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BAREFOOT IN QUICKSAND: THE FUTURE OF “FUTURE DANGEROUSNESS” PREDICTIONS IN DEATH PENALTY SENTENCING IN THE WORLD OF DAUBERT AND KUMHO

*Thomas Regnier**

It is my opinion that such future-telling is admissible under no theory of law and prejudicial beyond belief. . . .[†]

—Judge Wendell A. Odom

[P]sychiatric predictions based on hypothetical situations sometimes bear more resemblance to medieval fortune-telling than to modern scientific techniques.[‡]

—Texas Defender Service

Shortly after midnight on October 24, 1984, Thomas Barefoot was executed by lethal injection in Huntsville, Texas,¹ for the murder of a policeman.² While it may not be surprising that Barefoot would be put to death for this crime, what is disturbing is the way the state of Texas arrived at the decision to execute Barefoot rather than sentence him to life in prison. Under Texas sentencing procedures, a convicted murderer could be put to death only if a jury found that he was likely to be

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[†] State v. Smith, 534 S.W.2d 900, 905 (Tex. Crim. App. 1981) (Odom, J., concurring in part and dissenting in part).

[‡] TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 45 (as modified May 22, 2003), available at <http://www.texasdefender.org/state%20of%20denial/Chap3.pdf>.

1. PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 220 (1991).
 2. Barefoot v. Estelle, 463 U.S. 880, 883 (1983) (holding psychiatric predictions of future dangerousness admissible in death penalty sentencing), *superseded on other grounds by statute, as stated in* Slack v. McDaniel, 529 U.S. 473, 480-81 (2000).

dangerous in the future.³ In other words, Barefoot's death sentence was based, not only on an act he had done in the past, but on acts that the jury *anticipated he might do in the future*. In addition, the jury's decision was partially based on predictions, made by two psychiatrists, that Barefoot would be dangerous in the future, in spite of the fact that the American Psychiatric Association disclaims such predictions, admitting that they are *wrong twice as often as they are right*.⁴ Finally, and this fact is perhaps most disturbing of all, the entire process received the seal of approval of the U.S. Supreme Court.⁵

To understand the *Barefoot* decision, it is necessary to examine *Jurek v. Texas*,⁶ an earlier case in which the Supreme Court upheld the constitutionality of using predictions of future dangerousness as an element in capital sentencing.⁷ I will begin by analyzing the background to *Barefoot*, and then the *Barefoot* case itself. I will consider how admissibility of future dangerousness testimony in capital cases may or may not have changed after the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals*⁸ and *Kumho Tire Co. v. Carmichael*.⁹ I will argue that future dangerousness predictions in capital cases are an unconstitutional due process violation, and that they violate evidentiary principles requiring reliability and excluding evidence that is substantially misleading or prejudicial. Finally, I will argue that we must re-think the *Daubert/Kumho* test for admissibility of expert testimony so as to preserve the insights of the *Frye v. United States*¹⁰ test and ensure that reliability becomes the keynote in both scientific and technical testimony.

I. BEFORE *BAREFOOT*: *JUREK* PARK

The law regarding the death penalty in the United States changed dramatically in 1972 with the Supreme Court's landmark decision in *Furman v. Georgia*.¹¹ In a five-to-four decision, the Court effectively struck down the death penalty procedures then in existence in the United

3. TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon 1981).

4. Brief for American Psychiatric Association, as *Amicus Curiae*, at 9, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080) [hereinafter APA Brief].

5. *Barefoot*, 463 U.S. at 905.

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

7. *Id.* at 276.

8. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

9. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

10. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

11. *Furman v. Georgia*, 408 U.S. 238 (1972).

States.¹² The Court's rationale was difficult to discern, however, as each of the five justices in the majority wrote his own opinion.¹³ Justices Brennan¹⁴ and Marshall¹⁵ argued that the death penalty was unconstitutional in all circumstances, as a violation of the Eighth Amendment's ban on "cruel and unusual punishments."¹⁶ They interpreted "cruel and unusual" through the lens of "evolving standards of decency that mark the progress of a maturing society"¹⁷ and found that the death penalty served no legitimate retributive or deterrent function.¹⁸

Justices Douglas,¹⁹ Stewart,²⁰ and White²¹ found that the death penalty violated the Eighth Amendment because it was administered with such a wide range of discretion that the results were arbitrary and unpredictable.²² They were disturbed by the disproportionate application of the death penalty based on racial factors.²³

The upshot was that the states could administer the death penalty only if they were able to devise new death penalty schemes that guided a jury's discretion in such a way as to remove the arbitrary and discriminatory effects that the Court had disapproved.²⁴

After *Furman*, about three-fourths of the states enacted new death penalty laws.²⁵ Some states solved the problem of rampant jury discretion by simply requiring mandatory death sentences for particular types of crimes.²⁶ Most states, however, adopted "guided discretion" statutes.²⁷ In these schemes, a separate sentencing hearing, or "penalty phase," takes place after the defendant is found guilty of first degree murder.²⁸ The sentencer (usually the jury) chooses either the death penalty or life in prison (with or without the possibility of parole) based

12. JOHN KAPLAN, ET AL., CRIMINAL LAW 512-13 (4th ed. 2000).

13. *Furman*, 408 U.S. at 240.

14. *Id.* at 305-06 (Brennan, J., concurring).

15. *Id.* at 358-59 (Marshall, J., concurring).

16. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

17. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Warren, C. J.).

18. *See Furman*, 408 U.S. at 301-05 (Brennan, J., concurring).

19. *Id.* at 249-57 (Douglas, J., concurring).

20. *Id.* at 309-10 (Stewart, J., concurring).

21. *Id.* at 313 (White, J., concurring).

22. *See, e.g., id.* at 249 (Douglas, J., concurring).

23. *See id.* at 249-50 (Douglas, J., concurring).

24. KAPLAN, *supra* note 12, at 513.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

on a balancing of aggravating and mitigating factors.²⁹ This model has become the norm for death penalty procedures in the United States.³⁰

On July 2, 1976, the Supreme Court decided a set of five companion cases considering the constitutionality of newly enacted death penalty procedures in five states: Georgia, Florida, Texas, North Carolina, and Louisiana. The North Carolina³¹ and Louisiana³² statutes, which had revived the automatic death penalty for certain crimes, were struck down. The Georgia,³³ Texas,³⁴ and Florida³⁵ statutes, all of which provided for guided discretion, were upheld. Although the Georgia statute in *Gregg* received the most attention at the time, it is only the Texas statute, upheld in *Jurek*, which is relevant to the issue of future dangerousness. Texas is the only state that *requires* prediction of future dangerousness to be considered in imposing the death penalty,³⁶ although a few other states allow it to be considered as an aggravating factor.³⁷

Jerry Lane Jurek was convicted in Texas for the August 16, 1973,³⁸ murder of a ten-year-old girl.³⁹ The murder took place as part of the kidnapping and attempted rape of the child.⁴⁰ He was found guilty of first degree murder and sentenced to death under two Texas statutes that had been passed in response to *Furman*.⁴¹ Article 1257, Texas Penal Code,⁴² defined the offense, and article 37.071, Texas Code of Criminal Procedure,⁴³ prescribed the punishment. Article 1257(b)(2) provided, in part:

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if: . . .

29. *Id.*

30. *Id.*

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

32. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

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

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

35. *Proffitt v. Florida*, 428 U.S. 242 (1976).

36. *Jurek v. Texas*, 522 S.W.2d 934, 945 (Tex. Crim. App. 1975) (Odom, J., concurring in part and dissenting in part); *see also* Guy Goldberg & Gena Blum, *Balancing Fairness and Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. L. & POL. 49, 128 (2000).

37. *See* Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in THE KILLING STATE 81, 105 (Austin Sarat ed., 1999).

38. *Jurek*, 522 S.W.2d at 937 n.1.

39. *Id.* at 936-37.

40. *Id.* at 937.

41. *Id.* at 938.

42. TEX. PENAL CODE ANN. § 1257 (Vernon 1973) (effective June 14, 1973).

43. TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon 1973) (effective June 14, 1973).

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(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson⁴⁴

Article 37.071, delineating the sentencing phase of the proceedings, provided:

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection may not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) *whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society*; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of “yes” or “no” on

44. TEX. PENAL CODE ANN. § 1257 (Vernon 1973). The statute defines four other categories under which a person may be guilty of first degree murder:

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

...

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue “yes” unless it agrees unanimously; and

(2) it may not answer any issue “no” unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.⁴⁵

When Jurek’s case reached the Texas Court of Criminal Appeals,⁴⁶ the court upheld the statutory scheme as constitutional.⁴⁷ The court approved Article 1257 on the basis that it limited the circumstances under which the state could seek the death penalty to a small group of narrowly defined and especially brutal offenses.⁴⁸ The court found article 37.071 acceptable because, in response to *Furman*, it provided a separate sentencing procedure and limited jury discretion.⁴⁹ The court found that the questions asked of the jury “channel the jury’s consideration on punishment and effectively insure against the arbitrary and wanton imposition of the death penalty.”⁵⁰

The court next addressed Jurek’s argument that subsection (b)(2) of article 37.071, the future dangerousness element, was too vague to provide adequate guidance to the jury.⁵¹

[T]here are some factors which are readily apparent and are viable

45. TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon 1973) (emphasis added).

46. *Jurek*, 522 S.W.2d at 934.

47. *Id.* at 940.

48. *Id.* at 939.

49. *Id.*

50. *Id.*

51. *Id.*

factors for the jury's consideration. In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.⁵²

Note that the court does not suggest, nor does it reject, enlisting expert witnesses to help the jury determine a defendant's future dangerousness.

Judges Odom and Roberts, both dissenting at least in part, found subsection (b)(2) problematically vague.⁵³ The subsection says that the jury must find whether there is a probability that the defendant would commit criminal acts of violence.⁵⁴ Subsection (c) requires, before imposition of the death penalty, that the jury find this probability, as well as the elements of subsections (b)(1) and (3) to exist beyond a reasonable doubt.⁵⁵ But what does this mean, to find that there is "probability" that a person will commit acts of violence "beyond a reasonable doubt?" What is meant by a probability beyond a reasonable doubt? Does it mean that, beyond a reasonable doubt, there is some probability? How much probability? Any probability?⁵⁶ Judge Roberts noted that this formula would have to be answered in the affirmative for every individual because it is beyond a reasonable doubt that every person has *some* probability (though admittedly it may be very small for many of those people) that he or she will commit criminal acts of violence at some time in the future.⁵⁷ Presumably only the dead are absolutely incapable of committing future acts of violence.

Judge Roberts considered the future dangerousness issue even more deeply and stated:

I have other, graver reservations about subsection (b)(2). Under this subsection we go beyond our traditional understanding of reasonable doubt, which is based on the defensible premise that where acts have

52. *Jurek*, 522 S.W.2d at 939-40.

53. *Id.* at 943-50 (Odom, J., concurring in part and dissenting in part; Roberts, J., dissenting).

54. TEX. CRIM. PROC. CODE ANN. art. 37.071(b)(2) (Vernon 1973).

55. TEX. CRIM. PROC. CODE ANN. art. 37.071(c) (Vernon 1973).

56. *See Jurek*, 522 S.W.2d at 945 (Odom, J., concurring in part and dissenting in part).

57. *Id.* at 948 (Roberts, J., dissenting).

been performed, they can be proven to have produced an incident beyond a reasonable doubt. This concept has been tried, tested, and proven valid.

But under subsection (b)(2) the jury is required to find beyond a reasonable doubt that an individual, the defendant, will in the future perform certain acts. This adopts the principle of predestination: That man is destined to do certain things and hence has no control over his actions. If this be true, we should not punish or attempt to rehabilitate, since the defendant is no more responsible for his acts than an individual who is insane at the time he commits an offense.

However, if individuals are responsible for their acts—as I believe—this cannot be true; yet if individuals are so responsible, (b)(2) is unconstitutional, since it is impossible to prove beyond a reasonable doubt or to a moral certainty that a person will act in a certain manner in the future.⁵⁸

Judge Roberts perhaps overstates the case when he speaks of predestination: it is quite possible to find that certain events are highly likely without finding that they are inevitable or predetermined.⁵⁹ Nevertheless, Judge Roberts has here hit upon the mind-boggling flaw that the majority overlooked: how can a legal system that prides itself on due process make imposition of the death penalty, as opposed to life in prison, turn on someone's—anyone's—speculation about *what that person will do in the future*? Can we justifiably put someone to death for a crime he has not yet committed? The Texas penalty procedure for capital murder in effect says to the defendant: “Your past crimes have earned you at least life in prison. We will now determine whether to put you to death based on our predictions of your *as-yet-uncommitted* crimes.”

This dilemma puts us at the crossroads of science and law. Faigman notes that while law operates on the premise that people are responsible for their actions, science assumes that people are affected by some combination of their biology and their experiences.⁶⁰ If we take the

58. *Id.* at 948 n.6 (Roberts, J., dissenting).

59. Perhaps Judge Roberts was doing what philosopher Daniel Dennett describes as confusing determinism with fatalism. See Ronald Bailey, *Pulling Our Own Strings*, REASON 25, 27 (May 2003) (quoting Dennett as saying, “Fatalism is the idea that something’s going to happen no matter what you do. Determinism is the idea that what you do *depends*. . . . still, what you do matters. . . . Fatalism is determinism with *you* left out.”).

60. DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 27 (1999).

purely legal viewpoint and assume free will, we will consider Jurek to be an autonomous individual who may choose to be violent or not. Since it is entirely possible that he will choose not to be violent, it would be unjust to execute him. Besides, as Judge Roberts points out, there is the empirical difficulty that we cannot see into the future in order to know “beyond a reasonable doubt or to a moral certainty”⁶¹ what will happen. Even if we take the purely “scientific” viewpoint, in Faigman’s terms, and assume that Jurek’s future violence is predetermined based on his nature and his nurture, it is still a policy decision whether we choose to execute him based on our conclusions about his future behavior. It would seem that we have a well-established, though flexibly defined, policy known as “due process,” which, it could be argued, would militate against using speculation about future behavior as justification for an execution.

There is an additional problem with the Texas statute, which went unaddressed by any of the Texas courts and even by the U.S. Supreme Court when it eventually reviewed the case. The problem was perhaps first pointed out by Professor Charles L. Black, Jr.⁶² Take another look at article 37.071(b):

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.⁶³

The jury has to answer “yes” to all three of the questions before a defendant may receive the death penalty. The defendant may thus escape execution by winning on any one of the three points. But this is less consolation than one might think if one looks closely at the three questions. Point (1) amounts to the question of whether the defendant

61. *Jurek*, 522 S.W.2d at 948 n.6 (Roberts, J., dissenting).

62. Charles L. Black, Jr., *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. L. REV. 1, 3-4 (1976).

63. TEX. CRIM. PROC. CODE ANN. art. 37.071(b) (Vernon 1973).

killed deliberately. Remember that this is being asked as part of the sentencing phase for first degree murder, where guilt has already been determined. As noted earlier, Article 1257(b)(2), under which Jurek was found guilty, provides:

(b) The punishment for murder *with malice aforethought* shall be death or imprisonment for life if: . . .

(2) the person *intentionally* committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson⁶⁴

The phrases “malice aforethought” and “intentionally” already appear in the definition of the crime.⁶⁵ Since the jury will already have agreed that these elements exist in finding the defendant guilty, it would be utterly illogical for it now to find that the defendant didn’t do it “deliberately.”⁶⁶

Likewise, point (3) raises the issue of whether the victim may have provoked the murderer in some way. Surely, this issue would already have been considered in the guilt phase, and if sufficient provocation had been found the defendant would have been convicted of some lesser charge, such as murder without malice or manslaughter.⁶⁷ In short, questions (1) and (3) involve issues that in most cases would have already been answered affirmatively; the death sentence, then, would depend entirely on the assessment of future dangerousness. But how can there be “due process” when the outcome depends strictly on someone’s surmises about the future, not on provable incidents from the past?

When Jurek’s case reached the U.S. Supreme Court, Justice Stevens, writing for a plurality, grappled with Jurek’s contention that it was impossible to predict future behavior and that the question posed by article 37.071(b)(2) was so vague as to be meaningless.⁶⁸ Perhaps “grappled” is the wrong word, considering what Justice Stevens and his colleagues did with the question. Stevens wrote:

The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is

64. TEX. PENAL CODE ANN. § 1257(b)(2) (Vernon 1973) (emphasis added).

65. Note that the word “intentionally” does not appear in any of the other four categories of first degree murder, though “malice aforethought” still applies to all of them. See TEX. PENAL CODE ANN. § 1257 (Vernon 1973). While § 1257 was the operating law at the time of Jurek’s crime, it had already been superseded by TEX. PENAL CODE ANN. § 19.03. (Vernon 1974) (effective January 1, 1974), which was substantially similar, by the time of the U.S. Supreme Court decision. See *Jurek*, 428 U.S. at 265 n.1.

66. Black, *supra* note 62, at 3-4.

67. *Id.*

68. *Jurek*, 428 U.S. at 274.

an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.⁶⁹

What the Court did here was not to grapple with, but to dodge the issue. Yes, it is difficult to make predictions about the future, the Court concedes; but we've been making predictions about the future for a long time about many things, so why stop here? In other words, because the criminal justice system makes predictions about the future in the contexts of (a) setting bail, (b) sentencing in general, and (c) parole decisions, why shouldn't it make future predictions when it decides whether or not to impose the death penalty? The Court could have answered its own question with a phrase it coined in one of the companion cases to *Jurek*, decided on the same day: "death is different."⁷⁰ As the Court said in *Gregg*:

While *Furman* did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.⁷¹

But what could be more arbitrary and capricious than inflicting this unique punishment based on someone's *guess* about the future?

In fact, distinguishing common future dangerousness predictions (in the settings of bail, general sentencing and parole) from future dangerousness predictions in capital cases should have been child's play to jurists of Supreme Court caliber. As to bail, an overly cautious

69. *Id.* at 274-76 (citations omitted).

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

71. *Id.*

prediction error in admitting a defendant to bail may involve a *temporary* loss of the defendant's liberty. And while questions of punishment in noncapital cases may involve a consideration of future dangerousness, they usually concentrate on the seriousness of the crime or crimes the person has committed in the past. Finally, parole decisions are actually decisions about whether to *lessen* a prisoner's sentence, not increase it. While there are potential hazards in all three situations, they do not entail the irreversible extinguishing of the defendant's life. In addition, the Court entirely overlooked the fact that on that same day, it had approved two death penalty schemes (Florida's⁷² and Georgia's⁷³) that did not use future dangerousness predictions.

But the Court, for whatever reason, chose to breeze over the fact, and the accompanying legal principle, that death is different to uphold, in theory, the use of future dangerousness predictions for determining the death penalty. Other than the Court's statement, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant,"⁷⁴ the Court's opinion didn't delve into the issue of what kinds of information might be relevant in predicting future dangerousness, and it didn't touch the issue of how, or whether, expert testimony might play a part in those predictions. Later, when *Barefoot* came along, the Court was stuck by *stare decisis*, or at least it acted as if it were. The Court's decision in *Barefoot* was inevitable unless it forsook the two points made in *Jurek*: (1) that the death penalty could turn on future dangerousness predictions and (2) that the jury needed to have all the relevant information about the defendant.

II. BAREFOOT BOY MEETS "DOCTOR DEATH" (BUT ONLY IN COURT)

While psychiatric testimony was not presented in *Jurek*,⁷⁵ it occupied center stage in the *Barefoot* case. On August 7, 1978, Thomas Barefoot fatally shot a police officer in the head at point-blank range after the officer had stopped him for questioning in an arson investigation.⁷⁶ A jury found him guilty of capital murder.⁷⁷ At the penalty phase of the trial, two psychiatrists, Drs. John Holbrook and James Grigson, testified that Barefoot would probably commit future

72. *Proffitt*, 428 U.S. at 242.

73. *Gregg*, 428 U.S. at 153.

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

75. *Barefoot*, 463 U.S. at 897 ("[T]here was only lay testimony with respect to dangerousness in *Jurek*.").

76. *Barefoot v. Texas*, 596 S.W.2d 875, 878-79 (Tex. Crim. App. 1980).

77. *Id.* at 878.

acts of violence that would constitute a continuing threat to society.⁷⁸ Neither psychiatrist had personally examined Barefoot; both based their predictions on a set of hypothetical questions put to them by the prosecution.⁷⁹

Dr. Grigson, a Dallas forensic psychiatrist, nicknamed “Dr. Death” for his testimony in death penalty cases, eventually testified for the state of Texas in over 140 capital trials.⁸⁰ Dr. Grigson’s testimony almost never changed from case to case.⁸¹ He would testify “as a matter of medical certainty” that the defendant was the most severe type of “sociopath,” that is, a person who is not mentally ill, but is beyond the range of psychiatric treatment.⁸² Dr. Grigson invariably stated that he was 100% certain of his conclusions, that the defendant would only get worse and would most certainly kill again if not executed.⁸³ Over two decades, Grigson testified in one-third of all Texas capital cases that ended in the death penalty; in over 90% of the cases in which he testified, the jury sentenced the defendant to death.⁸⁴

A 1989 study of the post-commutation behavior of ninety-two former Texas death row inmates whose death sentences were reversed and commuted in the early 1980’s indicated that Dr. Grigson’s predictions were extremely unreliable.⁸⁵ In one case, Grigson continued to maintain that his prediction at the trial—that the defendant was on the “severe end of the scale” of sociopathy and would continue to be a threat to society—had been correct, even after the prisoner was released from death row because he was found to be innocent.⁸⁶ In 1995, after repeated reprimands, Grigson was expelled from the American Psychiatric Association “for arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, he could predict with 100% certainty that

78. *Id.* at 887.

79. *Id.*

80. Amnesty Int’l website, <http://web.amnesty.org/library/index/ENGAMR510282003> (20 February 2003). Dr. Grigson is profiled in Errol Morris’s documentary film, *THE THIN BLUE LINE* (BFI/Third Floor/American Playhouse 1988).

81. Jonathan Sorensen & James Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. SOC. CH. 743, 749 (1990-91).

82. James Marquart et al., *Gazing Into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC. REV. 449, 458 (1989).

83. Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1, 23 (1994),

84. *Id.* at 22.

85. Marquart, *supra* note 82, at 461-62.

86. Amnesty Int’l website, <http://web.amnesty.org/library/index/ENGAMR510282003> (20 February 2003).

the individuals would engage in future violent acts.”⁸⁷ Nevertheless, Thomas Barefoot was sentenced to death rather than life based on this man’s testimony. Dr. Grigson still testifies for the state of Texas despite his expulsion from the psychiatric ranks,⁸⁸ but he has spawned a “growing entourage of Grigson-like psychiatrists acting as hired guns for the state.”⁸⁹

As *Jurek* had already determined the admissibility of future dangerousness predictions as a matter of constitutionality, it was left for *Barefoot* to validate their admissibility as an evidentiary issue. Would the Court use the *Frye*⁹⁰ “general acceptance” test, a liberal interpretation of Federal Rule of Evidence 702,⁹¹ or some other rule? The American Psychiatric Association (APA) weighed in on the issue with an *amicus curiae* brief which, somewhat surprisingly it may seem, argued against admitting psychiatric testimony on future dangerousness. The APA argued that psychiatric predictions of future dangerousness were extremely *unreliable*:

Psychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness of a defendant in a capital case, at least in those circumstances where the psychiatrist purports to be testifying as a medical expert possessing predictive expertise in this area. Although psychiatric assessments may permit short-term predictions of violent or assaultive behavior, medical knowledge has simply *not* advanced to the point where long-term predictions—the type of testimony at issue in this case—may be made with *even reasonable accuracy*. The large body of research in this area indicates that, even under the best of conditions, *psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases*.⁹²

In addition, the APA argued that if such predictions did have to be made, the psychiatrist ought at least to examine the defendant personally

87. *Id.*

88. TEXAS DEFENDER SERVICE, 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>.

89. Sorensen & Marquart, *supra* note 81, at 749.

90. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that expert testimony based on a scientific principle is admissible only if the principle is “sufficiently established to have gained general acceptance in the particular field in which it belongs”).

91. “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” FED. R. EVID. 702 (1975) (revised 2000).

92. APA Brief, *supra* note 4, at 8-9 (emphasis added).

before making the prediction.⁹³ Personal examination, however, would not have made a difference in any of Dr. Grigson's court appearances, it seems, as he always predicted, whether he had examined a defendant or not, that that person would be violent again.⁹⁴ Perhaps the only prediction that could be made with certainty was that Dr. Grigson, a sociopath who showed no remorse, would kill again, using "junk science"⁹⁵ as his weapon.

As Professor John Monahan, one of the leading legal experts in the field of future dangerousness jurisprudence, has noted, "[r]arely have research data been as quickly or nearly universally accepted by the academic and professional communities as those supporting the proposition that mental health professionals are highly inaccurate at predicting violent behavior."⁹⁶ Indeed, the statement has the ring of truth because it is apparently a statement against interest. Psychiatrists as a group were admitting their own shortcomings as predictors of future violence and urging that members of their profession such as Dr. Grigson forego the lucrative expert witness fees they could receive for their services. Surely, one supposes, a group that is willing to diminish its members' incomes for the sake of truth must be operating in the interests of justice.

While the APA is, in my opinion, correct that psychiatrists are not very accurate in predicting future dangerousness,⁹⁷ the APA Brief is not quite the statement against interest that it seems to be. The APA Brief emerged in the shadow of a 1976 California Supreme Court case, *Tarasoff v. Regents of University of California*.⁹⁸ That court held that a psychotherapist has a duty of care to protect the intended victim of a patient who presents a serious danger of violence.⁹⁹ If psychiatrists were to claim a high degree of accuracy in determining who presents a serious

93. *Id.*

94. See, e.g., George E. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 155-61 (1977).

95. The phrase was coined by HUBER, *supra* note 1.

96. John Monahan, *Predicting Violent Behavior: An Assessment of Clinical Techniques* (1981), quoted in Mark David Albertson, *Can Violence Be Predicted? Future Dangerousness: The Testimony of Experts in Capital Cases*, 3 WTR CRIM. JUST. 18, 21 (1989).

97. In his dissenting opinion, Justice Blackmun states that the evidence establishing the unreliability of psychiatric long-term predictions is "overwhelming." *Barefoot*, 463 U.S. at 919 (Blackmun, J., dissenting). He cites over a dozen authorities for this proposition, *see id.* at 919, 919 n.2, and notes that neither the majority nor the state of Texas has cited a single reputable scientific source refuting the conclusion that psychiatric predictions of future violence are wrong more often than right. *Id.* at 919.

98. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

99. *Id.* at 340.

danger of violence, their responsibility in such cases would be increased. This would often leave them in the excruciating position of having to choose between violating doctor-patient confidentiality and suffering civil liability for their patients' actions. If, on the other hand, psychiatrists by their own admission are no better than anyone else at predicting dangerousness, why should they be held to a higher duty of care in protecting the intended victims of their patients? Liability in negligence cases, after all, hinges on the defendant's ability to *foresee* possible harm to a plaintiff.¹⁰⁰ If one can't predict with any certainty, how can one foresee; hence, how can one be liable? Thus, the APA's position on future dangerousness predictions acted as a self-protecting disclaimer in the context of the *Tarasoff* duty to warn.

While there is ample underlying research to justify the APA's position, it may be a matter of policy as well as science. This may explain why the APA *still* contends that "[p]sychiatrists have no special knowledge or ability with which to predict dangerous behavior. Studies have shown that even with patients in which there is a history of violent acts, predictions of future violence will be wrong for two out of every three patients."¹⁰¹ This is despite the fact that it has been estimated that, today, psychiatrists' ability to predict dangerousness may have improved to the point that "clinicians are able to distinguish violent from nonviolent patients with a modest, better-than-chance level of accuracy."¹⁰² Still, this hardly brings clinical accuracy to the level of reliability that one might wish when a human being's life is in the balance.

The Supreme Court in *Barefoot* could have taken any one of at least three possible approaches to the admission of psychiatric testimony. It could have chosen reliability as the keynote to admissibility, in which case the psychiatric one-out-of-three average would not have made the grade. It could have used the *Frye* general acceptance test,¹⁰³ in which case the APA Brief, representing as it did the general attitude among the psychiatric profession, would also have kept Grigson's testimony out. The Court instead chose to follow a liberal interpretation of Federal Rule of Evidence 702: as long as the testimony was relevant, and helpful to the trier of fact, it was admissible.

100. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

101. APA *Statement on Prediction of Dangerousness*, quoted in APA FactSHEET on *Violence and Mental Illness*, APA website, <http://www.psych.org> (2000).

102. Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. CONSULTING & CLINICAL PSYCHOLOGY 783, 790 (1994).

103. *Frye*, 293 F. at 1014.

Barefoot made three arguments against the constitutionality of the psychiatric testimony that had been entered against him: (1) that psychiatrists in general are not competent to predict future dangerousness with any reliability (a point that the APA Brief makes difficult to contest), (2) that psychiatrists should not be allowed to make future dangerousness predictions based on hypothetical questions without having examined the defendant personally, and (3) that the testimony of the two psychiatrists in this case was so unreliable that the sentence should be set aside.¹⁰⁴ The Supreme Court, with Justice White writing for the majority, rejected all three arguments.¹⁰⁵

The Court rejected the first argument—that psychiatrists in general are not competent to predict future dangerousness with any reliability—because it had already, by implication, rejected it in *Jurek*.¹⁰⁶ Never mind that psychiatric testimony was not offered in that case.¹⁰⁷ Never mind that the issue of the reliability of psychiatric testimony had not been briefed or argued. The Court had said that all relevant information should be admissible¹⁰⁸ and that was that. When the Court said “relevant information,” that must have included psychiatric evidence, no matter how unreliable—not that they’d really thought about it at the time. In other words, the *Barefoot* Court unblinkingly considered the question of admissibility of psychiatric testimony to have been decided in *Jurek*, though the specific issue had not been before the Court in that case.

The Court fell back on its hypothesis (I hesitate to use the word “reasoning”) in *Jurek* that if it eliminated future dangerousness prediction in death sentencing, it might have to get rid of it in other areas of the law.¹⁰⁹ Again, no attempt was made to distinguish between capital sentencing and other kinds of legal judgment. The Court cites a statement by Professor Monahan that “there may be circumstances in which prediction is both empirically possible and ethically appropriate,”¹¹⁰ without catching on to the very narrow and tentative nature of the statement. Yes, there *may* be some situations in which prediction is ethical and appropriate, but that does not mean it is therefore ethical and appropriate in all situations. The Court fails to pick up the hint from Monahan that prediction could be held to be appropriate

104. *Barefoot*, 463 U.S. at 896.

105. *Id.*

106. *Id.* at 896-97.

107. *Id.* at 897.

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

109. *Barefoot*, 463 U.S. at 897.

110. *Id.* at 899 n.7, quoting JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR*, at v (1981).

in some contexts but not others.

This hint would have been most useful to the Court if it wanted to reconsider one of its main premises, namely, that if lay people are allowed to make predictions of future dangerousness, then why shouldn't psychiatrists—people who are trained in the study of human behavior—be able to make such predictions.¹¹¹ The Court might have said that when it comes to the death penalty, no one, layman or psychiatrist, should be able to make predictions about future dangerousness. But the Court had already decided in *Jurek* that they could.¹¹²

The majority answered the problem of the unreliability of psychiatric testimony with a determined faith that the adversarial system would sort it all out:

Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored. If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors.¹¹³

In other words, if the state presents an expert witness saying the defendant will commit future acts of violence, the defense can simply present expert witnesses who say that the state's witnesses are mistaken, or that they are quacks. Then the jury can try to make sense of it all. The Court quotes with approval the district court's¹¹⁴ analysis of the role of the jury *vis-à-vis* expert witnesses:

[T]he differences among the experts were quantitative, not qualitative. The differences in opinion go to the weight [of the evidence] and not the admissibility of such testimony Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and

111. *Id.* at 896-97.

112. *Id.* at 896.

113. *Id.* at 898-99.

114. Barefoot's case reached the Supreme Court through the *habeas corpus* route, as an application for stay of execution, which was treated (and granted) as a petition for writ of certiorari, rather than through the ordinary certiorari route. *Barefoot v. Estelle*, 459 U.S. 1169 (1983); *Id.* at 885-87.

criminal.¹¹⁵

A jury's job is to decide matters of fact. Admittedly, this sometimes involves speculation about the future. For example, in the damages phase of a wrongful death suit, a jury might decide how much money the decedent *would have earned* in his life if he had not been killed at, say, age thirty-four. In such a case, a jury can extrapolate a reasonable figure based on the decedent's skill, training, and past earnings. The result will always be, at best, an educated guess, but some kind of estimate is necessary in order to compensate the victim's family. But prediction of a murderer's future dangerousness is a much more uncertain proposition because the vast majority of murderers do not kill again and, in fact, have a tendency not to commit further violent crimes.¹¹⁶ Besides, being able to permit a certain amount of speculation in matters involving money damages does not mean we can allow the same degree of uncertainty in matters involving a person's liberty. Even less should we tolerate such uncertainty when a person's life is at stake.

The majority notes, however, that Barefoot offered no evidence at trial to rebut Drs. Holbrook and Grigson.¹¹⁷ The Court implies that this must have been the defense's fault because Texas law provided a \$500 budget for indigent defendants such as Barefoot to use for purposes of investigation and expert testimony.¹¹⁸ The Court does not consider whether this might be enough to pay for the services of an expert witness to rebut the two psychiatrists, especially when it is supposed to cover costs of investigation as well. Here again, the Court does not even address the possible due process violation. But how fair can the "adversarial" process be when one side (the state) has nearly unlimited resources with which to retain expert witnesses, while the defense has only \$500?

In addition, the district court had said, "[t]he majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises,"¹¹⁹ but that court did not make it clear that the improved accuracy did not apply to clinical predictions, but to predictions based on statistical analysis. As the APA stated: "To the extent such predictions have any validity, they can only be made on the

115. *Barefoot*, 463 U.S. at 902.

116. See Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845, 854-55 (1990).

117. *Barefoot*, 463 U.S. at 899 n.5.

118. *Id.*

119. *Id.* at 902.

basis of essentially actuarial data to which psychiatrists, *qua* psychiatrists, can bring no special interpretative skills.”¹²⁰

The Supreme Court opinion admits that neither Barefoot nor the APA “suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time.”¹²¹ Well, that’s a relief. Apparently, the Court has *some* standards. If one is *sometimes* right, his testimony is admissible. Is this a hint that the Court might be so rigorous as to exclude testimony that is *always* wrong?

But while the Court seems to be basing much of its decision on Federal Rule of Evidence 702, it misses the opportunity to apply Federal Rule of Evidence 403, which states that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”¹²² All this time that the Court has been looking at relevance, it has ignored the question of the evidence’s probative value. How probative is expert testimony that is wrong two-thirds of the time? More specifically, in the context of the Texas death penalty statute, how probative is expert testimony that is wrong two-thirds of the time when it is being offered to establish a matter that *must be proved beyond a reasonable doubt*? In other words, when the standard of proof is that high, how can evidence so unreliable even be considered to make a meaningful contribution towards a resolution? In the context of capital sentencing, courts should be especially wary of the dangers of unfair prejudice. And when the evidence presented has such a high probability of being wrong, its probative value would seem to be not just outweighed by the chance of unfair prejudice, but *substantially* outweighed, as FRE 403 requires. As the APA said:

[T]he use of psychiatric testimony on this issue causes serious prejudice to the defendant. By dressing up the actuarial data with an “expert” opinion, the psychiatrist’s testimony is likely to receive undue weight. In addition, it permits the jury to avoid the difficult actuarial questions by seeking refuge in a medical diagnosis that provides a false aura of certainty. For these reasons, psychiatric testimony on future dangerousness impermissibly distorts the fact-finding process in capital cases.¹²³

The Court rejected Barefoot’s second argument—that psychiatrists

120. APA Brief, *supra* note 4, at 9.

121. *Barefoot*, 463 U.S. at 900.

122. FED. R. EVID. 403.

123. APA Brief, *supra* note 4, at 9.

should not be allowed to make future dangerousness predictions based on hypothetical questions, without having examined the defendant personally¹²⁴—on similar grounds to those on which it rejected Barefoot’s first argument. The use of hypotheticals rather than a clinical examination went to the weight of the evidence rather than its admissibility.¹²⁵ Hypotheticals are standard evidentiary procedure, and the Court saw no reason why this should change just because the death penalty was involved.¹²⁶ Let the jury sort it out.

Finally, the Court dismissed Barefoot’s third argument, that the testimony of the two psychiatrists in this case was so unreliable that the sentence should be set aside.¹²⁷ Barefoot argued that the hypothetical questions given to the two psychiatrists used controverted facts.¹²⁸ The Court responded that Barefoot’s attorney, on cross-examination, could have propounded a set of hypothetical facts in conformity with Barefoot’s theory of the case.¹²⁹

In its conclusion the majority said that to agree with Barefoot’s position would seriously undermine and, in effect, overrule *Jurek*,¹³⁰ which appears by this time to have achieved the status of sacred cow. This hardly seems an accurate rendition of that case, however. *Jurek* established that, as a constitutional matter, future dangerousness predictions could be used in death penalty sentencing. It said that all “relevant information” could be adduced but didn’t delve into what was relevant or how other rules of evidence, such as FRE 403, might apply. It did not address the issue of admissibility of psychiatric testimony because that issue wasn’t raised. *Barefoot* went beyond *Jurek* by holding that psychiatric testimony was admissible as long as it was relevant—even if it was inaccurate, even if it was based on hypotheticals rather than examination, even if those hypotheticals were based on disputed facts—and by rejecting consideration of the reliability of the testimony or general acceptance of the principles underlying it.

124. *Barefoot*, 463 U.S. at 896.

125. *Id.* at 904, citing *Barefoot*, 596 S.W.2d at 887.

126. *Id.*

127. *Id.* at 896.

128. *Id.* at 905.

129. *Id.* at 905 n.10.

130. *Id.* at 906.

III. MINORITY REPORT:¹³¹ BLACKMUN'S PIQUE

In a positively livid dissent to the *Barefoot* decision, Justice Blackmun,¹³² joined by Justices Brennan and Marshall, fumes: "In the present state of psychiatric knowledge, this is too much for me."¹³³ To Blackmun, the fact that it is a capital case clearly *does* make a difference: "One may accept this in a routine lawsuit for money damages, but when a person's life is at stake—no matter how heinous his offense—a requirement of greater reliability should prevail."¹³⁴

After a quick survey of the "overwhelming" scientific evidence (unrebutted by the majority or the state of Texas) on the unreliability of psychiatric predictions,¹³⁵ Blackmun hones in on the difference, noted by the APA, between clinical predictions and statistical predictions.¹³⁶ The statistical predictions are usable by laymen and are possibly more accurate than the psychiatrists' clinical predictions.¹³⁷ While psychiatric predictions may be more reliable where there is a pattern of repetitive assault and violent conduct, says Blackmun, "psychiatrists have no special insights to add to this actuarial fact, and a single violent crime cannot provide a basis for a reliable prediction of future violence."¹³⁸ Psychiatrists may be *less* accurate predictors than laymen because they would prefer to have someone wrongly incarcerated or executed than be held liable for later violence committed by that individual.¹³⁹ Blackmun argues that there was no reliable trial testimony that *Barefoot* had committed acts of violence other than the crime for which he was being tried, only testimony that he had a bad reputation for peaceable and law abiding conduct.¹⁴⁰ "A death sentence cannot rest on highly dubious predictions secretly based on a factual foundation of hearsay and pure

131. The recent film *MINORITY REPORT* (DreamWorks LLC/Twentieth Century Fox Film Corp. 2002) is relevant to the subject of future dangerousness. There, in a futuristic society, law enforcement officials are able to predict murders reliably and thereby prevent them from happening. The police then arrest the would-be murderers as if they had actually succeeded in their intended crimes. In an early scene in the film, a law enforcement officer arrests a man for the "future murder" of his wife. The arrestee protests, "I didn't do anything," to no avail, as he is led away in shackles.

132. Note that Justice Blackmun concurred with the majority in *Jurek*, 428 U.S. at 279 (Blackmun, J., concurring).

133. *Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting).

134. *Id.*

135. *Id.* at 920-21 (Blackmun, J., dissenting).

136. *Id.* at 921-22 (Blackmun, J., dissenting).

137. *Id.* at 922 (Blackmun, J., dissenting).

138. *Id.* at 922 n.5 (Blackmun, J., dissenting).

139. *Id.* at 922 n.4 (Blackmun, J., dissenting).

140. *Id.* at 922 n.5 (Blackmun, J., dissenting).

conjecture.”¹⁴¹

Blackmun demonstrates that *Jurek* is not the only case that can be used as precedent. He cites *Jurek's* companion case, *Gregg*, for the proposition that “accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.”¹⁴² He cites *Woodson*, another companion case to *Jurek*, on the qualitative difference between the death penalty and any other punishment. “Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”¹⁴³ Blackmun echoes the APA’s point that jurors are likely to invest psychiatrists with greater infallibility on the subject of future violence than they actually have.¹⁴⁴ He quotes Imwinkelried on the “aura” surrounding scientific experts in jurors’ minds:

Scientific evidence impresses lay jurors. They tend to assume it is more accurate and objective than lay testimony. A juror who thinks of scientific evidence visualizes instruments capable of amazingly precise measurement, of findings arrived at by dispassionate scientific tests. In short, in the mind of the typical lay juror, a scientific witness has a special aura of credibility.¹⁴⁵

Blackmun points out that because juries may overestimate the probative value of polygraph evidence, it is usually excluded from trials despite what he calls conservative estimates that it is accurate 80 to 90 percent of the time when administered by experienced examiners.¹⁴⁶

Next, Blackmun argues against the majority’s undue faith that the adversarial process will do justice in such circumstances.¹⁴⁷ Cross-examination may not reveal the flaws in psychiatric testimony, says Blackmun, because such predictions are often based on subjective factors.¹⁴⁸ Suppose, for example, that a psychiatrist claims an ability to

141. *Id.*

142. *Gregg*, 428 U.S. at 190, *cited in Barefoot*, 463 U.S. at 928 (Blackmun, J., dissenting).

143. *Woodson*, 428 U.S. at 305, *cited in Barefoot*, 463 U.S. at 924 (Blackmun, J., dissenting).

144. APA Brief, *supra* note 4, at 9.

145. Edward Imwinkelried, *Evidence Law and Tactics for the Proponents of Scientific Evidence*, in SCIENTIFIC AND EXPERT EVIDENCE 33, 37 (E. Imwinkelried ed. 1981), *cited in Barefoot*, 463 U.S. at 928 n.8 (Blackmun, J., dissenting).

146. Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 736 (1974), *cited in Barefoot*, 463 U.S. at 930 (Blackmun, J., dissenting).

147. *Barefoot*, 463 U.S. at 929-30 (Blackmun, J., dissenting).

148. *Id.* at 931-32 (Blackmun, J., dissenting).

make predictions based on his many years of clinical experience. If the psychiatrist says that a defendant shows many of the same symptoms as patients who later became violent and that, in his opinion, the defendant will likely be violent, what is a defense attorney to do? Grill the psychiatrist on all his past patients who had similar symptoms? Challenge the psychiatrist's sincerity in stating his clinical opinion? The following exchange shows what a slippery customer a clever psychiatrist like Dr. Grigson could be on cross examination. In the Ernest Smith, Jr. trial, Dr. Grigson testified on direct examination that the defendant was a "severe sociopath" with no conscience and no regard for other people's lives or property, and was likely to commit future acts of violence.¹⁴⁹ On cross, the defense counsel tried to establish that Grigson was prosecution-oriented:

Q. On how many occasions do you think that you have ever testified for anybody other than the District Attorney's Office?

A. Well, I never testify for anybody. I only testify as to what my findings are. Usually, if the Defense Attorney likes what I have found, they [sic] call me. If the District Attorney's Office—well, usually they call me whether they like it or dislike it. I never testify for anybody.¹⁵⁰

Note here how this thoroughly pro-prosecution witness manages to pass himself off as neutral and to imply that prosecutors are more likely than defense lawyers to be interested in his testimony whether it goes for their case or against it. When defense lawyers have tried to impeach Dr. Grigson with the APA's condemnation of his testimony, Dr. Grigson has deflected such attacks by saying that *he* is the preeminent mental health expert on the criminal mind and that the APA is just a group of East Coast liberals who oppose the death penalty and think "queers are normal."¹⁵¹

Finally, Blackmun attacks the adequacy of the adversarial system to get to the truth in matters related to a person's mental state.¹⁵² He quotes then-Chief Justice Burger, in a statement Burger wrote before he was on the Court:

The very nature of the adversary system . . . complicates the use of scientific opinion evidence, particularly in the field of psychiatry. This system of partisan contention, of attack and counterattack, at its best is

149. Dix, *supra* note 94, at 157-58.

150. *Id.* at 159 (quoting Smith Transcript at 2948-49).

151. Ron Rosenbaum, *Travels with Dr. Death*, VANITY FAIR 141, 168, 147 (May 1990).

152. *Barefoot*, 463 U.S. at 931-32 (Blackmun, J., dissenting).

not ideally suited to developing an accurate portrait or profile of the human personality, especially in the area of abnormal behavior.¹⁵³

Blackmun expands on this point to observe that where one expert tells jurors that he knows a defendant will commit violent acts, while an opposing expert tells them that no one can predict who will be violent, the jurors are more likely to believe the expert who speaks with certainty, as this will be more helpful to them in performing their duty.¹⁵⁴ He expresses concern that jurors' attention will be drawn to the sideshow of experts and away from the individualized sentencing that the Eighth Amendment requires.¹⁵⁵

IV. BLACKMUN'S REVENGE: *DAUBERT* CHANGES EVERYTHING – OR DOES IT?

Federal Rule of Evidence 702, as interpreted in *Barefoot*, was the laissez faire rule on admissibility of expert testimony. Federal judges didn't have to worry much about screening expert testimony. Usually, as long as it was relevant, they could let it in and the jury would decide what to do with it. Some Circuits, such as the Ninth, however, still used the *Frye* general acceptance test for screening scientific testimony. But in 1993, the *Daubert* case¹⁵⁶ seemed to change everything. Unlike *Jurek* and *Barefoot*, *Daubert* was not a criminal case, and it had nothing to do with psychiatric testimony. It was a civil case in which children born with birth defects sued the manufacturer of Bendectin, an anti-morning sickness drug, claiming that Bendectin was the cause of their deformities.¹⁵⁷ More than thirty published studies on Bendectin involving 130,000 patients had failed to find that the drug caused birth defects.¹⁵⁸ The children produced heavily credentialed experts of their own, though the experts' findings had not been published and peer reviewed.¹⁵⁹ The district court, applying the general acceptance test, refused to admit the children's experts and granted summary judgment to the drug manufacturer. The Ninth Circuit affirmed, citing *Frye*.¹⁶⁰ The

153. Warren Burger, *Psychiatrists, Lawyers, and the Court*, 28 FED. PROB. 3, 6 (1964), cited in *Barefoot*, 463 U.S. at 932-33.

154. *Barefoot*, 463 U.S. at 934 (Blackmun, J., dissenting).

155. *Id.* at 934-35 (Blackmun, J., dissenting).

156. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

157. *Id.* at 582.

158. *Id.*

159. *Id.* at 583.

160. *Id.* at 584.

U.S. Supreme Court granted certiorari.¹⁶¹

Justice Blackmun, writing for the majority, clarified a question that scholars had puzzled over since 1975, namely, did the Federal Rules of Evidence on expert testimony supersede the *Frye* test, or were they meant to co-exist with it?¹⁶² The Court said (unanimously on at least this particular point) that the Federal Rules of Evidence superseded *Frye*.¹⁶³ It interpreted Federal Rule of Evidence 401 to mandate a liberal standard of relevance.¹⁶⁴ Up to this point, it sounds as if nothing has changed since *Barefoot*.

But, wait! This is Blackmun writing, remember? Suddenly, in a part of the opinion that gets only a 7-to-2 majority, he writes, “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”¹⁶⁵ Reliable! Shades of the *Barefoot* dissent! Psychiatric predictions of dangerousness would *never* have been admitted if they had to be *reliable*. This could change everything. The Court goes on to hold that the mention of “scientific . . . knowledge” in Federal Rule of Evidence 702 implies knowledge that is reliable and sets up federal judges as gatekeepers with the assigned task of keeping out evidence that is unreliable.¹⁶⁶ One can almost picture Justice Blackmun getting ready to give Dr. Death the boot when he appears at the gate seeking admission.

Daubert goes on to list a set of factors (illustrative, not definitive) that can be used to determine whether proposed scientific testimony is indeed scientific (i.e., reliable) knowledge that will be helpful (i.e., relevant) to the trier of fact in understanding or determining a fact in issue.¹⁶⁷ The Court suggests these factors: (1) Has the theory or technique been (or can it be) tested?¹⁶⁸ (2) Has the theory or technique been subjected to peer review and publication?¹⁶⁹ (3) What is the technique’s known or potential rate of error?¹⁷⁰ (4) Has it been generally accepted in the relevant scientific community?¹⁷¹

While the list of factors does not purport to be exhaustive, it is

161. *Daubert*, 509 U.S. at 585.

162. *Id.* at 586 n.4.

163. *Id.* at 587.

164. *Id.*

165. *Id.* at 589.

166. *Id.* at 589-90.

167. *Id.* at 592.

168. *Id.* at 593.

169. *Id.*

170. *Id.* at 594.

171. *Id.*

instructive to apply it to psychiatric predictions of future dangerousness: (1) Have such predictions been tested? Yes, they have, and they have been found to be wrong two-thirds of the time.¹⁷² (2) Has the theory or technique been subject to peer review and publication? Yes, and numerous studies have found it to be unreliable.¹⁷³ (3) What is the technique's known or potential rate of error? See answer to (1) above. (4) Has it been generally accepted in the relevant scientific community? No, the relevant scientific community has officially rejected it.¹⁷⁴ A judge of the U.S. Court of Appeals for the Fifth Circuit has said that psychiatric predictions of future dangerousness appear to fail all the *Daubert* factors.¹⁷⁵ All this means that psychiatric predictions of future dangerousness are on their way out, right? Well, not so fast.

Of course, the state of Texas was not obliged to adopt the *Daubert* rules for admitting scientific testimony just because the federal courts had done so. The Supreme Court had propounded an evidentiary principle, not a constitutional one; states could still have their own rules of evidence. But the Texas evidence rules are patterned after the Federal Rules.¹⁷⁶ In 1995, in *DuPont v. Robinson*,¹⁷⁷ the Texas Supreme Court in essence adopted *Daubert*, though it added a few wrinkles of its own. In addition to the four *Daubert* factors for determining reliability and relevance, the Texas court added: (1) the extent to which the technique relies on the subjective interpretation of the expert, and (2) the non-judicial uses of the theory or technique.¹⁷⁸ The first of these new factors does not seem to favor psychiatric *clinical* predictions of future dangerousness, which rely a great deal on the doctor's impressions. Predictions based on *statistics* would be less subjective, except that there is always some degree of subjectivity involved in determining the characteristics that go into analyzing the statistics (e.g., if asked whether a patient has been "violent" in the past, would one count his smashing a coffee mug as violence, or would he have had to strike a person to be considered violent?). As for the second new factor, there *are* non-judicial uses for clinical predictions of future dangerousness. People in mental institutions have to make them all the time, though they are aware that much of what they are doing is a guess. Still, these new

172. See APA Brief, *supra* note 4, at 9.

173. See *Barefoot*, 463 U.S. at 919, 919 n.2 (Blackmun, J., dissenting).

174. *Id.*

175. *Flores v. Johnson*, 210 F.3d 456, 464-65 (5th Cir. 2000) (Garza, J., specially concurring).

176. *Neeno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998).

177. *DuPont v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

178. *Id.* at 557.

factors, added to the old ones, do not move one very far in the direction of wanting to call future dangerousness predictions reliable. Any way one slices it, such predictions are still wrong much more often than they are right. Under *Daubert/Robinson*, clinical predictions of future dangerousness, would no longer be admissible, one might assume, even in Texas. One would be wrong.¹⁷⁹

V. WAITING FOR *KUMHO*, FINDING *NENNO*

While Federal Rule of Evidence 702 applies to “scientific, technical, or other specialized knowledge,” *Daubert* limited its holding to *scientific* knowledge.¹⁸⁰ This left open questions about whether *Daubert*’s gatekeeping function and reliability/relevance factors applied to such expert witnesses as airplane pilots, beekeepers, real estate appraisers, accountants, auto mechanics—all of whom have particular expertise and experience that might help a trier of fact, but who are clearly not scientists. In 1999, in *Kumho*,¹⁸¹ the Supreme Court addressed this issue; but up until that time, other courts had to confront the question on their own.

In 1998, in *Nenno v. State*,¹⁸² the Texas Court of Criminal Appeals again dealt with the question of expert testimony regarding future dangerousness in the penalty phase of a capital murder case, this time in the light of the *Daubert/Robinson* test. By this time, article 37.071 of the Texas Code of Criminal Procedure, which laid out the sentencing procedure for capital murder, had been amended (as of 1991) so that the moot-for-all-practical-purposes questions about deliberateness (subsection (b)(1)) and provocation (subsection (b)(3)) were eliminated.¹⁸³ Though there were other changes (e.g., mitigating

179. See John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901, 910-15 (2000).

180. *Daubert*, 509 U.S. at 590 n.8.

181. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

182. *Nenno*, 970 S.W.2d at 549.

183. The article provides, in pertinent part:

Sec. 2. . . .

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

evidence could be presented on behalf of the defendant¹⁸⁴), future dangerousness was still a required question at sentencing in capital murder cases.¹⁸⁵

Eric Charles Nenno had been found guilty of raping and choking to death a seven-year-old girl.¹⁸⁶ The state of Texas presented “expert” testimony on future dangerousness from Kenneth Lanning, a Supervisory Special Agent in the Behavioral Science unit of the FBI, who specialized in studying the sexual victimization of children.¹⁸⁷ Based on information given about Nenno, Lanning concluded that he was a pedophile and that such a person was difficult to rehabilitate.¹⁸⁸ After being given a lengthy hypothetical matching the facts shown by the evidence, Lanning testified that an individual matching the hypothetical “would be an extreme threat to society and especially children within his age preference.”¹⁸⁹

Citing Texas Rule of Criminal Evidence 702 (identical at the time to Federal Rule of Evidence 702¹⁹⁰), as interpreted in *Kelly v. State*,¹⁹¹ Nenno challenged the admissibility of Lanning’s testimony.¹⁹² In *Kelly*, the Texas Court of Criminal Appeals held that Rule 702 required the satisfaction of a three-part reliability test before novel scientific evidence would be admissible: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question.¹⁹³ The court further held that factors relating to this determination of reliability include, but are not limited to: (a) acceptance by the relevant scientific community, (b) qualifications of the expert, (c) literature concerning the technique, (d) the potential rate of error of the technique, (e) the availability of other experts to test and evaluate the technique, (f) the clarity with which the underlying theory or technique can be explained to the court, and (g) the experience and skill of the

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of “yes” or “no” on each issue submitted under Subsection (b) of this Article.

TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon 1991) (effective September 1, 1991).

184. See TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(a)(1) (Vernon 1991).

185. TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(b)(1) (Vernon 1991).

186. *Nenno*, 970 S.W.2d at 552.

187. *Id.*

188. *Id.*

189. *Id.*

190. See *id.* at 560 n.7; FED. R. EVID. 702 (1975) (revised 2000).

191. *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

192. *Nenno*, 970 S.W.2d at 560.

193. *Kelly*, 824 S.W.2d at 573.

person applying the technique.¹⁹⁴ The court later held that this inquiry is substantively identical to the inquiry mandated by the Supreme Court in the federal system in *Daubert*.¹⁹⁵

But Lanning was not a doctor,¹⁹⁶ and the evidence he gave did not purport to be scientific evidence.¹⁹⁷ So how should *Kelly* be applied to this type of nonscientific (i.e., involving technical or other specialized knowledge) testimony?¹⁹⁸ The court, in an opinion written by Judge Keller,¹⁹⁹ presciently anticipated *Kumho* by saying that *Daubert's* gatekeeping function applied to all forms of expert testimony.²⁰⁰ It added that the four factors in *Daubert* do not necessarily apply outside the “hard science” context, but could vary depending on the field of expertise.²⁰¹ The court did not attempt to draw a bright line between “hard” and “soft” sciences, or nonscientific testimony, and admitted that the distinction might often be blurred.²⁰² It did, however, speak of fields apart from the hard sciences, “such as the social sciences or fields that are based primarily upon experience and training as opposed to the scientific method.”²⁰³ By now, one can see the end-run around the gatekeeper coming. Partly, it is accomplished by the fact that the expert witness is not a doctor. This may seem to satisfy Blackmun’s and the APA’s complaint that having a doctor testify on future dangerousness gives the testimony an unwarranted aura of credibility. Conceding that prediction of future dangerousness is not a “science” *lessens the standard under which it is admitted*.

Thus, in *Nenno*, the court held that *Kelly's* reliability requirement applied, but with less rigor, to soft science and nonscientific fields.²⁰⁴ The court formulated a new set of criteria for such fields:

- (1) whether the field of expertise is a legitimate one,
- (2) whether the subject matter of the expert’s testimony is within the scope of that field, and
- (3) whether the expert’s testimony properly relies upon and/or utilizes the principles involved in the field. These questions are merely an appropriately tailored translation of the *Kelly* test to areas

194. *Id.*

195. *Jordan v. State*, 928 S.W.2d 550, 554 (Tex. Crim. App. 1996).

196. *Nenno*, 970 S.W.2d at 552, 562.

197. *Id.* at 560.

198. *Id.*

199. *Id.* at 551.

200. *Id.* at 561.

201. *Id.*

202. *Id.* at 560-61.

203. *Id.* at 561.

204. *Id.*

outside of hard science. And, hard science methods of validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences.²⁰⁵

The court next applied this test to expert-witness Lanning's testimony. Lanning stated that his analysis was based on his experience studying the sexual victimization of children for fifteen years full-time and eight years part-time prior to that.²⁰⁶ He had been with the FBI for over twenty-five years, and had been with a Behavioral Science Unit of the FBI Academy for fifteen years.²⁰⁷ He did not claim that he had a particular methodology for assessing future dangerousness.²⁰⁸ The court stated that research concerning the behavior of offenders who sexually victimize children appeared to be a legitimate field of expertise: "Through interviews, case studies, and statistical research, a person may acquire, as a result of such experience, superior knowledge concerning the behavior of such offenders."²⁰⁹ The court found that Lanning's testimony showed that future dangerousness was a subject that often surfaced during the course of research in the field of child victimization.²¹⁰ Lanning testified that he had studied more than a thousand cases that concerned future dangerousness in some way.²¹¹ His research included personally interviewing inmates convicted of child sex offenses, examining the inmates' psychological records, and examining the facts of the offenses involved.²¹²

Nenno complained about the lack of peer review of Lanning's technique.²¹³ "But the absence of peer review," the court responded, "does not necessarily undercut the reliability of the testimony presented here. To the extent that a factfinder could decide that the absence of peer review cast doubt on the credibility of the testimony, such affects the weight of the evidence rather than its admissibility."²¹⁴ The court found Lanning's testimony to be sufficiently reliable under Rule 702.²¹⁵ How is this any different from *Barefoot*? What makes Lanning's testimony any

205. *Nenno*, 970 S.W.2d at 561.

206. *Id.* at 562 n.10.

207. *Id.*

208. *Id.* at 562.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

more reliable than Dr. Death's? Application of *Daubert* makes no difference, it would seem, where future dangerousness is concerned.

The Texas Court of Criminal Appeals' superficial analysis shows just how weak its new reliability test is. The first question is the vague one of whether the field is "legitimate." So, what do we mean by "legitimate," and what is the difference between that and "reliable"? Presumably, rocket science is legitimate and tarot cards are not, but how do we judge all the soft and semi-soft sciences in the middle? The court concludes that the study of child victimization is a legitimate field because it utilizes such techniques as interviews, case studies, and statistical research.²¹⁶ These are certainly valid research methods, and Lanning would appear to be eminently qualified to talk about the subject of child victimization *ad nauseam*. But does one's knowledge about child victimization cases qualify one to make *predictions* about a person's future behavior? Before we listen to such predictions, shouldn't we be told what bases (I'm not even going so far as to ask for "principles") the expert uses to make his predictions? Wouldn't it be helpful to know how accurate the expert's predictions have been in the past? This is something that *can* be tested: How many times in the past did Lanning make a prediction about someone's future dangerousness, and how often was he right? Is that too rigorous a test to require, even for a soft science? The court says that potential rate of error may not be appropriate for assessing the reliability of fields outside the hard sciences,²¹⁷ but it gives no reason why such information would be inappropriate here. Indeed, it seems it would be highly relevant. Why not a general acceptance test: What does the APA, for example think about Lanning's future dangerousness predictions? What about the *Daubert/Robinson* factor of the expert's subjectivity?²¹⁸ Isn't Lanning ultimately just giving us his "gut feeling?" While I agree that not all *Daubert* factors must necessarily be applied to so-called soft sciences, there is no need to jettison them all when several of them might reasonably be asked and would be most useful in gauging reliability.

In short, the court does an *ipse dixit* on the first question of its three-part test (whether the field of expertise is a legitimate one), in effect saying, "Is it legitimate? Yes." It skimps on the second and third parts. Regarding the second prong (whether the subject matter of the expert's testimony is within the scope of the field), the court never

216. *Nenno*, 970 S.W.2d at 562.

217. *Id.* at 561.

218. *Robinson*, 923 S.W.2d at 557.

explains how Lanning's expertise in child victimization puts his testimony on future dangerousness within the scope of that field. The court does not say whether Lanning has had to make predictions on future dangerousness as part of his job or if he has merely studied other people's predictions. As for the third prong of the test (whether the expert's testimony properly relies on or utilizes the principles involved in the field), the court never addresses this because it never establishes that there *are* any principles on which Lanning is basing his testimony. For all one can glean from the opinion, Lanning's testimony amounts to saying, in effect, "I've studied thousands of child victimizers who committed similar crimes later on, and Mr. Nenno certainly reminds me of them." The court never even says what Lanning considers the telling characteristics of a repeat child victimizer to be.

Future dangerousness predictions in death penalty cases are alive and well in Texas.²¹⁹ When the *Kumho* decision came down from the U.S. Supreme Court a year after *Nenno*, it left the *Daubert* reliability test so flexible that it did nothing to upset the test established in *Nenno*.²²⁰ The *Kumho* Court, in an opinion by Justice Breyer, clarified that *Daubert's* gatekeeping obligation applies to all expert testimony, not just scientific testimony.²²¹ The Court reiterated that the purpose of the gatekeeping role was to ensure the reliability and relevance of expert testimony while still giving trial courts considerable leeway in deciding how to assess reliability; courts were not bound to use the *Daubert* factors but could improvise their own sets of tests to determine reliability.²²² As the Court had already held in *Joiner* that a trial court's

219. See, e.g., *Murphy v. State*, 112 S.W.3d 592, 596-97 (Tex. Crim. App. 2003) (finding harmless error where state dismissed juror for cause because she would require proof of another murder or attempted murder before finding appellant would commit criminal acts of violence that would pose a continuing threat to society); *Guevara v. State*, 97 S.W.3d 579, 581 (Tex. Crim. App. 2003) (reviewing the sufficiency of the evidence at punishment to determine whether any rational trier of fact could have believed beyond a reasonable doubt that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society); *Reyes v. State*, 84 S.W.3d 633, 638 (Tex. Crim. App. 2002) (affirming exclusion of pro-defendant psychologist's testimony on mitigating factors regarding future dangerousness); *Ripkowski v. State*, 61 S.W.3d 378, 385 (Tex. Crim. App. 2001) (affirming admission of psychiatric testimony on defendant's future dangerousness despite lack of *Miranda* warnings before psychiatrists interviewed defendant).

220. *Nenno* was cited as precedent in *Hernandez v. State*, 53 S.W.3d 742, 748-50 (Tex. App. 2001) (admitting testimony on Child Abuse Accommodation Syndrome where expert had not conducted any studies or published any articles, did not know the potential error rate of her opinion, but testified that her opinions were based on experience, observation, and training, and was unimpeached in her assertion that her data and opinions were recognized by the general community of psychology and psychiatry).

221. *Kumho*, 526 U.S. at 141.

222. *Id.* at 152-53.

decision whether to exclude expert testimony would be reviewed on an “abuse of discretion” standard rather than a *de novo* standard,²²³ this left a great deal of freedom (or, to view it from a different angle, an utter lack of guidance) to federal district court judges in exercising their gatekeeping function. *Kumho* proved so congenial to already-existing Texas law that it was cited approvingly in Texas evidentiary case law the month after it was decided.²²⁴ Thus, there is nothing standing in the way of Texas judges who wish to admit psychiatric, or other, testimony on future dangerousness in the sentencing phase of death penalty cases.

VI. KANGAROO COURT

In my opinion, future dangerousness predictions should not be admitted in the penalty phases of capital cases, no matter how reliable they might eventually become. If “due process” means anything, it should mean that one may not be put to death based on speculation about his future conduct, no matter how reasonable the speculation. As a person has a right *not* to be deprived of life without due process of law,²²⁵ the presumption is in favor of life, and the state should have to surmount a very high hurdle to overcome that presumption. Where, on the other hand, future predictions are used to spare a life, the state’s burden is lower, since the state is acting in favor of the presumption of life. Declining, for example, to execute a prisoner based on doctors’ diagnoses that he has a short time to live would not be an abuse of future prediction because the benefit of the doubt goes toward preserving life.

Even if future dangerousness predictions do not fail the constitutional due process test, they still fail on evidentiary principles because they violate Federal Rule of Evidence 403, which provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”²²⁶ When one profession, the psychiatric community, maintains that there is overwhelming evidence that clinical predictions of future dangerousness are unreliable, and where a particular clinician, such as Dr. Grigson, has been found in empirical studies to be highly inaccurate, it is a sad miscarriage of justice for a judge to allow Grigson or a Grigson-like clone to get on the witness stand and claim that he can predict future dangerousness with any degree

223. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997).

224. *See Godsey v. State*, 989 S.W.2d 482, 490 (Tex. App. 1999).

225. U.S. CONST. amends. V, XIV.

226. FED. R. EVID. 403.

of certainty. This misleads the jury by presenting pure speculation as verifiable fact. It is “prejudicial beyond belief,”²²⁷ to the defendant because it unfairly characterizes him as a monster who must be destroyed.

There is a great deal that is questionable about the way capital punishment is administered in Texas.²²⁸ Since the death penalty was reinstated in 1976, the state of Texas has carried out over one-third of the executions in the United States (321 out of 907, as of April 2, 2004).²²⁹ There tends to be a carnival atmosphere during Texas executions: revelers chant death slogans, buy death penalty souvenirs, drink beer, and cheer outside the place of execution until they are hoarse.²³⁰ As of January 1, 2004, Texas had 458 prisoners on death row,²³¹ so it appears there will be no end to the festivities. If Texas is so in love with capital punishment that it must have it, let it base the death penalty entirely, as other states do, on a defendant’s *past, provable* actions. The irony is that Texas would not need its “future dangerousness” factor to execute murderers such as Barefoot (who killed a policeman), Jurek, and Nenno (both rapists and murderers of children). Their crimes would bring on the death penalty under the sentencing schemes of many other states.²³² What is disturbing is that less culpable defendants may be executed due to the foreordained nature of the proceedings.²³³ One study showed that, between 1974 and 1988, Texas juries voted for the death penalty in 77% of capital murder cases.²³⁴ In Georgia, by contrast, a defendant convicted of capital murder has only slightly more than a 50-50 chance of getting the death penalty.²³⁵ In Texas, the death penalty is likely to turn on the highly unreliable testimony of a pro-prosecution witness who is predicting the future.

227. *Smith*, 534 S.W.2d at 905 (Odom, J., concurring in part and dissenting in part).

228. *See generally, e.g., Newton, supra* note 83; TEXAS DEFENDER SERVICE, *supra* note 88, available at <http://www.texasdefender.org/state%20of%20denial> (providing a critique of the Texas system). *But see generally* Goldberg, *supra* note 36 (providing a defense of the Texas system).

229. Death Penalty Information Center website, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last updated April 2, 2004).

230. *See Newton, supra* note 83, at 4-5.

231. Death Penalty Information Center website, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#state> (as of January 1, 2004).

232. *See Simon & Spaulding, supra* note 37, at 84.

233. I oppose the death penalty on philosophical, not merely constitutional or practical, grounds, though this topic is outside the scope of this article. I mention it merely to reveal my bias and to emphasize that I am not advocating the death penalty; I am merely urging that, where it is used, the sentencing procedure should be such that the outcome is not predetermined.

234. Sorensen & Marquart, *supra* note 81, at 769.

235. Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1340-41 (1985).

Use of future dangerousness predictions seems particularly unnecessary when the choice being made is between the death sentence and life in prison without parole. Proponents of the current system argue that inflicting the death penalty on potentially violent criminals protects other inmates and prison officials from risk of violence.²³⁶ But this theory ignores research showing that murderers are extremely unlikely to murder again while in prison.²³⁷ A study of all homicides in state and federal prisons in 1973 found that 99.8% of prisoners convicted of murder do not murder again while in prison.²³⁸ If one could reliably identify the 0.2% of convicted murderers who will murder in prison, one could save some inmates' lives; but, as we have seen, there is no reliable method for determining which murderers will kill again.²³⁹ And, counterintuitive as it may seem, research indicates that, among all convicted felons, murderers are the best parole risks.²⁴⁰ A study of New York parolees over a ten-year period showed a much lower recidivism rate among murderers (7.2% were convicted of the same or a lesser offense) than among other offenders (20.3% were convicted of similar offenses).²⁴¹

VII. RE-THINKING EXPERT TESTIMONY

The ability of future dangerousness testimony to survive seemingly radical changes in evidentiary policies demonstrates the lack of rigor in the new approaches. The *Daubert/Kumho* rule is so flexible that it allows loopholes which admit even the testimony of a Dr. Grigson, despite his expulsion from the APA. I sympathize with such commentators as Paul S. Milich,²⁴² Adina Schwartz,²⁴³ and Peter Huber,²⁴⁴ who prefer the *Frye* rule, or some improved version of it. The basic insight of *Frye*, which requires general acceptance in the scientific community,²⁴⁵ is that there

236. Goldberg & Blum, *supra* note 36, at 130.

237. Radelet & Marquart, *supra* note 116, at 855.

238. Wendy Phillips Wolfson, *The Deterrent Effect of the Death Penalty upon Prison Murder*, in *THE DEATH PENALTY IN AMERICA* 159, 160 (Hugo Bedau ed., 1982).

239. *Id.* at 170.

240. Radelet & Marquart, *supra* note 116, at 854.

241. John Stanton, *Murderers on Parole*, 15 *CRIME & DELINQ.* 149, 152 (1969).

242. Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law's Hubris*, 43 *EMORY L. J.* 913 (1994).

243. Adina Schwartz, *A "Dogma of Empiricism" Revisited: Daubert v. Merrell Dow Pharmaceuticals, Inc. and the Need to Resurrect the Philosophical Insight of Frye v. United States*, 10 *HARV. J. L. & TECH.* 149 (1997).

244. Peter Huber, *Junk Science in the Courtroom*, 22 *VAL. U. L. REV.* 723, 742-43 (1992).

245. *Frye*, 293 F. at 1014 (holding that expert testimony based on a scientific principle is admissible only if the principle is "sufficiently established to have gained general acceptance in the

is no extra-scientific standpoint from which judges can gauge the reliability of scientific evidence and that scientists are better prepared to make this assessment than are judges.²⁴⁶ Schwartz insists that the reliability of scientific evidence must be decided by scientists, not technicians.²⁴⁷ In the matter of future dangerousness predictions, this would mean that experimental psychologists, not clinicians, would make the reliability assessment.²⁴⁸

But even a re-vamped *Frye* rule, such as that proposed by Schwartz,²⁴⁹ would not apply to all expert testimony, only to that which is considered “scientific.” This loophole allows “technical” knowledge to fly in below the *Daubert* or *Frye* radar, as future dangerousness testimony did in *Nenno*. Indeed, in considering the testimony of, say, an airplane pilot or a real estate appraiser, a test for acceptance in the *scientific* community would be out of place, as we do not think of these professions as scientific. Neither would we expect such witnesses to be peer reviewed and published. But we should have a right to expect from them some showing of *reliability* (the word which summarizes the key insight of *Daubert* and *Kumho*). How would we know if an airplane pilot has reliable knowledge about flying airplanes? If he has been flying them for years and has safely taken off and landed thousands of times, he obviously has some reliable knowledge about flying airplanes. What about a real estate appraiser? We could compare his appraisals of different houses to the actual prices at which those houses were sold within a reasonable time after the appraisals. In *Kumho*, Justice Breyer wrote for the Court:

In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert’s experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.²⁵⁰

Even the above examples, however, have ominous pitfalls, in my view. I

particular field in which it belongs”).

246. Schwartz, *supra* note 243, at 193-96.

247. *Id.* at 208.

248. See Milich, *supra* note 242, at 917.

249. Schwartz, *supra* note 243, at 206-37.

250. *Kumho*, 526 U.S. at 151.

am sure the engineering expert will tell us his methodology is flawless and generally accepted in the engineering community. So let's not ask *him*; let's ask other members of the engineering community. As for the perfume tester, no doubt, he will not hesitate to say that others in the field would recognize his preparation as acceptable; therefore, the query should not be put to him, but to those "others" in the field—or, even better, to disinterested observers outside the field who have had a chance to study and evaluate the methodology.

Putting aside for the moment whether the expertise involved in future dangerousness predictions is "scientific" or "technical," how would we know if these predictions are reliable? We would look at whether, in the past, such predictions have been borne out by experience. Reliability must be the common denominator in admitting both scientific and technical expert testimony.

The *Nenno* court fudged this issue by substituting the word "legitimate" for the word "reliable,"²⁵¹ and deciding that the subject was legitimate because it had some connection with actual observation.²⁵² That isn't enough to establish its reliability. Figuring out tests of reliability for technical experts should be a matter of simple common sense for judges who are willing to take the responsibility seriously.

VIII. CONCLUSION

The U.S. Supreme Court committed constitutional error in its 1976 decision in *Jurek*, when it allowed speculations about a defendant's as-yet-unperformed acts to determine whether he would be put to death. The Court brushed aside any consideration of due process and ignored its own precedents that held that "death is different." It compounded the error in 1983 in *Barefoot*, when it allowed psychiatrists' predictions of future behavior to be admitted even though the psychiatrists had not personally examined the defendant and even though the psychiatric profession as a whole rejected such predictions as unacceptably inaccurate. This ignored the highly misleading and unfairly prejudicial (*see* Federal Rule of Evidence 403) nature of the testimony. While *Daubert's* gatekeeping role for judges and demand for reliability as well as relevance would seem to have raised the standards high enough that such testimony should be excluded, *Daubert* left serious loopholes (lack of guidance regarding nonscientific expert testimony and a too-flexible test for reliability). As applied in Texas, the future dangerousness

251. *Nenno*, 970 S.W.2d at 560-61.

252. *Id.* at 562.

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element of the penalty phase in capital murder cases is a façade that shields the process's lack of due process; Texas should adopt a more honest sentencing procedure, one that gives convicted defendants a reasonable chance of coming out of it alive. And we still need to re-think our tests for admissibility of expert testimony, both scientific and technical. A re-vamped *Frye* test may be the answer for scientific testimony, while a more commonsense approach to assessing reliability may be a solution for determining the admissibility of technical experts' testimony.