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## The Danger of Future Dangerousness in Death Penalty Use

Brian Sites  
a@h.com

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# FLORIDA STATE UNIVERSITY LAW REVIEW



## THE DANGER OF FUTURE DANGEROUSNESS IN DEATH PENALTY USE

*Brian Sites*

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# THE DANGER OF FUTURE DANGEROUSNESS IN DEATH PENALTY USE

BRIAN SITES\*

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## I. INTRODUCTION

I have but one lamp by which my feet are guided, and that is the lamp of experience. I know no way of judging the future but by the past.<sup>1</sup>

My interest is in the future because I am going to spend the rest of my life there.<sup>2</sup>

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1. Unknown, FBI Futures Working Group, Futures Working Group Members: Quotables, <http://www.fbi.gov/hq/td/fwg/quotables.htm> (last visited July 2, 2007).

2. Charles F. Kettering, *quoted at* The Quotations Page, <http://www.quotationspage.com/quote/11322.html> (last visited July 2, 2007).

In spite of thousands of years of science, humankind is distinctly unable to predict the future. And yet, the judicial system is called upon to do just so daily. In bail considerations, judges predict flight risk. In parole hearings, officials contemplate the likelihood of re-offense. And in three states, a defendant convicted of a capital crime will live or die based on what a judge and jury thinks he will do in an unknown future.<sup>3</sup> It has been observed that “what separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes. If that process is flawed . . . the legitimacy of our legal process is threatened.”<sup>4</sup> When states execute based in part on the defendant’s future actions, the legal process is confronted with several complex questions. If they cannot be satisfactorily answered, the state risks collapsing the distinction between murderer and executioner.

This Comment collects and responds to several of the strongest arguments—stemming from both constitutional objections and more general concerns—against the use of future dangerousness as a consideration in death penalty sentencing. Following this Introduction, Part II provides definitions and basic background information on future dangerousness. Part III compares the use of clinical methods to actuarial methods for determining future dangerousness and advocates for the conclusion reached by other commentators that actuarial methods are preferable. It also briefly reviews the Violence Risk Appraisal Guide (VRAG) and the Classification of Violence Risk (COVR) software, two actuarial tools referenced by example throughout this Comment. Part IV reviews the case law history of future dangerousness and the death penalty. On the foundation laid by Parts III and IV, Part V collects and responds to six of the most potent objections to future dangerousness: (1) relevance and admissibility of evidence, (2) the requirement of an individualized assessment, (3) reliance on factors that do not index blameworthiness, (4) vagueness challenges, (5) predestination considerations, and (6) objections to future dangerousness as nonretributive. Part VI considers generalized and specific arguments for the use of future dangerousness testimony. Part VII makes several specific suggestions as to how future dangerousness evidence should be used by courts. Part VIII concludes with general comments.

## II. SOME QUICK DEFINITIONS

“Future dangerousness” refers to the prediction of whether an individual in the criminal justice system will commit a violent crime in

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3. OR. REV. STAT. § 163.150 (2007); TEX. CODE CRIM. PROC. ANN art. 37.071 § 2(e)(1) (Vernon 2007); VA. CODE ANN. § 19.2-264.4 (2007).

4. *Flores v. Johnson*, 210 F.3d 456, 469-70 (5th Cir. 2000) (Garza, J., concurring).

the future.<sup>5</sup> Future dangerousness is ultimately a yes-or-no decision, and juries are restricted to concluding that the defendant *is* or *is not* a future danger; “maybe” is not an option.<sup>6</sup> However, the evidence that informs this decision is rarely black and white: often it involves conflicting expert opinions and competing risk assessments cast in shades of grey. A “risk assessment” involves the use of clinical, actuarial, or physiological methods to determine the probability that an individual will commit a violent crime in the future. Risk assessments return a percentage chance that a given defendant will commit a violent crime in the future. They are thus somewhat analogous to when weather forecasts give a percentage chance that certain weather will occur in the future.<sup>7</sup>

Using risk assessments (or other future dangerousness evidence presented), juries decide the larger, normative aspect of a future dangerousness decision: how much risk is sufficient to conclude that the defendant will be a future danger to society? In other words, if a risk assessment expert testifies that there is a 52% chance that a defendant will commit a crime in the future, the jury must decide if that chance is “enough” under the applicable law. It is presumed that a jury can reach this conclusion without any explicit assistance, but often expert witnesses are called on to give opinions or findings based on different risk assessment methods. Thus, while a future dangerousness consideration is partially empirical, it is primarily normative as juries are asked to determine whether the empirical component compels the decision that the person is, in fact, a future danger.<sup>8</sup>

### III. THE EMPIRICAL: CLINICAL AND ACTUARIAL METHODS

When mental health professionals testify as to whether a defendant is a future danger, several methods are available. These methods fall into two general categories: clinical methods that rely on the subjective judgment of mental health professionals and actuarial methods that rely on structured scoring tools and statistics.<sup>9</sup> Both

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5. For a discussion of what should be defined as a “violent crime,” see Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 72 (1999). For a comprehensive analysis of future dangerous predictions and methodology, see generally VERNON L. QUINSEY ET AL., *Violent Offenders: Appraising and Managing Risk* (2d ed. 2006).

6. See OR. REV. STAT. § 163.150 (2007); TEX. CODE CRIM. PROC. ANN art. 37.071 (Vernon 2007); VA. CODE ANN. § 19.2-264.4 (2007).

7. See John Monahan & Henry J. Steadman, *Violent Storms and Violent People: How Meteorology Can Inform Risk Communication in Mental Health Law*, 51 AM. PSYCHOLOGIST 931, 935-37 (1996).

8. For a discussion of the empirical and normative components of a future dangerous decision, see Aletha Claussen-Schulz et al., *Dangerousness, Risk Assessment, and Capital Sentencing*, 10 PSYCHOL. PUB. POL’Y & L. 471, 484-85 (2004).

9. Physiological methods also ostensibly exist, but research on them is thus far scarce and therefore they are not considered in this Comment.

clinical and actuarial models have been criticized,<sup>10</sup> but studies now generally support the validity of at least some actuarial tools.<sup>11</sup> This Part briefly reviews some of the findings on both clinical and actuarial methods and agrees, based on these findings and practical considerations, with the consensus of current literature that actuarial methods are greatly preferable.

### A. Clinical Methods

Clinical methods take several forms. A mental health professional might interview a patient, examine his criminal record, talk with his friends and family, or even, in extreme cases, base the future dangerousness prediction only on the fact pattern of the defendant's crime, as related to him at trial.<sup>12</sup> The mental health professional relies on any of a number of factors in making a clinical future dangerousness determination. The core feature of this method is that the determination is based on the experience and intuition of the professional in an unstructured format; the clinician determines what is important to consider in reaching his or her conclusion.

The greatest weakness of clinical methods is that they rely on the subjective analysis of individual mental health professionals. Several studies have shown that people make a variety of "systematic and gross errors"<sup>13</sup> when asked to make predictions, and mental health professionals are prone to the same mistakes.<sup>14</sup> Since the early 1980s, studies have shown that when mental health professionals make predictions about future dangerousness based on clinical methods, they are wrong much of the time.<sup>15</sup> Clinical assessment is also problematic because it does not lend itself easily to any review or

10. See, e.g., Thomas R. Litwack, *Actuarial Versus Clinical Assessments of Dangerousness*, 7 PSYCHOL. PUB. POL'Y & L. 409 (2001) (arguing evidence does not support the conclusion that actuarial methods are superior to clinical methods); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 406-07 (2006).

11. See, e.g., QUINSEY ET AL., *supra* note 5, at 141-69.

12. Dr. James Grigson, discussed *infra* Part V.B, is the most infamous example of a mental health professional utilizing this practice.

13. See QUINSEY ET AL., *supra* note 5, at 61. For a discussion of several of these errors, see *id.* at 61-62.

14. See Lewis R. Goldberg, *Simple Models or Simple Processes?: Some Research on Clinical Judgments*, 23 AM. PSYCHOLGIST 483, 484-85 (1968).

15. Compare Charles W. Lidz et al., *The Accuracy of Predictions of Violence to Others*, 269 JAMA 1007 (1993) (setting forth a study which showed that 53% of patients predicted to be violent later committed a violent act during the six-month follow-up period, while 36% of patients predicted to be safe later committed a violent act), with Diana Sepejak et al., *Clinical Predictions of Dangerousness: Two Year Follow-Up of 408 Pre-Trial Forensic Cases*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 171 (1983) (setting forth a study which showed that 39% of defendants rated to have a "medium" or "high" likelihood of future violence committed a violent act during the two-year follow-up period, while 26% rated to have a "low" likelihood of future violence committed a violent act in the follow-up period).

validation process. Because each clinician is relying on her own subjective method of clinical analysis, it is difficult to determine her accuracy—there are not likely to be articles on Dr. Jane's particular subjective method. The individual clinician is also unlikely to know how accurate she is, especially in criminal predictions of future dangerousness. Unless she keeps track of the defendant's subsequent criminal history or lack thereof, she will receive no feedback on her prediction.

These problems lead to a substantial variance in the quality of clinical predictions. The situation is compounded by the fact that, because individual professionals are often unaware of even their own capabilities, courts may be unable to identify qualified professionals. Even assuming there are highly skilled clinical predictors—and studies suggest there are few—the court's inability to identify them results in a game of expert witness Russian roulette: if a poor clinician is in the chambers, the result for the defendant is likely death.

Finally, even assuming there exist highly skilled clinical predictors *and* it is a skilled predictor who testifies, the jury has no evaluative tools to determine if the expert is, in fact, correct. If, for example, there is conflicting expert testimony and the highly skilled predictor is inarticulate, her opinion may be disregarded in favor of a less capable, but charismatic opposing expert. The jury has no way to confront the methods objectively. Thus, based on practical difficulties, clinical assessments are suboptimal measuring tools.

### B. Actuarial Methods

Actuarial methods involve structured assessments in which the mental health professional follows some set of instructions to determine the defendant's risk of being a future danger. One such tool is the Violence Risk Appraisal Guide (VRAG), developed in 1993 and verified repeatedly since then.<sup>16</sup> Researchers created the VRAG based on assessments of over 600 men at the maximum-security Oak Ridge psychiatric hospital in Ontario, Canada.<sup>17</sup> Its creators began with fifty variables obtained from institutional files and used statistical analysis to narrow the list down to the twelve most predictive variables—those currently included in the VRAG.<sup>18</sup> The twelve VRAG factors are: whether the defendant lived with both biological

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16. See Grant T. Harris et al., *Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument*, 20 CRIM. JUST. & BEHAV. 315 (1993). However, the VRAG was not referred to as such until 1995. See also <http://www.mhcr-research.com/ragpage.htm> for additional information on the VRAG's history and <http://www.mhcr-research.com/ragreps.htm> for information on known replications of the VRAG.

17. QUINSEY ET AL., *supra* note 5, at 144; Monahan, *supra* note 10, at 409-10.

18. See QUINSEY ET AL., *supra* note 5, at 141-47.

parents until age sixteen, elementary school maladjustment, history of alcohol problems, marital status, nonviolent criminal history, failure on a prior conditional release (such as bail, probation, parole, et cetera), age, seriousness of victim injury for the index offense, whether there was a female victim, the presence of a personality disorder, the presence of schizophrenia, and a Psychopathy Checklist score.<sup>19</sup> The presence or absence of each variable corresponds with a point value (+1, -2, +5, et cetera), and the total of these point values places the defendant into one of nine risk categories, each with a corresponding probability of violent recidivism.<sup>20</sup> These probabilities, at seven and ten years in the future, are produced in the table below.<sup>21</sup>

VRAG Category	Percentage Scoring in Range	VRAG Score	7 years	10 years
1	2	≤ -22	0	0.08
2	11	-21 to -15	0.08	0.10
3	17	-14 to -8	0.12	0.24
4	17	-7 to -1	0.17	0.31
5	19	0 to + 6	0.35	0.48
6	15	+ 7 to + 13	0.44	0.58
7	12	+14 to +20	0.55	0.64
8	6	+21 to +27	0.76	0.82
9	1	≥ +28	1.00	1.00

Actuarial methods have recently come into increasing favor among mental health professionals<sup>22</sup> and have been shown to be more accurate and reliable than clinical measures.<sup>23</sup> New tools are constantly in development; one of the newer actuarial methods, developed in the MacArthur Violence Risk Assessment Study, is the Classification of Violence Risk (COVR) software.<sup>24</sup> This software,

19. See *id.* at 237-38.

20. See *id.* at 147-48, 237-40.

21. Table adapted from *id.*, app. A at 240 and app. C at 245.

22. *Id.*

23. William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293, 298 (1996) (describing how only 8 of 136 studies comparing clinical to actuarial methods found clinical methods to be more accurate).

24. See John Monahan et al., *An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders*, 56 PSYCHIATRIC SERVS. 810 (2005) [hereinafter Monahan et al., *An Actuarial Model*], available at <http://psychservices.psychiatryonline.org/cgi/reprint/56/7/810>; see also MacArthur Research Network on Mental Health & the Law, *The MacArthur Violence Risk Assessment: Executive Summary*,



validated and released in 2005, relies on a “classification tree” to consider several different combinations of risk factors and places participants into one of five risk classes.<sup>25</sup> The software was designed by assessing over 1,000 patients in acute civil psychiatric facilities on 134 potential risk factors and then following the patients for twenty weeks after discharge from the psychiatric hospital.<sup>26</sup> Most of the patients assessed fell into the lower risk categories instead of the higher; 36.5% were in the lowest risk category while only 6.7% were in the highest.<sup>27</sup> The resulting rate of violence for each class during the twenty weeks after release was 1.2% for the lowest risk category, 7.7% for the next lowest, 26.2% for the middle category, 55.9% for the second highest category, and 76.2% for the highest category.<sup>28</sup> Thus, violence was highly concentrated in the highest risk classes.

Actuarial methods are not free from the concerns raised in Part III.A, *supra*, regarding clinical methods, but the risk of errors going undetected is much smaller. Just as experts are prone to making mistakes in clinical predictions, it is also possible that professionals administering actuarial methods will err, perhaps by inaccurate scoring or misunderstanding the results. But the adversarial system is designed to address these possibilities through review by opposing counsel’s experts and by cross-examination. Since actuarial tools are transparent and standardized, these errors are easier to catch. Thus, even if the court is confronted with an unskilled expert, it will have several evaluative tools at its disposal to examine the interview findings, how the expert scored the test, what the literature says those scores mean, and so on. If the court does not catch the errors itself, the opposing counsel’s expert will have a chance to testify as to the inaccuracies. If neither the court nor opposing counsel recognizes that the expert has erred, the jury at least has at its disposal objective, scientific means and standards to determine the accuracy of the expert’s methodology.<sup>29</sup>

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<http://www.macarthur.virginia.edu/risk.html> (last visited July 2, 2007). For a summary of the main findings of the MacArthur Violence Risk Assessment Study, see generally JOHN MONAHAN ET AL., *RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE* (2001) [hereinafter MONAHAN ET AL., *RETHINKING RISK ASSESSMENT*].

25. Monahan et al., *An Actuarial Model*, *supra* note 24, at 810.

26. Monahan, *supra* note 10, at 411-12. For a list of the risk factors, see John Monahan et al., *Developing a Clinically Useful Actuarial Tool for Assessing Violence Risk*, 176 *BRIT. J. PSYCHIATRY* 312, 313-15 tbl. 1 (2000).

27. See MONAHAN ET AL., *RETHINKING RISK ASSESSMENT*, *supra* note 24, at 126.

28. See *id.* at 125 tbl. 6.7.

29. That is not to say that a jury’s task in evaluating such testimony is easy. However, actuarial tools offer the jury a chance to evaluate the expert’s findings, a chance that clinical assessment generally do not provide.

#### IV. THE NORMATIVE: THE HISTORY OF THE DEATH PENALTY AND FUTURE DANGEROUSNESS

##### A. *The Death Penalty*

In the 1972 case of *Furman v. Georgia*,<sup>30</sup> the Supreme Court held that statutes which offered juries no guidance on what to consider in death penalty sentencing were unconstitutional.<sup>31</sup> Because they led to arbitrary and capricious impositions of the death penalty, such statutes violated the Eighth and Fourteenth Amendments.<sup>32</sup> In part because five concurring opinions were filed in the case,<sup>33</sup> *Furman* was widely received as confusing, and states responded to the ruling in a variety of ways.<sup>34</sup> Some states specified in detail how the jury was to consider the imposition of death<sup>35</sup> while others removed the jury's discretion entirely.<sup>36</sup> The variety of modifications and the diversity of statutes set the stage for reconsideration by the Supreme Court.

In *Gregg v. Georgia*,<sup>37</sup> the Court upheld Georgia's revised statute because it allowed the jury to exercise discretion and provided statutory guidelines.<sup>38</sup> In particular, it specified consideration of statutory mitigating and aggravating circumstances.<sup>39</sup> Under Georgia's statute, the death penalty was unlikely to be "wantonly and freakishly" imposed.<sup>40</sup> But how would other states fare?

On the same day it decided *Furman*, the Court also decided *Woodson v. North Carolina*.<sup>41</sup> Unlike Georgia, North Carolina had attempted to comply with *Furman* by removing jury discretion and mandating the death penalty in first degree murder convictions.<sup>42</sup> The *Woodson* Court struck down the North Carolina statute because it did not "replac[e] arbitrary and wanton jury discretion with objective standards."<sup>43</sup> In other words, the Court wanted guided discretion, not no discretion at all. The Court also said that "[w]hile the prevailing practice of individualizing sentencing determinations gen-

30. 408 U.S. 238 (1972).

31. See *id.* at 239-40; *id.* at 253, 255-58 (Douglas, J., concurring).

32. See *id.* at 239-40 (per curiam).

33. *Id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring).

34. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 352-53 (1998).

35. See *Gregg v. Georgia*, 428 U.S. 153, 163-66 (1976).

36. See *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976).

37. 428 U.S. 153.

38. *Id.* at 206-07.

39. *Id.* at 196-98.

40. *Id.* at 206-07.

41. 428 U.S. 280.

42. *Id.* at 286-87.

43. *Id.* at 303.

erally reflects simply enlightened policy rather than a constitutional imperative . . . in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires [individualized sentencing].”<sup>44</sup> The Court emphasized that the severity and uniqueness of the death penalty required an increased level of “reliability in the determination that death is the appropriate punishment in a specific case.”<sup>45</sup> Mandatory death sentences removed jury discretion and failed this standard.

Yet another case decided with *Furman* and *Woodson* was *Jurek v. Texas*,<sup>46</sup> a case that helped to ignite the current future dangerousness debate. The Texas statute at issue required the jury to consider three special questions, the second of which involved future dangerousness.<sup>47</sup> Because the Texas Court of Criminal Appeals had read into the future dangerousness question the possibility for the defendant to bring to the jury’s attention any mitigating circumstances, the Supreme Court held that the Texas statute was constitutional.<sup>48</sup> Although the discretion that Texas allowed juries to exercise was narrow and formulaic, it was likely to lead to the consistent and predictable imposition of the death penalty.<sup>49</sup>

### B. Future Dangerousness

Seven years later, the Supreme Court decided *Barefoot v. Estelle*.<sup>50</sup> If *Jurek* kindled the future dangerousness fire, *Barefoot* poured on the kerosene by addressing the issue of expert witness testimony on future dangerousness. In *Barefoot*, the Court held that a Texas district court had not erred in admitting psychiatric testimony on future dangerousness.<sup>51</sup> During the sentencing phase, two State experts testified that the defendant was likely to be dangerous in the future.<sup>52</sup> One expert, psychiatrist Dr. James Grigson, even testified that he was “100% sure” the defendant was going to repeat offend.<sup>53</sup> Neither expert had examined the defendant, and both expert opinions were based primarily on a lengthy hypothetical question posed by the State in court.<sup>54</sup>

Despite criticism from the American Psychiatric Association

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44. *Id.* at 304.

45. *Id.* at 305.

46. 428 U.S. 262 (1976).

47. *See id.* at 269.

48. *Id.* at 276. Texas’ statute now specifically provides an additional question on mitigating circumstances. *See* TEX. CODE CRIM. PROC. ANN. 37.071 § 2(e)(1) (Vernon 2007).

49. *Jurek*, 428 U.S. at 276.

50. 463 U.S. 880 (1983).

51. *Id.* at 905-06.

52. *Id.* at 884.

53. *Id.* at 905 n.11.

54. *Id.* at 917-19 (Blackmun, J., dissenting).

(APA) in its amicus brief that psychiatrists were unable to accurately predict future dangerousness, the majority held that psychiatrists were accurate enough to pass constitutional muster.<sup>55</sup> The Court was confident that the adversarial system would reveal inaccuracies in testimony and that juries would be able to sort out the truth.<sup>56</sup> Over two fierce dissents, the Court upheld the use of psychiatric testimony on future dangerousness because it was not “entirely unreliable”<sup>57</sup>—despite the APA’s contention that it was wrong “two times out of three.”<sup>58</sup>

Although *Barefoot* has been heavily criticized,<sup>59</sup> it has not been overruled, and courts have continued to admit the testimony of mental health professionals. Some commentators have argued, however, that the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>60</sup> modified the criteria for admitting expert testimony in criminal sentencing.<sup>61</sup> In *Daubert*, Justice Blackmun, writing for the majority, “echo[ed] the language of his dissent in *Barefoot*”<sup>62</sup> and overruled the existing “general acceptance” test from *Frye v. United States*<sup>63</sup> for admitting expert witness testimony.<sup>64</sup>

*Daubert*, a federal civil case about birth defects caused by a morning sickness drug, identified a four-factor review for the admission of expert testimony.<sup>65</sup> The review requires consideration of four “general observations,” a list of nonexclusive factors a judge is to consider in determining whether to admit the testimony into evidence.<sup>66</sup> Unlike the narrow *Frye* test, *Daubert*’s four factors permit a more comprehensive review of the basis of the testimony. The four factors are: (1) testability (both whether the scientific methodology can be tested and whether it actually has been tested), (2) whether the methodology has been subjected to peer review, (3) the existence of methodological standards and the rate of error, and (4) general ac-

55. *Id.* at 899 (majority opinion).

56. *Id.*

57. *Id.*

58. *Id.* at 916 (Blackmun, J., dissenting).

59. See, e.g., 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, 469-70 (2004).

60. 509 U.S. 579 (1993).

61. See Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 367-69 (2003); Regnier, *supra* note 59, at 493-95.

62. Eugenia T. La Fontaine, Note, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207, 226 (2002).

63. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The *Frye* test only allowed entry of evidence that had gained “general acceptance” in the relevant scientific field. *Id.*

64. See *Daubert*, 509 U.S. at 588-89.

65. See *id.* at 593-94.

66. See *id.* at 593-95.

ceptance of the methodology in the field.<sup>67</sup> If the testimony fails every factor or is otherwise not relevant, the judge should exclude it.<sup>68</sup> Acting in this manner, the judge functions as a gatekeeper, allowing only reliable and relevant information to reach the jury.<sup>69</sup>

### C. A Future Dangerousness Standard?

How does *Daubert* affect future dangerousness testimony? While it expressly overruled the existing standard for the admission of expert testimony in federal cases, *Daubert*, a federal case, does not apply to state criminal cases or to federal or state sentencing proceedings.<sup>70</sup> There are several reasons, however, why applying *Daubert*'s "general observations" to sentencing proceedings would be logical.

Because death is an absolute and severe punishment, allowing the admission of relevant information during the sentencing stage is paramount.<sup>71</sup> Since *Daubert*'s review is broad, it encourages the admission of relevant information. Courts also require that evidence used to weigh a decision as severe as execution be reliable.<sup>72</sup> *Daubert* encourages a thorough review of the methods, and by excluding irrelevant or baseless testimony, a judge using *Daubert* protects reliability.

Given that "death is different"<sup>73</sup> than other sentences due to its severity and irreversibility, courts should have comprehensive admissibility guidelines that ensure the decision to impose death is well-informed. Put more directly, if proceedings where death is *not* contemplated require the thorough *Daubert* standard, proceedings that contemplate the more severe punishment of execution should logically require a review standard with at least the same level of caution. Some states, such as Texas, have recognized this argument and essentially adopted *Daubert*.<sup>74</sup> While the Supreme Court has not addressed this position, this Comment proceeds on the assertion that *Daubert* should apply in death penalty proceedings.<sup>75</sup>

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67. See *id.* at 593-94.

68. See *id.* at 592-95.

69. See *id.* at 597.

70. See FED. R. EVID. 1101(d)(3); Flores v. Johnson, 210 F.3d 456, 464 n.10 (5th Cir. 2000) (Garza, J., concurring) ("It is well settled that, in the federal courts, the rules of evidence generally do not apply at a sentencing hearing, even one in which the death penalty is a possibility."); see also G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 974 (1996).

71. See *Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

72. See *Beecher-Monas*, *supra* note 61, at 358-59.

73. *Gregg*, 428 U.S. at 188.

74. See *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995); see also *Regnier*, *supra* note 59, at 495.

75. For additional discussion on why *Daubert* should apply, see *Beecher-Monas*, *supra* note 61, at 360-85; see also Lisa M. Dennis, Note, *Constitutionality, Accuracy, Admissibility: Assessing Expert Predictions of Future Violence in Capital Sentencing Proceedings*, 10 VA. J. SOC. POL'Y & L. 292, 312-14 (2002).

### D. Future Dangerousness Now

Future dangerousness has marched ahead despite the *Daubert* uncertainty, court confusion,<sup>76</sup> scholarly criticism,<sup>77</sup> and professional condemnation.<sup>78</sup> Although some states, such as Mississippi, do not permit a consideration of future dangerousness,<sup>79</sup> three states—Oregon, Texas, and Virginia—expressly require a finding of future dangerousness before imposing a sentence of execution.<sup>80</sup> Twenty-one additional states use future dangerousness as an aggravating factor.<sup>81</sup>

States are not alone in this consideration; juries almost always consider whether a given defendant will pose a continuing threat to society, even if the prosecutor neither introduces evidence on nor says anything about future dangerousness.<sup>82</sup> Furthermore, jury consideration of future dangerousness is not in passing; in determining what sentence to impose, jurors spend more time discussing future dangerousness than any other factor save the facts of the crime.<sup>83</sup> As the debate among both mental health professionals and legal scholars illustrates, future dangerousness is an issue that is ripe for Supreme Court review.

### V. THE PERMISSIBILITY OF FUTURE DANGEROUSNESS

The use of mental health professional testimony regarding future dangerousness invokes several important constitutional questions. In the last few decades, it has become increasingly clear that the science behind some future dangerousness predictions is generally problematic.<sup>84</sup> Why, then, has it been permitted to remain in the judicial system?

Courts may have thus far refused to exclude mental health professional testimony because they believed that future dangerousness is a valuable consideration in criminal sentencing and that psychologists and psychiatrists seemed the best equipped to testify about it.<sup>85</sup>

76. See *supra* Part III.A.

77. See, e.g., La Fontaine, *supra* note 62, at 238-43.

78. See *Barefoot v. Estelle*, 463 U.S. 880, 899-903 (1983) (referring to the APA's amicus brief condemning judicial reliability on psychiatric testimony in future dangerousness considerations).

79. See *Balfour v. State*, 598 So.2d 731, 748 (Miss. 1992).

80. See OR. REV. STAT. § 163.150 (2007); TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (Vernon 2007); VA. CODE ANN. § 19.2-264.4 (2007).

81. Claussen-Schulz et al., *supra* note 8, at 479. For a partial list of states, see *id.* at 479 n.48.

82. See John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398-99 (2001).

83. *Id.* at 404.

84. At least this is the case for unstructured clinical assessment. See Monahan, *supra* note 10, at 394.

85. The Supreme Court in *Barefoot* implied a similar position when it said that "it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons

Casting out the whole lot of expert testimony would deprive a jury facing a tough future dangerousness question of the best information modern science can furnish. Thus, faced with choosing between abandoning a desirable sentencing tool (future dangerousness) and relying on unsteady analytical tools (psychological testing), courts prefer the latter.

However, courts no longer face this dilemma. Instead of discarding all future dangerousness analysis, certain types of future dangerousness predictions could be excluded without emptying the judicial tool belt of all future dangerousness utilities. For example, courts might choose to exclude clinical methods, while allowing actuarial tools. This is one potentially viable option. But in excluding clinical methods, courts would also surely contemplate the numerous objections raised against future dangerousness as a whole. This Part collects six such objections advanced by commentators that the courts might consider.

#### A. *Relevance*

The argument against future dangerousness stemming from relevance grounds goes something like this: to be relevant in criminal sentencing, information must be reliable.<sup>86</sup> Death penalty sentencing procedures require a heightened level of reliability for information to be relevant and thus admissible.<sup>87</sup> Since death is a final, irreversible punishment, courts strictly require that the jury only use accurate information with probative value in making its decision. Given the severity and corresponding high standards of capital trials, future dangerousness testimony is too inaccurate to be relied upon and therefore has little probative value. It threatens to bias the jury. Thus, future dangerousness evidence is problematic and should be excluded.<sup>88</sup>

The Supreme Court has repeatedly emphasized that juries should receive only accurate information during the sentencing phase of death penalty trials.<sup>89</sup> In *Gregg*, the Court stated that “accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.”<sup>90</sup> Indeed, only a reasoned, noncapricious system is constitutional.<sup>91</sup> The relevant question, then, is whether future dangerousness predictions

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who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.” *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983).

86. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

87. *See id.*

88. For a version of this argument primarily concerning clinical assessment, see Regnier, *supra* note 59, at 502-04.

89. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

90. *Id.*

91. *See id.* at 188-89.

qualify as reliable.

Under the *Daubert* standard, the most accurate answer is that many future dangerousness tools meet this requirement, but some do not. As discussed *supra* Part III.A, clinical assessment methods are generally problematic. By applying the four considerations in *Daubert*—testability, peer review, the presence of methodological standards, and general acceptance—it is clear clinical assessment should be excluded.<sup>92</sup> First, clinical assessment methods cannot readily be tested. Second, clinical assessment methods cannot be subjected to peer review (and have not been). Third, methodological standards do not really exist beyond a clinician-to-clinician basis. And fourth, rather than being generally accepted, the profession has almost unanimously rejected the use of clinical assessment methods.<sup>93</sup> The relevance argument directed against clinical assessment is thus both accurate and commendable. However, the relevance argument leads to a different conclusion when directed against actuarial tools. Consider, for example, the VRAG.

The VRAG passes all four of the *Daubert* factors and should therefore not be excluded. It is a testable instrument; it has been validated repeatedly by its authors and peers;<sup>94</sup> it possesses clear methodological standards, including error rates; and it has been generally accepted in the scientific community.<sup>95</sup> Because the VRAG has been shown to be accurate and reliable, it is a suitable tool for judicial adoption, even in light of the exacting evidentiary standards present in death penalty sentencing.

The VRAG, however, is only one of several actuarial tools, and a separate *Daubert* inquiry would be required for each prior to use in any future dangerousness consideration. There should be no general presumption towards the accuracy of actuarial methods; only those tools carefully constructed and repeatedly verified are suitable for judicial use. As long as each tool is carefully scrutinized by a gate-keeping judge, actuarially-informed future dangerousness predictions will be relevant, admissible evidence.

Finally, even assuming tools like the VRAG meet the *Daubert* standard, some commentators argue that *Daubert* is not scrutinizing enough.<sup>96</sup> *Daubert* is not a perfect test, and it requires the courts to undertake a sometimes daunting review of scientific matters. But *Daubert* is a comprehensive review and is the best standard currently available. This Comment does not suggest *Daubert* is a judi-

92. See Regnier, *supra* note 59, at 494.

93. See *id.* at 495.

94. See Harris et al., *supra* note 16.

95. See *id.*

96. See Regnier, *supra* note 59, at 504-05 (arguing that *Daubert* is too porous to exclude clinical assessment).



cial ambrosia. It simply argues that if future dangerousness is to be relied upon, it should be analyzed with the best, most comprehensive standard available. For now, *Daubert* is such.

### B. Individualized Assessment

The sentencing process must permit consideration of the “character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”<sup>97</sup> The Supreme Court has repeatedly recognized this sort of “individualized assessment” as essential in death penalty sentencing.<sup>98</sup> However, the Court has not indicated in detail what it means by an “individualized assessment” and has never clarified how it pertains to future dangerousness. In particular, since several of the methods informing the empirical component of a future dangerousness assessment rely on statistics, and therefore sample data,<sup>99</sup> it is unclear how strictly “individualized” a sentencing determination must be.<sup>100</sup> The argument against future dangerousness based on individualized assessment grounds claims that the use of sample data equates to a nonindividualized assessment and thus is prohibited in capital sentencing.<sup>101</sup>

Actuarial risk assessment examines the traits of the defendant and is clearly concerned with the particular individual before the court. It is, after all, that specific defendant’s traits, conduct, and circumstances that tests like the VRAG are designed to score. However, those traits are only meaningful in the context of the actuarial assessment because they statistically relate to other people in the sample data that informs the test. It is true, in part, that risk assessment is not individualized because it explicitly considers the defendant as compared to often hundreds of other individuals.<sup>102</sup> The same could be said, however, for any psychological assessment tool. Even one that relies solely on a mental health professional’s intuition could not avoid this “collective” consideration, because clinical intuition will

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97. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

98. *See id.* at 303-05. *But see id.* at 321-22 (Rehnquist, J., dissenting) (arguing that individualized assessments are not required).

99. Sample data here refers to the data from the participants in a particular test. For example, the VRAG collected data from over 600 individuals and conducted statistical analysis to identify the most predictive traits those individuals possessed. These predictions come from the sample of 600, but are assumed to apply to the general population (or at least to those similar to the sample). Thus, when a defendant is scored on the VRAG, he is being compared to the sample used to create it, or the “sample data.” Some commentators advancing this position refer to it as “population data,” but population data is a term of art that refers to data from a sample that is generalized to (theoretically) apply to the public. *See QUINSEY ET AL.*, *supra* note 5, at 141-47.

100. *See Claussen-Schulz et al.*, *supra* note 8, at 485-90.

101. *See id.*

102. The VRAG was formed by analyzing over 600 individuals. *See supra* Part III.B.

likely be based, at least in part, on the given clinician's prior experience treating individuals.<sup>103</sup> In a strict sense, psychology as a field is informed by and based on statistical analysis of sample data of hundreds of thousands of people.

The argument against future dangerousness testimony as "collective" is advanced by Claussen-Schulz, Pearce, and Schopp, although their argument primarily concerns reaching *dispositive* conclusions using actuarial methods and does not stretch as far as the debate is carried in this Comment.<sup>104</sup> Two breeds of this argument are discussed here: (1) the fallacy of division and (2) the more general question of what the Court meant when it required "individualized assessment." Although the two overlap in their details, each merits a separate analysis to evaluate individualized assessment concerns.

### 1. *Fallacy of Division*

A "fallacy of division" is a logical error in which one concludes that person X possesses qualities which others in X's class possess because X is a member of that class.<sup>105</sup> The fallacy of division lends itself well to an example: "Heads of state are highly likely to be married, the pope is [a] head of state, therefore, the pope is highly likely to be married."<sup>106</sup> The pope is determined to likely be married because he is a member of the "head of state" class, but clearly he is *not* likely to be married. This is a fallacy of division. The terms "trait" and "class" can be used interchangeably in this contemplation; the Pope's "head of state" class status could also be called a trait. Ultimately, the fallacy of division is concerned with using one trait or class membership to deduce the existence of other traits or class memberships.<sup>107</sup> Actuarial tools such as the VRAG do not encourage *dispositive* conclusions, but do claim a 100% probability for certain score results.<sup>108</sup> Realistically, juries facing a claimed-100% probability may feel compelled to conclude that future dangerousness exists. Thus, the VRAG risks functioning as a dispositive prediction.

Future dangerousness assessments initially appear to fall prey to the fallacy of division. The VRAG was developed by looking at a class (people who were released and had reoffended) and identifying traits

103. "Collective," as used here, means that the clinician does not evaluate the individual in a vacuum and thus the assessment is potentially not sufficiently individualized.

104. See Claussen-Schulz et al., *supra* note 8, at 485-86.

105. See *id.* at 486. See e.g., JAMES WILLIAM LETT, SCIENCE, REASON, AND ANTHROPOLOGY 65 (Rowman & Littlefield 1997).

106. Claussen-Schulz et al., *supra* note 8, at 486.

107. "[I]t is improper to apply [the results of a sample-based tool] as dispositive in the capital sentencing context, because the capital sentencing decision must always be applied to the individual who is being sentenced." *Id.*

108. For the VRAG, the probability of a repeat violent offense reported for category 9 is 1.00. See *supra* Part III.B and accompanying table.

they possess (those traits most predictive of violence). When later using the VRAG in an assessment, a defendant who has some number of these traits is predicted to belong to a class—that is, the defendant is predicted to be violent in the future based on traits he possesses. Is this actually a fallacy of division? Probably not.

The fallacy of division argument often focuses on simplistic errors, such as where a single trait (being a head of state) is used to predict membership in a class (being married). Future dangerousness risk assessments typically do not commit so obvious an error. The VRAG, for instance, uses several traits, scores both pluses and minuses (for example, +5 for severe elementary school maladjustment, but -1 if no maladjustment),<sup>109</sup> and categorizes participants into nine different categories with varying probabilities of repeat offending.<sup>110</sup> Other tools also involve complex consideration of traits. For example, the COVR software is adaptive, and the answer to one question alters which question is subsequently presented.<sup>111</sup> Actuarial tools thus rely on multiple traits to make predictions, and this complex analysis enables accurate prediction. Since actuarial tools use multiple traits to predict class status, they diverge from the typical fallacy of division example.

It is not clear, however, that actuarial risk assessment tools avoid the problems raised by the fallacy of division simply because they use multiple factors to predict membership in the “future dangerous” class. It may be argued that the fallacy of division also applies to convoluted logic trees involving multiple traits. For instance, the following trait trends may all exist: heads of states are likely to be married, public figures are likely to be married, financially secure individuals are likely to be married, and males over fifty are likely to be married. Using these traits, a “marriage prediction test” on the Pope would fail; the Pope possesses all four of these factors, but is not married. Predicting that he is married would be a sophisticated fallacy of division, but still a fallacy.

But the error is also obvious: our marriage prediction test did not take the right factors into consideration. It should have also considered religious affiliation (and related celibacy) and a whole host of other traits and circumstances. If it had, it would have more accurately predicted the Pope’s marital status. The “fallacy” is in the test—not necessarily the theory.

Actuarial tools are generally created by statistical methods, such

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109. See QUINSEY ET AL., *supra* note 5, at 283-85, app. A.

110. See *supra* Part III.B and accompanying table.

111. See Monahan, *supra* note 10, at 412.

as regression analysis,<sup>112</sup> that evaluate several factors and identify those with the greatest predictive value.<sup>113</sup> The fallacy of division is thus increasingly unlikely because actuarial tools are not picking random traits, but instead are picking those traits that are most predictive and using them in tandem.

There is also direct conflict between the success of a given assessment tool and the allegation that it falls prey to any fallacy, because a prediction is only a fallacy if it is wrong.<sup>114</sup> If it is an error to predict class membership based on a host of traits correlated with that class, then the peer-reviewed, repeatedly successful predictions of class membership must be explained. Even if fallacies of division are possible, the predictive success of future dangerousness tools suggests that such tools are not committing this logical error. If the thrust of the fallacy of division argument is that actuarial tools will simply be mistaken, then the argument should be presented as an attack on accuracy. Certainly inaccurate tools should not be used; the VRAG, however, appears to be accurate.

Finally, the fallacy of division argument assumes that there are no traits that definitively predict class membership—in other words, that the equivalent of causation does not exist. *If* certain classes all share a given trait or certain traits always predict membership in a class, it would not be erroneous to recognize this predictive link. If, for example, all Michigan football fans were actually allergic to buckeye nuts, it would not be a fallacy to predict that serving buckeyes to Michigan fans would lead to their becoming sick. This hypothetical, of course, illustrates actual causation; the nuts are causing the sickness. What the VRAG might capture is *effective* causation, that is, a consistent, overwhelming impact of circumstances.

As a matter of theory, it would not be a fallacy to use predictive traits that actually caused other traits. Probably no such traits exist—the traits studied in the VRAG probably do not actually cause individuals to commit violent crimes. This Comment does not argue that *actual* causality is real. But what the VRAG and tests like it ask is if there could be traits or circumstances that always,<sup>115</sup> or nearly

112. Regression analysis is a statistical tool that identifies the best fit between two sets of data. In other words, regression tools analyze the interaction between the two sets of data and identify any relationship to each other. By understanding the relationship, regression analysis informs prediction. *See e.g.*, FREDERICK J. GRAVETTER & LARRY B. WALLNAW, STATISTICS FOR THE BEHAVIORAL SCIENCES 556-69 (5th ed. Wadsworth 2000).

113. For example, the VRAG uses approximately fifty factors. *See* Monahan, *supra* note 10, at 410.

114. Of course, individual predictions may be correct by fluke, and so the standard must be much higher—of the scale contemplated by peer review and study repetitions.

115. “Always” serves an interesting illustrative point here, but in reality, it is very unlikely there are any such traits. Perhaps there are traits that nearly always link with

always, correctly *predict* whether a defendant will commit a future violent act. If the answer is yes, the fallacy of division is inapplicable. As is discussed below, just because a test can predict the mistakes someone will make does not mean the person did not choose to make the mistakes. While notions of free will suggest that there are no traits that “cause” recidivism, if tests like the VRAG can actually predict near 100% probabilities<sup>116</sup> it is worth contemplating whether a certain subset of circumstances has so severe an impact on individuals that they are driven to violence.<sup>117</sup>

In summary, the fallacy of division strain of the individual assessment argument seems to be inapplicable to future dangerousness. Because actuarial tools rely on many traits to predict class membership, because such tools rarely function in a dispositive manner, and because some actuarial tools appear able to accurately predict recidivism, the fallacy of division argument should not prevent the use of future dangerousness testimony.

## 2. *Individualized Assessment Generally and Discretion*

The second type of the individualized assessment argument is more general and inquires what the Supreme Court meant when it required an “individualized assessment” in *Lockett v. Ohio*,<sup>118</sup> *Penry v. Lynaugh*,<sup>119</sup> *Woodson*,<sup>120</sup> and *Jurek*.<sup>121</sup> Did it mean that the defendant cannot be compared to others via sample data-based statistics? Likely, the Court intended no such application of its individual assessment requirement given the context of the phrase’s use. In each case, the Court was largely concerned with the removal of discretion by the statutes at issue. But future dangerousness as a whole does not involve a removal of discretion, nor does its empirical component, risk assessment, prevent juries from exercising discretion in the normative component. Risk assessment simply provides a statistical prediction of the defendant’s likelihood of recidivism; it aims to give the jury more information upon which to exercise its discretion.

Does individualized assessment, separate from the fallacy of division argument, forbid the use of sample data? Presumably the answer is no, as revealed in part by the discussion *supra* Part V.B.

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classes, but free will, assuming it exists, would dictate that there may be exceptions to every “always.” See *infra* Part V.G.

116. Category 9 of the VRAG is associated with a probability of 1.0. Of course, less than 1% of those the VRAG was based on fell into this category, so it is highly uncertain if such a 100% chance is accurate. See QUINSEY ET AL., *supra* note 5, app. A at 240, app. C at 245.

117. If nothing else, it would be valuable to direct additional resources to preventing such circumstances from occurring.

118. 438 U.S. 586, 604-05 (1978).

119. 492 U.S. 302, 316-17 (1989).

120. 428 U.S. 280, 304 (1976).

121. 428 U.S. 262, 271 (1976).

Comparing a defendant to others does not deny him an individualized assessment; rather, it informs that assessment. Arguing that the Court's "individualized assessment" language requires a defendant to be considered in a vacuum is illogical; making any decision requires contemplation of other similar decisions.

The best way for juries to predict the defendant's future dangerousness is comparison to other situations which jury members have experienced. Whether this comparison is on the micro scale (such as where a jury member compares the defendant to the member's own life experiences) or on a larger, institutionalized scale (such as actuarial methods that factor in hundreds of people) seems immaterial. In fact, the latter—actuarial methods with hundreds of people—seems preferable because, with a larger group of experiences drawn from the actuarial data, the jury is more likely to get an accurate result. But even with a jury relying only on its own experiences, the end result is that, in sentencing the defendant, the jury will consider experiences that are not "individualized" to the defendant. The ability to make reasoned comparisons is at the heart of jury discretion. Because the use of sample data does not mean the process is "unindividualized," and because actuarial tools aid discretion, such tools satisfy the individualized assessment requirement.

### *C. Forbidden Factors*

All risk assessment methods rely on various factors or traits to reach a conclusion about future dangerousness. Clinical assessment may even rely on such factors, either intuitively or explicitly (as is the case with actuarial methods).<sup>122</sup> One argument against future dangerousness is that it relies on traits that are not judicially permissible.<sup>123</sup> While a relevance analysis is concerned only with the scientific validity of such traits, this "forbidden factors" analysis considers whether they are forbidden *despite* their predictive power. The criticisms tend to focus on three factor types: race, gender, and traits that do not index blameworthiness. This Comment does not dispute that factors such as race and gender are problematic in several obvious ways, but since many actuarial tools—including the VRAG—do not rely on gender or race, the primary objection is to factors that do not index blameworthiness.

It is important to clarify that the consideration here is not whether these factors are useful in risk assessment. Risk assessment

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122. The HCR Checklist, a structured interview, is transparent as to the factors to be considered. See CHRISTOPHER D. WEBSTER ET AL., *MENTAL HEALTH, LAW, & POL'Y INST.*, HCR-20: ASSESSING RISK FOR VIOLENCE 11 (Version 2) (1995) (cited in Monahan, *supra* note 10, at 410-11 n.77).

123. See, e.g., Monahan, *supra* note 10, at 427-35.

tools are based on whatever traits are found to be most predictive, and mental health professionals may generally use whatever traits they choose. But in the judicial arena, the question is not just the scientific utility of factors, but also their legal permissibility. We turn now to this concern.

Are factors that do not index blame permissible? Suppose that there exists a risk assessment tool, a survey perhaps, that predicts with 97% accuracy who will commit serious violent acts in the next ten years. Now suppose that this same survey uses as one of its predictive criteria a factor that does not index blameworthiness (a "blame-free factor"). A blame-free factor could be any trait that a person possesses but that they are not culpable for possessing, such as having blond hair, being under 35, or even liking the colors blue and maize. For reasons unknown, working in conjunction with other factors this blame-free factor is potently predictive. May this survey be used in a judicial setting?

At least one state supreme court has held that the use of blame-indexing factors is permissible,<sup>124</sup> but it is unclear if blame-free factors are also permissible traits for future dangerousness analysis. Leading commentators on future dangerousness have concluded that the use of factors that do not index blameworthiness is improper, noting that it seems odd to punish a defendant more harshly because of things beyond his control.<sup>125</sup> After all, why should a defendant receive a harsher sentence because his parents separated before he reached age sixteen?

Technically, the escalation of punishment is not actually tuned towards those circumstances beyond the defendant's control. The harsher sentence is imposed because he is likely to be dangerous in the future, not because his parents divorced. It is not the event (the divorce) that triggers punishment, it is the effect the event has on the person—an effect the individual can control.<sup>126</sup> This distinction may seem narrow, but it is essential; we return to it in discussing

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124. *Joseph v. Commonwealth*, 452 S.E.2d 862, 865 (Va. 1995) (considering prior crimes in future dangerousness determinations as not a violation of double jeopardy).

125. See, e.g., *Monahan*, *supra* note 10, at 427-28. ("Retribution deeply colors the implementation of all sentencing schemes, including those whose avowed goals include crime control. . . . Given this state of affairs, the use of violence risk factors in sentencing . . . should be limited to those that index the extent or seriousness of the defendant's prior criminal conduct.")

126. The immediate question, then, is if they can control it, how can an actuarial tool accurately predict future dangerousness? This question is addressed more in later portions of this Comment, but for now, the briefest answer is actuarial tools predict what will probably happen based on a host of events. A related question is why is the effect of a blame-free event a legitimate tool? Again, the shortest answer is that society seems to assume that a person is the master of his or her own response to even horrible events. However, such events would likely also have a place, as discussed *infra*, in mitigating evidence considerations.

free will *infra*. Nevertheless, it is hard to escape the reality that factors beyond the defendant's control are leading to a harsher sentence, perhaps even execution.

But if future dangerousness itself is constitutionally permissible, blame-free factors should be as well. The argument against future dangerousness' reliance on blame-free factors is that events that do not index blame cannot be used to punish. But future dangerousness itself does not index blame; no matter how it is determined, future dangerousness is intended to punish on the basis of the defendant's future, a future that is blame-free until it occurs.<sup>127</sup> When a jury sentences a defendant to death in part for the danger he poses in the future, it is punishing him for something he has never done, something for which he has not accrued any blame. If the use of future dangerousness is permissible to punish for the blame-free future, reliance on blame-free factors should also be permissible for the same reasons.

Perhaps future dangerousness' blame-free basis is acceptable—either actually permissible or justified by its usefulness—but we still wish only to predict using blameworthy factors. Following this preference may be very costly to the predictive ability of actuarial tools. The VRAG, for example, relies on several factors that do not index blame, including separation from biological parents, age, presence of a personality disorder, and presence of schizophrenia. The VRAG also uses factors that involve the defendant's choices but may not involve blame, such as elementary school maladjustment (including attendance problems), history of alcohol problems (including parental alcoholism), and marital status. The VRAG, which was created by identifying the best predictors out of several dozen, would be severely undermined by a requirement that only blameworthy factors be used.

The objection that the blame-free basis of future dangerousness is permissible but the use blame-free factors is not is thus an argument that such factors *should* not be used, rather than that they *may* not be used. If there is no judicial prohibition against using future dangerousness, there should not be a prohibition against using its blame-free factors. Even if the use of blame-free factors is undesirable, because there is no prohibition against their use and the reliability of the determination (and therefore its admissibility) thus far depends upon them, the judiciary should still permit them.

If, however, blame-indexing factors are equally or more predictive, it remains a reasonable preference that only blame-indexing factors

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127. Or is it? Is there blame to be attached for acts that have not, but objectively will, occur? If I drop your favorite vase towards the floor, is it not blameworthy until it reaches the floor sometime in the future? If I drop it from the top of the Empire State building, are you prohibited from scolding me for breaking it until it actually breaks? There is a chance that some event will intercede; I may dive after it, absorb the blow, and die to save the vase. May you only scold me for placing your vase in danger of breaking after it falls?



be used. The key question, then, is whether actuarial tools using blame-indexing factors are as accurate as tools using blame-free factors. If they are not, since courts do not bar blame-free factors, something more than a preference will be necessary to justify the use of less accurate actuarial tools. Only time and subsequent risk assessment studies will tell if blame-free factors are equally predictive.

Despite the inability of statistics to prove causation, the VRAG's blame-free factors are highly predictive, likely because the events these factors measure have a great impact on the defendant. Blame-free factors measure events in the defendant's life, such as abuse or parental separation, which are generally recognized as beyond his control. But unless notions of free will are discarded, the effects of those events on the defendant are not beyond his control. If free will means anything, it is a person's ability to choose to transcend one's surroundings and become the person he or she wants to be. The predictive power of blame-free factors remains, despite the existence of free will, because presumably people often do not succeed at resisting the effects of adverse events, especially when several occur. This is certainly an unfortunate fact if true, but it is not one that undermines future dangerousness analysis.

It is, however, an observation that compels caution. While the criminal justice system does not halt before a defendant's submission to powerfully negative influences, it should and does have sympathy for the defendant in the contemplation of mitigating factors. When given risk assessment results, a jury should be given an instruction directing them to consider whether the defendant has escaped the negative influences of his past. Defense counsel may argue, using whatever character or other mitigating evidence is available, that this defendant will not be a future danger because he has escaped their influence, or that he is different than the sample population. The opportunity to present these and other arguments is protected by the requirement that mitigating factors be considered in capital sentencing proceedings. These are the sort of adversarial protections the Supreme Court likely relied on. And they certainly should not be overlooked.

In summary, given their apparent predictive power and the lack of a prohibition, blame-free factors can and should be used. The use of blame-indexing factors, however, would be a reasonable alternative if they create equally accurate predictive tools. Time will tell if this is the case. In the interim, any preference for blame-indexing factors should give way when blame-free factors are superior predictors, especially in light of the heightened need for accurate tools in death penalty sentencing. And given the severity of a death penalty, defense lawyers should make certain the jury understands the limits of actuarial prediction.

### D. Vagueness

Vagueness arguments question the specificity of statutes. When a statute such as the Texas death penalty statute requires that the jury conclude beyond a reasonable doubt there is “a probability” the defendant will repeat offend in the future, what does “a probability” mean?<sup>128</sup> Does this language give juries sufficient guidance in answering the question? How is “a probability” proved beyond a reasonable doubt? These questions are prime examples of the vagueness argument.

The Supreme Court has reviewed the “a probability” language and declined to condemn it.<sup>129</sup> Still, such language is problematic because there is a probability of everything. Statistically speaking, there is a probability that a thousand monkeys with typewriters will actually produce the works of Shakespeare.<sup>130</sup> But that probability, while it may exist, is very small.<sup>131</sup> Still, a jury may feel compelled to answer the question in the affirmative, based on the fact that there is *some* possibility that a person will commit a violent act in the future. A better approach would be to require the jury to conclude there is a “meaningful probability” or “substantial probability” of future violence or to adopt a percentage level at which it considers the possibility of recidivism sufficient to conclude a person is a future danger. Vagueness arguments correctly suggest that simply requiring a finding of “a probability” is problematic and that additional guidance is necessary. The next question is obvious: what level of probability is sufficient?<sup>132</sup>

If state legislatures hesitate when faced with the question of how much risk is enough, a jury will have even more difficulty answering the question. Legislatures may assemble dozens of experts and panels, review thousands of pages of findings, and commission studies; they have the ability to gather a variety of resources to answer the question. Juries have no such power; they may rely only on the evi-

128. See TEX. CODE CRIM. PROC. ANN art. 37.071 (Vernon 2007).

129. See *Penry v. Lynaugh*, 492 U.S. 302, 323-24 (1989); *Jurek v. Texas*, 428 U.S. 262, 272-74 (1976).

130. It was once possible to test this theory yourself using the Monkey Shakespeare Simulator, which simulated monkeys banging on keyboards. See *The Monkey Shakespeare Simulator*, <http://web.archive.org/web/20040603094742/http://user.tninet.se/~ecf599g/aardasnails/> (last visited Aug. 28, 2007) (archived version of the original website). The record as of December 4, 2005 (before the original site went down) was reportedly twenty-four letters from Henry IV part 2.

131. *Id.* This webpage posits,

The odds against monkeys typing Shakespeare by chance are astronomical. With about 80 typewriter keys, the chance of getting the first letter right is about 80 to 1. The chance of getting 2 letters right is 1 in 80×80, or 6400 to 1. Each letter increases the odds against by 80 times. The odds of getting 10 letters right is about 11 million million million to 1.

*Id.*

132. See *infra* Part VII.A for a discussion on what juries are to do with various percentages.

dence presented to them. And while the question for a legislature is largely abstract, the decision for a jury is very real. A particular defendant will live or die based on the jury's answer to the question of how much risk is enough.

Yet, if a legislature does utilize its resources and statutorily quantifies how much risk is enough, the statute may be struck down for denying the jury the required level of discretion. Exactly how much discretion is required is generally unknown. But given the constitutional vagueness concerns, legislatures should at least adopt the "meaningful probability" or "substantial probability" language, or instead provide specific guidance on what level of risk is appropriate. Whatever path a legislature takes, the use of "a probability" alone is insufficient, and the question of how much risk is enough is problematic. However, despite the difficulty of the question, it is one which the resource-laden legislature should assist in answering.

#### *E. Predestination*

Another argument against the use of future dangerousness is that it adopts the principle of predestination.<sup>133</sup> If the defendant cannot choose a different path, then he lacks free will and is therefore not culpable for his actions.<sup>134</sup> The argument claims that future dangerousness, in asserting a probability that the defendant will commit another violent act, denies the existence of his free will and ability to choose a different path. The argument continues that, if future dangerousness is going to adopt the deterministic position that the defendant will definitely commit an act in the future, then he is not culpable for that act because he did not choose to do it. Therefore, future dangerousness proponents should be against punishment of blameless defendants based on their predictions (or so the argument goes).

This argument confuses predestination with accurate prediction, and the difference is vital. Predestination is where an individual has no choice, no control over his actions, and will invariably arrive at a given destination without deviation. Accurate prediction, on the other hand, correctly identifies the destination at which an individual will arrive, but says nothing about how he will get there. If future dangerousness relied on a predestination model, the defendant would not be morally culpable because such predictions would assume his actions are beyond his control. But that is not reality.<sup>135</sup>

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133. *Jurek v. State*, 522 S.W.2d 934, 948 n.6 (1975) (Roberts, J., dissenting).

134. *Id.*

135. Interestingly, even if events were predestined and no person had control over his or her actions, the criminal justice system would likely continue to function. If, by some remarkable discovery, it was revealed to all humankind that no one had free will, would society simply stop locking up those who murdered, raped, and assaulted? Perhaps. But it is more likely that things would continue largely as they do now. After all, the end result—

Instead, future dangerousness predicts what destination an individual will arrive at of his own volition. When a wife tells her husband to arrive for a 6:30 dinner at 6:15 because she is confident he will be late, if he is in fact late, this is not predestination. Instead, it is skilled, informed prediction; the wife knows her husband so well that she can predict that the sum of his volitional choices will result in his being late to dinner. Although future dangerousness concerns substantially more severe matters than punctuality, it does the same sort of thing: it considers the sum of the defendant's individual factors and predicts a result. Depending on the tool's accuracy, the defendant either will or will not validate that prediction. If he does, it will be because the sum of his choices produced the result, not because future dangerousness tapped into some predestination-prediction spring. Thus, future dangerousness concerns the defendant's voluntary choices.

Future dangerousness risk assessment acknowledges free will in its percentage predictions. While certain traits are predictive, they are not always definitive, hence the generally less-than-100%-chance predictions. Because risk assessment only uses accurate predictions and does not assume predestination, its use is permissible.

#### *F. Non-Retributive*

The United States criminal justice system is based on both utilitarian and retributive grounds. Blackstone penned that “punishments are chiefly intended for the prevention of future crimes.”<sup>136</sup> But conversely, Monahan has observed that “[r]etribution deeply colors the implementation of all sentencing schemes, including those whose avowed goals include crime control.”<sup>137</sup> Whereas most of the criminal justice system involves a blend of both utilitarian and retributive objectives, future dangerousness is based primarily on utilitarian, preventative grounds. Because future dangerousness contemplates an increase in punishment based on an uncommitted act, the nonretributive argument claims that the use of future dangerousness is impermissible. The nonretributive argument thus overlaps with the forbidden factor, blame-free traits, and predestination arguments previously discussed. An iconic representation of this argument is the following statement: “Your past crimes have earned you at least life in prison. [Your future dangerousness may earn you death].”<sup>138</sup>

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either continue sentencing criminals or stop sentencing criminals—would be predetermined. If society were to continue sentencing criminals, then those predestined to be deterred would paradoxically require the existence of a deterrent mechanism—the continuation of sentencing. Such speculation quickly devolves into convoluted, abstract questions.

136. WILLIAM BLACKSTONE, 4 COMMENTARIES \*16.

137. Monahan, *supra* note 10, at 427-28.

138. Regnier, *supra* note 59, at 476.

The Federal Sentencing Guidelines are “theoretically agnostic about *why* we punish.”<sup>139</sup> The Supreme Court thus far has indicated that the preventive emphasis is permissible; even when the escalation of punishment has arguably hinged on future dangerousness considerations, the death penalty statute at issue was upheld.<sup>140</sup> More generally, faced with a defendant who has made blatant threats and credible indications that he will kill or rape if released, the criminal justice system is pressed to find some way to preventively detain him.

The non-retributive argument fails, however, for three reasons. First, to the extent it claims that future dangerousness’ premises are simply improper, prior sections of this Comment and the preventative aspect of punishment undermine it. Second, the argument is incomplete: the statement “it is improper to punish based on non-retributive future dangerousness” is a conclusion without a premise. Again, the premises that would seem to most often accompany this argument were discussed earlier in this Part.<sup>141</sup> Third, many long-accepted procedures in the criminal justice system contemplate events which have not yet occurred. Bail considerations contemplate the future risk of flight, and if the tribunal determines there is a sufficient probability the defendant will flee, bail may be set astronomically high or denied entirely.<sup>142</sup> Parole and probation also contemplate future dangerousness.<sup>143</sup> For these three reasons, the non-retributive argument does not preclude use of future dangerousness.

Still, if the first two reasons were to be proven false, could the non-retributive argument be rejected solely on the grounds that other accepted aspects of the criminal justice system use future dangerousness (bail, parole, and probation)? Perhaps. The rationale that future dangerousness is permissible for capital sentencing because other areas of the criminal justice system rely on it is a sort of stage magician maneuver; it moves to justify a controversial practice simply by pointing to other procedures that also use it. A fair response to this argument is that future dangerousness is an inappropriate tool in all uses, it just hasn’t been criticized as much for bail, parole, and probation uses. But again, this is a conclusion without a premise. If future dangerousness cannot be used, what is the reason?

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139. Monahan, *supra* note 10, at 397.

140. See Regnier, *supra* note 59, at 478-80 (discussing the Court’s upholding of the Texas death penalty statute in *Jurek* despite the question of execution turning on future dangerousness considerations).

141. Those premises that immediately come to mind being (1) it is improper because the American system of justice is purely retributive, (2) it is improper because a non-retributive approach uses “blame-free” or other forbidden factors, or (3) it is improper because non-retributive factors are unreliable. Each of these has already been addressed.

142. *Jurek v. Texas*, 428 U.S. 262, 275 (1976).

143. *Id.*

Pragmatically, this retort that all uses of future dangerousness are inappropriate would also be an uphill battle. Judicial predictions about the future dangers posed by a defendant have long been a part of the justice system. The system is rooted in such preventative grounds, and sweeping change is unlikely. As long as the utilitarian basis of the criminal justice system persists, future dangerousness assessments, as a means to directly or indirectly detain dangerous persons, are unlikely to disappear.<sup>144</sup>

It is certainly true, however, that at least two key differences separate bail, parole, and probation uses of future dangerousness from its use in capital sentencing: mitigation and severity. Each merits some discussion.

### *1. Mitigation Versus Escalation*

The first difference is that bail, parole, and probation all involve considering a future event in order to mitigate a sentence, not escalate it. They are a type of exception—a forgiveness, almost—for an alleged or proven wrong. Thus, the aforementioned iconic statement is reversed in these examples: “Your crimes have earned you a harsh outcome (e.g. two more years in jail, a \$50,000 bail, or a one-year sentence); your future acts mitigate it (e.g. release you on parole two years early, earn you a \$10,000 bail, or earn you one year of probation, respectively).”

May future dangerousness be relied upon to mitigate, but not relied upon to escalate? If so, the functional effect of this argument against future dangerousness as nonretributive would seem to be reduced to semantics. Whether used to escalate or mitigate, the analysis turns on the existence of future dangerousness.

For example, what if state legislatures simply reworded their statutes to adhere to the following mitigation framework: “If a defendant is not a future danger, the defendant shall be sentenced to life.” The statute would function nearly identically to death penalty statutes that require future dangerousness as a condition precedent to the death penalty, as a finding of no future dangerousness in either case would require a sentence of life in prison, rather than death. It would also likely pass constitutional muster because it would allow for jury discretion. The end result, however, is that whether used to escalate or mitigate, future dangerousness would hold a final say, thereby revealing that a mitigation vs. escalation argument is form without substance. Just like the overarching nonretributive argu-

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144. However, its continued existence does not dictate that its continued *criminal* application persist. Instead, civil commitment or other statutory schemes might suffice. For a discussion touching application in other contexts, see Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 58-62 (2003).

ment is incomplete (it is a conclusion without a premise), so too is a distinction based on escalation as opposed to mitigation.

If states did employ this death penalty framework, would it allow a constitutionally permissible level of discretion? The Supreme Court could answer this question in either direction. In *Woodson*, the Court struck down the mandatory North Carolina statute,<sup>145</sup> but in *Jurek* the Court upheld a Texas statute which essentially confined discretion to the question of future dangerousness.<sup>146</sup> A death penalty statute like the above example is more like the *Jurek* statute than the *Woodson* statute. Given that the Court upheld the *Jurek* statute even though its discretion was minimal, a statute that allows for discretion to mitigate a death sentence would presumably be permitted.

## 2. Greater Versus Lesser Severity

Capital sentencing involves a much more severe penalty than a high bail, denial of parole, or long probation. Looking ahead at events that are unknown may involve the same probability of success in bail, parole, probation, and capital sentencing situations, but the cost of error is much greater in capital sentencing. This difference impacts the issue of reliability, and thus admissibility. The argument implies that future dangerousness evidence may be sufficiently accurate for bail, parole, and probation considerations, but that it is not accurate enough for a matter as serious as capital sentencing. Differing evidentiary requirements respond to this concern and undercut the Greater vs. Lesser Severity argument.

Judicial gatekeeping, via standards such as those outlined in *Daubert*, is designed to screen unreliable evidence from the jury's consideration. Bail, parole, probation, and capital sentencing decisions each involve different costs in the event of error, and thus capital sentencing should adhere to exacting admissibility standards. *Daubert* offers a gatekeeping judge an opportunity to carefully review the future dangerousness tool at issue and, if it is insufficiently reliable, it can (and should) be excluded. The Greater vs. Lesser Severity argument thus correctly identifies that death penalty use of future dangerousness requires increased reliability and evidentiary standards. It does not, however, dictate that future dangerousness as a sentencing tool should be discarded.

## G. Summary

Actuarial risk assessment is reliable and relevant to the difficult question of future dangerousness which many statutes present to ju-

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145. See *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976).

146. See *Jurek*, 428 U.S. at 269.

ries. While actuarial tools rely on statistics, this does not result in a lack of discretion or a “nonindividualized” assessment. Most tools do not rely on forbidden factors such as race and gender, and those that rely on blame-free factors are permissible since future dangerousness itself contemplates the blame-free future. Future dangerousness does not adopt the concept of predestination, and its nonretributive basis is not discordant with the foundations of the United States justice system. Finally, statutes that do not specify what “a probability” of future dangerousness means are problematic and should be avoided as too vague. Future dangerousness informed by risk assessment is permissible and may be used by courts.

## VI. GENERAL AND SPECIFIC SUPPORT FOR FUTURE DANGEROUSNESS

If future dangerousness requires the defenses set forth at length in the prior portions of this Comment, it begs the question “why should courts bother with such a tool?” This Part attempts to answer such an inquiry and begins by considering reasons why future dangerousness is useful as a general principle. It then considers some specific examples from the literature on future dangerousness and discusses more specifically why the use of future dangerousness in the judicial system is desirable.

### A. *General Reasons to Keep Future Dangerousness*

One reason the courts should continue to allow future dangerousness testimony is because most rules of evidence provide for the admissibility of all relevant information for the jury to consider.<sup>147</sup> According to studies, a jury will consider the implications of future dangerousness even if the issue does not come up at trial.<sup>148</sup> Therefore, accurate information that helps juries address such considerations is certainly relevant. Actuarial results are easy to comprehend and offer valuable insights to juries. Since the jury will likely make a future dangerousness determination whether asked to or not, they should be given the best tools available to make that determination.

As the American Bar Association has noted, if juries are going to consider future dangerousness, risk assessment by mental health professionals is the best means of evidence available.<sup>149</sup> While some methods, such as the clinical assessments discussed *supra* Part III.A, are unreliable, the social and mental health sciences continue to

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147. See, e.g., FED. R. EVID. 403.

148. See Blume et al., *supra* note 82, at 398-99.

149. JOHN W. PARRY, NATIONAL BENCHBOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY 49 (1998).



work to improve risk assessment tools.<sup>150</sup> Certainly, for states that require juries to consider the defendant's future dangerousness, it is reasonable that juries be given the best information modern science and technology have to offer. The adversarial process, gatekeeping judges, and careful instructions to the jury will help to reduce whatever limitations the particular assessment instrument might have. So long as the risk assessment tool is reliable, its results should be available to juries.

Another reason to keep future dangerousness is the odd paradox that would result from discarding it. Assume, *arguendo*, that one of the above-mentioned arguments against the use of future dangerousness risk assessments is valid, such that the State could no longer use future dangerousness evidence. Could the defendants nevertheless use such evidence if it would aid his defense? If, for instance, the defendant scores in the lower categories on several major actuarial tools, indicating he is unlikely to be a future danger, it may greatly aid his case to present this evidence. The defendant potentially faces execution, and part of the purpose of allowing a broad range of information into evidence during sentencing is to give the defendant a full and meaningful chance to present his case. The defendant would therefore likely be permitted to introduce future dangerousness evidence even despite whatever argument above prevailed over the use of future dangerousness evidence generally.

But if the State could not do the same, this would create an odd paradox where the defense could introduce evidence that the State could not rebut with its own findings. Ultimately, this would lead to an inequality in criminal proceedings. Thus, another reason to admit future dangerousness evidence is that denying its availability to the State would likely create an inequality in capital sentencing, a generally undesirable event.

In summary, future dangerousness risk assessment is a valuable tool because it addresses a question that is both hard to answer and that juries essentially always consider, even if not asked to. Future dangerousness addresses a question that is of obvious importance in sentencing defendants – will he or she be a danger to others, such as guards, fellow inmates, or even the public should the defendant escape? While the use of future dangerousness risk assessment requires answering many complex and difficult questions, provided those questions can be answered satisfactorily, future dangerousness remains a valid judicial tool.

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150. For an example of such an ongoing research project with the VRAG, see, e.g., Research Risk Assessment Page, [www.mhcep-research.com/ragpage.htm](http://www.mhcep-research.com/ragpage.htm) (last visited Aug. 27, 2007).

### B. Specific Examples: Three Future Dangerousness Candidates

Perhaps the best reason to keep future dangerousness as an analytical tool is revealed by viewing it in action. It is thus worth describing some real future dangerousness candidates, as described by fellow commentators.<sup>151</sup> Consider the following individuals, both in terms of preventative detention future dangerousness uses and its use in death penalty sentencing:

Garry David is about to be released from prison after serving fourteen years for shooting a woman and two police officers.<sup>152</sup> He has been diagnosed with antisocial personality disorder, a disorder that often leads to violent and dangerous behavioral outbursts.<sup>153</sup> The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), describes the disorder as follows:

As an adult, the person often commits acts that are against the law and/or fails to live up to the requirements of a job, financial responsibility, or parenting responsibilities. [Such persons] frequently are involved in alcohol and drug abuse.

....

Currently, there is no widely accepted effective method of treating sociopathic personality types. They tend to be very manipulative during treatment and tend to lie and cover up personal faults in themselves and have little insight into their behavior patterns.<sup>154</sup>

A tribunal has also specifically determined that Garry is “likely to be violent if released.”<sup>155</sup>

Leroy Hendricks is about to be released after serving time for his fifth child molestation.<sup>156</sup> He has stated expressly that the only sure way to stop him from molesting children is for him “to die.”<sup>157</sup> Leroy has testified before a judge and jury, confessing he has “repeatedly abused children whenever he was not confined.”<sup>158</sup> He told his treating physician, who diagnosed him with pedophilia, that “treatment is bull-...”<sup>159</sup> and that when he “get[s] stressed out” he “can’t control the

151. Some of the situations described *infra* have been previously discussed by scholars and have been modified for their inclusion here. See, e.g., Slobogin, *supra* note 144, at 1.

152. *Id.* at 1 (citing C.R. Williams, *Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case*, 16 MONASH UNIV. L. REV. 161, 162, 170-78 (1990)).

153. *Id.*

154. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) § 301.70 (4th ed. text revision 2000), available at <http://www.accg.net/antisocial.htm>.

155. Slobogin, *supra* note 144, at 1 (citing Williams, *supra* note 152).

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

157. *Id.* at 2078; see also Slobogin, *supra* note 144, at 1.

158. *Hendricks*, 521 U.S. at 2078.

159. *Id.* at 2079.

urge [to molest children].”<sup>160</sup>

John Coker was convicted and sentenced to three life terms for two rapes, a murder, and other crimes.<sup>161</sup> John escaped from prison just two years after being incarcerated, and before being recaptured he raped another victim.<sup>162</sup> He told another victim he encountered, “[I] don’t have nothing to lose—[I am in] prison for the rest of [my] life, anyway.”<sup>163</sup> He has since been reapprehended.<sup>164</sup>

Now imagine Garry, Leroy, and John are before a tribunal. Should it be able to preventatively detain any of them? What about if they commit some other crime and the death penalty is on the table (as it likely already is for John Coker)? Could the State use future dangerousness evidence against them?

What if Garry later commits another crime and the following fictional facts are added to the equation: when he was last in a super-maximum-security prison, he assaulted forty-seven guards, nearly killing twelve, and almost escaped twice. Should the tribunal be prevented from considering the danger he poses to the guards if sent back, or to the public if he escapes?

Faced with reliable evidence that an individual is likely to commit a crime in the future, a tribunal should be able to act to prevent the potential harm. The justice system, as noted earlier, was partially developed on preventative grounds.<sup>165</sup> The difficulty arises in defining what constitutes “reliable evidence.” But this is a reason to set exacting evidence standards, not to completely forbid future dangerousness as an evidentiary tool. Future dangerousness is a highly useful component of criminal sentencing because it allows the judge and jury to consider all options for defendants serving a life sentence who feel they have “nothing to lose.” And this is only one of its uses. As such, it is a not a tool courts should discard.

## VII. A FUTURE FOR FUTURE DANGEROUSNESS SANS DR. DEATH

Future dangerousness is a useful tool, but not yet a perfect tool. As such, controls to minimize risk should be continuously enhanced. Several restrictions and prohibitions should be followed to ensure fairness and minimize abuse. This Part thus contemplates developments that might aid in creating a more-ideal future dangerousness schematic. As with the real defendants discussed above, it begins

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160. *Id.* at 2078.

161. *Coker v. Georgia*, 433 U.S. 584 (1977); *see also* JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 70 (3d ed. 2003).

162. *Coker*, 433 U.S. at 592 n.4.

163. *Id.*; *see also* DRESSLER, *supra* note 161, at 70.

164. *Coker*, 433 U.S. at 592 n.4.

165. *See supra* Part VI.F.2.

with a real future dangerousness “expert.”

Dr. Grigson, one of the experts who testified in *Barefoot*, has been dubbed “Dr. Death.”<sup>166</sup> Before his recent retirement, Grigson testified in over 140 capital cases for the State of Texas.<sup>167</sup> He often testified it was “a matter of medical certainty”<sup>168</sup> that the defendant would repeat offend, and sometimes even asserted such as a “one thousand percent chance.”<sup>169</sup> Despite being expelled from the American Psychiatry Association and the Texas Association of Psychiatrists, he continued to be a star witness for Texas.<sup>170</sup> Even in the face of DNA evidence proving that one of the individuals he testified was certain to reoffend was actually innocent, Dr. Grigson has maintained that his testimony was accurate.<sup>171</sup>

Despite the merits of future dangerousness analysis, the example of Dr. Grigson’s testimony compels careful consideration of how the tribunal decides to act when presented with risk assessment evidence.<sup>172</sup> Though Dr. Grigson has retired, the world is likely full of similarly motivated Grigson clones that may persuade judges and juries that the future is certain to be better if the defendant is locked up or executed.<sup>173</sup> It is only through stringent controls that such abuse can be minimized. We turn now to such controls.

#### A. *Improving Future Dangerousness Considerations*

When experts testify, juries give great weight to their opinions.<sup>174</sup> Thus, if an expert gives misleading or inaccurate testimony, jury members may disregard the accurate opinions they themselves had developed. Since the court has bestowed the testimony with the “expert witness” title, jury members may assume that any disagreements between what the expert thinks and what the jury member thinks should be resolved in favor of the expert. This is not necessar-

166. Regnier, *supra* note 59, at 481; *see also* Jeralyn Meritt, Texas: ‘Dr. Death’ Retires, TALKLEFT (Dec. 21, 2003), [http://talkleft.com/new\\_archives/004754.html](http://talkleft.com/new_archives/004754.html).

167. Regnier, *supra* note 59, at 481.

168. *Id.*

169. TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 30 (as modified May 22, 2003), *available at* <http://www.texasdefender.org/state%20of%20denial/Chap3.pdf>.

170. Regnier, *supra* note 59, at 482.

171. *Id.* at 481. Interestingly, this stubbornness itself reveals a flaw. Since he made his future dangerousness predictions based on hypothetical fact scenarios that involved the description of the crime the defendant was being charged with, if the defendant did not commit the crime alleged, Grigson’s prediction stands on nothing but air. That Grigson would support such a prediction, founded on nothing at all, is highly indicative of the worth of his testimony generally.

172. *See supra* Part VI.B.

173. *See* Regnier, *supra* note 59, at 482.

174. Fontaine, *supra* note 62, at 230; *see also* White v. Estelle, 554 F. Supp. 851, 858 (S.D. Tex. 1982) (explaining that when a future dangerousness opinion is offered by an expert witness, such as a doctor, it has an “much greater” impact on the jury).

ily problematic when the expert testimony is accurate, but when an expert's inaccurate testimony or "junk science" is given dispositive weight, there is a serious problem. It is also problematic if the expert's views are adopted in areas where the jury is to do the deciding, such as normative considerations.

To avoid this, courts must stringently adhere to standards like those in *Daubert*. Under the *Daubert* analysis, "general acceptance" and "peer reviewed" must never be reduced to asking "are there a lot of articles on this topic?" Methodological standard inquiries should consider the validity of those methods as they pertain to the goal of the technique.

*Daubert* should also not be presumed to be an endpoint in future dangerousness evidence admissibility standards. Commentators from both scientific and legal fields should continue to contemplate what a better standard might be. All the utility of future dangerousness is corrupted whenever the Dr. Deaths of the world are permitted to testify to "a one thousand percent [medical certainty]." <sup>175</sup>

Experts must be screened carefully to avoid misleading the jury, and they should also be advised to communicate their findings within certain confines. This Comment supports the view that mental health professionals *must not* be permitted to testify as to the normative aspect of the jury's future dangerousness inquiry. <sup>176</sup> Mental health professionals are no more qualified than any jury member to conclude what level of risk is enough to determine there is a "probability" of future danger. Given the weight such expert opinion is usually accorded, allowing an expert to opine on the normative aspect of the question severely limits the discretion jury members may exercise. Perhaps some field of experts has a series of qualifications that enables them to offer such advice. However, psychologists, psychiatrists, FBI agents, and other mental health professional do not intrinsically have such expertise.

Along with the substantive control of communication, experts should also carefully consider *how* they communicate permissible information to the jury. Monahan and Steadman compare future dangerousness predictions to weather forecasts: "Forecasts possess no intrinsic value . . . [but] acquire value through their ability to influence the decisions made by users of the forecasts." <sup>177</sup> Juries must decide what percentage risk is enough to conclude that there is "a probability" of future dangerousness. Because a mental health professional

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175. TEX. DEFENDER SERV., *supra* note 169, at 30.

176. See Claussen-Schulz et al., *supra* note 8, at 487-90.

177. Monahan & Steadman, *supra* note 7, at 937 (quoting Allen H. Murphy, *What Is a Good Forecast? An Essay on the Nature of Goodness in Weather Forecasting*, 8 WEATHER & FORECASTING, 281, 286 (1993)).

cannot offer advice on how to consider the probability of recidivism in a normative context, she should be careful about how she presents evidence to the jury. Adverbs, adjectives, emphasis, and intonation will pose the greatest threat, as a 62% chance of recidivism sounds very different when presented as “he has *only* a 62% chance” versus “he has a *high* 62% chance” or even “he has a *62% chance!*” These sorts of simple mistakes can have a large impact on a jury weighing execution. Only by reducing the expert’s testimony to a recitation of scientific facts may these mistakes be avoided.

Juries may also be confused if they are presented with all of the data an actuarial tool returns but provided no further guidance. For example, while the sophisticated COVR software indicates that an individual in the highest risk category has a 76% chance of recidivism, juries may be inappropriately persuaded by the fact that this is the highest risk category on the measure. Upon hearing that the defendant has a 76% chance, the jury may be inclined to think that 76% is too low to execute him. But when they learn that 76% is the highest percentage that the actuarial tool returns, they may feel compelled to choose death. Thus, juries should be instructed that the category the defendant falls into is only part of their analysis, not the end of the future dangerousness consideration.

Indeed, even if studies claim probability levels of 100%, such as the VRAG’s category 9,<sup>178</sup> that should not be the end of the jury’s normative contemplation. Juries should still examine the actuarial instrument used, its applicability to this individual (as compared to its sample population), and any other mitigating factors. Judges should instruct juries to consider each of these. To avoid confusion, juries should only be given information with probative value that exceeds its prejudicial effect. Some evidence, such as that a given percentage is the tests’ highest category, may well be more prejudicial than probative.

To address jury confusion, judges should be careful to instruct jury members thoughtfully and to answer questions they pose. It takes a fair deal of nerve to ask a judge a question, and if a jury does inquire, it probably indicates that there is something meaningful perplexing them. Judges should respond carefully and thoughtfully. Judges are a last line of defense to a confused jury—questions they pose should not be taken lightly or ignored.

One such area of jury confusion is length of sentences. Juries are often confused in capital considerations and assume that if the defendant is sentenced to life, rather than death, he will be eligible for

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178. QUINSEY ET AL., *supra* note 5, app. B at 240, app. C at 245.

parole.<sup>179</sup> Juries also tend to underestimate the length of a life prison sentence dramatically.<sup>180</sup> In one study of jurors from actual capital cases in South Carolina, the median juror prediction was that a life sentence meant seventeen years in jail.<sup>181</sup> In reality, in the cases the study involved, the life sentence would have actually meant life in prison, as the defendants were ineligible for parole.<sup>182</sup> While such jury mistakes have ramifications for all criminal sentencing involving life imprisonment and the possibility of parole, they have an especially potent impact on future dangerousness considerations. Judges should consider instructing the jury to avoid such confusion.

In the same vein of fairness to the defendant, courts must allow defendants faced with future dangerousness evidence to access expert witnesses of their own, even if they cannot afford it. By making qualified mental health professionals available for consultation, the court protects the defendant's rights. The Supreme Court in *Barefoot* relied on the adversarial system to sort out the accuracy of expert witness testimony.<sup>183</sup> But if the defendant is unable to fully utilize that system, the Court's rationale fails disastrously.

This principle was recognized in *Ake v. Oklahoma*,<sup>184</sup> though it has been somewhat restricted since that decision.<sup>185</sup> The indigent defendant is just as entitled as any other defendant to the protections the adversarial system affords in future dangerousness cases. To deny the defendant such protections is to remove one of the fundamental bases on which the Court decided to allow future dangerousness testimony. The loss of these protections would seem to compel the conclusion that future dangerousness testimony is not permissible in situations where the defendant cannot fully use the adversarial system.<sup>186</sup>

## VIII. CONCLUSION

While future dangerousness is permissible in capital sentencing,

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179. See Blume et al., *supra* note 82, at 397-402 (discussing *Shafer v. South Carolina*, 121 S. Ct. 30 (2000), where the jury was confused about the defendant's ineligibility for parole and subsequent sentence of death).

180. *Id.* at 404.

181. *Id.*

182. *Id.*

183. *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983).

184. 470 U.S. 68 (1985) (holding that due process requires that the defendant have access to mental health evaluation in cases involving future dangerousness determinations).

185. See Dennis, *supra* note 75, at 298-99 (discussing how decisions since *Ake* have narrowed the defendant's access to counsel). The Eleventh Circuit Court of Appeals now requires the defendant to show "a reasonable probability that the expert would be of assistance to the defense and that the denial of an expert would result in a fundamentally unfair trial." *Id.* at 299 (citing *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (en banc)).

186. For additional discussion on future dangerousness and the adversarial system, see Regnier, *supra* note 59, at 379-80.

several important precautions must be heeded. Evidence must be presented clearly and restricted to empirical, nonnormative statements. Judges must be diligent gatekeepers and also be sensitive to jury misunderstandings that may prejudice either party. *Daubert* must be applied carefully and accurately. The Supreme Court upheld the use of future dangerousness largely based on its belief in the reliability of the judicial process to protect individual rights. In capital sentencing, rights trampled on may not necessarily be revived later. Death is, after all, irreversible. Future dangerousness use would be increasingly justified if the improvements detailed herein were adopted.

Finally, it is worth remembering that future dangerousness considerations occur squarely at the crossroads of psychology and law. The result is that literature on the topic comes from psychologists, lawyers, judges, psychiatrists, law and psychology students, and countless other professionals. Commentators should always strive for clarity in making suggestions, and while certain familiarity with the lexicon may be assumed, explanations via footnote are rarely unwelcome. By doing so, commentators help encourage new entrants who may have valuable insights to offer into the discussion. Given the severity of the discussion topic, and the consequences of error, the more thoughtful commentators the better.