FUTURES PAST: INSTITUTIONALIZING THE RE-EXAMINATION OF FUTURE DANGEROUSNESS IN TEXAS PRIOR TO EXECUTION

By: Jessica L. Roberts*

"I am sorry. I really am. You, Brian's sister, thanks for your love – it meant a lot. Shane – I hope he finds peace. I am sorry I destroyed you all's life. Thank you for forgiving me. To the moon and back. I love you all." – Last Words of James Vernon Allridge, II[1]

I. INTRODUCTION

On August 26, 2004 the State of Texas put James Vernon Allridge, III to death for the murder of Brian Clenbennen.[2] Although James was found a "continuing threat to society" by his jury, during his tenure on death row, he became a prolific artist, respected member of the prison community, and a mentor to younger inmates.[3] Former prison guard Jacoby Garmon had the following to say about James:

> James was always respectful and never in trouble. . . . I would consider James a role model prisoner. . . . He never did get into any trouble and everyone seemed to like him. . . James was the kind of prisoner that made everybody's life easier as far as being able to work around the death row inmates. . . . I can never imagine James posing any kind of threat to any other inmates or correctional officers. . . . James probably saved a lot of correctional officers' lives and they didn't even know

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1. Texas Department of Criminal Justice, Last Statement of James Vernon Allridge, http://www.tdcj.state.tx.us/stat/allridgejameslast.htm.

2. Texas Department of Criminal Justice, Offender Information, http://www.tdcj.state.tx.us/statistics/deathrow/drowlist/allridj.jpg.

3. John Moritz, *Saying He's Changed, Killer Asks for Life*, FORT WORTH STAR-TELEGRAM, Aug. 12, 2004, 4B, *available at* http://www.dfw.com/mld/startelegram/news/state/9380468.htm?1c.. "While jurors heard Allridge described at his 1987 trial as a heartless killer who shot tied-up 21-year-old Brian Clendennen in the back room of a Circle K store, [a juror] now describes him as a sensitive artist who has served as a model inmate and a mentor to young prisoners."

it, just by calming the situation.[4]

The execution of such an individual appears counterintuitive to the promotion of order and a disincentive for good behavior on the part of other inmates. If taken off death row, would James have continued to behave this way in the general population? Probably so.

When asked to evaluate James' prison records, Sherrel Odis Woods, the former Chairman of the State Classification Committee said:

> My prediction is that there's no need for maximum custody status. He represents no immediate threat to escape, he's not assaultive to the staff or other inmates, he's not in need of protection and there's really no reason not to place him in general population.
> [T]here is no evidence that he represents a threat to staff or employees by his past conduct.[5]

Even a one-time prison official responsible for the determination of inmate placement found that James would function safely and appropriately among the general prison population.

In his petition for certiorari to the United States Supreme Court, James' lawyers argued that "[t]he legitimate aims of capital punishment are undermined by executing a rehabilitated, model prisoner only because 17 years ago, he was erroneously deemed a future danger."[6] A man who was found to be a future danger during his trial now appeared to be a stabilizing force. However, this argument persuaded neither the Supreme Court of the United States, nor the Texas Board of Pardons and Paroles, which unanimously rejected James' petition.[7]

In sentencing defendants to death, Texas law requires juries to evaluate the future dangerousness of the person on trial, an inquiry inevitably based on speculation.[8] While often cited as a

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4. Jacoby Garmon, former death row correctional officer, quoted in cert at 13. Garmon's opinion does not stand alone:

> Prison guards and inmates alike now universally regard James Allridge as a positive influence in the prison. Those who have lived or worked alongside James for the last seventeen years cite his calming effect, his conciliatory influence on inmate and guard relations, and the way other inmates emulate his attitude.

Allridge v. Texas, Petition for Writ of Certiorari to the Texas Court of Criminal Appeals [*hereinafter* Petition] at 13 (on file with author).

5. Interview with Sherrel Odis Woods, former Chairman of the State Classification Committee and Assistant Director of TDCJ-ID, quoted in Petition, *supra* note 4, at 12.

6. Petition, *supra* note 4, at 18.

7. Maria Recio, *'Changed' Murderer Facing Death by Injection*, FORT WORTH STAR-TELEGRAM, Aug. 25, 2004, 1A.

8. *See infra* Section II(d).

demonstration of the inhumanity of the death penalty,[9] the lengthy terms of incarceration served by death row inmates tipped in James Allridge's favor. Without his seventeen year imprisonment on and off death row, James would never have had the opportunity to do what he ultimately did: prove his jury wrong.

The jury is one of the fundamental safeguards of our justice system, intended to protect defendants from unfair trials and reflect the social norms of the surrounding community. However, juries are far from infallible. While the possibility for jury error exists in all judicial proceedings, mistakes in capital cases have fatal implications. An incorrect jury finding that results in a death sentence may have devastating implications on not just the defendant slated for execution, but on the jurors responsible for making that choice. One such juror, Laury Robertson, served in James' case.

> When 21-year-old Laury Robertson joined her 11 fellows [sic] jurors to decide what punishment James Vernon Allridge should receive for killing a young convenience store clerk during a robbery in February 1985, she voted for the death penalty without hesitation.
>
> During a news conference at the state Capitol on Wednesday, Robertson called that vote the biggest mistake of her life.[10]

Yet in spite of highly persuasive proof that the jury based its decision on inaccurate information, the way in which the capital punishment system currently operates does not allow the state to rectify Laury's mistake. How do we prevent the execution of inmates like James in the future? This Note attempts to answer that question.

Section II examines the Texas death sentencing scheme and the use of future dangerousness determinations. This analysis discusses the intent of the Texas Legislature to limit death sentences to dangerous individuals and the possible reasons for making this designation. I conclude that the use of predictive psychiatric evidence, which is often inaccurate, may result in erroneous jury determinations and consequently the over-application of capital punishment. Section III explores the role of the jury in capital proceedings and the current system of capital appeals. I argue that despite the possibility of faulty dangerousness predictions, we should preserve the jury's part in capital sentencing. Section IV outlines my proposition to check jury power and prevent executions resulting

9. *See, e.g.*, Petition, *supra* note 4, at 15-16.
10. Moritz, *supra* note 3.

from erroneous determinations of future dangerousness.

I propose that Texas create a standard procedure to revisit the issue of future dangerousness when the execution becomes imminent. This type of proceeding would enable the death penalty to function according to its statutory intent, punishing those who truly pose a continuing threat to society. Furthermore, such a hearing allows the criminal justice system to preserve the essential role of the jury at the trial level in capital cases at low administrative costs, while taking into account the possibility of error inherent in establishing future dangerousness.

II. FUTURE DANGEROUSNESS DETERMINATIONS IN DEATH CASES

The problem addressed in this paper arises out of a specific provision of the Texas Code of Criminal Procedure. Article 37.071 requires juries to determine that a defendant convicted of capital murder poses a "continuing threat to society" before the defendant may be sentenced to death; those defendants who, while guilty of capital murder, do not pose a continuing threat to society, receive life imprisonment.[11] Thus, Article 37.071 implies that, however awful the crime committed, the state should not execute a person who poses no real future danger. This implication presents a new issue, not addressed by the language of the statute: how to treat an individual who, despite a jury determination of future dangerousness, has proved *not* to be dangerous. To answer this inquiry, we must look to the history of the current death statute, its purpose, and the possible justifications for drawing the line at future dangerousness. This section explores the legislative history of the modern capital statute, examines the legislature's intent in drafting the statute, and recounts the way in which judges and lawyers understand and implement Article 37.071(b)(1).

A. CURRENT STATUTE

The Texas law, like other state capital statutes,[12] outlines a bifurcated proceeding for the determination of death sentences consisting of a guilt/innocence phase followed by a punishment

11. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2005).

12. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703 (West 2005); CAL. PENAL CODE § 190.3 (West 2005); FLA. STAT. ANN. § 921.141 (Harrison 2000); LA. REV. STAT. ANN. § 14:30 (West 2005); NEV. REV. STAT. ANN. 200.03 (Michie 2003); N.H. REV. STAT. ANN. § 630:5 (Michie 2005); N.J. STAT. ANN. § 2C: 11-3 (c) (West 2005); OHIO REV. CODE ANN. § 2929.03 (West 2005); 42 PA. CONS. STAT. ANN. § 9711 (West 2005); S.C. CODE ANN. § 16-3-20 (West 2004); S.D. COD. LAWS § 23A-27A-4 (Michie 2003); TENN. CODE ANN. § 39-13-204 (Michie 2003); UTAH CODE ANN. § 76-3-207 (Michie 2005).

phase. Texas Penal Code Section 19.03 defines capital murder and Texas Code of Criminal Procedure Article 37.071 provides the sentencing structure. To be charged with capital murder, a defendant must have committed a crime containing at least one of eleven statutorily defined aggravating factors.[13] During the guilt phase, the prosecution must prove its case, including the presence of one of the aggravating factors, to the jury beyond a reasonable doubt.[14] The jury's verdict of guilt or innocence ends the first part of the trial.

If the jury returns a verdict of guilty of capital murder, the trial proceeds to the punishment phase. During this part of the trial, the same jury hears additional evidence and must consider three sentencing factors, currently outlined in Article 37.071(b) of the Texas Code of Criminal Procedure, to decide whether the defendant will receive life in prison or be executed:

> 1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society [*hereinafter* future dangerousness question—also referred to as the violence question in older literature]; and
> 2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find 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 [*hereinafter* the deliberateness question].
> 3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article [*hereinafter* mitigation question].[15]

Again, the standard of proof for the prosecution is beyond a reasonable doubt.[16] The bifurcated trial, like the use of aggravating factors, is not distinctive to the Texas system. All states currently using the death penalty divide their trials between guilt and

13. TEX. PENAL CODE ANN. § 19.03 (Vernon 2005).

14. TEX. CODE CRIM. PROC. ANN. art. 37.071(c) (Vernon 2005).

15. TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1965). Note that in the original drafting of this provision the third factor was on provocation. The Texas legislature later replaced this with the mitigation question.

16. TEX. CODE CRIM. PROC. ANN. art. 37.071(c) (Vernon 2005).

sentencing.[17] Conversely, the way in which Texas asks its jurors to determine death sentences in the penalty phase sets this particular system apart from other states.

The Texas statute contains distinctive elements. Writing on issues specific to the capital statute in Texas, one scholar notes:

> While there are similarities among the death penalty laws of the several states, each has a slightly different coverage and procedure. The approach of the Texas law is in many respects unique. It contains a surprising number of unexplored territories that can make a life-or-death difference in the outcome of a capital murder trial.[18]

Among the unique qualities of Texas' law is the use of future dangerousness as a determinative element in death sentences. The deliberateness and mitigation questions are fairly typical issues raised in capital litigation. States often ask their juries to determine deliberateness and consider mitigation, even in the course of regular criminal proceedings. The future dangerousness question, however, differentiates Texas from other capital systems. At present, Texas requires juries to speculate about future behavior, while most other states sentence defendants to death based only on past behavior.[19] Nine states allow juries to consider future dangerousness at some point during a capital trial.[20] Only Texas and Oregon have chosen to

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17. *See, e.g.*, FLA. STAT. ANN. § 921.141(1) (Harrison 2000); MD. CODE ANN., CRIM. LAW § 2-303(a)(1) (Michie 2005); MISS. CODE ANN. § 99-19-355(1) (Michie 2004); N.M. STAT. ANN. § 31-18-26(A) (Michie 2003); OKLA. STAT. ANN. § 701.10(A) (West 2006).

18. David Crump, *Capital murder: Issues in Texas*, 14 HOUS. L. REV. 531, 531-32 (1977).

19. Most states do not consider future dangerousness. *See* ALA. CODE § 13A-5-47 (Michie 2004); ARIZ. REV. STAT. ANN. § 13-703 (West 2005); ARK. CODE ANN. § 5-4-603 (Michie 2005); ARK. CODE ANN.. § 5-4-604 (Michie 2005); CAL. PENAL CODE § 190.3 (West 2005); CONN. GEN. STAT. ANN. § 53a-46a (West 2005); DEL. CODE ANN. Tit. 11, § 4209 (Michie 2004); FLA. STAT. ANN. § 921.141 (Harrison 2000); GA. CODE ANN. § 17-10-30 (Michie 2005); GA. CODE ANN. § 17-10-31.1 (Michie 2005); IDAHO CODE § 19-2515 (Michie 2005); 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2005); IND. CODE ANN. § 35-50-2-9 (Michie 2005); KAN. STAT. ANN. § 21-4624 (2004); KAN. STAT. ANN. § 21-4625 (2004); KY. REV. STAT. Ann. § 532.025 (2) (Michie 2004); LA. REV. STAT. ANN. § 14:30 (West 2005); MISS. CODE ANN. § 99-19-101 (Michie 2004); MISS. CODE ANN. § 99-19-103 (Michie 2004); MO. REV. STAT. § 565.032 (Vernon 2005); MONT. CODE ANN. § 46-18-301 (West 2005); MONT. CODE ANN. § 46-18-303 (West 2005); MONT. CODE ANN. § 46-18-304 (West 2005); NEB. REV. STAT. ANN. § 28-105.01 (4) (West 2003); NEB. REV. STAT. ANN. § 29-2520 (West 2003); NEB. REV. STAT. ANN. § 29-2523 (West 2003); NEV. REV. STAT. ANN. 175.552 (Michie 2003); NEV. REV. STAT. ANN. 200.03 (Michie 2003); N.H. REV. STAT. ANN. § 630:5 (Michie 2005); N.J. STAT. ANN. § 2C: 11-3 (c) (West 2005); N.Y. CRIM. PRO. LAW § 400.27 (West 2005); N.Y. PENAL LAW § 125.27 (West 2005); N.C. GEN. STAT. § 15A-2000 (Michie 2003); OHIO REV. CODE ANN. § 2929.03 (West 2005); 42 PA. CONS. STAT. ANN. § 9711 (West 2005); S.C. CODE ANN. § 16-3-20 (West. 2004); S.D. COD. LAWS § 23A-27A-4 (Michie 2003); TENN. CODE ANN. § 39-13-204 (Michie 2003); UTAH CODE ANN. § 76-3-207 (Michie 2005).

20. The nine states that consider dangerousness do so in a variety of different ways. Two states consider dangerousness as an aggravating factor, but do not make dangerousness considerations requisite for a death sentence. OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 2006);

make these jury determinations a prerequisite for a capital sentence.[21] Twenty-nine of the thirty-eight states permitting the death penalty do not allow any consideration of future dangerousness.[22]

Furthermore, the phrasing of the questions during the penalty phase makes this unusual provision extremely pertinent during capital trials. In his 1977 article on issues in capital punishment in Texas, David Crump explains that "[o]rdinarily in a capital case the violence question is determinative."[23] Crump supports this assertion with an analysis of the context in which juries make determinations of future dangerousness:

> By the time the jury reaches the sentencing hearing it has usually found the defendant guilty of a hired killing, robbery-murder, or like offense in which deliberation is clearly present and provocation is clearly absent. Since that is the case, the attorneys frequently concentrate their efforts on the violence question. Unfortunately, however, the violence question is peculiarly difficult to prove or to disprove under the conventional rules of evidence.[24]

WYO. STAT. ANN. § 6-2- 102(h) (xi) (Michie 2005). Four states allow juries to consider the *absence* of future dangerousness as a mitigating factor. COLO. REV. STAT. ANN. § 18-1.3-1201(4)(k) (West 2005); MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(vii) (Michie 2005); N.M. STAT. ANN. § 31-20A-6(G) (Michie 2003); WASH. REV. CODE § 10.95.070(8) (West 2006). Texas and Oregon both require juries sentencing defendants to death to consider "special issues" that include future dangerousness. TEX. CODE CRIM. PROC. ANN. art 37.071(b)(1) (Vernon 2005); OR. REV. STAT. § 163.150(1)(b)(B) (2003). Lastly, Virginia law requires a jury finding beyond a reasonable doubt that the defendant constitutes a "continuing serious threat to society" *or* that defendant's conduct was "outrageously or wantonly vile, horrible, or inhuman" to impose a death sentence). VA. CODE § 19.2-264.4(C) (Michie 2004).

21. TEX. CODE CRIM. PROC. ANN. art 37.071(b)(1) (Vernon 2005); OR. REV. STAT. § 163.150(1)(b)(B) (2003).

22. TEXAS DEFENDER SERVICE, DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS xii (2004) [*hereinafter* TDS]. "Texas is only one of three states in the nation that allows highly speculative, often inaccurate evidence on the possibility of future bad acts to play a crucial role in life and death decisions made by juries. Twenty-nine of the 38 death penalty states do not allow for consideration of future dangerousness at all in their capital sentencing procedures. Six other states allow speculative future dangerousness evidence to play a limited role in the sentencing decision."

23. Crump, *supra* note 18, at 561.

24. *Id. See also* Robert Wayne Gordon, Comment, Crystal-Balling Death?, 30 BAYLOR L. REV. 35, 53 (1978). "A careful analysis of the three special issues under Article 37.071 will reveal that the second issue is almost always going to be the only one on which the jury actually decides anything it has not already decided. By the time the jury reaches the sentencing hearing it has usually found the defendant guilty of a hired killing, robbery-murder, or other like offense in which deliberation (first special issue) is clearly present and provocation (third special issue) is clearly absent. Thus, the second special issue is, in reality, the life or death question in the ordinary capital murder case." Guy Goldberg and Gena Bunn, *Balancing Fairness and Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. L. & POL. 49, 128 (2000) (calling future dangerousness "the single most important factor in determining which defendants spend their lives in prison and which defendants are sent to the execution chamber").

Empirical evidence supports this statement. Based on a Capital Murder Study conducted by the Texas Judicial Council at the advent of this provision's enactment, "it is clear that the violence question is the determinative factor in the life or death struggle in all but a few cases."[25] In sum, a Texas capital jury must determine whether to sentence a defendant to life or death primarily by speculating on the defendant's probability for violent recidivism.[26] As capital trials are rare in Oregon but virtual banalities in Texas,[27] the future dangerousness jury question stands out as a uniquely determinative characteristic of the nation's most active capital system.

B. LEGISLATIVE HISTORY

A review of the legislative history of the current death penalty statute reveals that while the Texas Legislature expended considerable time and energy during the redrafting process, the future dangerousness provision received very little attention.[28]

The Texas future dangerousness provision was enacted following the Court's watershed decision in *Furman v. Georgia*. Prior to *Furman*, judges and juries received minimal guidance.[29] In *Furman*, the Supreme Court reviewed three cases in which a jury sentenced a defendant to death: one for a conviction of murder, the other two for rape.[30] Each justice sitting on the Court issued a separate opinion. The five-justice majority supported a per curiam order that held three statutes, including a Texas statute, in violation of the Eighth and Fourteenth Amendments.[31] Justices Brennan and Marshall found capital punishment to be cruel and unusual punishment, per se.[32] The remaining three justices condemned the discretionary power of the juries in capital cases and the erratic and inconsistent patterns of executions produced, primarily taking issue with the "wanton" and "freakish" way in which the juries imposed the death penalty.[33] State legislatures responded to *Furman* by

25. Crump, *supra* note 18, at n.128.

26. TDS, *supra* note 22, at xi.

27. Texas executes more inmates than any of the 37 other states with the death penalty. If Harris County were its own state, it would rank third. Death Penalty Information Center, *Number of Executions by State Since 1976, at http://www.deathpenaltyinfo.org/dpicreg.html.*

28. *See infra* note 52 and accompanying text.

29. Thomas Aumann, *Death by Peers: the Extension of the Sixth Amendment to Capital Sentencing in* Ring v. Arizona, 34 LOY. U. CHI. L.J. 845, 846 (2003). "For most of our nation's history, judges and juries handed down death sentences with little to no guidance."

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

31. *Id. at 239-240.*

32. *See id* (Brennan, J., concurring) (Marshall, J., concurring).

33. *Id.* at 310 (Stewart, J., concurring). "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *See also id.* at 253 (Douglas, J. concurring). "[O]ur task is not restricted to an effort to divine what motives impelled these death

drafting capital statutes that would remedy the constitutional problems identified by these three justices.[34]

While the *Furman* Court found the death penalty unconstitutional, as defined by Texas law in *Branch v. Texas*,[35] Texas and Georgia were not alone. Dissenting justices speculated that the Court's decision in *Furman* would commute the sentences of over 600 death row inmates across the country, invalidating almost every current capital statute.[36] For the most part, they were right. The day the decision was issued, it vacated death sentences in twenty-six states.[37] Ultimately, *Furman* invalidated the statutes of thirty-nine states and the federal government.[38] The Court effectively struck down every capital punishment law in the United States. In Texas, courts gave the *Furman* decision full effect, commuting all of the death sentences to life imprisonment[39] and putting the death penalty on hold.

But it was not long before the states whose laws *Furman* struck down decided to test the constitutional bounds of the decision. While the justices expressed a variety of opinions on improving the death penalty, *Furman* is ultimately read as a call to limit wide jury discretion in capital cases.[40] Before *Furman*, Texas possessed a capital punishment scheme allowing unguided jury discretion.[41] If the Texas Legislature could draft a capital statute that adequately limited jury discretion, preventing arbitrary and constitutionally unsound results, Texas could reinstate the death penalty. In the spring of 1973, this is exactly what the Texas Legislature attempted to do. Again, Texas was not alone. Thirty-five states enacted post-*Furman* death penalty legislation.[42]

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penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."

34. *See id* (Douglas, J., concurring) (Stewart, J., concurring) (White, J., concurring).

35. Branch v. State, 447 S.W.2d 932 (1969), *rev'd* by Furman, 408 U.S. at 238.

36. *See, e.g.*, Furman 408 U.S. at 417 (Powell, J., dissenting).

37. *See* Stewart v. Massachusetts, 408 U.S. 845 (1972) (per curiam); Furman, 408 U.S. at 932-41 (1972) (orders vacating death sentences).

38. Dissenters pointed out the breadth of the order. *See* Furman, 408 U.S. at 411 (Blackmun, J., dissenting); *id.* at 417 (Powell, J., dissenting).

39. Hall v. State, 488 S.W.2d 94, 96-97 (Tex. Crim. App. 1972); Antwine v. State, 486 S.w.2d 578, 581 (Tex. Crim. App. 1972); Tenzeno v. State, 484 S.W.2d 374 (Tex. Crim. App. 1972).

40. Daniel Suleiman, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 445 (2004). "[T]he central concern behind the *Furman* and *Gregg* decisions—that giving juries complete sentencing discretion (or no discretion) produces arbitrary and discriminatory results—goes directly to the issue of culpability or blameworthiness."

41. *See, e.g.*, TEX. PENAL CODE art. 1189 (Vernon 1969) (stating that "a person guilty of rape shall be punished by death or by confinement in the penitentiary for life, for term of years not less than five").

42. Lisa L. Havens-Cortes, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, n.20 (1993).

The Texas effort, House Bill 200, became effective on June 14, 1973. The new law reinstated the death penalty for specific categories of homicide, while trying to avoid the "cruel and unusual" aspects outlined in the *Furman* decision.[43] House Bill 200 passed the House by a vote of 98 to 38 and went to the Senate on May 10, 1973.[44] The bill mandated the death penalty for three specific circumstances and included a rigorous test for prospective jurors.[45] The Senate made a variety of changes, such as replacing the mandatory features of the law with specific circumstances under which capital punishment would be applicable,[46] modifying jury selection,[47] and enumerating certain aggravating and mitigating circumstances to be considered during a death sentence.[48] However, the House rejected the amended bill and referred it to a joint conference committee.[49] The bill that ultimately passed was a compromise, drawing from both the House and Senate versions.[50] The Texas law resulted from several months of deliberation.[51] However, while the new capital punishment laws in their entirety may have sprung from careful consideration, the "continuing threat to society" question did not appear to receive a great deal of attention. Texas Defender Service writes that "[t]he 'future dangerousness' issue was a hurried and last-minute addition to the death penalty statutes after the *Furman* ruling. The issue was not included in the original bill debated and was added by a committee at the end of the session."[52] Because the Texas legislators did not debate the future dangerousness provision, we must speculate from the overall legislative purpose of the newly drafted capital laws to determine what the representatives wanted to accomplish with this provision.

House Bill 200 expresses a sincere effort on behalf of the Texas Legislature to create a death penalty structure that complies with *Furman*'s constitutional mandates.[53] "The entire procedure was

43. TEX. LAW 1973, ch. 426, arts. 1-3 (1973).

44. TEX. H.R. JOUR. 3363 (1973).

45. Circumstances warranting death included murder of a peace officer or firemen in the course of official duty, murder of a penal employee in the course of escape, or murder during certain enumerated felonies. TEX. H.R. JOUR. 3217-25 (1973). The provision on jurors disqualified a juror that "has a bias or prejudice for or against the infliction of the death penalty which would affect his determination of any material issue of fact." TEX. H.R. JOUR. 3221-22 (1973).

46. Tex. SEN. JOUR. 1535-36 (1973).

47. *Id.* at 1536.

48. *Id.* at 1539.

49. TEX. H.R. JOUR. 4677-78 (1973); TEX. S. JOUR. 1743 (1973).

50. For a comparison of the final law to House and Senate versions, see Michael Kuhn, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410, 418 (1973-1974) (Table 1).

51. *Id.* at 420-21.

52. TDS, *supra* note 22, at 2-3.

53. Kuhn, *supra* note 50, at 423.

devised to avoid the problem of excessive jury discretion and potential discrimination that the Supreme Court condemned in *Furman*."[54] However, the Texas Legislature was careful not to restrict the jury excessively. Lawmakers wanted to strike a balance between limiting jury discretion and preserving the traditional legal role of the jury.[55] Judging from the drafting and redrafting of the new capital statute, Texas legislators sought to devise a constitutionally sound system of capital punishment to eliminate unfair and inconsistent implementation of the death penalty by giving the jury guidance, but without divesting jurors of their fact-finding power.

Furthermore, the Texas House and Senate did not intend every defendant guilty of capital murder to be sentenced to death. In lieu of creating a mandatory system of capital punishment, which is a constitutionally viable option,[56] the Texas Legislature chose to bifurcate its capital trials. This decision indicates that, even after convicting a defendant of capital murder, juries still have the opportunity to make additional evaluations and thereby not sentence certain defendants to death.[57] As discussed above, under current law, the primary criterion differentiating those found guilty of capital murder who should receive life in prison or alternatively, death, is future dangerousness.

The Texas Legislature constructed the questions in Article 37.071(b) to distinguish between defendants guilty of capital murder during the sentencing phase. As previously stated, because the jury often decides deliberateness prior to sentencing, and mitigation consists of balancing, the question of future dangerousness is frequently determinative. In addition to its determinative value, the future dangerousness question has theoretical import. "[I]n terms of sentencing philosophy, the violence question is pertinent. Incapacitation of the dangerous offender is its primary concern, and that is at least one basis upon which capital punishment is said to be justifiable."[58] Thus, the Texas Legislature intended to reserve the death penalty for those defendants who, in addition to being guilty of capital murder, threaten society – thereby making their execution, in theory, for the greater good.

C. WHY DANGEROUSNESS AS A DIFFERENTIAL?

54. Crump, *supra* note 18, at 533.

55. Kuhn, *supra* note 50, at 421. "The sentencing procedure attempts to avoid arbitrary and unpredictable aspects without unduly divesting the jury of its traditional role as the communal conscience."

56. Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990) (stating that a mandatory death penalty is not unconstitutional as long as jury may consider relevant mitigating evidence).

57. *See* TDS, *supra* note 22, at 3.

58. Crump, *supra* note 18, at 455.

As previously observed, in redrafting the capital statute, the Texas Legislature made future dangerousness a determinative factor, yet the legislative history sheds little light on this decision. I speculate that Texas lawmakers had a dual goal in limiting the death penalty to dangerous defendants: 1) to prevent violent inmates from committing future crimes (both inside and outside prison) and 2) to restrict the class of defendants eligible for death in compliance with constitutional death penalty jurisprudence.

Juries today rely heavily on expert predictions of future violence in capital trials. This form of testimony originated in the 1970s in civil commitment cases,[59] and courts continue to rely heavily on psychiatry-based future dangerousness predictions in civil commitment cases.[60] While states vary as to what must be proven, all states include a dangerousness element,[61] and all civil commitment procedures include a definition of mental illness, yet that definition varies by state.[62] States also define who is eligible to apply for a petition.[63] Psychologists or psychiatrists often testify at these hearings.[64] Additionally, each civil commitment statute includes provisions for continuing judicial review after the initial hospitalization.[65]

Determinations of dangerousness for civil commitment purposes occasionally intersect with criminal law. For example, a recent article in the New York Times detailed the current movement towards the indefinite civil commitment of violent sexual predators following their prison sentences. According to the article, "a new jury would determine whether the defendant was likely to strike again, taking into account the victim's age, the nature of the crime and whether it was a first offense."[66] Currently, sixteen other states have similar laws regarding violent sexual predators.[67] Both New York Governor George Pataki[68] and the New York State Senate,

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59. TDS, *supra* note 22, at 10. "The two primary types of court proceedings in which psychiatrists and psychologists routinely testify are the penalty phase of capital murder trials and civil commitment hearings."

60. Joanmarie Ilaria Davoli, *Psychiatric Evidence on Trial*, 56 S.M.U. L. REV. 2191, 2203 (2003).

61. *Id.* at 2204.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Lisa W. Foderaro, *Pirro Seeks Confinement for Violent Sex Offenders*, N.Y. TIMES, Feb. 2, 2005, at B6.

67. Arizona, California, Florida, Illinois, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, South Carolina, Texas, Virginia, Washington, and Wisconsin have instituted such laws.

68. Foderaro, *supra* note 66, at B6.

which voted to enact such a law in June 2003,[69] favor the passage of this legislation. The purpose of this law is to prevent future crimes.

The insanity defense is another area in which determinations of future dangerousness intersect with criminal law. Acquittal by reason of insanity often results in preventative detention. Thus the critical issue is not whether to detain a mentally ill defendant, but when to release him. Among the standards for release are sanity and the absence of dangerousness. According to Abraham Goldstein, some state laws make "no reference whatever to 'sanity' or to the mental condition of the patient. They ask only whether continued detention is necessary for the safety of the patient or the public. The patient who is not dangerous is to be released, even if he is mentally ill."[70] Detention in these cases therefore relies not upon mental health but upon future dangerousness. In the jurisdictions employing a dangerousness element, "the therapeutic basis for the commitment is virtually abandoned and its roots in preventative detention are made most explicit."[71] Prevention is the major goal of determining dangerousness.

As seen in cases involving both the insanity defense and civil commitment hearings, differentiating between dangerous and non-dangerous capital defendants is in the spirit of prevention, not punishment. In his examination of the jurisprudence of prevention, Edward P. Richards states that "[i]n the prevention cases, the Supreme Court has allowed the disassociation of punishment and prevention in criminal law: states may now restrict liberty of individuals to protect public welfare, irrespective of the nature of the threat."[72] Often these preventative strategies involve speculations of future dangerousness.

Under this analysis, capital cases in Texas exemplify a preventative mentality. Death sentences turn on the underlying substantive issue of whether the prosecution adequately proves to jurors that the capital defendant is so dangerous as to warrant the death penalty.[73] Furthermore, the wording of Article 37.071(b)(1) indicates that the state must convince jurors beyond a reasonable doubt that there is a mere *probability* of future dangerousness,

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69. The New York State Senate passed the proposed amendment to New York Mental Hygiene Law on June 13, 2003. *See* Civil Commitment of Sexually Violent Predators, Art. 10, S.5556, SFY 2003-2004 (2003), *available at* http://criminaljustice.state.ny.us/legalservices/civil_commitment.htm.

70. ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 148 (1967).

71. *Id.*

72. Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 331 (1989).

73. *Id.* at 359. The article contains a discussion of *Barefoot v. Estelle* as a prevention case, explaining that "Barefoot is a prevention case because the underlying substantive issue was whether Texas has proved that Thomas Barefoot was so dangerous to society as to merit the death penalty."

making the burden of proof on this issue unsettlingly low.[74] Richards explains that although radical, differentiating between capital defendants on mere probability may in fact be justifiable:

> While this is an extreme result, it may nonetheless be rational. The issue of future dangerousness is not reached until the defendant is convicted of capital murder. Constitutionally, Texas could sentence the defendant to death without further findings. Instead it requires the defendant's life to be balanced against the potential threat that he or she poses to society.[75]

Frank G. Carrington states this proposition more bluntly: "There is nothing like an execution to prevent a second murder."[76] While a life sentence incapacitates, death incapacitates completely. In his dissent in *Roberts v. Louisiana*, a companion case to *Gregg v. Georgia*, Justice White observed that "death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not."[77] A prisoner sentenced to life may be released on parole, commit crimes in prison, or escape.

The preventative goal of future dangerousness determinations may indicate that legislators were aware of the significant lapse in time between conviction and execution. Being a "continuing threat to society" has implications not only for society at-large, but also for the prison population. Defendants convicted of violent offenses (such as capital murder) would not be released but rather would be placed within the general prison population among other prisoners. Inmates who pose a legitimate future danger and are not executed may be a threat to their fellow prisoners and guards.[78] Thus, when presenting the jury with the issue of future dangerousness, courts have understood "society" to include prison society.[79] Prison is, after all, where the accused will spend a great deal of his life. The

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74. *Id.* at 360. "The state's burden of proof was so slight that Barefoot could have been put to death as a regulatory restriction."

75. *Id.* at 363-64.

76. FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 111 (1978).

77. Roberts v. Louisiana, 428 U.S. 325, 354 (1976) (White, J., dissenting).

78. CARRINGTON, *supra* note 76, at 105. "Why don't we just give murderers a life sentence and keep them inside forever so they can't harm the innocent in our society? Because . . . they can and do harm other prisoners, and guards. . ."

79. Garcia v. State, 57 S.W.3d 436, 441 (Tex.Crim.App.2001) (citing Ladd v. State, 3 S.W.3d 547, 557 (Tex.Crim.App.1999) (interpreting "continuing threat to society" as "if allowed to live, would commit criminal acts of violence in the future, so as to constitute a continuing threat to people and property, whether in or out of prison"); *see, e.g.*, Masterson v. State, 2005 WL 236822, at *4 (Tex. Crim. App. 2005) (stating that "the evidence was strongly suggestive that Appellant would be, and would strive to be a continuing threat both in prison and in free society, were he ever to get there").

language of the statute seeks to prevent future crime, both in and out of prisons, making the avoidance of future violence a likely motivator for the creation of the future dangerousness question.

Yet, while future dangerousness may have been invoked in the spirit of prevention, the use of a mandatory death penalty was a constitutionally viable option at the time. If prevention had been the only goal of the Texas Legislature in drafting the new capital statute, one would expect lawmakers to err on the side of caution and sentence all defendants guilty of capital murder to death. However, this is not what the legislators did, and as such, we must consider their motivation behind examining future dangerousness beyond preventing future violence.

Future dangerousness determinations have a limiting function. Arguably, by including this provision in the law, the Texas Legislature not only sought to execute the dangerous capital defendants, but also to spare the non-dangerous. Lawmakers were softening the penalty, reserving it only for those defendants who prosecutors demonstrate as constituting a continuing threat. The drafters of the law must have felt that there were some defendants who, while statutorily guilty of the crime of capital murder, should not receive a death sentence. By law, juries sentence such individuals to life imprisonment. Capital punishment is thereby not merely the result of a retributivist instinct on the part of the legislature, as not all those guilty of capital murder must receive the death penalty. The system intends to be individualistic and distinguish between guilty defendants in the sentencing phase.

Whereas executing the dangerous serves the goal of prevention, showing mercy to the non-dangerous also serves an important legislative interest. By restricting the death penalty to a narrower class of defendants, legislators were likely attempting to remedy some of the constitutional infirmities articulated in *Furman*.[80] Furthermore, the use of individualized sentencing based on the characteristics of the particular defendant allows for the requisite degree of discretion.[81] Thus, there are constitutionally salient reasons for not executing non-dangerous capital defendants.

In sum, the legislature intended to craft an individualized, constitutionally permissible capital structure by limiting juror discretion using sentencing questions that ultimately reserve the death penalty for those capital defendants whose continued existence would continue to threaten society. This intention raises two

80. *See, e.g.*, Pulley v. Harris, 465 U.S. 37 (1984); Zant v. Stephens, 462 U.S. 862 (1982); Lowenfield v. Phelps, 484 U.S. 231 (1988).

81. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976) (striking down mandatory statute post-*Furman* on the grounds that the statute did not allow the jury enough discretion to consider the individual case); *see also* Lockett v. Ohio, 438 U.S. 586 (1978).

important questions: (1) How should the fact-finder determine the probability of future dangerousness? (2) How should the system deal with death row inmates who, despite being found a continuing threat at their trials, have proven that they present no real danger?

D. DETERMINING DANGEROUSNESS

If the probability of being a "continuing threat to society" is to distinguish between a life sentence and a death sentence, we should investigate the meaning of this phrase. In his partial concurrence in *Jurek v. State*, Judge Odom of the Texas Court of Criminal Appeals discusses the meaning of this newly created statutory provision:

> What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a 'probability' that he will perform certain acts in the future? Did it mean, as the words read, is there *a* probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, yet it is some probability, *a* probability. . . . The statute does not require a particular degree of probability but only directs that *some* probability need be found.[82]

As Odom points out, the legislature is silent as to how serious a probability need be under Article 37.071(b)(1) in order for the jury to answer this question affirmatively.

Failing to adequately define a method for the determination of dangerousness creates the potential of producing unconstitutionally arbitrary results. In *Cross v. Harris*, the D.C. Circuit indicated that a framework is necessary for determining what constitutes a dangerous act:

> Without some such framework, 'dangerous' could readily become a term of art describing anyone whom we would, all things considered, prefer not to encounter on the streets. We did not suppose that Congress had used 'dangerousness' in any such Pickwickian sense. Rather, we supposed that Congress intended the courts to refine the unavoidably vague concept of 'dangerousness' on a case-by-case basis, in the

82. Jurek v. State, 522 S.W. 2d 934, 945 (Tex. Crim. App. 1975), *aff'd by* Jurek v. Texas, 428 U.S. 262 (1976) (Odom, J., concurring in part and dissenting in part).

traditional common-law fashion.[83]

Although not a capital case, *Cross* articulates the problem of having juries base capital sentences on determinations of future dangerousness. The concept of what qualifies as a danger is vague and malleable. This ambiguity leaves the door open for jury discretion in defining a continuing threat to society. If the jury exercises too much leeway in this area, constitutional problems may arise. John Monahan writes:

> "[d]angerousness" confuses issues regarding *what* one is predicting with the *probability* one is assigning to its prediction. The word has a tendency in practice to degenerate from a characteristic of behavior to a reified personality trait. . . . The "prediction of dangerous behavior" is even more troublesome. "Dangerous behavior" may be thought of as a prediction in itself. It is a *conditional* probability.[84]

He suggests that it would simplify the discussion of dangerousness to instead refer to "violence" or "violent behavior," as these terms separate "definitional issues from probabilistic ones and keep the focus on actions rather than on personalities."[85] Violent behavior is defined as "acts characterized by the application or overt threat of force which is likely to result in [physical] injury to people."[86]

According to the Model Sentencing Act, there are two types of dangerous offenders: one "who has committed a serious crime against a person and shows a behavior pattern of persistent assaultiveness based on serious mental disturbance" and one who is "deeply involved in organized crime."[87] The Act's definition of dangerousness is intended to be fairly limited, the number of such offenders in a given state never totaling more than one hundred. Monahan notes that "if one considers all repetitive violent offenders who have a serious mental disturbance, one has reduced the concept of mental disturbance to a tautology."[88] Such tautological reasoning also creates a problem during capital determinations of dangerousness.

By the punishment phase of the trial, the jury has already

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83. 418 F.2d 1095, 1099 (1969).

84. JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 25 (1981).

85. *Id.* at 26.

86. *Id.*

87. *Id.* at 24.

88. *Id.*

found the defendant guilty of capital murder, a violent crime by definition. In *Smith v. State*, the Texas Court of Criminal Appeals implied that it would sustain a probability finding on dangerousness in every instance where a defendant has a prior record, also indicating that whenever a crime is "calculated and remorseless" the crime itself may be sufficient to sustain a determination of dangerousness.[89] This policy may result in a tautology: capital murder convictions frequently involve calculated and remorseless crimes, making the crime of capital murder alone enough evidence to support a dangerousness finding.[90] Such blending of the guilt and sentencing phases of a capital trial defeats the purpose of a bifurcated system. Dangerousness findings based solely on the circumstance of the offense should be reserved for only the most heinous of crimes.[91]

As indicated by the preceding sections on defining and determining dangerousness, future dangerousness is a vague concept, often confusing jurors and attorneys alike. This provision has been the primary source of contention regarding the modern Texas capital punishment law since it was first challenged in *Jurek v. State*.[92] In *Jurek*, the defendant challenged the constitutionality of the future dangerousness question, arguing that the provision was so vague as to be meaningless. Upholding the newly drafted statute, the United States Supreme Court discussed the problems of behavioral prediction and enumerated examples of evidence the jury could employ to make such an assessment.[93] Responding to the assertion that juries are incapable of accurately making determinations of future dangerousness, Justice Stevens wrote:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean it cannot be made. Indeed, prediction

89. Smith v. State, 540 S.W.2d 693, 697 (1976).

90. Crump, *supra* note 18, at 558-59. The court's opinion in *Smith v. State* "implies that the court will likely sustain a probability finding whenever the defendant has a prior record, since by committing a subsequent capital murder he will, by definition, have committed a 'surrender to misfortune,' which the court considers to be of 'extreme importance.' Alternatively, the court implies that an offense that is 'calculated and remorseless' in its entirety may be enough to sustain a finding by itself. If these implications are correct, it will be a rare capital murder case in which the evidence will not sustain a jury verdict on the violence issue, because it will be likely that the defendant has a criminal record for at least minor charges. It will be equally likely that the offense is calculated and remorseless, given the nature of capital murder."

91. *Id.* at 559. "[A]n affirmative jury verdict on the violence question should not be sustained on the fact of conviction of capital murder alone. . . . While the circumstances of the offense may, in a case such as *Jurek*, be sufficient by themselves to sustain a jury finding on the violence question, that should be true only of offenses that are exceptionally brutal or remorseless."

92. *Id.* at 556. "The phraseology of the question, however, is infelicitous and has sometimes proved confusing for both jurors and attorneys. In *Jurek v. State*, the court of criminal appeals indicated that the violence question was the primary source of contention."

93. Jurek v. Texas, 428 U.S. 262, 274-76 (1976) (plurality opinion).

> of future criminal conduct is 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.[94]

The Court, however, failed to note that there is much less at stake in the other uses of dangerousness determinations, such as admitting bail or deciding upon parole. Although members of the criminal justice system may make similar decisions countless times each day, only in capital sentencing proceedings do such determinations have potentially fatal results. Regardless, the Supreme Court ruled that juries are capable of evaluating and deciding future dangerousness.

The Court also suggested possible forms of evidence that jurors could use in arriving at their decision. According to the plurality opinion:

> 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 look further 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.[95]

A variety of evidence is available to prosecutors and defense attorneys alike to aid them in their efforts of proving or disproving future dangerousness. Yet despite the wide range of possible

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94. *Id.*

95. Jurek v. State, 522 S.W. 2d 934, 939-40 (Tex. Crim. App. 1975), *aff'd by* Jurek v. Texas, 428 U.S. 262 (1976).

evidentiary options, prosecutors have preferred one particular means for proving future dangerousness: expert medical testimony.

While the decision in *Jurek* "was guided by [the] recognition that the inquiry mandated by Texas law does not require resort to medical experts,"[96] the state has employed psychiatric experts to assist jurors in answering this query.[97] The use of psychiatric testimony ranks among the most unusual characteristics of capital trials.[98] Such evidence does not follow the typical requirements of expert testimony, including proof of expertise and reliability of evidence, or acceptance within the research community.

Moreover, it is debatable whether a degree in psychiatry assists in making determinations of future dangerousness in any way. As pointed out by Monahan, predictions of future dangerousness rely on speculation nested within speculation, not medical or scientific fact. Due to the highly speculative nature of the analysis, there is no currently accepted method for determining future dangerousness: "neither medical schools nor textbooks are capable of explaining the method and criteria by which such evaluations are to be made."[99] Because there is no recognized process for predicting future dangerousness, there is no medical training associated with making these predictions,[100] and wide discrepancies may exist between what psychiatrists consider indicia of dangerousness. Consequently, unlike other types of expert witness testimony, credentials in psychiatry do not necessarily qualify the witness to make determinations of dangerousness. Individual psychiatrists enjoy so much discretion in deciding how to arrive at their conclusions that "expert" witnesses are likely no better at predicting dangerousness than lay people.[101]

Furthermore, testing the accuracy of predictions of future dangerousness is not a simple endeavor. Empirical evidence on this subject is inherently difficult to produce, as future dangerousness determinations cannot be replicated in a controlled environment; the only possible way to examine the accuracy of predictions of

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96. Estelle v. Smith, 451 U.S. 454, 473 (1981).

97. *See* Collins v. State, 548 S.W.2d 368, 377 (Tex. Crim. App. 1976); Moore v. State, 542 S.W.2d 664, 675-76 (Tex. Crim. App. 1976); Livingston v. State, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976); Gholson v. State, 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976).

98. Crump, *supra* note 18, at 571. "One of the most unusual aspects of capital murder cases is the use of psychiatric testimony."

99. Nan Bussey Braley, *Estelle v. Smith and Psychiatric Testimony: New Limits on Predicting Future Dangerousness*, 33 BAYLOR L.REV. 1015, 1028 (1981).

100. Gordon, *supra* note 24, at 52-53.

101. *Id.* at 40. "The psychiatric profession has thus far been unable to demonstrate that it employs techniques and applies knowledge with regard to its ability to predict future dangerousness than could the techniques and knowledge available to laymen. It has simply been assumed that something in the education, training, experience, and techniques of psychiatrists makes such predictions more reliable and more valid than they would be in the absence of such education, training, and experience. That assumption may be incorrect."

dangerousness is via a retrospective analysis of actual determinations.[102] This, however, is not standard procedure. "[U]nlike other medical specialties, psychiatry lacks adequate statistics and follow-ups, because psychiatrists have not seriously attempted to check their methods and results in the way other medical doctors regard as their scientific duty."[103]

When researchers conduct such retrospective analyses, the results indicate that psychiatric predictions of dangerousness are more likely to be wrong than right. For example, in his 1970 article, *Some Fictions About Predictions*, Alan Dershowitz states that he and his researchers

> were able to discover fewer than a dozen studies which followed up psychiatric predictions of anti-social conduct. And even more surprisingly, these few studies strongly suggest that psychiatrists are rather inaccurate predictors; inaccurate in an absolute sense, and even less accurate when compared with other professionals such as psychologists, social workers and correctional officials; and when compared to actuarial devices, such as prediction or experience tables.[104]

Recent studies have reaffirmed these findings. According to the 2004 report published by the Texas Defender Service, expert witness testimonies regarding future dangerousness were incorrect in 95% of the cases examined by the study.[105] TDS used prison records of past and current death row inmates to determine which of these individuals proved to be threats to the prison community.[106] The report detailed numerous case studies of individuals found to pose future dangers but who had committed no serious infractions during their incarcerations,[107] including one inmate deemed a future danger by state experts but later found to be innocent.[108] Thus it appears

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102. Braley, *supra* note 99 at 1022-23. "Little empirical evidence exists concerning the accuracy of clinical predictions of dangerousness. Primarily, this is because controlled experiments, as a practical matter, are impossible to conduct. Any legitimate study would require the release of persons predicted to be dangerous, which would subject innocent persons to substantial risks. Consequently, the only available studies are natural experiments that involve unplanned situations, yet permit the assessment of predictions."

103. Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment*, 57 NW. U. L. REV. 19, 21 (1962).

104. Alan M. Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL ED. 24, 46 (1970).

105. TDS, *supra* note 22, at 23.

106. *Id.* at 21.

107. *See generally id.*

108. *Id.* at 25. "[Adam's] actual innocence did not prevent two state-paid 'experts' from announcing to the jury that after a brief interview with Adams, they had concluded that Adams would certainly continue to be a threat to society."

that several defendants sentenced to death based on future dangerousness determinations turned out to be compliant inmates, posing no risk to other inmates or prison guards.[109] The report found that this trend of non-violence held true even in cases of reduced sentences and increased opportunity to engage in violent behavior.[110] The TDS study concluded that "state sponsored experts are much more likely to be wrong than right in their predictions of dangerousness"[111] and "[the ninety-five percent] error rate caused an over-inclusion of non-violent inmates among those who were condemned to death."[112] Put succinctly by the report's authors: "Texas would execute 155 inmates to prevent continued violence by eight."[113] For the most part, experts tend to over-predict dangerousness.[114] Dershowitz explains that "violent conduct is extremely rare, even among the mentally ill, and any attempt to predict a rare event necessarily results in an undue number of false positives."[115]

The psychiatric community as a whole has rejected such determinations. Following the upholding of the new capital statute, the Supreme Court allowed the use of speculative psychiatric testimony to prove future dangerousness in the landmark case *Barefoot v. Estelle*[116], yet not without some resistance in the psychiatric community. The American Psychological Association (APA) filed an amicus brief in *Barefoot*, stating that "[t]he unreliability of psychiatric predictions of future dangerousness is by now an established fact within the profession."[117] The APA asserted that mental health professionals such as psychologists and psychiatrists are unable to make accurate determinations of long-term future dangerousness, and this organization continues to urge that expert testimony on future dangerousness be found inadmissible at capital sentencing hearings.[118] However, in *Barefoot*, the Court rejected the APA assertion that future dangerousness was not a reasonable foundation upon which to base a capital sentence, quipping that "[t]he suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is

109. *Id.* at xiv.

110. *Id.*

111. *Id.* at xi.

112. *Id.* at 34.

113. *Id.* at xv.

114. Braley, *supra* note 99, at 1023. "One reason for this tendency to overpredict is that predictions of violence have little opportunity to be approved or disapproved, because those who are predicted to be 'violent' are usually incarcerated. Erroneous predictions of nonviolence are more visible."

115. Dershowitz, *supra* note 104, at 46.

116 TDS, *supra* note 22, at 12.

117. Brief of Amicus Curaie, Am. Psychiatric Ass'n, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080).

118. TDS, *supra* note 22, at 12.

somewhat like asking us to disinvent the wheel."[119] Similarly, despite the infirmities in reliability, the Texas Court of Criminal Appeals has not ruled on the issue of whether the field of psychiatry is sufficiently advanced so as to accurately predict future dangerousness.[120] The Texas Court of Criminal Appeals, which reviews all capital cases, has consistently allowed expert psychiatric testimony during the punishment phase. Predictive psychiatric evaluations of dangerousness remain a routine occurrence in capital murder trials despite their lack of method, discernible accuracy, or professional support.[121]

While psychiatric testimony on dangerousness has proven to be unreliable, the danger lies in juries treating such evidence as credible and highly determinative when considering dangerousness. Research indicates that juries and judges often act in compliance with scientific experts, mistakenly overestimating the accuracy of their statements, believing them to be close to infallible.[122] One can attribute this phenomenon to an "assumption of expertise" that psychiatrists are able to offer reliable and valid testimony regarding future dangerousness. "[J]udges and legislators are seemingly unaware of the enormous and relatively consistent body of professional literature questioning the reliability and validity of psychiatric evaluations and predictions."[123] Thus, despite the serious reliability and evidentiary problems arising from predictive testimony, juries are inclined to feel secure basing their determinations of future dangerousness on expert testimony.[124] In his dissent in *Barefoot*, Justice Blackmun touched on the issue of both the perceived authority of a doctor and the unreliability of predictive testimony:

> In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person's life is at stake...a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical

119. Barefoot, 463 U.S. at 896.

120. *See id.*

121. Davoli, *supra* note 60, at 2203.

122. Gordon, *supra* note 24, at n.6.

123. Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 695-96 (1974).

124. TDS, *supra* note 22, at xi. "Particularly troubling is the Texas prosecutors' use of state-paid expert witnesses employed to convince juries of a defendant's 'future dangerousness.' As the defendant's fate—and the prosecutor's success—hinges primarily on this question, the apparently infallible testimony of state-commissioned expert witnesses is a deceptive but reassuring hook on which a jury can hang its hat."

specialist's word, equates with death itself.[125]

Blackmun recognizes at once the sway of a doctor before a jury of lay people and the unreliable nature of expert testimony regarding future dangerousness. The result here is unfortunate. Given the determinative nature of the dangerousness question and the reliance on expert psychiatric testimony, court-appointed psychiatrists in effect make the determinations of dangerousness.[126] The result is rather unsettling: "whether a man lives or dies may well depend upon the expert testimony of a single psychiatrist."[127] Article 37.071(b)(1) limits capital punishment to those individuals who will continue to threaten society. It then follows that if psychiatrists over-predict dangerousness and jurors defer to expert authority, the current application of the statute is overbroad, ultimately resulting in the death of non-violent capital inmates.

E. HOW TO TREAT NON-VIOLENT INMATES SENTENCED TO DEATH

Executing a rehabilitated or otherwise non-dangerous individual runs contrary to the language and apparent legislative intent of Article 37.071(b)(1). The state should devise a procedure to reevaluate the dangerousness of death-row inmates prior to execution in order to better serve the goals of the Texas Legislature and of *Furman* itself.

The execution of rehabilitated or otherwise non-dangerous inmates is by no means a novel problem, yet the Supreme Court remains largely silent on this issue. Justice Marshall, however, has spoken out regarding the constitutional problems of executing a non-dangerous inmate when the applicable capital statute involves a finding of dangerousness. Marshall expressed his views in his dissent in *Evans v. Muncy*, which involved Virginia's death penalty statute. Although Virginia, unlike Texas, does not require a finding of future dangerousness in order for a defendant to be eligible for the death penalty, Virginia does permit the jury to consider future dangerousness.[128] Wilbert Evans, an inmate on Virginia's death row, petitioned the Supreme Court for certiorari to consider whether the Constitution forbids the execution of a completely rehabilitated

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

126. Gordon, *supra* note 24, at 55. "The answer to the second special issue, for the most part, is being determined by the psychiatrist, most often by court-appointed psychiatrists, and not by the jury which ostensibly considers all the many factors suggested by the Supreme Court."

127. *Id.* at 35. Overworked and underfinanced capital defense attorneys often fail to obtain psychiatric experts of their own.

128. Virginia juries may consider future dangerousness *or* whether the defendant's conduct was "outrageously or wantonly vile, horrible, or inhuman." *See supra* note 20.

person, someone that no rational fact-finder would conclude poses a threat to society.[129] Uncontested affidavits of guards taken hostage during a prison uprising indicated that Evans actively attempted to quell the riot, thereby saving the lives of hostages and preventing the rape of a nurse.[130] In his habeas writ, Evans asked that "the jury's prediction of his future dangerousness be reexamined in light of his conduct during the Mecklenberg uprising."[131] The Supreme Court denied certiorari, most likely due to the state's argument that the allowance of such claims would result in an endless stream of litigation and undermine adjudicative finality. Justice Marshall replied with a scathing dissent:

> This Court's approval of the death penalty has turned on the premise that given sufficient procedural safeguards the death penalty may be administered fairly and reliably. Wilbert Evans' plea to be spared from execution demonstrates the fallacy of this assumption. Notwithstanding the panoply of procedural protections afforded Evans by this Court's capital jurisprudence, Evans today faces an imminent execution that even the State of Virginia appears to concede is indefensible in light of the undisputed facts proffered by Evans. Because an execution under these circumstances highlights the inherently cruel and unusual character of capital punishment, I dissent.
>
> Remarkably, the State of Virginia's opposition to Evans' application to stay the execution barely contests either Evans' depiction of the relevant events or Evans' conclusion that these events reveal the clear error of the jury's prediction of Evans' future dangerousness. In other words, the State concedes that the sole basis for Evans' death sentence—future dangerousness—in fact does not exist.
>
> The State's interest in 'finality' is no answer to this flaw in the capital sentencing system. It may indeed be the case that a State cannot realistically accommodate postsentencing evidence casting doubt on a jury's finding of future dangerousness; but it hardly follows from this that it is Wilbert Evans who should bear the burden of this procedural limitation. In other words, if it is impossible to construct a system

129. Evans v. Muncy, 498 U.S. 927 (1990).
130. *Id.* at 928.
131. *Id.* at 929.

> capable of accommodating all evidence relevant to a man's entitlement to be spared death—no matter when that evidence is disclosed—then it is the system, not the life of the man sentenced to death, that should be dispatched.
>
> The indifferent shrug of the shoulders with which the Court answers the failure of its procedures in this case reveals the utter bankruptcy of its notion that a system of capital punishment can coexist with the Eighth Amendment. A death sentence that is dead wrong is no less so simply because its deficiency is not uncovered until the eleventh hour. A system of capital punishment that would permit Wilbert Evans' execution notwithstanding as-to-now unrefuted evidence showing that death is an improper sentence is a system that cannot stand.
>
> I would stay Wilbert Evans' execution.[132]

Justice Marshall's words ring even more true when applied to a convict in a state where a jury must find future dangerousness in order to mete out a death sentences. His points regarding the frailties of the system and the relevance of evidence in "the eleventh hour" are also of particular importance. The current system of appeals is geared toward discovering innocent parties, not commuting the sentences of guilty but rehabilitated or otherwise non-dangerous inmates. An alternate system should be developed in states using future dangerousness as a justification for death sentences to ensure that non-dangerous offenders are not executed.

James Allridge, like Wilbert Evans, proved his jury wrong during his time in prison. Records generated from years of Allridge's incarceration indicate that the inmate posed no continuing threat. While more accurate jury determinations at trial (placing the inmate in general population and not on death row) are clearly preferable, there should be a venue in which the system may weigh this "eleventh hour" evidence. As Justice Marshall wrote, "A death sentence that is dead wrong is no less so simply because its deficiency is not uncovered until the eleventh hour." I propose a system to reevaluate jury determinations to better serve the purpose of Article 37.071(b).

III. POSSIBLE REMEDIES

Before proposing my own solution, I explore several possible but ultimately unsatisfactory solutions to the problem presented in

132. *Id.* at 927-31 (Marshall, J., dissenting).

Section II.

A. ROLE OF JURY

One possible solution is to take the job of determining future dangerousness out of the jury's hands. If empirical evidence indicates that findings of future dangerousness are potentially overbroad, perhaps we should not leave this important decision to the jury. However, this reform is not a viable option because the role of the jury is too embedded in criminal trials and in capital cases in particular. Although the jury may arrive at erroneous determinations of dangerousness, the presence of a jury is essential to the fairness of capital proceedings.

In the criminal justice system, the jury serves as a gatekeeper between the government and the community, protecting defendants against possible abuse or collusion by district attorneys, prosecutors, and judges. This fundamental liberty is essential to ensuring fairness during both phases of capital trials, where a conviction is accompanied by the most serious of consequences.

The Court recognized the importance of this liberty in *Duncan v. Louisiana*.[133] Writing for the majority, Justice White expounded upon the right to a jury trial, calling it "an inestimable safeguard."[134]

Furthermore, the Court's decisions in *Apprendi v. New Jersey* and *Ring v. Arizona* created a Sixth Amendment right of jury determination for any factor increasing the punishment beyond the statutorily dictated maximum, including in death cases.[135] In evaluating a hate crimes statute, the Court in *Apprendi* held that the Constitution requires that any factor increasing a sentence beyond the maximum statutory penalty be determined by a jury beyond a reasonable doubt.[136] In *Ring*, the Court extended this ruling to capital cases, holding that the Sixth Amendment entitles defendants to a jury determination of any factor used for determining a sentence

133. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

134. *Id.* at 156. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."

135. Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002).

136. Apprendi, 530 U.S. at 484. "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached."

of death.[137] While the state argued that judges may be better equipped to evaluate the appropriateness of a particular sentence, the Court noted that most states look to juries to make this determination.[138] In his concurrence, Justice Kennedy wrote: "It is beyond question that during the penalty phase of a first-degree murder prosecution in Arizona, the finding of an aggravating circumstance exposes 'the defendant to a greater punishment than that authorized by the jury's guilty verdict.'"[139] Determinations resulting in death sentences are the equivalent of sentencing factors, making *Apprendi* applicable.[140] Although jury determinations of future dangerousness may be unreliable or incorrect, the jury enjoys an essential role in capital trials that should be preserved.

B. APPELLATE SYSTEM

The purpose of our criminal appellate system is to protect the innocent from conviction, yet the system does not provide opportunities to identify and correct erroneous jury determinations of future dangerousness. This is because appellate courts must presume that a jury's factual determinations are correct. Jury verdicts are only reviewable for factual[141] and legal *sufficiency*, not correctness.[142] Consequently, someone convicted of capital murder may seek post-conviction relief only by asserting legal, not factual, error. Federal courts further limit issues on appeal by hearing only constitutional violations.[143] Neither direct appeals nor habeas corpus proceedings (in both states and federal courts) provide an opportunity to relitigate facts found by the jury, including future dangerousness. Put simply, a future dangerousness finding is not

137. Ring, 536 U.S. at 589.

138. *Id.* at 607-08.

139. *Id.* at 613 (Kennedy, J., concurring).

140. *Id.* at 609. "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both."

141. For example, Florida has used the "no reasonable jury standard" in reviewing judicial overrides of life sentences. *See* Fead v. State, 512 So. 2d 176, 178 (Fla. 1987); Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). In Texas, evidence is sufficient to support a finding of fact when the evidence as a whole rises to a level that would enable reasonable and fair-minded people to differ in the conclusions. Merrell-Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997). In some instances, a jury's verdict may be overridden on the grounds that "no reasonable jury" could have found as the jurors did.

142. Findings of fact by a jury are only reviewable for legal and factual sufficiency. In Texas, courts consider only the evidence and inferences supporting the finding, not the finding itself. *See* Minnesota Mining & Mfg. Co. v. Nishika Ltd., 953 S.W.2d 733, 738 (Tex. 1997). Anything more than a scintilla of evidence is legally sufficient to support a jury finding. Continental Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996).

143. *See generally* Laura Denvir Smith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 Val. U.L. Rev. 421 (2004).

challengeable on appeal.

After death row inmates exhaust their direct appeal and state and federal habeas petitions, a final opportunity to prevent the carrying out of a death sentence exists in applications for clemency or commutation, but clemency applications do not provide an adequate venue for challenging jury determinations of future dangerousness. Texas Administrative Code Title 37, Part 5, Chapter 143 outlines the procedure for clemency applications. Under this statute, prisoners may be eligible for a full pardon, a conditional pardon, a reprieve of execution, or a commutation of a death sentence.[144] Yet while these legal safeguards exist statutorily, they are rarely, if ever, invoked.

Clemency petitions for capital inmates are seldom granted. In discussing the clemency process in Texas, one scholar notes:

> In the twenty years since the Supreme Court reinstated the death sentence, a number of political and legal developments have converged to undermine the role of clemency in death cases. The result is that the inmate confronting the severest penalty often has the least chance of securing meaningful review of his petition for commutation or pardon.[145]

In Texas, inmates file clemency petitions with the Board of Pardons and Paroles.[146] The Board reviews the applications and votes for or against granting clemency.[147] The Board has no formal criteria for evaluating commutation petitions, and Board members have indicated that they would only review cases to determine innocence or lack of fair access to the courts.[148] Because an erroneous jury determination is unrelated to innocence claims or the right to access the courts, future dangerousness is not a topic of consideration for the Board. Furthermore, Amnesty International reported that

> [n]one of the testifying BPP members could clearly define what he or she would look for in a petition that

144. 37 TEX. ADMIN. CODE §143 (2005).

145. Coleen E. Klasmeier, *Towards A New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1508 (1995).

146. *See* TEX. CONST. art. IV, § 11.

147. *Id.*

148. Amnesty International, *The Death Penalty in Texas: Lethal Injustice*, March 1, 1998, *available at* http://web.amnesty.org/library/Index/engAMR10101998 [*hereinafter* "Lethal Injustice"]. "Although the Board has no criteria for what objective standards should be applied to a request for commutation ... comments by the Board's Chair, Victor Rodriguez, and Texas Governor George Bush indicate that the cases will only be reviewed to determine whether the inmate is innocent and had fair access to the courts."

> might merit clemency. Several members reviewed clemency petitions only to confirm that the prisoners had been duly convicted of terrible crimes and had received appellate review (foregone conclusions in most capital cases). Few of the members could recall until prompted that their clemency authority also extended to investigating claims and convening hearings. It was revealed that the Board's voting forms contain no provision for those options or any area for members to indicate reasons for their decisions.[149]

Again, given the infrequency of successful clemency petitions and the high number of erroneous determinations of future dangerousness, it is unlikely that Board members, who are not required to revisit this issue, would take future dangerousness into serious account when deciding whether to grant clemency petitions.

Nine other states have commuted death sentences based on rehabilitation.[150] Cases of rehabilitation exemplify incorrect determinations of dangerousness: if a jury finds that a capital defendant will pose a continuing threat to society, the implication is that the defendant is beyond redemption. Texas should follow the pattern established by other states and commute the death sentences of inmates who no longer pose a threat. However, as it stands, current clemency procedures fail to present an adequate venue for the challenging of predictive jury determinations, which Amnesty International categorizes as a human rights violation.[151]

IV. PROPOSED SOLUTION

As explored in Section II, capital juries, under the current sentencing structure, make their decisions regarding punishment based on the prevention of future violence. In its report entitled *Deadly Speculation*, the Texas Defender Service elaborates on juror intention within the current Texas framework:

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149. Amnesty International, *Killing Without Mercy: Clemency Procedures in Texas*, June 1, 1999, *available at* http://web.amnesty.org/library/Index/engAMR510851999 [*hereinafter* Clemency].

150. Lethal Injustice, *supra* note 148. "The Board and Governor's current criteria completely rule out the historical basis for granting commutation through executive clemency, which consider such factors as mercy, mental illness, equity and rehabilitation. Nine other US states have commuted death sentences based in part upon the inmate's rehabilitation."

151. Clemency, *supra* note 149. "Amnesty International has been forced to conclude that the Texas clemency process violates minimum human rights safeguards, by failing to provide any genuine opportunity for death row inmates to seek and obtain the reduction of their sentences. These procedures clearly fail to comply with reasonable concepts of fairness and provide no protection against arbitrary decision-making by the courts."

> In imposing death sentences, juries sought to protect society—the prison society of guards and other inmates, and the community at large—from inmates they were assured would commit serious acts of violence or kill again. Juries did not impose a death sentence out of concern that an inmate might illegally possess cookies or jalapenos while incarcerated. They did not seek to execute inmates who they thought might hang a sheet up as a curtain in their cell, yell an obscenity in the hallway, or refuse to shave. Yet the present system pressures juries to choose death for inmates who are able to peaceably co-exist in an institutional setting with other inmates and guards, regardless of the nature of their crime.[152]

As articulated by TDS, jurors aim to distinguish between the defendants who will continue to behave violently and those who will not in accordance with the language of the statute. If death row inmates commit no greater disciplinary offense during a long-term incarceration than the possession of certain banned foods or a lack of willingness to shave, the jury and the statute have not achieved their purpose. The presence of such non-violent prisoners on death row shows that assessments of future dangerousness are overly broad.

In order to better accomplish the law's intended purpose – to execute those who will continue to threaten society with their conduct and just as importantly, not those who won't – steps should be taken to protect against the execution of those intended to fall outside the scope of the statute. Further, the gravity and irreparability of death sentences weigh in favor of providing safeguards to ensure the accurate and narrow implementation of the law. "When the stakes are as high as they are with capital punishment, it is of fundamental importance to ensure that the system is operating fairly."[153] To allow capital trials to proceed in an inaccurate and overbroad fashion jeopardizes the integrity of the judicial system as a whole.[154]

Reevaluating a jury's determinations of future dangerousness prior to carrying out death sentences would avoid the execution of at least some non-violent death row inmates. Therefore, I propose keeping the Texas capital sentencing structure intact (in order to

152. TDS, *supra* note 22, at 35.

153. Goldberg, *supra* note 24, at 54.

154. TDS, *supra* note 22, at xi. "Basing outcomes of the most solemn proceedings in the American law on specious reasoning and conjecture threatens the integrity of the entire judicial system."

preserve the crucial participation of the jury) but introducing a hearing prior to execution to review the jury determination. Institutionalizing a forum for review would better serve the purpose of the Texas capital statute.

When making future dangerousness determinations, Texas capital juries are often presented with unreliable evidence relayed by persuasive medical experts, which lead the jurors to make incorrect determinations of future violent behavior. While we should not compromise the role of the jury, the criminal justice system must develop a procedure to counterbalance the probability of erroneous determinations, while maintaining the protection offered by the jury. As also previously observed, the appeals and clemency processes in Texas do not provide adequate opportunity for the review of jury determinations of future dangerousness. I, therefore, advocate a hearing close to the date of execution during which an official can use prison records to reevaluate the jury's prediction of dangerousness. The process I propose would not allow all inmates on death row to escape their sentence by engaging in superficial good behavior. The procedure for reevaluating jury determinations of future dangerousness should be specifically tailored to commute the sentences of non-dangerous inmates mistakenly sentenced to death.

The type of hearing I advocate avoids the nullification of a jury-imposed, statutorily-authorized capital sentence for mere good behavior in a number of different ways. First, the inmates themselves will bear the burden of proving that they do not pose a continuing threat. This allocation of the burden of proof is in keeping with the processes used to reevaluate the commitment of the criminally insane. In his book on the insanity defense, Goldstein notes that "[i]n virtually all jurisdictions, the patient who wishes to challenge his continued detention has the burden of persuading the court that he should be released. To do so, he must ordinarily prove he is sane or will pose no threat to the community."[155] Similarly, a capital inmate bears the responsibility of adequately demonstrating that he will not be a danger if he is transferred to the general population. The standard of proof for this determination should be rather high. In cases of the criminally insane, "[t]he evidence of recovery must lead to a 'substantial degree of certainty' that he will not be dangerous, perhaps even to proof beyond a reasonable doubt."[156] Again, the future dangerousness hearings of death row should mirror the process used to evaluate future dangerousness in other contexts; however, the difficulty of proving a probability of future behavior beyond a reasonable doubt has already been

155. GOLDSTEIN, *supra* note 70, at 153.
156. *Id.* at 154.

discussed. Thus, I propose using a clear and convincing evidence standard. Clear and convincing evidence requires a more certain determination than a mere preponderance of evidence but less than the stringent standard of beyond a reasonable doubt.[157] Furthermore, clear and convincing evidence is the traditional standard of proof for evaluating the dangerousness of institutionalized individuals.[158]

Second, the proposed process would limit the evidence a capital inmate may present in order to challenge the validity of his or her dangerousness determination. Like James Allridge, many inmates on death row may have numerous pen pals and advocates. While such character evidence may present a well-rounded picture of the inmate as a person, dangerousness rehearings should focus not upon the inmate's attributes as a human being but upon the possibility of his or her committing other dangerous acts if his death sentence is commuted to a life sentence. Thus, the process should limit the means of proof to evidence that speaks to the inmate's potential for dangerousness, such as prison records, interactions with guards and other prison officials, and behavior during riots or other uprisings. For example, classifications experts could make recommendations based on their professional expertise as to how the inmate would fair in general population, such as S.O. Wood's assessment of James Allridge in his clemency petition. Requiring clear and convincing evidence of a particular type (limited to indicators of dangerousness and an inmate's potential to adjust adequately to general population) helps to assure that capital inmates are not able to override their sentences with superficial good behavior.

Because they depend upon evidence accumulated while the inmate is in prison, the proposed hearings must take place on the eve of execution. Having hearings prior to execution is already a standard practice. For example, a "competency to execute" determination occurs sometime near to the date set for execution,[159] as the issue of sanity is often not ripe until the execution is imminent.[160] While that may prove problematic in the case of an insane inmate left untreated on death row, the imminence requirement actually weighs in favor of a revisitation of future dangerousness; the closer the hearing is to execution, the more information the evaluating party can draw upon to make his or her decision. A court cannot determine the accuracy of a future

157. RICHARD O. LEMPERT ET AL. A MODERN APPROACH TO EVIDENCE 1240-1247 (3d. 2000).

158. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425-33 (1979).

159. Lindsay A. Horstman, *Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society*, 36 U.S.F. L. REV. 823, 832 (2002).

160. *Id.* at 840-41.

dangerousness prediction without sufficient evidence. Waiting until execution is imminent will provide the fact-finder with the optimal evidence. In evaluating prison records, officials should only consider violent infractions as evidence of a continuing threat. However, the number and degree of the offenses committed necessary to prove an inmate is a future danger could be left to the fact-finder's discretion. The fact that an inmate behaved violently at one time, but has subsequently acted peaceably, should be taken into account. Again, this favors conducting hearings as close to execution as manageable. An inmate may have acted dangerously five years before his execution but has engaged in no threatening activity since. If the hearing were conducted too soon, subsequent evidence of non-violent behavior would not be available.

Lastly, the individual or body conducting the evaluation provides a safeguard against the unfair nullification of death sentences. Unlike the proposed New York sexual predator law, which uses juries to assess dangerousness, the Board of Pardons and Paroles would make this determination in my suggested system. To reuse a jury as fact-finder at the hearings, albeit a different jury as dictated by the New York law, creates the same difficulties associated with jury determinations of future dangerousness at trial.

While outside its traditional scope of responsibilities, the Board of Pardons and Paroles would be an appropriate body to reassess future dangerousness. First, the governor or a board generally exercises a state's commutation power. While not currently a role of the Board, overseeing revisitations of future dangerousness is in keeping with the recognized purpose of this governmental organization. Furthermore, vesting the Board with the fact-finding responsibility provides an advantage over a judge-conducted proceeding. Rehearings by judges would require statutes to be drafted to establish both the procedure itself and the criteria used to measure dangerousness. Conversely, as a regulatory entity, the Board could establish its own rules and regulations defining its responsibilities and outlining the standards by which to reexamine future dangerousness. Additionally, trial judges in Texas are elected, making them subject to political pressures. Therefore, a hearing conducted by the Board of Pardons and Paroles would be more isolated from outside influence than one overseen by a judge. Lastly, using the Board would avoid procedural complications that would arise in a judicial hearing. For example, questions of due process and appealability would arise if judges reevaluated dangerousness. Giving this power to the Board prevents the possibility of an endless stream of litigation on the dangerousness issue.

The type of review hearing I propose would not create a substantial burden on the state: the Board of Pardons and Paroles

would review prison records and reports by classifications experts. This procedure would incur a minimum cost. Prison records and classifications personnel are readily available. The cost of a hearing is far less than that of a jury, but would provide a large benefit to the inmate facing execution. If cost is prohibitive, the state could overcome the structural difficulty of assembling the Board in its entirety by allowing three member panels to make these determinations. It should be clear that this proposal does not advocate the release of death row inmates – they have been found guilty by courts of law – but rather their placement in general population.

There are considerable benefits to institutionalizing this practice. A post-trial hearing allows the jury to maintain its critical role in capital cases as members of the community. Yet revisiting predictive testimony will catch mistakes and inaccuracies in the speculation, thereby better serving the goal of the Texas death penalty statute. Such a practice balances the legislative goal of prevention (society's desire to protect itself) with the individual liberties of the inmate, while lending legitimacy to the process and better serving the intent of the statute. By differentiating on the basis of a defendant's being a "continuing threat to society," the Texas Legislature signaled that the State should execute only those convicted of capital murder who are likely potential recidivists. Jurors, therefore, make their decision regarding punishment based on the prevention of future violence. Jurors aim to distinguish between the defendants who will continue to behave violently and those who will not, in accordance with the language of the statute.[161]

In order to better accomplish the law's intended purpose—to execute those who will continue to threaten society with their conduct—steps should be taken to protect against the execution of those intended to fall outside the scope of the statute. Furthermore, the gravity and irreparability of the death sentence weigh in favor of providing safeguards to ensure the accurate and narrow implementation of the law. "When the stakes are as high as they are with capital punishment, it is of fundamental importance to ensure that the system is operating fairly."[162] To allow capital trials to proceed in an inaccurate and overbroad fashion jeopardizes the integrity of the judicial system as a whole.[163] Having a check on the jury determinations of future dangerousness prior to the carrying out of death sentences would avoid the execution of non-violent inmates,

161. *See supra* note 141.

162. Goldberg, *supra* note 24, at 54.

163. TDS, *supra* note 22, at xi. "Basing outcomes of the most solemn proceedings in the American law on specious reasoning and conjecture threatens the integrity of the entire judicial system."

including those who are a positive force on death row, such as James Allridge.