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Making Sure We Are Getting It Right: Repairing "The Machinery of Death" By Narrowing Capital Eligibility

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COMMENT

MAKING SURE WE ARE GETTING IT RIGHT: REPAIRING "THE MACHINERY OF DEATH" BY NARROWING CAPITAL ELIGIBILITY

INTRODUCTION

Can we fix the American capital punishment system? Do we want to? Or should we simply abolish the death penalty altogether, as so many countries encourage us to do?[1] These were questions that many Americans asked themselves over the course of 2014 as botched execution followed botched execution, and as multiple innocent men were exonerated after sitting on death row for years.[2] Despite the best efforts of the members of the federal and state departments of justice, we continue to face serious constitutional questions when we look at death penalty-related issues, including the estimated rate of false convictions,[3] the disproportionately high exoneration rate for death penalty inmates,[4]

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1. CAP. PUNISHMENT PROJECT, ACLU, HOW THE DEATH PENALTY WEAKENS U.S. INTERNATIONAL INTERESTS 6–7 (2004), *available at* https://www.aclu.org/files/FilesPDFs/idp_report.pdf.

2. *See, e.g.*, Michael Biesecker, *Innocent NC Inmate Free After 30 Years*, WFLA.COM, http://www.wfla.com/story/26444799/nc-inmate-to-adjust-to-life-outside-after-30-years (last updated Sept. 18, 2014); Mark Gillispie, *Judge Dismisses Two Men Charged in 1975 Slaying*, OHIO.COM (Nov. 21, 2014, 10:00 AM), http://www.ohio.com/news/break-news/judge-dismisses-two-men-charged-in-1975-slaying-1.543007; Michael L. Radelet, *Examples of Post-*Furman *Botched Executions*, DEATH PENALTY INFO. CTR. (July 24, 2014), http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions.

3. Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7234–35 (2014).

4. Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 942 (2008); SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012 19 (2012) (finding that between 1977 and 2004, fewer than 0.1% of prisoners had death sentences, yet 12% of all exonerations occurred in capital cases).

racial, social, and geographical disparities in capital conviction rates,[5] and the complicated and messy process of execution itself.[6] On top of those issues, moral and religious concerns persist, often raised in the form of the question: Who are we to decide who lives and who dies?[7] Yet despite all of these concerns—and in fact running counter to them—national surveys continue to indicate that the death penalty is still widely perceived as justifiable, and that it still has a place in our criminal justice system.[8]

This comment argues that, starting with the framework of the federal system, there is a way to reconcile modern concerns about the death penalty with society's need for leverage over those criminals who truly are the worst of the worst—those who present grave threats to society even after incarceration. This reconciliation can be achieved by amending the Federal Death Penalty Act to require prosecutors to establish one additional element before they can secure a capital conviction: future dangerousness of the defendant in prison. Requiring proof of future dangerousness would narrow capital eligibility, checking some of the system's inherent retributive impulses and logically leading to a decrease in the number of capital convictions. This, in turn, would reduce the risk and rates of capital punishment problems, such as wrongful convictions and sentencing disparities. Finally, it would bring the number of capital convictions closer to the number of

5. *See* Scott Phillips, *Status Disparities in the Capital of Capital Punishment*, 43 L. & SOC'Y REV. 807, 830–31 (2009) (racial and social disparities); *see also Scattered Justice: Geographic Disparities of the Death Penalty*, ACLU (Mar. 5, 2004), https://www.aclu.org/capital-punishment/scattered-justice-geographic-disparities-death-penalty (geographical disparities); *The Clustering of the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/clustering-death-penalty (last updated Jan. 1, 2013) (geographical disparities).

6. *See* Radelet, *supra* note 2.

7. *See* Thomas Regnier, Barefoot *in Quicksand: The Future of "Future Dangerousness" Predictions in Death Penalty Sentencing in the World of* Daubert *and* Kumho, 37 AKRON L. REV. 469, 476 (2004) (describing how handing out death sentences writes off the chance that a defendant will reform, a chance that the principle of free-will would suggest is always present).

8. Jeffrey M. Jones, *View of Death Penalty as Morally OK Unchanged in US*, GALLUP (May 15, 2014), http://www.gallup.com/poll/169085/view-death-penalty-morally-unchanged.aspx (reporting no change in the perception of morality of capital punishment, despite the botched executions in the first part of 2014); Jeffrey M. Jones, *Americans' Support for Death Penalty Stable*, GALLUP (Oct. 23, 2014), http://www.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx (placing support for the death penalty at 60%).

criminals we as a society "truly have the means and the will to execute."[9]

Part I of this comment gives an overview of existing procedure for prosecuting death penalty cases in federal court. Part II lays out the recommended amendment and its justifications, addresses predicted critiques, and demonstrates how prosecutors should establish the proposed eligibility element in capital trials. Part III discusses the impact the proposed element would have on the ongoing federal capital prosecution of Dzhokhar Tsarnaev, the 2013 Boston Marathon bomber.

I. CAPITAL PROSECUTIONS IN FEDERAL COURT

Three sources govern federal capital prosecutions: Supreme Court jurisprudence, federal statutory law, and the Department of Justice's "Death Penalty Protocol," a procedural guide for U.S. Attorneys. The Supreme Court established the key constitutional parameters for death penalty statutes in *Furman v. Georgia*[10] and *Gregg v. Georgia*;[11] Congress and the Department of Justice ("DOJ") subsequently established specific guidelines for capital prosecutions within those constitutional bounds.

A. *Supreme Court Jurisprudence*

The 1972 case of *Furman v. Georgia* held that death penalty statutes granting unchecked sentencing discretion to judges and juries were unconstitutional under the Eighth and Fourteenth Amendments,[12] wiping death penalty laws off the books in forty-one states and similarly invalidating federal statutes.[13] Four years later, in *Gregg v. Georgia*, the Supreme Court reopened the door to capital punishment when it held that the Eighth and Fourteenth Amendments would permit the imposition of a death

9. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 31 (1995).

10. 408 U.S. 238 (1972) (per curiam).

11. 428 U.S. 153 (1976) (plurality opinion).

12. *Furman*, 408 U.S. at 239–40 (concluding that a death sentence imposed in an arbitrary and capricious manner constituted cruel and unusual punishment).

13. John P. Cunningham, Comment, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 948 (1998).

sentence if it resulted from a bifurcated proceeding (where a defendant's guilt and sentence are decided by separate trials), and if the judge and jury's discretion in sentencing was guided by a consideration of aggravating and mitigating circumstances.[14] Using such procedures, the result was an individualized—rather than an arbitrary and capricious—sentence.[15]

B. *Federal Capital Statutes*

Following *Gregg*, both the federal government and individual states enacted new death penalty statutes that complied with the Court-established guidelines.[16] The first new federal death-penalty provision arrived with the passage of the Anti-Drug Abuse Act of 1988.[17] Next came the Federal Death Penalty Act of 1994 ("FDPA"), which both established new capital-eligible offenses and revised old crimes so that they fell under the procedural sections of the FDPA and, accordingly, complied with *Gregg* standards.[18]

The most important feature of the FDPA is its comprehensive procedural scheme for death penalty prosecutions. This scheme satisfies the bifurcation requirement of *Gregg*,[19] as well as the Court's requirement that "the capital-sentencing scheme . . . narrow the eligible class of murderers by controlling the discretion of the sentencer with clear and objective standards."[20] Finally, the procedures of the FDPA ensure individualized sentencing consistent with *Gregg*, a safeguard against *Furman*-based claims of arbitrary or capricious capital sentencing.[21]

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14. *Gregg*, 428 U.S. at 193–95.

15. *Id.* at 206.

16. Cunningham, *supra* note 13, at 950.

17. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181 (codified as amended at 21 U.S.C. § 848(e) (1994)).

18. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591–98 (1994)).

19. *Gregg*, 428 U.S. at 195.

20. David J. Novak, *Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S.C. L. REV. 645, 654 (1999) (citing Arave v. Creech, 507 U.S. 463, 471 (1993); *Gregg*, 428 U.S. at 196–98).

21. *Id.*; Spaziano v. Florida, 468 U.S. 447, 460 (1984) (requiring states to be able to rationally "distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not" in order to avoid a *Furman* claim); *see also Gregg*, 428 U.S. at 206.

1. Bifurcation

Federal capital prosecutions are divided into two parts, both of which are normally conducted before a jury: the guilt phase and the penalty (or sentencing) phase.[22] Where a defendant has committed one of the capital-eligible offenses covered by the FDPA, the government must decide before the guilt-phase begins whether it will seek the death penalty.[23] If the government chooses to seek the death penalty, the FDPA requires the government to file a notice of its intent to do so, and therein disclose the aggravating factors upon which the government will rely in its arguments for death.[24] Likewise, the indictment of the defendant must also include all the aggravating factors upon which the government will base its case for capital punishment.[25]

If the defendant is convicted at the guilt phase, the capital prosecution will move forward into the second phase, the sentencing hearing.[26] At this stage, parties present information[27] to the jury in support of the aggravating and mitigating factors, which the jury will balance to determine the defendant's fate.[28] Finally, should the jury return a recommendation for death, the judge is bound by the FDPA to "sentence the defendant accordingly."[29]

2. Discretion Guided by Clear and Objective Standards

To pass constitutional muster, the sentencing phase must limit the judge's and jury's opportunities to exercise discretion and to potentially make an arbitrary or capricious recommendation for

22. Novak, *supra* note 20, at 669; 1 MOLLY TREADWAY JOHNSON & LAUREL L. HOOPER, FED. JUD. CTR., RESOURCE GUIDE FOR MANAGING CAPITAL CASES: FEDERAL DEATH PENALTY TRIALS 2 (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dpen0000.pdf/$file/dpen0000.pdf.

23. 18 U.S.C. § 3593(a) (2012).

24. *Id.*

25. United States v. Bourgeois, 423 F.3d 501, 507 (5th Cir. 2005) (requiring the government to charge the aggravating statutory factors of the FDPA in the indictment, and considering the failure to do so a constitutional violation).

26. Novak, *supra* note 20, at 647.

27. Parties present "information" rather than "evidence;" this reflects the fact that the sentencing phase of the trial is not governed by the Federal Rules of Evidence. 18 U.S.C. § 3593(c); *see also* United States v. Fulks, 454 F.3d 410, 436 (4th Cir. 2006) (noting that the Federal Rules of Evidence do not apply in capital sentencing proceedings).

28. Novak, *supra* note 20, at 647.

29. 18 U.S.C. § 3594.

death.[30] The FDPA achieves this limit by narrowing the class of capital-convicted defendants eligible for the death penalty in what is known as the "eligibility phase"—a sub-part of the sentencing phase of the trial.[31] The eligibility phase is governed by 18 U.S.C. §§ 3591 and 3592.

Section 3591 first narrows the death-eligible class by excluding defendants who were less than eighteen years old when they committed the capital offense.[32] Section 3591 then requires an initial "gateway eligibility finding."[33] For the great majority of capital offences, this gateway takes the form of a mens rea requirement specifically delineated in § 3591(a)(2)(A)–(D). The Act's elevated mens rea threshold of intentionality limits sentencing discretion by ensuring that mere "negligent killers" cannot be sentenced to death, even if a particular crime's statute provides for capital punishment.[34] If no threshold mens rea is established, the defendant, however guilty of the underlying crime, cannot receive the death penalty.[35]

Section 3592 provides additional narrowing, laying out the FDPA's most significant limits on sentencing discretion.[36] In this section, Congress codified the numerous factors that it has determined are, if found, sufficiently aggravated and reprehensible to justify execution.[37] Perhaps even more importantly, if the jury finds that none of the § 3592 statutory aggravating factors exist, the court cannot impose a death sentence.[38] Accordingly, to fully qualify the defendant as eligible for capital punishment under the FDPA, the government must establish: (1) the defendant has

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30. Gregg v. Georgia, 428 U.S. 153, 196–98 (1976) (plurality opinion).

31. Novak, *supra* note 20, at 654.

32. 18 U.S.C. § 3591 ("[N]o person may be sentenced to death who was less than 18 years of age at the time of the offense.").

33. Novak, *supra* note 20, at 655 n.72; *see* 18 U.S.C. § 3591(a)(2).

34. 18 U.S.C. § 3591(a)(2); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 394 (1999).

35. *See* 18 U.S.C. § 3591(a)(2).

36. *See id.* § 3591 (stating that a defendant found guilty of a capital offense and passing the threshold mens rea gateway "shall be sentenced to death *if*, after consideration of the factors set forth in section 3592 . . . it is determined that imposition of a sentence of death is justified.") (emphasis added).

37. *Id.* § 3592(b)–(d).

38. *Id.* § 3593(d) ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death. . . .").

been found guilty of a capital-eligible offense; (2) the defendant was at least eighteen years old when he committed the capital offense; (3) a gateway factor from § 3591 exists; and (4) at least one of the statutory aggravating factors from § 3592 exists.[39] A finding of all four concludes the eligibility phase of the sentencing hearing.

3. Individualized Sentencing

After the government establishes eligibility, the final step is the selection phase. In this phase of sentencing, the government and defense put on information pertaining to aggravating and mitigating factors, respectively, focusing on "the character and record of the individual offender."[40] The purpose of this phase is to make the judge and jury recognize the defendant as a "uniquely individual human being[]" rather than a "member[] of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[41]

Section 3592 sets out mitigating and aggravating factors which are to be included in this assessment, but also makes special room for non-statutory factors to be presented to the jury for consideration.[42] These non-statutory aggravating factors serve the *Gregg*- and *Woodson*-mandated "individualizing" function that ensures "the jury [has] before it all possible relevant information about the individual defendant whose fate it must determine."[43] Some common non-statutory aggravating factors are the defendant's prior criminal history,[44] victim impact,[45] and future danger-

39. *Id.* §§ 3591, 3593(d). There are 3 statutory aggravating factors when the capital offense is espionage or treason, 16 for capital homicides, and 8 for capital drug offenses. *Id.* § 3592(b)–(d).

40. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

41. *Id.*

42. 18 U.S.C. § 3592(a)(8) (permitting consideration of "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence"); *id.* § 3592(b)–(d) ("The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.").

43. Jurek v. Texas, 428 U.S. 262, 276 (1976); *see Woodson*, 428 U.S. at 304; Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion).

44. *See* United States v. Walker, 910 F. Supp. 837, 854–55 (N.D.N.Y. 1995).

45. United States v. Davis, 912 F. Supp. 938, 947 (E.D. La 1996).

ousness.[46] The factfinder must balance the aggravating and mitigating factors and, if it finds that the aggravating factors sufficiently outweigh any mitigating factors, may recommend a sentence of death.[47]

C. *Department of Justice Protocol*

Shortly after Congress passed the FDPA, the DOJ promulgated what is known among U.S. Attorneys as the Death Penalty Protocol (the "Protocol") to replace the contents of the "Capital Crimes" section in the U.S. Attorneys' Manual.[48] This protocol was an effort to "promote reasonable uniformity"[49] in the application of the federal death penalty, attempting "to ensure that the death penalty is sought in a fair and consistent manner, free from ethnic, racial, or other invidious discrimination."[50] The Protocol imposes a multi-layer review process, so that it is not just an individual U.S. Attorney, the local office, or even the main office that makes the final decision to file a notice of intent to seek death; the decision belongs to the Attorney General of the United States.[51] Similarly, once notice has been filed, only the Attorney General may authorize its withdrawal.[52]

The Protocol is triggered when a defendant is charged with a federal capital-eligible offense.[53] The prosecuting U.S. Attorney must prepare a Death Penalty Evaluation Form and compose a

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46. *See Jurek*, 428 U.S. at 272, 275.

47. 18 U.S.C. § 3593(e).

48. Little, *supra* note 34, at 407. The entire U.S. Attorneys' Manual was comprehensively revised in 1997, and there have been minor changes and additions since. All statements regarding the Protocol refer and cite to the most recent version of the "Capital Crimes" section of the U.S. Attorneys' Manual, available on the Department of Justice website. *See* U.S. ATTORNEYS' MANUAL, U.S. DEP'T OF JUST., *available at* http://www.justice.gov/usao/eo usa/foia_reading_room/usam/index.html (last visited Feb. 27, 2015) [hereinafter USAM]; *see* Memorandum from Eric H. Holder, Att'y Gen., to All Fed. Prosecutors (July 27, 2011), *available at* http://www.deathpenaltyinfo.org/documents/FedDPRules 20 11.pdf ("The procedures for submission [of federal capital cases for review] are set forth in the United States Attorneys' Manual and are commonly referred to as the Department's Death Penalty Protocol.").

49. JOHNSON & HOOPER, *supra* note 22, at 10.

50. Novak, *supra* note 20, at 650.

51. *See* USAM, *supra* note 48, at 9-10.130.

52. *Id.* at 9-10.160.

53. Little, *supra* note 34, at 409–10; *see* USAM, *supra* note 48, at 9-10.040.

prosecution memorandum to the DOJ.[54] These documents must lay out "the theory of liability, evidence relating to the criminal offense as well as any aggravating or mitigating factors, the defendant's background and criminal history, and the basis for a federal prosecution," as well as the prosecuting U.S. Attorney's recommendation on whether or not to seek death.[55] The file is reviewed by the Capital Case Unit, which makes a recommendation to the Capital Case Review Committee; the Committee in turn makes a recommendation directly to the Attorney General.[56] Defense counsel may make a presentation of relevant facts or mitigating evidence when the case is before the Review Committee.[57]

The Protocol and its multi-layer case review process serves as an eligibility screening mechanism before the case ever gets to trial, selecting from the pool of U.S. Attorney-recommended cases that include the "relatively 'high end' homicides that plainly merit consideration of death . . . under the statutory scheme."[58] According to DOJ data, between 1990 and 1998 "a little more than two-thirds of the time (238 out of 418), the Attorney General has *not* authorized pursuing the death penalty in cases submitted by U.S. Attorneys for review."[59] This number of eligible defendants is then further narrowed when juries apply the statutory factors at sentencing: of the 135 federal defendants for whom the Attorney General authorized a capital prosecution between 1990 and 1998, only twenty received death sentences.[60]

This Protocol-induced narrowing is not enough, however, to assuage concerns about the current state of capital convictions. As one former member of the Capital Case Review Committee has suggested, "Silent regional disparity in case acceptance and review submissions" persists, and "is a flaw that is potentially quite serious."[61] The Protocol is also an unsatisfactory narrowing tool because decisions to prosecute are based on the very factors of the

54. USAM, *supra* note 48, at 9-10.080; *see* Novak, *supra* note 20, at 650; Little, *supra* note 34, at 409.

55. USAM, *supra* note 48, at 9-10.080; Novak, *supra* note 20, at 650–51.

56. USAM, *supra* note 48, at 9-10.130; *see* Little, *supra* note 34, at 409–12.

57. USAM, *supra* note 48, at 9-10.040; *see* Little, *supra* note 34, at 411.

58. Little, *supra* note 34, at 411.

59. *Id.* at 429 (emphasis added).

60. *Id.* at 430 (noting, however, that thirty-two defendants were still awaiting trial as of 1999 when the source data was released).

61. *Id.* at 502.

FDPA; such decisions, therefore, merely serve as a discretionary filter rather than a countervailing force, actively limiting who may be sentenced to death. When faced with the problems of our capital punishment system and the vast amount of money spent in pursuit of death sentences,[62] the need for such a limit is readily apparent. Rather than relying on prosecutorial discretion, the best limit is to narrow statutory eligibility, restricting it to those defendants for whom we can comfortably say there was no other option. Given that no lawmaker wants to appear soft on crime by advocating or voting for removing a capital offense or aggravating factor from the books,[63] the solution with the highest likelihood of success is for our lawmakers to do precisely the opposite: Add another qualification.

II. INTRODUCING A THIRD STATUTORY ELIGIBILITY ELEMENT: FUTURE DANGEROUSNESS

As mentioned above, future dangerousness is in fact already employed in federal capital prosecutions, in the guise of a non-statutory aggravating factor.[64] The Supreme Court has approved the consideration of future dangerousness in the penalty phase of a capital trial, recognizing that the "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system."[65] This comment proposes that the role of future dangerousness in capital sentencing should be transformed from an optional non-statutory aggravating factor used in the sentencing phase to a third narrowing (or gateway) element in the eligibility phase of capital prosecutions. This ap-

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62. *See* RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 14 (2009), *available at* http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf.

63. *See, e.g.*, Nolan E. Jones, *Three Strikes You're Out: A Symbolic Crime Policy?*, *in* CRIME CONTROL & SOCIAL JUSTICE: THE DELICATE BALANCE 53, 53 (Darnell F. Hawkins et al. eds., 2003) ("[D]uring the last several decades of American Politics, not wanting to be labeled as being "soft on crime" has become a preoccupation for politicians.").

64. *See supra* notes 43–46 and accompanying text.

65. Jurek v. Texas, 428 U.S. 262, 275 ("[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."); *see id.* (citing bail and parole as other instances where future conduct determinations are made); *see also* Simmons v. South Carolina, 512 U.S. 154, 162 (1994) ("This Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system.").

plication of future dangerousness is compatible with the so-called "Stevens Solution"—the proposition from Justice Stevens that the death penalty should be narrowed to only the most aggravated crimes and the worst of the worst criminals,[66] such that "everybody would agree that if we're going to have a death [penalty], these are the cases that should get it."[67]

In response to critiques that have arisen from the use of future dangerousness as a non-statutory aggravating factor, this comment argues first that once included in the FDPA, the definition of future dangerousness needs to be tailored so that the element is only satisfied by proof of future dangerousness in prison. Second, this comment argues that the means of establishing the element in court need to be standardized to ensure that it serves an accurate and truly narrowing—rather than catch-all—function. Finally, this comment offers the case of *United States v. Hager*[68] as a model both for the type of case in which the death penalty should be sought if future dangerousness were a statutory element and for the way in which the government should establish the future dangerousness element at trial.

A. *Fitting Future Dangerousness Into the Federal Death Penalty Act*

The future dangerousness element should be incorporated into 18 U.S.C. § 3591 in the same way that consideration of the § 3592 factors is incorporated into § 3591.[69] For example, § 3591(a) would thereafter read as follows:

> A defendant who has been found guilty of [a capital offense and the requisite threshold mens rea] shall be sentenced to death if, after consideration of the factors set forth in section 3592 [*and after consideration of the defendant's future dangerousness according to sec-*

66. McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting) ("[T]here exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty. . . . If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.").

67. *Id.* at 287 n.5 (majority opinion) (quoting testimony from an evidentiary hearing in the district court).

68. 721 F.3d 167 (4th Cir. 2013).

69. *See* 18 U.S.C. § 3591 (2012)

> *tion* ___] in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.[70]

Additionally, future dangerousness would need to be incorporated into each of the subparts of § 3593(e) to ensure its recognition as a necessary factor in the imposition of all capital sentences.[71] Section 3593(e) would thereafter read as follows:

> If, in the case of an offense described in section 3591(a)(1), [(a)(2), or (b)] an aggravating factor required to be considered under section 3592(b)[, (c), or (d)] is found to exist[, *and the defendant is found to present a future danger according to section* ___,] the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death. . . .[72]

B. *Justifications for Future Dangerousness as an Eligibility-Narrowing Factor*

The general concept of narrowing death penalty eligibility is hardly new; the Supreme Court has been doing so ever since its decision in *Gregg*.[73] The proposed FDPA amendment fits easily into this narrowing narrative. Using future dangerousness in particular to serve that narrowing function offers additional advantages: it gives the government recourse against inmates who are impossible to reform or control. Also, it provides a clear line demarcating one type of depraved criminal from another. Moreover, it would starkly reduce the number of capital convictions, bringing the rate thereof in line with the rate of executions that actually occur.

1. Narrowing Eligibility, Generally

The Supreme Court has consistently narrowed capital eligibility over the last forty years in two specific ways. Through one line

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70. *Id.* § 3591(a) (italicized alteration indicates suggested text).

71. *See id.* § 3593(e).

72. *Id.* (italicized alteration indicates suggested text).

73. *See generally* Gregg v. Georgia, 428 U.S. 153, 206 (1976) (per curiam) (narrowing eligibility by approving a provision in Georgia capital sentencing program which serves "as a check against the random or arbitrary imposition of the death penalty").

of cases, the Court has narrowed the type of crimes punishable by death, developing the rule that murder is the only permissible basis for a death sentence, but that the blanket imposition of death for every murder is unconstitutional.[74] Through the second line of cases, the Court has narrowed the funnel of eligibility for death based on age and mental capacity.[75] As such, death penalty cases since *Gregg* have created a clear common law narrative of restricting capital eligibility. The proposed amendment to the FDPA continues this narrative and, therefore, falls within the bounds of what the Supreme Court has identified as legitimate death penalty legislation.

2. The Merits of Future Dangerousness, Particularly

One of the purposes for capital punishment recognized by the Supreme Court is "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise

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74. For an example of the court's progression in narrowing the type of crimes eligible by death, see Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion) (imposing "the limits of civilized standards" on a state's power to execute criminals and holding that a statute's mandatory imposition of the death penalty on all murderers is unconstitutional); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the rape of an adult woman where death did not occur was insufficient basis for a death sentence); Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (holding that a statutory requirement for a murder to be "outrageously or wantonly vile, horrible and inhuman" provided insufficient basis for imposing the death penalty because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman'"); Kennedy v. Louisiana, 554 U.S. 407, 420–21 (2008) (explaining that the death penalty should be reserved for "those offenders who commit a narrow category of the most serious crimes and whose extreme culpability make them the most deserving of execution") (citations omitted) (internal quotation marks omitted); *id.* at 447 ("Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.").

75. To trace the court's progression in narrowing death penalty eligibility by age and mental capacity, see Ford v. Wainwright, 477 U.S. 399, 410 (1986) (removing insane persons from capital punishment eligibility); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (excluding from capital punishment eligibility individuals who under the age of sixteen at the time of their offense); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (removing mentally retarded persons from capital punishment eligibility); Roper v. Simmons, 543 U.S. 551, 569–74 (2005) (excluding individuals younger than eighteen at the time of offense from capital eligibility); Hall v. Florida, ___ U.S. ___, ___, 134 S. Ct. 1986, 2000–01 (2014) (finding that IQ tests alone are insufficient to determine capital punishment eligibility in the context of intellectual disability—in other words, the fact that a defendant does not qualify as "mentally retarded" on a given IQ scale does not necessarily render him or her eligible for death under *Atkins v. Virginia*).

commit in the future."[76] If this purpose is paired with the goal of narrowing the death penalty to only the worst of the worst,[77] against whom the government has no other recourse, then a mandatory showing of future dangerousness in prison is the most appropriate amendment to current capital prosecutorial procedure. Using future dangerousness as a narrowing mechanism accounts for future crime prevention while also forcing an examination of the individual defendant, independent both of the single crime that has delivered him to the defendant's chair and of the emotions inherently aroused thereby. Such a separation, in turn, can reduce the retributive impulses that often lurk behind capital convictions, which drive us to sentence far more criminals to death than we actually execute.[78]

The defendants who qualify for death in the face of a future dangerousness requirement are those who have already committed a capital-eligible murder *and* who have shown themselves to be dangerously uncontrollable and impossible to deter, despite being in the institutional setting. This disposition is commonly described as the "nothing to lose" mindset.[79] In cases of defendants

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76. *Gregg*, 428 U.S. at 183 n.28.

77. *See* Little, *supra* note 34, at 505 ("[A]mong moderate observers of capital punishment—persons not entirely pro or con, who are accepting of *Gregg* and yet concerned about the *McClesky* [racial discrimination and sentencing disparity] arguments—there appears to be a growing convergence of views that reserving the death penalty for an 'extremely aggravated' murder category provides a sensible solution to many systemic problems resulting from current capital punishment regimes.").

78. *See, e.g.*, Art Swift, *Americans: "Eye for an Eye" Top Reason for Death Penalty*, GALLUP (Oct. 23, 2014), http://www.gallup.com/poll/178799/americans-eye-eye-top-reason-death-penalty.aspx; *see also* Kozinski & Gallagher, *supra* note 9, at 4 ("[T]he number of executions compared to the number of people who have been sentenced to death is miniscule, and the gap is widening every year."). *See generally* Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489 (2009) (arguing that emotionless, non-retributive and rational deliberation is a myth in the capital punishment context).

79. *See, e.g.*, Mark D. Cunningham & Jon R. Sorensen, *Nothing to Lose? A Comparative Examination of Prison Misconduct Rates Among Life-Without-Parole and Other Long-Term High-Security Inmates*, 33 CRIM. JUST. & BEHAV. 683, 686 (2006) [hereinafter Cunningham & Sorensen, *Nothing to Lose*]. Contrary to the impression given by the federal designation of life without parole ("LWOP") inmates to high- (as opposed to minimum-, low-, or medium-) security confinement, a "nothing to lose" mindset does not automatically vest when inmates receive a LWOP sentence. *See id.* (examining the Security Designation and Custody Classification Manual of the Federal Bureau of Prisons). Studies over the past few decades have demonstrated this numerous times, showing that LWOP inmates do not "constitute a major correctional management problem or . . . evidence disproportionately higher rates of institutional violence than other long-term inmates." *Id.* at 701 (discussing own findings, as well as those of prior studies from 1996 and 2005); *see also*

who have adopted this outlook and who continue engaging in violence, what can the government do? Tack on time beyond life for the offender to serve, allowing them to continue posing a threat to prison officials and other inmates? These are the defendants against whom the government can and should bring to bear its monopoly on the legitimate use of force. Once past the clear line demarcating those few, it becomes exceedingly difficult to draw a line anywhere else; past this line, how else can we non-arbitrarily differentiate between types of depravity, or "make moral distinctions as to how far someone has stepped down the rungs of hell[?]"[80]

Although some might object to narrowing death penalty eligibility to the extent that would result from the addition of a future dangerousness requirement, such a measure would sufficiently unclog death row to allow our capital system to close the gap between the number of criminals given capital sentences and the number of criminals who are actually executed.[81] In turn, closing that gap addresses a recently developing challenge to the death penalty: that while the imposition of death sentences may have become less arbitrary and capricious, the administration of sentences—the actual carrying out of executions—has become more so, verging on cruel and unusual, due to the irregularity of executions compared to the rate of death sentences handed down.[82] Narrowing eligibility as proposed in this comment would, in the words of Judge Kozinski of the Ninth Circuit, "[E]nsure that . . . we will run a machinery of death that only convicts about the

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Mark D. Cunningham & Jon R. Sorensen, *Improbable Predictions at Capital Sentencing: Contrasting Prison Violence Outcomes*, 38 J. AM. ACAD. PSYCHIATRY L. 61, 68 (2010) [hereinafter Cunningham & Sorensen, *Improbable Predictions*] (asserting that long-term inmates take a largely non-disruptive approach to "doing time" because "by virtue of their projected tenure in the institution, they ha[ve] greater incentive to preserve the privileges allowed to compliant inmates"). As such, it is entirely unsupported and, therefore, improper to argue before a jury that the defendant, if not sentenced to death, *will become* a danger within prison by merit of having been sentenced to life without parole. This comment's proposed eligibility element—requiring a showing of how the defendant's past conduct in the institutional setting demonstrates the inability of the prison system to prevent him from committing or orchestrating further criminal acts—is tailored to bar just this type of improper argument, while instead looking at the individual defendant, his personal history, and his relevant conduct. *See infra* Parts II.C.1, II.D.

80. Kozinski & Gallagher, *supra* note 9, at 30.

81. *See id.* at 4.

82. *See* Jeffers v. Lewis, 38 F.3d 411, 425 (9th Cir. 1994) (en banc) (Noonan, J., dissenting).

number of people we truly have the means and the will to execute."[83]

Accordingly, the creation of a gateway factor of future dangerousness follows the example set by the Supreme Court,[84] and is supported by multiple practical and policy considerations. All of those policy considerations can be translated into money the federal government would save through reducing the number of times it has to undertake the drawn-out process of capital litigation and, on top of that, through reducing the costs of supporting a death-row inmate.[85] Those potential savings suggest that this is a change even policymakers in Washington would support.

C. *Addressing Critiques of Future Dangerousness*

It would be impossible to propose the codification of a future dangerousness requirement without addressing the many critiques that have arisen out of the application of future dangerousness in its current form as a non-statutory aggravating factor.[86] These critiques take two forms, the first of which is statistics driven and attacks the accuracy of future dangerousness assertions in capital sentencing.[87] For the purposes of this comment, this will be labeled "statistically based opposition." The second form of critique attacks the general idea that future dangerousness can ever be found beyond a reasonable doubt, given the principle of free will and the nature of the evidence usually presented in support of future dangerousness arguments.[88] This will be labeled "policy-based opposition."

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83. Kozinski & Gallagher, *supra* note 9, at 31.

84. *See supra* Part II.B.1.

85. *See, e.g.*, Jeffrey Toobin, *Christopher Dorner and the California Death Penalty*, NEW YORKER (Feb. 13, 2013), http://www.newyorker.com/news/news-desk/christopher-dorner-and-the-california-death-penalty.

86. *See generally* Cunningham & Sorensen, *Improbable Predictions*, *supra* note 79; James W. Marquart & Jonathan R. Sorensen, *A National Study of the* Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5 (1989); Regnier, *supra* note 7; Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145 (2008).

87. *See, e.g.*, Marquart & Sorensen, *supra* note 86, at 6–8, 28; Cunningham & Sorensen, *Nothing to Lose*, *supra* note 79, at 703.

88. *See, e.g.*, Jurek v. State, 522 S.W.2d 934, 948 (Tex. Crim. App. 1975) (Roberts, J., dissenting), *aff'd sub nom.* Jurek v. Texas, 428 U.S. 262 (1976).

1. Statistically Based Opposition

Statistically based opposition grew out of studies attempting to measure the accuracy of future dangerousness assertions made at capital trials.[89] Quite often, defense counsel in capital cases employ risk-assessment statisticians to testify as experts to the fact that "state-sponsored predictions of probable violence were wrong (i.e., false positive) in nearly all of the cases."[90] The first significant risk-assessment study of this kind was performed in the wake of the Court's decision in *Furman v. Georgia*, which "invalidated the death sentences of hundreds of inmates."[91] The *Furman*-affected inmates were integrated into the general prison populations of their respective states to serve out the remainder of their time; as such, they "represent[ed] an 'ideal' natural experiment for testing . . . predictions of future dangerousness."[92] The results of this study, and of others like it in the years since, indicate that most capital-eligible defendants, whether they were subsequently sentenced to death or not, do *not* represent "violent menaces to the institutional order" or "a disproportionate threat to guards and other inmates."[93]

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89. These studies look at the behavior of commuted capital inmates and LWOP inmate populations and measure the rates of violent conduct associated with those inmates relative to rates among inmates with the option of parole. *See, e.g.*, Mark D. Cunningham et al., *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCHOL. PUB. POL'Y, & L. 223, 228 (2009) (noting high false positive rates for jury determinations on likelihood of serious prison violence); John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?,"* 29 LAW & HUM. BEHAV. 55, 77 (2005) (stating the unreliability of predicting future violence in capital cases).

90. Cunningham & Sorensen, *Improbable Predictions*, *supra* note 79, at 68; *see* Shapiro, *supra* note 86, at 159–65.

91. Marquart & Sorensen, *supra* note 86, at 6; *see* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

92. Marquart & Sorensen, *supra* note 86, at 6.

93. *Id.* at 20; *see also* Cunningham & Sorensen, *Improbable Predictions*, *supra* note 79, at 66 ("[T]he rates of serious or potentially violent rules infractions among incarcerated capital murderers are similar to the rates of such violations among high-security inmates generally. . . .") (referencing statistics of federal inmates); Cunningham & Sorensen, *Nothing to Lose*, *supra* note 79, at 699 ("As a class, LWOP inmates . . . did not present a major threat to other inmates or prison staff.") (referencing a study of inmate disciplinary behavior of LWOP inmates in the Florida Department of Corrections).

2. Policy-Based Opposition

Those opposing future dangerousness on policy grounds largely take issue with the evidence used to support a future dangerousness finding. Policy-based opponents cite the Supreme Court's recognition that "death is different,"[94] and argue that, while the use of diagnostic testimony based on hypothetical questions may be acceptable in some instances, it is not acceptable in the context of a capital trial.[95] This argument ties into the Eighth Amendment's "doctrine of heightened reliability," which demands that "[a] death sentence cannot rest on highly dubious predictions secretly based on a factual foundation of hearsay and pure conjecture."[96] Opponents of the use of future dangerousness argue that psychiatric testimony rests on just this type of foundation.

In support of their arguments, policy-based opponents point to the statements of the American Psychiatric Association ("APA") itself. This organization has denounced the use of psychiatric testimony and the framing of psychiatrists as medical experts regarding a defendant's future dangerousness because

> [a]lthough psychiatric assessments may permit short-term predictions of violent or assaultive behavior, medical knowledge has simply not advanced to the point where long-term predictions . . . may be made with even reasonable accuracy. The large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases.[97]

Policy-based opponents also raise a general concern that "jurors are likely to invest psychiatrists with greater infallibility on the subject of future violence than they actually have," making

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94. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion).

95. *See* Barefoot v. Estelle, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting) ("One may accept this in a routine lawsuit for money damages, but when a person's life is at stake—no matter how heinous his offense—a requirement of greater reliability should prevail.").

96. *Id.* at 922 n.5; *see also* Sumner v. Shuman, 483 U.S. 66, 72 (1987) ("[H]eightened reliability [is] demanded by the Eighth Amendment in the determination [of] whether the death penalty is appropriate in a particular case."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

97. Brief for the American Psychiatric Ass'n as Amicus Curiae, at 8–9, *Barefoot*, 463 U.S. 880 (No. 82-6080).

the testimony of psychiatrists more prejudicial than probative.[98] Despite the APA's position, the Supreme Court has upheld the use of psychiatric testimony as an evidentiary matter, holding in the case of *Barefoot v. Estelle* that "if it is not impossible for even a lay person sensibly to arrive at that conclusion [of dangerousness], it makes little sense, if any, to submit that psychiatrists . . . would know so little about the subject that they should not be permitted to testify."[99] The Court in *Barefoot* went even further, approving the use of psychiatric testimony even where the witness had not personally examined the defendant and instead based his predictions on hypothetical questions put to him by the prosecution.[100] As it had when upholding future dangerousness considerations as a constitutional matter in *Jurek v. Texas*,[101] the Court approved this practice by comparison to the use of such evidence in other trial-contexts, stating that expert testimony, "whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted . . . where it might help the factfinder do its assigned job."[102] Apparently, the Court did not think that *Furman*'s "death is different" proposition[103] applied in this context.

3. Rebuttal and Recommendations

The issues underlying both the statistically- and policy-based opposition can be resolved with statutory safeguards accompanying the codification of future dangerousness as an eligibility element of the FDPA. First, future dangerousness should be explicitly defined as only future dangerousness within the institutional setting. Second, satisfaction of the future dangerousness element should require a showing of prior violent conduct both within and

98. Regnier, *supra* note 7, at 491 (comparing this over-investment in psychiatrists' testimony to that placed in polygraph evidence, which has a far greater reliability rate than government future dangerousness "experts" yet is usually excluded from trials because of the prejudicial risk).

99. 463 U.S. at 880, 896–97 (referencing the Court's holding in *Jurek v. Texas* which approved layperson testimony with respect to the defendant's future dangerousness).

100. *Id.* at 884–85.

101. *See supra* note 65 and accompanying text.

102. *Barefoot*, 463 U.S. at 903–04 (comparing the use of psychiatric testimony to the use of medical testimony based on hypothetical questions, citing both case law and the Advisory Committee Notes to the Federal Rules of Evidence).

103. *See supra* notes 94–95 and accompanying text.

without the institutional setting. Finally, restrictions should be placed on the evidence that will be admitted for supporting or rebutting a showing of future dangerousness.

While not directly related to critiques of future dangerousness, the first recommendation, to conclusively define the term as pertaining solely to dangerousness in prison, would resolve any ambiguity about in what context and to whom the defendant may present a future danger.[104] Without such a definition, future dangerousness as a statutory factor might be susceptible to *Furman* "vagueness" challenges.[105] The codification of this definition should not wreak much havoc among federal capital prosecutors, as it has practically been a common law requirement of capital litigation since *Simmons v. South Carolina* was decided in 1994.[106] In *Simmons*, the Supreme Court held that where a defendant is parole-ineligible and future dangerousness is being argued, the jury must be informed of the defendant's parole-ineligibility so that they will not sentence the defendant to death only "so that he will not be a danger to the public if released from prison."[107] Since the Sentencing Reform Act abolished parole for federal offenders with crimes committed after November 1, 1987,[108] every defendant is parole-ineligible per *Simmons*, and so prison is the only appropriate context for a consideration of future dangerousness in a capital trial.

Making "in prison" part of the future dangerousness statutory element unambiguous is not only an attempt at clarity. Doing so also sets up another of the proposed statutory safeguards for

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104. Shapiro, *supra* note 86, at 150–52 (discussing the confusion that arises from under-defined future dangerousness provisions in state statutes, and the subsequent overinclusive tendencies of such provisions in the capital context).

105. *See* Maynard v. Cartwright, 486 U.S. 356, 361–62 (1988) (referencing *Furman*'s holding and suggesting the need to invalidate vague statutes that provide for open-ended discretion); *see also* Simmons v. South Carolina, 512 U.S. 154, 172–73 (1994) (Souter, J., concurring) (discussing juror confusion in the context of future dangerousness as an undefined term, and how "a death sentence following the refusal of [a defendant's request for a jury instruction on the meaning of a vague term] should be vacated as having been 'arbitrarily or discriminatorily' and 'wantonly and . . . freakishly imposed.'") (quoting Furman v. Georgia, 408 U.S. 238, 249, 310 (1972) (per curiam)).

106. 512 U.S. at 165 & n.5.

107. *Id.* at 156, 163.

108. *See* NATHAN JAMES, CONG. RES. SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 9–10 (2014); *Parole in the Federal Probation System*, THIRD BRANCH NEWS (May 2011), http://uscourts.gov/news/TheThirdBranch/11-05-01/Parole_in_the_Federal_Probation_System.aspx.

proper application of future dangerousness: A required showing of prior violent conduct within the institutional setting, such that a jury may find beyond a reasonable doubt that the defendant's violent nature cannot be contained or deterred by incarceration. An evidentiary requirement of this sort would resolve the apparent disparity between this comment's support for future dangerousness as a feasible narrowing mechanism and the statistical critiques of future dangerousness as historically applied.

The studies underpinning statistically based opposition to future dangerousness are vulnerable to significant criticism: They look at inmates who were either sentenced to life imprisonment in lieu of death—the jury having been unconvinced by the prosecution's case for future dangerousness or other aggravating factors—or inmates who were wrongfully sentenced to death and have since had their sentences commuted to life imprisonment.[109] Further, these same studies establish the fact that future dangerousness, though raised as a sentencing consideration in the majority of cases, was frequently applied to capital defendants who had little violent history, or any record of adult incarceration.[110] The resulting findings of unexceptionally violent or disruptive prison conduct, therefore, predominantly reflect the actions of a wide class of defendants who would actually be filtered out of capital eligibility if future dangerousness were applied as advocated in this comment. As such, studies that report the low accuracy of historical future dangerousness predictions[111] actually support the proposition that future dangerousness, properly defined and applied, would be a highly effective narrowing factor, because the studies show how few defendants truly deserve a "future danger" label.[112]

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109. *See, e.g.*, Marquart & Sorensen, *supra* note 86 (studying commuted capital offenders); Cunningham & Sorensen, *Nothing to Lose*, *supra* note 79, at 683–84.

110. *Id.* at 14–15 ("Nearly three-quarters [of commuted offenders] had no prior convictions for violent . . . offenses. Specifically, 97% had no previous conviction for murder, 96% for rape, 87% for armed robbery, and 85% for aggravated assault. Additionally, 61% of these inmates had never been incarcerated in an adult correctional institution.") (footnote omitted).

111. *See* Cunningham & Sorensen, *Improbable Predictions*, *supra* note 79, at 68; Cunningham & Sorensen, *Nothing to Lose*, *supra* note 79, at 683, 699; J.F. Edens et al., *supra* note 89, at 61; Marquart & Sorensen, *supra* note 86, at 27–28.

112. *E.g.*, Cunningham & Sorensen, *Improbable Predictions*, *supra* note 79, at 71 (noting the growing body of data that suggests inmates labeled a future danger are likely less dangerous than assessed).

What is more, the same statisticians and risk-assessors who established the unreliability of future dangerousness predictions as currently applied have found that a showing of prior institutional misconduct, as recommended here, is in fact perceived as a reliable indicator of future misconduct.[113] Accordingly, if the proposed FDPA amendments were made and similar post-conviction analyses were performed of inmate conduct, the error rate of future dangerousness predictions would decrease dramatically.

Finally, with regard to the policy-based opposition to the historical future dangerousness application, this comment does not disagree with the demand for higher reliability in evidence or expert testimony, or with the underlying skepticism of psychiatric testimony in the context of a future dangerousness determination. However, this comment does argue that the proposed statutory future dangerousness element could resolve much of the debate with the simple inclusion of guidelines pertaining to admissible evidence. Supreme Court decisions do not bind legislative action, but rather highlight room for it where the majority is displeased with judicial interpretation.[114] Accordingly it is recommended that, at a minimum, Congress codify a requirement of personal examination in the context of admissible psychiatric testimony,[115] if it decides to permit such testimony at all.

D. *Establishing Future Dangerousness: How the Government Should Meet Its Burden*

This comment offers the case of *United States v. Hager*[116] as a model for both the type of defendant against whom future dangerousness as an eligibility factor would apply, and of how prosecutors should go about establishing the factor at trial. Admittedly, the *Hager* case was prosecuted under existing law, and the

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113. *Compare* Mark D. Cunningham & Jon R. Sorensen, *Predictive Factors for Violent Misconduct in Close Custody*, 87 PRISON J. 241, 248 (2007) ("[A]lthough violence in the free world is not indicative of violence in prison, prior violent acts in prison are a good indicator of future violence in an institutional setting."), *with* Cunningham & Sorensen, *Improbable Predictions*, *supra* note 79, at 68 (highlighting the fact that "state-sponsored predictions of probable violence were wrong . . . in nearly all of the cases" studied).

114. *See* Kozinski & Gallagher, *supra* note 9, at 32.

115. *See supra* text accompanying notes 99–102 (discussing psychiatric testimony based on personal examination versus predictions based on hypothetical questions).

116. 721 F.3d 167 (4th Cir. 2013).

future dangerousness element at issue was the problematic non-statutory aggravating factor variety; however, the prosecutors relied—as recommended here—predominantly on evidence of Hager's prior conduct in prison to establish Hager's future dangerousness beyond a reasonable doubt.[117] Furthermore, in the face of the defense's evidence of federal prison facilities and procedures that would supposedly mitigate any inmate's potential for harm, the prosecution was able to maintain Hager as the focus of the trial, rather than the Bureau of Prisons ("BOP").[118] *Hager* therefore demonstrates an application of future dangerousness that both distinguishes particularly uncontrollable defendants and focuses the capital determination on the character and conduct of the individual defendant.

Thomas Morocco Hager brutally murdered Barbara White while engaged in a drug trafficking conspiracy, in violation of 21 U.S.C. § 848(e)(1)(A).[119] During the selection phase of his trial, in its presentation of non-statutory aggravating factors, the prosecution primarily argued future dangerousness.[120] According to Jim Trump, an Assistant U.S. Attorney involved in the case, the prosecution made sure to charge future dangerousness based on conduct both before and during the defendant's incarceration.[121] Information pertaining to this conduct was presented as individual "non-statutory aggravating factors."[122] Both pre-incarceration conduct and conduct during incarceration serve the aggravating factors' purpose by showing (1) a pattern of dangerous conduct and (2) the BOP's proven inability to rehabilitate, deter, or control the defendant.[123] The prosecution put on evidence of multiple prior violent crimes committed by the defendant, as well as evi-

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117. Brief of the United States at 44, *Hager*, 721 F.3d 167 (No. 98-04) (listing the evidence the government relied on to establish future dangerousness) [hereinafter Brief of the United States].

118. *Id.* at 50–51, 54–55 (describing Hager's mitigating evidence pertaining to BOP facilities and procedures, and the government's response to this evidence).

119. *Hager*, 721 F.3d at 174–75.

120. *See* Brief of the United States, *supra* note 117, at 37–46.

121. Telephone Interview with Jim Trump, Assistant U.S. Att'y, U.S. Att'y's Office for the E.D. Va. (Oct. 31, 2014).

122. Brief of the United States, *supra* note 117, at 37–46.

123. *See id.*; *see also* Novak, *supra* note 20, at 657 ("Future dangerousness [as a non-statutory aggravating factor] may be established with evidence of . . . a continuing pattern of violence, . . . low rehabilitative potential, lack of remorse, . . . [and] misconduct while in custody. . . .").

dence of Hager having directed others to commit violent crimes.[124] Next, the prosecution produced evidence of three separate instances of violent misconduct by Hager while he was incarcerated for an unrelated crime at the United States Penitentiary ("USP") Pollock, a high-security federal facility for male inmates.[125] The prosecution also included evidence of Hager's more recent violent misconduct during his confinement at the Northern Neck Regional Jail, where he was awaiting the present trial.[126] Hager's conduct and comments towards other inmates and prison staff clearly established the fact that he had adopted the "nothing to lose" mindset, and testimony from disciplinary officers who had personally dealt with Hager established that the BOP had no leverage over Hager and could do nothing to alter his behavior.[127]

Hager sought to combat the government's aggravating factors with evidence from expert witnesses testifying about BOP facilities and procedures.[128] Hager presented mitigating evidence in the form of testimony from former BOP officials who had no personal experience with Hager, but nonetheless testified that the BOP was capable of safely holding him.[129] Such mitigation arguments are a common attempt to shift the focus of the trial from the defendant to the BOP and to establish that the BOP is equipped to manage otherwise capital-eligible defendants.[130] In doing so, the defense—as it did in this case—tends to put on evidence about "the most secure facility within the United States Bureau of Prisons," the Administrative Maximum Facility ("ADX") Prison in

124. *Hager*, 721 F.3d at 176–77.

125. *Id.* at 177 (highlighting Hager's involvement in two separate prison fights and possession of an eight-inch long shank); *USP Pollock*, FED. BUR. PRISONS, http://www.bop.gov/locations/institutions/pol/ (last visited Feb. 00, 2015).

126. Brief of the United States, *supra* note 117, at 157; Telephone Interview with Jim Trump, *supra* note 121. Hager "held court" among other inmates—serving as "judge"—and passed a death sentence on inmate Alphonso Satchell because Hager thought Satchell was a snitch. Brief of the United States, *supra* note 117, at 45. Hager then tried to carry out this death sentence, chasing Satchell and stabbing him four times with a pen before guards could intervene. *Id.* Additionally, guards later found another shank among Hager's possessions. *Id.*

127. Brief of the United States, *supra* note 117, at 157–59.

128. *Id.* at 47, 50–51.

129. *Id.* at 51.

130. *See* Novak, *supra* note 20, at 672.

Florence, Colorado, and to argue that the defendant will be sufficiently restrained and isolated from human contact to negate any risk of future harm to others.[131]

Once the defense opens the door to evidence regarding the conditions of the defendant's future confinement, the government may rebut with evidence of "the *actual* manner in which the Bureau of Prisons will house the defendant and of the danger that [he or] she still represents within the prison system."[132] In the *Hager* case, the prosecution presented testimony from a special investigative agent who had worked for the BOP at multiple high-security federal prisons, including ADX Florence.[133] This agent testified that, based on Hager's crimes, he would most likely not be sent directly to ADX Florence, and that even if Hager wound up there, he could not be held there indefinitely.[134] Regulations limiting maximum security incarceration are part of ADX Florence's larger "step-down" program "designed to channel inmates back into general prison populations at other facilities."[135] The agent further testified that "there have been several assaults and, in 2005, two murders at ADX Florence."[136] This testimony supported evidence the government elicited on cross-examination of Hager's own expert on prison violence regarding the proven ability of inmates in federal prisons both to commit and to order "hits."[137]

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131. *Id.*; *see also* Brief of the United States, *supra* note 117, at 51.

132. Novak, *supra* note 20, at 672 (emphasis added); *see, e.g.*, United States v. Caro, 597 F.3d 608, 626 (4th Cir. 2010).

133. Brief of the United States, *supra* note 117, at 54.

134. *Id.* at 54 ("[T]he control unit at ADX Florence, which houses prisoners for disciplinary reasons, has strict regulations governing how long an inmate may be housed in the control unit. Generally, an inmate cannot remain in the control unit longer than 80 days.").

135. *Caro*, 597 F.3d at 618; *see* Patrick Goodenough, *Conditions in U.S. Supermax Prison Better Than Most in Europe, European Court of Human Rights Finds*, CBS NEWS (Apr. 11, 2012, 3:56 AM), http://cnsnews.com/news/article/conditions-us-supermax-prison-better-most-europe-european-court-human-rights-finds.

136. Brief of the United States, supra note 117, at 54.

137. *See id.* at 187, 202. In addition to discussing the institutional violence frequently committed by members of prison gangs, "Cunningham[, Hager's expert,] agreed that there was 'the potential' for inmates to direct people outside of prison to commit criminal acts." *Id.* at 202; *see also* United States v. Bingham, 653 F.3d 983, 988–89 (9th Cir. 2011) (discussing several prison assaults and murders carried out by prison gangs in various federal prisons coordinated among inmates despite being housed in separate prison facilities).

The purpose of both parties' evidence concerning federal prison conditions was to either bolster or challenge the BOP's ability to handle an inmate like Hager. While the defense presented its evidence in general terms, the prosecution properly tied its arguments to Hager's own predicted placement in that prison system, and to Hager's own conduct in very similar environments thus far.[138] In doing so, the prosecution used the future dangerousness element to satisfy the demand of the Supreme Court in *Zant v. Stephens* that a capital determination be based on "the character of the individual."[139] Additionally, the prosecution's use of future dangerousness demonstrated how the element can be an effective narrowing factor if applied in this manner, because it would only cover those defendants, like Hager, whom the BOP has no ability to control or contain through its disciplinary processes and the wider federal prison framework.[140]

III. IMPLICATIONS OF THE PROPOSED FUTURE DANGEROUSNESS GATEWAY: THE TSARNAEV TRIAL

Whereas Hager would still have been capital-eligible if future dangerousness were a required element of death penalty eligibility, the same cannot be said for Dzhokhar Tsarnaev, the surviving Boston Marathon bomber currently facing a capital prosecution. Six days after the Marathon bombings, on April 21, 2013, the government filed a criminal complaint against Tsarnaev, alleging violations of 18 U.S.C. § 2332a(a) (Use of a Weapon of Mass Destruction), and 18 U.S.C. § 844(i) (Malicious Destruction of Property Resulting in Death).[141] Both of these are capital-eligible offenses.[142] Tsarnaev was indicted by a Grand Jury on June 27, 2013, on thirty counts in total.[143] On January 30, 2014, federal prosecutors submitted the government's notice of intent to seek the death penalty on seventeen of those counts, pursuant to

138. *See supra* texts accompanying notes 124–27.

139. 462 U.S. 862, 879 (1983); United States v. Hager, 721 F.3d 167, 199–200 (4th Cir. 2013).

140. *See* Brief of the United States, *supra* note 117, at 158–59 (describing Officer White's testimony that he "had no way of changing or modifying [Hager's] behavior").

141. Criminal Complaint, United States v. Tsarnaev, No. 13-2106 (D. Mass. Apr. 21, 2013), ECF No. 3.

142. 18 U.S.C. §§ 844(i), 2332a(a) (2012).

143. Indictment, *Tsarnaev*, No. 13-10200 (D. Mass. June 27, 2013), ECF No. 58.

18 U.S.C. § 3593(a).[144] Under the current FDPA scheme, assuming the prosecution is able to meet its burden of proof, Dzhokhar Tsarnaev fully qualifies for a death sentence. However, as despicable and upsetting as Tsarnaev's actions were, they would not merit the death penalty if future dangerousness were an eligibility element, as proposed in this comment.

To begin with, the government did not even propose future dangerousness as a non-statutory aggravating factor in its notice filing.[145] The FDPA requires the notice to include "the aggravating factor or factors that the government . . . proposes to prove as justifying a sentence of death."[146] Given this requirement, and the conspicuous lack of future dangerousness among the seven other non-statutory aggravating factors listed in the notice,[147] it would seem that prosecutors do not believe that Tsarnaev has a sufficient record or history to support a finding of future dangerousness. And rightfully so, one need only look at Tsarnaev's past to see that he is no hardened criminal, nor an uncontrollable threat within the federal prison system.[148] Tsarnaev has no history of incarceration, let alone prior institutional misconduct.[149] He presents no indicators of radicalism or violence independent of his brother.[150] Finally, he has no ties to any organization that might present an external danger to the facility or people guarding him, as might conceivably raise concerns in another terrorism case.[151] Accordingly, were future dangerousness applied as an eligibility-

144. Notice of Intent to Seek the Death Penalty, *Tsarnaev*, No. 13-10200 (D. Mass. Jan. 30, 2014), ECF No. 167 [hereinafter Notice of Intent to Seek the Death Penalty]; *see* 18 U.S.C. § 3593(a).

145. *See* Notice of Intent to Seek the Death Penalty, *supra* note 144, at 5–7.

146. 18 U.S.C. § 3593(a)(2).

147. Notice of Intent to Seek the Death Penalty, *supra* note 144, at 5–7.

148. Devlin Barrett et al., *Suspect Raised No Red Flags: Tsarnaev's Seeming Lack of Ideology Exposes Possible Gap in Anti-Jihad Strategy*, WALL ST. J., May 16, 2013, at A3.

149. Stephanie Slifer, *Expert: Tsarnaev May Avoid Execution Because of Age*, CBS NEWS (Jan. 31, 2014, 12:00 PM), http://www.cbsnews.com/news/expert-dzhokhar-tsarnaev-unlikely-to-be-executed-because-of-age/.

150. Barrett et al., *supra* note 148 (reporting that the signs largely point to Tsarnaev being "psychologically dependent" on his older brother, and that he simply—albeit dangerously—followed that brother's lead).

151. *Id.* (noting that months of investigation and interrogation have uncovered no actual ties between either of the Tsarnaev brothers and any terrorist networks). Counterterrorism officials investigating the brothers said the Marathon bombing "fits in the general framework of 'homegrown' or 'lone wolf' terrorists" rather than the activities of an organized cell. *Id.*

narrowing factor, Tsarnaev would not fall within the class of death-eligible defendants.

This would undoubtedly be a disappointment to all those who want to send a strong message to criminals and terrorists, and to those who want revenge for the lives lost and the lives ruined by the Boston Marathon bombings. Those impulses notwithstanding, this is the necessary outcome if we are to meaningfully narrow the federal death penalty, and if we are to do so by drawing a line that is not blurred by emotion or retributivist impulses, and not threatened by arbitrary decisions regarding "how far someone has stepped down the rungs of hell."[152]

CONCLUSION

Our capital punishment system is not working. In its current form, it has no deterrent effect,[153] it is plagued by inefficiencies,[154] and it gets things wrong with uncomfortable frequency.[155] This is unacceptable. Keeping the words of Justice Blackmun in mind, we should always be cautious of "tinker[ing] with the machinery of death."[156] However, given that this machinery will continue to be a part of our criminal justice system for the foreseeable future, we have an obligation to ensure it is operating smoothly, without error and without waste. Amending the FDPA to require the government to establish a defendant's future dangerousness in prison before securing a death sentence would move our capital punishment system a large step closer towards that optimal operation.

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152. Kozinski & Gallagher, *supra* note 9, at 30.

153. Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 501 (2009) (finding that 88.2% of the country's leading criminologists no longer believe that the death penalty is an effective deterrent to crime).

154. Kozinski & Gallagher, *supra* note 9, at 20 ("We have capital punishment . . . but we don't really have the death penalty. The reason for this is hotly debated: too many procedural hurdles, too many dilatory tactics, too few lawyers, too *many* lawyers.") (emphasis in original).

155. Gross et al., *supra* note 3, at 7234 (finding that at least 4.1% of death row inmates would be exonerated, given time and attention, and that this number is actually "a conservative estimate of the proportion of erroneous convictions of defendants sentenced to death in the United States from 1973 through 2004").

156. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

The future dangerousness requirement would narrow capital eligibility by drawing a non-arbitrary line that focuses on the character and conduct of the individual defendant, rather than on uncertain predictive "science" or the emotions surrounding one particular crime. This comment predicts that formulating capital eligibility in this fashion would greatly reduce the number of death sentences imposed and, as a result, greatly reduce the room for wrongful sentences to be passed through the federal court system. Given the ongoing debates about the pros and cons of the death penalty, this would be an ideal outcome. After all, at the end of the day, the fact stands that capital punishment remains deeply embedded in our system, and as such, we had better be getting it right.

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