NOTHING IS CERTAIN BUT DEATH: WHY FUTURE DANGEROUSNESS MANDATES ABOLITION OF THE DEATH PENALTY

by
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More than 40 years after the Supreme Court issued its terse, one-paragraph opinion in Furman v. Georgia*, which effectively invalidated death-penalty schemes across the country, the problem of arbitrary and capricious decision-making persists. Attempts to cabin juror discretion, by narrowing eligible offenses and delineating specific aggravating factors, have largely failed. Among the variety of aggravating factors, perhaps none exercises more influence over the death penalty decision than a defendant's perceived future dangerousness. This Article examines the constitutionality of capital punishment through the lens of a defendant's future dangerousness and concludes that erroneous predictions of future behavior result in arbitrary and capricious death sentences contrary to the mandate of* Furman v. Georgia*. Surveying case law from all states that permit some form of a future-dangerousness argument, this Article uncovers the dominant and insidious influence an individual's perceived future dangerousness has on the penalty decision. In many jurisdictions, a jury may decide whether death is the appropriate punishment based solely on its prediction of future behavior. Relying on comparisons of juror predictions of future violence and longitudinal studies of actual violence among death-sentenced inmates, this Article demonstrates that the future dangerousness question is a fundamentally flawed inquiry and argues that abolition is the only viable solution for addressing the problem of arbitrary and capricious death sentences.*

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I. INTRODUCTION

In 1972, the United States Supreme Court issued a terse, one-paragraph opinion announcing that the death penalty as then applied "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[1] Writing separately, the fractured opinions of the nine Justices in *Furman v. Georgia* reflected the polarized arguments concerning the appropriateness of death as a punishment and the legitimacy of the criteria on which its imposition was based.[2] Effectively invalidating death-penalty schemes across the country,[3] the *Furman* decision sparked frantic efforts by the states to amend and conform their capital-punishment systems to address the Court's concern with arbitrary and unguided juror discretion.[4]

The trickle of states that had already abolished capital punishment prior to *Furman* led many commentators to speculate that the Court had sounded the death knell for capital punishment in America.[5] However,

[1] Furman v. Georgia, 408 U.S. 238, 240 (1972) (per curiam).

[2] The one-paragraph opinion did not detail the Court's reasoning. The five Justices that concurred in the judgment explained their interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment in five separate opinions. *See id.* at 256–57 (Douglas, J., concurring) (arguing that discretionary death-penalty statutes are unconstitutional because they allow for discriminatory application of cruel and unusual punishment in violation of equal protection); *id.* at 305 (Brennan, J., concurring) (arguing that the punishment of death is, in its severity and finality, anathema to human dignity, thereby qualifying it as a cruel and unusual punishment); *id.* at 309–10 (Stewart, J., concurring) (not reaching the issue of whether the death penalty itself is a cruel and unusual punishment, but finding, in these individual cases, that a death sentence was so out of proportion with the alleged crime as to constitute cruel and unusual punishment); *id.* at 313 (White, J., concurring) (arguing that the statutes at issue have "for all practical purposes run [their] course" since the infrequent imposition of the death penalty undermines any deterrent effect it may have on future criminals); *id.* at 348–50, 360 (Marshall, J., concurring) (arguing that the proposed reasons for capital punishment are not supported by the evidence and, even if they were, public opinion has deemed capital punishment to be morally unacceptable and therefore in violation of the Eighth Amendment).

[3] DAVID GARLAND, A PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 229 (2010) (The *Furman* decision "invalidated all of the nation's death-penalty statutes, nullifying the capital laws of 36 states and the District of Columbia. Overnight, capital punishment ceased to exist anywhere in the United States").

[4] WILLIAM R. LONG, A TORTURED HISTORY: THE STORY OF CAPITAL PUNISHMENT IN OREGON 57–58 (2001); EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 251–55 (2013).

[5] *See, e.g.*, GARLAND, *supra* note 3, at 229 (noting that "*Furman* appeared to many to be a decisive act of abolition ending American capital punishment once and for all"); MANDERY, *supra* note 4, at 242 (discussing journalists' reactions to the Court's decision in *Furman*, including an editorial in the Miami Herald exclaiming: "The

the swiftness of the states' responses in reforming their death-penalty schemes revealed the persistent fear that, at least in some cases, death was the only way to ensure the continued safety of society.[6] The states' solutions were varied, spawning litigation that has resulted in complex, contradictory, and often ad hoc rules governing the imposition of capital sentences.[7] Some states responded by enacting mandatory death sentences—later deemed unconstitutional—for specific crimes.[8] Others followed the example of the Model Penal Code, providing jurors with a framework of aggravating and mitigating factors.[9] And two states—Texas, and later Oregon—asked jurors to consider "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"—commonly known as the "future dangerousness" question.[10]

The future dangerousness question impermissibly asks jurors to function as fortune tellers, basing their sentencing determination on the likelihood of some future, unascertained event. The Supreme Court has repeatedly emphasized that "death is a punishment different from all

decision is a turning point in American justice and perhaps in the national attitude towards violence, crime, and punishment").

[6] *See* MANDERY, *supra* note 4, at 248 (noting "[l]aw-enforcement officers predicted *Furman* would increase crime" and politicians were quick to announce a parade of horribles would follow abolition).

[7] *See* GARLAND, *supra* note 3, at 258–59 (discussing the "five cases—*Gregg v. Georgia*, *Jurek v. Texas*, *Profitt v. Florida*, *Woodson v. North Carolina*, and *Roberts v. Louisiana*—[the Court] selected to represent each new type of capital statute passed since 1972"); *see also* Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding the Eighth Amendment prohibits imposition of a death sentence for the rape of a child that did not result in that child's death); Roper v. Simmons, 543 U.S. 551, 578 (2005) (categorically prohibiting capital punishment for juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring the execution of mentally disabled offenders); Enmund v. Florida, 458 U.S. 782, 797 (1982) (exempting an offender "who does not himself kill, attempt to kill, or intend that a killing take place" from the death penalty).

[8] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976) (holding that North Carolina's law imposing a mandatory death sentence for defendants convicted of first-degree murder did not allow the jury to consider the character of the individual or the particular circumstances of the offense and therefore violated the Eighth and Fourteenth Amendments); Roberts v. Louisiana, 428 U.S. 325, 332–34 (1976) (holding that, although Louisiana's statute imposing a mandatory death sentence for first-degree murder in certain categories was more circumscribed than North Carolina's, it was still unconstitutional for essentially the same reasons).

[9] LONG, *supra* note 4, at 57–58; *see, e.g.*, GA. CODE ANN. § 17-10-31 (2015) (formerly § 26-3102); S.C. CODE ANN. § 16-3-20 (2015) (requiring a jury to find "at least one of the statutory aggravating circumstances" *and* recommend a sentence of death).

[10] TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (West 2015); *see also* LONG, *supra* note 4, at 60–61 (explaining Oregon's adoption of a new death-penalty scheme modeled after the Texas statute).

other sanctions," therefore requiring a greater "need for reliability in the determination that death is the appropriate punishment in a specific case."[11] But despite this incontrovertible mandate, courts have consistently upheld capital-sentencing schemes that ask juries to predict a defendant's future dangerousness.[12]

To reconcile the future dangerousness question with its decision in *Furman*, the Supreme Court had to make two elementary assumptions. First, the Court had to presume the question adequately "guid[ed] and focus[ed] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender" by allowing the consideration of mitigating circumstances.[13] Second, the Court had to posit that capital juries could accurately and reliably predict whether the defendant was likely to engage in future violent acts.[14]

But as this Article will demonstrate, the future dangerousness question in practice—whether statutorily imposed or permissibly argued—has failed to satisfy either of the Supreme Court's assumptions. Far from guiding juror discretion and allowing a defendant to present mitigating evidence, the issue of future dangerousness often has an insidious influence on capital verdicts.[15] Moreover, contrary to the Court's conjecture, studies conducted in the special issue jurisdictions of Texas and Oregon have shown that both experts' and jurors' predictions of future dangerousness are no more accurate than random guesses.[16] Given the decisive influence the future dangerousness inquiry has on the sentencing verdict,[17] the likelihood that similarly situated defendants will receive drastically different sentencing outcomes undermines the constitutionality of capital punishment. While many scholars have advocated for eliminating the future dangerousness inquiry from capital-sentencing schemes to remedy this constitutional infirmity,[18] post-trial interviews with capital jurors reveal that future dangerousness is not so easily exorcised from the minds of jurors.[19]

As the birthplace of the explicit inquiry into a defendant's future dangerousness, Texas provides a good starting point for examining how

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[11] *Woodson*, 428 U.S. at 303–05.

[12] *See* Jurek v. Texas, 428 U.S. 262, 276 (1976); State v. Wagner, 752 P.2d 1136, 1159–61 (Or. 1988).

[13] *Jurek*, 428 U.S. at 273–74.

[14] *Id.* at 274–75.

[15] *See infra* Part III.

[16] *See infra* Parts V and VI.

[17] *See infra* Part V.

[18] *See, e.g.*, William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 923 (2010) (advocating for removal of the future dangerousness inquiry from capital-sentencing schemes).

[19] *See infra* Part V.

this question pervades capital-sentencing decisions.[20] However, the problems with future dangerousness are not confined to the special issue jurisdictions of Texas and Oregon—or even the states that list future dangerousness as a statutory aggravating factor. Missing from the current literature on future dangerousness is a holistic assessment of how the issue permeates capital-sentencing decisions in states where it is not an explicit element of the capital-punishment scheme. In these states, courts routinely dismiss the impact of improper argument and often exaggerate the reliability of future dangerousness evidence.[21] By examining capital decisions in states where future dangerousness is a permissive consideration, this Article will fill the gap in the scholarly literature and demonstrate why the issue of future dangerousness renders the death penalty incompatible with constitutional standards.

In establishing these constitutional infirmities, this Article begins in Part II with the history of the future dangerousness question as it developed in Texas and Oregon, highlighting the political expediencies that led to its adoption. Part III discusses the states where future dangerousness functions as a statutory aggravating factor. Part IV dissects the previously unexamined role of future dangerousness in the capital-sentencing decisions of non-statutory states. Part V exposes the problem with predicting future behavior and addresses the persuasive role of inaccurate expert testimony on the issue of future dangerousness. Part VI examines the role of future dangerousness in capital jury decision-making, presenting a recent study of Oregon inmates convicted of aggravated murder that empirically establishes that juries are unable to accurately predict whether a defendant poses a risk of future dangerousness. Finally, Part VII explains why the availability of a life-without-the-possibility-of-parole sentence alleviates the concerns the future dangerousness question was designed to address.

Ultimately, this Article demonstrates that the future dangerousness inquiry is a fundamentally flawed question that leads to arbitrary and capricious death sentences. The advent of life without the possibility of parole has undercut the traditional sentencing rationales—incapacitation, deterrence, and retribution—for relying on a future dangerousness determination.[22] The Supreme Court has repeatedly emphasized that punishment should be no greater than necessary to accomplish the sentencing goals,[23] and that death is a punishment different in kind from any

[20] *See* LONG, *supra* note 4, at 58.

[21] *See infra* Part III.

[22] Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 148, 167–68 (2008).

[23] *E.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (interpreting the Eighth Amendment to require proportionality between the punishment and the severity of the crime); *see also* Weems v. United States, 217 U.S. 349, 367 (1910) (noting "that it

other, thus requiring a greater degree of reliability.[24] The arbitrary, unpredictable, and persistent influence of future dangerousness in capital-sentencing decisions renders the death penalty incompatible with the prohibitions of the Eighth and Fourteenth Amendments on cruel and unusual punishment.

II. DEVELOPMENT OF THE FUTURE DANGEROUSNESS QUESTION

In the last forty years, the death penalty in the modern era has undergone dramatic, and often seemingly contradictory, changes. Following the Supreme Court's decision in *Furman*, states scrambled to amend their death-penalty statutes.[25] Many states adopted the Model Penal Code's (MPC) framework, which guided juror discretion in two ways.[26] First, it required a "bifurcated" trial with distinct guilt and punishment phases.[27] Second, the drafters of the MPC advocated for presenting jurors with a number of factors that either mitigated or enhanced the defendant's culpability.[28] In order to impose a death sentence, the MPC model required jurors to find at least one aggravating factor and no mitigating circumstances.[29]

In *Gregg v. Georgia*, the Court expressly endorsed this model as a cure for the infirmities of unguided juror discretion, with the caveat that each scheme "must be examined on an individual basis."[30] In upholding Georgia's revised statute,[31] the Court found the narrowing of the class of death-eligible offenders; the requirement that the jury find at least one aggravating circumstance before imposition of a death sentence; and the jurors' ability to consider "any other appropriate aggravating or mitigating circumstances," adequately guided the jurors' discretion.[32] Although the Court conceded that some juror discretion still existed, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application."[33]

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is a precept of justice that punishment for crime should be graduated and proportioned to offense").

[24] Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976).

[25] LONG, *supra* note 4, at 57–58; MANDERY, *supra* note 4, at 251–55.

[26] LONG, *supra* note 4, at 58.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 428 U.S. 153, 195 (1976) ("As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.").

[31] GA. CODE ANN. § 17-10-31.

[32] *Gregg*, 428 U.S. at 196–97.

[33] *Id.* at 198 (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)).

A less popular, and ultimately unsuccessful, attempt to bring death-penalty statutes in compliance with *Furman* was to require a sentence of death if the defendant was found guilty of a particularly heinous crime.[34] Proponents of this scheme reasoned that a mandatory death penalty for certain crimes remedied the problem of unfettered juror discretion identified in *Furman*.[35] However, for the few states that employed this method, the fix was short-lived. Finding mandatory death sentences prevented jurors from considering "the character and record of the individual offender and the circumstances of the particular offense," the Supreme Court struck down these statutes in 1976.[36]

A third solution to the problem of unguided juror discretion emerged in Texas. Texas's solution created a narrow category of crimes that were death eligible and required jurors to answer three special-issue questions during the penalty phase.[37] If the jury answered all three questions in the affirmative, a defendant would be sentenced to death.[38] While the first and third questions focused on aspects of the crime, the second question required jurors to speculate on the probability that the defendant would commit future violent acts.[39]

After receiving a death sentence for the murder of a ten-year-old girl, Jerry Lane Jurek challenged this question on appeal, arguing that "the question [wa]s so vague as to be meaningless."[40] In upholding the Texas statute, the Supreme Court relied on the assurances of the Texas Court of Criminal Appeals that this second question pertaining to a defendant's future dangerousness would be interpreted to allow the defense "to bring to the jury's attention" any mitigating circumstances.[41] As such, the Texas statute suitably guided and focused "the jury's objective consideration of

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[34] LONG, *supra* note 4, at 58.

[35] *Id.*

[36] Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

[37] Under the Texas statute, following a guilty verdict, jurors were required to answer the following three questions in the affirmative:

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

TEX. CODE CRIM. PROC. ANN. art. § 37.0711.3(b) (2014).

[38] *Id.* § 37.0711.3(g).

[39] *Id.* § 37.0711.3(b).

[40] Jurek v. Texas, 428 U.S. 262, 274 (1976).

[41] *Id.* at 272.

the particularized circumstances of the individual offense and the individual offender" before permitting the imposition of a death sentence.[42]

Notably, the Court's decisions in *Jurek* and *Gregg* did not attempt to define the set of criteria required for a constitutional capital-punishment scheme.[43] Rather, the decisions presaged the Court's ongoing involvement in evaluating state death-penalty systems.[44] The tension created by this continual tinkering, particularly in the context of future dangerousness and individualized sentencing, has undermined the Court's initial mandate to reduce the arbitrariness of death sentences.[45]

A. Legislative History of the Texas Statute

Despite the Supreme Court's endorsement of the future dangerousness question, little legislative debate or consideration was given to its inclusion in Texas's death-penalty statute.[46] On May 10, 1973, the Texas House—like other legislative bodies in states grappling with the uncertain requirements of *Furman*—voted in favor of a mandatory death-penalty bill.[47] A few weeks later, the Senate endorsed a more discretionary scheme modeled on the MPC approach.[48] The Senate's amendments to the original House proposal eliminated the mandatory imposition of the death penalty in certain circumstances and replaced it with a list of specific aggravating and mitigating circumstances that were designed to guide sentencing discretion.[49] Notably, none of the specified factors included any consideration of a defendant's future dangerousness.[50] With

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[42] *Id.* at 274.

[43] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 195 (1976) ("We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis." (footnote omitted)).

[44] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 363 (1995).

[45] *See id.* at 361.

[46] Eric F. Citron, Note, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL'Y REV. 143, 162 (2006).

[47] H. JOURNAL, 63rd Leg., Reg. Sess. 3363 (Tex. 1973). The bill provided for a mandatory death sentence if the jury concluded beyond a reasonable doubt that the defendant: murdered a peace officer or fireman while engaged in official duties; murdered an employee of a penal institution during an escape attempt; or intentionally committed the murder during the course of a kidnapping, burglary, robbery, arson, or rape. Michael Kuhn, Comment, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410, 416–17, 417 n.58. (1973–74); *see also* Citron, *supra* note 46, at 162.

[48] Kuhn, *supra* note 47, at 417 & n.65.

[49] *Id.* at 417.

[50] H.B. 200, 63rd Leg., Reg. Sess. (Tex. 1973).

the pending adjournment of the legislative session, the House rejected the amended bill and convened a conference committee to resolve the differences in the House and Senate proposals.[51]

On the last day of the legislative session, the conference committee presented a novel scheme with language not found in either of the prior proposals.[52] The new language required consideration of the probability that the defendant would constitute a "continuing threat to society."[53] This hastily prepared compromise passed both houses without comment or debate on the inclusion of the future dangerousness question.[54]

Since the final bill was the product of an unrecorded conference committee, it is difficult to ascertain why the future dangerousness language was included or even what prompted consideration of the question.[55] Although there is little in the way of legislative history, news reports and recollections shed some light on the tensions that pervaded the committee.[56] Like the House and Senate, the ten-member conference committee was divided on the issue of how best to cabin sentencing discretion.[57] Although the majority of the committee favored a mandatory death-penalty scheme, Senator William Meier—the principal architect of the aggravating and mitigating factors in the original Senate proposal—lobbied for some discretion in the sentencing decision.[58]

In an effort to reach a final compromise on the eve of the last day of the legislative session, Dallas Representative Robert Maloney proposed three special-issue questions as a way of allowing the jury to dispense limited mercy.[59] While the committee endorsed this model, the language of the special-issue questions was not agreed upon until Monday morning—the final day in the legislative session.[60]

A staunch supporter of the mandatory death-penalty scheme, Representative Maloney likely intended the special-issue model to function much like a mandatory framework, albeit with a narrow role for juror discretion.[61] Certainly an examination of the final bill supports this interpretation. The other two special-issue questions focus on "deliberateness" and "provocation"—qualities implicit in any guilty verdict.[62] Thus, the sole factor that would seem to permit a jury not to impose a sentence of

[51] Citron, *supra* note 46, at 162.
[52] *Id.*
[53] Kuhn, *supra* note 47, at 419 n.82.
[54] Citron, *supra* note 46, at 173.
[55] *Id.* at 170.
[56] *See id.*
[57] *Id.*
[58] *Id.* at 172.
[59] *Id.* at 171.
[60] *Id.*
[61] *Id.* at 172.
[62] *Id.*

death would be a finding that the defendant did not pose a continuing threat to society.[63] Far from functioning as a means to dispense mercy, it was widely believed that the future dangerousness question all but ensured most capital murderers would be sentenced to death.[64]

B. Oregon's Adoption of the Texas Model

While states that had abolished capital punishment were able to avoid much of the confusion engendered by the *Furman* decision, a shift in support for capital punishment brought Oregon into the fray.[65] Although Oregon voters had abolished the death penalty in 1964,[66] a string of brutal crimes brought about a call for reinstatement of the death penalty.[67] In 1978, a mere fourteen years after repealing the death penalty, Oregonians voted to reinstate capital punishment by a margin of 64.3% to 35.7%.[68]

This dramatic shift in the attitudes of Oregon voters was hardly surprising. By the mid-1970s, amidst a backdrop of rising crime rates and social unrest, there was mounting criticism of the rehabilitative model of criminal justice.[69] This dissatisfaction ushered in a new way of conceptualizing incarceration and punishment; punitive and retributive goals replaced rehabilitation as the dominant paradigm.[70] With this shift came increased support for capital punishment.[71]

In 1977, House Bill 2321, which was based on the Texas statute, was introduced in the Oregon legislature.[72] Since the bill failed to make it out of committee,[73] there was no legislative or public debate about the specif-

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[63] *Id.*

[64] *Id.* Following approval of the new statute, the Houston Post reported that "[o]ver half of capital murder cases [were] destined for death row." *Over Half of Capital Murder Cases Destined for Death Row*, HOUS. POST (Mar. 19, 1976).

[65] Notably, Oregon was the only state to reinstate capital punishment that did not have the death penalty in place at the time of the *Furman* and *Gregg* decisions. Aliza B. Kaplan, *Oregon's Death Penalty: The Practical Reality*, 17 LEWIS & CLARK L. REV. 1, 12 n.76 (2013).

[66] *Id.* at 12.

[67] *See* LONG, *supra* note 4, at 59. In the Oregon Voters' Pamphlet from 1978, supporters of reinstating capital punishment noted that the "real-life horror stories" of the time indicated how much the "justice system ha[d] shifted away from protecting people toward coddling criminals." SEC'Y OF STATE, STATE OF OR., GENERAL VOTERS' PAMPHLET 50 (1978).

[68] LONG, *supra* note 4, at 60.

[69] Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 811 (2012); *see also* GARLAND, *supra* note 3, at 245.

[70] Entzeroth, *supra* note 69, at 811–12.

[71] Kaplan, *supra* note 65, at 12.

[72] LONG, *supra* note 4, at 59.

[73] *Id.*

ic provisions of the statute. However, supporters of capital punishment would resurrect the bill the following year as Ballot Measure 8, which 64% of voters approved.[74]

Those who sought to reinstate the death penalty in Oregon were not explicit about why they modeled the measure after the Texas statute.[75] Perhaps it was, in part, to avoid the extensive litigation other states experienced in reforming their death-penalty schemes.[76] Since the Supreme Court had already upheld the Texas statute in *Jurek*,[77] proponents of the Oregon ballot measure likely assumed the proposed scheme would satisfy the constitutional mandates of *Furman* and *Gregg*.[78] However, the Oregon statute departed from the Texas model in two key ways. First, unlike the Texas statute, the Oregon statute did not narrow the class of death-eligible offenders.[79] Second, although the Oregon model endorsed a bifurcated trial, the trial judge was responsible for the sentencing decision, not the jury.[80]

A mere three years after it was passed, this lack of forethought would be the statute's undoing.[81] In *State v. Quinn*, the Oregon Supreme Court struck down the statute because it impermissibly delegated the penalty decision to the trial judge in violation of the defendant's right to trial by jury under Article 1, Section 11 of the Oregon Constitution.[82] Following the court's decision, supporters of capital punishment again turned to the ballot initiative process.

Capitalizing on the electorate's fear that crime had spiraled out of control, those supporting reinstatement of the death penalty introduced

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[74] *Id.* at 60.

[75] *Id.* at 61.

[76] Gregg v. Georgia, 428 U.S. 153, 193–95 (1976); Profitt v. Florida, 428 U.S. 242, 247–49 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

[77] *Jurek*, 428 U.S. at 276–77.

[78] *See* LONG, *supra* note 4, at 60. *See also* State v. Wagner, 752 P.2d 1136, 1154 (Or. 1988) ("It is undisputed that ORS 163.150 is modeled on Texas' statutory system, which was enacted in 1973 in response to *Furman v. Georgia*.").

[79] LONG, *supra* note 4, at 62. The Texas statute limited application of the death penalty to either offenders who committed certain heinous crimes or to those whose victims were involved in the justice system. In contrast, the Oregon statute applied to any offender convicted of murder. *Id.* at 61.

[80] *Id.* at 62.

[81] *See* State v. Quinn, 623 P.2d 630, 640 (Or. 1981) (noting that "ORS 163.116 was drafted in apparent disregard of the amendments to Oregon's murder statutes made when there was no death penalty").

[82] *Id.* at 644. As applied in *Quinn*, ORS 163.116 permitted the death penalty "to be imposed based upon a determination by the court of the existence of the requisite culpable mental state with which the crime was committed," which was different and greater than the mental state found by the jury. *Id.*

Ballot Measures 6 & 7 in 1984.[83] Ballot Measure 6, which passed with 55% of the vote,[84] amended the Oregon Constitution to exempt capital punishment for aggravated murder from the "constitutional prohibitions against cruel, unusual, disproportionate and vindictive punishments."[85] Ballot Measure 7, which passed with 75% of the vote,[86] amended Oregon's statutes to require that a defendant convicted of aggravated murder be sentenced to death if a "unanimous jury finds beyond a reasonable doubt that defendant acted deliberately with reasonable expectation that death would result, is probably a continuing threat to society, and responded unreasonably to any provocation by deceased."[87]

To avoid the constitutional infirmity identified by the Oregon Supreme Court in *Quinn*, the drafters of Ballot Measure 7 included a provision that required a separate sentencing proceeding before the trial jury following a finding that the defendant was guilty of aggravated murder.[88] This version of the statute would remain in place until 1989, when the Supreme Court revisited the constitutionality of the Texas statute upheld in *Jurek*.[89] But before turning to that decision, it is helpful to explain how the Court's death-penalty jurisprudence had evolved up to that point.

C. The Development of the "All Relevant Evidence" Doctrine

What materializes from the Court's evaluation of the states' various attempts to amend their capital-punishment schemes is an emphasis on permitting the defendant to present any mitigating circumstances, and allowing jurors to give effect to those mitigating circumstances.[90] The "all relevant evidence" doctrine emerged from the Court's recognition that a sentence of death is qualitatively different from other punishments, and therefore, requires a corresponding, heightened level of reliability in imposing it.[91] As noted, the Court in *Gregg* required that jurors' discretion be "suitably directed and limited so as to minimize the risk of *wholly* arbi-

[83] SEC'Y OF STATE, STATE OF OR., GENERAL VOTERS' PAMPHLET 28–31 (1984).

[84] Kaplan, *supra* note 65, at 12.

[85] OREGON GENERAL VOTERS' PAMPHLET 1984, *supra* note 83, at 28.

[86] Kaplan, *supra* note 65, at 12.

[87] OREGON GENERAL VOTERS' PAMPHLET 1984, *supra* note 83, at 31.

[88] *Id.* at 32.

[89] Penry v. Lynaugh, 492 U.S. 302, 315 (1989).

[90] *See, e.g.*, Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (reversing the defendant's death sentence and ordering "a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence"); Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (requiring the state courts to "consider all relevant mitigating evidence").

[91] *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

trary and capricious action."[92] At the same time, the Court also required jurors be given an adequate opportunity to consider both "the character and record of the individual offender and the circumstances of the particular offense" before recommending a death sentence.[93]

Two years after *Gregg* and its companion cases, the Court would further define the contours of the "all relevant evidence" doctrine in *Lockett v. Ohio*.[94] The Ohio aggravated murder statute in question in *Lockett* required the trial judge, upon a guilty verdict, to impose a sentence of death unless:

> [A]fter "considering the nature and circumstances of the offense" and Lockett's "history, character, and condition," he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she "was under duress, coercion, or strong provocation," or (3) the offense was "primarily the product of [Lockett's] psychosis or mental deficiency."[95]

Although the statute made reference to the defendant's character, any mitigating circumstances that arose from that "history, character, or condition" could only be given effect through the narrow lens of the enumerated factors.[96] Within those factors, there was no way for the sentencing judge to consider, among other things, the defendant's age, "lack of specific intent to cause death," or relatively minor role in the crime.[97]

Thus, the Court's opinion in *Lockett* substantially broadened the scope of mitigating evidence to include anything that might militate in favor of a sentence less than death, not just mitigation related to aspects of the crime.[98] It follows from the Court's opinion that the purpose, at least originally, of permitting the defendant to present all relevant evidence "was to ensure that no 'exonerating' evidence would be kept from the jury."[99]

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[92] Gregg v. Georgia, 428 U.S. 153, 189 (1976) (emphasis added).

[93] Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

[94] 438 U.S. at 604–05.

[95] *Id.* at 593–94 (citing OHIO REV. CODE ANN. §§ 2929.03–.04(B) (1975)) (alteration in original).

[96] *Id.* at 608.

[97] *Id.* at 597.

[98] Justice Rehnquist, in his partial dissent, stressed that far from guiding juror discretion, "encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' . . . will not guide sentencing discretion but will totally unleash it." *Id.* at 631 (Rehnquist, J., concurring in part and dissenting in part).

[99] Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249, 1255 (1993).

Any doubt that the Court's opinion in *Lockett* significantly broadened what could be considered relevant mitigating evidence was foreclosed in *Eddings v. Oklahoma*.[100] Eddings, who was sixteen at the time of the crime, was convicted of murdering an Oklahoma Highway Patrol officer after being pulled over.[101] In sentencing Eddings to death, the trial judge concluded that Eddings's youth was the sole mitigating circumstance and did not outweigh the aggravating factors.[102] The Supreme Court vacated the death sentence, finding the trial judge had erroneously refused, as a matter of law, to consider proffered evidence of Eddings's troubled upbringing, childhood abuse, and emotional disturbance.[103] Although the Court admitted the sentencer "may determine the weight to be given relevant mitigating evidence," he is not permitted to give such evidence "no weight" by wholly excluding it from consideration.[104]

This evolution of the Court's death-penalty jurisprudence prompted another challenge to the Texas capital-punishment scheme first upheld in *Jurek*. In *Penry v. Lynaugh*, the defendant argued that the three special-issue questions, which determined whether he would receive the death penalty, did not allow the jury to give effect to the mitigating evidence of his childhood abuse and mental disability.[105] The Court agreed, finding that without specific instructions, the jury was unable to acknowledge Penry's mitigating evidence when evaluating his culpability within the limited framework of the three special-issue questions.[106]

For the purposes of this Article, the Court's reasoning as to the second issue—whether the defendant constitutes a continuing threat to society—warrants further discussion.[107] In determining that this question

[100] 455 U.S. 104, 113–15 (1982).

[101] *Id.* at 105–06.

[102] *Id.* at 108–09. In explaining his reasoning, the trial judge wrote: "'[T]he Court cannot be persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.'" *Id.* at 109 (alteration in original) (emphasis omitted) (internal citations omitted).

[103] *Id.* at 113–15.

[104] *Id.* at 114–15.

[105] 492 U.S. 302, 315 (1989). Penry did not challenge the facial validity of the statute. Rather, he asserted that "in his particular case, without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence." *Id.* at 318 (emphasis omitted).

[106] *Id.* at 322.

[107] As to the first question, the court determined that, in the absence of an instruction defining "deliberately," a juror who believed Penry had committed the murder deliberately would be unable to consider his "mitigating evidence as it bears on his personal culpability." *Id.* at 323. The third question asked jurors whether Penry's conduct in killing the victim "was unreasonable in response to the provocation, if any, by the [victim]." *Id.* at 324. Here, the Court found that "a juror who believed Penry lacked the moral culpability to be sentenced to death could not

was an inadequate vehicle for the jury to give effect to Penry's mitigating evidence, the Court noted that, in this context, Penry's evidence was "a two-edged sword."[108] While Penry's mental disability and childhood abuse might "diminish his blameworthiness for his crime," it might also indicate that he would be dangerous in the future.[109] Hence, even if the jury thought that Penry was not deserving of the death penalty, his mitigating evidence "made it more likely, not less likely, that the jury would answer the second question yes."[110]

Absent instructions informing jurors that they could consider and give effect to Penry's mitigating evidence of mental disability and childhood abuse, the three special-issue questions did not allow the jurors to express their "reasoned moral response."[111] In arriving at this conclusion, the Court relied on its previous decisions in *Lockett* and *Eddings*, which established that the determination as to whether the death penalty was an appropriate punishment must reflect an individualized assessment of the defendant.[112] This individualized assessment required more than simply allowing the defendant to present mitigating evidence; the jury must actually be able to give effect to that evidence when determining the appropriate punishment.[113]

Although the Court's holding appeared cabined to the specific circumstances of the defendant's case,[114] Justice Scalia's dissent suggested the majority's decision effectively disavowed the scheme upheld in *Jurek*.[115] Notably, Scalia chastised the majority for injecting further uncertainty into the sentencing decision, stating: "The decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is unguided discretion to impose as well."[116] While on its face, the Court's mandate that the defendant be permitted to introduce any mitigating evidence appears to allow the jury to exercise its reasoned moral

express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id.* at 324–25.

[108] *Id.* at 324.

[109] *Id.*

[110] *Id.* (citation omitted).

[111] *Id.* at 328 (emphasis omitted) (citation omitted). As noted, Penry's challenge was "as applied" to the specific facts of his case. Accordingly, the Court did not strike down the Texas statute, but did remand the case. *Id.* at 340.

[112] *Id.* at 319.

[113] *Id.*

[114] *Id.* at 340.

[115] *Id.* at 354 (Scalia, J., concurring in part and dissenting in part) ("In holding that this scheme unconstitutionally limits the jury's discretion to consider the mitigating evidence of Penry's mental retardation and abused childhood, the Court today entirely disregards one of the two lines of our concern, requiring individualized consideration to displace the channeling of discretion, and throwing away *Jurek* in the process.").

[116] *Id.* at 360.

response after taking account of individual aspects of the defendant's character, in practice it has led to the admission of highly prejudicial and unreliable evidence.[117]

While this examination of the future dangerousness question as it developed in Texas is a useful starting point, it does not illuminate the pervasive and prejudicial role that future dangerousness plays in other jurisdictions. What follows is an examination of how future dangerousness is woven into capital-sentencing schemes in jurisdictions that explicitly list future dangerousness as a statutory aggravating factor, and those that merely permit the prosecution to argue future dangerousness. This comprehensive look at future dangerousness across jurisdictions reveals some of the problems associated with predicting future behavior—including the inaccuracy of expert testimony and the poor predictive ability of jurors—and demonstrates its highly aggravating role in the imposition of death sentences.

III. FUTURE DANGEROUSNESS AS A STATUTORY AGGRAVATING FACTOR

While Texas and Oregon explicitly require jurors to affirmatively find that a defendant poses a future danger in order to impose a death sentence, three other states list future dangerousness as a statutory aggravating factor,[118] and Virginia requires jurors to find either the conduct in the murder at issue was of a particular character or that the defendant would be a continuing threat to society.[119] An examination of how future dangerousness functions in these states will illustrate why the problems associated with predicting a defendant's likely future dangerousness extend beyond the special-issue jurisdictions.

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[117] *See infra* Part V.A.2 (discussing expert testimony and court decisions where death sentences were later reversed as a result of such prejudicial and inaccurate testimony).

[118] IDAHO CODE § 19-2515 (2015); OKLA. STAT. tit. 21, § 701.12 (2015); WYO. STAT. ANN. § 6-2-102 (2015). As the least populous state in the country, Wyoming's death row is currently empty, and the state has only carried out a single execution since 1976. Dan Frosch, *Wyoming Considers Firing Squad as Death-Row Backup*, WALL ST. J. (Jan. 25, 2015) http://www.wsj.com/articles/wyoming-considers-firing-squad-as-death-row-backup-1422230396. Accordingly, case law addressing the role of future dangerousness in capital sentencing is almost nonexistent. However, it is important to note that Wyoming requires jurors to weigh aggravating factors against mitigating circumstances; therefore, as in Oklahoma, any invalidation of the future dangerousness factor could affect whether the remaining aggravating factors outweigh the mitigating circumstances. WYO. STAT. ANN. § 6-2-102; *see* Olsen v. State, 67 P.3d 536, 571, 574 (Wyo. 2003) (holding that "Wyoming's death penalty statute is a constitutional, weighing statute," which "require[s] sentencers to balance aggravating circumstances against mitigating circumstances . . .").

[119] VA. CODE ANN. § 19.2-264.2 (2015).

A. Idaho

Unlike Texas and Oregon, which restrict the class of death-eligible offenders by requiring conviction of either capital or aggravated murder,[120] Idaho requires only that a defendant be convicted of first-degree murder in order to be eligible for a death sentence.[121] Once convicted, a jury must find at least one of eleven aggravating factors—including future dangerousness—beyond a reasonable doubt before a death sentence may be imposed.[122] Accordingly, imposition of a death sentence may be based solely on a finding of future dangerousness.

Although the statute states that conduct used to evaluate future dangerousness can occur "before, during or after the commission of the murder at hand,"[123] the courts tend to endorse predictions based on prior or contemporaneous conduct.[124] A finding that a defendant presents a continuing threat is often based on a cursory assessment of the defendant's prior and current criminal acts.[125] This backwards-looking assessment of future dangerousness rarely involves any expert testimony, thereby rendering many of the arguments against the use of such testimony moot.[126] However, the exclusion or absence of expert testimony does nothing to address the deficiencies in the predictive ability of capital jurors.[127]

In addition to examining prior and contemporaneous conduct, the courts frequently focus on whether the defendant exhibits a "propensity

[120] OR. REV. STAT. § 163.095 (2015); TEX. PENAL CODE ANN. § 19.03 (West 2015).

[121] IDAHO CODE § 18-4004 (2015). Although Idaho's first-degree murder statute includes a number of specific factors similar to those in jurisdictions with capital or aggravated murder statutes, it also contains a broad clause that encompasses *any* murder "perpetrated by any kind of willful, deliberate and premeditated killing." *Id.* § 18-4003(a).

[122] IDAHO CODE § 19-2515 (2015).

[123] *Id.*

[124] *See, e.g.*, State v. Porter, 948 P.2d 127, 144–45 (Idaho 1997) (finding that testimony from three of the defendant's prior girlfriends about his violent nature and his conduct in the present murder was sufficient to establish he would constitute a continuing threat to society "with, at least, some certainty"); State v. Wells, 864 P.2d 1123, 1125 (Idaho 1993) (finding the defendant's prior record and his "conduct in the commission of the murders at hand" were sufficient to support the trial court's finding that the defendant was a continuing threat to society).

[125] *See, e.g.*, *Wells*, 864 P.2d at 1125 (finding that evidence of the defendant's prior conduct established he was "a violent man, with a propensity toward rage and intimidation").

[126] *See infra* Part V (arguing against the admission of expert testimony to establish future dangerousness).

[127] *See infra* Part VI (highlighting the poor predictive accuracy of jury findings indicating a defendant would present a continuing threat to society).

to commit murder" as indicative of future dangerousness.[128] Although one would expect expert testimony would play a key role in this assessment, the courts submit to an unscientific, subjective meaning of "propensity." For example, in rejecting the notion that this propensity could be said to characterize "every murderer coming before a court,"[129] the Idaho Supreme Court stated:

> [W]e construe the "propensity" language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.[130]

The court did not provide any guidance as to how this propensity was to be determined, only holding that "as applied in the instant case," it was "beyond any doubt whatsoever" that the defendant had "exhibited a propensity to commit murder . . . ."[131] Although the defendant's propensity in that case was likely indisputable—given his previous murder convictions—the court's vague construction of "propensity" does nothing to cabin juror discretion and risks determinations of future dangerousness based on unreliable or prejudicial evidence.[132]

B. Oklahoma

Similar to Idaho's statutory scheme, Oklahoma provides that all offenders convicted of first-degree murder are death eligible.[133] In order to impose a death sentence, the jury must find at least one aggravating factor beyond a reasonable doubt, and must determine that the aggravating factors outweigh the mitigating circumstances.[134] As in Idaho, a defendant may be sentenced to death solely on a finding that he or she presents a "continuing threat to society."[135]

In Oklahoma, a finding that a defendant would pose a future danger may be based on any relevant evidence, including "other unrelated crim-

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[128] *E.g.*, State v. Creech, 670 P.2d 463, 471 (Idaho 1983) (quoting IDAHO CODE § 19–2515(f)(8) (current version as amended at IDAHO CODE § 19–2515(9)(i)(2013); quoted language remains in effect)).

[129] *Id.*

[130] *Id.* at 472.

[131] *Id.*

[132] *See, e.g.*, State v. Dunlap, 873 P.2d 784, 788–89 (Idaho 1993) (finding admission of unadjudicated criminal conduct was proper for the purposes of determining whether the defendant had exhibited a propensity to commit murder).

[133] OKLA. STAT. tit. 21, § 701.10 (West 2015).

[134] *Id.* § 701.11.

[135] *Id.* §§ 701.11, 701.12(7).

inal acts" and the "callous nature" of the instant crime.[136] In some cases, a finding of future dangerousness may be upheld merely on the "circumstances surrounding the murders" for which the defendant was convicted.[137] For example, where the defendant had no prior criminal history, the Oklahoma Court of Criminal Appeals endorsed a finding that the defendant posed a continuing threat based solely on his attitude towards the crime.[138] The court reasoned that "[a] defendant who does not appreciate the gravity of taking another's life is more likely to do so again."[139] But this rationale could arguably encompass any individual who commits murder—including those who do so under extreme mental disturbance or emotional distress.

Under Oklahoma's mandatory death-sentence review, if the Court of Criminal Appeals finds one of the aggravating factors is invalid, it may discard that evidence and reweigh the remaining aggravating factors against the mitigating circumstances.[140] Generally, some overlap between factors is permissible, as long as one factor does not subsume the others, and the evidence relied on in each determination is a different facet of the crime or another incident.[141] However, the fallacy with this approach is that it may discount the overwhelming influence that future dangerousness has on a jury's sentencing verdict.[142] If the "continuing threat" aggravator is invalid, but another aggravating factor remains, the court may assume the jury gave the remaining factor equal or greater weight when assessing it against the mitigating circumstances. Thus, the courts may uphold death sentences in cases involving invalid aggravators where,

[136] Warner v. State, 2006 OK CR 40, ¶ 126, 144 P.3d 838, 879; *see also* Charm v. State, 924 P.2d 754, 762–63 (Okla. Crim. App. 1996) (noting that the "most common grounds alleged to prove the continuing threat aggravator include the defendant's history of violent conduct, the facts of the homicide at issue, defendant's threats, lack of remorse, attempts to prevent calls for help, mistreatment of family members and testimony of experts").

[137] Turrentine v. State, 1998 OK CR 33, ¶ 78, 965 P.2d 955, 977.

[138] *Id.*

[139] *Id.* (internal citations omitted).

[140] OKLA. STAT. tit. 21, § 701.13 (West 2015); *see, e.g.*, Sellers v. State, 809 P.2d 676, 691–92 (Okla. Crim. App. 1991) ("After discarding the evidence supporting the invalid aggravating circumstance of 'especially heinous, atrocious or cruel,' and after carefully weighing the remaining aggravating circumstances against the mitigating evidence presented at trial, we find the sentence of death to be factually substantiated and appropriate.").

[141] *See, e.g.*, Garrison v. State, 2004 OK CR 35, ¶¶ 110–11, 103 P.3d 590, 610 ("Although there was some overlap[,]" the court found "the evidence supporting the two aggravating circumstances was not predicated on the same acts, nor did the evidence offered in support of one aggravating circumstance subsume the other.").

[142] As an example, in almost 73% of the executions in Oklahoma between 1990 and 2004, the trial jury found the defendant posed a future danger. Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 LAW & PSYCHOL. REV. 63, 81 (2005).

if the jury had only considered the valid aggravators, it may have voted in favor of life imprisonment.

C. Virginia

In order to impose a death sentence in Virginia, the jury must either "find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society *or* that his conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman."[143] Thus, capital jurors in Virginia must base any death sentence on either a specific finding that the defendant is a future danger or that the conduct involved was of a particular character.

The Virginia Supreme Court has severely circumscribed the evidence a jury may consider in evaluating a defendant's future dangerousness. Contrary to a common-sense understanding of the term, the courts have interpreted Virginia's statutory scheme to require that any assessment of future dangerousness be backwards-looking; a finding that the defendant presents a continuing threat must be based on either the defendant's prior criminal acts or the circumstances surrounding the instant offense.[144] Although failing to provide any empirical support for its reasoning, the Virginia Supreme Court has assumed that:

> If the defendant has been previously convicted of "criminal acts of violence" . . . there is a reasonable "probability," i.e., a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future. Such a probability fairly supports the conclusion that society would be faced with a "continuing serious threat."[145]

This conclusion all but ignores evidence of the minimal rates of future violence among capital offenders, as well as the American Psychological

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[143] VA. CODE ANN. § 19.2-264.2(2015) (emphasis added).

[144] *See id.* § 19.2-264.4 ("The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon the evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society."); Murphy v. Commonwealth, 431 S.E.2d 48, 53 (Va. 1993) ("The facts and circumstances surrounding the planned murder for hire of James is sufficient to support the trial court's finding of future dangerousness."); Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978) (interpreting the future dangerousness statutory aggravating factor as being "designed to focus the fact-finder's attention on prior criminal conduct as the principle predicate for a prediction of future 'dangerousness'").

[145] *Smith*, 248 S.E.2d at 149.

Association's admonishment that predictions of future violence are unreliable and inaccurate.[146]

Even where the defendant had no prior criminal record, the Virginia Supreme Court readily endorsed the jury's finding of future dangerousness.[147] Although the defendant in *Wolfe v. Commonwealth* had not been previously convicted of any crimes, the court found that evidence of his prior attempts to kill the victim were "sufficient to support the jury's finding beyond a reasonable doubt that there [wa]s a reasonable probability that th[e] defendant [wa]s a future danger to society."[148]

Moreover, despite the fact that Virginia prohibits parole for all capital offenses,[149] the courts have refused to limit "society" to "prison society," and have consistently excluded a defendant's proffered evidence of prison conditions or prison-violence risk assessments.[150] Although the Virginia Supreme Court suggested that such evidence might be permitted if it "connect[ed] the specific characteristics of the particular defendant to his future adaptability in the prison environment,"[151] this interpretation was foreclosed in *Lawlor v. Commonwealth*.[152]

On appeal, Lawlor argued the trial court erred in excluding much of the testimony of Dr. Mark Cunningham—a renowned expert on prison-violence risk assessments[153]—which the defendant had proffered as mitigation and as rebuttal of the State's evidence of future dangerousness.[154] In finding no abuse of discretion in the exclusion of the testimony for the purposes of rebuttal, the Virginia Supreme Court reasoned that the proffered testimony "expressed Dr. Cunningham's opinion of Lawlor's risk of future violence in prison society only, rather than society as a

[146] Brief for Am. Psychiatric Ass'n. as Amicus Curiae at 4–6, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080) [hereinafter Brief of APA]; *see also* TEX. DEF. SERV., DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 34 (2004), http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf; Thomas J. Reidy, Jon R. Sorenson & Mark D. Cunningham, *Probability of Criminal Acts of Violence: A Test of Jury Predictive Accuracy*, 31 BEHAV. SCI. L. 286, 289 (2013).

[147] *E.g.*, Wolfe v. Commonwealth, 576 S.E.2d 471, 485 (Va. 2003).

[148] *Id.*

[149] VA. CODE ANN. §§ 18.2-10, -31, 53.1-151 (2015).

[150] *See, e.g.*, Burns v. Commonwealth, 541 S.E.2d 872, 894 (Va. 2001) (barring defendant from introducing evidence of prison conditions in rebuttal to the State's evidence of future dangerousness); Cherrix v. Commonwealth, 513 S.E.2d 642, 653 (Va. 1999) (excluding evidence of prison conditions as irrelevant for the purposes of mitigation).

[151] Morva v. Commonwealth, 683 S.E.2d 553, 565 (Va. 2009) (citation omitted).

[152] 738 S.E.2d 847, 864–65 (Va. 2013).

[153] *See* Mark D. Cunningham, *Home*, http://www.markdcunningham.com/ (detailing Dr. Cunningham's research and experience providing testimony in state and federal cases).

[154] *Lawlor*, 738 S.E.2d at 881.

whole."[155] The court grounded its interpretation in the statutory text, asserting that "the question of future dangerousness is about the defendant's *volition*, not his *opportunity*, to commit acts of violence."[156] In rejecting the mitigating value of the excluded testimony, the court went on to conclude that Dr. Cunningham's predictions of the defendant's likely future behavior by comparing his attributes to statistical models were "mere 'statistical speculation.'"[157] While the court conceded that each attribute was "extracted from Lawlor's personal history," it stressed that "characteristics alone are not character."[158] Thus, the court firmly signaled that only evidence of the defendant's past behavior was relevant to mitigation or as rebuttal to the State's assertion that the defendant constitutes a continuing threat.[159]

In both its statutory framework and case law, Virginia positions the defendant's future dangerousness at the fulcrum of the decision between life and death. However, in limiting the defendant's opportunity to put forth mitigating evidence and to rebut evidence of future dangerousness, Virginia ensures that jurors are likely to base their penalty-phase decisions on speculative, incomplete, and inaccurate information.

IV. FUTURE DANGEROUSNESS JURISPRUDENCE: BEYOND THE SPECIAL ISSUE AND STATUTORY AGGRAVATING FACTOR JURISDICTIONS

In states where future dangerousness is not a special-issue question or statutory aggravating factor, it is often difficult to determine when and how the issue of future dangerousness affects the penalty phase proceeding. Although many of these states allow the prosecution to argue that a defendant poses a future danger,[160] the limitations and boundaries on these arguments are ill-defined. As a result, appellate courts often engage in post hoc rationalization of improper arguments, manipulating the contours of the future dangerousness issue to uphold a jury's sentencing decision.[161] Moreover, even when a court does concede that an argument was improper, only on rare occasions does the court find the error prej-

[155] *Id.* at 883.

[156] *Id.* at 882.

[157] *Id.* at 883–84 (internal citations omitted).

[158] *Id.* at 884–85.

[159] *Id.* at 883–84.

[160] *See infra* Part IV, Section A.

[161] *See, e.g.*, People v. Boyette, 58 P.3d 391, 434 (Cal. 2002) (discussing an exchange between the prosecutor and an expert witness and concluding that the prosecutor was not relying on prohibited expert testimony to establish future dangerousness, but rather was "arguing that the facts of the crime showed an absence of remorse and, from that absence, the jury could infer defendant was a threat to kill again").

udiced the defendant.[162] This judicial hindsight often obscures the effects of prejudicial and speculative evidence, and discounts the highly aggravating role that future dangerousness evidence plays in the penalty decision.

A. States Allowing the Prosecution to Argue Future Dangerousness

Although explicit discussion of a defendant's future dangerousness is more prominent in jurisdictions where it functions as a statutory aggravating factor, many states also allow prosecutors to argue a defendant presents a continuing threat during the penalty phase of a capital trial.[163] Because future dangerousness is not part of the statutory scheme, prosecutors are permitted wide latitude in the arguments they make and the evidence used to bolster them. A look at some of the decisions from each of these states demonstrates how the courts' treatment of these arguments—even when deemed improper—contributes to death sentences based on unreliable or prejudicial evidence. The following survey of states that permit argument as to a defendant's future dangerousness reveals wildly divergent approaches.[164]

1. Alabama

During the penalty phase of a capital trial, Alabama permits the introduction of "[a]ny evidence which has probative value and is relevant to [the] sentence . . . regardless of its admissibility under the exclusionary rules of evidence."[165] In demarcating the limits of probative and relevant information, the Alabama Court of Criminal Appeals has repeatedly en-

[162] *Compare* State v. Haselden, 577 S.E.2d 445, 450 (S.C. 2003) (remanding for a new sentencing proceeding after determining the State had placed the defendant's future dangerousness at issue and therefore a jury instruction explaining that the defendant would be ineligible for parole if sentenced to life imprisonment was required), *with* Sterling v. State, 477 S.E.2d 807, 811 (Ga. 1996) (concluding the prosecution's argument concerning future dangerousness was improper, but finding that, "in view of the trial court's corrective measures," there was no reversible error).

[163] The states that permit the prosecution to argue a defendant presents a future danger include: Alabama, California, Georgia, Louisiana, Missouri, Montana, Nevada, North Carolina, Ohio, Pennsylvania, South Carolina, and Utah. *See* Berry, *supra* note 18, at 898–99 (listing states that permit the State to argue future dangerousness).

[164] Although Montana allows the prosecution to argue a defendant presents a future danger, with only two individuals currently on death row and three executions since 1976, there is little case law addressing the issue. *State by State Database: Montana*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state (select "Montana" from dropdown menu). While the jury is responsible for deciding the statutory aggravating factors, the judge has considerable latitude in determining the sentence and may consider "the full range of evidence admitted." State v. Smith, 705 P.2d 1087, 1104 (Mont. 1985).

[165] ALA. CODE § 13A-5-45(d) (2015).

dorsed future dangerousness as a valid sentencing consideration.[166] But rather than resting on any empirical evidence, prosecutors' arguments concerning a defendant's future dangerousness are often tinged with emotional appeals and imagery that devalues the life at stake. For example, in *Holladay v. State*, the prosecutor compared the defendant to "Old Yeller," the dog in the popular children's story that was euthanized after contracting rabies.[167] In upholding the validity of the argument, the court found it was an appropriate analogy to highlight the need to "take the life of another person" when that "person poses a threat to society."[168] If one takes the court's rationale to its logical conclusion, it would seem the State would be justified in taking the life of an individual that posed any threat to society, including those with communicable or deadly diseases—certainly an extreme and untenable position.

Even if the prosecution does not put a defendant's future dangerousness at issue, in presenting mitigating evidence, the defendant may unwittingly open the door to future dangerousness arguments on rebuttal. In *Williams v. State*, the Alabama Court of Criminal Appeals determined the defendant put his future dangerousness at issue when he requested a psychological evaluation.[169] The defendant had presented the testimony of a certified social worker who suggested "that the act of murdering an individual" was "inconsistent with the [defendant's] previous behavior."[170] This allowed the prosecution to present testimony indicating the defendant suffered from a personality disorder—treatment of which was often unsuccessful—and that a person like the defendant was "very unlikely to change."[171] As will be discussed in Part V of this Article, expert statements purporting to guarantee a defendant's future dangerousness are highly aggravating and extremely persuasive, despite the fact they are often incorrect.

While it may be tempting to marginalize the impact future dangerousness has on the penalty-phase decision, any doubt as to its decisive in-

[166] *See, e.g.*, Whatley v. State, 146 So. 3d 437, 482 (Ala. Crim. App. 2010) (noting that although "[t]here is no aggravating circumstance that relates to a defendant's future dangerousness," the Alabama courts "have never restricted the admission of evidence at the penalty phase . . . to evidence related solely to the aggravating circumstances and the mitigating circumstances"); Doster v. State, 72 So. 3d 50, 116 (Ala. Crim. App. 2010) (noting "future dangerousness is 'a subject of inestimable concern at the penalty phase of a capital trial'"(internal citations omitted)); Arthur v. State, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990) (finding the prosecutor's comments that Arthur would kill again if given the opportunity were "proper because they concerned the valid sentencing factor of [Arthur's] future dangerousness" (alteration in original) (internal citations omitted)).

[167] 549 So. 2d 122, 132 (Ala. Crim. App. 1988).

[168] *Id.*

[169] 601 So. 2d 1062, 1078 (Ala. Crim. App. 1991).

[170] *Id.*

[171] *Id.*

fluence is foreclosed by the Alabama Court of Criminal Appeals' reasoning in *Doster v. State*.[172] Unlike most states with capital punishment, Alabama is the only state where elected judges routinely override a jury's decision to impose a life sentence, replacing it with the death penalty.[173] In affirming the circuit court's override of the jury's unanimous recommendation to sentence Doster to life without parole and its imposition of a death sentence, the Alabama Court of Criminal Appeals stated:

> [F]uture dangerousness is "a subject of inestimable concern at the penalty phase of a capital trial." . . . Evidence of such future dangerousness is exhibited in [Doster's] criminal history as contained in the pre-sentence report, his behavior in the underlying cause, and in his subsequent escape . . . . This Court believes that, had the jury been privy to all the information relating to future dangerousness, it would have impacted their decision making.[174]

Notably, the factors the circuit court cited in its decision to impose a death sentence were not known to the jury.[175] Thus, in rejecting the jury's recommendation, the court grounded its imposition of a death sentence squarely on the likelihood that the defendant presented some continuing threat—a speculative conclusion based on its own weighing of the aggravating and mitigating evidence.[176]

2. California

Although California proscribes the use of expert testimony to establish future dangerousness, prosecutors are permitted to argue a defendant presents a continuing threat to society based solely on the defendant's prior conduct.[177] Often the prior conduct at issue is that in the

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[172] 72 So. 3d 50, 116 (Ala. Crim. App. 2010).

[173] *Judge Override*, EQUAL JUSTICE INITIATIVE, http://www.eji.org/deathpenalty/override. Although judicial override is legal in Delaware and Florida, those states impose strict requirements before permitting a judge to override a jury's sentencing decision. *Id.*

[174] *Doster*, 72 So. 3d at 116 (second alteration in original) (citations omitted).

[175] *Id.* at 115.

[176] *Id.* at 115–16. In discussing the evidence not known to the jury, the court hints at the speculative nature of its inquiry:

> Had the jury been privy to this information, and had they been able to deal with it fairly and without undue prejudice to [Doster], it is *highly likely* that there would have been greater weight placed on the three aggravating circumstances that were found by the jury . . . . Doster's criminal history would likewise *tend* to decrease the weight the jury may have placed on the mitigating factor of the defendant's alcohol and substance abuse problems, and on the mitigating factor of his troubled youth.

Id. at 115 (alteration in original) (emphasis added).

[177] *See, e.g.*, People v. Boyette, 58 P.3d 391, 433 (Cal. 2002) (noting that "expert testimony that a capital defendant will pose a danger in the future if his life is spared is inadmissible, but 'prosecutorial argument regarding defendant's future

underlying case, for which the jury has already returned a guilty verdict.[178] Moreover, despite the fact that capital offenders are ineligible for parole,[179] prosecutors routinely invoke the specter of future sympathetic victims in arguing that a defendant presents a future danger. For example, in *People v. Boyette*, the prosecutor referred to the "cold calculated manner in which Mr. Boyette executed two people" as showing a "strong likelihood that he would kill again."[180] Asking whether the jurors wanted "to put more families through that," the prosecutor urged jurors to return a death sentence.[181] In addition to sustaining the prosecutor's argument, the court also upheld the use of victim impact evidence to support the "rhetorical question regarding the families of future victims."[182] But the court's ready endorsement of such argument overlooks what studies of capital inmates have shown: the likelihood of future violence is not so easily correlated with previous violence.[183]

Furthermore, a capital defendant in California is circumscribed in his ability to rebut such persuasive and prejudicial evidence of his future dangerousness.[184] Relying on the Supreme Court's mandate that capital sentencing be individualized to account for the character and background of the particular offender, the California Supreme Court has excluded any evidence of prison conditions.[185] Thus, even though a defendant may never be paroled and would remain subject to restrictive confinement conditions, he is unable to proffer this evidence to rebut the State's speculative assertion that he presents a future danger.

3. Georgia

In Georgia, the prosecution is permitted to argue future dangerousness during the penalty phase as long as the evidence adduced at trial reasonably supports that inference.[186] Unlike some states, Georgia does

dangerousness is permissible when based on evidence of the defendant's conduct rather than expert opinion'" (internal citations omitted)).

[178] *See, e.g.*, *id.*

[179] CAL. PENAL CODE § 190.3 (West 2016).

[180] *Boyette*, 58 P.3d at 433.

[181] *Id.*

[182] *Id.*

[183] *See* TEX. DEF. SERV., *supra* note 146, at 34–35; Reidy et al., *supra* note 146, at 289.

[184] *See* Jerome Deise & Raymond Paternoster, *More Than a "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing*, 40 HASTINGS CONST. L.Q. 611, 640 (2013) (detailing the authors' study suggesting "victim impact evidence can create unfair prejudice to the accused that would substantially outweigh the probative value for which such evidence is offered, thereby requiring its exclusion").

[185] People v. Ray, 914 P.2d 846, 869 (Cal. 1996) (noting that "[e]vidence concerning the rigors of confinement has no bearing on the character or background of the individual offender or the circumstances of the capital offense").

[186] Henry v. State, 604 S.E.2d 826, 829 (Ga. 2004).

recognize that capital defendants will be confined to prison for the remainder of their lives[187] and thus limits the "society" to which they may pose a danger to those within the prison system.[188]

However, even when the Georgia courts deem a future dangerousness argument to be improper, it is very difficult for the defendant to show this prejudiced the result. For example, in *Sterling v. State*, during his closing argument, the prosecutor admonished the jury to not put "that killer on the street."[189] Although the defendant objected, the trial court denied his motion for a mistrial.[190] On appeal, the Georgia Supreme Court admitted the argument was improper in the guilt phase of the trial, but concluded the trial court "did not commit reversible error" because it had instructed the jury to disregard the prosecutor's statements.[191] Despite empirical evidence that jurors are preoccupied with the issue of future dangerousness—even when not explicitly argued—such dismissive responses by the courts are common.[192]

4. Louisiana

In Louisiana, prosecutors have great latitude in arguing future dangerousness. During the guilt phase of the trial, if the defendant puts on evidence that implicates his potential future dangerousness, the prosecutor may argue this issue in closing arguments.[193] The courts' endorsement of these arguments discounts the persuasive force they may have on both the guilt verdict and the penalty decision. For instance, in *State v. Williams*, the prosecutor made numerous references to the defendant's prior arrest record,[194] and during the penalty phase, stated: "What will protect anyone in prison? What will protect the other inmates? There is nothing. Actually, I was wrong. There is one thing that will protect the other people, his death. That's the only thing that will protect the *world* from [defendant]."[195] Finding no merit in the defendant's objection to this argument, the court concluded that "the prosecutor's remark about

[187] GA. CODE ANN. § 17-10-31.

[188] *Henry*, 604 S.E.2d at 829.

[189] 477 S.E.2d 807, 810 (Ga. 1996).

[190] *Id.* at 810–11.

[191] *Id.* at 811. Similarly, in *McClain v. State*, the court concluded that because there was "overwhelming evidence of McClain's guilt," it was "highly unlikely" that improper arguments as to his future dangerousness in the guilt phase of the trial "contributed to the verdict." 477 S.E.2d 814, 822 (Ga. 1996).

[192] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559–60 (1998).

[193] *See, e.g.*, State v. Williams, 2007-1407, p. 18 (La. 10/20/09); 22 So. 3d 867, 896 (finding "the State was entitled to argue dangerousness in its closing arguments" because the defense's expert had addressed future dangerousness on cross examination).

[194] *Id.* at p. 14, 22 So. 3d at 894.

[195] *Id.* at p. 19, 22 So. 3d at 896 (alteration in original) (emphasis added).

defendant's death being the only way to protect other people from him referred to the evidence presented and did not merely express the prosecutor's personal opinion based on information not disclosed to the jurors."[196]

In dismissing the impact of improper arguments, the Louisiana courts often rely on a perceived factual basis in justifying prosecutors' remarks. For instance, although the court deemed the prosecutor's comments on "the societal costs of a life sentence, misspent tax dollars, future escapes, [and] more killings by defendant" improper, it found the "prosecutor at least had a factual basis for his remarks" because the defendant had admitted to previous escapes.[197] But in concluding there was a factual basis for the prosecutor's arguments, the court all but ignored the differences in the defendant's previous confinement conditions, and failed to acknowledge the speculative nature of predictions of future violence.[198] Rather than explore the impact of the prosecutor's argument on the jury, the court instead determined "it [was] *obvious* that the prosecutor's comments did not inject an arbitrary factor into the proceedings. It was rather the defendant's *seeming* disregard for human life, both his and others, which prompted the jury to impose a capital sentence."[199] But, as will be discussed in Part V and VI of this Article, this hindsight rationalization assumes that jurors are not unduly influenced by improper assertions, and that predictions of future dangerousness have a factual basis—two assumptions that studies appear to refute.

5. Missouri

Like many other states, Missouri allows comments regarding future dangerousness during the penalty phase of a defendant's trial.[200] However, even at the guilt phase, the State is able—albeit circuitously and in a general sense—to highlight the possibility that the defendant poses a continuing threat to society. For example, in *State v. Deck*, the Missouri Supreme Court rejected the defendant's argument that the state made improper reference to his future dangerousness when implying that imposition of the death penalty would save potential innocent victims, instead finding that "one of the purposes of capital punishment is the incapacitation of dangerous criminals and 'the consequent prevention of

[196] *Id.*

[197] State v. Busby, 464 So. 2d 262, 267 (La. 1985) *vacated sub nom.* State *ex rel.* Busby v. Butler, 538 So. 2d 164 (La. 1988).

[198] *Id.*

[199] *Id.* (emphasis added).

[200] Am. Bar Ass'n Death Penalty Mor'm Imp. Project, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report 390 (2012), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf (citing Mo. Rev. Stat. § 565.032.2 (2011); *State v. Bucklew*, 973 S.W.2d 83, 96 (Mo. 1998) (en banc)).

crimes that they may otherwise commit in the future.'"[201] Despite the State's obvious reference to the need to impose the death penalty to prevent future crimes, the court bizarrely concluded that the prosecution "did not suggest or imply the jurors would be directly responsible or held accountable if [the defendant] harmed anyone else in the future."[202] Contrary to the Supreme Court's *Lockett* line of cases, the Missouri Supreme Court's endorsement of this generalized argument for capital punishment seems to defy the constitutional mandate for an individualized sentencing determination.

6. Nevada

As with many other states, Nevada courts are eager to dismiss the impact of improper arguments or inadmissible evidence of future dangerousness, relying instead on evidence of other aggravating factors as determinative of the jury's verdict. While the Nevada Supreme Court has held that "psychiatric evidence purporting to predict the future dangerousness of a defendant is highly unreliable and, therefore, inadmissible at death penalty sentencing hearings," the courts are likely to find it was harmless error to admit such testimony.[203] But as will be demonstrated in Part V, jurors often readily accept psychiatric predictions of future dangerousness and give them inordinate weight in determining the appropriate penalty.

Prosecutors also often push the boundaries of improper argument by suggesting the jurors' penalty decision reflects their choice between the life of the defendant and the life of some future victim. Although the Nevada courts prohibit such arguments and frequently admonish prosecutors, these arguments are consistently and repeatedly raised.[204] As the Nevada Supreme Court stated:

> This court must, all too frequently, consider whether a prosecutor's statement constitutes a proper "future dangerousness" argument or some species of improper plea to or request of the jury. The problem lies either with the prosecutor's lack of comprehension of or respect for the law on this issue, or with a lack of clarity on the part of this court.[205]

Perhaps this recurring problem is due, in part, to the courts' failure to impose any meaningful sanctions on these improper arguments. In *Castillo v. State*, the prosecutor framed the decision of whether or not to im-

[201] 303 S.W.3d 527, 543 (Mo. 2010) (en banc) (internal citations omitted).

[202] *Id.* at 544.

[203] Redmen v. State, 828 P.2d 395, 400 (Nev. 1992), *overruled on other grounds by* Alford v. State, 906 P.2d 714 (Nev. 1995).

[204] *See, e.g.*, Schoels v. State, 966 P.2d 735, 739–40 (Nev. 1998) ("A prosecutor may not argue or suggest to the jury that the jury is or would be responsible for any future victims of the defendant."); *see also* cases cited *infra* notes 208, 210.

[205] McKenna v. State, 968 P.2d 739, 748 (Nev. 1998).

pose the death penalty as a choice between "an execution sentence for the killer" or "for a future victim of th[e] defendant."[206] In evaluating this comment on appeal, the Nevada Supreme Court concluded it was improper, but found the statement "did not unfairly prejudice [the defendant] in light of the overwhelming evidence of his guilt."[207] Similarly, in *Jones v. State*, the court noted the prosecutor's characterization of the defendant as a "rabid animal" was "wholly unnecessary" and outside the bounds of permissible future dangerousness argument, but ultimately concluded there was "ample evidence from which the jury could have drawn th[e] very same conclusion in the absence of the prosecution's demeaning and unprofessional remarks."[208]

Additionally, prosecutors are permitted to argue future dangerousness "based on no other evidence than the violent nature of the offense for which the defendant is being sentenced."[209] But as will be discussed in Part VI, a recent Oregon study of capital inmates suggests that, for many, the crime for which they were convicted is an extreme example of their propensity for violence, as most do not commit violent acts once in prison.

7. North Carolina

North Carolina grants prosecutors broad discretion in arguing a particular defendant presents a future danger, regularly permitting arguments based solely on deterrence of future crimes.[210] But the courts' endorsement of these arguments overlooks their persuasive force and ignores the studies that show predictions of future dangerousness are inherently unreliable and, more often than not, wrong.[211] For example, in *State v. Daniels*, the Supreme Court of North Carolina discounted case law from other states and evidence from the American Psychological Association concluding that "a psychiatric diagnosis made without the benefit of a personal interview is inherently unreliable."[212] In justifying its endorsement of such expert opinions, the court compared an expert who makes a diagnosis about a defendant's mental condition based solely on previous reports with a doctor who concludes a victim has been sexually

[206] 956 P.2d 103, 109 (Nev. 1998).

[207] *Id.* at 110.

[208] 937 P.2d 55, 65 (Nev. 1997).

[209] Harte v. State, 13 P.3d 420, 432 (Nev. 2000).

[210] *E.g.*, State v. Cummings, 536 S.E.2d 36, 55–56 (N.C. 2000) ("This Court has consistently 'approved prosecutorial arguments urging the jury to sentence a particular defendant to death to specifically deter that defendant from engaging in future murders.'" (citation omitted)); State v. Locklear, 505 S.E.2d 277, 304 (N.C. 1998) ("The prosecutor argued that prison would not do defendant any good and that the death penalty would prevent defendant from taking another life. . . . We have previously held that arguments invoking specific deterrence are proper.").

[211] *See infra* Part V and VI.

[212] 446 S.E.2d 298, 315 (N.C. 1994).

abused based on a review of the victim's medical records.[213] But this rationalization ignores key distinctions between expressing an opinion on the likely future behavior of a defendant and opining on an event that has already happened.

8. Ohio

Although Ohio does not permit the prosecution to inject non-statutory aggravating factors such as future dangerousness into either the guilt or penalty phase of the proceedings, presenting evidence of future dangerousness in rebuttal of mitigating factors or merely making reference to such in summation is permitted when a proper jury instruction is given.[214] But whether argument or evidence of future dangerousness is considered as an explicit non-statutory aggravating factor, as rebuttal of mitigating factors, or in closing argument likely makes little difference in terms of its effect on jurors.[215]

Moreover, even when such evidence is erroneously admitted, courts are reluctant to find the evidence prejudiced the defendant. For example, where evidence of future dangerousness was admitted during the guilt and penalty phases of the defendant's trial, the court found "no reasonable possibility that, but for the inclusion of the evidence, the outcome of the penalty phase would have been different."[216] This speculative, post hoc weighing of the evidence fails to address the prejudicial and unreliable nature of future dangerousness evidence.

9. Pennsylvania

The Pennsylvania courts tend to take a narrow view of when future dangerousness is put at issue. Despite the Supreme Court's admonishment in *Kelly v. South Carolina* that evidence tending to prove future dangerousness is not irrelevant to that point simply "because it might support other inferences,"[217] the Pennsylvania state courts often attribute some other purpose to the evidence. References to a defendant's past convictions or depravity of mind are often deemed to reference only past

[213] *Id.* at 314.

[214] *See, e.g.*, State v. Raglin, 699 N.E.2d 482, 490 (Ohio 1998) ("The prosecution was entitled to introduce relevant evidence rebutting the existence of any statutorily defined or other mitigating factor first asserted by the defense."); State v. Beuke, 526 N.E.2d 274, 280 (Ohio 1988) ("While requiring the jury through instruction or specification to review a non-statutory aggravating circumstance such as 'future dangerousness' would constitute reversible error . . . merely arguing such in summation, coupled with a proper jury instruction explaining the statutory aggravating circumstances and mitigating factors, does not create a non-statutory aggravating circumstance.") (internal citation omitted).

[215] *See infra* Part VI.

[216] State v. Richey, No. 12-87-2, 1989 WL 156562, at *26 (Ohio Ct. App. Dec. 28, 1989), *aff'd*, 595 N.E.2d 915.

[217] 534 U.S. 246, 254 (2002).

conduct and not to suggest future dangerousness.[218] In *Commonwealth v. Carson*, the prosecution argued that the defendant's history of felony convictions should encourage the jury to prevent the defendant from causing any more injury.[219] The Pennsylvania Supreme Court, in finding a "*Simmons* charge"[220] was not warranted, concluded the issue of future dangerousness was not implicated since the prosecutor focused "on appellant's history of violent felony convictions and tie[d] his failure to reform his conduct into the purpose served by th[e] statutory aggravating circumstance."[221] Thus, the court subverted the procedural protection provided by a *Simmons* instruction, deeming argument that was highly suggestive of future dangerousness irrelevant to that issue.

10. South Carolina

Much of the litigation involving future dangerousness in South Carolina centers on whether a parole ineligibility jury instruction is required.[222] The threshold inquiry in deciding this question is whether a defendant's future dangerousness was, in fact, put at issue. Historically, the South Carolina courts have employed a narrow view of when future dangerousness is at issue.[223] Three South Carolina cases granted certiorari by the Supreme Court are illustrative of the problems associated with analyzing whether evidence suggests a defendant presents a future danger.

In *State v. Simmons*, the trial court refused the defendant's requested instructions on parole ineligibility after the prosecution urged the jury to impose a death sentence as "an act of self-defense."[224] During deliberations, the jury asked whether there was any possibility of parole if the defendant was given a life sentence.[225] The trial judge responded with the following instruction:

[218] *See, e.g.*, Commonwealth v. Chimel, 889 A.2d 501, 536–37 (Pa. 2005) (finding that the prosecutor's comment that death is the only solution for certain killers did not suggest the defendant was a future danger, but was merely "oratorical flare"); Commonwealth v. Harris, 817 A.2d 1033, 1057 (Pa. 2002) (finding that "when viewed in context, it [wa]s clear that the prosecutor did not imply future dangerousness" when the prosecutor suggested the jurors' "own safety was at risk if [the defendant] was ever released from prison" (citations omitted)).

[219] 913 A.2d 220, 273 (Pa. 2006).

[220] A *Simmons* charge is required when a defendant's future dangerousness is at issue and, under the state's sentencing scheme, he would be ineligible for parole if sentenced to life in prison. Simmons v. South Carolina, 512 U.S. 154, 171 (1994).

[221] *Carson*, 913 A.2d at 273.

[222] *See* John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398–99 (2001) (discussing, *e.g.*, *Simmons*, 512 U.S. 154).

[223] *See, e.g.*, *Simmons*, 512 U.S. at 161.

[224] *Id.* at 157 (citations omitted).

[225] *Id.* at 160.

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their pla[i]n and ordinary meaning.[226]

In reversing, the U.S. Supreme Court held the trial court's refusal to provide an instruction that accurately apprised the jury of the defendant's parole ineligibility violated the Due Process Clause.[227] In the context of future dangerousness, the Court noted "there may be no greater assurance" that a defendant does not constitute a continuing threat to society than his inability to be released on parole.[228]

In *Shafer v. South Carolina*,[229] the defendant asserted the trial court erred by refusing to grant an instruction on his parole ineligibility after the prosecution placed his future dangerousness at issue.[230] The trial judge denied the requested *Simmons* instruction after determining the defendant's future dangerousness had not been placed at issue, even though "the prosecutor had come close to crossing the line."[231] In resolving Shafer's objection, the South Carolina Supreme Court did not address whether Shafer's future dangerousness had been placed at issue. Rather, the court held Shafer was not entitled to a *Simmons* instruction because, under the then-existing sentencing scheme, life without the possibility of parole was not the only "legally available" alternative sentence.[232] The U.S. Supreme Court reversed, but declined to address whether Shafer's future dangerousness was at issue, finding it to be a "question open for the state court's attention and disposition."[233] On remand, the trial court concluded the defendant's future dangerousness had, in fact, been placed at issue when the prosecution presented evidence of "appellant's character and adaptability to prison."[234]

In *Kelly v. South Carolina*, the Supreme Court reversed the state court's decision finding that future dangerousness had not been put at issue, stating: "[T]he evidence and argument cited by the state court are flatly at odds with the view that 'future dangerousness was not an issue in this case.'"[235] Although the South Carolina Supreme Court conceded that evidence that the defendant "took part in escape attempts and carried a

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[226] *Id.* (citations omitted).

[227] *Id.* at 162.

[228] *Id.* at 163–64.

[229] 532 U.S. 36 (2001).

[230] *Id.* at 46.

[231] *Id.* at 54.

[232] *Id.* at 47 (citing State v. Shafer, 531 S.E.2d 524, 528 (S.C. 2000)).

[233] *Id.* at 54–55.

[234] *Shafer*, 573 S.E.2d at 800.

[235] 534 U.S. 246, 253 (2002) (citations omitted).

shank" had been presented, it asserted this evidence "was designed to show that [the defendant] would not adapt to prison life" and thus, did not implicate future dangerousness.[236] In rejecting the state court's argument, the U.S. Supreme Court stated:

> The fallacy of the State Supreme Court's attempt to portray the thrust of the evidence as so unrealistically limited harks back to a comparable mistake by the trial judge, who spoke of the evidence as going, not to future dangerousness, but "to [Kelly's] character and characteristics." The error in trying to distinguish *Simmons* this way lies in failing to recognize that evidence of dangerous "character" may show "characteristic" future dangerousness, as it did here. This, indeed, is the fault of the State's more general argument before us, that evidence of future dangerousness counts under *Simmons* only when the State "introduc[es] evidence for which there is *no other possible inference* but future dangerousness to society." Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms.[237]

While the Supreme Court addressed the error in *Kelly*, there are likely many other capital cases that go unremedied. The South Carolina courts' attempts to subvert a *Simmons* instruction by contorting the evidence of future dangerousness undermines an important procedural safeguard and fails to recognize the highly prejudicial role future dangerousness plays in capital jury decision-making.

11. Utah

Future dangerousness is not often discussed in Utah case law. When it is discussed, it is usually in the context of a defendant's prior criminal behavior.[238] Although Utah does not exclude unadjudicated offenses, it does place some substantive limitations on their use. The state has the burden of proving beyond a reasonable doubt that the defendant did commit the unadjudicated offense.[239] However, the State is also free to introduce evidence of other crimes even where the defendant pleaded guilty to lesser offenses.[240] And the Utah courts have signaled that considering prior violent criminal behavior is essential to evaluating a defend-

[236] *Id.* at 251 (citing State v. Kelly, 540 S.E.2d 851, 857 (S.C. 2001)).

[237] *Id.* at 254 (alteration in original) (internal citations omitted).

[238] *See, e.g.*, State v. Maestas, 2012 UT 46, ¶ 286, 299 P.3d 892, 972; State v. Lafferty, 749 P.2d 1239, 1259 (Utah 1988).

[239] *Lafferty*, 749 P.2d at 1260.

[240] *See, e.g.*, *Maestas*, ¶ 289, 299 P.3d at 972 (finding that "the trial court did not err in allowing the State to present evidence that Mr. Maestas committed the two aggravated burglaries, even though he had pled guilty to lesser offenses").

ant's "violent propensities and future dangerousness, factors essential to an evenhanded consideration of death penalty issues."[241]

B. States Allowing the Prosecution to Argue Future Dangerousness in Rebuttal to Mitigating Factors Presented by the Defense

Unlike the states discussed above, two states—Arizona and Florida—do not permit the prosecution to directly argue that a defendant presents a future danger. However, these states do allow the prosecution to introduce evidence of future dangerousness to rebut a defendant's assertion of lack of future dangerousness as a mitigating factor. While this practice may seem innocuous, an examination of the case law from these two states demonstrates how future dangerousness plays a central role in juries' penalty decisions.

1. Arizona

Although prosecutors may only argue a defendant presents a future danger in rebuttal to mitigating evidence presented, Arizona courts frequently engage in a reweighing of aggravating and mitigating circumstances on appeal, sometimes excluding *lack of* future dangerousness as a mitigating factor entirely.[242] For example, in *State v. Sansing*, the defendant "offered his impaired capacity, age, difficult childhood, lack of education, acceptance of responsibility and remorse, potential for rehabilitation/lack of future dangerousness, family support, and the victim's family's request that Sansing not be sentenced to death as non-statutory mitigating circumstances."[243] The trial court outright rejected the motion that Sansing's proffered lack of future dangerousness even constituted a mitigating circumstance.[244] On appeal, the Arizona Supreme Court concluded that "[g]iven the shocking circumstances of th[e] crime, no reasonable jury could have given more than minimal weight to Sansing's argument that he presents no future threat."[245]

Even where there is evidence that the defendant is unlikely to pose a risk while incarcerated, the Arizona courts are reluctant to assign much weight to this conclusion.[246] Instead, the courts often focus on past behav-

[241] *Lafferty*, 749 P.2d at 1259.

[242] *See, e.g.*, State v. Reeves, 310 P.3d 970, 974–76 (Ariz. 2013); State v. Pandeli, 161 P.3d 557, 574–76 (Ariz. 2007).

[243] 77 P.3d 30, 38 (Ariz. 2003).

[244] *Id.* at 39.

[245] *Id.*

[246] *See, e.g.*, State v. Dann, 207 P.3d 604, 628 (Ariz. 2009) (en banc) ("We typically give little weight to a defendant's good behavior while in prison because prisoners are expected to behave and adapt to prison life."); State v. Stokley, 898 P.2d 454, 473 (Ariz. 1995) (en banc) ("Although defendant presented some evidence that he would no longer be dangerous if confined to prison for life, we find that he fails to prove this by a preponderance of the evidence.").

ior or the details of the particular crime at issue as determinative of the defendant's likely potential for future violence.[247] This tendency may be due, in part, to Arizona's sentencing scheme for capital crimes, which permits a life sentence with the possibility of release in certain circumstances.[248] But this backwards-looking assessment of future dangerousness ignores statistical data showing that violent conduct tends to decrease with age.[249] So even for a defendant who is sentenced to a minimum of twenty-five years, the probability that he may present a risk of future violence is likely to diminish as he ages.

Although Arizona does circumscribe the state's ability to contend a defendant presents a future risk by restricting such arguments to rebuttal, a defendant runs the risk of opening the door to these arguments when he puts on evidence in support of other mitigating circumstances.[250]

2. Florida

Florida is one of three states that permit judicial override of a jury's recommended sentence.[251] However, unlike in Alabama, Florida judges must give the jury's recommendation "great weight" and may only override a jury's recommendation of life imprisonment "when the facts suggesting a sentence of death are so clear and convincing that 'virtually no reasonable person could differ.'"[252] While jury recommendations are frequently overridden in Alabama, no judge has elected to override a jury's

[247] *See, e.g.*, State v. Pandeli, 161 P.3d 557, 572 (Ariz. 2007) (en banc) (noting that photographs of the murder scene "tended to show that Pandeli did not commit the Iler murder impulsively and that he might pose a future danger to others if not sentenced to death"); State v. King, 883 P.2d 1024, 1039 (Ariz. 1994) (en banc) ("[T]he only evidence that defendant offered to support his claim that he was no longer dangerous was Dr. McMahon's testimony that he did not present a risk of future criminality. We find it a stretch to read this testimony as saying that defendant was no longer dangerous.").

[248] ARIZ. REV. STAT. ANN. § 13-751 (2015).

[249] Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-*Daubert *World*, 24 CARDOZO L. REV. 1845, 1899 (2003) ("Base rates of violence are far lower after the age of sixty (when most life prisoners would be eligible for parole) than in the twenties."); Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1266 (2000) ("Risk of violence among offenders decreased as the age of inmates increased.").

[250] *King*, 883 P.2d at 1043–44 (noting that many of the nonstatutory mitigating circumstances were interrelated and involved the testimony of a defense expert, whom the court found indicated defendant might pose some risk for future violence).

[251] FLA. STAT. § 921.141 (2015). The other two states that permit judicial override are Alabama and Delaware. EQUAL JUSTICE INITIATIVE, *supra* note 173.

[252] Christmas v. State, 632 So. 2d 1368, 1371 (Fla. 1994) (internal citations omitted).

recommendation for life imprisonment in Florida since 1999.[253] Accordingly, a jury's sentencing recommendation is often reflective of the final outcome of a defendant's penalty phase, and arguments implicating future dangerousness can be influential.

Like in Arizona, prosecutors are prohibited from directly arguing that a defendant presents a future danger during either the guilt or penalty phases of a capital trial.[254] However, the prosecutor's statements must be exceptionally egregious to warrant reversal or a finding of prejudice.[255] Disregarding the influence of future dangerousness on the jury's sentencing recommendation, the Florida courts frequently find that an improper question designed to elicit an opinion on future dangerousness was harmless, particularly if the question was unanswered or the prosecutor never explicitly argued future dangerousness in closing.[256] For example, in *Walker v. State*, the prosecutor asked an expert to opine on whether he thought the defendant might kill again. Although the Florida Supreme Court agreed "the prosecutor's question was wholly improper," and concluded the '"bell was rung' by the question itself[,] and was not 'unrung' by the fact that the question was not answered," the court ultimately concluded there was "no reasonable possibility that this error contributed to the jury's recommendation."[257] The court grounded its reasoning in the fact that the prosecutor did not repeat the improper question or reference the defendant's likely potential for future violence in closing arguments.[258] However, this attempt to minimize the effect of the question seems contrary to the court's own admission that the bell could not be "unrung." The suggestion of future dangerousness had been made to the jury, and whether unanswered or not, was likely very much in the forefront of their minds as they deliberated on the recommended sentence. As discussed in Part VI of this Article, interviews with

[253] EQUAL JUSTICE INITIATIVE, *supra* note 173.

[254] *See* Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983) (reversing the death sentence after finding the prosecutor's argument urging jurors to recommend a death sentence on the basis of defendant's future dangerousness was "inexcusable prosecutorial overkill").

[255] *See, e.g.*, Delhall v. State, 95 So. 3d 134, 168–70 (Fla. 2012) (remanding for a new penalty phase after finding the prosecutor's "arguments that Delhall is a dangerous adult, who was dangerous from the time he was a child, and that he cannot be fixed" were improper).

[256] *See, e.g.*, Walker v. State, 707 So. 2d 300, 313–14 (Fla. 1997) (finding it was improper for the prosecutor to ask an expert whether he thought the defendant would kill again, but concluding the question "was harmless beyond a reasonable doubt" since the prosecutor did not repeat the question or raise this theme in closing); Davis v. State, 698 So. 2d 1182, 1192 (Fla. 1997) (finding the prosecutor's unanswered question as to whether the expert could predict whether the defendant would kill again was harmless error).

[257] *Walker*, 707 So. 2d at 314.

[258] *Id.*

capital jurors indicate future dangerousness is a subject of inestimable concern during penalty phase deliberations, even where it is not explicitly argued.

Likewise, even improper statements as to the deterrent effects of imposing a death sentence are usually not deemed egregious enough to constitute fundamental error. Where the prosecutor stated that the defendant would "kill, and kill and kill again" if not given a death sentence, the court concluded that, "[a]lthough the comment approache[d] the border of impropriety," it "did not impermissibly inject [the defendant's] 'future dangerousness' into the proceeding . . . sufficiently to constitute fundamental error."[259] Similarly, the Florida Supreme Court did not find fundamental error where the prosecution argued the defendant had been violent since birth and was an individual who could not "live out in the community without hurting someone."[260] The court's rationale in both cases ignores the prejudicial effect of such comments, as well as the weighty influence a defendant's future dangerousness has on the penalty-phase decision.

V. PREDICTIONS OF DANGEROUSNESS

In 1983, in *Barefoot v. Estelle*, the Supreme Court upheld the use of expert psychiatric testimony to predict the likelihood that a defendant would constitute a continuing threat to society.[261] Rejecting the amicus arguments of the American Psychiatric Association (APA),[262] the Court stated that barring all psychiatrists' testimony concerning a defendant's future dangerousness would be "like asking [the Court] to disinvent the wheel."[263] The Court expressed concern that prohibiting the use of psychiatric testimony in a capital-sentencing proceeding would undermine "other contexts in which predictions of future behavior are constantly made."[264] But two problems are apparent in the Court's rationale with respect to "other contexts." First, the Court's analogy between a civil commitment proceeding and a capital trial penalty phase undercuts the

[259] Knight v. State, 746 So. 2d 423, 431 (Fla. 1998).

[260] Braddy v. State, 111 So. 3d 810, 851–52 (Fla. 2012). In her dissent, Justice Pariente argued the prosecutor's comments "improperly attempted to incite the jury's passions" and squarely implicated defendant's future dangerousness. *Id.* at 867 (Pariente, J., dissenting).

[261] 463 U.S. 880, 905–06 (1983).

[262] In its amicus curiae brief, the APA asserted that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." *Id.* at 920 (Blackmun, J., dissenting) (citing Brief of APA, *supra* note 146, at 12) (alteration in original).

[263] *Barefoot*, 463 U.S. at 896.

[264] *Id.* at 898. The Court found the inquiry into a patient's mental state during a civil commitment proceeding to be analogous to evaluating the defendant's future danger during the penalty phase of a capital trial.

Court's own oft-repeated admonishment that "death is different."[265] Second, the structure of a civil commitment proceeding is fundamentally different from a capital penalty phase where jurors must decide whether the defendant will be sentenced to death.[266]

In *Barefoot*, the Court was not persuaded that expert testimony as to a defendant's future dangerousness was "almost entirely unreliable" or that "the factfinder and the adversary system w[ould] not be competent to uncover, recognize, and take due account of its shortcomings."[267] But numerous studies over the last few decades have shown that predictions of a defendant's future dangerousness are fundamentally flawed.[268]

A. The Texas Study

As the first state to adopt an explicit inquiry into a defendant's future dangerousness as a prerequisite for a death sentence[269] and the leader in executions,[270] Texas provides fertile ground for studying the impact and viability of the future dangerousness question. In 2004, the Texas Defender Service ("the Service") surveyed 155 cases where prosecutors had hired an expert to testify to the likelihood that the defendant posed a future threat.[271] Analyzing the defendant's post-sentence prison behav-

[265] *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (finding the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (recognizing that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice"); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (concluding that "the penalty of death is qualitatively different from a sentence of imprisonment, however long"); *see also* Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 282 (2006) (drawing a distinction between civil commitment proceedings, which are concerned with immediate dangerousness and must meet the clear and convincing standard or proof, and capital-sentencing hearings, which focus on long-term dangerousness and require proof beyond a reasonable doubt).

[266] *See* Barefoot v. Estelle, 463 U.S. 880, 936 n.14 (1983) (Blackmun, J., dissenting); Thomas L. Hagel, *Representing the Mentally Ill: Civil Commitment Proceedings*, 26 AM. JUR. TRIALS 97 (1979) (describing civil commitment proceedings and noting "[a] mental commitment hearing is usually unlike any other form of litigation"); *see also* Brief of APA, *supra* note 146, at 10 (distinguishing the more short-term predictions of dangerousness involved in civil commitment proceedings from the long-term predictions involved in capital sentencing).

[267] *Barefoot*, 463 U.S. at 889.

[268] Even at the time of the *Barefoot* decision, empirical research indicated that "psychiatrists were more often wrong than right in predicting violent behavior over an extended period of time." Brief of APA, *supra* note 146, at 5 (citing JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1978)).

[269] LONG, *supra* note 4, at 58.

[270] *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976.

[271] TEX. DEF. SERV., *supra* note 146, at 22.

ior, the study concluded that the experts' predictions were wrong 95% of the time.[272] Moreover, jurors were more likely to credit testimony from an individual testifying as an expert even where that expert had not personally examined the defendant,[273] undermining the Court's assertion in *Barefoot* that the adversary process is sufficient to ferret out unreliable evidence.

1. Methodology

Relying on the published opinions of the Texas Court of Criminal Appeals, archival records of the Texas Department of Criminal Justice (TDCJ), and correspondence with the District Attorneys, the Service identified 155 inmates whose penalty-phase trials contained expert testimony "declaring them a 'continuing threat to society.'"[274] In each case, the individual was sentenced to death—reflecting the jury's unanimous finding that the individual was likely to pose a future danger to society.[275] Because only 27% of the opinions of the Texas Court of Criminal Appeals were published between 1995 and 2000 and some prosecutors' offices did not provide the requested information, the sample of inmates studied is likely under-inclusive.[276] The authors did not filter the cases; any identified case in which state-paid experts testified was included.[277]

The Service obtained the disciplinary records of the 155 inmates from TDCJ.[278] Consistent with both TDCJ's definitions and prior research of violence rates among prisoners, the study defined "serious assaultive behavior" as "behavior that results in an injury requiring more than the administration of first aid."[279] This included fractures, cuts requiring stitches, or any injury that required more than a bandage.[280] Since most inmates in prison are likely to incur some kind of infraction as a result of the sheer number of prison rules, limiting the definition to serious assaultive behavior identified inmates who were able to adjust to the prison environment and coexist safely with others in that environment.[281]

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[272] *Id.* at 34.

[273] *Id.* at 12, 14–15.

[274] *Id.* at 21.

[275] *Id.*

[276] *Id.* at 21–22.

[277] *Id.* at 22.

[278] *Id.*

[279] *Id.* at 23.

[280] *Id.*

[281] *Id.* For example, the TDCJ provides inmates with a 136-page Offender Orientation Handbook detailing the rules inmates are expected to follow during incarceration. TEX. DEPT. OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK (Sept. 2015), http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf.

2. Findings

Based on the above definition, only eight (5%) of the 155 inmates reviewed had engaged in serious assaultive behavior.[282] Thirty-one inmates (20%) had no disciplinary violations at all, while 75% had minor infractions.[283] None of the inmates committed another homicide, the principal behavior most jurors are concerned about when evaluating the future dangerousness of a capital-murder defendant.[284] Thus, in 95% of the cases studied, expert predictions of future dangerousness were erroneous.[285]

While it may be tempting to attribute the low incidence of violence to the confinement conditions on death row, of the 155 inmates studied, forty-eight "had their sentences commuted, reduced to life in prison, or reduced to a term less than life," thus removing them from death row.[286] The average time served among these inmates was twenty years and eleven months.[287] Although records detailing the amount of time the inmates spent on death row before commutation were only available in twenty-eight cases, the average time spent on death row for inmates was seven years and nine months.[288] Thus, it is likely that many of these forty-eight inmates had spent time in the general prison population at the time of the study.

The results of the Texas study undermine the Supreme Court's assertion in *Barefoot* that the adversary process is sufficient to discern what is credible expert witness testimony regarding a defendant's future dangerousness.[289] In upholding the use of expert testimony on this issue, the Court assumes that a defendant has an adequate opportunity to cross-examine the state's witness. But this ignores the reality that defense attorneys are often ill-equipped to cross-examine experts on subjects in which they lack expertise.[290]

Compounding this problem is the structure of the expert testimony. In many cases, the prosecutor presents a hypothetical fact pattern approximating the circumstances of the crime and the defendant's previous

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[282] TEX. DEF. SERV., *supra* note 146, at 23.

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.* at 24.

[287] *Id.*

[288] *Id.* at 24 n.120.

[289] Barefoot v. Estelle, 463 U.S. 880, 901 (1983) ("We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.").

[290] *See* Charles P. Ewing, *"Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings*, 8 AM. J.L. & MED. 407, 427 n.90 (1983).

criminal record.[291] The hypothetical often omits any positive or mitigating information concerning the defendant.[292] The expert then provides his assessment of the defendant's future dangerousness, often without even meeting the defendant.[293]

Furthermore, even though a pronouncement of future danger based on a hypothetical would seem dubious, research suggests that jurors are often swayed in their deliberations by the air of authority that emanates from an expert bearing honorific titles such as "Doctor."[294] Dr. James Grigson, nicknamed "Dr. Death" for his unequivocal and highly persuasive guarantees of a defendant's future dangerousness, provides an illustrative example.[295] In the case of Randall Dale Adams, Dr. Grigson testified that the defendant was "at the very extreme, worse or severe end of the scale" and that there was nothing that would change him.[296] Adams, who was convicted of murdering a police officer and sentenced to death, was exonerated twelve years later.[297]

Similarly, in *Barefoot*, during the sentencing phase of the trial, Dr. Grigson was one of two psychiatrists that testified for the state of Texas.[298] Although he did not actually examine the defendant, Dr. Grigson placed the defendant "in the 'most severe category' of sociopaths" and stated "there was no known cure for his condition."[299] Based only on a hypothetical question, Dr. Grigson asserted that whether the defendant "was in society at large or in a prison society there was a '*one hundred percent and absolute*' chance that [the defendant] would commit future acts of criminal violence."[300]

The APA condemned Dr. Grigson's testimony, concluding that the use of such testimony "impermissibly distort[ed] the fact-finding process

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[291] TEX. DEF. SERV., *supra* note 146, at 14.

[292] *Id.*

[293] *Id.* at 14–15.

[294] *Id.* at 12.

[295] *Id.* at 17. By 1983, Dr. Grigson had testified in "more than 70 capital sentencing hearings, all but one of which . . . resulted in imposition of a death sentence." Ewing, *supra* note 290, at 410; *see also* Bennett v. State, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting) ("It seems to me that when Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty. . . . [W]hen Dr. Grigson speaks to a lay jury . . . the defendant should stop what he is then doing and commence writing out his last will and testament—because he will in all probability soon be ordered by the trial judge to suffer a premature death.").

[296] TEX. DEF. SERV., *supra* note 146, at 2.

[297] *Id.* at 25; *see also* Douglas Martin, *Randall Adams, 61, Dies; Freed with Help of Film*, N.Y. TIMES (June 25, 2011), http://www.nytimes.com/2011/06/26/us/26adams.html.

[298] Barefoot v. Estelle, 463 U.S. 880, 884 (1983).

[299] *Id.* at 919 (Blackmun, J., dissenting).

[300] *Id.*

in capital cases."[301] Noting the "unreliability of psychiatric predictions of long-term future dangerousness [wa]s . . . an established fact within the profession," the APA explicitly argued against the use of such predictions in capital cases.[302] So uniform was the scientific community's rejection of such psychiatric predictions that the APA eventually expelled Dr. Grigson from the organization.[303]

Even at the time of the 1983 *Barefoot* decision, the inaccuracy of psychiatric predictions of future dangerousness was well-documented. The American Psychological Association Task Force on the Role of Psychology in the Criminal Justice System determined that "the validity of psychological predictions of violent behavior" was "so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments."[304] But despite the APA's assertions and the consensus within the scientific community, the Court upheld the use of psychiatric testimony concerning a defendant's future dangerousness, reasoning that neither the defendant nor the APA "suggests that psychiatrists are always wrong," only that they are "most of the time."[305]

B. Clinical Versus Actuarial Expert Testimony

Conceding that expert clinical testimony concerning future dangerousness is problematic, proponents have argued that testimony based on actuarial models provides a more accurate assessment and should therefore be permitted in capital-sentencing hearings.[306] Unlike clinical assessments, which can vary markedly in the types of information clinicians use in making a prediction, actuarial methods rely "on a finite number of pre-identified variables that statistically correlate to risk."[307]

Although actuarial methods do provide some consistency as to the factors being evaluated and the given result, their rigid structure makes them vulnerable to criticism. Because the accuracy of actuarial models

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[301] Brief of APA, *supra* note 146, at 3.

[302] *Id.* at 4.

[303] TEX. DEF. SERV., *supra* note 146, at 17.

[304] TASK FORCE ON THE ROLE OF PSYCHOLOGY IN THE CRIMINAL JUSTICE SYSTEM, AM. PSYCHOLOGICAL ASS'N, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099, 1110 (1978).

[305] Barefoot v. Estelle, 463 U.S. 880, 901 (1983).

[306] *See* Slobogin, *supra* note 265, at 280.

[307] *Id.* at 283. An example of a commonly used actuarial model is the Violence Risk Appraisal Guide (VRAG). In making an assessment, the VRAG considers "twelve empirically derived and relatively narrow variables," which correlate with a score that denotes the probability of recidivism. *Id.* at 284–85. These variables include an offender's age at the time of the offense, past misconduct, substance abuse, and psychiatric diagnosis. Information falling outside the purview of the variables is not considered. *Id.*

depends on the quality and breadth of the underlying empirical data, actuarial information may not be available for certain populations where minimal data exists.[308] Other factors may also have substantial effects on an individual's rate of recidivism, but are not included in the evaluation or have not been adequately researched.[309] For example, some have argued the failure to incorporate biological factors into the actuarial models limits their predictive efficacy.[310] As one doctor has noted, given the complexity of the human brain and its response to both internal and external stimuli, "there is no predictable relationship between cause and effect."[311] This lack of case-specific and offender-specific information suggests these evaluative methods undermine the constitutional mandate for individualized sentencing in the capital context.[312]

The Supreme Court's decision in *Barefoot* was founded on the assumption that jurors will be able to distinguish between reliable and unreliable expert testimony in the context of an adversarial proceeding.[313] But research suggests "that this assumption is dubious."[314] In a study measuring the effects of clinical and actuarial testimony on capital juror decision-making, jurors gave more weight to the less accurate clinical testimony than to testimony based on standardized actuarial models.[315] Moreover, the cross-examination of these clinical experts or the presentation of rebuttal witnesses—common adversarial techniques—was insufficient to counter the influence of the clinical testimony.[316] These results were replicated in two subsequent studies involving different mock juror groups, but utilizing the same case materials.[317]

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[308] *Id.* at 289.

[309] *Id.* at 289–90.

[310] Beecher-Monas & Garcia-Rill, *supra* note 249, at 1887.

[311] *Id.*

[312] *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (stating "the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency"); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

[313] Barefoot v. Estelle, 463 U.S. 880, 898–99 (1983).

[314] Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL. PUB. POL'Y & L. 267, 267 (2001).

[315] *Id.* at 305.

[316] *Id.* at 302.

[317] Daniel A. Krauss & Dae Ho Lee, *Deliberating on Dangerousness and Death: Jurors' Ability to Differentiate Between Expert Actuarial and Clinical Predictions of Dangerousness*, 26 INT'L J.L. & PSYCH. 113, 115–16 (2003); Daniel A. Krauss, Joel D. Lieberman & Jodi Olson, *The Effects of Rational and Experiential Information Processing of Expert Testimony in Death Penalty Cases*, 22 BEHAV. SCI. & L. 801, 819 (2004).

C. Why Excluding Psychiatric Testimony Is Not Enough

Even if courts were to prohibit psychiatric testimony concerning an individual's future dangerousness, prosecutors are likely to explore other avenues for presenting convincing evidence that an individual constitutes a continuing threat to society. For example, following the discrediting of many state psychiatric experts, Texas prosecutors began introducing expert testimony from individuals, like A.P. Merillat, who were tasked with investigating violent crimes in prison.[318] Merillat, who was an investigator with the Special Prosecution Unit, became a "go-to expert for prosecutors seeking the death penalty."[319] His testimony, which often emphasized incidents of violence and exaggerated the relative freedom inmates had in prison, helped secure death sentences for fifteen individuals.[320]

But in 2012, the Texas Court of Criminal Appeals reversed two death sentences after finding Merillat gave false and misleading testimony.[321] In both cases, Merillat erroneously testified that a capital murderer sentenced to life without parole could receive a less restrictive prison classification after serving ten years or exhibiting good behavior.[322] Prior to entering a penalty-phase verdict, the *Estrada* jury sent out a note asking if it were possible for the defendant to qualify for a less-restrictive status after a given period of time.[323] As even the State conceded on appeal, this query suggested Merillat's testimony carried great weight in the jury's deliberations.[324] The persuasiveness of Merillat's testimony should not be discounted. In *Velez*, Merillat repeatedly stressed that "rules 'change all the time'" and "[t]he level of violence is extremely high inside Texas prisons."[325] He recounted a parade of prison "horribles," including "escapes . . . inmates 'raping and extorting' other inmates," and "two murders on death row and many attacks on guards."[326] Even though the state neither presented any psychiatric evidence that the defendant posed a continuing threat nor rebutted the defense's psychiatric evidence that he did not, the jury still answered the future dangerousness question in the affirmative.[327]

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[318] Maurice Chammah, *Prison-Crime Witness Now on the Defensive*, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/us/in-texas-a-p-merillat-deals-with-false-testimony-ruling.html.

[319] *Id.*

[320] *Id.*

[321] Velez v. State, No. AP–76051, 2012 WL 2130890, at *33 (Tex. Crim. App. June 13, 2012); Estrada v. State, 313 S.W.3d 274, 279, 288 (Tex. Crim. App. 2010).

[322] *Velez*, WL 2130890 at *31; *Estrada*, 313 S.W.3d at 286.

[323] *Estrada*, 313 S.W.3d at 286.

[324] *Id.* at 287.

[325] *Velez*, WL 2130890 at *32 (alteration in original).

[326] *Id.*

[327] *Id.* at *33.

A prohibition on expert testimony from psychiatric experts, or even from so-called experts on prison violence and conditions, does nothing to address the often insidious references prosecutors make in regards to a defendant's future dangerousness. Many states allow the prosecution to argue that a defendant poses a future danger, but place few, if any, limitations or boundaries on those arguments.[328] Even when a court does concede that an argument was improper, only on rare occasions does the court find the defendant was actually prejudiced by that error.[329]

Occasionally, courts' attempts to distinguish these improper arguments or evidence border on the absurd. In *State v. Davis*, the Supreme Court of North Carolina concluded that it was proper for the trial court to allow the State to elicit "testimony from [a] defense witness . . . that defendant *could* be dangerous in the future under *certain* conditions."[330] However, when the defendant proffered the testimony of a friend who indicated that the defendant "would have a positive impact by talking to and counseling young people who visited prison," the court deemed the exclusion of that evidence proper.[331] Unlike the expert testimony indicating the defendant "*could* be dangerous . . . under *certain* conditions," the mitigating testimony offered by defendant was characterized as "purely *speculative*" and therefore properly excluded.[332]

The likelihood that an individual will constitute a continuing threat to society is a necessarily amorphous inquiry that defies empirical proof. When prosecutors present arguments and testimony purporting to guarantee a defendant's future dangerousness, juries will inevitably punish a defendant for what they *may* do in the future. Instead of a "reasoned *moral* response to the defendant's background, character, and crime"[333] that is "directly related to the personal culpability of the criminal defendant,"[334] a sentence of death based on a likelihood of future dangerousness undermines the very integrity of the criminal justice system.

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[328] *See supra* Part IV; *see also* Dorland & Krauss, *supra* note 142, at 72–82.

[329] *See, e.g.*, Sterling v. State, 477 S.E.2d 807, 811 (Ga. 1996) ("[W]e conclude that the state's argument in this case regarding future dangerousness was improper. However, we conclude that, in view of the trial court's corrective measures in ruling that the argument was improper and in instructing the jury to disregard the statement, it did not commit reversible error in refusing to grant the motion for mistrial.").

[330] 539 S.E.2d 243, 258–59 (N.C. 2000) (emphasis added).

[331] *Id.* at 261.

[332] *Id.* at 258, 261 (emphasis added).

[333] Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

[334] *Id.*

VI. THE ROLE OF FUTURE DANGEROUSNESS IN CAPITAL JURY PREDICTIONS

In 1976, the Supreme Court expressed confidence in a jury's ability to predict future behavior when it concluded the Texas capital-sentencing scheme, which included a future dangerousness inquiry, adequately served to guide and focus the jury's decision-making.[335] Although the Court admitted it is "not easy to predict future behavior," the "fact that such a determination is difficult . . . does not mean that it cannot be made."[336] The Court's twisted logic rested on the necessity of determining a defendant's future dangerousness in other contexts such as whether to set bail or whether to grant or deny parole.[337] In contorting itself to uphold the Texas death-penalty scheme, the Court seems to have all but abandoned its oft-repeated mantra that "death is different."

Rather than guiding and focusing the jury's discretion, the Court's decision in *Jurek* permits twelve men and women to sentence a defendant to death based on nothing more than speculation about his probable future behavior. Post-trial interviews with capital jurors have revealed the primacy of a defendant's likely future dangerousness in the jury's decision-making process.[338] But since *Jurek*, studies have demonstrated that capital jurors are not only unable to accurately predict future dangerousness, but their predictions are no better than random guesses.[339] Thus, poor prediction rates of future dangerousness and the typical jury's proclivity to rely heavily on those predictions results in the arbitrary and capricious imposition of death sentences.

A. The Capital Jury Project—Future Dangerousness Always Highly Aggravating

Since 1991, the Capital Jury Project (CJP)—a consortium of university researchers funded by the National Science Foundation—has interviewed over 1,000 capital jurors in an effort to determine whether their exercise of sentencing discretion avoids the arbitrary and capricious sentences ruled unconstitutional in *Furman*.[340] The interviews, which last between three and four hours, "chronicle the jurors' experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their

[335] Jurek v. Texas, 428 U.S. 262, 276 (1976).

[336] *Id.* at 274–75.

[337] *Id.* at 275.

[338] Blume et al., *supra* note 222, at 403–04.

[339] Mark D. Cunningham, Jon R. Sorensen & Thomas J. Reidy, *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 PSYCHOL. PUB. POL'Y & L. 223, 240 (2009).

[340] *What Is the Capital Jury Project?*, SCH. OF CRIMINAL JUSTICE, UNIV. AT ALBANY–SUNY, http://www.albany.edu/scj/13189.php.

final sentencing decisions."[341] While there is no way to truly discern—after the fact—whether the jurors' responses reflect their actual views at the time of trial or whether the responses are hindsight rationalizations of those trial decisions, the CJP interviews provide an important tool for evaluating how prevalent the issue of future dangerousness is in capital sentencing.

For example, after conducting extensive research in South Carolina, the CJP found issues surrounding a defendant's future dangerousness were "second only to the crime itself in the attention they receive during the jury's penalty phase deliberations."[342] The data demonstrate that the perceived future dangerousness of a defendant is highly aggravating, with 57.9% of respondents stating they would be more likely to vote for death if asked whether the "defendant might be a danger to society in the future."[343] And while actual incidents of violence among death row inmates are relatively low,[344] more than 78% of jurors would find the defendant actually presented a risk of future danger.[345]

Moreover, the data suggests factors beyond the defendant's control may impact jurors' attitudes concerning the importance of the defendant's future dangerousness in the life or death decision.[346] For example, Professor Stephen Garvey noted in his analysis of the CJP interviews that 61.7% of white jurors were more likely to impose a death sentence if they found the defendant posed a future threat, whereas only 36.5% of black jurors would be more likely to impose a death sentence for this same reason.[347] Particularly in Oregon and Texas—which require an explicit finding of future dangerousness to impose a death sentence—and states where future dangerousness is a statutory aggravating factor, this observation suggests the outcome of the penalty decision might be influenced by something as unrelated to the defendant as the race of the jurors.

While the likelihood the defendant presents a future danger is highly aggravating, the CJP interviews also demonstrate that a lack of perceived future dangerousness does not have a corresponding mitigating effect. Even if jurors believed the defendant would be well-behaved in prison, "only slightly more than a quarter said that they would be either slightly or much less likely to vote for death."[348] Likewise, less than a quar-

[341] *Id.*

[342] Blume et al., *supra* note 222, at 404.

[343] Garvey, *supra* note 192, at 1559.

[344] *See supra* Part V.

[345] Garvey, *supra* note 192, at 1559–60.

[346] *Id.*

[347] *Id.* at 1560.

[348] *Id.*

ter of the jurors interviewed thought an absence of prior criminal conduct was mitigating.[349]

B. Jurors' Inability to Predict Future Dangerousness—The Oregon Study

Given the prominent role future dangerousness plays in a jury's sentencing decision, the predictive accuracy of that determination should be central in evaluating whether the death penalty is imposed in an arbitrary and capricious manner. One of the problems inherent in predicting an individual's likelihood to commit future violent behavior is the low occurrence of such behavior.[350] Most capital offenders, whether sentenced to death or placed in the general prison population after being sentenced to life without parole or obtaining relief from a death sentence, do not commit serious acts of violence while in prison.[351] As a result, the base rate of violent behavior among capital offenders in secure institutional settings is very low.[352] When the base rate, or frequency, of a given behavior is low, it becomes very difficult to accurately predict specific instances of such behavior.[353]

While previous studies have revealed a jury's inability to accurately predict a defendant's future dangerousness, these studies have been limited to defendants in Texas and the Federal Bureau of Prisons.[354] But a recent study of Oregon inmates convicted of aggravated murder between 1985 and 2008 demonstrates a jury's predictive inaccuracies are not confined to those jurisdictions.[355] Like the Texas sentencing scheme affirmed in *Jurek*, Oregon requires capital juries to unanimously and affirmatively find the defendant would pose a continuing threat to society in order to sentence the defendant to death.[356] Thus, the availability of these jury verdicts, coupled with the extended prison tenures of many of the offenders, provided an opportunity to study the accuracy of juries' predictions of future violent conduct.

1. Methodology

The study conducted a retrospective review of the disciplinary records of 115 male inmates[357] that were convicted of aggravated murder be-

[349] *Id.*

[350] Cunningham et al., *supra* note 339, at 227.

[351] *Id.*

[352] *Id.*

[353] *Id.*

[354] Reidy et al., *supra* note 146, at 289.

[355] *Id.* at 291–92.

[356] OR. REV. STAT. § 163.150(1)(b)(B), (1)(e)(2015).

[357] "The pool of participants was drawn from a database supplied by the Oregon Capital Resource Center (OCRC)," which had "collected information on Oregon aggravated murder cases that had proceeded to the sentencing phase of trial since 1985." Reidy et al., *supra* note 146, at 291 (footnote omitted). Of the 164 cases

tween 1985 and 2008.[358] Fifty were sentenced to death, while the remaining sixty-five were given life sentences.[359] The study authors considered the inmates' behavior from the time they entered prison until 2010, with the average time at risk ranging from 2.3 to 25.2 years and "a mean time served of 15.3 years."[360] Although much of the death-sentenced inmates' time was served on death row, "more than one-third . . . obtained relief from their death sentences and ended up serving a significant portion of time . . . among the broader prison population."[361]

In order to assess the jurors' predictive capacities for violent behavior, the study authors needed to define what behavior should constitute "continuing acts of violence."[362] The Oregon Department of Corrections (ODOC) classifies a number of non-violent offenses, such as racketeering and possession of a weapon, as major acts of misconduct regardless of whether the inmate harmed another inmate or staff member.[363] However, if physical harm did occur, the inmate would also be charged with assault.[364] Thus, the study authors focused on assaults as being the operative indicator of violent conduct.[365]

Since the classification of assaults may vary depending on other factors aside from the resulting harm, the authors employed "a standardized measure of the level of harm" consistent with other research concerning violence rates.[366] The extent of injury resulting from assaultive conduct was measured according to the definitions in Table 1.[367]

No injury	No injuries noted.
Outpatient minor injury	Cuts, bruises, abrasions, muscle strains, and injuries requiring tetanus shots.
Outpatient moderate injury	Lacerations requiring sutures, broken or knocked out teeth, broken and dislocated bones, and concussions.
In-patient serious injury	Hospitalization for nonlife-threatening injuries and injuries requiring reconstructive surgery.

identified by OCRC's database, a total of forty-nine cases were excluded from the study because they presented anomalies or difficulties in extrapolating behavior predictions. *See id.* at 292.

[358] *Id.*

[359] *Id.*

[360] *Id.*

[361] *Id.*

[362] *Id.* at 293.

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] *Id.*

[367] Table 1 is adapted from definitions provided in the study. *Id.*

In-patient severe injury	Hospitalization with life-threatening injuries.
Fatal injury	Injuries resulting in death.

In determining what constituted "criminal acts of violence," the study authors initially intended to include only those assaults resulting in moderate to fatal injuries.[368] However, after examining the disciplinary files of the sample, it was clear this definition failed to capture some of the inmates with lengthy histories of assaultive conduct that could have resulted in greater harm without intervention.[369] Accordingly, the authors expanded the definition to include "inmates who committed three or more assaultive acts of misconduct," regardless of the resulting level of harm.[370]

2. Findings

The study supported two general conclusions regarding violence perpetrated by inmates convicted of aggravated murder in an institutionalized setting. First, the occurrence of assaultive conduct, particularly that resulting in serious injuries, was quite rare.[371] Second, jurors' predictions of future violent conduct appeared "to be completely unrelated to the actual commission of such acts."[372] Whether jurors answered the future dangerousness question in the negative or the affirmative, the two groups displayed almost identical rates of serious violent behavior.[373] In the case of the single incident that resulted in a fatality, the jury predicted the defendant was unlikely to engage in future violent behavior.[374]

To properly contextualize the data, it is important to note that when all types of rule violations are considered, incidents of misconduct are quite common among inmates, with almost fifty annual incidents per 100 inmates.[375] However, more than 90% of the reported assaults "resulted in either no reported harm or only minor injuries."[376] Many of these violations involved resisting restraints, spitting or dousing guards and other inmates with urine, or mutual fights among inmates.[377] However, as the infractions increased in severity, there was a corresponding decrease in frequency.[378] When the authors considered only conduct resulting in at least moderate injury, the annual rate of occurrence dropped to less than

[368] *Id.*
[369] *Id.* at 293–94.
[370] *Id.* at 294.
[371] *Id.* at 296–97.
[372] *Id.* at 297.
[373] *Id.*
[374] *Id.*
[375] *Id.* at 296.
[376] *Id.* at 297.
[377] *Id.*
[378] *Id.*

five for every thousand inmates.[379] None of these incidents involved assaults on correctional staff.[380]

Although the jury predicted more than two-thirds of the defendants in the cases sampled were likely to commit criminal acts of violence, the disciplinary records demonstrate a far lower rate of violence.[381] Of the 115 cases surveyed, only twelve committed infractions that qualified as criminal acts of violence that resulted in at least moderate injury or committed three or more assaults at any level.[382] Of these twelve cases, jurors had predicted four were unlikely to pose a risk of future violence.[383] Only eight of the seventy offenders for which jurors answered the future dangerousness question in the affirmative committed qualifying acts of violence.[384] While jurors were correct in 90% of the cases in which they answered the future dangerous inquiry in the negative, they were also wrong in 90% of the cases in which they predicted future violence was likely.[385] When the sample was limited to "inmates committing assaults resulting in serious to fatal injury," the findings suggest "juries were nearly always right (97% of the time) when predicting that future violence was not likely, and nearly always wrong (99% of the time) when predicting that future violence was likely."[386]

To assess the robustness of the findings, the study authors also considered the effect of confinement conditions on an inmate's opportunity to commit assaultive acts.[387] Two-thirds of the inmates that juries predicted would commit future violent acts were sent to death row.[388] The findings indicate that it is possible that the more restrictive confinement conditions of death row affected an inmate's opportunity to commit a qualifying violent act.[389] Only 8% of the inmates sentenced to death, and for whom violence was predicted, committed assaultive acts, while 17.9% of the violence-predicted inmates sentenced to life behaved violently.[390] But as one incident involving moderate injury demonstrates, the lower rate of violence among the death-sentenced inmates cannot be attributed solely to the confinement conditions on death row.[391] One of the death-sentenced sample subjects was able to "enter[] another inmate's cell and

[379] *Id.*
[380] *Id.*
[381] *Id.* at 297–99.
[382] *Id.* at 299.
[383] *Id.*
[384] *Id.*
[385] *Id.*
[386] *Id.*
[387] *Id.* at 300.
[388] *Id.* at 299.
[389] *Id.* at 299–300.
[390] *Id.* at 300.
[391] *Id.*

slash[] him multiple times with a bladed weapon," indicating that access to materials and freedom of movement were not entirely restricted on death row.[392]

Moreover, violence among those inmates who obtained relief from their death sentences did not increase once they were transferred to the general prison population.[393] Of the eighteen former death-row inmates, only one committed qualifying violent acts once housed in the broader prison population.[394] Comparing violence rates among inmates spending a portion of their time in general population (10.9%) with those of inmates only serving time on death row (9.4%) suggests that confinement conditions were not influential in behavioral outcomes.[395]

The above data confirm what previous studies have suggested: predictions of violence by capital juries are no more accurate than random guesses.[396] Regardless of the level of violence considered, Oregon capital juries consistently exhibited chance-level predictive performance.[397] In fact, as the severity of the specified violence increased, juries demonstrated higher error rates in predictions.[398] Moreover, when "[c]ontrolling for individual characteristics, elements of the capital offense, and prior community criminality, conditions of confinement were not found to impinge on the accuracy of jury assessments."[399]

C. Poor Predictions Are Not Confined to Special Issue Jurisdictions

While it might be tempting to assume the abysmal predictive performance of capital jurors is limited to Oregon and Texas—the two jurisdictions that require a future dangerousness determination—other research suggests jurors perform just as poorly when future dangerousness is available as an aggravating sentencing factor.[400] A 2009 study examining the predictions of 72 federal capital juries revealed similar rates of inaccuracy when jurors considered future violence as a non-statutory aggravating factor.[401] Federal capital juries were wrong 97% of the time in predicting future violence where "an assault resulting in a moderate, life-threatening, or fatal injury w[as] the contemplated hazard."[402] Thus,

[392] *Id.*
[393] *Id.*
[394] *Id.*
[395] *Id.*
[396] *Id.* at 301.
[397] *Id.*
[398] *Id.*
[399] *Id.*
[400] *Id.* at 302.
[401] Cunningham et al., *supra* note 339, at 232, 234, 240–41.
[402] *Id.* at 240.

whether jurors consider future dangerousness as a special issue or as an aggravating factor, the rates of inaccuracy are largely unaffected.[403]

The 2009 study also revealed an alarming tendency for capital jurors to simultaneously endorse future dangerousness as an aggravating factor, while also finding mitigating factors reflecting a lack of future dangerousness.[404] Some scholars have suggested that these seemingly contradictory jury findings stem from "a substantial minority of jurors [that] misunderstand or confuse judges' instructions regarding aggravation and mitigation, as well as the standard of proof" required.[405] While the reasons for these dual endorsements are unclear, this "rather blatant predictive inconsistency"[406] severely undercuts the Court's confidence in a jury's ability to accurately and reliably consider future dangerousness in the context of capital sentencing.

D. Unguided Juror Discretion

As noted above, how jurors evaluate the future dangerousness question and why they reach a particular conclusion is not often clear. This ambiguity is of particular concern given how determinations of likely future violent conduct can "obscure or even supplant judgments of the defendant's moral culpability."[407] For instance, although "mitigating factors such as youthfulness, developmental adversity, mental illness, or mental deficiency" may demonstrate the defendant's reduced moral culpability,[408] a jury is likely to use these same factors to find the defendant presents a greater risk of future violent behavior, and is therefore more deserving of a death sentence to protect society.[409]

Moreover, some research suggests that a finding of future dangerousness can often be a response to some other factor and not an accurate determination of a defendant's risk for future violence.[410] When a sample of Texas jurors were asked, prior to hearing any penalty-phase evidence, whether the defendant should be sentenced to life, death, or whether they were undecided, 48.3% reported a decision on the appropriate pun-

[403] Reidy et al., *supra* note 146, at 302.

[404] Cunningham et al., *supra* note 339, at 244. In 47% of the cases studied, an average of 18% of jurors endorsed the aggravating factor of future dangerousness while simultaneously finding a "mitigating factor of reflecting a lack of dangerousness." *Id.* An average of 40% of jurors in 47% of the cases found a "likelihood of a positive adaption to prison" in conjunction with a likelihood that the defendant presented a risk of future violence. *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.* at 248.

[408] *Id.* at 249.

[409] *Id.*

[410] Dorland & Krauss, *supra* note 142, at 97.

ishment before the sentencing phase.[411] Three-quarters of this group had decided that a death sentence was appropriate even before they had heard evidence on the required special issue of future dangerousness.[412] This suggests that jurors' sentencing verdicts are dependent on other unarticulated factors and are not actually being guided or channeled by this special issue question.[413]

Evidentiary rules concerning future dangerousness also differ wildly by jurisdiction, and can often lead to the introduction of prejudicial, unreliable, or irrelevant evidence.[414] Despite its demonstrated fallibility, expert testimony concerning a defendant's future dangerousness is often given a vaunted status.[415] Recall the Supreme Court of North Carolina's decision in *State v. Davis* to allow the State to elicit "testimony from [an expert] defense witness . . . that defendant *could* be dangerous in the future under *certain* conditions."[416] Unlike the mitigating testimony offered by the defendant, this testimony was not considered speculative.[417]

In many states, jurors are also permitted to consider a defendant's criminal record when making a determination of future dangerousness.[418] In addition to past convictions, this record often includes unadjudicated conduct, including uncharged, pending, or dismissed charges.[419] For instance, in *Harris v. State*, the Texas Court of Criminal Appeals affirmed Kenneth Bernard Harris's capital conviction for the rape and murder of a woman in Houston, Texas.[420] During the sentencing phase of Harris's trial, the state offered testimony from five white women who claimed Harris had robbed and raped them.[421] The prosecution presented no physical evidence linking Harris to three of the woman, and only circumstantial evidence suggested he was ever in the apartments of the other two.[422] Although Harris had only been indicted on one of the allegations, and had never been "arrested, tried, or convicted" on the other four, the jury was permitted to consider the testimony as evidence of Harris's propensity to commit future violent crimes.[423]

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[411] *Id.*

[412] *Id.*

[413] *See* Cunningham et al., *supra* note 339, at 250.

[414] *Id.*; *see also supra* Part IV (discussing how evidence of future dangerousness is admitted in various states).

[415] *See supra* notes 314–317 and accompanying text.

[416] 539 S.E.2d 243, 258 (N.C. 2000) (emphasis added).

[417] *Id.* at 261.

[418] Shapiro, *supra* note 22, at 154. Some states explicitly require consideration of a defendant's previous criminal record. *See supra* Part IV.

[419] Shapiro, *supra* note 22, at 154–55.

[420] 827 S.W.2d 949, 953 (Tex. Crim. App. 1992).

[421] Smith, *supra* note 99, at 1249.

[422] *Id.*

[423] *Id.*; *Harris*, 827 S.W.2d at 961–62.

Given the disproportionate weight a defendant's prior criminal history has on a juror's sentencing determination, introduction of unadjudicated conduct risks undermining the reliability of that determination.[424] Without any objective verification, unadjudicated conduct lacks the guarantee of trustworthiness essential to the imposition of a death sentence.[425] Such an uncertainty in the facts of alleged conduct creates "a risk of reliance on an untrue factor, and hence an 'erroneous' sentence."[426] Even where prior conduct may suggest a general propensity for violence, it does not accurately reflect the risk of future violence that is posed by a defendant who will remain in a secure correctional institution.[427]

VII. ALTERNATIVE SENTENCING OPTIONS

The rationale supporting consideration of a defendant's future dangerousness lies in the need to ensure the defendant is incapable of perpetrating further harms on society.[428] Thus, execution is seen as necessary to incapacitate a defendant who a jury concludes is likely to pose a continuing threat to society[429]—or so the argument goes. But this justification presumes jurors are able to accurately predict who will be a continuing threat to society and assumes that no alternative methods of incapacitation can achieve the desired result. As discussed above, jurors are wrong in more than 90% of the cases in which they predict future violence is likely.[430] And, as indicated in the studies of violence among inmates in Texas and Oregon, the base rates of assaultive behavior are relatively low among capital defendants,[431] suggesting alternative sanctions may be just as effective as execution in preventing future harm.

Furthermore, central to the Supreme Court's interpretation of the Eighth Amendment is the concern that the punishment be no more than necessary to serve the traditional sentencing rationales.[432] If incapacitation is the goal then the punishment should be no more severe than what is required to protect society from further harm.[433] And while incapacita-

[424] Smith, *supra* note 99, at 1284.

[425] *Id.* at 1285.

[426] *Id.* at 1284.

[427] *See supra* Part VI.B.2.

[428] Berry, *supra* note 18, at 894.

[429] Dorland & Krauss, *supra* note 142, at 69.

[430] Reidy et al., *supra* note 146, at 299.

[431] *Id.* at 297.

[432] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[433] Berry, *supra* note 18, at 903. Although the Court specifically refers to retribution and deterrence as the central considerations of capital punishment, "evidence suggests that capital jurors nonetheless believe incapacitation to be a significant consideration." Steven J. Mulroy, *Avoiding "Death by Default": Does the*

tion is a proper consideration in capital sentencing, the Supreme Court has never endorsed it as singularly sufficient to impose a death sentence.[434] In a forceful dissent, Justice Marshall argued that capital punishment "cannot be seriously defended as necessary to insulate the public from persons likely to commit crimes in the future. Life imprisonment . . . would fully accomplish the aim of incapacitation."[435] And Justice Stevens recently stated that "the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty."[436]

Compounding the detrimental impact of fear-based concerns surrounding incapacitation, jurors often are misinformed or misunderstand alternative sentencing options in a capital trial.[437] Although the Court has held that a capital defendant is entitled to a jury instruction informing the jurors of his parole ineligibility under state law if not sentenced to death, this entitlement is only triggered if the prosecution places the defendant's future danger "at issue."[438] But as the discussion of state practices in Part IV illustrated, what constitutes placing a defendant's future dangerousness "at issue" is an imprecise determination, susceptible to manipulation.

The ill-defined contours of the "at issue" requirement allow courts to subvert procedural safeguards, such as parole ineligibility instructions, by categorizing the prosecution's arguments as supportive of other statutory aggravating factors. Recall that in *Commonwealth v. Carson*, the prosecution argued that the defendant's history of felony convictions should encourage the jury to prevent the defendant from causing any more injury.[439] The Pennsylvania Supreme Court determined the prosecution's focus "on appellant's history of violent felony convictions" tied "his failure to reform his conduct into the purpose served by th[e] statutory aggravating circumstance."[440] Although the prosecution made references to what could happen in the future if the defendant were allowed to live,

Constitution Require a "Life Without Parole" Alternative to the Death Penalty?, 79 TUL. L. REV. 401, 458 (2004).

[434] Spaziano v. Florida, 468 U.S. 447, 461–62 (1984).

[435] California v. Ramos, 463 U.S. 992, 1023 (1983) (Marshall, J., dissenting).

[436] Baze v. Rees, 553 U.S. 35, 78 (2008) (Stevens, J., concurring).

[437] *See, e.g.*, Estrada v. State, 313 S.W.3d 274, 286 (Tex. Crim. App. 2010). During penalty-phase deliberations, the jury sent out a note asking whether the defendant might be eligible for a less-restrictive prison classification after ten years if he were sentenced to life without the possibility of parole. In responding to the note, the trial court stated: "You have the law and the evidence. Please continue your deliberations." *Id.* at 286–87.

[438] Simmons v. South Carolina, 512 U.S. 154, 156 (1994).

[439] 913 A.2d 220, 273 (Pa. 2006).

[440] *Id.*

the court concluded a *Simmons* charge was not warranted because "the prosecutor focused on the defendant's past conduct, not his future dangerousness."[441]

Likewise, in *State v. Young*, the South Carolina Supreme Court found *Simmons* inapplicable and declined to recognize any issue regarding the defendant's future dangerousness.[442] Although evidence of the defendant's character and prior criminal record was presented, the court found such evidence was "relevant in the sentencing phase without regard to future dangerousness."[443] In contorting the evidence and arguments to avoid a *Simmons* instruction, the courts undermine an important procedural safeguard, and fail to recognize that alternative sentencing options have undercut the need to rely on future dangerousness as a sentencing factor.

The ability to sentence a capital defendant to life without the possibility of parole has negated the need for execution as a valid technique of incapacitation.[444] However, when jurors are deprived of complete and accurate information about a defendant's potential period of incarceration, the likelihood they will vote for death increases.[445] Therefore, it should come as no surprise—given the primacy of the future dangerousness question in the minds of jurors—that evidence suggests jurors are more likely to conclude a defendant presents a continuing threat to society when they are misinformed about death-penalty alternatives.[446] Denied adequate information about the potential sentences,[447] and often misunderstanding the level of violence in prisons,[448] jurors are presented with a false choice: sentence a defendant to death or take the chance he will be released into society to commit further harms.

While it may be tempting to believe that providing jurors with accurate sentencing information would remedy this false choice, the inseparability of the future dangerousness inquiry from the punishment determination also risks obfuscating the issue of a defendant's blameworthiness. In upholding the efficacy of capital punishment, the

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[441] *Id.*

[442] 459 S.E.2d 84, 87 (S.C. 1995).

[443] *Id.* at 88 n.4.

[444] With the exception of Alaska—which does not have the death penalty—every state has a life without parole sentencing option. Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1121 (2013).

[445] William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 664 (1999).

[446] *Id.* at 667–68.

[447] *See, e.g.*, Estrada v. State, 313 S.W.3d 274, 286 (Tex. Crim. App. 2010) (suggesting jurors were confused about the potential for the defendant to receive a different prison classification or early release).

[448] *See supra* notes 325–327 and accompanying text.

Court has often stressed the requirement that a sentence be proportionate to the defendant's culpability.[449] Certainly, under a retributive sentencing rationale, this is why some argue that capital punishment is necessary.[450] They maintain some crimes are so heinous that the only proper measure of retributive justice is death.[451] However, this justification assumes that culpability and moral blameworthiness are the factors given the greatest weight in the punishment determination. But, as noted above, jurors' minds are often very much focused on the future when making that decision.[452] Fearing responsibility for further violence, jurors may be distracted from an accurate determination of culpability when the issue of a defendant's future dangerousness is entangled with other aggravating factors that are essential to a determination of guilt.[453] Thus, jurors risk imposing a death sentence as retribution for a crime not yet committed.

A death sentence imposed in contradiction of a legitimate sentencing rationale can be nothing more than a "gratuitous inflection of suffering" in violation of the Eighth Amendment.[454] Given the availability of a sentence of life without the possibility of parole, and the corresponding problems associated with a defendant's future dangerousness, imposition of a death sentence cannot be justified under either an incapacitation or retribution sentencing rationale.

VIII. CONCLUSION

The problem of arbitrary and capricious decisionmaking in capital sentencing is as much a problem now as it was forty years ago when the Court handed down its decision in *Furman v. Georgia*. Attempts to cabin juror discretion—whether by proposing a list of aggravating or mitigating factors or providing jurors with special issue questions—have failed.

The inability of both experts and jurors to accurately predict a defendant's future dangerousness, together with its inexorable influence on the penalty decision, is indicative of these failures. Often based on unreliable and prejudicial evidence, predictions of future dangerousness undermine the efficacy of any imposed sentence. While some have argued for elimination of the future dangerousness issue from capital-sentencing

[449] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[450] *Id.* at 184.

[451] *See id.* (noting that capital punishment may be "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death").

[452] Blume et al., *supra* note 222, at 404.

[453] Shapiro, *supra* note 22, at 168–69.

[454] Gregg v. Georgia, 428 U.S. 153, 182–83 (1976).

schemes,[455] studies have shown the impossibility of exorcising its influence on the minds of jurors.[456] Moreover, the availability of life without the possibility of parole provides an alternative sanction that addresses jurors' concerns that a defendant could pose a continuing threat to society.

When expert and jury determinations of future dangerousness are no more accurate than flipping a coin, death sentences based in whole or in part on such determinations are necessarily arbitrary and capricious. And, as this Article has demonstrated, future dangerousness predominates and pervades capital-sentencing schemes across the country. Its unavoidable influence on life-or-death decisions, and the irremediableness of the problems associated with inaccurate predictions of future behavior, demonstrates why any system of capital punishment is unconstitutional and cannot be applied consistent with the Eight Amendment's prohibition on cruel and unusual punishment. Death sentences based on an often false perception that a defendant represents a continuing threat to society tell us the decades-long experiment with guiding and focusing juror discretion has failed. It is this failure—in the shadow of *Furman*'s prohibition on arbitrary and capricious death sentences—that necessitates nothing less than abolition of capital punishment.

[455] *See, e.g.*, Berry, *supra* note 18, at 923 ("By allowing the accepted purposes of the death penalty to become the focus of the inquiry, instead of future dangerousness, the use of capital punishment might become less arbitrary and more rational.").

[456] *See* Blume et al., *supra* note 222, at 404.