, despite research evidence to the contrary.**
Houston Journal of Health Law & Policy (2012) **THE REALITY OF THE DSM IN THE LEGAL ARENA:** **A PROPOSITION FOR**	**If a medical diagnostic publication is to exist in this capacity, there should be federal regulations setting forth acceptable practices in its formation and methodology.** **. . .**

CURTAILING UNDESIRED CONSEQUENCES OF AN IMPERFECT TOOL

By Cia Bearden

Author recommends federal regulations regarding psychiatric diagnostic manual.

We think the challenges of a "psychiatric diagnostic manual" in the 21st century are beyond the American Psychiatric Association, especially with the integration of Physical and Mental Health and the importance of other disciplines of medicine.

Further, the public policy and legal ramifications of such a "manual" mean a professional organization should not be overseeing this.

This should be overseen by the US National Institute of Mental Health with the US Department of Health and Human Services and other stakeholders to improve the science and systematically address the practical problems of less than perfect science in our science in our society and systems.

Rather than allowing the APA to defer to the influence of contributor's opinions simply because of lack of funding or time or any other reasons alleged, a publication that is intended to be used by the medical community as a diagnostic tool should be based on actual scientific evidence.

As such, a guideline for the threshold amount of empirical or historical evidence should be required for the inclusion of each and every diagnosis.

. . .

As for the DSM's function in the legal system, the APA's current approach is to attempt to protect themselves from liability by including a caveat warning against such uses.

Given the particular difficulties in understanding and applying mental illness, the DSM's continued use in the legal community is reasonably foreseeable.

Moreover, the APA is or should be fully aware of its use, regardless of their warning language.

Instead of trying to shield themselves from liability for unintended use, the APA and anyone else producing a medical diagnostic tool should work to

	create a manual that court proceedings accept as scientifically verifiable. **Currently, the DSM affects eligibility for insurance and disability benefits, culpability in** • **civil and criminal proceedings,** • **injury in civil proceedings and worker's compensation claims,** • **competency of a defendant to stand trial,** • **the possibility that a defendant will be forced into a lifetime of psychiatric commitment in addition to serving his sentence,** • **and in the most extreme cases, the difference between life and death for a person convicted of a capital crime.** **The APA cannot simply ignore its role in these circumstances by issuing a cautionary statement. Instead, they must work to create a scientifically valid manual.**
AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH (2016)	**Standard 7-1.1. Terminology** **(a) Unless otherwise specified, these Standards adopt the definition of "mental disorder" found in the current Diagnostic and Statistical Manual of the American Psychiatric Association.**

	*** In the settings addressed by the Standards, mental disorder is most likely to encompass mental illnesses such as schizophrenia, bipolar disorder, and major depressive disorders; developmental disabilities that affect intellectual and adaptive functioning; and substance use disorders that develop from repeated and extensive abuse of drugs or alcohol or some combination thereof.**
ATONEMENT **(OCT. 2014)** **BY THEN NIMH DIRECTOR DR. THOMAS INSEL**	**As it turns out, Mental Illness Awareness Week this year began with Yom Kippur, the Jewish Day of Atonement.** **Which begs the question: what do we (in the mental health community) need to atone for?** **There are so many answers.** • **For some, it may be the culture of blame and shame perpetuated for years by clinicians who explained all mental illness as being caused by trauma and evil parents.**

	• **For others, it may be the singular reliance on medication and modifying behavior rather than holistic care and the provision of skills.** • **Others will name the paternalistic structure of mental health care, which can undermine rather than empower individuals and their families.** • **The list goes on.** **Maybe it would take a week, not just a day, to capture the many complaints.** **My own favorite atonement issue for Mental Illness Awareness Week this year is the lack of humility in our field.** **Mental disorders are among the most complex problems in medicine, with challenges at every level from neurons to neighborhoods.**

	Yet, we know so little about mechanisms at each level. Too often, we have been guided more by religion than science. **That is, so much of mental health care is based on faith and intuition, not science and evidence.** **On the plus side, we put a premium on listening and compassion. We help people to change through understanding.** **But not enough of our care has been standardized to a high level of quality, as expected in the rest of medicine.** **On the research side, it's easy to lose humility.** **But, and this is a humbling caveat, we simply have not been able to translate this revolution in neuroscience to diagnostics or therapeutics for people with**

	mental disorders.

B. Problems with Personality Disorder Classifications in General

The YouTube Video above from Human Rights Watch describes how women were discharged from the Military for reporting rape, and then labelled with a "personality disorder."

Most of the harm done by the poor science associated with personality disorder is unintentional, but as is the case

here it can easily be manipulated for purposeful harm because the categories are so vague.

Oxford University Press Blog (2012) **Edward Shorter** **Historian of Psychiatry** **Personality disorders, the DSM, and the future of diagnosis**	**"Personality disorders exist not as natural phenomena but as cultural phenomena:** **"We need some way of identifying people who can't quite get it all together.** **"But is this an illness that psychiatrists can treat? In the way that they treat schizophrenia with Zyprexa and depression with Prozac? What do we, as a society in 2012, do with people who can't quite get it all together? I'm asking you."** **In 2020, researchers are finding biomarkers for "anti-social personality disorder" and issues not previously considered biological (see below)**
Psychiatric Times (2013) **S. Nassir Ghaemi, MD, MPH** **Why DSM-III, IV, and 5 are Unscientific** **(Focuses on the Unscientific Nature of Personality Disorders)**	**" Why do we have about 10 personality "disorders"? Because psychoanalysts believe in those ideas.** **"Were those ideas tested with observational studies, and then revised based on confirmations and refutations of their content? Not before 1980, and hardly since . . .** **"This is the problem. It's not complicated, and philosophically difficult. If you have opinion, and nothing else, it's not science. If you refuse to change your opinions, it's not science. Most of DSM has been based on opinion, and our profession has refused to change most of that opinion for 2 generations.** **"How can anyone imagine that any profession would ever experience progress, much less scientific progress, if it refuses to change its opinions, themselves based**

	on nothing but prior opinion? **"We are much more ignorant than Hippocrates over 2 millennia ago. He knew that opinion breeds ignorance, while science is the father of knowledge. We mistake our opinions for science."**

C. Problems with "Anti-Social Personality Disorder" Classification

This is often a default or catch-all diagnosis for people within the criminal justice system and it is often used to "rationalize" some harsh punishments.

In states with the Death Penalty, some juries may find this "diagnosis" is the icing on the cake to justify that execution. In states without the death penalty, the "diagnosis" is still used to "rationalize" long prison terms.

While the "semantics" of psychiatric diagnosis are fraught with peril, more and more researchers are finding biological bases for what is broadly termed "anti-social personality disorder."

Should the Criminal Law be punishing Biology? – Clearly not.

Neuroscience News	**August 3, 2020** ***Summary: Compared to typically developing children, those with***

Brain Scans of 9- to 11-Year-Olds Offer Clues About Aggressive and Antisocial Behavior	***disruptive behavioral disorders, characterized by antisocial behaviors and aggression, had less gray matter in the amygdala and hippocampus.*** ***Source: University of Pennsylvania*** **The behavioral problems of a 9-year-old tend to look very different from those of a teenager.** **What if, before any severe delinquency and rule-breaking began, the young child's brain function and reward-seeking behaviors could provide clues about whether antisocial behavior, violence, and aggression might develop later?**
International Journal of Psychological Research (2016) **Potential Biomarkers in personality disorders: current state and future research.**	**"Unfortunately, diagnoses done in psychiatry and psychology have a classification system based on the prevalence and intensity of symptoms and do not take into account the etiology, neurobiology, epidemiology, genetics, and drug responses.** **"On the other hand, explaining the phenomenology of personality disorders and how genes work together to express this phenotype implies a revision of the chaos theory, addressing the connection between neurodevelopment, significantly stressful events during early childhood and epigenetic modifications in DNA related to stochastic events which may contribute to the development of normal or abnormal behavior."**

International Journal of Forensic Mental Health (2019) **Some Ethical Considerations About the Use of Biomarkers for the Classification of Adult Antisocial Individuals**	**"It has been argued that a biomarker-informed classification system for antisocial individuals has the potential to overcome many obstacles in current conceptualizations of forensic and psychiatric constructs and promises better targeted treatments.** **"However, some have expressed ethical worries about the social impact of the use of biological information for classification.** **"Many have discussed the ethical and legal issues related to possibilities of using biomarkers for predicting antisocial behavior.** **"We argue that prediction should not raise the most pressing ethical worries. Instead, issues connected with "biologization", such as stigmatization and negative effects on self-image, need more consideration.** **"However, we conclude that also in this respect there are no principled ethical objections against the use of biomarkers to guide classification and treatment of adult antisocial individuals."**
Hofstra Law Review (2013) **Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels**	**"It is the authors' experience that the client's humanity is established, and the fallacies of the ASPD] [Anti-Social Personality Disorder rubric are exposed, when capital defense teams comply with the ABA and Supplementary Guidelines to conduct a thorough investigation of the client's life history."**

4. The Need for Interim Procedures to Prevent Further Injustice

Many places in the world, including the United States, are moving to a Public Health Approach to Criminal Justice.

That is true even in the case of "Anti-Social Personality Disorder." Australia

The crisis in psychiatry exposed by the US National Institute of Mental Health's 2013 calling out of an "invalid" diagnostic manual continues to deepen and widen with its most profound impacts perhaps in the Criminal Justice System.

In the law and public policy, this crisis requires interim procedures to fairly and equitably manage the fall-out.

Most specifically, we are recommending:

- **Immediate Review of the Australian Problem-Solving Court Model for Anti-Social Personality Disorder for possible adoption and/or modification. (See Antisocial Personality Disorder and Therapeutic Justice Court Programs 2012, revised 2014 – Journal of Judicial Administration)**

- **Thorough integration of the Medicaid State Agency with the Criminal Justice System to facilitate housing, services and placements for those labeled with anti-social personality disorder as well as other cognitive disabilities such as brain injury, other forms of mental illness, developmental disabilities, disability as the result of substance use and combinations of such disabilities. ---**

    - **Our assessment is that the people with cognitive "disabilities" make up the vast majority of people in the Criminal Justice System. However, we are not suggesting Medicaid Agencies rely on our assessment. Medicaid Agencies should collect their own on-going independent needs data.**

    - **See also 2015 CMS (Centers for Medicaid and Medicare Services) Guidance on Medicaid Housing Activities and Services for Individuals with Disabilities, including Olmstead Planning for people with disabilities.**

- **State Medicaid Agencies need to be specifically tasked with these duties and provided sufficient resources to successfully perform these duties.**

5. Conclusion

The transition from symptoms based psychiatric diagnostic categories to biologically based psychiatric diagnostic categories has enormous implications for the Criminal Justice System.

Currently, that effort is largely being led by researchers, not the American Psychiatric Association (APA). Further, the APA does not have the resources to make such a transition.

Because of the public importance of Psychiatric Diagnostic Classifications, the responsibility for such classifications need to be under the Federal control of the National Institute of Health with an integrated team of researchers from relevant medical disciplines, including the National Institute of Mental Health but not necessarily limited to them.

Further, there are enormous public policy ramifications as we are in this transitional period from symptoms based to biologically based understandings of human behavior. Additionally, this is part of an already begun integration of Physical and Mental Health.

We need the US Department of Health and Human Services along with other relevant stakeholders to spearhead the difficult and complex policy work needed in this interim period.

With respect to "Anti-Social Personality Disorder," it is time to include those concerns in a broader Public Health Approach to

Criminal Justice, moving away from punishment and providing for Humane Treatment and Safety.

We are in a critical time of widespread demand for Justice and Social Equity.

A public health approach to "anti-social personality disorder" and other cognitive disabilities is a big piece of that puzzle.