

GAZING INTO THE CRYSTAL BALL: CAN JURORS ACCURATELY PREDICT DANGEROUSNESS IN CAPITAL CASES?

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The Texas post-*Furman* death penalty statute restricts capital punishment to a limited category of murders. If the defendant is found guilty of one of these crimes, the jury must address two and sometimes three questions in the punishment phase of the trial. Affirmative answers to the questions by all jurors result in an automatic death sentence. A "no" answer to any question results in an automatic life sentence. One of the three questions is whether the defendant presents a continuing violent threat to society. From 1974 to 1988, ninety-two capital murderers had their sentences commuted to life imprisonment. These commutations allow a "natural experiment" to assess the predictions made by jurors that these individuals would present a future violent threat to society. Patterns of institutional and post-release behavior of this group were compared to similar patterns for defendants convicted of capital murder who were not predicted to be dangerous and who received life imprisonment over the same fifteen-year period. We found that although most capital offenders were model inmates, two commuted capital prisoners committed second murders, one while in prison and the other while in the community. We conclude with a discussion of the validity of current death statutes that require jurors to predict future dangerousness.

I. INTRODUCTION

Between 1924 and 1972, the state of Texas executed 361 persons for the crimes of murder, rape, and armed robbery. Prosecutors, jurors, and judges had wide discretion in deciding whether to execute an offender. No one raised a serious legal challenge to the death penalty until 1972, when the United States Supreme Court decided *Furman v. Georgia* and its companion case *Branch v.*

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Texas (408 U.S. 238). In this landmark decision, the Court declared that capital punishment as administered constituted cruel and unusual punishment because of the broad disparity and arbitrariness in sentencing practices. This decision invalidated death statutes in thirty states and the District of Columbia.

Almost immediately, states began restructuring their capital statutes to comply with *Furman*. In Texas, House Bill 200 was passed by the sixty-third legislature in an attempt to limit discretion in capital sentencing; it became effective on June 14, 1973 (Kuhn, 1974). This new statute limits capital punishment to offenders who knowingly and intentionally commit murder in one of five circumstances.¹ A sixth circumstance was added in 1985.² When a person is found guilty of murder and at least one of these circumstances exists, a punishment hearing is held. The jury in the punishment stage of the bifurcated proceedings must address the following three questions:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased (*Tex. Crim. Proc. Code* art. 37.071b (1985)).

The state must prove these facts beyond a reasonable doubt.³ The jury must answer "yes" to all three questions before the death

¹ The circumstances were as follows:

1. the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;
2. the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;
3. the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. the person committed the murder while escaping or attempting to escape from a penal institution; or
5. the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution (*Tex. Penal Code* § 19.03 (1974)).

² The sixth circumstance was:

the person murdered more than one person: (a) during the same criminal transaction; or (b) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct (*Tex. Penal Code* § 19.03 (1985)).

³ Question 3 is given to the jury only if the evidence warrants it; otherwise jurors consider only Questions 1 and 2.

penalty may be imposed. Affirmative responses to the questions result in an automatic death sentence. A negative answer to any question results in automatic life imprisonment.⁴ Texas law also provides for a mandatory review by the Court of Criminal Appeals (*Tex. Crim. Proc. Code* art. 37.071 c–f (1985)). The United States Supreme Court upheld the Texas statute in *Jurek v. Texas* (428 U.S. 262 (1976)).

Questions 1 and 3 are nearly always answered affirmatively. Of the seventy-four capital murder cases tried between June 14, 1973, and February 4, 1976, eighteen resulted in life sentences (3 were from plea bargains). Of the fifteen that went through a punishment hearing, the jurors in every instance answered “no” to the second question (Crump, 1977: 535). In only three of the fifteen cases did jurors also answer “no” to the first question. Our data on cases between 1974 and 1988, discussed in a later section, reveal the same pattern (see also Black, 1976; Davis, 1976; Scofield, 1980). Thus, it is Question 2 that prevents capital punishment from being mandatory and hence unconstitutional. In other words, it is the prediction of future dangerousness that is the determining factor between a life and a death sentence in Texas.

No research has measured the accuracy of juror predictions of future dangerousness in capital murder trials. In this paper, after a review of the literature, we shall first examine the evidence on which predictions are made in response to Question 2 of the Texas capital statute and then examine the evidence that offenders sentenced to death did in fact “constitute a continuing threat to society.” This latter check on jury predictions of dangerousness is made possible through a “natural experiment” in which we examine the institutional and post-release behavior of ninety-two persons sentenced to death in Texas who later had their sentences reduced (by commutation or otherwise) in 1974–88. In all ninety-two cases, the jury answered “yes” to the continuing threat question, deciding (and predicting) that these individuals were too dangerous to be permitted to live. The behavior of this group is then compared to all defendants ($N = 107$) in capital murder trials who were sentenced to life from 1974 to 1988 because juries had failed to affirmatively answer Question 2 in the punishment proceeding.

II. PREDICTING FUTURE VIOLENCE

The criminal justice system regularly depends on three types of prediction. The first is anamnestic, with predictions based on past behavior of the individual (see, e.g., Dix, 1981). The second is

⁴ For the jury to answer “no” to any of the 3 questions requires such an answer from 10 jurors; otherwise a retrial is called (*Tex. Crim. Proc. Code* art. 37.071d (1985)).

actuarial, with predictions based on the behavior of persons with similar characteristics (e.g., drug courier profiles). The third, and perhaps most common, is clinical, with predictions based on the clinical judgment of an expert, usually a psychologist or psychiatrist (*Barefoot v. Estelle*, 463 U.S. 880 (1983)).

Predictions of future behavior are routinely accepted by the criminal justice system (*Jurek*). While all prediction is difficult, violent behavior is relatively infrequent, and the low base rate makes accurate predictions particularly problematic. As many researchers have observed, overprediction (a high rate of false positives) is the norm (see Floud and Young, 1982; Morris and Miller, 1985; Monahan, 1981).

Studies measuring the accuracy of predictions of violence among the mentally ill illustrate this pattern of overprediction. Steadman and Coccozza (1974) examined the effect of *Baxstrom v. Herold* (328 U.S. 107 (1966)), which resulted in the transfer of 967 patients from a hospital for the criminally insane to civil hospitals. Only 3 percent of those committed to civil hospitals were violent enough to be returned to maximum security institutions. About one-fifth of those released were arrested (they averaged two and one-half years in the community), but only 2 percent were ever convicted of subsequent violent crimes. Thornberry and Jacoby (1979) followed the 586 patients released from a maximum security hospital for the criminally insane as a result of *Dixon v. Attorney General of the Commonwealth of Pennsylvania* (325 F. Supp. 966 (M.D. Pa. 1971)). Like Steadman and Coccozza, they found that a minority of the released patients were seriously assaultive during confinement. More important, only 14 percent of the former patients assaulted others in the free community within four years after their release.

One prior study has assessed dangerousness among what is arguably the most dangerous of populations: capital offenders. Marquart and Sorensen (1988; in press) examined the level of violent behavior over fourteen years by Texas offenders whose death sentences were reversed in *Furman*. They found that although prison personnel claimed that the group of *Furman* commutes would pose a disproportionate threat to prisoners and guards, and to citizens in the event of parole, this threat did not materialize. Over the fourteen years, one commuttee committed a second murder while on parole. The majority of the offenders were model inmates; among those paroled, most adjusted to the "free world" without serious arrest or conviction.

The Texas death penalty statute studied by Marquart and Sorensen required no explicit predictions of future dangerousness. Under the current post-*Furman* statute, however, juries must make an explicit prediction about the dangerousness of the offender. The question posed here is whether such predictions are in fact related to future behavior.

III. A TEST OF JURY PREDICTIONS OF DANGEROUSNESS

To test the accuracy of jury predictions of dangerousness, we compared 92 offenders sentenced to capital punishment who subsequently had their sentences commuted or reversed⁵ to capital offenders who had received a life sentence. A control group of inmates—those convicted of capital murder but sentenced to life imprisonment—was extracted from the population of murderers who entered the Texas Department of Corrections (TDC) from 1974 to 1988. This control cohort ($N = 107$) consists only of those prisoners convicted of capital murder who had their life sentences determined by juries during the punishment proceedings. Defendants found guilty of capital murder but given life imprisonment as a result of a plea bargain were not included in this analysis. Texas law also stipulates that juveniles (those who are 15 or 16 years old at the time of the offense) certified to stand trial as adults in capital cases may be found guilty of capital murder; however, they are automatically sentenced to life after a finding of guilt rather than having their penalties determined by juries. These cases were also excluded from the analysis (see Stadnik, 1989). We also excluded 19 offenders who were convicted of capital murder and sentenced to life imprisonment but for whom the jury predicted dangerousness by responding affirmatively on Question 2. These 19 offenders will be included in a later analysis in this paper. In short, the control group represents those 107 lifers who, like the 92 prisoners whose sentences were commuted or reversed, experienced both stages in the Texas capital sentencing scheme.

Of the final group of those released from death row ($N = 92$), the majority (82) were released by commutation; this group also includes those who were retried and sentenced to prison and those who had their original cases dismissed. Commutations were granted mostly in the 1980–83 period due to appellate rulings on jury selection procedures and questions of admissible evidence (see, e.g., *Adams v. Texas*, 448 U.S. 38 (1980); *Estelle v. Smith*, 451 U.S. 454 (1981)). Prior research suggests that these commutations were supported by local prosecutors who felt they might lose an expensive retrial (Ekland-Olson, 1988). The commutations usually led to a sentence of life imprisonment. Some death row inmates, however, were either retried and received non-capital sentences or commuted to serve time on concurrent sentences that ranged from six years to life. Two had their cases dismissed and served no additional prison time after their release from death row.

Once the final list of persons released from death row and the life-sentence capital inmates was obtained, three data sources were utilized: TDC records, the records of the Texas Board of Pardons and Parole, and trial transcripts at the court of criminal appeals.

⁵ All persons still on death row were excluded from the analysis, as were those who were executed, committed suicide, or died of natural causes.

Demographic information, prior criminal history, institutional conduct, and current status were recorded for each of the releasees based on a manual search of the inmates' institutional files at the TDC's Classification Office. Post-institutional information was gathered on those offenders released on parole through the Texas Board of Pardons and Parole. From the court transcripts we gathered psychiatric testimony and other insights into the evidence the jury had considered in determining that the defendant constituted a continuing threat to society. In the following sections, we shall inspect this evidence and then examine the institutional and post-release behavior of the commutees during 1974–88 to determine the degree to which these offenders did in fact represent a continuing threat of violence to society.

IV. JURY PREDICTIONS OF DANGEROUSNESS

In the sentencing phase of a Texas capital murder trial, the jury must predict that the defendant will “commit criminal acts of violence that would constitute a continuing threat to society” if it is to impose capital punishment. This must be established beyond a reasonable doubt. What evidence do jurors use in reaching this conclusion?

A. *Prior Record*

One factor juries consider is the defendant's prior criminal history (an anamnestic prediction). Table 1 displays criminal data gathered from extensive case files maintained by the Board of Pardons and Parole and the TDC, and supplemented by cross-checks with records from the Texas Department of Public Safety. Researchers disagree about which variables to use for prior record (see Tonry, 1987). Some scholars maintain that to obtain a “complete” picture of a defendant's criminal history arrests, indictments, and all other “contacts” with the system should be reported. Others insist that only conviction data should be used as the most accurate depiction of previous criminality. Table 1 reports both.

Table 1 shows that the criminal backgrounds of former death row inmates and those who were sentenced to life were similar. These data suggest that the juries' decision to sentence to death or life was not based primarily on the defendant's prior record. In terms of prior incidents, nine out of ten inmates from both groups had some contact with the police (e.g., under investigation for a crime). Well over three-quarters of the offenders from each group had no convictions for violent assaultive behavior. If convictions for violent offenses had been the sole factor used to predict future dangerousness, only 18 percent of the death-sentenced and 17 percent of the life-sentenced (control cohort) prisoners could have been considered threats to society. Only three of the former death

Table 1. Prior Criminal History

Type of Past Activities	Released from Death Row (<i>N</i> = 92)	Initially Sentenced to Life Imprisonment (Control Cohort) (<i>N</i> = 107)
Prior incidents ^a		
0	11%	9%
1–2	24%	21%
3–5	30%	29%
5 or more	35%	41%
Prior violent incidents ^b		
0	60%	69%
1–2	29%	25%
3 or more	11%	6%
Convictions for UCR violent crimes ^c		
0	82%	83%
1–2	15%	16%
3 or more	3%	1%
Convictions for UCR property crimes ^d		
0	54%	61%
1–2	21%	27%
3 or more	25%	12%
Adult incarcerations		
0	66%	69%
1–2	27%	28%
3 or more	7%	3%

^a Includes every known contact with a police agency, regardless of whether it resulted in an official disposition.

^b Includes all violent arrests and contacts with the police from serious (e.g., murder) to minor (e.g., fighting).

^c Includes murder, aggravated assault, armed robbery, and rape.

^d Includes burglary, auto theft, arson, and larceny.

row and two control cohort inmates had a prior murder conviction. In addition, two-thirds of each group had never been imprisoned. These conviction data suggest that most offenders in both groups were not violent, repetitive criminals. Instead, based on conviction data, they could be best described as property offenders who eventually committed a capital homicide.

B. Instant Offense

Jurors need not focus solely on a defendant's prior history of violent crime, for they are also presented with extensive and sometimes graphic details about the immediate offense. All capital

Table 2. Type of Homicide

Homicide Characteristics	Released from Death Row (<i>N</i> = 92)	Initially Sentenced to Life Imprisonment (Control Cohort) (<i>N</i> = 107)
Elements of capital murder		
Robbery	50%	52%
Police officer	14%	13%
Rape	12%	13%
Burglary	11%	8%
Hired/paid killer	8%	11%
Kidnapping	4%	1%
Other ^a	1%	2%
Weapon involved		
Firearm	74%	69%
Knife	11%	16%
Club	5%	6%
Strangulation/beatings	10%	9%
Relationship to victim		
Stranger	75%	73%
Non-stranger	25%	27%

^a Includes murder to collect on insurance policies, murder during arson, and murders involving multiple victims.

murders are not treated equally by prosecutors and jurors. Ekland-Olson (1988) has shown that rape-homicide cases are more likely to result in a death sentence than are robbery-murders. It is reasonable to assume that some of this differential final disposition is due to the jury's perception that the individual who rapes and then kills is a more violent threat and thus more deserving of execution than one who robs and kills. Similarly, the level of violence may vary within various types of murders. Because the prosecution usually presents this evidence, jurors are quite aware that the offense involved an unusual amount of brutality. On these facts alone, they may make predictions about the violent potential of the offender in the future.

Table 2 presents data on the type of capital murder for which the offender was indicted. At least 50 percent of each group were convicted of robbery-murders. The two groups were also very similar in the rest of the felony murder types, with no major or significant difference. From these data it is apparent that jurors did not rely solely on the type of homicide in making predictions about future dangerousness. They were confronted with fairly extensive criminal records and at times with stark patterns of violence in the instant offense.

C. *Expert Opinion*

A review of the trial transcripts suggests that juries also used psychiatric testimony in making a prediction about the defendant's future dangerousness. We reviewed twenty cases involving death-sentenced inmates in which expert clinical testimony was used. The testimony generally followed the same pattern in which defendants were labeled "sociopaths," or people who felt no remorse for their acts and were highly effective manipulators. When asked if there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, psychiatrists typically answered "yes," despite defense counsel objections that the question invaded the jury's province to answer that same question. The following testimony from different cases reveals this pattern:⁶

He will continue his previous behavior, there is no reason to think he will change this in any way (*Adams v. Texas*, 1409 (1977)).

Well, again from a medical standpoint or a psychiatric standpoint, [the defendant] . . . is going to go ahead and continue his previous behavior and pose a very serious threat to the lives of other human beings as long as he is allowed to operate within our society (*Hughes v. Texas*, 2563-64 (1975)).

Well, certainly at times [the defendant] . . . can be very pleasant and these type of things, but no matter what society he is in with regard to his destructive behavior, he will continue to exhibit this, and this type of behavior will only continue, no matter where he might be (*Robinson v. Texas*, 921 (1975)).

Some psychiatrists specialize in capital murder cases. One such psychiatrist, James P. Grigson, has been nicknamed "Dr. Death" and has testified for the prosecution in nearly one-third of the Texas cases involving death row inmates (Richards, 1988; Ewing, 1983). Grigson's very strong opinions are illustrated by his testimony in cases in which the offender was sentenced to death but later received a commutation:

Prosecutor: In your opinion, will he kill again?

Grigson: Yes he certainly will if there is any way at all he was given the opportunity to, he certainly will. . . . Well, society can restrict him, confine him; yet even in areas of confinement, this behavior [killing people] will continue (*Boulware v. Texas*, 1991-92 (1974)).

Prosecutor: Can you tell us whether or not, in your opinion, having killed in the past, he is likely to kill in the future, given the opportunity?

⁶ The quoted expert testimony comes from the indicated page(s) in the trial transcript of the named case.

- Grigson:* He absolutely will, regardless of whether he's inside an institutional-type setting or whether he's outside. No matter where he is, he will kill again.
- Prosecutor:* Are you telling me, then, that even if he were institutionalized, put in a penitentiary for a life sentence—would he still be a danger to guards, prisoners, and other people around him?
- Grigson:* Yes. He would be a danger in any type of setting, and especially to guards or to other inmates. No matter where he might be, he is a danger (*Rodriguez v. Texas*, 2136 (1978)).
- Prosecutor:* Say, if a person were put in a rigid setting, would you think these acts of violence would continue, if given an opportunity, even in the rigid setting, say of perhaps prison guards?
- Grigson:* Oh, absolutely. It certainly would continue.
- Prosecutor:* So, a person like the defendant, if given the opportunity, would be a menace to even the prison guards?
- Grigson:* Yes. As well as other prisoners.
- Prosecutor:* Do you feel that he would be a continuing threat to whatever society he might be in?
- Grigson:* Yes. He certainly will be (*Collins v. Texas*, 2083–84 (1975)).

Implicit in these answers is Grigson's firm belief that there is no hope of treating, curing, or rehabilitating these offenders, as the following remark illustrates:

A lot of research is being done and a lot of money has been spent, a lot of people are involved in trying to develop something but at the present time and thus far we can see medicine, psychiatry has absolutely nothing whatsoever to offer that modifies or improves the sociopathic behavior. We don't have anything (*Moore v. Texas*, 3269 (1974)).

Whatever the merits of the positions taken by psychiatrists in capital murder trials, the American Psychiatric Association (APA), in *Barefoot v. Estelle* (463 U.S. 880 (1983)), stated that predictions such as "100% certainty that the defendant will kill again" are prejudicial to the defendant (see also Worrell, 1987; Green, 1984; Levine, 1984). The APA, in *Barefoot*, concluded that "psychiatric testimony of future dangerousness impermissibly distorts the fact-finding process in capital cases." According to some psychologists (Faust and Ziskin, 1988), clinicians are no more accurate in their predictions than lay persons. Currently many defendants on death row in Texas are contesting psychiatric predictions on which their sentences were based (*Dallas Morning News*, April 10, 1988: 1).

Psychiatrists are often presented with hypothetical situations that essentially present the facts of the case. This increasingly popular method allows psychiatrists to predict future behavior

without having examined the defendant (see Appelbaum, 1984). The hypothetical describes the prior criminal acts committed by the defendant and the details of the instant offense. Even though most of the defendants' previous offenses are non-violent, the prosecution uses these crimes to demonstrate a pattern of criminal behavior as well as a failure to be rehabilitated. In the punishment stage of one death-sentenced inmate, the state's attorney referred to the defendant's failure to be rehabilitated from using drugs:

Prosecutor: You take what we know about him: He's been to the penitentiary. Did he get off dope when he went to the pen for dope? No. He goes on to heroin. You take that evidence, you stick it together with . . . [the details of the offense], and then you ask yourself is there a probability, more than not, that if this man were allowed to reenter society he would commit criminal acts of violence? Is there any doubt in your mind whatsoever?

Nobody can say for certain, but we can darn sure say there's a probability. There's no doubt about that, and we can darn sure say this was deliberate killing. Between this dough hook and this roller and this 10-inch butcher knife, that's about as deliberate as it gets (*Grijalva v. Texas*, 6663-4 (1978)).

While there is little direct evidence that such testimony affects jury decisions, it is regularly presented, and the Supreme Court has at least been willing to assume that the testimony affects jury decisions (*Barefoot* at 905).

D. Other Bases for Predicting Dangerousness

The state's attorneys consistently cited the three kinds of evidence—the testimony of psychiatrists, the past criminal acts of the defendant, and especially the heinousness of the immediate offense—when concluding that defendants are a continuing threat to society. They also appealed to the civil duty of the jurors and their willingness (established during voir dire) to impose the death penalty in an appropriate case. The following excerpts from two cases typify the attorneys' arguments:

Now, a person that will . . . [commit that type of act] has got to be a threat to society. It has got to be a threat to all of us, to our wives, to our families, to everybody in this country. What would be more of a threat to society, is he going to stop, is he going to stop with these two? We don't know. How do we know? Are you going to go into the jury room and say two is okay, I don't think he will do it again? (*Granger v. Texas*, 6 (1979)).

I tell you now that unless you do observe the evidence, and base your decision, and find beyond a reasonable doubt and

find the answer to be yes in this case, that upon your heads will lie the next man that's dead due to . . . [the defendant's] hands (*Fortenberry v. Texas*, 4719 (1977)).

In summary, jurors in capital cases must decide whether the offender represents a continuing violent threat to the community based on the facts of the case, including the offender's prior record. In some cases they are also confronted with expert psychiatric testimony and dramatic appeals to their civil duty.

V. EVIDENCE OF DANGEROUSNESS

We next examine the behavior of the ninety-two prisoners sentenced to death in part because the jury determined they represented a continuing threat, but who were later either released into the general prisoner population or paroled to the broader community.

A. *Institutional Behavior*

To evaluate the institutional behavior of these inmates, we compared their behavior with three comparison groups: (1) the control group of all 107 prisoners convicted of capital murder during 1974–88 who were sentenced to life imprisonment, but not predicted to be dangerous during the punishment stage of their trials; (2) the entire prison population in 1986; and (3) all inmates housed in a single high security prison (the Darrington Unit) in the TDC in 1986. If jurors acting under the current statute are effective at predicting the future dangerousness of convicted murderers, we would expect that the 92 inmates under the sentence of death who were later released from death row would have a record of more violent institutional conduct than any of the comparison groups.

It is difficult to make direct comparisons between these groups due to the differences in time spent in prison, or the “at risk” period. However, it is possible to make some general observations regarding prison behavior as well as the degree to which the inmates constituted a menace or disproportionate threat to other inmates and the custodial staff. The best indicator of a “continuing threat” concerns murders and violent assaults, especially those involving weapons. The data in Table 3 reveal that the yearly rate of weapon-related rule violations for those released from death row was somewhat lower than the rate for other groups.⁷ One commuted capital murderer (Noe Beltran), however, was involved in a gang-related prison murder in July 1988. Beltran, a member of the Hispanic prison gang the Texas Syndicate (TS), and several fellow

⁷ To calculate the average yearly rates of Level 1 rule violations (serious violent behavior) for the former death row prisoners, we computed the rate per prisoner ($4/90 = .044$). We then divided this rate by the average number of years spent in prison by these offenders ($.044/6.3 = .007$). For the control cohort we followed the same procedure: $7/107 = .065$; and then $.065/7.2$ (average time spent in prison) = .009.

Table 3. Reported Serious Violent Rule Violations^a

Prison Rule Infraction	Released from		Systemwide (1986) (<i>N</i> = 38,246)	Darrington (1986) (<i>N</i> = 1,712)
	Death Row (<i>N</i> = 90 ^b)	Life Sentence (<i>N</i> = 107)		
Murder of an inmate	1 (.18)	0	3 (.007)	1 (.05)
Aggravated assault on an inmate with a weapon	4 (.72)	7 (.90)	266 (.69)	23 (1.3)
Sexual abuse of an inmate by threat	0	1 (.13)	48 (.12)	1 (.05)
Murder of an officer	0	0	0	0
Striking an officer	4 (.72)	12 (1.56)	4144 (10.8)	308 (17.9)
Total Infractions	9 (1.61)	20 (2.60)	4461 (11.66)	333 (19.54)

^a The first number represents the actual number of infractions; the number in parentheses is the average yearly rate per 100 inmates.

^b Excludes institutional rule violations by two commutes who were discharged from death row to the community and did not serve any time in the general prison population.

gang members murdered another TS member in a power struggle. He thus became the first inmate in Texas since the inception of state-imposed executions in 1924 to be released from death row and returned with a second death sentence. However, murder in prison was not as common as the clinical predictions promised. Nor were the death row releasees, compared to the other groups, more violently assaultive or predatory, or a disproportionate threat to other inmates and staff.

We examined the evidence of positive institutional behaviors as well as rule-breaking activity, including time-earning status or class, good time accumulated, and program enrollment. As of January 1, 1989, approximately 90 percent of both the former death row inmates and the life-sentenced control cohort who were still incarcerated held trusty status.⁸ Further, four of the former death row prisoners received a total of thirteen furloughs (a 4-day stay with family members); two life-sentenced inmates had a total of fourteen furloughs. Inmates from both groups completed these furloughs without incident. Two-thirds of both groups have never

⁸ Trusty status in the Texas prison system is a reward for good behavior. Trusties receive more good time than non-trusties. Trusties can also work without armed supervision both in the institution and outside the prison compound.

been in solitary confinement, a punishment for serious disciplinary infractions. One former death row inmate graduated cum laude with a bachelor's degree in psychology from Sam Houston State University in May 1988. One-fifth of offenders in both groups (27% of commuted capital offenders and 22% of the control group) had clean records with no minor violations of any type recorded during their prison stay.

Despite these "glowing marks," some former death row prisoners, albeit a minority, have been disciplinary problems. Eight have been identified as prison gang members, and they have been confined indefinitely in administrative segregation or high security housing areas. Six control group members have been identified as gang members and have been housed in administrative segregation wings.

B. Post-Release Behavior

Of the ninety-two commutees, seventy-eight remain in prison. Of the fourteen who are no longer in prison, two died in the general prisoner population; another died while on parole in a construction accident in late 1987 more than one year after his release. The other eleven include one inmate who was transferred to a federal prison in New York in 1977 and was paroled in 1983. Four other inmates discharged their sentences. The remaining six inmates were paroled. As of April 1989, the average time spent in the broader community by these eleven inmates was 4.5 years. One of the six was returned to prison for a serious violent crime.⁹

Of the life-sentenced control cohort, ninety-four (88%) have never been released to the free society; one died in prison. Of the remaining thirteen, four had their cases reversed or dismissed. Nine have been paroled, spending an average of four years (at this writing) in the outside community; one of the nine parolees was returned to prison. This inmate has been released and returned to prison four times over the past seven years for the possession of drugs, aggravated assault, and aggravated robbery. He is currently out on parole.

C. Jury Predictions Among Life-Sentenced Prisoners

The difference between the two categories of capital offenders we are examining lies in the responses juries gave to the three questions in the sentencing phase of the bifurcated trial. Table 4

⁹ In 1975 Kenneth Dee Stogsdill was convicted in Texas of capital murder (a dismemberment slaying). In 1977 his capital murder case was overturned by the Texas Court of Criminal Appeals due to a lack of evidence. However, he was sentenced to ten years for burglary and sexual assault connected to the same crime for which he was originally sentenced to death; he was released from prison in 1980. Stogsdill then moved to California, where in 1985 he was convicted of first degree murder (a dismemberment slaying) and sentenced to a 25-year to life term.

Table 4. Jury Responses to the Three Questions Among Capital Offenders Sentenced to Life

Response	Question 1	Question 2	Question 3 ^a
Yes	76% (96) ^b	15% (19)	91% (29)
No	21% (27)	67% (85)	6% (2)
Deadlock	2% (3)	17% (22)	3% (1)

^a This question was asked in only 25% of the cases.

^b The number in parentheses is the number of defendants.

presents the pattern of these responses among the 126 inmates who received a life sentence after being convicted of capital murder. These data show that the decision to give life versus death in Texas rests squarely on Question 2—future dangerousness. In 85 percent ($N = 107$) of the cases (the control cohort), the jury failed to predict that the defendant would pose a continuing threat to society. This finding parallels Crump's (1977) research conducted over a decade ago.

Table 5 presents the prison behavior of all 126 life-sentenced inmates in response to Question 2. Of those 19 inmates jurors predicted would be a continuing violent threat, 4 (21%) engaged in violent assaultive behavior in the prison setting, while 15 (79%) did not commit any aggressive or predatory acts as prisoners. Among the inmates predicted *not* to be continuing threats, 10 (12%) did in fact commit violent acts. If the juries predicted no future prison violence for all cases, they would have been accurate in 110 (87%) instances, with no false positives and 13 percent false negatives. Instead, juries made correct predictions in 76 percent of the 104 cases, with 14 percent false positives and 10 percent false negatives. Even when the jury was deadlocked (badly split such as 6–6, 7–5, or 8–4) on the question of dangerousness, the majority of the inmates were not violent in prison.

Nevertheless, it can be argued from these data that Texas juries in capital cases have some predictive power. In this sense, the law is working successfully. However, there is a good deal of hidden irony. For example, one capital offender, Noe Beltran, was given a death sentence but later received a commutation. The Texas Court of Criminal Appeals reversed his death sentence, ruling there was insufficient evidence to predict future dangerousness. In 1988, however, Beltran murdered a fellow gang member and received a new death sentence. On the other hand, in the celebrated case represented in *The Thin Blue Line* (1988), Randall Dale Adams was predicted (by Dr. James Grigson) to be a danger,

Table 5. Prison Behavior of Life-Sentenced Inmates Compared to Question Predictions

Prison Behavior		Predicted to Be a Continuing Threat		
		Yes	No	Deadlocked
Violent in prison	Yes	4 ^a (21%)	10 ^b (12%)	2 (9%)
	No	15 (79%)	75 (88%)	20 (91%)
Total (<i>N</i> = 126)		19	85	22

^a These are actual figures rather than percentages.

^b One of these 10 prisoners was released on parole, committed a subsequent armed robbery, and was returned to prison.

spent time on death row, had his death sentence commuted to life, and was recently released from prison. It is widely acknowledged that Adams is innocent. Finally, one life-sentenced capital offender who was predicted not to be a future threat has been released from prison and returned several times for committing new violent felonies. It is very difficult to resolve the implications of these findings. Predicting future dangerousness appears to depart little from gazing in a crystal ball when it comes to determining the fate of capital murderers.

VI. CONCLUSION

The Texas capital statute, enacted in 1973, was an attempt to restrict the arbitrary and capricious imposition of the death penalty. The new statute was created to limit capital punishment to society's most dangerous offenders. Question 2, which asks jurors to predict whether there is a probability that the defendant would commit future criminal acts of violence, is clearly the major sentencing question that Texas jurors decide.

This paper analyzed the behavior of ninety-two persons, each of whom jurors judged to be a continuing violent threat to society. The former death row offenders spent an average of just over six years in the general prison population. A minority of these inmates committed a handful of violent offenses at rates comparable to or lower than other inmates. One, however, killed another prisoner in a gang-related murder. Overall these former death row prisoners were not a disproportionate threat to the institutional order, other inmates, or the custodial staff. Indeed, their total rate of assaultive institutional misconduct was lower than those of both the capital murder offenders who were given a life sentence and the general prisoner population. Further, the majority of infractions were committed by a minority of the capital prisoners; most never committed any serious rule violations after their release

from death row. Likewise, most never spent time in solitary confinement.

Behavior in prison is one thing. Behavior when released may be another. Twelve former death row inmates were eventually released to free society. One committed a second homicide, a brutal slaying in some ways similar to the offense for which he was originally sentenced to death. This, of course, is a disturbing finding. At this point, on the basis of a sample of twelve, the post-prison behavior of the former death row inmates cannot be assessed (1 of these 12 died while on parole).

Moreover, even if we were confident that one of twelve released prisoners would commit a future violent act, the policy implications are unclear. Should we kill all twelve persons, or all ninety-two, because an unknown minority in their midst are likely to be repeat offenders? Punishment, particularly capital punishment, on the basis of predictions of future behavior will always involve a large proportion of false positives. There is nothing to suggest a future that offers "100 percent certainty" in the prediction of violence. The data presented here indicate that overprediction is the norm. The Texas capital murder statute, as currently drawn, cannot avoid the dilemma.

Traditionally, it is argued that under the United States Constitution false positives are an anathema: Better that a hundred guilty go free than one innocent be sentenced to death. This raises the question of whether, in the context of the Texas predictive capital punishment scheme, future jurors should be told of the predictive record of their predecessors. The finding that past jurors have overpredicted violence may serve to caution future jurors in their deliberations. While this serves an important purpose, assignment of punishment to an individual offender even partially on the basis of the past behavior of similarly situated offenders also clearly entails important pitfalls.

The Supreme Court of New Jersey, in *New Jersey v. Davis* (477 A.2d 308, 314 (1984)), has held that in the penalty phase of a capital case the defendant "may offer in evidence, through expert witness, testimony relating to empirical studies, including presentation and analysis of statistical data, that is generally relevant to issue of the defendant's potential for rehabilitation when defendant presents character as mitigating factor." In a parallel argument, Justices Marshall and Brennan dissented when the United States Supreme Court refused to review a South Carolina case involving predictive statistical evidence in *Patterson v. South Carolina* (471 U.S. 1036 (1985)). They noted, in particular, the findings of *Jurek*, which held that in the predictive context of the Texas death penalty statute the jury should have before it "all possible relevant information about the individual defendant whose fate it must determine" (1975: 276). Arguably, general statistical information might not be considered relevant in that it does not apply

to the immediate defendant. However, this line of argument is undercut by *Barefoot*, in which the Court approved the relevance of expert psychiatric predictions of the offender's future dangerousness, even though the expert never actually examined the defendant. It is only a small step from generalized psychiatric conclusions, based on hypotheticals, to predictions based on statistical patterns.

While this line of reasoning would seem to favor the defendant, Goodman (1987) has convincingly argued that reliance on statistical patterns for predictions of violence and the assignment of punishments may create pernicious distinctions when expanded to include a range of demographic comparisons. What if it were found that one racial category of capital offenders was more likely than another to commit future acts of violence? Should this evidence be introduced during the sentencing phase of capital murder trials to soften or, alternatively, to maximize the punishment? In this context, as Goodman (*ibid.*, p. 521) correctly notes, "A procedure that allows judgments about an individual's blameworthiness to be based on statistical correlations to anonymous prior malefactors is deeply inconsistent with the general principles undergirding our system of law."

The data presented in this paper suggest that jurors err in the direction of false positives when it comes to predicting future dangerousness. What we do not know on the basis of these data is whether jury decisions in Texas would be different if jurors were not required to predict dangerousness as a precondition for sentencing an offender to death. We know that utilitarian justifications for punishment are preferred by the public over retributivist sentiments. Yet there is evidence that support for the death penalty is not based solely on instrumental motives; that is, respondents who claim to favor the death penalty for reasons of deterrence often report that they would be willing to support it even if it served no deterrent purpose (Sarat and Vidmar, 1976; Vidmar and Dittenhoffer, 1981).

Jurors in Texas may be reacting to the instant offense, the same way jurors do in California, Florida, Georgia, and other death-sentencing states. If so, the structure of the statute in Texas simply preserves the fiction that jurors are basing this crucial decision on anything approaching consistently valid predictions of future behavior. Even for those who have committed very violent acts in the past, the data simply do not bear out this rational, utilitarian image of capital sentencing. Further research is needed to assess whether jurors, consciously or unconsciously, decide that an offender deserves to die and then tailor their responses to the questions accordingly.

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