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THE DEATH OF FAIRNESS: TEXAS'S FUTURE DANGEROUSNESS REVISITED

Ana M. Otero *

Abstract

The death penalty in America continues to be a controversial topic; a rapidly changing landscape, whose efficacy is eroding under the weight of glaring injustices and proven error. In the last eight years, six states have abolished it and 146 exonerations nationwide rattle confidence in its accuracy and fairness. This article examines the future dangerousness inquiry of the Texas death penalty statute, a unique and lethal provision hastily engrafted into the revamped statute when it was enacted in 1973. Predictions of future dangerousness – whether a convicted capital defendant will engage in subsequent acts of violence and constitute a continuing danger or threat to society – are offered by the State in the sentencing stage of capital litigation to persuade a jury to render a sentence of death, rather than life imprisonment. This article argues that these predictions are unconstitutional and inadmissible under Texas law.

* This article is dedicated to Craig Washington, a staunch champion for justice, and indefatigable advocate for truth. This article is a labor of love; a long journey derailed by life's vicissitudes. I owe a debt of gratitude to many who have accompanied me in this long and winding road. To Sally Green, for not only encouragement and support throughout, but for getting down and dirty with the first run of this piece and for letting my voice shine. To Docia Rudley, an endless source of sustenance, and to Fernando Colon, for carrying my load while I was down. A debt of gratitude to Lynda Cevallos who gave up a bit of sun to keep me from catching fire. My thanks for your passion and for feeling the pain. I want to thank Ken Williams for his time and his invaluable insights and suggestions. I am deeply grateful to my numerous research assistants for their contributions to this article. To Benjamin James, for his meticulous and thoughtful excursion into the amendments to the Texas death penalty statute. I am grateful for his patience, our long conversations, and his measured insights. I am grateful for Aaron Cowart's brilliant and analytical mind, and for his ability to excavate deep in the chambers of the 63rd Texas Legislature and the Court of Criminal Appeals. To Kavita Nair Brignac, for lending me her sharp eye, for her unyielding scalpel, and for her masterful edits. To Christopher Self, for his thoughtful ideas, excellent research, and for walking with me to the end of the road. My sincere thanks goes to the University of Denver Criminal Law Review for outstanding editorial assistance. Finally, to an unsung hero for an endless reserve of patience and support; my deepest thanks for standing by me when the road seemed impossibly hard to traverse.

INTRODUCTION: A CONVINCING CASE FOR CHANGE

Texas law governing the punishment phase of capital litigation has been incisively and fittingly described “as difficult to navigate as a trip blindfolded across Texas.”¹ One aspect of this law – predictions of future dangerousness – allows the introduction of junk science into the courtroom, duping judges and juries, and oftentimes creating irreparable consequences for defendants.

Predictions of future dangerousness – whether a convicted capital defendant will engage in subsequent acts of violence and constitute a continuing danger or threat to society² – are offered by the state of Texas in the sentencing stage of capital litigation to persuade a jury to render a sentence of death, rather than life imprisonment.³ Presumably designed to eliminate arbitrariness and to better guide the jurors in making this difficult decision, these predictions have been widely challenged and criticized because they are used to support a death sentence based on unreliable and faulty scientific evidence.

Of the thirty-two capital jurisdictions,⁴ Texas and Oregon are the only two states that require future dangerousness determinations by the jury.⁵ The sentencing stage of most capital jurisdiction requires jurors to weigh aggravating and mitigating circumstances in deciding whether to render a verdict of death. In some jurisdictions, future dangerousness plays a role as an important factor to be considered by jurors in making their sentencing decision while in others, it is influential in determining the presence of aggravating factors; and in some states, evidence of the lack of future dangerousness acts as a mitigating factor.⁶ In Texas, future dangerousness is the touchstone of the death sentence because jurors must answer one question unanimously – “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,”⁷ before they can consider mitigating evidence to support a verdict less than death.⁸

¹ Janet Morrow & Robert Morrow, *In a Narrow Grave: Texas Punishment Law in Capital Murder Cases*, 43 S. TEX. L. REV. 979, 982 (2002).

² TEXAS DEFENDER SERVICE, DEADLY SPECULATION — MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 4, (2004) [hereinafter *Deadly Speculation*], available at http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf (“Thus, the institutional adjustment or ability of capital defendants to conform their behavior to a prison setting is generally the critical issue to consider when evaluating whether they actually continue to represent a threat to others.”); In Texas, for example, effective September 1, 2005, a capital defendant who does not get the death sentence will serve life without parole. See TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013).

³ TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013); Predictions of future dangerousness may be offered in other criminal settings as well. For example, one of the statutory factors the court may consider in setting the amount of bail is the future safety of the victim and the community. TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2013). Additionally, the courts may consider future dangerousness in making probation determinations, offering deferred adjudication, and approving plea bargaining agreements. Finally, future dangerousness is one of the factors considered by parole boards in making their determinations.

⁴ DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated May 21, 2014).

⁵ Eugenia T. La Fontaine, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207, 228 (2002) (stating that Oregon is the only other state that allows this factor when making the decision to grant life or death.).

⁶ William W. Berry, III, *Ending Death By Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 893 (2010) (explaining the varied use of future dangerousness as it applies to all capital jurisdictions).

⁷ TEX. CODE CRIM. PROC. ANN. art. 37.071 § (b)(1) (West 2013).

⁸ *Id.* at § 2(e)(1).

Noted psychiatrist, Alan Stone, alluded to the difficulties of predicting future dangerousness:

The decision to impose the sentence of execution is an awesome human responsibility. The retributive taking of a life in the name of justice forces the law-givers to reexamine the very concept of justice. Judges and juries should not be led to believe that the discipline of psychiatry has a scientific shoulder on which their terrible burden of decision can rest. I would, therefore, urge psychiatrists, on the grounds of humility if not truth, to inform courts that we have no professional or scientific basis for participating in a capital sentencing hearing.⁹

These unreliable predictions became a staple of the sentencing scheme and a prerequisite to capital punishment after Texas revamped its statute pursuant to *Furman v. Georgia*,¹⁰ the 1972 U.S. Supreme Court case which struck down the then existing death penalty statutes. While the Court did not rule that capital punishment was *per se* violative, the Court held that the death penalty statutes reviewed were arbitrary and capricious and constituted a violation of the 8th Amendment.¹¹ Although *Furman's* plurality opinion lacked clarity, its effect was enormous—invalidating the death penalty statutes of over thirty-five states and sending legislative bodies into a frenzied scramble to revamp their statutes to meet *Furman's* mandate.¹²

The Texas legislature acted quickly. By 1973, it had enacted a new death penalty statute designed to address the concerns of the *Furman* Court. In fact, the legislative history of the bills, presented to both the House and the Senate, indicates that many hours were spent in drafting and amending the proposed law, in public hearings, and in heated debates on the floor of the legislature. Nevertheless, the future dangerousness inquiry was added with seemingly little discussion or legislative scrutiny.

In 2004, the Texas Defender Service,¹³ reviewed 155 cases in which prosecutors had used experts to predict a defendant's future dangerousness.¹⁴ Its comprehensive study found that the experts were wrong 95% of the time,¹⁵ and it made the following salient findings: (1) of the total 155 inmates against whom state experts testified, five percent

⁹ Alan A. Stone, *Revisiting the Parable: Truth Without Consequences*, 17 INT'L J.L. & PSYCHIATRY 79, 91 (1994). Unfortunately, Stone also states "[I have] been unable to convince my colleagues that our epistemological problems create an unbridgeable abyss in the criminal courtroom." *Id.*

¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972). In a plurality decision, the United States Supreme Court held that the current form of the death penalty was unconstitutional and violated the 8th and 14th Amendments. *Id.* at 255-56. The Court reasoned that abdicating the decision to juries necessarily produced arbitrary and capricious results; therefore, it violated the Eighth Amendment's prohibition of cruel and unusual punishment as applied to the states through the Fourteenth Amendment. *Id.* Immediately following this decision, death penalty states scrambled to amend their death penalty statutes to comply with *Furman's* mandates. Marcia A. Widder, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1347 (1994).

¹¹ *Furman*, 408 U.S. at 239-40. The U.S. Supreme Court decided two other death penalty cases along with *Furman*: *Jackson v. Georgia* and *Branch v. Texas*. *Id.*

¹² See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 148 (1986).

¹³ The Texas Defender Service is a nonprofit organization established in 1995 by experienced Texas death penalty attorneys. The organization's mission is to improve the quality of legal representation for those who are facing the death penalty and to expose and eradicate the systemic flaws within the Texas death penalty statutes. TEX. DEFENDER SERVICE, <http://texasdefender.org/about> (last visited Jun. 9, 2014).

¹⁴ *Deadly Speculation*, *supra* note 2, at xiii.

¹⁵ *Id.*

engaged in seriously assaultive behavior; (2) many inmates sentenced to death based on predictions of future dangerousness have proven to be non-assaultive, compliant inmates who pose no risk to other inmates or prison guards; and (3) the use of future dangerousness question injects impermissible racial components into the sentencing process.¹⁶

The study aptly concluded that this component of the Texas sentencing process was highly flawed. Further, it questioned the validity and fairness of many Texas death sentences¹⁷—a grave and disturbing concern given Texas’s dubious distinction of leading the nation by approximately 400 executions.¹⁸ With Texas’s top governmental leader either seemingly clueless to the depth of its broken system, or cunningly unwilling to acknowledge it, the Texas death penalty statutes have been long ignored and only serve to perpetuate a grievously flawed system.

A. TEXAS’S “THOUGHTFUL [AND] VERY CLEAR PROCESS”: THE EGREGIOUS CASE OF CAMERON TODD WILLINGHAM

On September 7, 2011 at the Republican debate held at the Ronald Reagan Presidential Foundation and Library, the moderator, Brian Williams, asked Governor Perry whether he struggled to sleep at night with the idea that any one of the 234 death row inmates executed in Texas might have been innocent.¹⁹ Fueled by an unexpected round of applause in support of Texas’s executions, Perry responded confidently.²⁰

While he may glibly boast that Texas has in place a “thoughtful [and] very clear process,” the opposite is true. Texas’s death penalty system is profoundly flawed and the irrevocable consequences of its myriad problems, many of which resonate embarrassingly in the national news, are disconcerting and shameful. As this section will show, Governor Perry’s statement reflects, at best, a profound ignorance; at worst, an intentional and flagrant indifference to a serious and endemic problem that continues to rattle the minds of those who battle deep in the trenches of the Texas death penalty system.

In a recent article, noted prohibitionist, David Dow, mentioned possibly one of the most egregious “mistakes” – well-known to Perry – that should have caused him to lose a bit of sleep.²¹ On December 23, 1991, a fire moved quickly through a one-story

¹⁶ *Id.* at xiv.

¹⁷ *Id.* at xv.

¹⁸ Juan A. Lozano, *Texas Woman Set to be 500th Execution in State*, YAHOO NEWS (June 26, 2013), <http://news.yahoo.com/texas-woman-set-500th-execution-state-073800079.html>.

¹⁹ *The Republican Debate at the Regan Library*, N.Y. TIMES (Sept. 7, 2011), <http://www.nytimes.com/2011/09/08/us/politics/08republican-debate-text.html?pagewanted=all>

²⁰ Perry said the following:

No, sir. I’ve never struggled with that at all. The state of Texas has a very thoughtful, a very clear process in place of which —when someone commits the most heinous of crimes against our citizens, they get a fair hearing, they go through an appellate process, they go up to the Supreme Court of the United States, if that’s required. But in the state of Texas, if you come into our state and you kill one of our children, you kill a police officer, you’re involved with another crime and you kill one of our citizens, you will face the ultimate justice in the state of Texas, and that is, you will be executed.

Id.

²¹ David Dow, *Rick Perry’s Lethal Overconfidence*, THE DAILY BEAST (Sept. 9, 2011, 4:17 PM), <http://www.thedailybeast.com/articles/2011/09/09/rick-perry-and-the-death-penalty-executing-innocents.html> (“There are some I think could well have been innocent—Frances Newton, for example, who supposedly killed

house in the city of Corsicana in northeast Texas.²² The neighbors hurried to see Cameron Todd Willingham's house engulfed in flames as he was screaming, "My babies are burning up!"²³ His three daughters were trapped inside the house while he remained helpless standing on the front porch. He told the neighbors to call the fire department as he attempted to reenter the house, but it was too late. Willingham had lost all three of his children to smoke inhalation.²⁴

The trial began in August 1992 in downtown Corsicana and ended after two days with the jury only deliberating for barely an hour; they returned with a unanimous guilty verdict.²⁵

The prosecution brought forth two medical experts to confirm for the jury that Willingham was a sociopath. The first medical expert, Tim Gregory, was a psychologist with a master's degree in marriage and family issues who had also previously gone hunting with the assistant district attorney, John Jackson.²⁶ The other medical expert was James P. Grigson, a forensic psychiatrist also known as Dr. Death because of how frequently he testified for the prosecution in capital punishment cases.²⁷ Dr. Grigson diagnosed Willingham as an "extremely severe sociopath."²⁸ Neither had even met Willingham.²⁹ Three years after Willingham's trial, Grigson was expelled from the American Psychiatric Association for ethics violations.³⁰

her husband and two children without getting even a spot of blood or speck of gunpowder on herself, or Charles Nealy, who did not remotely match the description of the person who killed the convenience store clerk. But there was no DNA in either case, and so I am left being unsure."). Anthony Graves, Ernest Willis, Michael Toney, Michael Blair, and Robert Springsteen are just a few of the men exonerated during Perry's tenure. *Id.* David Dow is a professor at the University of Houston Law Center, where his teaching areas include constitutional law, contract law, and death penalty law. U. HOUS. L. CENTER, <http://www.law.uh.edu/faculty/ddow2/dpage2/> (last visited May 20, 2014). Dow formed the Texas Innocence Network, where he has represented more than a hundred death row inmates and worked to exonerate them. *Id.*

²² David Grann, *Trial By Fire*, NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (last visited May 20, 2014). This article was featured in 2009 asking the question, "Did Texas execute an innocent man?" It is a detailed article portraying the events that took place in the life of Cameron Todd Willingham and his family. *Id.* It reveals the step-by-step record of the tragic fire that killed Willingham's three daughters, the investigation of the fire, the alleged charges brought against Willingham, faulty arson forensic science, false expert witness testimony, incompetent counsel, and other errors that contributed to his execution. *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* While in prison, Willingham wrote letters to his prison pen pal, Elizabeth Gilbert, a forty-seven year-old French teacher and playwright from Houston. She began corresponding with Willingham and took an interest in his case when she noticed several contradictions in the eyewitness accounts. She filtered through the statements of witnesses that became complete opposites by the time the news spread throughout the community and the trial had begun over eight months later. *Id.* ("Diane Barbee had reported that, before the authorities arrived at the fire, Willingham never tried to get back into the house—yet she had been absent for some time while calling the fire department. Meanwhile, her daughter Buffie had reported witnessing Willingham on the porch breaking a window, in an apparent effort to reach his children. And the firemen and police on the scene had described Willingham frantically trying to get into the house.). Furthermore, several of Willingham's friends and relative had doubts that he was guilty, including his former probation officer, Polly Goodin, and even former Judge Bebe Bridges. *Id.*

²⁶ *Id.*

²⁷ *Id.*; Mike Tolson, *Effect of 'Dr. Death' and His Testimony Lingers*, HOUS. CHRON. (June 17, 2004), <http://www.chron.com/news/houston-texas/article/Effect-of-Dr-Death-and-his-testimony-lingers-1960299.php>.

²⁸ Grann, *supra* note 22

²⁹ *Id.*

³⁰ *Id.*; Laura Beil, *Groups Expel Texas Psychiatrist Known for Murder Cases*, DALL. MORNING NEWS (July 26, 1995) ("A statement issued last week by the psychiatric association says that Dr. Grigson violated the organization's ethics code by 'arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100 percent

In 1996, Willingham received a new court-appointed attorney by the name of Walter Reaves, who filed a writ of habeas corpus to introduce new evidence such as perjured testimony, unreliable medical experts, and false scientific findings.³¹ The Texas Court of Criminal Appeals denied the writ in October of 1997.³² However, Willingham was granted a temporary stay of execution when he filed another writ in federal court.³³ By 2002, the Federal District Court and the Fifth Circuit Court of Appeals denied Willingham's writ without even a hearing, and the U.S. Supreme Court later declined to hear his case in December of 2003.³⁴

Thirteen years later, in the days leading up to Willingham's execution, [in a last-ditch clemency appeal,] his attorneys sent to Governor Rick Perry and the Board of Pardon and Parole a report from Gerald Hurst, a nationally recognized arson expert, saying that Willingham's conviction was based on erroneous forensic analysis. Documents obtained by the Innocence Project show that state officials received that report but apparently did not act on it.³⁵

At 6:20 p.m. on February 17, 2004, Cameron Todd Willingham was executed at the Texas State Penitentiary in Huntsville, TX.³⁶

A few months after Willingham's execution, the Chicago Tribune published an investigative report challenging the forensic analysis.³⁷ Five of the nation's leading independent arson experts, assembled by the Innocence Project, reviewed the evidence in the case, issuing a forty-eight page report that none of the scientific analysis used to convict Willingham was valid.³⁸

In 2005, the Texas Legislature created the Forensic Science Commission to regulate state crime labs and investigate complaints that allege professional scientific negligence or misconduct.³⁹ In 2008, the agency began looking into the Willingham case, and the Ernest Ray Willis case, another similar arson case. The agency retained a well-known national arson expert, Craig Beyler, to do an analysis of the fire investigation

certainty that the individuals would engage in future violent acts.'"). In response to inquiries about Dr. Grigson, Dr. Jonas Rappeport, medical director for the American Academy of Psychiatry and the Law, stated that "no psychiatrist can predict with 100 percent certainty whether someone will be dangerous to society." *Id.*

³¹ Grann, *supra* note 22.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Cameron Todd Willingham's Surviving Relatives Petition for Posthumous Pardon 20 Years After Conviction: Nation's Arson Experts Uniformly Agree Evidence Was Flawed*, INNOCENCE PROJECT (Oct. 24, 2012), http://www.innocenceproject.org/Content/Cameron_Todd_Willinghams_Surviving_Relatives_Petition_for_Posthumous_Pardon_20_Years_After_Conviction.php#.

³⁶ *Id.* For an article comparing the Willingham case with another very similar arson case, that of Ernest Ray Willis, see Michael Hall, *Separated at Death*, TEX. MONTHLY (December 2009), <http://www.texasmonthly.com/story/separated-death?fullpage=1>.

³⁷ Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004), <http://www.chicagotribune.com/news/nationworld/chi-0412090169dec09,0,1173806.story>.

³⁸ Douglas J. Carpenter et al., *Report on the Peer Review of the Expert Testimony in the Cases of State of Texas v. Cameron Todd Willingham and State of Texas v. Ernest Ray Willis*, INNOCENCE PROJECT (Mar. 28, 2006), <http://www.innocenceproject.org/docs/ArsonReviewReport.pdf>.

³⁹ House Bill 1068, amended Chapter 38, Code of Criminal Procedure by adding 38.01 Texas Forensic Science Commission ("FSC"). The bill's authors were Senator Whitmire, Senator Hinojosa and Representative Driver. *About Us*, TEX. FORENSIC SCI. COMM'N, <http://www.fsc.state.tx.us/about/> (last visited February 8, 2014).

methods and procedures used in both criminal arson cases.⁴⁰ On August 17, 2009, Dr. Beyler issued a comprehensive sixty-four page report, in which he concluded:

The investigations of the Willis and Willingham fires did not comport with either the modern standard of care expressed by NFPA 921, or the standard of care expressed by fire investigation texts and papers in the period 1980-1992. The investigators had poor understanding of fire science and failed to acknowledge or apply the contemporaneous understanding of the limitations of fire indicators. Their methodologies did not comport with the scientific method or the process of elimination. A finding of arson could not be sustained based upon the standard of care expressed by NFPA 921, or the standard of care expressed by fire investigation texts and papers in the period 1980-1992.⁴¹

Dr. Beyler was scheduled to testify before the Forensic Science Commission in October 2009, and the commission's final report on the cases was scheduled to appear in early 2010. However, just two days before Dr. Beyler was scheduled to present its damaging findings to the commission, Governor Perry replaced the Chairman of the commission, along with three other appointees.⁴² In what many called a cover-up, Perry appointed to the seat a Williamson County District Attorney, whom he had originally appointed to the district attorney's office in 2001: "It looked an awful lot like the governor had used a crony to scuttle a meeting at which the commission was going to hear from an expert that Perry had overseen the execution of an innocent man."⁴³

Despite national outcry and ridicule for the many Texas cases gone awry, there continues to be endemic indifference to the problems plaguing the Texas's criminal justice system. Despite the realities that confront them, the Texas movers and shakers remain disconcertingly steadfast about the "thoughtful" implementation of capital punishment and recalcitrant on the issue of modifying statutes to follow advancements in forensic medical data. In Texas a flawed capital punishment system is particularly disturbing because of the staggering statistics. Since the revision of its death penalty statutes in 1976, Texas has executed 515 individuals as of June 30, 2014; the most recent on April 16, 2014, when Texas executed #999417, Jose Villegas.⁴⁴ With the diligent efforts of the Innocence Project, Texas has had 12 exonerations from 1973 – 2012, and they continue to work on hundreds of cases every year.⁴⁵

2014 marks the 41st anniversary of the post-*Furman* Texas death penalty statute. This article argues that, as enacted, Article 37.071 did not meet the requirements set forth in *Furman*. Namely that the future dangerousness provision of that statute allows the

⁴⁰ CRAIG L. BEYLER, ANALYSIS OF THE FIRE INVESTIGATION METHODS AND PROCEDURES USED IN THE CRIMINAL ARSON CASES OF ERNEST RAY WILLIS AND TODD CAMERON WILLINGHAM 1 (2009), available at <http://i.cdn.turner.com/cnn/2009/images/11/09/rpt.tx.forensic.willes.willingham.anaylsis.final.pdf>.

⁴¹ *Id.* at 52.

⁴² Matt Smith & Ed Lavandera, *Perry "Squashed" Texas Execution Probe. Ex-official Says*, CNN POLITICS (Sep. 8, 2011, 11:01 PM), <http://www.cnn.com/2011/POLITICS/09/07/texas.execution.probe/>.

⁴³ Hall, *supra* note 36.

⁴⁴ *Executed Offenders*, TEX. DEP'T CRIM. JUST. (June 30, 2014), http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html.

⁴⁵ See *Exoneration Statistics by State*, DEATH PENALTY INFO. CENTER (Mar. 12, 2014), <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>. Per the National Registry of Exonerations, total exonerations in Texas number 133; in 2013, Texas had 13 exonerations -the highest number of all states for that year. See NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2013 1-19 (2014), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.

admissibility of unreliable expert testimony in violation of the Due Process Clause of the U.S. Constitution and the Eighth Amendment. Further, it argues that these unreliable predictions are inadmissible under Texas Rule of Evidence 702 because they do not meet the requirements for scientific reliability established under Texas law. Thus, there is no alternative but to abolish it to prevent further abuses and injustices.

Future dangerousness has been the subject of a voluminous jurisprudence from mental health and legal professionals. Yet there has been no systematic attempt to examine both the legislative history of the 1973 statute, and its amendment history to show the consequences of its flawed inception. Additionally, there has been no critical analysis of Texas Court of Criminal Appeals' opinions involving these unreliable predictions to show the inexplicable pattern of incongruent holdings, the result of which being precisely the arbitrary decisions *Furman* sought to eradicate. This article attempts to fill that void in numerous ways. Part I examines in detail the legislative history of the 1973 statute, and concludes that the hasty addition of the future dangerousness provision was simply a codification of then existing practice. This part will show that long before 1973 prosecutors were already relying on the testimony of unreliable forensic mental health professionals to convince a jury to render a death verdict. Since 1973, the Texas Legislature has amended Article 37.071 at least nine times.⁴⁶ Part II explores three of the amendments that relate to future dangerousness to show the constitutional deficiencies of the statute, and how a hodgepodge of repairs has failed to yield the lofty promises of *Furman*. It argues that, despite legislative tinkering and the significant transformations of expert admissibility, the future dangerousness provision remains immutable. Part III examines the early decades following the enactment of the statute, showcasing the infamous testimony of "Dr. Death" to show the State's abuse of future dangerousness predictions. This section examines the evolution of stricter standards of expert admissibility and judicial gatekeeping. Further, this section argues that in spite these changes, Texas continues to admit unreliable scientific testimony to support its death sentences. It concludes with a brief review of Dr. Richard Coons's testimony, and the landmark *Coble* case, where the Texas Court of Criminal Appeals was forced to acknowledge the unreliability of this testimony.

Part IV explores the futility of appellate review in Texas to correct trial error. It examines a number of opinions from the Court of Criminal Appeals that demonstrate an evident pattern of judicial contradiction. This section demonstrates how failure to correct error in the trial court proceedings results in an ineffective and meaningless appellate review of capital opinions ultimately resulting in impermissible constitutional outcomes.

PART I. THE TEXAS LEGISLATURE AND *FURMAN*: FUTURE DANGEROUSNESS INQUIRY - A HASTY ADDITION TO THE REVAMPED DEATH PENALTY STATUTE

Under the current death penalty scheme, once a defendant is convicted of a capital offense, the court holds a separate sentencing proceeding to determine whether the defendant is sentenced to death or life imprisonment without parole.⁴⁷ During this hearing, both sides may present evidence that the court deems relevant to the sentence.⁴⁸ Upon the conclusion of the presentation of the evidence, the jury must answer two questions

⁴⁶ TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013).

⁴⁷ *Id.* § 2(a)(1). In 2005, Texas passed a bill that gave juries the option of sentencing a defendant to life without parole. See *Texas Governor Signs Life Without Parole Bill Into Law*, DEATH PENALTY INFO. CENTER (2014), <http://www.deathpenaltyinfo.org/node/158>.

⁴⁸ TEX. CODE CRIM. PROC. ANN. § 2(a)(1) (West 2013).

unanimously: 1) “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”; and 2) “whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.”⁴⁹ The state is required to prove each issue beyond a reasonable doubt, and the jury must answer “yes” unanimously, or “no” only if ten jurors agree.⁵⁰ Once the jury answers both issues affirmatively, it must then answer the following issue:

whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.⁵¹

But to understand how future dangerousness became the touchstone of the death penalty statute, a short journey into the 63rd Legislature in 1973 is warranted.

A. TEXAS IS FORCED TO MOVE QUICKLY TO REVAMP ITS DEATH PENALTY STATUTE

Prior to *Furman*, the Texas death penalty statutes contained no sentencing guidelines; there were no mitigating or aggravating circumstances or objective standards of any kind to guide or regularize the process, so that death penalties throughout Texas were “wantonly” and “freakishly” imposed.⁵² It was precisely this unfettered and arbitrary discretion that *Furman* sought to eliminate. After *Furman*, Texas moved quickly to revamp its death penalty legislation to ensure its compliance with *Furman*'s constitutional mandate against the arbitrary or capricious imposition of the death penalty. The Texas statute that ultimately became effective on June 14, 1973,⁵³ contained five capital offenses,⁵⁴ and a procedure for the sentencing stage of a capital trial. This procedure was designed to provide structure for the jury, based on three special questions or issues that the jury had to answer during deliberations. On May 28, 1973, a Conference Committee of the 63rd Legislature, composed of ten members, produced the future dangerousness inquiry as one of three special questions or issues in HB 200:

- 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 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.⁵⁵

⁴⁹ *Id.* § 2(b)(1)(2).

⁵⁰ *Id.* § 2(d)(2).

⁵¹ *Id.* § 2(e)(1).

⁵² See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”).

⁵³ Act of June 14, 1973, ch. 426 art. 1-3, 1973 Tex. Gen. Laws 1122, 1125.

⁵⁴ See *id.* art. 2 § 1, at 1123.

⁵⁵ CONF. COMMITTEE, CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess., at 8-9 (Tex. 1973).

Under the statute, the state was required to prove each issue beyond a reasonable doubt.⁵⁶ The capital defendant would receive either a sentence of death or life imprisonment based on the jury's answer to these questions. Although the statute did not direct the jury's vote either way, it required them to answer the questions where an affirmative answer by twelve jurors to all issues would result in a death sentence. However, a negative response to any issue would result in a life sentence, but the jury could not give a negative response to any issue unless ten or more jurors agreed.⁵⁷

While the legislative history of the death penalty statute reveals numerous hours of debate and haggling over the bill itself, these three special issues came out of the Conference Committee with little, if any, debate or legislative scrutiny—a significant flaw that would ominously presage lethal consequences. Unquestionably, heated debates on the floor of the legislature and the numerous amendments to the bill reveal a single-minded objective: to ensure that the revamped death penalty statute would pass *Furman*'s constitutional mandate. Yet, amazingly, the section of the bill that has been most problematic—the future dangerousness inquiry—remains shrouded in mystery. The record reveals that it was engrafted into the bill by a handful of members over the weekend before the session came to a close, and received no thoughtful consideration or debate on the issue in either House.

B. LEGISLATIVE STRUGGLE TO RESTORE A DEATH PENALTY THAT WOULD COMPLY WITH FURMAN - A BRIEF JOURNEY TO THE 63RD TEXAS LEGISLATURE

The Senate introduced two death penalty bills, which were not considered in a public hearing until shortly after the House passed H.B. 200: S.B. 10, authored by Senator William Meier⁵⁸ and S.B. 20, authored by Senator Ogg.⁵⁹ As introduced, both bills contained the same leniency provision as H.B. 200, but upon consideration in committee, Meier convinced the committee to substitute for S.B. 10 a completely revamped bill.⁶⁰ Discussion from the Senate Jurisprudence Committee hearings reveals that some senators took the District and County Attorneys Opinions and the House's response to mean that a mandatory bill would be the only way to make H.B. 200 constitutionally permissible.⁶¹ Senator Meier disagreed with the idea that a mandatory bill would be constitutional; in fact, he stated that this was erroneous.⁶² Focusing not on the swing justices in the majority,

⁵⁶ *Id.* at 9.

⁵⁷ *Id.*

⁵⁸ S. JOURNAL, 63d Leg., Reg. Sess., at 593 (Tex. 1973).

⁵⁹ *See id.* at 71.

⁶⁰ S. Subcomm. on Criminal Matters, 63d Leg. Reg. Sess. (Tex. 1973); *Hearings on Tex. H.B. 200 Before the S. Comm. on Jurisprudence*, 63d Leg., Reg. Sess. (Tex. 1973) [hereinafter *Hearings*], *Deb. on H.B. 200 on the Floor of the S.*, 63d Leg., Reg. Sess. (Tex. 1973).

⁶¹ S. Subcomm. on Criminal Matters, 63d Leg. Reg. Sess. (Tex. 1973) (statement of Sen. Ogg on May 23, 1973).

⁶² *Id.* In 1976, Meier's views were proved correct by the holding of the Supreme Court in *Woodson v. North Carolina*, a case which struck down the state's mandatory death penalty statute for a broad category of homicides. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society -- jury determinations and legislative enactments -- both point conclusively to the repudiation of automatic death sentences. At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict. As we have seen, the initial movement to reduce the number of capital offenses and to separate murder into degrees was prompted in

but those in the minority in *Furman*, Meier believed that neither Chief Justice Burger nor Justice Blackmun would vote for a mandatory death penalty, but that their votes were necessary to uphold any death penalty statute.⁶³ Meier convinced the Committee to report to the Senate Floor Meier's substitute for S.B. 10, as part of an agreement with Senator Ogg to "debate the two different philosophies of how the death penalty may be reinstated in light of the Supreme Court decision this past summer. . . ."⁶⁴ Meier and Ogg came to an agreement that Meier's bill would be reported out by the Committee, and Ogg would offer an amendment to the bill striking the remainder of Meier's bill below the enacting clause and substitute it with the mandatory bill passed by the House.⁶⁵ Ogg's amendment was tabled after a discussion of the merits between the two approaches.⁶⁶ Meier reiterated his view before the Senate Floor, as he did before the Committee, that the Supreme Court would hold a mandatory death penalty bill unconstitutional.⁶⁷ Additionally, Senator Meier believed that a second aspect of the bill, which made it constitutionally impermissible under *Furman*, was the lack of guidance given to the jury in making the decision to render the death penalty.⁶⁸ Referring to the three companion cases decided by the *Furman* Court, he noted that there were no "statutory guidelines for the juries in any of those three cases."⁶⁹ Meier's argument ultimately prevailed in the Senate, and his proposed amendment was the one accepted by the Senate as the starting point for further amendments of the bill from the Senate floor.⁷⁰ All subsequent amendments after Meier's bill were accepted with regard to the substantive elements of a capital offense.⁷¹ No amendment purported to change the procedure as enunciated in Meier's bill.⁷² The record indicates that legislators were more concerned with death penalty eligible offenses than they were with the procedure under which someone would be sentenced to death, a miscalculation that has become more significant as the multiple subsequent amendments to cure an initially procedurally flawed statute have proven.

Meier's answer to *Furman*'s mandate, with respect to the procedure under which juries were to sentence capital defendants, was to bifurcate the guilt and innocence phase before the same jury.⁷³ The language in Meier's bill regarding aggravating and mitigating

part by the reaction of jurors as well as by reformers who objected to the imposition of death as the penalty for any crime.").

⁶³ See *Deb. on H.B. 200 on the Floor of the S.*, 63d Leg., Reg. Sess. (Tex. 1973).

⁶⁴ *Id.*; *Hearings*, *supra* note 60 (statement of Sen. Meier).

⁶⁵ See *Hearings*, *supra* note 60 (statement of Sen. Meier); See also S. JOURNAL, 63d Leg., Reg. Sess., at 1441-42 (Tex. 1973).

⁶⁶ See S. JOURNAL, 63d Leg., Reg. Sess., at 1442 (Tex. 1973).

⁶⁷ *Deb. on H.B. 200 on the Floor of the S.*, 63d Leg., Reg. Sess. (Tex. 1973).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See S. JOURNAL, 63d Leg., Reg. Sess., at 1442 (Tex. 1973).

⁷¹ *Id.* at 1442-53

⁷² *Id.*

⁷³ *Id.* at 1442, 1445. Although the Model Penal Code formulation and procedure was in existence for some time before *Furman*, it was adopted by no state until after *Furman* was decided:

In recent years[,] academic and professional sources have suggested that jury sentencing discretion should be controlled by standards of some sort. The American Law Institute first published such a recommendation in 1959. Several States have enacted new criminal codes in the intervening 12 years, some adopting features of the Model Penal Code. Other States have modified their laws with respect to murder and the death penalty in other ways. **None of these States have followed the Model Penal Code and adopted statutory criteria for imposition of the death penalty.**

McGautha v. California, 402 U.S. 183, 202-03 (1971) (emphasis added).

circumstances was substantially the Model Penal Code's formulation.⁷⁴ However, Meier omitted one aggravating factor covering multiple or serial murders and one mitigating factor concerning circumstances that the defendant believed provided a "moral justification" for his conduct.⁷⁵ Although the Texas statute was later amended to give the prosecutor discretion whether or not to seek the death penalty in a capital case, a prosecutor who charged a capital offense under Meier's bill, as first passed by the Senate, would necessarily proceed after a guilty finding by the jury to the sentencing phase.⁷⁶ As in the former statutes, the jury chooses between confinement or death. Under the new bill, the jury would be instructed on the aggravating factors, which make a particular crime death-eligible; and mitigating factors, which make the individual characteristics of the defendant inappropriately suited for the punishment of death.⁷⁷ The recurring tension between Senator Ogg's belief that a mandatory bill would be constitutional and Meier's belief that it would not was that Senator Ogg did not believe a mandatory death penalty was ideal from a policy perspective.⁷⁸ The bill was ultimately passed by the Senate on

⁷⁴ Compare S. JOURNAL, 63d Leg., Reg. Sess., at 1445-46 (Tex. 1973) (offering an amendment so as to substitute Sen. Meier's bill), with MODEL PENAL CODE § 210.6(3)-(4) (Proposed Official Draft 1962) (listing the aggravating and mitigating circumstances of criminal homicide). The aggravating and mitigating circumstances listed in the Model Penal Code were as follows:

(3) Aggravating Circumstances. (a) The murder was committed by a convict under sentence of imprisonment. (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person. (c) At the time the murder was committed the defendant also committed another murder. (d) The defendant knowingly created a great risk of death to many persons. (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat or force, arson, burglary, or kidnapping. (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody. (g) The murder was committed for pecuniary gain. (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances. (a) The defendant has no significant history of prior criminal activity. (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. (c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. (d) The murder was committed under circumstances which the defendant believed to provide moral justification or extenuation for his conduct. (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. (f) The defendant acted under duress or under the domination of another person. (g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. (h) The youth of the defendant at the time of the crime.

Id.

⁷⁵ Compare S. JOURNAL, 63d Leg., Reg. Sess., at 1445-46 (Tex. 1973) (offering an amendment so as to substitute Sen. Meier's bill), with MODEL PENAL CODE § 210.6(3) to (4) (listing the aggravating and mitigating circumstances of criminal homicide).

⁷⁶ See S. JOURNAL, 63d Leg., Reg. Sess., at 1442, 1445 (Tex. 1973).

⁷⁷ COMM. SUBSTITUTE H.B. 200, 63d Leg., Reg. Sess., (Tex. 1973); S. JOURNAL, 63d Leg., Reg. Sess., 1445-46 (1973). Commenting on these factors before the Senate Jurisprudence Committee, Meier interpreted the intent of the drafters of the Model Penal Code, "what I would think they're trying to get at is that it's going to have these narrowly confined circumstances to look at in terms of aggravating and mitigating factors." S. *Subcomm. on Criminal Matters*, 63d Leg. Reg. Sess. (Tex. 1973).

⁷⁸ As the chair of the Senate Jurisprudence Committee remarked, "My heart goes with Meier's bill if we're going to have one, because at least there's a—but I think it would be unconstitutional, and [Ogg's] is just cold [laughter]." Then Ogg interjected: "it's just cold, it's callous, it's killing, but if anything we've got for us it's constitutional." S. *Subcomm. on Criminal Matters*, 63d Leg. Reg. Sess. (Tex. 1973); Commentator Eric Citron describes the Senate debate as "Justice vs. Discretion," where the illustrative exchange between Senator Meier and Senator Adams on May 23, 1973, reflects the "ways in which the legislators' constitutional confusion prevented them from fully reaching the deep moral issues that could have been at stake in an ideal debate about

May 23, 1973, but rejected by the House, which did not concur with the Senate Amendments.⁷⁹ On Friday, May 25th, the Senate bill was referred to a joint Conference Committee to “adjust the differences between the two Houses on the bill.”⁸⁰ It is in this 10-man committee that the future dangerousness language of the special issues was mysteriously crafted into the bill.⁸¹

C. PREDICTIONS OF FUTURE DANGEROUSNESS: A HASTY ADDITION TO THE BILL

The Conference Committee met every day of the weekend from the Friday it was appointed.⁸² The changes made retained Senator Meier’s framework for capital sentencing,⁸³ but also included the three special issues for the jury to determine, one of which is the future dangerousness inquiry.⁸⁴ Of the original three issues passed by the Legislature in 1973, only the issue of future dangerousness remains in the death penalty statute today.⁸⁵ The other two issues the jury was mandated to answer under the statute: 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;” and 2) “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”—reflected the influence of the House Bill calling for a mandatory statute.⁸⁶ The absurdity, that these two issues essentially duplicate the findings of the jury in the guilt phase of the capital murder trial, was not lost on all legislators.⁸⁷

capital punishment policies.” Eric F. Citron, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL’Y REV. 143, 166-67 (2006); Adams offered no policy justification for a mandatory bill, but rested his argument on the fact that Meier’s version gave the jury a guided discretion, which was, in fact, more discretion than existed in the mandatory bill passed in the House. *Deb. on Tex. H. B. 200 on the Floor of the S.*, 63d Leg., Reg. Sess. (Tex. 1973).

⁷⁹ H. JOURNAL, 63d Leg., Reg. Sess. 4678, 4985 (Tex. 1973).

⁸⁰ *Id.*

⁸¹ The Conference Committee was composed of Representatives Cobb, Washington, Lombardino, Doyle, and Maloney; Senators Ogg, Wallace, Meier, Sherman, and Adams. S. JOURNAL, 63d Leg., Reg. Sess., 1535, 1539 (Tex. 1973). Of these ten members, Members Washington, Wallace, and Sherman did not sign the Conference Committee report, but this is not indicative of lack of participation in the conference committees. HOUSE CONFERENCE COMM., CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess. (Tex. 1973). The Conference Committee met each day over the weekend from the Friday it was appointed. *Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (May 28, 1973).

⁸² *Hearings, supra* note 60.

⁸³ HOUSE CONFERENCE COMM., ANALYSIS OF THE HOUSE CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess. (Tex. 1973).

⁸⁴ *Id.* at ¶¶ 8-10; HOUSE CONFERENCE COMM., CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess., at 8 (Tex. 1973).

⁸⁵ Act of May 28, 1973, ch. 426, 1973 Tex. Gen. Laws 1122, 1125 (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013)).

⁸⁶ HOUSE CONFERENCE COMM., CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess., at 8-9 (Tex. 1973).

⁸⁷ The point here is that, arguably, these issues are covered by the guilt phase finding of an “intentional” or “knowing” killing, and the unreasonableness issue covered by then existing law providing for a jury charge of Voluntary Manslaughter, if raised by the evidence. H. JOURNAL, 63d Leg., Reg. Sess., 4978 (Tex. 1973); This absurdity was observed by Representative Spurlock:

I want to make a motion that the House not concur in the report of the Conference Committee and instruct our conferees to go back and try again. Look on page one, you have the punishment for murder with malice aforethought shall be death or life imprisonment if this, this—then you turn over to page eight and see what the criteria are to put someone to death. You find those criteria stated there are the same, basically, as the criteria that are required under a finding of murder with malice aforethought. You’ve got to have a jury find murder with malice aforethought in effect in two different places. That’ll never hold up.

The special issues were recognized simply as a condensed version of Senator Meier's "much lengthier bill."⁸⁸ There were two aggravating factors in Meier's Senate bill, which related to a defendant's future dangerousness. One aggravating factor being whether "the murder was committed by a person under sentence of imprisonment" or whether "the defendant was previously convicted of another murder or of a felony involving the use or threat of violence."⁸⁹ The mitigating circumstances stated in Meier's bill relevant to future dangerousness were the converse of the aggravating factors—whether "the defendant has no significant history of prior criminal activity."⁹⁰ Presumably, the assumption underlying Meier's criteria, which mirrored the Penal Code, is that a past criminal history can be used to predict continued future violence.⁹¹ The point of these criteria is not to punish for past conduct, which has already been addressed by the legal system by barring double jeopardy, but to use a history of criminal behavior as predictions of future conduct. These rearward looking factors that a jury could consider became a single unifying dispositive formula that mandated the special issue the jury had to answer: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."⁹²

Representative Robert Maloney, a member of the committee, is credited with authoring the issue of future dangerousness.⁹³ On Monday, May 28, 1973, the Dallas Morning News reported that a legislative compromise had been reached on Sunday night and that the ten-man conference committee would meet later in the day to review the bill one more time and to resolve any final problems before it was signed.⁹⁴ The article listed the special issues to be decided by the jury in sentencing, but these were different from the ones that were ultimately crafted into the committee's report⁹⁵—indicating that the compromise bill was tweaked and tugged into its final form up to the last minute of the last week of the session. Amazingly, despite the new language engrafted into the bill in the committee, it was adopted by both houses with little, if any, legislative scrutiny.⁹⁶ The

Deb. on Tex. H.B. 200 on the Floor of the H., 63d Leg., Reg. Sess. (Tex. 1973).

⁸⁸ *Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (Tex. 1973).

⁸⁹ S. JOURNAL, 63d Leg., Reg. Sess. 1445-46 (Tex. 1973).

⁹⁰ *Id.*

⁹¹ This assertion is not unsupported by research. See, e.g., Gordon Hall, *Prediction of Sexual Aggression*, 10 CLINICAL PSYCHOL. REV. 229, 239 (1990), as cited in Russell Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 257 n.330 (2004).

⁹² TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013).

⁹³ *Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (Tex. 1973) (showing that Cobb wanted Maloney to be recognized for helping Lombardino and Cobb come up with the language of the death penalty statute).

⁹⁴ *Compromise Reached on Death Penalty Bill*, DALL. MORNING NEWS, May 28, 1973, at A8.

⁹⁵ *Id.*

⁹⁶ However, the record does show definite references made by the district attorneys regarding the issue of a defendant's future dangerousness. In the February 6, 1973 public meeting attended by Representative Maloney, one of the members of the ten-man conference committee, John Green, Ector County's District Attorney, testified in an exchange that uncannily prophesied the use of psychiatrists to make these predictions. Mr. Green spoke of a defendant who had committed multiple murders to which he eventually confessed, and had plead guilty to life on the hopes of getting out on early parole. He said that he had the defendant examined by one of the top psychiatrists in the State of Texas who said: "The man, if he gets back out of the penitentiary will again continue to kill." During Mr. Green's testimony, Representative Craig Washington probed him further: "You indicated that no matter how long he stays in the penitentiary, if he ever gets out, that he will more than likely, if he gets another opportunity, kill again?" Subsequently, at the same hearing, Carol Vance, Harris County D.A. made the following statement:

only time the issue is specifically mentioned, other than when it was read before the House, is Cobb's reference to the future dangerousness issue as a showing the defendant is a "menace to society."⁹⁷ During the debate on the final passage of the bill in the House, Cobb observed that the criteria provided by the three special issues were to be narrowly construed.⁹⁸ In a last-ditch attempt to force discussion on the new language added by the Committee, Representative Craig Washington, one of the ten members of the committee, and a vocal advocate against the proposed death penalty bill, raised a point of error against consideration of the Committee Report on the bill "on the grounds that it contains language not included in either the House or Senate versions of the bill."⁹⁹ The point of order was overruled.¹⁰⁰

On June 14, 1973, H.B. 200 was signed into law.¹⁰¹ The bill amended Article 1257 of the 1925 Penal Code, and added as part of the new penal code §19.03 to include five capital offenses. In addition, it added Article 37.071—the capital sentencing scheme containing the three special jury issues. The hybrid bill reflected a compromise between the two houses of the legislature. Yet, the last-minute inclusion of the special issues reflected only the will of the seven lawmakers who signed the conference committee report. As one commentator has shrewdly observed:

The effect of the conference committee's decision to add new language never before debated was thus to transform themselves into a seven-person state legislature, for it was impossible for either house to alter the bill without dooming it and unlikely that either would vote to kill it. Future dangerousness thus became law without a word.¹⁰²

Arguably, the Texas legislature merely codified an existing statewide practice by district attorneys of relying on psychiatrists to make predictions of future dangerousness to convince the jury to render a death sentence; a practice well-documented and explained by prosecutors at that fateful House Committee on Criminal Jurisprudence. Between 1970 and 1972, at least four newspaper articles had appeared in the Dallas Morning News recounting the use of forensic psychiatrists, most notably, Doctors Grigson and Holbrook to testify at the

I think that there are just certain types of cases that juries look on as being death penalty cases. I wish we had a crystal ball, and could go into the minds of these individuals and find out exactly what's wrong and give them an instant shot to counteract whatever it may be and to make them well. But despite all of our progress in other areas, I don't even think we've dented the surface so far as doing this...but the psychiatrists could not give an answer...[I] just think that there are certain persons, either because they will kill again, or else because the death penalty should be in our law, or that there are a lot of persons that sit and think "well, if I hijack that store and take the money, I better not kill this person because the 10 years, or five years to life that I might get might turn into the death penalty."

Pub. Hearing on H.B. 200, 63d Leg., Reg. Sess. (Tex. Feb. 6, 1973).

⁹⁷ *H. Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (1973).

⁹⁸ "[T]he criteria is so narrow and the burden upon the prosecution so great—the burden is such that he won't attempt to seek the death penalty in a case where there appears to be any circumstantial. . . ." At this point, Representative Cobb is interrupted, but it seems that the thrust of this statement, derived from the context of the discussion, is that the presence of mitigating circumstantial evidence would contraindicate to the jury the imposition of the death penalty under H.B. 200. *Id.*

⁹⁹ *H. JOURNAL*, 63d Leg., Reg. Sess., at 4985 (Tex. 1973).

¹⁰⁰ *Id.*

¹⁰¹ *See Act of June 14, 1973*, ch. 426 art. 3 § 1(c)-(d), 1973 Tex. Gen. Laws 1125.

¹⁰² Citron, *supra* note 78, at 173.

sentencing hearing of capital defendants.¹⁰³ The testimony by prosecutors at the public hearings of HB 200 clearly shows that prosecutors honestly relied on these doctors' predictive ability—a reliance that at best was grounded on sheer ignorance, and at worst a blind determination to obtain a verdict of death even if the scientific testimony was shrouded in junk science.

D. TEXAS'S DEATH PENALTY SCHEME IS CHALLENGED: JUREK V. STATE – THE U.S. SUPREME COURT UPHOLDS THE STATUTE AS CONSTITUTIONAL

From its inception, the future dangerousness element of the revised capital sentencing statute in Texas has attracted much deserved criticism.¹⁰⁴ Critics have argued that the purpose of Texas's revised statute

[A]imed to make the individualized assessment required by *Furman* the touchstone of the infliction of the State's ultimate punishment¹⁰⁵ ... [a]s implemented has backfired: the sentencing procedure fails to give juries meaningful—rather than merely inflammatory—information about defendants. It has led to an obscene ballooning of the number of people sentenced to death, an expansion far beyond those deserving the death penalty.¹⁰⁶

Texas cases support this contention. The first challenge to the constitutionality of the revamped capital scheme in Texas was made by Jerry Lane Jurek who was charged with the capital murder of ten-year old Wendy Adams in Cuero, Texas.¹⁰⁷ Jurek argued that the imposition of the death penalty under Articles 1257 and 37.071 constituted cruel and unusual punishment under *Furman*.¹⁰⁸ The Court of Criminal Appeals reviewed salient points of *Furman* and examined in detail portions of the revamped Texas statute to conclude that the latter were constitutional.

The Court's examination of the special issues offered to the jury under the statute is particularly relevant to the subsequent amendments of the statute. The Court considered Jurek's argument that the special issues submitted to the jury under Art. 37.071(b) were too vague to provide adequate guidance to the jury in choosing between life and death.¹⁰⁹ The Court, however, rejected this argument focusing only on the second special issue, the future dangerousness inquiry. The court stated that in reaching an answer the jury could consider: (1) whether the defendant had a significant criminal record; (2) the range and severity of the prior criminal record; (3) the age of the defendant at the time of the commission of the offense; (4) whether the defendant at the time of the offense was under

¹⁰³ See, e.g., *Accused Killer Called Sociopath by Doctor*, DALL. MORNING NEWS, Oct. 24, 1970, at 17A; Tom Johnson, *Nathan Curry, 25, Left Enigmatic Legacy*, DALL. MORNING NEWS, Apr. 4, 1971, at 1A, 26A; *Psychiatrist Feels Calley Didn't Have Intent to Kill*, DALL. MORNING NEWS, May 28, 1972, at 13A; Marc Bernabo, *Five Testify Gross Is Insane*, DALL. MORNING NEWS, June 18, 1972, at 23A; Marc Bernard, *Doctors Testify In Murder Case*, DALL. MORNING NEWS, June 21, 1972, at 4A; *Final Arguments Set in Gross Murder Trial*, DALL. MORNING NEWS, June 22, 1972, at 13A; and Henry Tatum, *Jury Finds Daniels Guilty In Slaying of NASA Man*, DALL. MORNING NEWS, Feb. 13, 1971, at 1D.

¹⁰⁴ *Deadly Speculation*, *supra* note 2, at 2-3.

¹⁰⁵ Michael Kuhn, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410, 423 (1973-1974), as cited in *Deadly Speculation*, *supra* note 2, at 2 n.17, 3-4.

¹⁰⁶ *Deadly Speculation*, *supra* note 2, at 3-4.

¹⁰⁷ *Jurek v. State*, 522 S.W.2d 934, 937 (Tex. Crim. App. 1975). It is worth noting that the court stated that this case was the first to reach the court under the new Texas Penal Code. *Id.* at 936 n.1.

¹⁰⁸ *Id.* at 937.

¹⁰⁹ *Id.* at 939.

duress or domination of another and; (5) whether the defendant at the time of the offense was under an extreme form of mental or emotional pressure less than insanity.¹¹⁰ The Court held that the ability of the jury to consider these factors gave the jury a reasonable and controlled discretion required by *Furman* in imposing the death penalty.¹¹¹

However, the dissenting justices agreed with Jurek that the second special issue was too vague to be constitutional.¹¹² They both noted that the word “probability” was not defined by statute and, therefore, the usual acceptance of the word in common language applied.¹¹³ Potentially it could mean that a jury would vote for the death penalty even if they believed that there was only “a chance” the convicted defendant would be dangerous in the future. As the Justices aptly pointed out, such a definition would almost always compel an affirmative answer.¹¹⁴

In 1976, the Supreme Court of the United States reviewed Jurek’s case, and the new death penalty statutes of three other states: Florida, Georgia, and North Carolina.¹¹⁵ In his appeal, Jurek argued “that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”¹¹⁶ Jurek further argued that the substantial legislative changes made to the

¹¹⁰ *Id.* at 939-40. Over twenty years later, the Texas high court in *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987), outlined eight specific factors that the jury could consider:

1. the circumstances of the capital offense, including the defendant’s state of mind and whether he was acting alone or with other parties;
2. the calculated nature of the defendant’s acts;
3. the forethought and deliberateness exhibited by the crime’s execution;
4. the existence of a prior criminal record and the severity of the prior crimes;
5. the defendant’s age and personal circumstances at the time of the offense;
6. whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;
7. psychiatric evidence; and
8. character evidence.

See also Dewberry v. State, 4 S.W.3d 735, 743 (Tex. Crim. App. 1999) (holding that the jury could find that the defendant would be a continuing threat to society by evidence presented of the brutal nature of the crime, and the lack of remorse or contrition); Baker v. State, 956 S.W.2d 19, 21 (Tex. Crim. App. 1997) (finding evidence in the punishment phase of the trial supported the jury’s finding of future dangerousness, where the evidence showed that the defendant set out to kill his employer but killed someone else instead so he could steal his car when, besides the murder weapon, the victim was carrying a number of other weapons, and a notebook that included his plans for the year stated: “30 + victims dead. 30 + armed robberies. Steal a lot of cars.”); Alvarado v. State, 912 S.W.2d 199, 209 (Tex. Crim. App. 1995) (holding that in addition to the circumstances of the capital case, the jury can consider criminal history, reputation evidence, and psychiatric testimony of a violent personality).

¹¹¹ *Jurek*, 522 S.W.2d at 940.

¹¹² *Id.* at 945 (Odom, J., concurring in part and dissenting in part) (“Article 37.071 is so confusing that even the majority of this Court have been misled. They have not even addressed the vagueness of that issue upon which the operation of this mandatory statute pivots. I would hold the statute unconstitutionally vague in violation of Article 1, Section 10, Texas Constitution and the due process clause of Amendment XIV, United States Constitution.”); *Id.* at 946 (Roberts, J., dissenting) (“The conclusion is thus inescapable that the appellant’s punishment was decided to a significant degree by the answer to a question which— as a result of its vagueness and overbreadth —[c]ould not have been answered in his favor. It is equally clear that such a procedure violates due process and thus constitutes error.”).

¹¹³ *Id.* at 945-46 (Odom, J., concurring in part and dissenting in part); *Id.* at 947-48 (Roberts, J., dissenting).

¹¹⁴ *Id.* at 945-46 (Odom, J., concurring in part and dissenting in part); *Id.* at 948 (Roberts, J., dissenting).

¹¹⁵ *Jurek v. Texas*, 428 U.S. 262 (1976). On the same day that *Jurek* was decided, the Supreme Court upheld the validity of the Florida and Georgia statutes in *Proffitt v. Florida*, and *Gregg v. Georgia*, respectively. 428 U.S. 242 (1976); 428 U.S. 153 (1976). However, the Court struck down the death penalty scheme in *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹¹⁶ *Jurek*, 428 U.S. at 268.

Texas capital sentencing statute in response to *Furman* were “cosmetic” in nature and failed to eliminate the ‘arbitrariness’ and ‘caprice’ that *Furman* held to be violations of the Constitution.¹¹⁷ With respect to the second statutory question, Jurek argued that “it is impossible to predict future behavior and that the question is so vague as to be meaningless.”¹¹⁸

The U.S. Supreme Court upheld the constitutionality of the Texas statute. In specifically, with respect to the issue of future dangerousness, the Court reasoned that while this determination may be difficult, it can be made.¹¹⁹

The task that a Texas jury must perform in answering the statutory question *in issue* is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury has before it all possible relevant information about the individual defendant whose fate it must determine.¹²⁰

Not surprisingly, “the tasks performed countless times each day” alluded to by the court were instances in criminal litigation. Such instances include admitting a defendant to bail, determining sentencing alternatives, and parole determinations—none of which involved the serious consequences of capital litigation.¹²¹

In the last forty-one years, Article 37.071 has been amended at least nine times. The next section examines the three amendments that relate to future dangerousness - the 1991, 2001, and 2005 amendments. The analysis of the reasons prompting the amendments show how the procedural infirmities, highlighted by Justices Odom and Roberts in their dissent in *Jurek*, have resulted in irreparable consequences.

PART II. THE IMPLEMENTATION OF THE DEATH PENALTY STATUTE: THE BUMPY ROAD OF AMENDMENTS

¹¹⁷ *Id.* at 274.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 276. Justice Stewart, joined by Justices Powell and Stevens, noted that the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed, “but a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we have held in *Woodson v. North Carolina* to be required by the Eighth and Fourteenth Amendments.” *Id.* at 271. *Woodson v. North Carolina*, decided the same day as *Jurek*, invalidated the North Carolina death penalty statute on Eighth Amendment grounds. 428 U.S. 280, 304 (1976). The death penalty in *Woodson* was mandatory upon a guilty finding. *Id.* at 305. (Brennan, J., and Marshall, J., concurring). The Court of Criminal Appeals interpretation of the second special issue curiously led the Stewart plurality to conclude that the Texas Court’s interpretation, listing five factors that could be considered with reference to future dangerousness, broadly authorized the defense to present evidence of “whatever mitigating circumstances relating to the individual defendant can be adduced.” *Jurek*, 428 U.S. at 276. The plurality also found that “Texas law clearly assures that all such evidence will be adduced,” in spite of the fact that the statute does not explicitly speak of mitigating circumstances. *Id.* at 272, 276. The touchstone of *Jurek* is that “the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.” *Id.* at 272. Having found that these dictates were satisfied in this case, the Court affirmed the judgment. *Id.* at 277 (Burger, J., and Blackmun, J., concurring).

¹²⁰ *Jurek*, 428 U.S. at 275-76. The court alluded to a number of instances where predictions of future criminal conduct were essential elements of decisions rendered throughout the criminal justice system: whether to admit a defendant to bail; determining sentencing alternatives, parole determinations. *Id.* at 275. But none of these decisions alluded to by the court involved capital litigation—a process that has been repeatedly attacked for the fatal consequences of its endemic flaws.

¹²¹ *Id.* at 275-76.

Despite numerous amendments, future dangerousness has remained intact. This history of constant change and revision and the apparent immutability of future dangerousness, highlights the impossibility of establishing an infallibly accurate death penalty system. It also speaks to the long, dark consequences of a procedure that was hastily conceived and poorly vetted.

A. THE 1991 AMENDMENT: THE PENRY FACTOR—TWO OF THE SPECIAL ISSUES ARE DELETED

In yet another effort to comply with *Furman*, Texas amended Article 37.071 twice in 1991. The second amendment was the result of *Penry v. Lynaugh*.¹²² Eighteen years after the enactment of the revamped death penalty statute, the 72nd Legislature abolished two of the special issues, which were hastily engrafted into the bill. However, the future dangerousness inquiry remained intact.

In 1989, the United States Supreme Court decided *Penry v. Lynaugh*.¹²³ In *Penry*, the Court held that although Art. 37.071, as interpreted by *Jurek v. Texas*,¹²⁴ allowed a defendant to present mitigating evidence on his or her behalf, the jury was not able to give any meaningful effect to such mitigating evidence.¹²⁵ In other words, if the jury answered affirmatively to the three special issues set forth in Art. 37.071 but, at the same time did not think the convicted defendant deserving of death due to mitigating evidence offered, then the jury had no vehicle through which to express its leniency. Under this circumstance the jury would have to give an intentionally false answer to one of the special issues in order to avoid the death penalty. Moreover, the *Penry* Court held that some evidence that had a mitigating effect such as an abused childhood, the effects of which are irreversible, also served to increase the likelihood of an affirmative answer to the future dangerousness special issue (the “two-edged sword”).¹²⁶ The Court concluded that “in the absence of instructions informing the jury that it could consider and give effect to mitigating evidence,” the abovementioned problems inherent in Art. 37.071 rendered the Texas statute unconstitutional as a violation of the Eighth and Fourteenth Amendments.¹²⁷

Penry was predictable given a line of cases that were decided by the U.S. Supreme Court between 1976 and 1982 dealing with individualized consideration at capital sentencing. In *Woodson v. North Carolina*, the Supreme Court held that North Carolina’s mandatory death sentence statute violated the Eighth and Fourteenth Amendments because of the fear that the jury, finding a mandatory death penalty unduly harsh and unworkably rigid, would factor in the severity of the penalty in finding guilt.¹²⁸ Harkening back to Justice Stewart’s admonitions in *Jurek* that sentencing procedures must allow for consideration of particularized mitigating factors,¹²⁹ in *Lockett v. Ohio* and

¹²² *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹²³ *Id.*

¹²⁴ *Jurek*, 428 U.S. at 269, 276.

¹²⁵ *Penry*, 492 U.S. at 327-28; Lisa L. Havens-Cortes, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 56 (1993) (discussing the Supreme Court’s requirement that a jury be able to give meaningful effect to mitigating evidence offered by a convicted defendant).

¹²⁶ 492 U.S. at 323-24; *See* Havens-Cortes, *supra* note 125, at 56-57.

¹²⁷ *Penry*, 492 U.S. at 328; *See* Havens-Cortes, *supra* note 125, at 57-58.

¹²⁸ 428 U.S. 280, 304-05 (1976).

¹²⁹ *Jurek*, 428 U.S. at 271-72 (“Thus, in order to meet the requirement of the Eighth and Fourteenth Amendment, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances . . . the Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three

in *Eddings v. Oklahoma* the court expanded the rule from *Woodson*.¹³⁰ The Court held that the Eighth and Fourteenth Amendments require that the sentencer in capital trials “not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹³¹ The jury must be afforded an opportunity to give independent mitigating weight to the circumstances presented by the defendant at the sentencing hearing.¹³² This rule, the Court explained, “is the product of a considerable history reflecting the law’s effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual.”¹³³

In 1988, the habeas petitioner in *Franklin v. Lynaugh* seized upon these principles in seeking to attack the constitutionality of his death sentence.¹³⁴ *Franklin v. Lynaugh* involved a case where the only mitigating circumstance that the defendant was able to present at his sentencing hearing was that his conduct record during time periods where he was incarcerated showed no disciplinary infraction.¹³⁵ The petitioner argued that even if the jury believed that the two special issues submitted to them under the Code of Criminal Procedure, Art. 37.071, ought to be answered yes, then the mitigating evidence offered by petitioner at his sentencing hearing stripped the jury of an opportunity to impose life imprisonment as an alternative to the death penalty. This was because the mitigating evidence had no weight toward imposing a life sentence except as relevant to and channeled through the special issues.¹³⁶ The court held that the Eighth Amendment was not violated in sentencing the petitioner to death.¹³⁷ While the plurality’s reasoning rested on the grounds that it was appropriate for the mitigating evidence, presented by the defendant, to influence the jury’s consideration of the answers to the special issues,¹³⁸ Justice O’Connor’s cautious concurrence affirming the death sentence rested on narrower grounds. In expressing her doubts about the Texas death penalty scheme, Justice O’Connor observed that the principle underlying *Lockett* and *Eddings* is that “punishment should be directly related to the personal culpability of the criminal defendant.”¹³⁹ The statute as drafted left open the possibility that mitigating evidence, offered by a defendant against the death penalty, would have relevance towards the defendant’s moral culpability. Yet the sentencer would not be permitted to give effect to its consideration in answering

questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.”)

¹³⁰ *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

¹³¹ *Lockett*, 438 U.S. at 604 (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”). Recognizing that the “imposition of death by public authority is... profoundly different from all other penalties,” the Court held that the sentence must be free to give “independent mitigating weight to aspects of the defendant’s character and to circumstances of the offense proffered in mitigation.” *Id.* at 604-05. In *Eddings*, the Court cited to the rule in *Lockett* as cited above. *Eddings*, 455 U.S. at 110 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

¹³² *Lockett*, 438 U.S. at 605.

¹³³ *Eddings*, 455 U.S. at 110-11.

¹³⁴ 487 U.S. 164, 177 (1988).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 183 (plurality opinion); *Id.* at 188 (O’Connor, J., concurring).

¹³⁸ *Id.* at 182.

¹³⁹ *Id.* at 184.

the special verdict questions.¹⁴⁰ As applied, such a situation would present an Eighth Amendment violation.¹⁴¹ However, Justice O'Connor concluded that the death sentence in this case was constitutional because the defendant's single piece of mitigating evidence "had no relevance to any other aspect of petitioner's character."¹⁴² The jurors were able to weigh with the fullest consideration the mitigating effect of this evidence without exceeding the built-in limitations of the statute.

Thus, *Penry v. Lynaugh* presented the Court with a case where the mitigating effect of the evidence presented at sentencing was capable of expanding beyond the constraints of the three issues presented under the Code of Criminal Procedure, Art. 37.071.¹⁴³ The constitutional proviso reserved by Justice O'Connor in *Franklin v. Lynaugh* was triggered, and the Texas Legislature once again was sent to the drawing board to revise its death penalty statutes. Justice O'Connor joined the *Franklin* dissenters to conclude for the Court in *Penry* that the sentencing jury was not able to consider and give effect to the defendant's mental retardation and history of childhood abuse "without any jury instructions on mitigating evidence."¹⁴⁴

The Court found that the jury could not give full effect to Penry's mitigating factors through Special Issue Two, which asks whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.¹⁴⁵ The defendant's retardation and consequent inability to learn from mistakes is a mitigating factor in the moral sense, but it is turned into an aggravating factor in evaluating whether the defendant shall be a future danger.¹⁴⁶ A jury that wanted to use the defendant's retardation as a mitigating factor was precluded from doing so by the wording of Special Issue Two.¹⁴⁷ Lastly, the third special issue, which requires the jury to evaluate "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased," was examined.¹⁴⁸ The Court found that it did not provide the jury with a vehicle for expressing their disapproval of the death penalty in Penry's case. Even if a juror concluded that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime in a moral sense, this in itself did not diminish the "unreasonableness" of committing murder. None of the special issues satisfied constitutional scrutiny "in the absence of instructions informing the jury it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background."¹⁴⁹ As a result, Penry received a new sentencing hearing.¹⁵⁰

A year earlier in *Franklin*, Justice White had characterized the dissenting view that effectively imposed an additional special issue to be given to the jury: "Does any

¹⁴⁰ *Id.* at 185. In her discussion, Justice O'Connor alluded to the holding in *Jurek* where the Court had noted that the Texas statute did not explicitly mention mitigating circumstances but the Texas Court of Criminal Appeals had construed the special issue regarding future dangerousness to permit consideration of the defendant's prior criminal record, age, mental state, and the circumstances of the crime in mitigation. *Id.* at 183-84.

¹⁴¹ *Id.* at 185.

¹⁴² *Id.*

¹⁴³ 492 U.S. 302, 302, 310-13 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁴⁴ *Id.* at 322.

¹⁴⁵ *Id.* at 324.

¹⁴⁶ *Id.* at 323.

¹⁴⁷ *Id.* at 324.

¹⁴⁸ *Id.* at 310.

¹⁴⁹ *Id.* at 328.

¹⁵⁰ *Id.*

mitigating evidence before you, whether or not relevant to the above two questions, lead you to believe that the death penalty should not be imposed?"¹⁵¹ Ironically, the Texas Legislature's response to *Penry* hewed close to Justice White's assessment.

While the basic sentencing statute remained, the *Penry* decision provoked many significant changes to Art. 37.071 when the Texas legislature convened in 1991.¹⁵² Special issues one and three were deleted; special issue two on future dangerousness was retained, and is now re-designated as the first special issue under Code of Criminal Procedure, Art. 37.071(b). A second special issue was added to subsection (b), which asks, in cases where the capital murder conviction is obtained under a theory of vicarious liability, "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that human life would be taken."¹⁵³ As before, both issues must be answered "yes" unanimously under the standard of beyond a reasonable doubt in order for the defendant to receive the death penalty.¹⁵⁴ When answering these one or two issues, the statute is explicitly amended so that the jury is instructed that

[i]n deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.¹⁵⁵

This hearkens back to the flaws in the death sentence in *Penry*. The amendment, by its deletion of special issues one and three, places all of the argument during a death sentencing hearing (not encompassing a theory of vicarious liability) squarely on the issue of future dangerousness. Arguably this was the practical result under the pre-1991 statute. Special issues one and three escaped a judicial declaration of unconstitutionality; nevertheless, they were subject to constant attack in the courts as duplicative of the finding of guilt in a capital trial.¹⁵⁶

The House Research Organization's analysis of the 1991 amendments notes that the purpose of deleting these two special issues was to clarify the questions presented and make them less vulnerable to appeal.¹⁵⁷ Supporters of the bill admitted that "juries have often interpreted "deliberate" to mean "intentional."¹⁵⁸ Lastly, the reason for deleting special issue three is that it will now be subsumed under an additional step included in the amendment to the statute, addressing the *Penry* mandate of allowing the jury to properly

¹⁵¹ *Franklin v. Lynaugh*, 487 U.S. 164, 180 n.10 (1988).

¹⁵² S.B. 880, 1991 Leg., 72nd Reg. Sess. (Tex. 1991) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)); SENATE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR S.B. 880, 1991 Leg., 72nd Reg. Sess. (Tex. 1991) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)).

¹⁵³ SENATE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR S.B. 880, 1991 Leg., 72nd Reg. Sess. (Tex. 1991).

¹⁵⁴ TEX. CODE CRIM. PROC. ANN. art. 37.071(d) (West 2013).

¹⁵⁵ *Id.*

¹⁵⁶ *Sattiewhite v. State*, 786 S.W.2d 271, 289-90 (Tex. Crim. App. 1989); *Marquez v. State*, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987); *Heckert v. State*, 612 S.W.2d 549, 552-53 (Tex. Crim. App. 1981) (finding "deliberate" under art. 37.071(b)(1)(pre-1991) not to be the linguistic equivalent of "intentionally" so as to avoid rendering art. 37.071(b)(1) a nullity).

¹⁵⁷ See HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR H.B. 1240, 72nd Leg., Reg. Sess. (Tex. 1991).

¹⁵⁸ *Id.*

consider factors which mitigate against the imposition of capital punishment.¹⁵⁹ The additional step dictates that the jury considers an additional question that must be answered before the death penalty may be assessed:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.¹⁶⁰

The jury, in order to answer the question so as to assess the death penalty, must unanimously answer this question “no,” while a “yes” finding requires the agreement of only 10 jurors.¹⁶¹ A “yes” finding or a failure to agree results in a sentence of life imprisonment. Specifically in response to *Penry*, the jury decides the special issue with the specific instruction that the jury “shall consider mitigating evidence to be evidence that a juror might regard as reducing a defendant’s moral blameworthiness.”¹⁶²

Thus, the 1991 amendments¹⁶³ underscored the glaring deficiencies of the 1973 statute. The deletion of the two original special issues speaks directly to the flawed process under which the statute was crafted; the addition of the mitigation language, a recognition that the original three issues that were upheld in *Jurek*, in fact, failed to allow consideration of particularized mitigating factors.¹⁶⁴ Opponents of the bill, however, astutely observed that “although th[is] bill attempts to conform current law to recent judicial decisions . . . still would leave the sentencing statute subject to a number of potential constitutional challenges.”¹⁶⁵

Between 1982 and 1991 Texas executed forty individuals,¹⁶⁶ arguably under a sentencing scheme that was not consistent, principled, humane, or sensible to the uniqueness of the individual.¹⁶⁷ The 2001 amendment, however, reveals an even more

¹⁵⁹ *Id.*

¹⁶⁰ TEX. CODE CRIM. PROC. ANN. art. 37.0711(e) (West 2013).

¹⁶¹ TEX. CODE CRIM. PROC. ANN. art. 37.071(f)(1)-(2) (West 2013).

¹⁶² *Id.*; art. 37.071(f)(4); *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁶³ Act of Sept. 1, 1991, ch. 838 §§1-6, 1991 Tex. Sess. Law Serv. 838 (West). The amendments retain the requirement that neither the court, nor the attorneys inform the jury of the effect of a failure to agree as to any issue. *Id.* Lastly, the 1991 bill created a statutory exception to the requirement that the sentencing phase be conducted as soon as practicable in the trial court. *Id.* This exception is provided for in article 44.29(c), and provides for a procedure in the event that a resentencing procedure is held after reversal of error affecting the punishment stage of the trial, if the punishment after reversal is not reformed to life under article 44.251. TEX. CODE CRIM. ANN. art. 44.29(c) (West 2013). The entire conviction is not reversed, but a new jury is empanelled for the sentencing hearing as if proceeding directly from a guilt finding. *Id.*

¹⁶⁴ *Jurek v. Texas*, 428 U.S. 262, 272 (1976). Recall that “*Lockett* underscored *Jurek*’s recognition that the constitutionality of the Texas scheme ‘turns on whether the enumerated questions allow consideration of particularized mitigating factors.’” *Penry*, 492 U.S. at 317 (citing *Jurek*, 428 U.S. at 272).

¹⁶⁵ See HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR H.B. 1240, Tex. H.B. 1240, 72nd Leg., Reg. Sess., at 14-16 (Tex. 1991). Opponents observed that the bill still contained vague language that would lead to confusion, inconsistency, and appeals, and they recommended that it define several terms. *Id.* Specifically, they alluded to the “watered down” mitigation definition, and vague, undefined terms like “probability,” which “lead to inconsistent application of the law, which has been a principal reason why the Texas capital punishment law has been invalidated in the past.” *Id.*

¹⁶⁶ 1982—1 individual; 1984—3 individuals; 1985—6 individuals; 1987—6 individuals; 1988—3 individuals; 1989—4 individuals; 1990—4 individuals; 1991—3 individuals (data through June 1991, before the statute was amended). *Executions*, TEX. DEP’T. CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_executions_by_year.html (last updated Apr. 17, 2014).

¹⁶⁷ See *Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982).

insidious problem with the statute – it permitted the jury to consider race as a predictor of future violence.

B. THE 2001 AMENDMENT – PROHIBITS RACE AS A PREDICTOR OF FUTURE DANGEROUSNESS

In 2001, the Texas legislature again amended Art. 37.071 at the indirect behest of the U.S. Supreme Court in *Saldano v. Texas*.¹⁶⁸ In 1999, the Texas Court of Criminal Appeals upheld¹⁶⁹ on procedural grounds¹⁷⁰ Victor Hugo Saldano's death sentence, despite the sentencing jury hearing the testimony of Dr. Walter Quijano, a licensed clinical psychologist.¹⁷¹ Quijano testified that Saldano constituted a future danger to society in part because he is Hispanic.¹⁷² In fact, Dr. Quijano had testified in six other capital murder

¹⁶⁸ S.B. 133, 77th Reg. Sess. (Tex. 2001) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)); see *Saldano v. Texas*, 530 U.S. 1212 (2000).

¹⁶⁹ *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. App. 1999), *vacated*, *Saldano v. Texas*, 530 U.S. 1212 (2000); Diana L. Hoermann, *Why the Injection of Race in Saldano v. State Constitutes a Fundamental Error*, 4 SCHOLAR 261, 262-63, 265 n.18, 268 (2002).

¹⁷⁰ *Saldano*, 70 S.W.3d at 891 (holding that Saldano's race claim was procedurally defaulted as his defense attorney failed to object to Dr. Quijano's testimony regarding Saldano's race); Hoermann, *supra* note 169, at 268.

¹⁷¹ Hoermann, *supra* note 169, at 265 n.18.

¹⁷² *Saldano*, 70 S.W.3d at 891; Hoermann, *supra* note 169, at 265 nn.21 & 23, 267-68 nn.24-25 (citations omitted). The following are the pertinent excerpts from Dr. Quijano's testimony at Saldano's sentencing proceeding. At Victor Hugo Saldano's trial, Dr. Quijano testified on direct examination by the prosecutor as follows:

Q. Okay. What is the fourth category?

A. The fourth category is race.

Q. Well, let's talk about that. In this age of political correctness, that somehow it is an item that we tend to gloss over. But, empirically, there is a statistical analysis of it. Is that correct?

A. Yes. This is one of those unfortunate realities also that blacks and Hispanics are over-represented in the criminal justice system.

Q. And there may be social problems for that; we don't know. But that doesn't alter the fact that, statistically, that's a reality of life.

A. The race itself may not explain the over-representation, so there are other subrealities that may have to be considered. But statistically speaking, 40 percent of inmates in the prison system are black, about 20 percent are - - about 30 percent are white, and about 20 percent are Hispanics. So there's much over-representation.

Q. In the category - categorization of races, how is an Argentinean fitted?

A. That - he would be considered a Hispanic.

Reporters Record, *supra* note 22, at 75-76. Not only did Mr. Saldano's trial defense attorney not object to Dr. Quijano's testimony, he elicited even more of it on cross-examination:

Q. Now, one of the factors - one of your other statistical factors you mentioned was the factor of race. Is that right?

A. Yes.

Q. Okay. And you - you pointed out a fact that's probably pretty well-known to everybody; that blacks and Hispanics are over-represented in the United States prison population.

A. Yes.

Q. And, basically, what we mean by that is, if African-American people make up about 16 percent of the population, but 40 percent of the people in prison are African-American people, then we can say, Well, if the population in prison corresponded to the free population, then there should only be 16 percent African-American people in prison, so that fact that there's only 40 shows that they're over-represented. Right?

A. Yes.

....

sentencing proceedings stating that the defendant's race should be a factor in considering future dangerousness.¹⁷³ Saldano subsequently requested certiorari to the U.S. Supreme Court, asking the Court to consider whether the State could constitutionally impose the death penalty on the basis of the petitioner's race.¹⁷⁴ In response to Saldano's filing with the High Court, then Texas Attorney General John Cornyn confessed that "the infusion of race as a factor for the jury to weigh in making its determination violated [Saldano's] constitutional right to be sentenced without regard to the color of his skin."¹⁷⁵ In light of Cornyn's confession of error, the Supreme Court vacated Saldano's death sentence and remanded the case to the Texas Court of Criminal Appeals.¹⁷⁶ Prior to 2001, Art. 37.071 permitted either the state or the defense to present any evidence "that the court deems relevant to sentence."¹⁷⁷ The Texas Legislature did not wait for the Court of Criminal Appeals to hear *Saldano* on remand before amending Articles 37.071 and 37.0711 of the Texas Rules of Criminal Procedure. The legislature added the proviso that during the capital sentencing hearing "evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct."¹⁷⁸

Supporters of the amendment argued that [it] would correct a wrong in the Texas criminal justice system. It is fundamentally unfair for the state to present evidence that a defendant's race is a predictor of his or her likelihood to commit new crimes. The AG has argued before the U.S. Supreme Court that this practice is inappropriate and that race should not be considered as a factor in the criminal justice system. This pseudoscience should be disallowed in a

Q. ... Now, the Hispanics that have been considered in coming up with these statistical factors are the Hispanics that are in American prisons. Is that correct?

A. Or American criminal justice system.

Q. All right. And do you think it would be fair to say that the overwhelming majority of those Hispanics would be Mexican people?

A. In this part of the country, yes. In the East Coast, Puerto Ricans.

Hoermann, *supra* note 169, at 265 n.23.

¹⁷³ See *John Cornyn*, Statement from Attorney General John Cornyn Regarding Death Penalty Cases, OFF. ATT'Y GEN. (June 9, 2000), <https://www.texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609/saldanocases.htm> (identifying the following six capital defendants (in addition to Saldano) at whose sentencing proceedings the state used Dr. Quijano's testimony, using race as a foundation for finding future dangerousness, to seek the death penalty: Julian Garcia, Eugene Alvin Broxton, John Alba, Michael Dean Gonzales, Carl Henry Blue, Duane Buck (all were sentenced to death)); Hoermann, *supra* note 169 at 269 n.34; HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR S.B. 133, 77th Leg., Reg. Sess. (Tex. 2001) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)).

¹⁷⁴ See *Saldano*, 530 U.S. at 1212; Hoermann, *supra* note 169, at 261, 268..

¹⁷⁵ See *Saldano*, 530 U.S. at 1212; SENATE RESEARCH CTR., BILL ANALYSIS FOR S.B. 133, 77th Leg., Reg. Sess. (Tex. 2001) (amending TEX. CODE CRIM. PROC. art. 37.071 (1973)); Hoermann, *supra* note 169, at 261, 268-69.

¹⁷⁶ See *Saldano*, 530 U.S. 1212; Hoermann, *supra* note 169, at 269. On remand from the Supreme Court, the Texas Court of Criminal Appeals affirmed Saldano's death sentence primarily on the grounds that the Attorney General's confession of error did not address the issue on which Saldano's death sentence had originally been upheld by the Court of Criminal Appeals: procedural default (at trial, Saldano did not object to Dr. Quijano's testimony and the Court of Criminal Appeals held that Dr. Quijano's introduction of race and recidivism into the sentencing proceeding did not constitute fundamental error.). *Saldano v. State*, 70 S.W.3d 873 (Tex. App. 1999); Hoermann, *supra* note 169, at 270 n.41 & 46. Saldano presently remains on death row. *Offenders on Death Row*, TEX. DEP'T CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html, (last updated May 20, 2014).

¹⁷⁷ TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1999) amended by S.B 133, 77th Reg. Sess. (Tex. 2001); SENATE RESEARCH CTR., BILL ANALYSIS FOR S.B. 133, 77th Leg., Reg. Sess. (Tex. 2001).

¹⁷⁸ TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (a)(2) (West 2013); TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3 (a)(2) (West 2013); Act of Sept. 1, 2001, ch. 585 §§ 2-3, 2001 Tex. Sess. Law Serv. (West) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071, 37.0711 (West 1973)).

courtroom just as other unreliable evidence, like lie detector tests, already is.¹⁷⁹

Amazingly, despite this acknowledgement that the future dangerousness inquiry permits unreliable pseudoscience to enter the courtroom, the latter remained intact.

The next amendment demonstrates how the statute as enacted did not permit reasonable notice of expert testimony in death penalty cases, although under the law it was required in non-capital cases.

C. THE 2005 AMENDMENTS – TO PERMIT REASONABLE NOTICE OF EXPERT TESTIMONY IN CAPITAL CASES

Subject to the prohibition on the state using race to demonstrate future dangerousness during the capital sentencing hearing of a Texas defendant, “evidence may be presented by the state . . . that the court deems relevant to sentence”¹⁸⁰ This provision of the Code of Criminal Procedure called for the types of evidence typically offered under Texas Rules of Evidence 404(b).¹⁸¹ The notice requirements of Rule 404(b) as a prerequisite to admissibility under the rule are read into the requirements of the introduction of such extraneous evidence in non-capital cases.¹⁸² However, no provision was made governing notice in capital sentencing in Art. 37.071, and Art. 37.07 did not govern in capital cases.

In 2005, the legislature amended Art. 37.071 § 2(a)(1)¹⁸³ to incorporate the notice requirement under Art. 37.07(3)(g),¹⁸⁴ which in turn is that under Texas Rule of Evidence

¹⁷⁹ HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR S.B. 133, 77th Leg., Reg. Sess. (Tex. 2001) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)).

¹⁸⁰ TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (a)(1) (West 2013).

¹⁸¹ *Id.* (stating that the introduction of extraneous evidence is governed by notice requirements of TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3 (g) (West 2013)).

¹⁸² TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3 (a), (g) (West 2013). The notice requirement under Texas Rules of Evidence 404(b) is as follows:

Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

TEX. R. EVID. 404(b).

¹⁸³ This statute reads:

If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The introduction of evidence of extraneous conduct is governed by the notice requirements of Section 3(g), Article 37.07. The court, the attorney representing the state,

404(b).¹⁸⁵ The amendment to Art. 37.071, as said in the Bill Analysis, codifies existing practice, as the notice requirement of 37.07(3)(g) is “followed routinely by prosecutors.”¹⁸⁶ Yet the distinction did previously preclude claims under Rule 404(b) for a new sentencing hearing based on the reasonableness of the notice provided by the prosecutor in sentencing hearings.

Prior to the amendment and during the time that Texas Rule of Criminal Evidence 404(c) governed in capital sentencing hearings, the applicable rule read:

In the penalty phase, evidence may be offered by an accused or by the prosecution as to the prior criminal record of the accused. Other evidence of his character may be offered by an accused or by the prosecution. Nothing herein shall limit provisions of Article 37.071, Code of Criminal Procedure.¹⁸⁷

The Court of Criminal Appeals specifically held the notice provision of Rule 404(b) did not govern in capital cases. As such, the defendant was not entitled to object on the basis that the notice provided was unreasonable.¹⁸⁸ The standard in capital cases was whether the introduction of such evidence without reasonable notice constituted unfair surprise.¹⁸⁹ The Court acknowledged the change in the notice standard governing capital sentencing hearings, and rejected the claims raised under it in a number of cases.¹⁹⁰ For example, in *Vuong v. State*, the defendant argued on appeal that the trial court erroneously allowed the State’s expert to testify at the punishment phase without providing him with reasonable notice of the expert’s testimony pursuant to TRE 404(b).¹⁹¹ The Texas Court of Criminal Appeals held that 404(b) did not apply:

the defendant, or the defendant’s counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e).

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (a)(1) (West 2013).

¹⁸⁴ The notice requirement under article 37.07 (3)(g) is as follows:

On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Evidence. If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence, notice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3 (g) (West 2013).

¹⁸⁵ Act of Sept. 1 2005, ch. 399, § 1, 2005 Tex. Sess. Law Serv. (West).

¹⁸⁶ HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS OF S.B. 1507, 79th Leg., Reg. Sess. (Tex. 2005).

¹⁸⁷ *Vuong v. State*, 830 S.W.2d 929, 942 & n.7 (Tex. Crim. App. 1992) (en banc).

¹⁸⁸ *Id.*; *See also Hughes v. State*, 24 S.W.3d 833, 842 (Tex. Crim. App. 2000); *See also Rojas v. State*, 986 S.W.2d 241, 251 (Tex. Crim. App. 1998).

¹⁸⁹ *Adanandus v. State*, 866 S.W.2d 210, 233 (Tex. Crim. App. 1993).

¹⁹⁰ *Leza v. State*, 351 S.W.3d 344, 358-60 (Tex. Crim. App. 2011) (holding that the government provided adequate notice of its intent to introduce a prison guard’s testimony that the defendant threatened to kill the guard during the punishment phase); *See Robertson v. State*, No. AP-71224, 2011 WL 1161381, at *12-13 (Tex. Crim. App. March 9, 2011) (holding that the government provided sufficient notice for testimony offered in rebuttal to mitigation evidence suggesting that the defendant valued human life); *Wilkins v. State*, No. AP-75878, 2010 WL 4117677, at *8-9 (Tex. Crim. App. Oct. 20, 2010) (holding that no harm was caused by the lack of notice of the evidence and the effect that the lack of notice had on the defendant’s ability to present an adequate defense).

¹⁹¹ 830 S.W.2d at 942.

In deciding questions concerning the admissibility of character evidence at the punishment stage of the trial, the appropriate governing statute is Rule 404(c) of the Texas Rules of Criminal Evidence. Rule 404(c) contains no notice provision, nor does Article 37.071 of the Texas Code of Criminal Procedure, the provisions of which specifically govern the scope of Rule 404(c) in capital murder cases.¹⁹²

D. THE LOFTY PROMISES OF FURMAN UNFULFILLED BY THE TEXAS LEGISLATURE

In the modern world of business, the effectiveness and success of a new product launch is directly tied to rigorous pre-launching activities: long hours of meticulous design, planning, preparation, defining, and testing. Once launched, an unsuccessful product with proven errors is recalled or abandoned. The launching of Texas's new product – Article 37.071 – was from its inception beset with challenges. The numerous revisions to Art. 37.071 underscore the criticisms leveled against the statute in Judge Odom's 1973 dissent in *Jurek v. State*, when he labeled it "so confusing that even the majority of this Court have been misled."¹⁹³ Further, Judge Odom argued that the statute was unconstitutionally vague in violation of both the Texas and the U.S. Constitution.¹⁹⁴ Arguably, the amendments reflect an attempt by the legislature to rectify the constitutional deficiencies, but this piecemeal effort spanning a period of over forty years shows that *Furman's* promise of eradicating arbitrary and capricious statutes has not been fulfilled. Furthermore this begs the question: After forty years of dicey implementation, shouldn't Texas abandon future dangerousness?

The next two parts squarely address this question. Together, they demonstrate how neither evolving stricter standards of admissibility, nor appellate review have deterred the parade of forensic experts willing to offer predictions of future dangerousness on the reliability of a crystal ball. Part III covers the early decades following the launch of Art. 37.071 which briefly features the infamous testimony of "Dr. Death," and the evolution of stricter judicial gatekeeping. Additionally, Part III features the testimony of Dr. Richard Coons in numerous capital cases, leading to the landmark 2008 *Coble* case, which forced a unanimous Court of Criminal Appeals to find his testimony inadmissible. Part IV questions the effectiveness of appellate review as it showcases a litany of capital cases reviewed by the Court of Criminal Appeals whose opinions are rife with judicial contradictions.

PART III. HANGING PSYCHIATRISTS' PREDICTIONS OF FUTURE DANGEROUSNESS : THE LONG AND WINDING ROAD FROM BAREFOOT TO COBLE

A. "SLIDE INTO ETHICAL CHAOS"¹⁹⁵ - "DR. DEATH" REIGNS SUPREME IN TEXAS

The amendment history of Art. 37.071 incisively demonstrates how twenty-eight years after its enactment, the Texas Legislature amended the statute after the debacle with Dr. Quijano's testimony in a number of cases. Although acknowledging that pseudoscience is unreliable, the legislature chose not to abolish predictions of future dangerousness. For almost forty years, Texas has relied on the testimony of psychiatrists to persuade juries to

¹⁹² *Id.*

¹⁹³ 522 S.W.2d 934, 946 (Tex. Crim. App. 1975) (Odom, J., concurring in part and dissenting in part).

¹⁹⁴ *Id.*

¹⁹⁵ The phrase is borrowed from Paul S. Appelbaum, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*, 13 INT'L J.L. & PSYCHIATRY 249, 255 (1990).

render a death verdict in answering the special issue. Although some defendants' convictions were ultimately reversed after the use of future dangerousness led the jury to impose a death sentence, others have not been as fortunate. A litany of Texas cases shows how the State used Dr. Grigson to abuse future dangerousness with irreparable consequences.

In 1973, Ernest Benjamin Smith was indicted for murder by a Texas grand jury.¹⁹⁶ The State sought the death penalty, and its attorney was informally ordered to arrange a psychiatric examination for Smith to determine his competency to stand trial.¹⁹⁷ The State called Dr. Grigson, who concluded in a letter to the judge that Smith was competent after interviewing the defendant for only 90 minutes.¹⁹⁸ Smith was then convicted of murder, and Grigson was once again asked to testify at his sentencing hearing,¹⁹⁹ this time on his assessment of Smith's future dangerousness.²⁰⁰ Over defense counsel's objection, Grigson testified to the jury:

(a) that Smith 'is a very severe sociopath'; (b) that 'he will continue his previous behavior'; (c) that his sociopathic condition will 'only get worse'; (d) that he has no 'regard for another human being's property or for their life, regardless of who it may be'; (e) that '[t]here is no treatment, no medicine...that in any way at all modifies or changes this behavior,'; (f) that he 'is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so'; and (g) that he 'has no remorse or sorrow for what he has done.'²⁰¹

As a result, Smith was sentenced to death, and the Texas Court of Criminal Appeals affirmed the conviction.²⁰² However, the U.S. Supreme Court vacated the death sentence, holding that Smith's Fifth and Sixth Amendment rights were violated by the introduction of Dr. Grigson's testimony during the penalty phase.²⁰³ This makes *Smith* problematic on a number of levels, but principally because Dr. Grigson's role as an examiner in a competency hearing was entirely different from his role as an expert witness regarding future dangerousness during the sentencing phase. As a noted psychiatrist indicated, in the former, the examiner's role is neutral, while testifying in the latter, he is acting as an agent for the state.²⁰⁴ In addition, despite Grigson's damning prognosis that Smith's sociopathic condition would worsen, a 2005 study reported that Smith has been a model prisoner for the past twenty years. Smith obtained a college degree while

¹⁹⁶ *Estelle v. Smith*, 451 U.S. 454, 456 (1981).

¹⁹⁷ *Id.* at 456-57.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 457-59; In Texas, capital cases are statutorily bifurcated into a guilt phase and a sentencing phase. *Id.* at 457, and the applicable statute at the time of Mr. Smith's trial was Article 37.071(a) of TEX. CODE CRIM. PROC. ANN. (West 1980), *Id.* at 458.

²⁰⁰ *Id.* at 467. Although the State had been ordered to disclose the name of all the witnesses it planned to use at both stages of the trial, it did not provide Grigson's name. *Id.* at 459.

²⁰¹ *Id.* at 459-60.

²⁰² *Id.* at 460.

²⁰³ *Id.* at 473. As noted by Dr. Paul Appelbaum, the Supreme Court's ruling that Smith should have been given his 5th Amendment rights is in accord with the American Psychiatric Association's Annotation on ethics in psychiatry: "The Psychiatrists must fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination." Paul S. Appelbaum, *Psychiatrists Role in the Death Penalty*, 32 n.11 HOSP. & CMTY. PSYCHIATRY 761, 761 (1981).

²⁰⁴ Appelbaum, *supra* note 203, at 761.

incarcerated, trained other prisoners on computers, and worked as a clerk in the prison.²⁰⁵ Although Smith's rehabilitation in prison shows the glaring inaccuracy of Grigson's predictions, one of the most damaging decisions regarding future dangerousness is the Supreme Court's holding in *Barefoot v. Estelle*.²⁰⁶ One scholar has correctly argued that *Estelle* is "egregiously wrong-headed by current standards for relevance" with an "effect on capital sentencing proceedings [that] has been pernicious and pervasive, undermining basic rule-of-law precepts."²⁰⁷

B. THE DANGER OF GOING BAREFOOT: SUPREME COURT'S "WRONG ONLY MOST OF THE TIME STANDARD"²⁰⁸

In 1978, during the capital murder trial of Thomas A. Barefoot, Dr. James Grigson served as an expert witness for the State of Texas yet again, this time along with Dr. John Holbrook.²⁰⁹ When asked to testify as to the future dangerousness of the defendant, both psychiatrists were given a lengthy hypothetical based on Barefoot's prior convictions, his bad reputation in his community, and the events surrounding the murder for which he was on trial.²¹⁰ However, neither Holbrook, nor Grigson ever requested the opportunity to examine Barefoot.²¹¹

Dr. Grigson told the jury that he had examined "between thirty and forty thousand individuals..." and that he would be able to "give a medical opinion within reasonable psychiatric certainty as to the psychological or psychiatric makeup of an individual."²¹² Grigson also stated that based on the hypothetical, Barefoot could be diagnosed as having a sociopathic personality disorder²¹³ and that "that there was a 'one hundred percent and absolute' chance that Barefoot would commit further acts of criminal violence that would constitute a continuing threat to society."²¹⁴ After only an hour of deliberation, Barefoot's jury sentenced him to death.²¹⁵

In 1983, the U.S. Supreme Court reviewed Barefoot's case and upheld the use of future dangerousness in capital cases.²¹⁶ The American Psychiatric Association (APA)—the nation's largest organization of psychiatrists—filed an *amicus curiae* brief on behalf of

²⁰⁵ *Deadly Speculation*, *supra* note 2, at 29; see also *Holloway v. State*, 613 S.W.2d 497, 500 (Tex. Crim. App. 1981). Grigson testified in this case without ever examining Holloway and based his review on the offense report and interviews with people who knew Holloway. *Id.* Holloway was sentenced to death, but this conviction was ultimately reversed in 1981. *Id.* at 503.

²⁰⁶ *Barefoot v. Estelle*, 463 U.S. 880, 938 (1983).

²⁰⁷ Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 359 (2003).

²⁰⁸ Subheading borrowed from Paul S. Appelbaum, *Death, The Expert Witness, and the Dangers of Going Barefoot*, 34 n.11 HOSP. AND CMTY. PSYCHIATRY 1003, 1004 (Nov. 1983).

²⁰⁹ *Barefoot*, 463 U.S. at 884 (1983).

²¹⁰ *Id.* at 918 (Blackmun, J., dissenting).

²¹¹ *Id.* at 917.

²¹² *Id.* at 918. Grigson also stated "that this skill was "particular to the field of psychiatry and not to the average layman." *Id.*

²¹³ *Id.* at 919. Grigson also stated that on a scale of one to ten, Barefoot was "above ten," in the "most severe category" of sociopaths, and stated that there was no cure for the condition. *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 896 (majority opinion).

Barefoot,²¹⁷ in which it unequivocally stated its position against the use of psychiatric testimony to predict a defendant's future dangerousness:

Psychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness of a defendant in a capital case, at least in those circumstances where the psychiatrist purports to be testifying as a medical expert possessing predictive expertise in this area. Although psychiatric assessments may permit short term predictions of violent or assaultive behavior, medical knowledge has simply not advanced to the point where long-term predictions – the type of testimony at issue in this case – may be made with even reasonable accuracy. The large body of research in this area indicates that, even under the best of conditions, *psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases* ... Contrary to the claims of the prosecution psychiatrists who testified in this case, psychiatric predictions of long-term future dangerousness – even under the best of conditions and on the basis of complete medical data – are of fundamentally low reliability. Although a likelihood of future violent behavior may be assigned to a given individual solely on the basis of statistical 'base rates' and other information of an actuarial nature, psychiatric determinations in this area have little or no independent validity. We believe, therefore, that diagnoses of 'sociopathy' or 'antisocial personality disorder,' and predictions of future behavior characterized as 'medical opinions,' serve only to distort the fact-finding process. Because the prejudicial impact of such assertedly 'medical' testimony far outweighs its probative value, it should be barred altogether in capital cases.²¹⁸ (emphasis added)

The APA further argued that “[a]t a minimum, psychiatrists should not be allowed to offer medical opinions concerning the likelihood of long-term future dangerousness unless they have: 1) conducted an in-depth psychiatric examination of the defendant”²¹⁹ and 2) indicated that “hypothetical questions... fail to provide sufficient information to make the diagnosis.”²²⁰ The questions posed to Holbrook and Grigson, the APA argued, contained no information that would have allowed the psychiatrists to rule out other mental disorders, or to offer alternative explanations for Barefoot's behavior.²²¹ Finally, the APA asserted that the “inadequate procedures used in this case allow a psychiatrist to masquerade his personal preferences as ‘medical’ views, without providing a meaningful basis for rebutting his conclusions.”²²² However despite this argument, the U.S. Supreme Court made an astonishing statement that revealed its profound disregard

²¹⁷ Brief for American Psychiatric Ass'n as Amici Curiae Supporting Defendant at 1, *Barefoot v. Estelle*, 463 U.S. 880 (1982) (No. 82-6080).

²¹⁸ *Id.* at 3-4.

²¹⁹ *Id.* at 6.

²²⁰ *Id.* at 7. For additional arguments rejecting the use of hypotheticals in these cases, see also Appelbaum, *supra* note 208, at 1003; Paul S. Appelbaum, *Hypotheticals, Psychiatric Testimony, and the Death Sentence*, 12 BULL. AM. ACAD. PSYCHIATRY & L., 169, 171 (1984) (arguing that hypotheticals as the “sole source of evidence for a psychiatric opinion... raises enormous problems of the validity of expert judgments”).

²²¹ Brief for the Defendant, *supra* note 217, at 7 (“Dr. Holbrook and Dr. Grigson presumably assumed that petitioner had no history of delusions or hallucinations – symptoms that might have suggested the alternative diagnosis of schizophrenia – simply because the hypothetical questions contained no information in that regard.”).

²²² *Id.* at 9.

for organized psychiatry, encouraging prosecutors to continue leveling death penalties on the precarious edifice of speculation. The court noted: “Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time.”²²³ Thomas Barefoot was executed on October 30th, 1984.²²⁴

In 1985, three years after the APA issued its opinion on future dangerousness, Grigson testified in the capital murder case of Stephen Ray Nethery.²²⁵ At the trial, Grigson testified that:

he was competent to give his opinion based upon a hypothetical question because of his medical and psychiatric training, and his experience in examining murder and capital murder defendants over the past sixteen years. When asked if he could cite any medical authority or research that states that a psychiatrist is competent to testify based solely on a hypothetical question, Grigson said he was probably the best authority in that area. He then cited two articles which he said stated that the best indication of future acts of violence are a history of prior acts of violence in the past.

Grigson admitted being familiar with the brief filed by the American Psychiatric Association, in a Supreme Court case, involving his testimony, *Estelle v. Smith*... in which the association said that making a prediction of future violent behavior is beyond psychiatry and verges on quackery. ... Grigson also stated that he was 100% accurate in his predictions of future violence and that he based his answers... on the facts given in the hypothetical.²²⁶

Mr. Nethery was found guilty and sentenced to death.²²⁷ On appeal, he argued that the state failed to qualify the psychiatric witnesses as experts in predicting future dangerousness, and the predictions were too speculative and lacking in scientific basis.²²⁸ Stephen Ray Nethery was executed on May 27, 1994.²²⁹

In 1985, Dr. Grigson also testified in the capital case of Baby Ray Bennett, who was convicted and sentenced to death.²³⁰ In a scathing dissent, Judge Teague referring to him by the then well-earned epithet of “Dr. Death,” said:

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.

After having read many records of capital murder cases in which Dr. Grigson testified at the punishment stage of the trial, I have concluded that, as a general proposition, when Dr. Grigson speaks to a lay jury, or an uninformed jury, about a person who he characterizes as a

²²³ Barefoot v. Estelle, 463 U.S. 880, 901 (1983).

²²⁴ TEX. DEP’T CRIM. JUST., *supra* note 44.

²²⁵ Nethery v. State, 692 S.W.2d 686, 708-09 (Tex. Crim. App. 1985).

²²⁶ *Id.*

²²⁷ *Id.* at 691.

²²⁸ *Id.* at 708.

²²⁹ TEX. DEP’T CRIM. JUST., *supra* note 44.

²³⁰ Bennett v. State, 766 S.W.2d 227, 227-28 (Tex. Crim. App. 1989).

“severe” sociopath, which a defendant who has been convicted of capital murder always is in the eyes of Dr. Grigson, 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.²³¹

In 1995, the APA expelled Grigson from its ranks because he had violated its code of ethics by “arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100 percent certainty that the individuals would engage in future violent acts.”²³² Grigson, who had been certified to testify in over 150 cases, stated that the expulsion would not affect his license to practice.²³³

Unfortunately, despite the conclusions made by the APA in *Barefoot*, and continued criticism from members of the psychiatric profession, Texas continues to proffer predictions of future dangerousness. However, in the last two decades, the legal landscape of expert admissibility has evolved considerably, with tectonic changes occurring in the 1990’s. As one scholar has noted, the courts’ “foray”²³⁴ into the realm of expert admissibility was inevitable given the society’s growing dependence on technology.²³⁵ Complex technological and scientific evidence has become the centerpiece of much litigation, forcing the gates of admissibility to be more meticulously guarded by the gatekeepers.

C. THE BRAVE NEW WORLD OF EXPERT ADMISSIBILITY: THE *DAUBERT*, *KELLY*, AND *NENNO* STANDARDS

In 1993, the Supreme Court rejected the *Frye* “general acceptance” standard for admissibility²³⁶ in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which enumerated a two-prong test for the admissibility of expert testimony.²³⁷ In *Daubert*, the parties were reduced to a veritable battle of experts, both sides proffering testimony by well-credentialed experts.²³⁸ The U.S. Supreme Court held that *Frye*’s “general acceptance” test was not a prerequisite for the admission of scientific evidence and was superseded by the Federal Rules of Evidence.²³⁹ Moreover, under FRE 104, the Court stated that trial judges

²³¹ *Id.* at 232. Baby Ray Bennett was sentenced to death. After serving ten years on death row, his sentence was commuted to life. By 2004, Bennet was a trustee in prison, disciplined for only four minor infractions, and had not lost a single day of good-time credits in 17 years. *Deadly Speculation*, *supra* note 2, at xiv.

²³² Laura Beil, *Groups Expel Psychiatrist Known for Murder Cases*, DALL. MORNING NEWS July 26, 1995, at 21A.

²³³ *Id.*

²³⁴ Margaret A. Berger, *What Has a Decade of Daubert Wrought*, 95 AM. J. PUB. HEALTH S59, S59 (2005).

²³⁵ *Id.*

²³⁶ *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that as long as there is a consensus among those in the field, an expert’s testimony would be allowed because expert admissibility turns on “general acceptance in the particular field in which it belongs”). However, critics of the *Frye* standard state that it merely looks at the number of followers rather than the validity of the theory; it does not account for determination of the relevant field, and this standard has a propensity to lead to “self-validating experts.” Berger, *supra* note 234, at S60. For a thorough analysis of the *Daubert* trilogy and its impact on scientific testimony, see Berger, *supra* note 234.

²³⁷ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587, 592-93 (1993).

²³⁸ *Id.* at 582-83.

²³⁹ *Id.* at 587. Both the District Court and the Ninth Circuit Court of Appeals held that the plaintiff’s evidence failed to meet *Frye*’s general acceptance standard because it “had not been published or subjected to peer review.” *Id.* at 584.

act as gatekeepers²⁴⁰ to ensure that “any and all scientific testimony ... is not only relevant but reliable” in order to be admissible.²⁴¹ On December 1, 2000 in response to *Daubert*, Article VII of the Federal Rules of Evidence was amended. FRE 701, 702, and 703 were all modified to incorporate the principles established in the *Daubert* trilogy and subsequent line of cases.²⁴²

In Texas, one year prior to the *Daubert* decision, in *Kelly v. State*²⁴³ the Texas Court of Criminal Appeals had pronounced *Frye*'s general acceptance test already dead and enunciated its own reliability factors, which were eerily similar to *Daubert*'s.

Acknowledging that the court had used the *Frye* standard in previous occasions, the court stated that it had never explicitly adopted it,²⁴⁴ and proceeded to conclude that the *Frye* test was no longer part of Texas law.²⁴⁵ The Court held that Texas Rule of Criminal Evidence 702 incorporated the analyses in rules 402 and 403, mandating a finding that the evidence was relevant and reliable,²⁴⁶ and stated that the requirements of R. 702 do not apply specifically or exclusively to novel scientific evidence.²⁴⁷ To be considered reliable, evidence from a scientific theory had to satisfy three criteria: “1) the underlying scientific theory must be valid; 2) the technique applying the theory must be valid; and 3) the technique must have been properly applied on the occasion in question.”²⁴⁸

The court outlined seven factors that could potentially affect the trial court's determination of reliability:

²⁴⁰ *Id.* at 589. The Court established four “general” yet nonexclusive factors the gatekeepers could consider: 1) whether the theory can and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) technique's known or potential rate of error; and (4) whether there has been widespread acceptance of the technique. *Id.* at 593-94.

²⁴¹ *Id.* at 589. In addition, gatekeepers must assess “whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592-93.

²⁴² The post-*Daubert* modifications were as follows: In Rule 701, Opinion Testimony By Lay Witnesses, the following language was added: “and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FED. R. EVID. 701. Rule 702 was amended “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” FED. R. EVID. 701 advisory committee's notes (2000 Amendment). Specifically Rule 702, Testimony by Expert Witnesses was amended to include the following, “(b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” FED. R. EVID. 702. The following language was added to Rule 703: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” FED. R. EVID. 703.

²⁴³ 824 S.W.2d 568, 572-73 (Tex. Crim. App. 1992).

²⁴⁴ *Id.* at 572 (“Although this Court has never explicitly adopted the *Frye* test, on several occasions we have used a general acceptance test when reviewing lower court decisions regarding the admission of scientific evidence. See *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988); *Reed v. State*, 644 S.W.2d 479 (Tex. Crim. App. 1983); *Cain v. State*, 549 S.W.2d 707 (Tex. Crim. App. 1977); *Romero v. State*, 493 S.W.2d 206 (Tex. Crim. App. 1973). In all those cases, however, the trials were held before the promulgation of the Texas Rules of Criminal Evidence.”).

²⁴⁵ *Id.*

²⁴⁶ *Id.* (stating explicitly in footnote 11 that 702 incorporates 402 and 403).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 573.

(1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community[;] ... (2) the qualification of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.²⁴⁹

The *Daubert* and *Kelly* tests, while useful in guiding the gatekeepers with respect to scientific testimony, presented problems for non-scientific expert testimony or the “soft sciences.” In 1998, in *Nenno v. State*,²⁵⁰ the Texas Court of Criminal Appeals explicitly stated that the “flexible” *Daubert* factors “do not necessarily apply outside the hard science context; instead, methods of proving reliability will vary, depending upon the field of expertise.”²⁵¹

When addressing fields of study ... that are based primarily upon experience and training as opposed to the scientific method..., the appropriate questions are: (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert’s testimony is within the scope of that field; and (3) whether the expert’s testimony properly relies upon and/or utilizes the principles involved in the field.²⁵²

Although some courts have held it to be inapplicable,²⁵³ the *Kelly* and *Daubert* tests remain the standards of admissibility of scientific and non-scientific testimony.²⁵⁴ However, it seems that courts require less scrutiny of prosecution expert witnesses in criminal cases.²⁵⁵

²⁴⁹ *Id.*

²⁵⁰ 970 S.W.2d 549 (Tex. Crim. App. 1998).

²⁵¹ *Id.* at 561 (citing numerous federal cases in the court’s analysis).

²⁵² *Id.* The Court further explained: “These questions are merely an appropriately tailored translation of the *Kelly* test to areas outside of hard science. And, hard science methods of validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences.” *Id.*

²⁵³ See *Green v. Tex. Workers’ Comp. Ins. Facility*, 993 S.W.2d 839 (Tex. App. 1999) (concluding that evidence of fact learned in capacity as treating doctor should have been admitted, even if proper to exclude causation testimony of doctor); *Harris v. Belue*, 974 S.W.2d 386 (Tex. App. 1998) (holding the *Robinson* test factors inapplicable to the logical deduction employed by the medical expert witnesses, and further inapplicable because objection to the reliability of the proffered testimony did not come until after the case had rested, which did not allow the trial court’s discretion as a “gatekeeper”); *Frohne v. State*, 928 S.W.2d 570 (Tex. App. 1996) (deciding inapplicability of *Kelly* in light of the expert testimony was not based on a novel scientific test or theory, but on her consultations).

²⁵⁴ See *Rousseau v. State*, 171 S.W. 3d 871 (Tex. Crim. App. 2005); *Roberts v. State*, 220 S.W. 3d 521, 529-30 (Tex. Crim. App. 2007). See also *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 579-80 (Tex. 2006) and *Walker v. Thomasson Lumber Co.*, 203 S.W.3d 470 (Tex. App. 2006) (concluding that the non-exclusive list of six *Robinson* test factors should be utilized when determining the reliability of an expert witness involving scientific knowledge); *Doyle Wilson Homebuilder, Inc. v. Pickens*, 996 S.W.2d 387 (Tex. App. 1999) (utilizing the “reliability” and “relevancy” requirements of *Robinson* to determine the scientific reliability of the plaintiff’s expert witness testimony); *Weathered v. State*, 15 S.W.3d 540, 542-43 (Tex. Crim. App. 2000) (finding psychologist’s testimony on reliability of eyewitness identifications excludable where defendant failed to show that said proffered expert testimony was scientifically reliable).

²⁵⁵ *Berger*, *supra* note 234 at S63.

Arguably, the decade of the 90s forced judges to be more cautious and guarded to prevent unreliable testimony from slipping through the gates. But in Texas, despite this safety net, unreliable predictions of future dangerousness continued undeterred. This begs many questions, but one interesting theory posited by a recent study is that when a judge gives the green light to expert testimony, even unreliable and junk science is “imbue[d] ... with underserved credibility” in the eyes of the jury, tipping the scale in favor of the party offering the evidence.²⁵⁶ This theory is amply supported by the litany of cases that follow.

D. POST-GRIGSON PREDICTIONS OF FUTURE DANGEROUSNESS – ARE THE GATEKEEPERS EFFECTIVELY GUARDING THE GATES OF ADMISSIBILITY?

In 1994, Miguel Angel Flores was convicted of capital murder and sentenced to death.²⁵⁷ In this case, Dr. Clay Griffith offered his expert opinion on Flores’s future dangerousness without examining Flores or his psychiatric records.²⁵⁸ As Dr. Grigson before him, Griffith based his conclusion on the facts of the case and Flores’s conduct during trial. In his concurrence, Judge Emilio Garza made some scathing observations regarding this type of “expert” testimony:

Such testimony lacking objective scientific testing or personal examination defies scientific rigor and cannot be described as expert testimony. It is simply subjective testimony without any scientific validity by one who holds a medical degree. Given the paucity, indeed

²⁵⁶ N. J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges’ Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 PSYCHOL. PUB. POL’Y & L. 1, 1, 13 (2009) (“Ironically, a landmark Supreme Court decision motivated in large part by a desire to shield jurors from “junk science” could serve to heighten the impact of false or misleading scientific evidence when judges allow it through the courtroom gates. If a judge’s decision to admit evidence endows that evidence with additional weight, and if that phenomenon is exacerbated by a *Daubert* ethos, then the burden on judges to make the correct gatekeeping decision is that much greater.”).

²⁵⁷ *Flores v. Johnson*, 210 F.3d 456 (5th Cir. 2000).

²⁵⁸ *Id.* at 458. At the time of *Flores*, Dr. Griffith had examined over 8,000 people charged with criminal offenses and had testified in at least 146 capital murder trials. *Id.* at 462. In a footnote Judge Garza noted as follows:

A brief search of the cases reveals that, in those cases which have produced published opinions, Dr. Griffith has testified “yes” to the second special issue on twenty-two occasions, and “no” on zero occasions. See *Miller v. Johnson*, 200 F.3d 274, 287 (5th Cir.2000); *Barber v. Johnson*, 145 F.3d 234, 235 & n.9 (5th Cir.1998); *Moody v. Johnson*, 139 F.3d 477, 484 (5th Cir.1998); *Ex Parte Gardner*, 959 S.W.2d 189, 190 (Tex.Crim.App.1996); *Massey v. State*, 933 S.W.2d 141, 156 (Tex.Crim.App.1996); *Soria v. State*, 933 S.W.2d 46, 52 (Tex.Crim.App.1996); *Purtell v. State*, 761 S.W.2d 360, 373, *reh’g granted* 1994 WL 18209, *appeal after new trial* 910 S.W.2d 145, 146 (Tex.App.Eastland 1995, *pet. ref’d*); *Clark v. State*, 881 S.W.2d 682, 697 (Tex.Crim.App.1994) (en banc); *Ex Parte Barber*, 879 S.W.2d 889, 891 (Tex.Crim.App.1994) (en banc); *McBride v. State*, 862 S.W.2d 600, 607 (Tex.Crim.App.1993) (en banc); *Joiner v. State*, 825 S.W.2d 701, 707 (Tex.Crim.App.1992) (en banc); *Spence v. State*, 795 S.W.2d 743, 762 (Tex.Crim.App.1990) (en banc); *Beathard v. State*, 767 S.W.2d 423, 435 (Tex.Crim.App.1989) (en banc); *Fearance v. State*, 771 S.W.2d 486, 512 (Tex.Crim.App.1988) (en banc); *Holland v. State*, 761 S.W.2d 307, 323 (Tex.Crim.App.1988); *Pyles v. State*, 755 S.W.2d 98, 118 (Tex.Crim.App.1988) (en banc); *Gardner v. State*, 733 S.W.2d 195, 198 (Tex.Crim.App.1987) (en banc); *Mays v. State*, 726 S.W.2d 937, 950 (Tex.Crim.App.1986) (en banc); *Nethery v. State*, 692 S.W.2d 686, 709 (Tex.Crim.App.1985) (en banc); *Smith v. State*, 683 S.W.2d 393, 408 (Tex.Crim.App.1984) (en banc); *Holloway v. State*, 691 S.W.2d 608, 616 (Tex.Crim.App.1984) (en banc), *vacated* 475 U.S. 1105, 106 S.Ct. 1508, 89 L.Ed.2d 908 (1986); *Ex Parte Padgett*, 673 S.W.2d 303, 308 (Tex.App.Dallas 1984), *aff’d* 717 S.W.2d 55 (Tex.Crim.App.1986).

Id. at 462 n.6.

the complete lack of mitigating evidence presented in this case, Dr. Griffith's testimony virtually compelled the jury's answer to the second special issue. In short, the truly troubling facet of this case is the sole evidence upon which the jury found Flores to be a future danger: the testimony of a doctor who had never met the defendant.²⁵⁹ ... The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific. It is as true today as it was in 1983 that '[n]either the Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of future dangerousness are wrong more often than they are right.' ... As those in the field have often noted, nothing within the training of a psychiatrist makes him or her particularly able to predict whether a particular individual will be a continuing threat to society. ... The inadequacy of the science underlying Dr. Griffith's testimony becomes strikingly apparent when considered relative to scientific evidence generally admissible at trial.²⁶⁰

In the last decades, Texas's predictions of future dangerousness and its parameters have evolved but not shifted. In fact, in a recent appeal, a death row defendant argued in his appellate brief that the use of psychological testimony by the State demonstrated that "a so-called expert can be found to say anything."²⁶¹ The brief referred to the State's mental health witness as having "no question at all about his godlike ability to see into the future and to see into another's soul."²⁶² The brief referred to him as the "new Doctor Death, one who can determine the future with absolute accuracy, even without testing and without considering Robert's behavior when incarcerated."²⁶³

Perhaps the most notorious forensic psychiatrist of the last two decades is Dr. Richard E. Coons who in 2008 testified that he had practiced forensic psychiatry for thirty-one years, evaluated the competence or sanity of between 8,000 to 10,000 people, performed 150 "future dangerousness" evaluations, and testified in fifty trials as an expert.²⁶⁴ Dr. Coons testified in the 2008 retrial of Billie Wayne Coble, where a unanimous Court of Criminal Appeals was finally forced to admit that his testimony was inadmissible because it failed to meet the requirements of Rule 702 and the scientific admissibility criteria established in landmark cases, such as *Daubert*, *Kelly*, and *Nenno*.²⁶⁵ However, to fully understand the lethal consequences of future dangerousness as it intersects with junk science and poor judicial gatekeeping, a quick plunge through the rabbit hole of the Court of Criminal Appeals' capital opinions leading to *Coble* is imperative.

E. DEATH AND THE EXPERT WITNESS: DR. RICHARD E. COONS'S WINDING ROAD TO COBLE

²⁵⁹ *Id.* at 458.

²⁶⁰ *Id.* at 463-64.

²⁶¹ Brief for Appellant at 19, *Roberts v. State*, 220 S.W.3d 521 (Tex. Crim. App. 2007) (No. 75.051), 2006 WL 3751270 at *19.

²⁶² *Id.* at *20.

²⁶³ *Id.* at *27.

²⁶⁴ *Coble v. State*, 330 S.W.3d 253, 270 (Tex. Crim. App. 2010).

²⁶⁵ *Id.* at 277-80.

In 1978, David Lee Powell was charged with capital murder and sentenced to death.²⁶⁶ Dr. Richard E. Coons was appointed by the court to examine David Lee Powell to establish his competency to stand trial and sanity at the time the crime was committed.²⁶⁷ After meeting with Mr. Powell on four different occasions, Dr. Coons testified at trial that “there was no indication that appellant had been insane” on the date of the offense. Dr. Coons “specifically disclaimed having observed any evidence that appellant was suffering from paranoid schizophrenia.”²⁶⁸ Over defendant’s objection, Dr. Coons then testified at the punishment hearing that in his opinion there was a “high” probability that Powell “would commit future acts of violence that would constitute a continuing threat to society.”²⁶⁹ Relying on the Supreme Court’s ruling on *Estelle v. Smith*,²⁷⁰ Powell appealed, but the Texas Court of Criminal Appeals affirmed his death sentence. The court distinguished *Smith* by holding that Powell had waived his Fifth and Sixth Amendment rights because he introduced the testimony on the issue of insanity at the guilt-innocence stage of the trial.²⁷¹ In 1989,²⁷² reviewing the *Powell* case for a second time,²⁷³ the United States Supreme Court again reversed the judgment of the Court of Criminal Appeals, holding that its decision was inconsistent with the Supreme Court’s rulings in *Satterwhite*²⁷⁴ and *Estelle v. Smith*.²⁷⁵

In deciding that petitioner waived his right to object to the Coons and Parker testimony, the Court of Criminal Appeals in its initial opinion concentrated almost exclusively on petitioner’s Fifth Amendment claim to the exclusion of his separate contention that counsel should have been informed that he was to be examined on the issue of future dangerousness. Moreover, even after we remanded for further consideration in light of *Satterwhite*, a case that was premised exclusively on the Sixth Amendment, the Court failed to give any further attention to the Sixth Amendment claim. Because the evidence of future dangerousness was taken in deprivation of petitioner’s right to the assistance of counsel, and because there is no basis for concluding that petitioner waived his Sixth Amendment rights, we now hold that *Smith* and *Satterwhite* control and, accordingly, reverse the judgment of the Court of Criminal Appeals.²⁷⁶

²⁶⁶ *Powell v. State*, 742 S.W.2d 353, 354 (Tex. Crim. App. 1987).

²⁶⁷ *Id.* at 355.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 356.

²⁷⁰ *Estelle v. Smith*, 451 U.S. 454 (1981).

²⁷¹ *Powell*, 742 S.W.2d at 357. The Court relied on a loose reading of *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981), which Judge Onion in dissent aptly refuted through his own analysis of *Estelle v. Smith*. *Id.* at 361 (Onion, J., dissenting).

²⁷² *Powell v. Texas*, 492 U.S. 680 (1989).

²⁷³ After the Texas Court of Criminal Appeals affirmed his conviction and death sentence in 1989, Powell filed a petition for writ of certiorari. The United States Supreme Court vacated and remanded the case for further consideration. *Powell v. Texas*, 487 U.S. 1230 (1988). On remand, the Texas Court of Criminal Appeals again reaffirmed Powell’s death sentence. *Powell v. State*, 767 S.W.2d 759 (1989).

²⁷⁴ *Satterwhite v. Texas*, 486 U.S. 249 (1988).

²⁷⁵ *Estelle*, 251 U.S. at 454.

²⁷⁶ *Powell*, 492 U.S. at 686.

In 1991, Texas retried Powell, and Dr. Coons testified again.²⁷⁷ The defendant was once again convicted and sentenced to death a second time. The Court of Criminal Appeals affirmed the conviction in 1994.²⁷⁸ David Lee Powell was executed on June 15, 2010.²⁷⁹

In 1992 Dr. Coons testified on the issue of future dangerousness for the state at the punishment phase of John Avalos Alba's capital trial.²⁸⁰ The prosecutor posed a lengthy hypothetical question and asked Dr. Coons to opine as to Alba's future dangerousness.²⁸¹ Before Dr. Coons responded, the defense objected and requested a voir dire hearing pursuant to Texas Rule of Crim. Evid. 705(b).²⁸² The trial court refused to hold the hearing and Dr. Coons testified.²⁸³ Alba was convicted and sentenced to death.²⁸⁴ In 1995, on appeal, Alba argued that the trial court erred in denying him the opportunity to conduct a voir dire examination of Dr. Coons outside the presence of the jury, as provided by 705(b).²⁸⁵ The Texas Court of Criminal Appeals affirmed the conviction and death sentence holding that, notwithstanding the mandatory nature of the rule, the trial court did not err in denying the voir dire hearing because the hypothetical question satisfied the purpose of the rule by putting before the jury the facts and data upon which Dr. Coons opined.²⁸⁶ Both Judge Baird and Judge Clinton took issue with the plurality's cavalier reading of the statute.²⁸⁷ Judge Clinton's dissent went much further, chastising the plurality not only for its flawed analysis, but its dismissive holding that even if the trial court's denial was an error, it was harmless.²⁸⁸ Judge Clinton's dissent echoed his dissent in *Flores*²⁸⁹ where he questioned the admissibility of future dangerousness. Here, he stated that the court's denial of voir dire was particularly egregious given the nature of future dangerousness:

But just because the law tolerates admission of expert testimony of the kind at issue here does not mean appellant should not be permitted, as part of the discovery that Rule 705(b) contemplates, to adduce not just the factual, but also the psychiatric, basis for the expert's opinion. Under 705(b) an opponent of psychiatric expert testimony ought to be allowed

²⁷⁷ *Powell v. State*, 897 S.W.2d 309 (1994). Appellant argued that the trial court violated Texas law by appointing Dr. Coons to examine him, even though Dr. Coons had testified at this trial fourteen years earlier. "At a pretrial hearing, appellant asserted that Coons was not a disinterested party because he had testified at appellant's first trial. The trial judge declined to appoint another psychiatrist and ordered counsel not to interfere with Coon's examination." *Id.* at 314. The Court of Criminal Appeals held that "the fact that Coons testified against appellant fourteen years ago does not alone establish that he was or is biased against appellant. Some evidence of bias is required." *Id.*

²⁷⁸ *Id.* at 309. Although the death sentence was vacated in 1994, on March 6, 1999, after a third punishment trial, Powell was again sentenced to death. *Powell v. Quarterman*, 536 F.3d 325, 326 (5th Cir. 2008).

²⁷⁹ TEX. DEP'T CRIM. JUST., *supra* note 44.

²⁸⁰ *Alba v. State*, 905 S.W.2d 581, 588 (Tex. Crim. App. 1995).

²⁸¹ *Id.*

²⁸² *Id.* The Texas Rules of Evidence provided as follows: "Voir Dire. Prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury." TEX. R. EVID. 705(b).

²⁸³ *Alba*, 905 S.W.2d at 588.

²⁸⁴ *Id.* at 583.

²⁸⁵ *Id.* at 588.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 590 (Baird, J., concurring); *Id.* at 591 (Clinton, J., dissenting).

²⁸⁸ *Id.* at 591 (Clinton, J., dissenting).

²⁸⁹ *Flores v. State*, 871 S.W.2d 714, 724 (Tex. Crim. App. 1993) (Clinton, J., dissenting); *See also supra* notes 257-60 (discussing the federal opinion in the *Flores* case).

to inquire precisely what it is about an accused's past conduct that would lead a forensic psychiatrist to conclude he will continue to commit violent acts in the future.²⁹⁰

Although Alba's death sentence was later vacated by the 5th Circuit in 2000²⁹¹ due to Walter Quijano's racially-charged testimony,²⁹² he was tried a second time on punishment in 2003, and again, was sentenced to death. After a number of unsuccessful appeals,²⁹³ John Avalos Alba was executed on May 25, 2010.²⁹⁴

In 1993, Dr. Coons testified in the capital murder trial of Edward Louis Lagrone, who was convicted and sentenced to death.²⁹⁵ In his 1997 appeal, Lagrone challenged Dr. Coons's testimony on future dangerousness in a prison context. A unanimous court found the challenge "untenable."²⁹⁶ Affirming the conviction, the Court held that:

the trial court was able to rely on Dr. Coons' [sic] professional qualifications—Dr. Coons is a medical doctor specializing in psychiatry who has a law degree and extensive professional experience as an expert witness in both capital and non-capital cases—to justify the admission of the contested future dangerousness testimony. These qualifications provided the trial court with a more than adequate basis for admitting Dr. Coons' [sic] testimony.²⁹⁷

Edward Louis Lagrone was executed on February 11, 2004.²⁹⁸

In 1998, Dr. Coons testified in the punishment phase of the capital murder trial of Brittany Marlowe Holberg. Dr. Coons testified that, based on her record, there was a "significant probability that [she] would commit criminal acts of violence in the future."²⁹⁹ Although Holberg raised fifty points of error in her 2000 appeal, she did not challenge Dr. Coons's qualifications as an expert. Instead, Holberg argued that there was insufficient evidence to support the jury's affirmative finding to the punishment issue regarding her future dangerousness.³⁰⁰ Dr. Coons's evidence in support of a "yes" finding on the issue of future dangerousness contributed to the court finding that the evidence, taken as a whole, was sufficient to support the jury's finding of future dangerousness.³⁰¹

²⁹⁰ *Alba*, 905 S.W.2d at 592 (Clinton, J., dissenting).

²⁹¹ *Alba v. Johnson*, 232 F.3d 208 (5th Cir. 2000).

²⁹² *Id.* at 208. On June 9, 2000, Attorney General John Cornyn identified the Alba case as one of Quijano's tainted cases: "After a thorough audit of cases in our office, we have identified eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in determination about the sentence in a capital murder trial." *Office of the Attorney General News Release Archive*, TEX. ATT'Y GEN., <https://www.texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609death.htm> (last visited June 5, 2014).

²⁹³ *See, e.g., Ex parte Alba*, 256 S.W.3d 682 (Tex. Crim. App. 2008).

²⁹⁴ TEX. DEP'T CRIM. JUST., *supra* note 44.

²⁹⁵ *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997).

²⁹⁶ *Id.* at 616.

²⁹⁷ *Id.*

²⁹⁸ TEX. DEP'T CRIM. JUST., *supra* note 44.

²⁹⁹ *Holberg v. State*, 38 S.W.3d 137, 139 (Tex. Crim. App. 2000).

³⁰⁰ *Id.*

³⁰¹ *Id.*

The composition of the Texas Court of Criminal Appeals has remained relatively stable over the last few years, which raises the question: what happened in the Court in ensuing years which caused at least five justices to rule that Dr. Coons's testimony is unreliable? Despite the APA's scathing rebuke of Dr. Grigson's unscientific predictions in its 1982 amicus curiae brief, widespread judicial efforts to curtail "junk science" in the courtroom have proven fruitless. Even after Texas's embarrassing debacle with Dr. Quijano's racially-charged predictions, Dr. Coons's dubious methodology reigned supreme and unchanged for at least three decades. Part of the explanation may lie with the Court itself, which has earned scathing criticism; one 1998 case was so unfairly decided that one of its own justices said it made the court a "national laughingstock."³⁰² Referring to the same case, a Texas journalist reported how the national media characterized our highest court of criminal appeals:

The CCA, the national media reported, was a powerful group of nine conservative Republicans. Though they were public officials, elected in staggered six-year terms, theirs was a "stealth court," shrouded in secrecy, whose sometimes outrageous decisions often came with no explanation. The court handled only criminal appeals (the Texas Supreme Court took care of civil matters), and the judges were mostly ex-prosecutors whose main goal seemed to be to satisfy the state's appetite for execution; the court reversed only 3 percent of the death penalty convictions that came before it, less than any other state high court. It even had a group of staff lawyers called the Death Squad who worked on nothing but death penalty cases.³⁰³

Arguably, this may not be an accurate description of the current court. Still, what the following Texas Court of Criminal opinions reveal is disturbing on many levels: at best, sheer inattentiveness to capital cases by members of the Court; at worst, a total disregard for precedent. This indifference resulting in unexplainable judicial contradictions highlights Texas's endemic fault lines leading directly to the death chamber.

PART IV. THE FUTILITY OF APPELLATE REVIEW: THE ROAD TO *COBLE* RIDDLED WITH JUDICIAL CONTRADICTION

In 2004, when George Rivas appealed his death sentence to the Court of Criminal Appeals, the Court was composed of Presiding Judge, Sharon Keller, and Associate Judges Johnson, Price, Womack, Keasler, Hervey, Holcomb, Cochran, and Meyers.³⁰⁴ Rivas argued that Dr. Coons's predictions of future dangerousness in the punishment stage of his 2001 capital case was inadmissible under Texas Rule of Evidence 702 because it did not meet the requirements for scientific reliability established in *Kelly v. State* and *Nenno v. State*.³⁰⁵ Dr. Coons based his opinion on Rivas's future dangerousness on statements

³⁰² Michael Hall, *And Justice for Some*, TEX. MONTHLY (November 2004), <http://www.texasmonthly.com/story/and-justice-some> ("For a long time the court was ridiculed for its tolerance of careless trial attorneys, such as the infamous cases in which it upheld death sentences even though the attorneys were known to have fallen asleep during trial. Horror stories such as these led the legislature in 2001 to pass the Fair Defense Act, setting standards for court-appointed trial lawyers and procedures for appointing them.").

³⁰³ *Id.*

³⁰⁴ *Rivas v. State*, No. 74,143 (Tex. Crim. App. June 23, 2004) (unpublished).

³⁰⁵ *Id.* See generally *supra* notes 243-49 (discussing *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)); *supra* notes 250-52 (discussing *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998)).

made by Rivas, police and autopsy reports, witness statements, and psychiatric evaluations previously conducted by other psychiatrists who examined Rivas.³⁰⁶ In response to a question posed by the defense outside the hearing of the jury, Dr. Coons testified:

(1) that he himself had not examined appellant, (2) that he had not consulted with other experts in the field regarding his opinion, (3) that he was unaware of any literature or studies regarding predictions of future dangerousness in capital cases, and (4) that he himself had never performed any follow-up study to determine the accuracy of his own predictions, and thus did not know the rate of error.³⁰⁷

The defense objected to the admissibility of Dr. Coons's testimony, but the State argued that Dr. Coons, who had testified in similar capital cases, was qualified to offer his opinion.³⁰⁸ Dr. Coons told the jury that he had "extensive qualifications as a practicing psychiatrist," and that he had "evaluated thousands of criminal defendants for issues such as competency to stand trial, sanity at the time of the offense, and the risk of future dangerousness."³⁰⁹ His criteria in making future dangerousness assessments, he told the jury relied on several factors:

First, he determined whether the defendant had an 'active mental illness.' He looked at the defendant's history of violence, his attitude about violence, and at the facts of the offense in question. Then he looked at the defendant's personality and behavior patterns during his life so far. He considered whether the defendant appeared to have a conscience to help him control his behavior. And lastly, he looked at the future society of the defendant (i.e., whether that person would be on death row or in general population).³¹⁰

Based on a lengthy hypothetical posed by the prosecutor grounded on facts established in Rivas's trial, Dr. Coons opined "that the person described in the hypothetical would probably commit criminal acts of violence in the future, which would constitute a continuing threat to society."³¹¹

The Court of Criminal Appeals acknowledged the *Nenno* and *Kelly* factors and recognized that "the proponent of scientific evidence bears the burden of showing that the proffered evidence is relevant and reliable."³¹² However, the court stated that the "trial court's acceptance of the reliability of psychiatric testimony on this subject without requiring the state to present extrinsic evidence of that reliability is not unusual."³¹³ It further stated that the U.S. Supreme Court in *Barefoot* held such evidence not to be *per se* inadmissible. Further, since that time predictions of future dangerousness had been widely used in the Court of Criminal Appeals.³¹⁴ The Court compared the holding in *Barefoot*, stating that Dr. Coons's testimony was much more restrained than Dr. Grigson's 100%

³⁰⁶ *Rivas*, No. 74,143.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* (citing *Weathered v. State*, 15 S.W.3d, 540, 542 (Tex. Crim. App. 2000)).

³¹³ *Id.*

³¹⁴ *Id.*

certainty predictions. Further the court stated that Dr. Coons's statements "regarding an individual's propensity to commit violent acts in the future were based on common-sense principles (for example, individuals with a long history of violence tend to continue to commit acts of violence)."³¹⁵ Accordingly, a unanimous court overruled Rivas's points of error, and affirmed the trial court's judgment.³¹⁶ George Rivas was executed on February 29, 2012.³¹⁷

Just two years later, however, Judge Womack who had no quarrel with the validity of future dangerousness testimony in *Rivas*, filed a dissenting opinion in Raphael Deon Holiday's appeal.³¹⁸ In *Holiday*, the forensic psychiatrist who testified as to Holiday's future dangerousness, was not Dr. Coons, but Dr. Edward B. Gripon. Dr. Gripon, on cross exam, explained that he based his predictions on the "clinical/demographic approach"—which looks at the presence of mental illness and accounts for other factors, such as education level, family support, and age.³¹⁹ Dr. Gripon stated "that most actuarial studies show that most people fall below the probability of being a future danger."³²⁰ "He agreed that the position of the American Psychiatric Association was that psychiatrists are not better qualified than anyone else to make predictions about future danger in capital cases."³²¹ "Gripon stated that he had not done any studies to determine if his predictions were reliable because 'it is proven to be impossible to date to do any kind of study that will either validate or invalidate that issue.'"³²²

In overruling Holiday's point of error, Judges Keasler, Keller, Meyers, Price, Hervey, Holcomb, Cochran, and Johnson held that:

the trial court was within the zone of reasonable disagreement in holding that the State had met its burden of establishing Gripon's qualifications and the reliability of his testimony. As a board certified psychiatrist with years of experience and specializing in forensic psychology, Gripon was shown to be qualified. While making predictions of future behavior is controversial among psychiatrists, forensic psychiatry is a legitimate and recognized field by the American Psychiatric Association. Gripon testified that his method of assessing future-dangerousness was considered valid³²³

Judge Womack's dissenting opinion took no issue with forensic psychiatry as a recognized field of medicine or with Dr. Gripon as an experienced practitioner, but he made a frontal challenge to the validity of dangerousness predictions.³²⁴ Citing to Dr. Gripon's own statement regarding the impossibility of validating the reliability of future

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ TEX. DEP'T CRIM. JUST., *supra* note 44.

³¹⁸ *Holiday v. State*, Nos. AP-74446, AP-74447, AP-74448, 2006 WL 288661, at *1 (Tex. Crim. App. Feb. 8, 2006) (Womack, J., dissenting).

³¹⁹ *Holiday v. State*, Nos. AP-74,446, AP-74,447, AP-74,448, (Tex. Crim. App. Feb. 8, 2006) (unpublished).

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Holiday v. State*, Nos. AP-74446, 2006 WL 288661, at *1 (Tex. Crim. App. Feb. 8, 2006) (Womack, J., dissenting).

dangerousness, he stated: “If it cannot be validated, it’s not science. Not even soft science. It may be soft, as many things are, but it’s not science.”³²⁵

Judge Womack’s dissent unambiguously stated that while he would allow “Dr. Gripon’s opinions on medical or psychiatric issues—diagnoses or treatments that have been validated,” he would exclude his testimony on future dangerousness because “predicting dangerousness is not medicine or psychiatry.”³²⁶ Then, he acknowledged that though the Court has received this testimony in a number of death penalty cases, (citing to Court of Criminal Appeals decisions between 1978 and 1991), he argued these opinions were rendered before “[*Kelly*] led the way in raising the requirements for the admission of expert opinion.”³²⁷ Today, he stated, these so called “experts” would not pass muster and should be excluded.³²⁸ Forcefully, he added: “When he [Dr. Gripon] said his predictions were immune from being proved right or wrong, he should have been shown to a seat next to the others whose ‘expert’ opinions have been admitted in the past, but should be excluded today.”³²⁹ Yet, that was the precise challenge made by Rivas in 2004 when he argued that Dr. Coons’s testimony “was inadmissible under Texas Rule of Evidence 702 because it failed to meet the requirements for scientific reliability, as defined in [*Kelly* and *Nenno*].”³³⁰ Furthermore, while the *Rivas* Court spent a great deal of time discussing both the *Kelly* and *Nenno* factors, Judge Womack sided with the majority and expressed no concerns regarding the validity of predictions of future dangerousness.³³¹

Holiday was decided on February 8, 2006.³³² Just four months later, on June 28, the Court rendered its opinion in the capital murder appeal of Guy Len Allen, who made a very similar challenge to Dr. Coons’s testimony based on the *Kelly* factors.³³³ While the Court overruled the points of error and affirmed the death sentence,³³⁴ Judge Womack authored a short, but forceful concurrence, joined by Judges Meyers, Johnson, and Cochran, which suggests that only two months later, members of the Court that affirmed *Holiday*’s sentence, suddenly took notice of the concerns regarding the validity of future dangerousness predictions.³³⁵ In *Allen*, Judge Womack simply asked:

How have earlier predictions turned out? ... Why doesn’t somebody ask an expert witness, has he (or any other “expert”) bothered to look at the records? If he has, how did the predictions turn out? If no one has looked, why not? Isn’t science the careful and systematic study of observations, and tests of the conclusions that are based on the observations?³³⁶

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Rivas v. State*, No. 74,143 (Tex. Crim. App. June 23, 2004) (unpublished).

³³¹ *Id.*

³³² *Holiday v. State*, Nos. AP-74,446, AP-74,447, AP-74,448 (Tex. Crim. App. Feb. 8, 2006) (unpublished).

³³³ *Allen v. State*, No. AP-74951, 2006 WL 1751227, at *5 (Tex. Crim. App. June 28, 2006).

³³⁴ *Id.* at *1.

³³⁵ *Id.* at *7 (Womack, J., concurring).

³³⁶ *Id.* at *7-8.

In a concurrence reminiscent of Judges Odom and Robert's dissent in *Jurek* thirty-one years earlier,³³⁷ Judge Johnson filed a concurrence joined by Judge Price that highlighted the "difficulty with asking witnesses to testify about the probability that a given defendant will be a danger in the future."³³⁸

If we want to know the probability that an individual will engage in a certain behavior within a given time frame, the only probability that can be accurately and truthfully stated must assume a person who is *like* the members of the reference group on which the estimate of probability is based. By its very nature, probability cannot, and does not, exist based on one observation of a group of one, nor can it be used to predict the behavior of a given individual. It is misleading to purport to be able to state a probability that a given individual will act in a given way in the future.³³⁹

Then, referring to Dr. Grigson's prediction in *Barefoot*, she said: "Dr. Grigson may have been committing the common mistake of conflating probability and possibility. Probability does not exist without large numbers of observation of a defined reference group."³⁴⁰ Although four out of nine judges expressed reservations with Dr. Coons's testimony, none of these judges would have held the evidence inadmissible, and none voted to reverse the death sentence.³⁴¹

In 2008, just two years after the Court of Criminal Appeals decided *Allen*, Noah Espada challenged Dr. Coons's testimony in the punishment phase of his capital trial.³⁴² His arguments, in point of error two, echoed those made by many capital defendants before him that Dr. Coons's testimony did not satisfy Rule 702's requirement for admissibility.³⁴³ Specifically he argued that:

Coons: (1) 'never authored a paper on the subject of future dangerousness'; (2) 'had no 'hard core data' to support his opinion'; (3) had ... no research to confirm the error rate of his previous predictions of future dangerousness.' and (4) '[was][u]nable to cite any established body of scientific work on the prediction of future dangerousness.'³⁴⁴

Espada's arguments were based on a number of assertions made by Dr. Coons at a hearing outside the presence of the jury, where he testified, among other things that:

he did not know his rate of error, ... his opinion regarding a defendant's future dangerousness was ultimately based on his professional training and experience, ... his methodology was not based on any specific scientific study, ... [and] it is impossible to conduct accurate scientific

³³⁷ *Jurek v. State*, 552 S.W.2d 934, 945 (Tex. Crim. App. 1975) (Odom, J., dissenting) ("What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a 'probability' that he will perform certain acts in the future? Did it mean, as the words read, is there a probability, some probability, any probability?"); *See also supra* note 85.

³³⁸ *Allen v. State*, No. AP-74951, 2006 WL 1751227, at *8 (Tex. Crim. App. June 28, 2006).

³³⁹ *Id.*

³⁴⁰ *Id.* at *9 n.1.

³⁴¹ *Id.* at *7-8 (Womack, J., concurring); *Id.* at 8-9 (Johnson, J., concurring).

³⁴² *Espada v. State*, AP-75, 219, 2008 WL 4809235, at *8 (Tex. Crim. App. Nov. 5, 2008).

³⁴³ *Id.* at *8.

³⁴⁴ *Id.*

research regarding capital defendants' future dangerousness because such defendants 'go to death row'.³⁴⁵

In overruling the point of error and affirming his conviction and death sentence, the Court of Criminal Appeals citing to *Nenno* stated:

On this record, we discern no abuse of discretion on the part of the trial court in its admission of Coons's testimony. Given the arguments, information, and evidence before the trial court at the time it ruled, the trial court could have reasonably concluded that psychiatry was a legitimate field of expertise, that predicting future dangerousness was within the scope of psychiatry, and that Coons's testimony would properly rely upon the principles involved in psychiatry. Coons testified that he was an experienced psychiatrist, that psychiatrists are called upon to make predictions of future dangerousness "all the time," and that they do so utilizing such factors as he set forth. Appellant offered no evidence to rebut Coons's testimony. The fact that Coons did not know his rate of error is not dispositive. We overrule point of error two.³⁴⁶

Inexplicably, Judge Price, who just two years prior in *Allen*, had joined Judge Johnson in her concerns with the issue of "probability," joined the majority opinion here in finding no error in Dr. Coons's testimony.³⁴⁷ However, four judges did not join the majority in its opinion. Judges Meyers and Cochran, who had joined in Womack's concurrence in *Allen* asking the pivotal question: "How have the earlier predictions turned out?" concurred with the Court's result on point of error two, but did not join in the

³⁴⁵ *Id.* The full testimony before the jury was as follows:

(1) he was a board-certified psychiatrist with thirty-one years of experience in forensic psychiatry; (2) in the course of his career, he had "evaluated" more than 7,000 persons charged with crimes; (3) taking various factors into account, he could oftentimes formulate an opinion regarding a defendant's future dangerousness; (4) he did not know his rate of error; (5) his opinion regarding a defendant's future dangerousness was ultimately based on his professional training and experience; (6) among the factors he considered were the defendant's personality, the defendant's history of violence, the defendant's attitude toward violence, the nature of the crime in question, the defendant's "behavior patterns" during his lifetime, the defendant's physical abilities, whether the defendant has expressed remorse, whether the defendant has a conscience to help him control his behavior, and the defendant's probable future location (prison); (7) other professionals used the same factors in assessing future dangerousness; (8) his methodology was not based on any specific scientific study; (9) it is impossible to conduct accurate scientific research regarding capital defendants' future dangerousness because such defendants "go to death row"; (10) it is impossible to "get the same level of hard data reliability [about future dangerousness] that you can [get] in [the] hard sciences"; (11) he had attended many professional seminars concerning future dangerousness but had written no papers on that subject; (12) he had read much about, and had consulted many other professionals about, future dangerousness; (13) "psychiatrists are called upon to make judgments about people's [future] dangerousness all the time," e.g., before "commit[ting] somebody [involuntarily to a mental institution], we're asked to determine whether they're likely to be dangerous to themselves or others"; (14) psychiatrists "rely on history to make predictions about the future"; and (15) psychiatrists "can reach conclusions [about future dangerousness], and do [so] all the time, about people who are charged with crimes."

Id. at *9.

³⁴⁶ *Id.* (citation omitted).

³⁴⁷ *Id.* at *16.

Court's opinion on that point of error.³⁴⁸ On the other hand, Judge Womack filed a punchy dissenting opinion, which Judge Johnson joined.³⁴⁹

The Court's opinion says that the fact that the psychiatrist 'did not know his rate of error is not dispositive.'

The fact that there seems to be no evidence at all, anywhere, of the reliability of these predictions of future dangerousness should be dispositive. 'Now the ordinary rules of evidence require that evidence be reliable in order to be admissible. Reliability in the context of scientific evidence requires scientific validity. It is doubtful that testimony about future dangerousness could withstand *Daubert* analysis.' We apply that analysis to psychiatrists' and psychologists' predictions of future dangerousness.

The expert in this case said that the predictions could not be tested because the defendants "go to death row." First, not all of them do; some are sentenced to life in prison. Second, those who do go to death row spend years in prison before they are put to death. It wouldn't be very hard to research how many persons convicted of capital murder committed acts of violence after being sentenced. It must always be remembered that the capital murderer who is not sentenced to death will be sentenced to prison for life without parole. So the relevant question is whether they will commit violent acts in prison.

Our laws permit people with communicable diseases to be quarantined. The laws are based on scientific research that has shown that, without quarantining, the diseases will be spread. Before we accept an opinion that a capital murderer will be dangerous even in prison, there should be some research to show that this behavior can be predicted.³⁵⁰

But perhaps even more egregious and inexplicable than Judge Price's contradictory indifference to Dr. Coons's testimony in *Espada* is Judge Womack's position in *Ramey v. State*,³⁵¹ just three months after delivering his forceful dissent in *Espada*.

Ramey challenged Dr. Coons's testimony at the punishment phase of his trial on the grounds that his qualifications were insufficient to satisfy the *Daubert*, *Kelly*, and *Robinson* criteria for expert admissibility.³⁵² Judge Womack delivered the opinion for a unanimous court affirming Ramey's conviction and death sentence.³⁵³ In a brief, innocuous, and formulaic recitation of the facts and legal authorities, Judge Womack wrote:

The evidence was that Dr. Coons held both a law degree and a medical degree, served in the United States Army Medical Corps, and was a consultant for the Brook Army Medical Center. He was certified by the Board of Psychiatry and Neurology, trained in neurology and

³⁴⁸ *Id.* at *19.

³⁴⁹ *Id.* at *20 (Womack, J., dissenting).

³⁵⁰ *Id.* at *20 (citations omitted).

³⁵¹ *Ramey v. State*, No. AP-75678, 2009 WL 335276 (Tex. Crim. App. Feb. 11, 2009).

³⁵² *Id.* at *14.

³⁵³ *Id.* at *1.

psychiatry, and had been in private practice since 1975. Dr. Coons had evaluated approximately 8,000 people for competency to stand trial, and had consulted on 150 capital cases for either the prosecution or the defense.

In evaluating the appellant for the special issue on future dangerousness, Dr. Coons examined “twenty pounds of printed material and quite a number of CDs regarding statements” as well as offense reports, pictures, and educational records. While he did not personally interview the appellant, the Rules do not require an expert to complete personal interviews in order to make such determinations. Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

We find that the trial court did not abuse its discretion in finding Dr. Coons qualified as an expert witness with respect to future dangerousness.³⁵⁴

On the heels of Judge Womack’s impassioned dissent in *Espada*, the unanimous approval of Judges Meyers, Price, and Johnson evinces a disturbing lack of meaningful appellate review and an intolerable gross indifference in capital cases.

In 2010, the Court of Criminal Appeals ruled on *Coble v. State*, a case that has become a lightning rod for expert admissibility in Texas.³⁵⁵ Dr. Coons had testified as to Coble’s future dangerousness both at Coble’s 1990 trial, as well as his retrial in 2008, at which he testified that Coble “would still be a future danger even though [he] did not have a single disciplinary report for the eighteen years that he had been on death row.”³⁵⁶ Predictably, as other capital defendants before him, Coble argued that Dr. Coons’s testimony was inadmissible under Rule 702.³⁵⁷ Here, however, in sheer contrast with *Ramey*’s five paragraphs, the Court³⁵⁸ spent over twenty pages meticulously examining Dr. Coons’s methodology and thoughtfully exploring the evolution of expert admissibility since *Barefoot*. The court concluded “that the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons’s methodology for predicting future dangerousness by clear and convincing evidence during the *Daubert/Kelly* gatekeeping hearing in this particular case.”³⁵⁹

Notably, neither Dr. Coons’s testimony, nor Coble’s direct challenge were distinctively different from the previous capital cases where the Court summarily affirmed the death sentences. Which begs the question: what caused the Court to radically shift and pointedly ask: “the issue ... is whether [Dr. Coons’] future dangerousness testimony is

³⁵⁴ *Id.* at *14-15 (quoting TEX. R. EVID. 703).

³⁵⁵ *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010).

³⁵⁶ *Id.* at 264.

³⁵⁷ *Id.* at 270.

³⁵⁸ Three members of the Court, Presiding Judge Keller, and Associate Judges Meyers and Keasler did not concur in the Court’s opinion that Dr. Coons’ testimony was inadmissible. *Id.* at 300-01 (Keller, P.J., concurring).

³⁵⁹ *Id.* at 279 (majority opinion).

based upon the scientific principles of forensic psychiatry?”³⁶⁰ Suddenly, the same qualifications and methodology admissible by the Court in myriad cases since *Barefoot*, but most notably in 2009 in *Ramey*, were inexplicably inadmissible. Certainly, the arguments that caused the shift were neither novel nor new. Almost thirty years prior, the APA had offered uncontroverted reasons as to why these predictions were unreliable. Subsequently, appellants in countless capital cases had cited scientific studies corroborating the invalidity of future dangerousness since *Barefoot*—all of which fell upon deaf ears. This renders the *Coble* Court’s epiphany, regarding Dr. Coons’s methodology, hollow:

From this record, we cannot tell what principles of forensic psychiatry Dr. Coons might have relied upon because he cited no books, articles, journals, or even other forensic psychiatrists who practice in this area. There is no objective source material in this record to substantiate Dr. Coons’ methodology as one that is appropriate in the practice of forensic psychiatry. He asserted that his testimony properly relied upon and utilized the principles involved in the field of psychiatry, but this is simply the *ipse dixit* of the witness. Dr. Coons agreed that his methodology is idiosyncratic and one that he has developed and used on his own for the past twenty to thirty years. Although there is a significant body of literature concerning the empirical accuracy of clinical predictions versus actuarial and risk assessment predictions, Dr. Coons did not cite or rely upon any of these studies and was unfamiliar with the journal articles given to him by the prosecution.

Dr. Coons stated that he relies upon a specific set of factors: history of violence, attitude toward violence, the crime itself, personality and general behavior, conscience, and where the person will be (i.e., the free community, prison, or death row). These factors sound like common-sense ones that the jury would consider on its own, but are they ones that the forensic psychiatric community accepts as valid? Have these factors been empirically validated as appropriate ones by forensic psychiatrists? And have the predictions based upon those factors been verified as accurate over time? Some of Dr. Coons’ factors have great intuitive appeal to jurors and judges, but are they actually accurate predictors of future behavior? Dr. Coons forthrightly stated that “he does it his way” with his own methodology and has never gone back to see whether his prior predictions of future dangerousness have, in fact, been accurate. Although he had interviewed appellant before the first trial in 1990, Dr. Coons had lost his notes of that interview in a flood and apparently had no independent memory of that interview. He relied entirely upon the documentary materials given to him by the prosecution, including his 1989 report. Dr. Coons, therefore, did not perform any psychiatric assessment of appellant after his eighteen years of nonviolent behavior on death row, nor did he refer to any psychological testing that might have occurred in that time frame.³⁶¹

Relying on the precedent of *Barefoot*, the court rejected *Coble*’s argument that this type of testimony “fails to meet the heightened reliability requirement of the Eighth

³⁶⁰ *Id.* at 277.

³⁶¹ *Id.* at 277-79.

Amendment.”³⁶² Predictably, it held that the error in admitting Dr. Coons’s testimony did not affect Coble’s substantial rights to a fair sentencing trial, and it overruled Coble’s points of error, and affirmed the death sentence.³⁶³ Five members of the court—Judges Cochran, Price, Womack, and Johnson—who in *Allen* appeared to scrutinize Dr. Coons’s testimony under a more stringent standard—joined the majority. Judge Holcomb changed his view from *Allen* to *Coble*, as did Judge Meyers. Judge Meyers, who had previously joined Judge Womack in questioning Dr. Coons’s testimony in *Allen*, and who had previously refused to join the Court on this issue in *Espada*, joined Presiding Judge Keller and Judge Keasler’s concurrence. Here, they argued the trial court did not err in admitting Dr. Coons’s testimony because his testimony shows that:

[F]orensic psychiatry is a legitimate field, that predicting future dangerousness is within the scope of that field, and that using education and experience to assess future dangerousness is a proper application of the principles involved in the field. Notably, appellant has presented no evidence to the contrary. The Court faults Dr. Coons for failing to cite “books, articles, journals, or even other forensic psychiatrists who practice in this area” to substantiate his methodology, while acknowledging that Dr. Coons is “a genuine forensic psychiatrist with a lengthy medical career.” But appellant did not introduce any “books, articles, journals, or even other forensic psychiatrists” to testify that, contrary to Dr. Coons’ testimony, Dr. Coons’ experience-based method of evaluating future dangerousness is inappropriate.³⁶⁴

In the last two months of 2011, following *Coble*, the Court ruled in three additional cases where Dr. Coons testified: *Gobert*,³⁶⁵ *Devoe*,³⁶⁶ and *Brewer*.³⁶⁷ In each case, a unanimous Court affirmed the convictions and death sentences. In *Gobert*, the Court was forced to acknowledge that Dr. Coons’s testimony was inadmissible, but it concluded that given “appellant’s life-long penchant for violence,”³⁶⁸ and other factual circumstances, Dr. Coons’s testimony was harmless.³⁶⁹

In *Devoe*, the appellant argued that the evidence at the punishment stage of the trial was insufficient to prove his future dangerousness beyond a reasonable doubt. His argument focused on the weight that the Court should give to his “pristine” behavioral record while incarcerated.³⁷⁰ Citing to the *Keeton* factors,³⁷¹ the court examined the facts of the case and the testimony at the penalty phase, and stated that “while good behavior in prison is a factor to consider, it did not preclude a finding of future dangerousness.”³⁷² The court concluded “that there was sufficient evidence to support the jury’s affirmative

³⁶² *Id.* at 270.

³⁶³ *Id.* at 287.

³⁶⁴ *Id.* at 300 (Keller, J., concurring).

³⁶⁵ *Gobert v. State*, No. AP-76345, 2011 WL 5881601 (Tex. Crim. App. Nov. 23, 2011).

³⁶⁶ *Devoe v. State*, 354 S.W.3d 457 (Tex. Crim. App. 2011).

³⁶⁷ *Brewer v. State*, No. AP-76378, 2011 WL 5881612 (Tex. Crim. App. Nov. 23, 2011).

³⁶⁸ *Gobert*, 2011 WL 5881601, at *7.

³⁶⁹ *Id.*

³⁷⁰ *Devoe*, 354 S.W.3d at 461.

³⁷¹ *Id.* at 461-62.

³⁷² *Id.* at 468.

finding on the future dangerousness issue, and we defer to the jury's conclusion that the mitigating evidence was not sufficient to warrant a sentence of life imprisonment."³⁷³

In *Brewer*, decided the same date as *Gobert*, the Court found that appellant failed to preserve error for appeal.³⁷⁴ However, the arguments for non-preservation are surprisingly unpersuasive in light of the facts. At trial, appellant filed a motion which, although he titled motion in limine, explicitly asked that such expert predictions be excluded since they "do not meet the standards for reliability articulated in the rules of evidence or the common law."³⁷⁵ The motion specifically stated:

Such predictions are unreliable due to (a) their overwhelming rate of error; (b) their lack of acceptance in the relevant scientific community, (c) the inconsistent, ad hoc and standardless manner in which they are formed, (d) the absence of a proper and adequately reliable data source upon which to base them. Any testimony the State seeks to admit incorporating such predictions does not satisfy the reliability requirements of Tex. R. Evid. 702, and must be excluded.³⁷⁶

The trial court denied the motion, but at trial when the State sought to present the testimony of Dr. Coons, the defense asked for a Tex. R. Evid. 702 and 705 hearing, which the court granted.³⁷⁷ At this *Daubert* hearing, Dr. Coons testified, among other things, that he "believes his assessments can be made without examining the prisoner, if enough data can be gleaned from sources. He did not know, though, if any specific standards on predictions of future dangerousness had been generally accepted by the scientific community."³⁷⁸ On cross, "he stated that he did not know the error rate on his style of risk assessments, but in any event he finds the literature on this topic almost meaningless due to poor data on the 'huge amount' of unreported prison violence."³⁷⁹ The trial judge stated: "I'm going to hold that Dr. Coons is qualified and that the field –the psychiatric field of future dangerousness is a valid scientific theory and that – that the technique he used to apply it was valid, and that it was applied validly here in this *Brewer* case."³⁸⁰

The Court held that the record was insufficient to show that the trial judge understood the motion to be a *Daubert* motion rather than a motion in limine. However, even assuming the judge understood it to be a *Daubert* motion, *Brewer* failed to preserve error for appeal because his motion did not specifically refer to Dr. Coons but, instead was a general attack on the admissibility of expert testimony on future dangerousness.³⁸¹ The Court appeared to go a great distance to support its non-preservation argument:

Appellant's motion did not refer to Dr. Coons but generally castigated psychiatric and psychological expert testimony on future dangerousness as not meeting the applicable standards of reliability and relevance under Rule 702 and as unfairly prejudicial under Rule 403. With respect

³⁷³ *Id.*

³⁷⁴ *Brewer v. State*, No. AP-76378, 2011 WL 5881612, at *6 (Tex. Crim. App. Nov. 23, 2011).

³⁷⁵ Brief for Appellant at 15, *Brewer v. State* AP-76378 (Tex. Crim. App. 2011), 2011 WL 1299685 at *15.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at *15-16.

³⁷⁹ *Id.* at *16.

³⁸⁰ *Brewer v. State*, No. AP-76378, 2011 WL 5881612, at *7 (Tex. Crim. App. Nov. 23, 2011).

³⁸¹ *Id.* at *6.

to the reliability claim under Rule 702, the motion was in essence an attack under the second prong of *Nenno*—whether future-dangerousness predictions are properly within the scope of the fields of psychiatry and psychology. Although we have held Dr. Coons' methodology to be unreliable under Rule 702, we did so solely on the basis of the third prong of *Nenno*—whether Dr. Coons' testimony properly applied the principles in his field. There are other psychiatrists and psychologists that use methodologies for assessing future dangerousness that differ radically from the methodology employed by Dr. Coons. The motion's attack under the second prong of *Nenno* did not place the trial court on notice of appellant's current complaint relating to the third prong of *Nenno*. Indeed, it seems difficult to envision how an attack under the third prong could be made as a general matter, without reference to a specific expert witness's anticipated testimony. The broad-based attack on all psychiatric and psychological testimony on future dangerousness in the motion *in limine* simply did not preserve a contention that Dr. Coons' methodology in particular was unreliable, and appellant does not now, in his brief, attempt to argue that all psychiatric and psychological assessments of future dangerousness are inadmissible.³⁸²

In addition, the Court found that *Brewer* did not lodge an objection to the reliability of Dr. Coons's testimony at the *Daubert* hearing.³⁸³

Texas's contemporaneous objection rule is governed by Rule of Appellate Procedure 33.1(a), which requires that in order to preserve a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely objection which stated the grounds for the ruling sought with sufficient specificity, unless those grounds are apparent, and that the trial court ruled or refused to rule on the objection.³⁸⁴ Texas Rule of Evidence 103(a) provides: "In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."³⁸⁵ Arguably, *Brewer's* motion, though concededly mislabeled, was sufficiently specific to put the trial judge on notice of his complaint regarding the admissibility of expert testimony, so that its denial by the trial judge would have preserved error. Thus, the failure to object was not fatal because the specific ground of objection was apparent from the context as required by Rule 103. In addition, any doubts as to whether *Brewer* was challenging expert admissibility evaporated after Dr. Coons's testimony at the *Daubert* hearing, and the judge's decision to allow him to testify.

After *Coble*, the Court's concerted effort to deny *Brewer* relief based on non-preservation error appears contrived. In an earlier case, the Court stated:

It follows that the trial judge's role in the admission and exclusion of evidence is generally not called into play unless a dispute develops between the parties concerning the proper application of an evidentiary rule. And because, absent any such dispute, our system generally expects him not to interfere with the presentation of evidence, it likewise

³⁸² *Id.*

³⁸³ *Id.* at *7.

³⁸⁴ TEX. R. APP. P. 33.1.

³⁸⁵ TEX. R. EVID. 103(a)(1).

does not fault him for refusing to interfere when a party fails to make the basis for his objection known. Beyond this, there are no technical considerations or form of words to be used. Straightforward communication in plain English will always suffice.

The standards of procedural default, therefore, are not to be implemented by splitting hairs in the appellate courts. As regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it. Of course, when it seems from context that a party failed effectively to communicate his desire, then reviewing courts should not hesitate to hold that appellate complaints arising from the event have been lost. But otherwise, they should reach the merits of those complaints without requiring that the parties read some special script to make their wishes known.³⁸⁶

The *Brewer* ruling of non-preservation heralded the Court's decision in its denial of Ramey's writ of habeas corpus a year later. After the Court's unanimous decision in 2009 affirmed Ramey's conviction and death sentence,³⁸⁷ he filed a habeas petition in March 2011.³⁸⁸ In light of *Coble*, in April 2011, the Court ordered Ramey's application to be set on the following issues: "Whether the trial court erred in admitting testimony of Dr. Richard Coons with regards to the future dangerousness of applicant because Coons' testimony violates the Eight Amendment and applicant's rights to due process."³⁸⁹

On November 7, 2012, in a perfunctory and dismissive one-page opinion, the Court denied relief: "Habeas corpus is available only for jurisdictional defects and violations of constitutional or fundamental rights; a claim alleging the violation of a rule of evidence is not cognizable on habeas corpus. *Coble* was a direct appeal case, and it's holding was based upon a rule of evidence. Consequently, the holding in *Coble* does not give rise to a claim that is cognizable on habeas corpus."³⁹⁰ Resting Dr. Coons' admissibility on the precedent of *Barefoot v. Estelle*, the court rejected Ramey's contention that the testimony violated the heightened reliability requirement of the Eighth Amendment.³⁹¹ The opinion delivered by Presiding Judge Keller was joined by Price, Keasler, Hervey, Cochran, and Alcalá. Judges Womack and Johnson concurred. Judge Meyers filed a five-page dissenting opinion. In a footnote, the dissent minced no words in frontally attacking the majority's contrived denial:

It seems apparent that the majority is going to great lengths to prevent Applicant from bringing forth his claim by unsubstantiated claims of non-preservation and cognizability. I have seen previous 11.071 writs with only a fraction of the amount of preservation evidence that this writ contains where we have not rejected the claim based on preservation or cognizability. This also seems particularly peculiar in light of this

³⁸⁶ *Lankston v. State*, 827 S.W.2d 907, 908-09 (Tex. Crim. App. 1992).

³⁸⁷ *Ramey v. State*, No. AP-75678, 2009 WL 335276, at *1 (Tex. Crim. App. Feb. 11, 2009).

³⁸⁸ *Ex parte Ramey*, No. AP-76533, 2011 WL 1288284, at *1 (Tex. Crim. App. Apr. 6, 2011).

³⁸⁹ *Id.*

³⁹⁰ *Ex parte Ramey*, 382 S.W.3d 396, 397 (Tex. Crim. App. 2012).

³⁹¹ *Id.*

Court's previous scrutiny of Dr. Coons' methodology in *Coble*. Also, as our dissenting opinion further shows, the harm created by his testimony was clearly established in this case using the same analysis this Court used in *Coble*.³⁹²

The dissent underscored the majority's hasty and shoddy conclusion that the allegations failed to raise a habeas claim: "If the majority would have taken the time to research the record, it would have discovered that Applicant's claim was raised, but not addressed by this Court on direct appeal. Therefore, the majority's entire analysis is based on a false premise."³⁹³ Then, it challenged the majority's conclusion regarding the issue of non-preservation:

The majority alleges that the issue of reliability was not preserved at trial. ... [E]ven if it had not been preserved at trial, the fact that it wasn't preserved should have been addressed in the direct appeal opinion. Instead this Court completely avoided the issue. In effect, this claim has not been raised and rejected on direct appeal and the failure of this Court to properly address the argument on direct appeal violated Applicant's due process rights. We made a mistake, and now we have the opportunity and obligation to correct it.³⁹⁴

After a lengthy examination of the legal principles governing expert admissibility and scrutinizing the requirements of *Daubert*, *Kelly*, and *Nenno*, the dissent concluded that Dr. Coons's testimony failed to meet the third *Nenno* standard, and that the prosecution did not satisfy its burden to show scientific reliability.³⁹⁵ Further, the dissent held that the error affected Applicant's substantial right to a fair sentencing hearing.³⁹⁶

Arguably, the review of a litany of cases where defendants have been convicted of vicious and indefensible crimes is a cumbersome task. However, so long as the death penalty is condoned in Texas, the Constitution requires meaningful appellate review – one that fulfills "its basic historic function of correcting error in the trial court proceeding,"³⁹⁷ because "what separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes. If that process is flawed because it allows evidence without any scientific validity to push the jury toward condemning the accused, the legitimacy of our legal process is threatened."³⁹⁸

CONCLUSION

If the contradictions, errors and missteps—intentional or otherwise—of appellate review are insufficient to convince the Texas Legislature that future dangerousness is hopelessly flawed, perhaps the legislature will heed the advice and recommendations of the mental health professionals in reassessing its merit. Since 1983 when the APA denounced predictions of future dangerousness in *Barefoot*, both the U.S. Supreme Court, and presumably, the Texas Court of Criminal Appeals have demanded greater scrutiny on

³⁹² *Id.* at 400 n.3 (Meyers, J., dissenting).

³⁹³ *Id.* at 398.

³⁹⁴ *Id.* at 399-400.

³⁹⁵ *Id.* at 403.

³⁹⁶ *Id.* at 405.

³⁹⁷ *Barclay v. Florida*, 463 U.S. 939, 988 (1983) (Marshall, J., dissenting).

³⁹⁸ *Flores v. Johnson*, 210 F.3d 456, 469-70 (5th Cir. 2000).

the validity and merit of expert testimony. However, as this article reveals, unreliable testimony continues to escape the evidentiary net to bypass the putative safeguards of judicial gatekeeping, and remain unchecked by appellate review.

In 2011 the American and the Texas Psychological Associations joined as Amici Curiae in support of *Coble's* petition to the U.S. Supreme Court.³⁹⁹ Once again, the brief urged the Court to grant the petition “because the integrity of the legal system and the mental health profession are undermined if unscientific, unreliable, but purportedly expert testimony about future dangerousness is deemed constitutionally admissible in capital sentencing.”⁴⁰⁰ Predictably, citing to numerous studies, they argued that Dr. Coons’s “unstructured clinical” testimony cannot accurately assess future dangerousness.⁴⁰¹ The American and Psychological Associations explained that in the last twenty years “mental health professionals have made much progress in developing three risk-assessment approaches that are based on scientific principles and can be reliable in assessing risk of future dangerousness in appropriate cases.”⁴⁰² However, pointing to the challenges of developing these studies for capital offenders, they acknowledged that these more reliable approaches have been developed outside that context.⁴⁰³

Despite the extensive evidence provided in their brief, at least three justices of the *Coble* Court were not persuaded, which begs the question: if sophisticated and experienced jurists can be swayed by the “aura of scientific infallibility that shrouds the evidence,”⁴⁰⁴ what can be expected of capital jurors?

As of 2014, the death penalty exists in 32 states, the U.S. Government, and the military,⁴⁰⁵ but during the last forty years the national landscape has changed considerably as more states recognize that the administration of capital punishment is endemically flawed. In the last eight years, six states have abolished it,⁴⁰⁶ and 1,394 exonerations nationwide since 1989 continue to rattle confidence in its accuracy and fairness.⁴⁰⁷

³⁹⁹ Brief for Amici Curiae American Psychological Ass’n & Texas Psychological Ass’n in Support of Petition for a Writ of Certiorari at 2, *Coble v. Texas*, 131 S.Ct. 3030 (2011) (No. 10-1271) 2011 WL 2002207 at *2 (“[B]ecause the integrity of the legal system and the mental health profession are undermined if unscientific, unreliable, but purportedly expert testimony about future dangerousness is deemed constitutionally admissible in capital sentencing.”).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at *8. The brief explained: “This approach imposes no structure on any of the four key decisions in the assessment process: (1) determining which risk factors to consider; (2) determining how to measure them; (3) combining the factors into a ‘single overarching estimate of violence risk’; and (4) ‘generating a final risk estimate.’” *Id.* (Citing John Monahan, Ph.D., *Structured Risk Assessment of Violence*, in *TEXTBOOK OF VIOLENCE ASSESSMENT AND MANAGEMENT* 17, 20-21 (Robert I. Simon & Kenneth Tardiff eds., 2008)).

⁴⁰² *Id.* at *14 (“These three methods- (1) actuarial assessment, (2) structured professional judgment, and (3) the anamnestic approach – incorporate varying degrees of structure in one or more of the four steps of the risk assessment process.”).

⁴⁰³ *Id.* at *20.

⁴⁰⁴ The phrase is borrowed from Giannelli’s now oft-cited phrase: “The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny.” Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence*: Frye v. United States, a Half-Century Later, 80 COLUM. L. REV. 1197, 1237 (1980).

⁴⁰⁵ *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER., <http://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited June 5, 2014).

⁴⁰⁶ *Id.* (listing New York and New Jersey, 2007; New Mexico, 2009; Illinois, 2011; Connecticut, 2012; and, Maryland, 2013).

⁴⁰⁷ *Exonerations in 2013*, NAT’L REGISTRY EXONERATIONS (July 7, 2014), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.

However, whether grounded on ignorance or indifference, Texas remains recalcitrant to self-examine the considerable flaws of its “runaway criminal justice system.”⁴⁰⁸

To be fair, in the last five years Texas has made some impressive inroads to improve capital procedures, including, most recently, revamping criminal discovery in response to the infamous Michael Morton case.⁴⁰⁹ In the same session, Texas passed SB 344, which allows for relief where a defendant is convicted of a crime based on scientific evidence.⁴¹⁰ The “junk science” bill, as it is colloquially known, creates a new source of habeas corpus relief, provided that the applicant can prove: (1) that exculpatory scientific evidence is currently available; (2) that was not ascertainable through the exercise of reasonable diligence by the applicant at the time of trial; and (3) the applicant would not have been convicted, had the evidence been presented at trial.⁴¹¹ While this new remedy is available even to those applicants who have exhausted their prior writs,⁴¹² the sad truth is that for many people who have already been executed, like Todd Willingham, this reform is too little, too late. Furthermore Texas has established the Regional Public Defender for Capital Cases, and the Office of Capital Writs, two offices to provide capital representation in the state.⁴¹³ And as recently reported, “For the sixth year in a row, Texas

⁴⁰⁸ Hall, *supra* note 302.

⁴⁰⁹ Michael Morton was convicted of the murder of his wife in 1987. After decades in prison, Morton’s motion for the State to turn over its sealed case file was granted. The file revealed that the prosecutor had withheld exculpatory evidence, such as a bloody bandana and the identification of the actual killer by Morton’s son. In 2011, Morton’s innocence was proven and he was released from prison. See *Know the Cases: Michael Morton*, THE INNOCENCE PROJECT, (May 27, 2014), http://www.innocenceproject.org/Content/Michael_Morton.php. In response to this highly publicized case, the 2013 session of the Texas Legislature amended TEX. CODE CRIM. P. art. 39.14 to provide for a more open discovery process in criminal cases. Michael Morton Act, 2013 Tex. Gen. Laws § 2, ch. 49 (S.B. 1611), eff. Jan. 1, 2014 (*amending* TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2013)). Generally, the amendment provides that:

- (1) The State is required to turn over any evidence requested by the defense, save for work product, within a reasonable time after the request;
- (2) Should the State choose to withhold evidence or redact it in part, the court must, upon request by the defendant, conduct a hearing to determine whether the State has good cause in doing so;
- (3) The State has a duty to “disclose . . . any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged” at any time before, during, or after trial.
- (4) The State must keep electronic records of items disclosed under the article; and
- (5) Before accepting a guilty or nolo contendere plea, an inventory of items obtained under these discovery provisions.

Id. There is no constitutional right to discovery in a criminal case, so legislation such as this is much needed and long overdue.

⁴¹⁰ TEX. CODE CRIM. PROC. art. 11.073 (West 2013). This article was added by Acts 2013, 83rd Leg., ch. 410 (S.B. 344), § 1, eff. Sept. 1, 2013.

⁴¹¹ See *id.*

⁴¹² TEX. CODE CRIM. PROC. art. 11.07 § 4(a)(1) (West 2013) (a court may consider the merits of a “subsequent application . . . after final disposition of an initial application,” provided that “the application contains specific facts establishing that . . . the legal basis for the claim was unavailable on the date the applicant filed the previous application . . .”).

⁴¹³ See *About Us*, REG’L PUB. DEFENDER FOR CAPITAL CASES, <http://rpdo.org/about.php> (last visited June 5, 2014) (“The office represents only indigent defendants charged with a capital case where the death penalty is sought at the trial level.”); Maria Sprow, *Murder Insurance*, COUNTY MAG., 20 (Sept./Oct. 2008), <http://www.courts.state.tx.us/tidc/pdf/MurderInsuranceSprowCountyMagazineSeptOct2008.pdf> (explaining not only does the office have a mission to provide competent defense for its clients, but it also aims to help keep the indigent defense budgets of smaller counties in check by aggregating the costs amongst the whole and providing a consistent formula for fee calculation); OFF. CAPITAL WRITS, <http://www.ocw.texas.gov/> (last visited June 5, 2014) (“[The office] is a capital post-conviction state agency charged with representing death sentenced persons in state post-conviction habeas corpus and related proceedings.”); Michael Graczyk, *Year-Old State Office*

had fewer than 10 death sentences, a stark difference from 1999, when it recorded 48.”⁴¹⁴ But future dangerousness, the most widely challenged provision of the statute remains intact.

Oregon is the only other state where future dangerousness is a special issue that the jury must answer to render a verdict of death, but the effect of that provision is significantly diminished by a glaring distinction: while Texas has executed 515 individuals since 1976; Oregon has executed 2.⁴¹⁵

In September 2013, the American Bar Association’s Due Process Review Project launched its Texas Capital Punishment Assessment Report – a comprehensive evaluation of Texas’s capital procedures, laws, and practices.⁴¹⁶ Among its key findings, it recommended that Texas should restructure its capital punishment statute “to abandon altogether the use of the ‘future dangerousness.’”⁴¹⁷ Harkening back to the criticisms leveled by the dissenters in *Jurek*, it argues that the lack of precise explanation of the key terms in the future dangerousness provision, leaves juror to discern the meaning of terms such as “probability,” “criminal acts of violence,” and “society,” “so broadly that a death sentence would be deemed warranted in virtually every capital murder case.”⁴¹⁸ Second, the reliance on unreliable testimony has a persuasive effect on the jury;⁴¹⁹ an argument that is amply supported by numerous reputable psychiatric journals, and mental health organizations.⁴²⁰ Finally, the fact that life without parole is the only sentencing alternative, there is no longer a concern that capital defendants pose an imminent threat to society.⁴²¹

This last point is significant. Recall the words of Justice Stevens in a recent opinion:

Challenges Death Sentences, OFF. CAPITAL WRITS, <http://www.ocw.texas.gov/news/year-old-state-office-challenges-death-sentences.aspx> (last visited June 5, 2014) (“Sen. Rodney Ellis... who sponsored the measure creating the agency [said,] ‘Considering the mistakes made in Texas to date, we should pay for this safety net and pray it’s adequate enough to get the job done right.’”) (alluding to the troubled history of death penalty litigation in Texas).

⁴¹⁴ See *The Death Penalty in 2013: Year End Report*, DEATH PENALTY INFO. CTR., 2 (Feb. 11, 2014), <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf>.

⁴¹⁵ See *Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER, 3 (June 2014), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

⁴¹⁶ *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, A.B.A., 3 (Sept. 2013), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_-_moratorium/tx_complete_report.authcheckdam.pdf [hereinafter A.B.A., *Assessment Report*].

The ABA’s Death Penalty Due Process Review Project was established in the fall of 2001. Originally titled the Death Penalty Moratorium Implementation Project, the project was created “[T]o conduct research and educate the public and decision-makers on the operation of capital jurisdictions’ death penalty laws and processes in order to promote fairness and accuracy in death penalty systems, both in the United States and abroad. The Project encourages legislatures, courts, administrative bodies, and state and local bar associations to adopt the ABA’s Protocols on the Fair Administration of the Death Penalty; provides technical assistance to state, federal, international, and foreign stakeholders on death penalty issues; and collaborates with other individuals and organizations to develop new initiatives to support reform of death penalty processes, including adoption of the ABA’s 1997 resolution promoting a suspension of executions.” *ABA Death Penalty Due Process Review Project: About Us*, A.B.A., http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/about_us.html. (last visited June 5, 2014).

⁴¹⁷ A.B.A., *Assessment Report*, *supra* note 413, at viii.

⁴¹⁸ *Id.* at xxxix.

⁴¹⁹ *Id.* at xxxix-xl.

⁴²⁰ See, e.g., Schweitzer & Saks, *supra* note 256.

⁴²¹ A.B.A., *Assessment Report*, *supra* note 413, at xl-xli.

While incapacitation may have been a legitimate rationale in 1976, 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. Moreover, a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option. And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.⁴²²

Myriad opinions of the U.S. Supreme Court have consistently held that the “Eighth Amendment insists upon ‘reliability in the determination that death is the appropriate punishment in a specific case.’”⁴²³ This article offers irrefutable proof that future dangerousness is neither reliable, nor constitutional. Its continued use casts a pall in the legitimacy of Texas’s capital punishment. A system that inflicts the ultimate punishment must be anchored to principles of fairness and justice in its rules and procedures. Anything less will harbor a society denuded of the most basic of moral and social values. The execution of innocent people and the unfair administration of death affects all of us, for at the end: “It is tempting to pretend that [those] on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined... [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.”⁴²⁴

⁴²² *Baze v. Rees*, 553 U.S. 35, 78-79 (2008) (Stevens, J., concurring).

⁴²³ *Oregon v. Guzek*, 546 U.S. 517, 525 (2006).

⁴²⁴ *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting). Justice Brennan was specifically referring to minorities on death row. I have borrowed from the essence of this quote. Here’s the actual quote: “It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. ‘The destinies of the two races in this country are indissolubly linked together,’ ... and the way in which we choose those who will die reveals the depth of moral commitment among the living.” *Id.* (citation omitted).

USING TECHNOLOGY THE FOUNDERS NEVER DREAMED OF: CELL PHONES AS TRACKING DEVICES AND THE FOURTH AMENDMENT

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Abstract

This paper considers the Fourth Amendment issues surrounding warrantless surveillance by law enforcement using cell phone data to track the location of suspects and the potential application of the Supreme Court's 2012 decision in *United States v. Jones* to this behavior. The paper provides an overview of the Court's historic privacy jurisprudence from *Olmstead v. United States* to *Katz v. United States* and of the recent decisions in *Jones* and *Florida v. Jardines*. A dataset of federal and state cases in which the use of cell phones to track suspects was at issue was constructed and analyzed. At this point in time, there is no clear legal standard by which the courts can provide oversight over law enforcement in this growing area of police practice. It is suggested that the application of Justice Scalia's trespass standard will only make the problem worse and the probable cause standard adopted in five states could easily be applied to all jurisdictions without limiting police effectiveness while still providing protection for the privacy rights of Americans.

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INTRODUCTION: IT'S 10 PM AND THE POLICE MAY ALREADY KNOW WHERE YOUR CHILDREN ARE

Back in the 1960s, some television stations would run a public service announcement just before the late evening news. A sonorous voice would intone, "It's 10 pm. Do you know where your children are?"¹ The announcement was intended to remind parents that there was a curfew in place, but now, in light of the fact that local and national law enforcement agencies are already commonly tracking the locations of people without a warrant and without individualized suspicion, these simple words from our nation's past remind us that modern technology empowers the police to do amazing things that are quite inconsistent with the notions of freedom and privacy that our founders likely had in mind when they adopted the Fourth Amendment.

The revelation in the spring of 2013 that the National Security Agency was gathering enormous amounts of data by routinely tracking cell phone and internet traffic stunned many in our nation.² A major lawsuit was filed by the American Civil Liberties Union against the federal government based on the fact that members' phones were flagged by the data mining algorithms employed.³ The NSA program is just the tip of the iceberg. Police agencies in major cities already have systems in place to automatically track cars by license plate, creating databases of who was where and when.⁴ Many cities have cameras,⁵ although few have gone as far as London in terms of the sheer number of cameras or as far as New York in terms of centralized receipt and automated analysis of the images from these cameras.⁶

Each year, millions of requests are made by local police departments for data about cell phone customers from service providers, often without a warrant.⁷ The police

¹ The origins of the phrase can be traced to the 1960s on the East coast. See, Kara Kovalchik, *The Origin of "It's 10PM. Do You Know Where Your Children Are?"* MENTAL FLOSS (June 17, 2012, 6:00 PM), <http://mentalfloss.com/article/30945/origin-its-10-pm-do-you-know-where-your-children-are>.

² Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 5, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>; Dana Priest, *NSA Growth Fueled by Need to Target Terrorists*, WASH. POST (July 21, 2013), http://www.washingtonpost.com/world/national-security/nsa-growth-fueled-by-need-to-target-terrorists/2013/07/21/24c93cf4-f0b1-11e2-bed3-b9b6fe264871_story.html.

³ *ACLU File Lawsuit Challenging Constitutionality of NSA Phone Spying Program*, AM. CIV. LIBERTIES UNION (June 11, 2013), <https://www.aclu.org/national-security/aclu-files-lawsuit-challenging-constitutionality-nsa-phone-spying-program>; See also, *Klayman v. Obama*, 957 F. Supp. 2d 1, 7 (D.D.C. 2013) (describing a case in which a private citizen sued the federal government seeking an injunction against the NSA's practices and referencing other lawsuits requesting the same relief).

⁴ Catherine Crump, *You Are Being Tracked: How License Plate Readers Are Being Used to Record Americans' Movements*, AM. CIV. LIBERTIES UNION, 2 (July 2013), <http://www.aclu.org/files/assets/071613-aclu-alpreport-opt-v05.pdf>.

⁵ Steve Henn, *In More Cities, A Camera On Every Corner, Park And Sidewalk*, NPR (June 20, 2013, 2:57 AM), <http://www.npr.org/blogs/alltechconsidered/2013/06/20/191603369/The-Business-Of-Surveillance-Cameras>.

⁶ Rebecca Rosen, *London Riots, Big Brother Watches: CCTV Cameras Blanket the UK*, ATLANTIC (Aug. 9, 2011), <http://www.theatlantic.com/technology/archive/2011/08/london-riots-big-brother-watches-cctv-cameras-blanket-the-uk/243356/>; Robin Young & Jeremy Hobson, *NYC's Web of Cameras Can Catch Unattended Bags*, HERE & NOW (Apr. 24, 2013), <http://hereandnow.wbur.org/2013/04/24/nyc-surveillance-cameras>.

⁷ Ellen Nakashima, *Cellphone Carriers Report Surge in Surveillance Requests From Law Enforcement*, WASH. POST (July 9, 2012), http://www.washingtonpost.com/world/national-security/cellphone-carriers-report-surge-in-surveillance-requests/2012/07/09/gJQAVk4PYW_story.html; *Cell Phone Location Tracking Public Records Request*, AM. CIV. LIBERTIES UNION (Mar. 25, 2013), <http://www.aclu.org/protecting-civil-liberties-digital-age/cell-phone-location-tracking-public-records-request>; David Bresnahan, *Gov't Tracking Cell Phones without*

have the ability to “ping” a phone to determine its location in real-time,⁸ or to pinpoint its position through access to records of its use from the carrier.⁹ This last tool is often referred to as cell site location information or CSLI.¹⁰ CSLI can be historical or prospective. In the former, the police seek the past location of a cell phone user, either by triangulating from the cell phone towers that the phone contacted in the course of completing a call or sending a text, or from actual Global Positioning System (GPS) data from the cell phone itself.¹¹ Prospective, or real time, CSLI means that the police intend to use the data to track the location of the suspect currently and in the future. Sixty days is a common time period for such tracking. CSLI does not include the content of any communication emanating from the phone.

Virtually all cell phones in existence have a GPS device included so that the authorities can locate the phone in case of its use to call 911 in an emergency. “Smart” phones are capable of a number of applications and uses that depend on the use of GPS information and frequently communicate their location to cell towers. As such, such devices may be very useful to the police if they want to track a suspect who is in possession of a smart phone. While a few states do require, as a matter of state law, police to obtain a warrant before gathering this kind of information,¹² as of yet there is no clear standard established in the federal courts to determine whether the warrantless use of this technology is constitutionally permissible.

The nation is faced with practices that are highly attractive to and commonly used by police,¹³ but for which there is no legal standard for judicial oversight. Most people are not aware of just how much data cell phone companies are storing and for how long.¹⁴ This state of affairs should not be allowed to exist. The purpose of this paper is to analyze the state of the law on the meaning of the Fourth Amendment in the context of the use of data from hand held devices or the network of hardware by which they function to locate a suspect. This is independent from the question of the warrantless search of a cell phone or hand-held device incident to arrest, which the Court addressed in the 2014

Court Order, NEWS WITH VIEWS (Jan. 4, 2006, 1:00 AM), <http://www.newswithviews.com/BreakingNews/breaking40.htm>.

⁸ See, e.g., *Commonwealth v. Rushing*, 71 A.3d 939, 946 (Pa. Super. Ct. 2013).

⁹ See, e.g., *United States v. Graham*, 846 F. Supp. 2d 384, 391-92 (D. Md. 2012). At the time of writing, the *Graham* case was under appeal to the United States Court of Appeals, 4th Circuit. See also, *State v. Earls*, 70 A.3d 630, 632 (N.J. 2013).

¹⁰ See *Commonwealth v. Wyatt*, No. 2011-00693, 2012 WL 4815307, at *1-2 (Mass. Super. Ct. Aug. 7, 2012).

¹¹ See cases cited *infra* Parts II, IV, and V for details on CSLI capabilities.

¹² Maine and Montana have passed statutes mandating that police obtain a warrant before seeking to track a suspect using his or her cell phone. Maine, ME. REV. STAT. tit. 16, § 642 (West, Westlaw through 2013 Sess.); Montana, H.B. No. 603, 63d Reg. Sess. (2013), <http://leg.mt.gov/bills/2013/billhtml/HB0603.htm> (last updated Apr. 22, 2013). The New Jersey Supreme Court has ruled that a warrant is required to access locational data. *State v. Earls*, 70 A.3d 630, 632 (N.J. 2013). The Pennsylvania Supreme Court ruled similarly. *Commonwealth v. Rushing*, 71 A.3d 939, 946 (Pa. 2013). Three trial courts in Massachusetts have ruled that police must obtain a warrant before accessing CSLI. See *Commonwealth v. Augustine*, 467 Mass. 230, 244 (2014); *Commonwealth v. Wyatt*, No. 2011-00693, 2012 WL 4815307, at *2 (Mass. Super. Ct. Aug. 7, 2012); *Commonwealth v. Pitt*, No. 2010-0061, 2012 WL 927095, at *11 (Mass. Super. Ct. Feb. 23, 2012).

¹³ Declan McCullagh, *Cops to Congress: We Need Logs of Americans' Text Messages*, CNET (Dec. 3, 2012, 9:00 AM), http://news.cnet.com/8301-13578_3-57556704-38/cops-to-congress-we-need-logs-of-americans-text-messages/.

¹⁴ Allie Bohm, *How Long Is Your Cell Phone Company Hanging On To Your Data?*, AM. CIV. LIBERTIES UNION (Sept. 28, 2011, 10:17 AM), <http://www.aclu.org/blog/technology-and-liberty/how-long-your-cell-phone-company-hanging-your-data/>; *Cell Phone Location Tracking Public Records Request*, AM. CIV. LIBERTIES UNION (last visited July 29, 2013), <http://www.aclu.org/protecting-civil-liberties-digital-age/cell-phone-location-tracking-public-records-request>.

Term.¹⁵ The approach used by the current Justices of the United States Supreme Court to address issues of the use of modern electronic technology by the police will be critiqued, an exhaustive analysis of lower federal court and state court decisions will be provided, and a legal standard that would provide both protection of the privacy rights of citizens and adequate guidance to the police and the lower courts will be suggested.

Part I of this paper will trace the history of Fourth Amendment jurisprudence concerning the use of new technologies to gather information about suspects, beginning with *Olmstead v. United States*,¹⁶ continuing through *Katz v. United States*,¹⁷ *Smith v. Maryland*¹⁸, *United States v. Knotts*,¹⁹ *United States v. Karo*,²⁰ and *Kyllo v. United States*.²¹ Part II will lay out the types of cases that have been decided by the lower courts as a way of educating the reader about common police uses of locational data. Part III will provide a detailed analysis of the three most recent Supreme Court decisions in the area of the use of technology by the police, *United States v. Jones*²² and *Florida v. Jardines*,²³ and *Riley v. California*.²⁴ Part IV will explain the origins of, and the conflict between, the Scalia “trespass standard” and the Harlan “reasonable expectation of privacy standard.” Part V will provide an overview and analysis of the cases to date that have considered the issue of when and under what standards may the police gain access to Cell Site Location Information. Part VI will make the case for a probable cause standard that would apply to all uses of locational data. The standard will provide clear guidance to the police, a clear and easily applied set of criteria for courts to use, and greater protection to the ordinary citizen than currently exists. In order to do so, the main point that must be addressed is the definition of “property” in this context. There must be agreement on what data the customer owns, what data are owned by the service provider, and when and how the customer can use the courts to protect these rights. The Court must transcend the traditional common law notion of property as being something tangible and capable of being owned or possessed.

PART I: TRACING THE HISTORY OF FOURTH AMENDMENT JURISPRUDENCE WITH REGARD TO THE USE OF TECHNOLOGY TO LOCATE A SUSPECT

The Supreme Court’s jurisprudence in this area of police use of communication and/or surveillance technology is well known. The Court first was faced with the task of applying essentially 18th Century concepts to modern communication technology in *Olmstead v. United States* in 1928, where phone tapping was analogized to trespass.²⁵ Later, in 1967, the Court changed course in *Katz v. U.S.* and held that courts should apply a “reasonable expectation of privacy” standard in such cases.²⁶ The doctrine was applied

¹⁵ *Riley v. California*, 573 U.S. ___, Nos. 13-132 and 13-212 (June 25, 2014). The sweeping language in Chief Justice Roberts’ majority opinion in that case is potentially relevant to the discussion of how cell phone tracking cases may be decided and will be addressed in the Parts III, V, and VI of this paper.

¹⁶ 277 U.S. 438, 455 (1928), *overruled by* *Katz v. United States* 389 U.S. 347 (1967).

¹⁷ 389 U.S. 347, 348 (1967).

¹⁸ 442 U.S. 735, 736 (1979).

¹⁹ 460 U.S. 276, 277 (1983).

²⁰ 468 U.S. 705, 706 (1984).

²¹ 533 U.S. 27, 29 (2001).

²² 132 S. Ct. 945, 948 (2012).

²³ 133 S. Ct. 1409, 1417 (2013).

²⁴ *Riley v. California*, 573 U.S. ___, Nos. 13-132 and 13-212 (June 25, 2014).

²⁵ *Olmstead v. United States*, 277 U.S. 438, 465-66 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

²⁶ 389 U.S. at 360-62 (1967) (Harlan, J., Concurring).

in several important cases during the time between 1967 and 2012, when *U. S. v. Jones* was decided.

In *Olmstead*, the first major case where the Court ruled on the legality of using technology to gather information on a suspect, government agents were investigating a large-scale “bootlegging” operation in the city of Seattle.²⁷ Federal agents, without seeking a warrant, tapped the office phone, and several home phones, of the bootleggers.²⁸ They placed the taps along existing phone wires without physical trespass on the office spaces or homes of the conspirators.²⁹ After monitoring the taps for months, extensive transcriptions of the conversations were compiled and introduced into evidence at the trial.³⁰ In holding that the wiretaps did not violate the Fourth Amendment, the majority focused on the lack of physical trespass by the government agents.

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants.³¹

In doing so, the majority defined a search as an intrusion of a constitutionally protected place.

“The [Fourth] Amendment itself shows the search is to be of material things, the person, the house, his papers, his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized.”³²

The “trespass doctrine” placed the core value of Fourth Amendment protection on constitutionally protected places. Thus, because the wiretap was done outside of the home, there was no intrusion. The end result was that the Fourth Amendment was interpreted quite narrowly and, as interpreted, was incapable of providing guidance regarding law enforcement use of any electronic technologies, like telephones.

In dissent, Justice Brandeis foreshadowed the concerns that led the Court to overrule *Olmstead* in 1967 in *Katz v. United States*.³³ Justice Brandeis was very concerned that the trespass standard would allow the government to intrude into the private affairs of citizens in ways not yet developed.

The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.³⁴

²⁷ 277 U.S. at 455-57.

²⁸ *Id.* at 456-57.

²⁹ *Id.* at 457.

³⁰ *Id.*

³¹ *Id.* at 464.

³² *Id.*

³³ *See id.* at 471; *See Katz v. United States*, 389 U.S. 347, 352-54 (1967).

³⁴ *Olmstead*, 277 U.S. at 474.

Brandeis also articulated a deeper understanding of the meaning of the Fourth Amendment. To him, the Amendment did more than just protect specific places. It served as a core element of liberty.

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.³⁵

Brandeis' view would remain in dissent for forty years, until the Court decided *Katz v. United States*.

The facts in the *Katz* case are also simple. Mr. Katz was part of an illegal gambling operation and was conducting that business by using a pay phone in California to talk with his partners in crime in Boston and Miami.³⁶ The police were aware of this and placed a listening device on the outside of the phone booth, where Katz would not see it.³⁷ This enabled them to listen to his side of the conversations, transcripts of which were introduced at trial.³⁸

Writing for the majority, Justice Stewart took the position articulated by Justice Brandeis' dissent in *Olmstead* and viewed the Fourth Amendment as a matter of privacy, rather than trespass on private property. Stewart argued that the Fourth Amendment protects people, not places, and declared that "what a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected."³⁹ In doing so, Stewart explicitly acknowledged that the rationale underlying the trespass doctrine had been eroded and "can no longer be regarded as controlling."⁴⁰

It is Justice Harlan's concurrence that fleshed out the standard or test that the Court has used to answer the question whether an activity constitutes a search: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁴¹

³⁵ *Id.* at 478.

³⁶ *Katz*, 389 U.S. at 348 (1967).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 351 (citation omitted).

⁴⁰ *Id.* at 353.

⁴¹ *Id.* at 361 (Harlan, J., concurring).

In the instant case, Katz had a subjective expectation that the government would not listen in on his phone conversations, and that expectation was one that society was willing to recognize as reasonable.⁴² This two prong “reasonable expectation of privacy” test has persisted to the present day, although Justice Scalia argued that it should be eliminated during the oral argument of *U.S. v. Jones*⁴³ and he did not rely on it in either the *Jones* or *Jardines* decisions.⁴⁴ Until 2012, it was commonly understood that Justice Stewart’s opinion in *Katz* over-ruled the trespass doctrine, but as we will see below, Justice Scalia has revived it in his two majority opinions in *Jones* and *Jardines*.

The *Katz* reasonable expectation of privacy doctrine was applied in several important cases during the time since 1967. These cases, oft cited by the lower courts in attempting to come to grips with challenges to the use of cell phone data, include the 1979 case of *Smith v. Maryland*,⁴⁵ the 1983 case of *U. S. v. Knotts*,⁴⁶ the 1984 case of *U. S. v. Karo*,⁴⁷ and the 2001 case of *Kyllo v. U. S.*⁴⁸ With few exceptions, such as *Kyllo*, the Court has generally ruled against individual privacy claims.⁴⁹

Most relevant to cell phone location surveillance are the Court’s decisions in *Smith v. Maryland*, *U.S. v. Knotts*, and *U.S. v. Karo*. *Smith* involved the use of a pen register device to capture the phone numbers called by the phone in question.⁵⁰ No warrant was issued to justify the use of the device.⁵¹ The Court held that there is no legitimate expectation of privacy in the numbers one calls from a telephone on the basis that these numbers are voluntarily provided by the user to the phone company which keeps the records in the normal course of its business.⁵² This idea that such information is voluntarily provided by the phone user and kept by the service provider for its own legitimate business purposes plays a large role in the thinking of a number of judges faced with the need to decide whether the Fourth Amendment protects cell phone subscribers who do not wish for the authorities to use locational data stored by cell phone service providers.⁵³

For those judges who did attempt to wrestle with the Fourth Amendment’s meaning in the context of the use of CSLI, there are numerous citations to both *U.S. v. Knotts*⁵⁴ and *U. S. v. Karo*.⁵⁵ Both cases involved the placement of beepers on personal property and the monitoring of those beepers to determine the location of the property. In *Knotts*, the beeper was placed in a container of chloroform upon request by the police to

⁴² *Id.* at 360-361.

⁴³ Transcript of Oral Argument at 6-7, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).

⁴⁴ *Jones*, 132 S. Ct. at 950; *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

⁴⁵ 442 U.S. 735, 738-41 (1979).

⁴⁶ 460 U.S. 276, 283 (1983) (discussing privacy expectation with phones).

⁴⁷ 468 U.S. 705, 726 (1984).

⁴⁸ 533 U.S. 27, 33 (2001).

⁴⁹ *See, e.g., Minnesota v. Carter*, 525 U.S. 83, 91 (1998) (holding defendants did not have a legitimate expectation of privacy).

⁵⁰ 442 U.S. at 737.

⁵¹ *Id.*

⁵² *Id.* at 745-46.

⁵³ *See, e.g., In re Application of the United States of America for Historical Cell Site Data*, 724 F.3d 600, 611-12 (5th Cir. 2013).

⁵⁴ *See, e.g., United States v. Caraballo*, 934 F. Supp. 2d 341, 354-56 (D. Vt. 2013) (citing *United States v. Knotts*, 460 U.S. 276 (1983)).

⁵⁵ *See, e.g., Caraballo*, 934 F. Supp. 2d at 354-56 (citing *United States v. Karo*, 468 U.S. 705 (1984)).

the private company that sold the chemical to the defendants.⁵⁶ The request had been made because the police believed the defendants were making illegal drugs.⁵⁷ The police used the beeper to follow the transport of the chemical to a remote cabin in the woods in Wisconsin.⁵⁸ After three days of watching the cabin, the police obtained a search warrant and found a drug lab in operation in the cabin.⁵⁹ In refusing to suppress the evidence derived from the use of the beeper, Justice Rehnquist wrote that the beeper served as nothing more than an enhancement of the police ability to follow the car while it was on a public thoroughfare.⁶⁰ In essence, the Court ruled that one has no reasonable expectation of privacy while on public streets because one can be observed by anyone, including the police, who happen to be on the same street.

*U. S. v. Karo*⁶¹ was decided during the next Term and also involved the use of a beeper. Once again, the police suspected the defendants of using bulk chemicals to make illegal drugs and had a beeper placed in a container of ether that the defendants were planning to use to manufacture cocaine.⁶² The Court, per Justice White, upheld the conviction, but did hold that the monitoring of the beeper while the container was inside a private residence would violate the Fourth Amendment.⁶³ Taken together, *Knotts* and *Karo* stand for the proposition that the government may use technology that enhances the senses to improve their ability to conduct surveillance in public areas without any restrictions, but to use such technology to search a private space, such as a home, would require a warrant based on probable cause.

This distinction between the type of privacy protection that one has in the home and the ones that one does not have when in a public space would be important in the decision of the last of the major cases before the 2012 *U. S. v. Jones* case, *Kyllo v. U. S.*⁶⁴ In *Kyllo* the police were using a thermal imaging camera to scan the defendant's home after becoming suspicious that he was growing marijuana.⁶⁵ The police were looking for a heat signature consistent with the use of grow lamps.⁶⁶ In overturning this search, the Court, per Justice Scalia, held that this was the type of intrusion into the home that was forbidden by the Fourth Amendment.⁶⁷ Despite expressly stating that Fourth Amendment analysis was no longer tied to any Common Law concept of trespass,⁶⁸ and despite his open acceptance of Justice Harlan's reasonable expectation of privacy standard,⁶⁹ Justice Scalia was adamant that the Fourth Amendment must protect the home from the use of technology that allows the police to gather information that could not be gathered with the unaided senses of the officers.⁷⁰

⁵⁶ 460 U.S. at 277.

⁵⁷ *Id.* at 278.

⁵⁸ *Id.*

⁵⁹ *Id.* at 279.

⁶⁰ *Id.* at 285.

⁶¹ 468 U.S. 705, 708 (1984).

⁶² *Id.* at 708.

⁶³ *Id.* at 716.

⁶⁴ *Kyllo v. United States*, 533 U.S. 27, 32-33 (2001).

⁶⁵ *Id.* at 29.

⁶⁶ *Id.*

⁶⁷ *Id.* at 40.

⁶⁸ *Id.* at 32 ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property.")

⁶⁹ *Id.* at 33.

⁷⁰ *Id.* at 34.

PART II: WHAT KINDS OF CASES GIVE RISE TO CHALLENGES TO THE USE OF LOCATIONAL DATA?

There are a small but growing number of federal and state court cases in which criminal defendants are challenging the use of locational data obtained from cell phone service providers. In the federal practice, these cases often have cumbersome sounding names like *In the Matter of the Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register and Trap and Trace Device*.⁷¹ Judges faced with deciding such cases do not have the benefit of clear guidance with regard to the standard of review, so they tend to provide a recitation of existing cases in their opinions.⁷² Two important federal cases in this area are *United States v. Graham*,⁷³ appeal of which is currently pending in the United States Court of Appeals for the Fourth Circuit, and *In the Matter of the Application of the United States of America for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*,⁷⁴ decided in 2010 by the Third Circuit. Cases in state court have also contributed to this area of jurisprudence and in three states courts have held that their state constitutions provide greater protection for suspects than the Fourth Amendment.⁷⁵

The 2010 Third Circuit case originated when federal law enforcement officers, investigating a suspected drug trafficker, asked a federal magistrate in Pennsylvania for an order under section 2703(d) of the Stored Communication Act directing a cell phone service provider to disclose CSLI data on the suspect.⁷⁶ The magistrate refused to grant the request on the grounds that the statute did not authorize the seizure of information to be used to track a suspect.⁷⁷ The district court judge affirmed the magistrate's decision, but the Third Circuit overturned it. The rationale for doing so hinged more on an understanding of the Stored Communications Act than on an interpretation of the Fourth Amendment itself.⁷⁸ The Court held that the statute itself does not mandate a finding of probable cause, the usual standard for determining whether to issue a warrant, but that a federal magistrate, in his or her discretion, could use that standard in determining whether to grant the warrant.⁷⁹ In doing so, they largely avoided the Fourth Amendment issue.

United States v. Graham stems from a criminal charge against two men involved in a string of burglaries in Baltimore, Maryland, in 2011.⁸⁰ The two defendants were arrested for burglarizing two fast food restaurants.⁸¹ Their cell phones were seized and

⁷¹ *E.g.*, *In re the Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d) to Disclose Subscriber Info. & Cell Site Info.*, 849 F. Supp. 2d 177 (D. Mass. 2012).

⁷² *See, e.g.*, *Commonwealth v. Rushing*, 71 A.3d 939, 950 (Pa. Super. Ct. 2013).

⁷³ 846 F. Supp. 2d 384, 389 (D. Md. 2012), *appeal filed*, No. 12-4659, (4th Cir. 2012), *available at* <http://dockets.justia.com/docket/circuit-courts/ca4/12-4659>.

⁷⁴ 620 F.3d 304, 305 (3d Cir. 2010).

⁷⁵ *State v. Earls*, 70 A.3d 630, 642-44 (N.J. 2013); *Commonwealth v. Rushing*, A.3d 939, 961 (Pa. Super. Ct. 2013); *Commonwealth v. Wyatt*, 2012 WL 4815307 at *6-8 (Mass. Super. Ct. Aug. 7, 2012).

⁷⁶ *In re the Application of the United States Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to the Gov't*, 620 F.3d 304, 306 (3d Cir. 2010) (citing *In re the Application of the United States for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to the Gov't*, 534 F. Supp. 2d 585, 588-89 (W.D. Pa. 2008)).

⁷⁷ *Id.* at 308.

⁷⁸ *See id.* at 315.

⁷⁹ *Id.*

⁸⁰ 846 F. Supp. 2d 384, 385-87 (D. Md. 2012).

⁸¹ *Id.* at 385-386.

searched and the police became convinced that these two men were responsible for a series of burglaries that preceded the incidents for which they were arrested.⁸² The police sought a total of 221 days of CSLI data, under the aegis of the Stored Communications Act.⁸³ This request was granted and Sprint/Nextel complied with the order.⁸⁴ The defendants objected, among other things, to the long length of time that the police sought to track their movements.⁸⁵ The trial court likened the records from the cell phone provider to any other business record, essentially using the doctrine laid out in *Smith v. Maryland*, which held that there is no expectation of privacy in the phone numbers one dialed.⁸⁶ In doing so, the court tied the analysis to a personal property concept more appropriately suited to paper documents, citing a series of other federal trial court decisions.⁸⁷ Once the court decided to treat cell phone records as ordinary business records, it was easy for it to rule in favor of the police. In essence, the decision to treat the locational data as a business record allowed the court to avoid the Fourth Amendment issue and rely solely on the lower statutory standard of “specific and articulable facts” that is provided in the Stored Communications Act.⁸⁸

In contrast to the cases in the federal courts, courts in three states, including one state supreme court, have made clear statements that their state constitutions provide greater privacy protection than the Fourth Amendment when it comes to the use of cell phones to track suspects. The first of these cases is *Pennsylvania v. Rushing*. After responding to the scene of a horrific multiple murder, the police learned that the suspect was still at large and had professed the intention to commit further violence.⁸⁹ They sought and received a court order to “ping” the suspect’s cell phone, and using the data along with the GPS unit in the phone itself, were able to locate and apprehend the suspect without his committing any further acts of violence.⁹⁰ The judge granted the order based on the “specific and articulable facts” standard stated in the then applicable version of the Pennsylvania Wiretap Act.⁹¹ The suspect argued for exclusion of evidence based on the theory that the order to “ping” his cell phone should only have been issued if there was probable cause.⁹² Pennsylvania Superior Court Justice Bowles’ opinion in the case is very detailed and carefully crafted because “[t]he . . . issue Appellant levels on appeal presents a matter of first impression in this Commonwealth, although the federal courts have addressed the question with conflicting results.”⁹³ The court ruled that, under Pennsylvania law, the standard of review to be followed in considering a request for locational data is probable cause.⁹⁴ This reasoning was based in part on Pennsylvania statutes, but the court stated that the Pennsylvania constitution creates greater protections for privacy than the Fourth Amendment.⁹⁵ As such, under Pennsylvania law, citizens have

⁸² *Id.* at 386.

⁸³ *Id.* at 387.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 389; *Smith v. Maryland*, 442 U.S. 735, 745 (1979).

⁸⁷ *Graham*, 846 F. Supp. 2d at 389.

⁸⁸ 18 U.S.C.A. § 2703(d) (West, Westlaw through 2009 sess.).

⁸⁹ *Commonwealth v. Rushing*, 71 A.3d 939, 946 (Pa. Super. Ct. 2013).

⁹⁰ *Id.*

⁹¹ *Id.* at 954.

⁹² *Id.* at 947.

⁹³ *Id.* at 954.

⁹⁴ *Id.* at 963.

⁹⁵ *Id.* at 954.

a reasonable expectation of privacy in the data contained in their cell phone records.⁹⁶ It was also made clear that the combination of probable cause and exigent circumstances, which existed in this case, was sufficient to justify a warrantless search of cell phone records for locational data.⁹⁷ The opinion is very thorough in terms of addressing the details of how triangulation is used to locate suspect as well as providing citations to, and explanations of, many federal and state cases and statutes.

The second state court case, *State v. Earls*,⁹⁸ arose in New Jersey. In that case, the Middletown Township Police were investigating a string of burglaries and had located one of the conspirators who had provided useful evidence.⁹⁹ This informant was believed to be at risk of harm from her partner in crime and the police, knowing the cell phone number of the suspect and knowing that he was using a cell phone from T-Mobile, asked T-Mobile to provide locational data, which they did.¹⁰⁰ No warrant was ever sought.¹⁰¹ The New Jersey Supreme Court ruled unanimously that Article 1, Paragraph 7, of the New Jersey State Constitution gives a person a protected privacy interest in the location of his or her cell phone.¹⁰² This means that the police must seek a warrant from a neutral magistrate based on probable cause before they can obtain locational data from a cell phone provider. As with the decision in *Pennsylvania v. Rushing*, the New Jersey Supreme Court was careful to fully analyze the Fourth Amendment issue and yet base their decision squarely in state law. Also, in agreement with the Pennsylvania courts, the New Jersey Supreme Court was careful to protect the interests of law enforcement by stating that probable cause and exigent circumstances would be sufficient to justify a warrantless search, i.e., a direct appeal to a cell phone company for data.¹⁰³ Lastly, the New Jersey Supreme Court limited its decision to prospective effect only, meaning that older cases with similar fact patterns would not be revisited or re-opened.¹⁰⁴

In the State of Massachusetts, five cases have dealt with issues of the use of CSLI. Three ruled in favor of the defendant and two in favor of the state. *Commonwealth v. Wyatt* and *Commonwealth v. Augustine* ruled explicitly that the Massachusetts constitution provides for greater privacy protection than the Fourth Amendment in such cases and that the police must obtain a warrant based on probable cause to access CSLI.¹⁰⁵ In contrast, *Commonwealth v. Pitt* ruled that the Fourth Amendment itself requires a warrant based on a showing or probable cause before the police may use a cell phone to locate a suspect.¹⁰⁶ *Commonwealth v. Princiotta* ruled that that since the phone in question was not the suspect's phone, he lacked standing to challenge data from that account.¹⁰⁷ Similarly, *Commonwealth v. Willis*, held that the defendant lacked standing to challenge the use of CSLI since it was her who had called 911 and the evidence in question concerned the location of her phone when she made that call.¹⁰⁸ Of the cases wherein there

⁹⁶ *Id.* at 963.

⁹⁷ *Id.* at 965-66.

⁹⁸ 70 A.3d 630 (N.J. 2013).

⁹⁹ *Id.* at 633.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 634.

¹⁰² *Id.* at 644.

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 645.

¹⁰⁵ *See Commonwealth v. Augustine*, 467 Mass. 230, 244 (Mass. 2014); *See also Commonwealth v. Wyatt*, No. 2011-00693, 2012 WL 4815307, at *6 (Mass. Super. Ct. Aug. 7, 2012).

¹⁰⁶ No. NOCV2010-00061, 2012 Mass. Super. LEXIS 39, at *31 (Feb. 23, 2012).

¹⁰⁷ 31 Mass. L. Rptr. 68, 9 (Mass. Super. Ct. 2013).

¹⁰⁸ No. SUCR2012-10180, 2013 Mass. Super. LEXIS 114, at *6 (Mar. 8, 2013).

was a clear privacy issue raised by the facts, the Massachusetts courts have ruled that this privacy issue must be resolved in favor of a warrant requirement for the use of CSLI.¹⁰⁹

In Florida, where the case of *Tracey v. State* is, at the time of this writing, pending before the Florida Supreme Court, the lower courts have ruled that there is no expectation of privacy when the search only concerns the location of a suspect while he is on the public roads.¹¹⁰ In that case, the sheriff's deputy who applied for the order to access CSLI relied solely on an unsupported statement from a federal agent.¹¹¹ The appellate court held that granting the order violated the state statutes that authorize access to CSLI, but the lower court held that exclusion of evidence is not an available remedy under those statutes.¹¹² The opinion contained language that indicated that the court was sympathetic to the notion that cell phone users do not voluntarily and knowingly convey locational data when they possess a cell phone.¹¹³ That the facts involve an overreach by the police could be meaningful when the Florida Supreme Court makes its decision.

In each of these cases, the authorities wanted to obtain information from a cell phone service provider to find the location of a suspect. In none of these instances was there probable cause to justify the issuance of a search warrant. In most of the cases, the state relied on statutory provisions that purport to allow a court to issue a subpoena to a cell phone service provider based on less than a probable cause standard. In some cases, the authorities simply requested data from the cell phone service providers and the request was granted without any court supervision at all.¹¹⁴ These cases also show the different approaches taken by state courts, many of which base their decisions on state constitutional provisions, and federal courts, that tend to apply the Fourth Amendment or applicable statutes.

PART III: UNITED STATES V. JONES AND FLORIDA V. JARDINES, AND RILEY V. CALIFORNIA

Until the 2012 decision in *U. S. v. Jones*,¹¹⁵ the legal standard for adjudicating claims of violations of the Fourth Amendment was clear, if not particularly predictable in terms of outcome when applied to actual cases. Justice Harlan's famous two-prong test was uniformly applied, even by Justice Scalia himself, to determine whether a search was valid.¹¹⁶ *Jones* sent ripples throughout the legal and law enforcement community, not only because it placed limits on a technological tool that was coming into widespread use, but because the outcome was unanimous, and all nine justices agreed that a warrant was

¹⁰⁹ See, e.g., *Pitt*, 2012 Mass. Super. LEXIS 39, at *31.

¹¹⁰ *Tracey v. Florida*, 69 So. 3d 992, 993, 999-1000 (Fla. Dist. Ct. App. 2011), *appeal docketed*, No. SC11-2254, 2013 Fla. LEXIS 215 (Fla. Jan. 28, 2013).

¹¹¹ *Id.* at 993.

¹¹² *Id.* at 999-1000.

¹¹³ See *id.* at 996 ("We acknowledge that a compelling argument can be made that CSLI falls within a legitimate expectation of privacy."); See also *id.* ("Technology evolves faster than the law can keep up, extending the search capabilities of law enforcement and transforming our concept of privacy.")

¹¹⁴ See *U.S. v. Caraballo*, 963 F. Supp. 2d 341, 346 (D. Vt. 2013), for an example of when a court order made mention of a Sprint corporate procedure for requests for emergency release of such information; In other cases, it is clear that there was no court order, or none was offered by the prosecution. See, e.g., *State v. Earls*, 70 A.3d 630, 633 (N.J. 2013); *People v. Fernandez*, 2011 Cal. App. Unpub. LEXIS 1931, at *6-7 (Mar. 16, 2011); *Devega v. State*, 689 S.E.2d 293, 299 (Ga. 2010).

¹¹⁵ 132 S. Ct. 945 (2012).

¹¹⁶ *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

needed, even though the justices were divided as to why.¹¹⁷ To legal scholars the case raised numerous questions due to Justice Scalia's attempt to return to the long-discarded trespass doctrine while distancing the decision from the reasonable expectation of privacy standard.¹¹⁸ Justice Sotomayor's concurrence is also important in that she criticized the third party doctrine that results from the application of *Smith v. Maryland*¹¹⁹ to CSLI cases and she seemingly embraced the mosaic approach to the Fourth Amendment.¹²⁰

The facts of the *Jones* case are fairly well known, even if the actual path of the case traced through the court system was convoluted and lengthy.¹²¹ The police in the District of Columbia obtained a warrant that would allow them to place a GPS device on a car being used by Jones.¹²² The warrant allowed for the device to be placed within a ten day window.¹²³ It was placed on day 11, and the attachment of the device occurred in Maryland in a public parking lot.¹²⁴ Thus, the Court treated the case as if the placement of the GPS was warrantless.¹²⁵ Twenty-eight days of data were gathered and these data were used at trial to convict Jones of conspiracy to traffic in illegal drugs.¹²⁶

Five of the Justices, led by Justice Scalia, seized on the fact that the device was placed on the car without a valid warrant.¹²⁷ In Scalia's opinion, this action constituted a trespass at common law and this was sufficient to taint the placement of the device and all evidence subsequently derived from the use of the device.¹²⁸ The other four Justices who signed the majority opinion agreed that the placement of the device was tainted, but could not all agree on Justice Scalia's trespass rationale. Justice Sotomayor agreed that the warrantless placement of the GPS device was enough to invalidate the search, and joined the majority on that basis, but wrote separately to reject Scalia's new trespass standard.¹²⁹ In her concurrence, Sotomayor applied the reasonable expectation of privacy test to hold

¹¹⁷ The Court determined that it need not address the government's contention that Jones had no reasonable expectation of privacy and therefore there was no search "because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation." See *Jones*, 132 S. Ct. at 950. Justice Sotomayor discusses the test that she would apply to cases of GPS monitoring given "some of the unique attributes of GPS surveillance relevant to the *Katz* analysis [which] will require particular attention." *Id.* at 955-56 (Sotomayor, J., Concurring). Justice Alito states that he would analyze the issue by asking whether the long-term monitoring of the moments of the vehicle that Jones drove violated his reasonable expectations of privacy. *Id.* at 958 (Alito, J., Concurring).

¹¹⁸ See *id.* at 950-52.

¹¹⁹ See *id.* at 957 (Sotomayor, J., Concurring) ("[Third party doctrine] is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."); See also *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).

¹²⁰ *Jones*, 132 S. Ct. at 957 (Sotomayor, J., Concurring); See Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 327-28 (2012); See, also *Commonwealth v. Augustine*, Criminal Action 11-10748, 2013 WL 5612574, at *5-7 (Mass. Super. Apr. 3, 2013), vacated and remanded on other grounds by *Commonwealth v. Augustine*, 467 Mass. 230, 244 (2014), wherein the lower court expressly adopted the mosaic theory.

¹²¹ There were two trials. See *Jones*, 132 S. Ct. at 948. The first ended in a hung jury. *Id.* There was an appeal to the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 949. The Supreme Court vacated Jones' conviction. *United States v. Jones*, 908 F. Supp. 2d 203, 204 (D.D.C. 2012). Proceedings on remand included a hearing on a motion to suppress 120 days of CSLI. See *Jones* 908 F. Supp. 2d at 205.

¹²² *Jones*, 132 S. Ct. at 948.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 949 (setting out procedural posture).

¹²⁶ See *id.* at 948-49.

¹²⁷ *Id.* at 949.

¹²⁸ See *id.*

¹²⁹ *Id.* at 954-57.

that tracking the whereabouts of a person over time was not a reasonable search.¹³⁰ For her, and for the four Justices who signed Justice Alito's concurring opinion, the proper test is the reasonable expectation of privacy test.¹³¹

Justice Sotomayor also wrote that it is perhaps time to reconsider the third party doctrine of *Smith v. Maryland*, arguing that it is "ill suited to the digital age"¹³² and expressly mentioned the fact that cell phone users routinely and automatically convey information to their providers in the course of using the phone.¹³³ This item of *dicta* is especially significant when attempting to decide petitions for court order to release CSLI. Some commentators interpreting the *Jones* decision have argued that taken together, the Sotomayor and Alito concurring opinions create something called the "mosaic" theory of the Fourth Amendment.¹³⁴ This approach involves taking the entire set of official behaviors in a holistic way, as opposed to examining each action taken by the government in a sequential way.¹³⁵ This type of reasoning has potential for application to cell phone tracking cases since it seemingly would allow for the context in which cell phone data are gathered to be considered free from the constraints of the third party doctrine.

Despite the lack of five votes for his new, and old, trespass standard, it was also applied to decide the case of *Florida v. Jardines*.¹³⁶ Police suspected Joelis Jardines of keeping illegal drugs inside his home and brought a K-9 unit to the defendant's front porch.¹³⁷ After the drug-sniffing dog indicated to officers that there were narcotics inside the house, they obtained a warrant using that information as part of the presentation to the judge.¹³⁸ Upon execution of the warrant, officers seized marijuana plants from inside the home.¹³⁹ Justice Scalia, writing for the majority, held that because the officers brought the drug-sniffing dog physically onto the defendant's porch, they were invading the province of his home and consequently searching it.¹⁴⁰ But the court did not explain why it should make a difference, for Fourth Amendment purposes, that the drug-sniffing dog had to be on the defendant's porch in order to smell the plants as opposed to detecting them from the street. Scalia's application of the trespass doctrine was particularly interesting, given the similarities in *Jardines* to the *Kyllo* thermal vision imaging case from a decade earlier, where Scalia's majority opinion relied on the reasonable expectation of privacy in one's home to disallow warrantless thermal imaging of the home.

The development of a new trespass doctrine, in effect, resurrecting *Olmstead*, while at the same time leaving the *Katz* reasonable expectation of privacy standard in place, has injected confusion and uncertainty to the Fourth Amendment. The ruling in *Riley v. California*, issued in June of 2014, did little to resolve this confusion.¹⁴¹ The opinion actually decided two cases in which the police had seized a cellular phone from a suspect

¹³⁰ *Id.* at 956.

¹³¹ *Id.* at 956-57, 64.

¹³² *Id.* at 957.

¹³³ *Id.*

¹³⁴ Kerr, *supra* note 120, at 313-14.

¹³⁵ *Id.* at 314.

¹³⁶ 133 S. Ct. 1409, 1417 (2013).

¹³⁷ *Id.* at 1413.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1417-18.

¹⁴¹ *Riley v. California*, 573 U.S. ___, Nos. 13-132 and 13-212 (June 25, 2014).

as part of a search incident to arrest.¹⁴² In both cases, the police had proceeded to search the contents of the phone and used that evidence against the defendants in their trials.¹⁴³

The opinion in the *Riley* case was written by Chief Justice Roberts, with only a special concurrence by Justice Alito preventing a unanimous Court. The opinion shows that the justices have educated themselves about cell phone technology, something that was long overdue given the famous reluctance of the justices to embrace information technology.¹⁴⁴ The court in several places expressly stated that cellular phones are fundamentally different than other types of personal property that is commonly discovered in a search incident to arrest because of the comprehensive nature of the information stored on these devices:

Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.¹⁴⁵

Additionally, the Court made it clear that cell phones can store all sorts of sensitive personal information as well as provide access to information stored in browser histories or stored in the cloud.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.¹⁴⁶

Lastly, concerning locations, the Court was quick to note that cell phones do allow the police to discover where a person has been with great detail.

Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.¹⁴⁷

Because of the concern for the huge amount of private data that can be accessed whenever the police seize a cellular phone, the Court held that the police must obtain a warrant before searching the information on the phone. The court even went so far as to suggest strategies for protecting evidence by securing the phone against remote wiping or data encryption.¹⁴⁸ It should be noted that the opinion in *Riley* did not apply Justice

¹⁴² The second case was *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), cert granted, 134 S. Ct. 999 (2014).

¹⁴³ The *Riley* case involved a smart phone, and images and video from the phone were used as evidence. The phone in *Wurie* was an older flip phone, which was used to determine the location of the suspect's home and to justify a warrant to search that home.

¹⁴⁴ Will Oremus, *Elena Kagan Admits that Justices Haven't Quite figured Out E-Mail Yet*, (August 20, 2013, 3:33 pm), *Future Tense*, http://www.slate.com/blogs/future_tense/2013/08/20/elena_kagan_supreme_court_justices_haven_t_gotten_to_email_use_paper_memos.html (last visited, June 24, 2014).

¹⁴⁵ 573 U.S. ___, Nos. 13-132 and 13-212, slip op. at 20-21 (June 25, 2014).

¹⁴⁶ *Id.* at *19.

¹⁴⁷ *Id.* at *19-20.

¹⁴⁸ *Id.* at *12-14.

Scalia's trespass doctrine. The case was decided based on analysis of the two prongs, officer safety and preventing destruction of evidence, laid out in *Chimel v. California*.¹⁴⁹

PART IV: DIFFICULTIES IN APPLYING AND MIXING THE TRESPASS DOCTRINE OF *JONES* AND THE REASONABLE EXPECTATION OF PRIVACY TEST FROM *KATZ*

Both standards used by the Supreme Court thus far in determining whether a search or seizure has taken place, the trespass standard and the reasonable expectation of privacy standard, have flaws, especially the former. Applying them to the modern world creates problems and complications they were not designed to address. The trespass doctrine cannot coherently address situations created by today's technology, and despite decades of jurisprudence, the reasonable expectation of privacy standard remains malleable and difficult for law enforcement to use. Applying the trespass doctrine is becoming increasingly arbitrary, as shown in the two drug sniffing dog cases that have been decided recently, *Florida v. Jardines*¹⁵⁰ and *Illinois v. Caballes*.¹⁵¹ Further complicating this area of jurisprudence is an emerging patchwork of state constitutional provisions mimicking the Fourth Amendment, yet often providing a higher level of protection of individual rights.¹⁵² All of these factors further muddy the water for law enforcement officers, judges, and ordinary citizens trying to determine what constitutes a violation of the rights of a suspect.

The trespass doctrine has its roots in originalism, an approach to constitutional analysis that seeks to understand what the Constitution meant at the time the provision in question was written when construing its meaning today.¹⁵³ According to originalists like Justice Scalia, the Fourth Amendment was only meant to protect physical spaces.¹⁵⁴ Hence a suspect's Fourth Amendment rights are not implicated unless the government has physically trespassed onto the suspect's property. This was the rationale for deciding not to suppress evidence obtained from listening devices attached to the phone lines of suspects in *Olmstead v. United States*.¹⁵⁵ The Court held that no search or seizure took place because there was no physical entry into the suspect's homes or office.¹⁵⁶ This outcome foreshadowed the problems the trespass doctrine would encounter in the future. Justice Brandeis, in dissent, was quite specific – even prophetic – in wondering what new technological developments would mean in this area of the law.¹⁵⁷

As Justice Brandeis suggested, the application of the trespass doctrine is ill-suited for modern technological problems that complicate Fourth Amendment issues.¹⁵⁸ Physical

¹⁴⁹ 395 U.S. 752 (1969).

¹⁵⁰ 133 S. Ct. at 1413.

¹⁵¹ 543 U.S. 405, 406-407 (2005).

¹⁵² See, e.g., *Commonwealth v. Rushing*, 71 A.3d 939, 954-55 (Pa. Super. Ct. 2013); See *State v. Earls*, 70 A.3d 630, 632 (N.J. 2013).

¹⁵³ See *United States v. Jones*, 123 S. Ct. 945, 949-50 (2012) (describing the relationship between trespass and the Fourth Amendment); See Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 578 (2011) (describing the constitutional interpretation method of Originalism).

¹⁵⁴ See *Jones*, 123 S. Ct. at 949-50; See Richard H. Seamon, *Kyllo v. United States and the Partial Ascendance of Justice Scalia's Fourth Amendment*, 79 WASH. U. L.Q. 1013, 1018 (2001).

¹⁵⁵ 277 U.S. 438, 465-66 (1928).

¹⁵⁶ *Id.* at 466.

¹⁵⁷ *Id.* at 474 (Brandeis, J., dissenting).

¹⁵⁸ See *id.*

intrusion is often unnecessary for law enforcement to track suspects. Tracking a suspect by pinging a cell phone or by obtaining CSLI from a cell phone service provider gives law enforcement the ability to record the suspect's movements over a period of time, and in private spaces, but without any physical intrusion on the suspect's person, property, or home. Situations like these seem to run contrary to Justice Scalia's announced purpose of "preserv[ing] . . . that degree of privacy against government that existed when the Fourth Amendment was adopted,"¹⁵⁹ before the government had the ability to gather such extensive information about its citizens without physically searching them or their effects.

The inadequacy of the trespass doctrine to grapple with modern technology can lead to arbitrary results. This discrepancy is illustrated in *Florida v. Jardines*.¹⁶⁰ Surely the act of sending the dog to investigate the defendant's home in the first place was of more consequence than how far away it was when it inhaled. And *Jardines* only demonstrates the complexities of applying the trespass doctrine to search and seizure cases *without* the complications added by modern technology. Imagine the difficulty in applying the trespass doctrine to a similar situation where, instead of a dog, piece of equipment such as a drone, or a satellite is sent to investigate a suspect. We already know, from *California v. Cirallo*, and *Florida v. Riley*, that over flights by manned aircraft in search of marijuana growing activities do not violate the Fourth Amendment so long as they occur in commercial air space.¹⁶¹ We also know that the use of a thermal imaging device is not allowed on the grounds that it is a type of technology not in general use by the public.¹⁶² Would the suspect care more about whether the drone was in public air space, or the availability of a device to the general public, or the fact that his every move inside the privacy of his own home is being recorded? The trespass doctrine could allow such intrusions, which is why it is ill-equipped to answer such questions. There is simply no viable reason why a home should be constitutionally protected from a dog or a thermal imaging camera, but not a drone.¹⁶³

The combination of a trespass doctrine with the reasonable expectation of privacy standard¹⁶⁴ provides another layer of complications. *Jones* revived the trespass doctrine despite the fact that it was replaced in *Katz* with the reasonable expectation of privacy standard.¹⁶⁵ In *Jones*, Justice Scalia explained that "the *Katz* reasonable expectation of privacy test has been *added to*, not *substituted for*, the common law trespassory test."¹⁶⁶ But the two can often conflict. How to define a reasonable expectation of privacy is largely dependent upon judges and juries, which are in turn influenced by societal norms.

¹⁵⁹ *Jones*, 132 S. Ct. at 950 (quoting *Kyllo v. United States*, 533 U.S. 27, 28 (2001)).

¹⁶⁰ See 133 S. Ct. 1409, 1417 (2013) (describing an application of the trespass doctrine).

¹⁶¹ *California v. Ciraolo*, 476 U.S. 207, 215 (1986); *Florida v. Riley*, 488 U.S. 445, 451-52 (1989).

¹⁶² *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001).

¹⁶³ Further complicating the application of the trespass doctrine are cases like *Illinois v. Caballes*, 543 U.S. 405 (2005), that *Jones* did not overrule but seemingly add wrinkles to the doctrine's application. There the defendant was stopped for speeding and officers had a drug-sniffing dog inspect his car without any indication of the presence of narcotics. *Id.* at 406. There was in fact marijuana in the car, but the Court held that the inspection was not a search for Fourth Amendment purposes because the defendant had no legitimate expectation of privacy in contraband. *Id.* at 408-09. The Court reasoned that only where such inspections have the capability to detect lawful activity is the Fourth Amendment implicated, and the drug-sniffing dog could only detect contraband. *Id.* at 409. Although the search in *Jardines* arguably had such capability, as the officers could have peered into a window from the defendant's porch, at minimum, *Caballes* obscures the trespass doctrine and makes its application even more difficult.

¹⁶⁴ *Jones*, 132 S. Ct. at 950, 953.

¹⁶⁵ See *Katz v. United States*, 389 U.S. 347, 351 (1967) (declaring that the Fourth Amendment protects people, not places).

¹⁶⁶ 132 S. Ct. at 952.

The invasions of privacy that are considered reasonable can change with the times and indeed, with changes in technology. As applied in *Katz*, the reasonable expectation of privacy standard depends on the difference between “what a person knowingly exposes to the public,” which is not given Fourth Amendment protection, versus “what he seeks to preserve as private, even in an area accessible to the public,” which may be protected.¹⁶⁷ The reasonable expectation of privacy standard evolves over time. It is also quite subjective. What one set of justices views as reasonable may change as the Court’s membership changes and as the common uses to which a technology is put changes over time. Thus, Justice Sotomayor’s concerns about re-thinking what is a reasonable expectation of privacy regarding phone calls and bank records. The trespass doctrine, on the other hand, is not so malleable. The definition of “physical invasion” does not change with a suspect’s desire to preserve her privacy. The trespass doctrine is essentially stuck in the past: government actions that were considered physical invasions in the founding era are still viewed as such today. This tension was revealed in *Katz* itself, where the Court declared that a search had taken place when law enforcement eavesdropped on calls the defendant made from a phone booth.¹⁶⁸ Today, a well-placed camera or listening device need not even be physically near a phone booth to record the defendant’s conversation. Under the reasonable expectation of privacy standard, such listening would violate the suspect’s expectation of privacy. But under the trespass doctrine, such a search could be considered legitimate because the government did not physically intrude into the phone booth. The *Jones* majority does not adequately address this dilemma or explain how to apply the two tests together when each points to a different outcome.

It should be acknowledged that the reasonable expectation of privacy standard does not provide a spotless alternative. That standard, espoused in *Katz*,¹⁶⁹ was strongly calculated to rebut the holding in *Olmstead* that the Fourth Amendment protects only places.¹⁷⁰ Instead of being based on a physical/non-physical distinction, the reasonable expectation of privacy standard changes with society, and the defendant’s, expectations.¹⁷¹ Precisely because of its ability to change with societal expectations, it is inconsistent in application. Different judges and juries come to different conclusions about what is reasonable, which will likely produce conflicting precedents on a regular basis.¹⁷² In addition, such uncertainty provides imperfect guidance for law enforcement officers who must apply the doctrine in real time and should (ideally) be able to reasonably predict the outcome of doing so. When a faulty search might lead to the acquittal of a guilty party, such foreseeability is extremely important.

A further complication is that the privacy expectations of cell phone users are unclear. While the data on how Americans feel about the National Security Agency’s interceptions of cell phone and internet traffic data are mixed,¹⁷³ to apply a trespass

¹⁶⁷ 389 U.S. at 351.

¹⁶⁸ *Id.* at 353.

¹⁶⁹ *Id.* at 351.

¹⁷⁰ *Id.* at 351-54 (declaring that the Fourth Amendment protects people, not places).

¹⁷¹ *See id.* (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

¹⁷² The changes in the precision by which triangulation location can be accomplished using CSLI have caused changes in the way that such cases are judged. *Compare In re Application of the U.S. for an Order for Disclosure of Telecomms. Records*, 405 F. Supp. 2d 435, 449 (S.D.N.Y. 2005), with *In re Application of the U.S. for Historical Cell Site Data*, 747 F. Supp. 2d 827, 837 (S.D. Tex. 2010), vacated, 724 F.3d 600 (5th Cir. 2013).

¹⁷³ *Majority say NSA tracking of phone records “acceptable” – Washington Post-Pew Research Center poll*, WASH. POST (June 10, 2013), <http://www.washingtonpost.com/page/2010->

standard is to rule that there is no reasonable expectation of privacy in any data generated by the use of a cellular phone and stored in the databases of the service provider. The trespass standard does not construe such data as important since no trespass on any property or effect of the suspect need occur for the police to access those data. In fact, it is not clear at all that a suspect would have any protected interest at all in data held by the cell service provider. While there has been no case explicitly on the issue of who owns such data, the opinion in *New York v. Harris* reports that the trial court in that case ruled that the defendant had no standing to challenge a subpoena directed to Twitter that ordered the production of tweets written by the defendant and stored in Twitter's database.¹⁷⁴ Thus, the use of a trespass standard effectively allows the police to access any data that the service provider elects to turn over to them, without any protection of the rights of the user.

Further complicating modern search and seizure jurisprudence are state constitutional and statutory provisions noted above that mirror the Fourth Amendment yet provide more extensive protections for individuals.¹⁷⁵ If the current muddled standards continue, federal courts risk seeing this area of federal jurisprudence fade into irrelevancy as state supreme courts create their own standards that are more protective of individual privacy and would render Fourth Amendment protections redundant. *Pennsylvania v. Rushing*¹⁷⁶ is a prime example. There, the Pennsylvania Supreme Court ignored *Jones* and adopted the reasonable expectation of privacy standard alone when interpreting Article I, Section 8 of its own constitution.¹⁷⁷ The court also disregarded the "specific and articulable facts" standard used by federal courts in determining when the government can overcome a reasonable expectation of privacy and trace a suspect's location in real time.¹⁷⁸ Instead, the court adopted a probable cause standard.¹⁷⁹ As noted above, the *Earls* court had a similar holding limited to the New Jersey Constitution.¹⁸⁰ The danger with continuing on with the unclear standard from *Jones* is that state courts will take their cues

2019/WashingtonPost/2013/06/10/National-Politics/Polling/release_242.xml; 59% Oppose Government's Secret Collecting of Phone Records, RASMUSSEN REPORTS (June 9, 2013), http://www.rasmussenreports.com/public_content/politics/general_politics/june_2013/59_oppose_government_s_secret_collecting_of_phone_records; Doug Mataconis, *Initial Polls Seemingly In Conflict On Public Opinion Of NSA Surveillance Programs*, OUTSIDE THE BELTWAY (June 11, 2013), <http://www.outsidethebeltway.com/initial-polls-seemingly-in-conflict-on-public-opinion-of-nsa-surveillance-programs/>; *Most disapprove of gov't phone snooping of ordinary Americans*, CBS NEWS (June 11, 2013), http://www.cbsnews.com/8301-250_162-57588748/most-disapprove-of-govt-phone-snooping-of-ordinary-americans/.

¹⁷⁴ *People v. Harris*, 945 N.Y.S.2d 505, 510 (Crim. Ct. 2012); See, for example, *United States v. Meregildo*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012), in which the court held that admission of Facebook material listed as private by defendant, but provided by Facebook friends of the defendant, was not a violation of the Fourth Amendment.

¹⁷⁵ Maine and Montana have passed statutes mandating that police obtain a warrant before seeking to track a suspect using his or her cell phone. ME. REV. STAT. tit. 16, § 642 (West, Westlaw through 2013 Sess.); H.B. No. 603, 63d Reg. Sess. (2013), available at <http://leg.mt.gov/bills/2013/billhtml/HB0603.htm> (last updated Apr. 22, 2013).

¹⁷⁶ *Commonwealth v. Rushing*, 71 A.3d 939, 962 (Pa. Super. Ct. 2013).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 961.

¹⁷⁹ *Id.*

¹⁸⁰ *State v. Earls*, 70 A.3d 630, 644 (N.J. 2013); See, also, the discussion in five lower court cases from Massachusetts: *Commonwealth v. Augustine*, No. 11-10748, 2013 WL 5612574, at *7 (Mass. Super. Ct. Apr. 3, 2013), *vacated*, 467 Mass. 230 (Mass. 2014); *Commonwealth v. Princiotta*, No. 2009-00965, 2013 WL 1363901, at *9 (Mass. Super. Ct. Apr. 1, 2013); *Commonwealth v. Willis*, No. SUCR2012-10180, 2013 Mass. Super. LEXIS 114, at *5-6 (Mar. 8, 2013); *Commonwealth v. Wyatt*, No. 2011-00693, 2012 WL 4815307, at *7 (Mass. Super. Ct. Aug. 7, 2012); *Commonwealth v. Pitt*, No. 2010-0061, 2012 WL 927095, at *4 (Mass. Super. Ct. Feb. 23, 2012).

from Pennsylvania, Massachusetts, and New Jersey, developing their own standards and taking this section of search and seizure jurisprudence out of the hands of federal courts. This scenario would create yet another area of law where the rules change as one crosses state lines, an unacceptable state of affairs when often a suspect being tracked is in one state, the police tracking him are in another, and the data monitoring his movements are in a third state. In order to maintain uniformity and promote predictability, federal courts must adopt a clear standard that is more effective than the *Jones* rule.

PART V. AN ANALYSIS OF FEDERAL AND STATE CASES INVOLVING POLICE USE OF CSLI TO TRACK A SUSPECT

In order to fully explore the current state of the law with regard to police use of CSLI to track a suspect, it is necessary to find as many trial and appellate court cases as possible. The process used to do so is tedious, but the best available. The 2010 case *In the Matter of the Application of the United States of America for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*¹⁸¹ was shepardized as a starting point. On January 7, 2014, that processed yielded 133 hits, 56 of which were trial court orders or appellate opinions that had cited this case. All of those orders and opinions were read and content analyzed, and any earlier cases that were cited in those orders and opinions were noted and included in the data. Trial court orders that were subsequently addressed by appellate courts were listed only under the auspices of the appellate court opinion to avoid double listing of cases. As a check to make sure that all possible cases were identified, a search on Lexis was conducted using the search term "CSLI." That search yielded 45 case hits, 11 of which were not in the data base already and involved the police using a cell phone to track the location of a criminal suspect. Reading those cases yielded one more case that had not been found through earlier efforts.

Ultimately, a database of 82 court cases in which the government's use of CSLI was at issue was compiled.¹⁸² The earliest case was decided in 2004.¹⁸³ Of the 82 cases, only sixteen came from state courts, and only eight came from the United States Courts of Appeals. No United States Supreme Court case has addressed this issue and, at the time of this writing, no petition for certiorari has been granted. One case has been appealed to the state supreme court of Florida.¹⁸⁴

In addition to case name and citation, the level of court, whether the case arose in the state or federal systems, whether the trial court suppressed the data or refused to grant the order, the length of time of the surveillance, information about the basis for the search, and the rationale of the decision was recorded. Whether the order or opinion cited to *U. S. v. Jones* and *Katz v. U. S.*, the type of crime in question, and whether the request was for historical CSLI, real time CSLI, or a ping were recorded as well.

It should be noted that most of the motions to suppress were not granted. 26 of the 82 cases, or 32 percent ultimately resulted in suppression of the evidence, which means that the government was able to use the evidence in 68 percent of the cases. It did

¹⁸¹ 620 F.3d 304, 305-06 (3d Cir. 2010). This case was chosen because it was, at the time, the first United States Court of Appeals decision known to the authors on this issue.

¹⁸² See *infra* Appendix A.

¹⁸³ *U. S. v. Forest*, 355 F.3d 942 (6th Cir. 2004).

¹⁸⁴ *Tracey v. State*, 69 So. 3d 992 (Fla. Dist. Ct. App. 2011), *appeal docketed*, No. SC11-2254, 2013 Fla. LEXIS 215 (Jan. 28, 2013).

not matter much whether the issue was before a state or a federal court, as the government was successful in 11 of the 16, or 69 percent, of state cases and in 45 of the 66, or 68 percent, of cases heard in federal courts. Table 1 shows the number of cases and who won by type of jurisdiction.

Table 1: Number of Cases by Who Won and Type of Jurisdiction

	Defendant Won	State Won	Total
Federal Courts	21 (32%)	45 (68%)	66 (80%)
State Courts	5 (31%)	11 (69%)	16 (20%)
	26 (32%)	56 (68%)	82 (100%)

There also was no clear pattern based on the time the case was heard, but it should be noted that defendants were more successful in cases heard in 2005 (86%), 2006 (60%), and 2010 (44%) than in other years. It should also be noted that the government was successful in more than 80 percent of cases decided after 2010. Table 2 shows the distribution of cases by year.

The pattern of results is fairly clear. Criminal defendants challenging the use of CSLI were often successful in the earliest cases to be brought, but not in the most recent cases. All of the early cases came from federal courts and no clear geographic pattern appears. Defendants were successful in The District of Columbia,¹⁸⁵ Indiana,¹⁸⁶ Maryland,¹⁸⁷ and Wisconsin.¹⁸⁸ Some defendants were successful and some were not in New York¹⁸⁹ and Texas.¹⁹⁰ Defendants were not successful in Louisiana,¹⁹¹ Ohio,¹⁹² and

¹⁸⁵ *In re Applications of the United States for Orders Authorizing the Disclosure of Cell Site Info.*, 2005 U.S. Dist. LEXIS 43736, at *2 (D.D.C. Oct. 26, 2005); *In re the Application of the United States for an Order Authorizing the Release of Prospective Cell Site Info.*, 407 F. Supp. 2d 132, 133 (D.D.C. 2005).

¹⁸⁶ *In re the Application of the United States for an Order: Authorizing the Installation & Use of a Pen Register*, No. 1:06-MC-6, 2006 U.S. Dist. LEXIS 45643, at *14-15 (N.D. Ind. July 5, 2006).

¹⁸⁷ *In re Application for an Order Authorizing the Installation & Use of a Pen Register*, 439 F. Supp. 2d 456, 457 (D. Md. 2006); *In re the Application of the United States for Orders Authorizing Installation & Use of Pen Registers*, 416 F. Supp. 2d 390, 391 (D. Md. 2006); *In re the Application of the United States for an Order Authorizing Installation & Use of a Pen Register*, 402 F. Supp. 2d 597, 605 (D. Md. 2005).

¹⁸⁸ *In re the Application of the United States for an Order Authorizing the Disclosure of Prospective Cell Site Info.*, No. 06-MISC-004 2006 U.S. Dist. LEXIS 73324, at *22 (E.D. Wis. Oct. 6, 2006).

¹⁸⁹ Compare *In re Application of the United States for an Order (1) Authorizing the Use of a Pen Register & a Trap & Trace Device*, 396 F. Supp. 2d 294, 322-23 (E.D.N.Y. 2005), and *In re the Application of the United States for an Order Authorizing Installation & Use of a Pen Register and/or Trap & Trace for Mobile Identification No. (585)111-1111*, 415 F. Supp. 2d 211, 219 (W.D.N.Y. 2006), with *In re Application of United States for an Order for Disclosure of Telecomms. Records*, 405 F. Supp. 2d 435, 450 (S.D.N.Y. 2005).

¹⁹⁰ Compare *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d 747, 765 (S.D. Tex. 2005), and *In re the Application of the United States for an Order Authorizing (1) Installation & Use of a Pen Register & Trap & Trace Device or Process*, 441 F. Supp. 2d 816, 836-37 (S.D. Tex. 2006), with *In re the Application of the United States for an Order: (1) Authorizing the Installation & Use of a Pen Register & Trap & Trace Device*, 433 F. Supp. 2d 804, 806 (S.D. Tex. 2006).

¹⁹¹ *In re the Application of United States for an Order: (1) Authorizing the Installation & Use of a Pen Register & Trap & Trace Device*, 411 F. Supp. 2d 678, 682-83 (W.D. La. 2006).

¹⁹² *United States v. Forest*, 355 F.3d 942, 951-52 (6th Cir. 2004).

West Virginia.¹⁹³ In those early cases in which the evidence was allowed to be used, often the judges cited the lack of precision of the data,¹⁹⁴ the lack of standing of the defendant,¹⁹⁵ or the fact that the defendant's location was only tracked while he was on public streets.¹⁹⁶

Table 2: Cases by Year Decided¹⁹⁷

	Defendant Won	State Won	Total
2004	0 (0%)	1 (100%)	1
2005	6 (86%)	1 (14%)	7
2006	6 (60%)	4 (40%)	10
2007	1 (25%)	3 (75%)	4
2008	1 (33%)	2 (67%)	3
2009	1 (20%)	4 (80%)	5
2010	4 (44%)	5 (56%)	9
2011	2 (20%)	8 (80%)	10
2012	2 (13%)	13 (87%)	15
2013	3 (13%)	15 (83%)	18
	26 (32%)	56 (68%)	82 (100%)

One thing that does appear in cases decided before 2009 are rulings on an apparently concerted effort by the Justice Department to craft arguments that no warrant is required in order for the government to access CSLI. The notion was that the Stored Communications Act,¹⁹⁸ together with the Pen Register Statute¹⁹⁹ and the

¹⁹³ *In re the Application of the United States for an Order Authorizing the Installation & Use of a Pen Register with Caller Identification Device*, 415 F. Supp. 2d 663, 666 (S.D.W. Va. 2006).

¹⁹⁴ See, e.g., *In re Application of the United States for an Order for Disclosure of Telecomms. Records*, 405 F. Supp. 2d 435, 438 (S.D.N.Y. 2005); See, e.g., *In re the Application of the United States or an Order*, 411 F. Supp. 2d at 680.

¹⁹⁵ *In re the Application of the United States for an Order Authorizing the Installation & Use of a Pen Register*, 415 F. Supp. 2d at 664-66.

¹⁹⁶ *Forest*, 355 F.3d at 950-51.

¹⁹⁷ While the limits of the Chi-Square statistic do not allow for the calculation of an accurate measurement of the probability that the distribution of cells occurred randomly when so many cells have very small numbers of cases, the authors did collapse the year variable into three categories – 2004 to 2006, 2007 to 2010, and 2011 to 2013, and ran a chi-Square analysis of that contingency table. The result was statistically significant at the .001 level. We are convinced that the differences by year were not random. There is a strong association between time and outcomes.

¹⁹⁸ 18 U.S.C.A. §§ 2701-2712 (West 2014).

¹⁹⁹ 18 U.S.C.A. §§ 3121-3127 (West 2014).

Communications Assistance for Law Enforcement Act,²⁰⁰ would justify access to pretty much any type of cell phone data. Most courts rejected this “hybrid theory,”²⁰¹ although two courts in New York did not.²⁰² The tone of one DC judge’s order was notable in admonishing the prosecutors, “I am afraid that I find the government’s chimerical approach unavailing. Indeed, and to keep the animal metaphor going, it reminds one of the wag who said a camel is a horse planned by a committee.”²⁰³

Many of these judges in early cases were convinced by arguments that the use of CSLI is the same as the use of a tracking device such as was used in the *Karo* and *Knotts* cases.²⁰⁴ This argument lost its potency as more of these kinds of cases made their way through the courts, but no obvious reason has emerged from our analysis for why this changed. It is entirely possible that as judges have become more familiar with such cases, they have changed the way that they perceive the culpability of criminals who use their cellular phones in the pursuit of their criminal goals, resulting in more denials of motions to suppress. It is also plausible that judges have come to believe that cell phone users are aware of the data collection that occurs with their use and accept this reality when making decisions about what expectations of privacy are reasonable. Regardless of the reason, the trend in this area of the law in federal court is in favor of the state.

Given the comments made by Justices Sotomayor and Alito in their concurring opinions in *U. S. v. Jones* that the long term tracking of the suspect was of constitutional significance, the question of whether the length of the surveillance in question is well worth an investigation.²⁰⁵ In the 43 cases for which this information was known, the average length of surveillance for the twelve cases in which the defendant was successful in getting evidence suppressed was 44 days. For the 31 cases for which this information was known and in which the defendant was not successful in getting the evidence suppressed, the average length of time of the surveillance was 66 days. If the courts are concerned that long term surveillance is a violation of the privacy of suspects, one would

²⁰⁰ 47 U.S.C.A. §§ 1001-1010 (West 2014).

²⁰¹ See, e.g., *In re the Application of the United States for an Order Authorizing Installation & Use of a Pen Register and/or Trap & Trace for Mobile Identification No. (585)111-1111*, 415 F. Supp. 2d 211, 219 (W.D.N.Y. 2006); *In re the Application of the United States for an Order Authorizing (1) Installation & Use of a Pen Register & Trap & Trace Device or Process*, 441 F. Supp. 2d 816, 828, 836 (S.D. Tex. 2006); *In re the Application of the United States for an Order Authorizing Installation & Use of a Pen Register & a Caller Identification Sys. On Tel. Nos. [Sealed] & [Sealed]*, 402 F. Supp. 2d 597, 600 (D. Md. 2005).

²⁰² *In re: Application of the United States for an Order for Prospective Cell Site Location Info. on a Certain Cellular Tel.*, 460 F. Supp. 2d 448, 461 (S.D.N.Y. 2006); *In re an Application of the United States for an Order Re-Authorizing (1) The Use of a Pen Register & a Trap & Trace Device with Prospective Cell-Site Info.*, No. M-08-533, 2009 U.S. Dist. LEXIS 55739, at *3 (E.D.N.Y. Jan. 12, 2009).

²⁰³ *In re the Application of the United States for an Order Authorizing the Release of Prospective Cell Site Info.*, 407 F. Supp. 2d 132, 133 (D.D.C. 2005).

²⁰⁴ See, e.g., *In re the Application of the United States for an Order Authorizing (1) Installation & Use of a Pen Register & Trap & Trace Device or Process*, 441 F. Supp. 2d at 837; See, e.g., *In re the Application of the United States for an Order Authorizing the Installation & Use of a Pen Register &/or Trap & Trace for Mobile Identification No. (585) 111-1111*, 415 F. Supp. 2d at 216.

²⁰⁵ In his opinion in *U. S. v. Graham*, Judge Bennett, in referring to his interpretation of the opinions in *U.S. v. Jones*, said, “Accordingly, it appears as though a five justice majority is willing to accept the principle that government surveillance over time can implicate an individual’s reasonable expectation of privacy.” 846 F. Supp. 2d 384, 394-404 (D. Md. 2012) (referencing 132 S. Ct. 945 (2012)); See, also, *In re an Application of the United States for an Order Authorizing the Release of Historical Cell-Site Info.*, No. 11-MC-0113, 2011 U. S. Dist. LEXIS 15457 (E.D.N.Y. Feb. 16, 2011) (explaining that length of time of continuous monitoring is key in determining whether probable cause is required to justify the release of CSLI.)

hypothesize that longer periods of continuous surveillance would result in the courts being more reluctant to approve the search. This hypothesis is not supported by this analysis.²⁰⁶

One point that is worth mentioning is how these lower courts have responded to the decision in *U. S. v. Jones*. Interestingly, the trespass standard that Justice Scalia advocated has been of virtually no import to the lower court judges deciding these cases.²⁰⁷ U.S. Magistrate Judge Orenstein (S.D.N.Y.), well known and often cited for his early opinions in this area of the law, explicitly argued that cell phone tracking cases needed to be re-examined after the DC Circuit issued its decision in *United States v. Maynard*, the case that would become *United States v. Jones*. The factors that were of the most import to these re-examinations of the cell phone tracking jurisprudence were: 1) the idea that use of the phone to track a person over an extended period of time was of greater constitutional significance than a ping or tracking over a brief time period; and 2) the distinction between historical and real time, or prospective, CSLI.²⁰⁸ Several cases arising in New York, Massachusetts, and Texas did address the issue of tracking over time,²⁰⁹ but no consensus has emerged regarding the length of time that triggers the treatment of cell phone CSLI in the same way as the installation of a GPS tracking device.²¹⁰

Several of the cases in the data made specific points about the distinction between historical CSLI and real time CSLI. For example, in *U. S. v. Moreno-Navarez*, the judge stated, “This Court joins the Third and Fifth Circuits, as well as the majority of the courts to address this issue . . . in concluding that there is no ‘reasonable expectation of privacy’ in historical cell site data.”²¹¹ In *U. S. v. Graham*, the court went to great lengths to argue that the instant case was very different than the facts in *U. S. v. Jones*²¹² and that historical CSLI can be handled differently than real time CSLI or a tracking device.²¹³ By contrast, some courts have ruled that where the police intend to use a cell phone to track the location of suspect using the global positioning function of the phone or if they intend to use CSLI to triangulate the location of a suspect, then that is the same as the use of a dedicated tracking device such as was used in *U. S. v. Jones*.²¹⁴ At least one

²⁰⁶ A difference of means test was conducted and the difference between the two means was not statistically significant.

²⁰⁷ *Jones* was only cited by 24 of the 36 of the cases in the database that were decided after January of 2012, when the decision in *Jones* was issued. Some criminal defendants attempted to get new hearings on suppression motions in the aftermath of the *Jones* decision. See, e.g., *United States v. Gordon*, No. 09-153-02, 2012 U.S. Dist. LEXIS 188445, at *2 (D.D.C. 2012).

²⁰⁸ *In re Application of the United States for an Order Authorizing the Release of Historical Cell Site Info.*, 736 F. Supp. 2d 578, 582 (E.D.N.Y. 2010).

²⁰⁹ See, e.g., *id.* at 578-79 (58 days); See, e.g., *In re an Application of the United States for an Order Authorizing the Release of Historical Cell Site Info.*, 809 F. Supp. 2d 113, 114 (E.D.N.Y. 2011) (113 days); See, e.g., *In re an Application of the United States for an Order Authorizing the Release of Historical Cell-Site Info.*, 2011 U.S. Dist. LEXIS 15457, at *6 (21 days); See, e.g., *In re the Application of the United States for an Order Pursuant to Title 18, U.S.C. § 2703(d) to Disclose Subscriber Info. & Cell Site Info.*, 849 F. Supp. 2d 177 (D. Mass. 2012) (210 days); See, e.g., *In re Application of the United States for Historical Cell Site Data*, 747 F. Supp. 2d 827, 840 (S.D. Tex. 2010) (60 days).

²¹⁰ It should be noted that on remand, Antoine Jones’s motion to suppress 120 days of CSLI evidence was not granted. *United States v. Jones*, 908 F. Supp. 2d 203, 216 (D.D.C. 2012). The court refused to decide the issue on the merits, citing to the Good Faith exception to the Exclusionary Rule. *Id.* at 215.

²¹¹ No. 13-CR-0841-BEN, 2013 U.S. Dist. LEXIS 143900, at *4-6 (S.D. Cal. 2013).

²¹² *United States v. Jones*, 132 S. Ct. 945 (2012).

²¹³ 846 F. Supp. 2d 384, 394-404 (D. Md. 2012).

²¹⁴ See, e.g., *In re the Application of the United States for an Order: (1) Authorizing the Use of a Pen Register & Trap & Trace Device*, 727 F. Supp. 2d 571, 579-80 (W.D. Tex. 2010); *In re the Application of the United States for an Order Authorizing the Disclosure of Prospective Cell Site Info.*, No. 06-MICS-004, 2006 U.S. Dist. LEXIS 73324, at *13-16 (E.D. Wis. 2006).

federal court has ruled that access to prospective, or “real time” CSLI always requires a warrant,²¹⁵ and one court expressly stated that citizens have a reasonable expectation of privacy in their movements.²¹⁶

Table 3 shows the cross-tabulation of the type of information sought by the government with the outcome of the motion to suppress.

Table 3: Success of Motion to Suppress by Type of Information Requested²¹⁷

	Defendant Won	State Won	Total
Historical CSLI	7 (21%)	27 (79%)	34
Real time CSLI	18 (49%)	19 (51%)	37
	25 (35%)	46 (65%)	71 (100%)

$\chi^2 = 6.115, p < .05^*$

The differences are statistically significant. In the aggregate, judges are more reluctant to grant access to real time CSLI than historical CSLI data. The reasons for this seem fairly clear. Access to locational data wherein the suspect is in a private space can be protected by a judge via redacting those parts of the CSLI records when the order is initially granted. By contrast, an order for real time or prospective CSLI inherently grants access to the suspect’s location for the entire time of the order, regardless of whether the suspect is in a private space or not. Some courts have used the terms like “intimate portrait” to describe the consequences of granting the government complete access to a person’s location during a given time period.²¹⁸ Regardless, the key difference seems to be the ability to protect against access to a person’s location when he or she is in a private space.

But the quantitative analysis does not reveal the full story of this area of the law. As with all analysis of case opinion data, sometimes the quantitative analysis leaves out important parts of the story. In this case, there are several interesting points. For example, there were a number of cases in which the court considered the application of the good faith exception to the exclusionary rule to cell phone tracking cases.²¹⁹ Because the police often had little idea what was allowed and what the legal standards are in this area of the law, once they had relied in good faith on a court order, the courts often allowed the evidence to be admitted, even when they had doubts about the validity of the search.²²⁰

²¹⁵ *In re the Application of the United States for an Order Relating to Target Phone 2*, 733 F. Supp. 2d 939, 940 (N.D. Ill. 2009).

²¹⁶ *See In re the Application of the United States for an Order Directing Provider of Elec. Comm’n Serv. to Disclose Records to the Gov’t*, 534 F. Supp. 2d 585, 591 (W.D. Pa. 2008) *vacated*, 620 F.3d 304 (3d Cir. 2010).

²¹⁷ For purposes of computing the Chi-Square statistic, cases in which only a ping was involved were omitted and cases in which both historical and real time CSLI were sought we treated as requests for real time CSLI.

²¹⁸ *See, e.g.*, *United States v. Maynard*, 615 F.3d 544, 563 (D.C. Cir. 2010); *See also, In re an Application of the United States for an Order Authorizing Release of Historical Cell-Site Info.*, 736 F. Supp. 2d 578, 582 (E.D.N.Y. 2010) (depicting the tracking motion of an individual as an “intimate picture” of his movements).

²¹⁹ *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 924-26 (1984).

²²⁰ *See United States v. Barajas*, 710 F.3d 1102, 1110-11 (10th Cir. 2013); *See United States v. Espudo*, 954 F. Supp. 2d 1029, 1043-44 (S.D. Cal. 2013); *See United States v. Powell*, 943 F. Supp. 2d 759, 793 (E.D. Mich. 2013); *See People v. Moorer*, 959 N.Y.S. 2d 868, 879-80 (Monroe Cnty. Ct. 2013).

Additionally, some courts simply used the concept of good faith to avoid deciding the Fourth Amendment issue.²²¹

A key split of authority in this area of the law has to do with the impact of *Smith v. Maryland*.²²² The holding in that case was that suspects have no reasonable expectation of privacy in information voluntarily provided to third parties, such as phone service providers, that is not considered content.²²³ Thus, phone numbers dialed and cell towers contacted are not subject to any limits in terms of police use. A number of judges have declared that cell phone users have no privacy interests in the numbers they dial, the location of the cell towers that their phones contact, or in historical cell site location information.²²⁴ All of these judges have relied heavily on the *Smith v. Maryland* opinion.²²⁵ Many rely heavily on the idea that these location data have been voluntarily given to the service provider who keeps them as a business record and that the defendant has no standing to argue for the exclusion of the evidence.²²⁶

The decision in *Riley v. California*²²⁷ may shed some light on this issue. The Court dismissed the claim that accessing the call logs stored on a cell phone is no different than using a pen register as was done in *Smith v. Maryland*.²²⁸ Coupled with the Court's detailed description of the qualitative difference between a cell phone and other types of personal possessions, the third party doctrine is potentially weakened by the decision.

Earlier cases had held that cell phone service subscribers did not have full knowledge of the extent to which they were providing data to the cell phone service provider.²²⁹ More recently, a trial court judge in Texas held that the changes in the technology are such that the courts should rethink the issue of reasonable expectation of privacy in the context of cell phone usage.²³⁰ The issue boils down to two real questions:

²²¹ See, for example, *United States v. Jones*, 908 F. Supp. 2d 203, 214 (D.D.C. 2012), which was a subsequent proceeding to the famous case of the same name; See also *United States v. Muniz*, H-12-221, 2013 WL 391161, at *4 (S.D. Tex. Jan. 29, 2013).

²²² 442 U.S. 735 (1979).

²²³ *Id.* at 744-46.

²²⁴ See, e.g., *United States v. Moreno-Nevarez*, No. 13-CR-0841-BEN, 2013 U.S. Dist. LEXIS 143900, at *3-5 (S.D. Cal. Oct. 1, 2013) (historical CSLI); See, e.g., *In Re Application of the United States for Historical Cell Site Data*, 724 F.3d 600, 610-11 (5th Cir. 2013); See, e.g., *United States v. Madison*, No. 11-60285-CR-ROSENBAUM, 2012 U.S. Dist. LEXIS 105527, at *22-27 (S.D. Fla. July 30, 2012); See, e.g., *United States v. Graham*, 846 F. Supp. 2d 384, 385 (D. Md. 2012) (historical CSLI); See, e.g., *State v. Marinello*, 49 So. 3d 488, 509-10 (La. Ct. App. 2010) (historical CSLI & numbers dialed); See, e.g., *United States v. Benford*, No. 2:09 CR 86, 2010 U.S. Dist. LEXIS 29453, at *7-8 (N.D. Ind. Mar. 26, 2010) (cell towers); See, e.g., *Mitchell v. State*, 25 So. 3d 632, 634-35 (Fla. Dist. Ct. App. 2009) (historical CSLI); See, e.g., *United States v. Suarez-Blanca*, No. 1:07-CR-0023-MHS/AJB, 2008 U.S. Dist. LEXIS 111622, at *24-28 (N.D. Ga. Mar. 26, 2008) (cell towers & historical CSLI).

²²⁵ See cases cited *Supra* note 224 excluding *Moreno-Nevarez*.

²²⁶ *United States v. Ruby*, No. 12-1073, 2013 U.S. Dist. LEXIS 18997, at *17-18 (S.D. Cal. Feb. 12, 2013). The most unexamined statement of this point found in these cases was made in *United States v. Gordon*, No. 09-153-02, 2012 U.S. Dist. LEXIS 188445, at *4-5 (examining the reasonable expectation of privacy when voluntarily revealing information to a third party).

²²⁷ *Riley v. California*, 573 U.S. ___, Nos. 13-132 and 13-212 (June 25, 2014).

²²⁸ *Id.*, slip op. at *24.

²²⁹ See, for example, Judge Orenstein's oft cited opinion in the case of *In re an Application of the U.S. for an Order (1) Authorizing the Use of a Pen Register & a Trap & Trace Device*, 396 F. Supp. 2d 294, 322-23 (E.D.N.Y. 2005) ("Unlike dialed telephone numbers, cell site data is not 'voluntarily conveyed' by the user to the phone company. As we have seen, it is transmitted automatically during the registration process, entirely independent of the user's input, control, or knowledge.")

²³⁰ See *In re Application of the United States for Historical Cell Site Data*, 747 F. Supp. 2d 827, 845-46 (S.D. Tex. 2010).

1) just how much do cell phone users really know about the data they are providing to the government via their cell phones; and, 2) just how much choice does anyone have if they want to stay connected with the rest of the world. The answer to that second issue has as much to do with what subjective expectations of privacy we have in a world that is increasingly interconnected by all sorts of hand held devices that are capable of communicating with the internet and with the rest of the world. It is the issue that Justice Sotomayor raised in her concurrence in *Jones*, when she said “I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year.”²³¹ Chief Justice Roberts expressly addressed the potential for invasion of privacy with regard to browser history in his opinion in *Riley v. California*.²³² He wrote fairly extensively about the pervasiveness of cell phones in Americans’ lives.²³³ He also cited Justice Sotomayor’s opinion in *Jones* favorably on the issue of location information.²³⁴

In the absences of any clear standard on this issue, federal courts turn to the good faith doctrine²³⁵ to avoid the issue or find enough facts to rule in favor of the government based on the absence of any search of a public space²³⁶ or they rely on the third party doctrine to argue that the suspect has no expectation of privacy in records maintained by the cell phone service provider.²³⁷ One state trial court has held that warrantless use of CSLI by the police was a violation of the Fourth Amendment.²³⁸ One state supreme court,²³⁹ one state appellate court,²⁴⁰ and two state trial courts in Massachusetts,²⁴¹ have decided that their state constitutions provide enough protection to mandate that police establish probable cause before using a cell phone to track a suspect. Other state courts have ruled that the suspect did not have a reasonable expectation of privacy while traveling on public streets.²⁴² One state appellate court has held that there is no reasonable expectation of privacy in historical CSLI.²⁴³

How you fare as a criminal defendant seeking to suppress evidence of your location gained from a warrantless search of your cell phone records depends on where you are. Admittedly, there does not seem to be any clear pattern based on region or political culture of the state. Defendants in Maine, Massachusetts, Montana, New Jersey, or Pennsylvania enjoy greater privacy rights.²⁴⁴ Defendants in state courts in California,²⁴⁵

²³¹ *United States v. Jones*, 132 S. Ct. 945, 957 (2012).

²³² *Riley v. California*, 573 U.S. ___, Nos. 13-132 and 13-212, slip op. at *19 (June 25, 2014).

²³³ *Id.*

²³⁴ *Id.*, slip op. at *20.

²³⁵ It should be noted that some of these courts have expressed doubts about the validity of the searches in question. *See, e.g.*, *United States v. Powell*, 943 F. Supp. 2d 759, 783 (E.D. Mich. 2013).

²³⁶ *See, e.g.*, *United States v. Skinner*, 690 F.3d 773, 781 (6th Cir. 2012) (giving an example of how some judges have ruled that the CSLI did not cover any time in which the suspect was in a private space and that thus there was no reasonable expectation of privacy).

²³⁷ *See, e.g.*, *U. S. v. Ruby*, 2013 U. S. Dist. LEXIS 18997, at *15 (S.D. Cal. Feb. 12, 2013); *Contra*, *State v. Earls*, 70 A.3d 630, 644 (N.J. 2013) (showing that the New Jersey Supreme Court expressly rejected the third party doctrine).

²³⁸ *Commonwealth v. Pitt*, No. NOCV2010-00061, 2012 Mass. Super. LEXIS 39, at *19 (Feb. 23, 2012).

²³⁹ *Earls*, 70 A.3d at 644.

²⁴⁰ *Commonwealth v. Rushing*, 71 A.3d 939, 954-55 (Pa. Super. Ct. 2013)

²⁴¹ *Commonwealth v. Wyatt*, 2012 Mass. Super. LEXIS 248, at *28 (Mass. Super. Ct. Aug. 7, 2012); *Commonwealth v. Augustine*, 2013 Mass. Super. LEXIS 116, at *15 (Mass. Super. Ct. Apr. 3, 2013).

²⁴² *See, e.g.*, *Tracey v. State*, 69 So. 3d 992, 993 (Fla. Dist. Ct. App. 2011); *See also*, *People v. Hall*, 86 A.D.3d 450, 451 (N.Y. App. Div. 2011).

²⁴³ *Louisiana v. Marinello*, 49 So. 3d 488, 510 (La. Ct. App. 2010)

²⁴⁴ *See cases cited supra* note 12.

Florida,²⁴⁶ Georgia,²⁴⁷ Louisiana,²⁴⁸ Nevada,²⁴⁹ or New York,²⁵⁰ have not fared as well, depending on the facts of their cases. In the federal courts, judges in the Eastern District of Michigan²⁵¹ and the Northern District of Illinois²⁵² have ruled in favor of defendants, but not so in Georgia,²⁵³ Maryland,²⁵⁴ or Ohio.²⁵⁵ In the Southern District of California it may depend on whether you are trying to suppress historical or real time CSLI.²⁵⁶ The Third²⁵⁷ and Fifth²⁵⁸ Circuits have expressly ruled that there is no reasonable expectation of privacy in historical CSLI, although there are some judges in Texas that are more sympathetic.²⁵⁹ In federal court in New York, it may depend on the judge you get.²⁶⁰

²⁴⁵ *People v. Fernandez*, No. B214476, 2011 Cal. App. Unpub. LEXIS 1931, at *1 (Cal. Ct. App. Mar 16, 2011).

²⁴⁶ *Tracey v. State*, 69 So. 3d 992, 1000 (Fla. Dist. Ct. App. 2011); *Mitchell v. Florida*, 25 So. 3d 632, 633 (Fla. Dist. Ct. App. 2009).

²⁴⁷ *Devega v. State*, 689 S.E.2d 293, 301 (Ga. 2010).

²⁴⁸ *Marinello*, 49 So. 3d at 490.

²⁴⁹ *Zuniga v. State*, No 58267, 2012 Nev. Unpub. LEXIS 1626, at *5-6 (Nev. Nov. 29, 2012). Please note that this is an unpublished opinion which, according to the header, has no precedential value.

²⁵⁰ *People v. Hall*, 86 A.D.3d 450, 451-52 (N.Y. App. Div. 2011); *People v. Moorer*, 959 N.Y.S.2d 868, 881 (N.Y. Cnty. Ct. 2013).

²⁵¹ *United States v. Powell*, 943 F. Supp. 2d 759, 764 (E.D. Mich. 2013).

²⁵² *In re the Application of the United States for an Order Relating to Target Phone 2*, 733 F. Supp. 2d 939, 939 (N.D. Ill. 2009).

²⁵³ *United States v. Booker*, No. 1:11-cr-00255-TWT-RGV, 2012 U.S. Dist. LEXIS 188404, at *3 (N.D. Ga. Sept. 6, 2012); *United States v. Suarez-Blanca*, No. 1:07-CR-0023-MHS/AJB, 2008 U.S. Dist. LEXIS 111622, at *1 (N.D. Ga. Mar. 26, 2008).

²⁵⁴ *United States v. Graham*, 846 F. Supp. 2d 384, 385 (D. Md. 2012).

²⁵⁵ *United States v. Dye*, No. 1:10CR221, 2011 U.S. Dist. LEXIS 47287, at *25–26 (N.D. Ohio Apr. 27, 2011).

²⁵⁶ See *United States v. Moreno-Navarez*, No. 13-CR-0841-BEN, 2013 U.S. Dist. LEXIS 143900, at *4–5 (S.D. Cal. Oct. 1, 2013) (denying motion to suppress the warrantless search of historical CSLI); *United States v. Espudo*, 954 F. Supp. 2d 1029, 1034–1045 (S.D. Cal. 2013) (denying a motion to suppress the warrantless search of CSLI data by holding that, although a warrant to obtain real-time CSLI data must be supported by probable cause, the good faith exception to the exclusionary rule applied in this case); *United States v. Ruby*, No. 12CR1073 WQH, 2013 U.S. Dist. LEXIS 189997, at *18–21 (S.D. Cal. Feb. 12, 2013) (denying motion to suppress evidence obtained with a warrant for historical cell phone records); *United States v. Reyes*, No. 09CR2487-MMA, 2012 U.S. Dist. LEXIS 134866, at *7–11 (S.D. Cal. Sept. 20, 2012) (denying the defendant's argument that if his attorney had moved to suppress the historical CSLI, it was reasonably likely that the court would have granted the motion).

²⁵⁷ *In re the Application of the United States for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 312–13 (3d Cir. 2010).

²⁵⁸ *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600, 608–15 (5th Cir. 2013). The Tenth Circuit has not directly ruled, but has stated in dicta that a ping is a search within the meaning of the Fourth Amendment. *United States v. Barajas*, 710 F.3d 1102, 1108 (10th Cir. 2013). The Sixth Circuit has ruled that tracking a suspect through his pay-as-you-go cell phone while on public roads, but not while the suspect was in any private places, was not a Fourth Amendment violation. *United States v. Skinner*, 690 F.3d 771, 777–81 (6th Cir. 2012).

²⁵⁹ See, e.g., *In re the Application of the U.S. for Historical Cell Site Data*, 747 F. Supp. 2d 827, 840–45 (S.D. Tex. 2010), *vacated*, 724 F.3d 600 (5th Cir. 2013).

²⁶⁰ Compare, e.g., *In re the Application of the United S. for Release of Historical Cell-Site Info.*, 736 F. Supp. 2d 578, 578–79, 595–96 (E.D.N.Y. 2010) (requiring the government to obtain a warrant before acquiring an order for CSLI), with *In re Smartphone Geolocation Data Application*, 13-MJ-242, 2013 U.S. Dist. LEXIS 62605, at *12–22 (E.D.N.Y. May 1, 2013) (holding that a warrant can issue if the government has probable cause to believe that geolocation data would aid in a defendant's apprehension, and defendant has no reasonable expectation of privacy if they agreed with their carrier that their geolocation information could be provided without consent), and *United States v. Gilliam*, No. 11 Crim. 1083, 2012 U.S. Dist. LEXIS 130248, at *5 (S.D.N.Y. Sept. 12, 2012) (denying motion to suppress CSLI evidence because the Stored Communications Act permits disclosure in emergency situations), and *In re Application of United States for Release of Historical Cell-Site Info.*, No. 11-MC-0113, 2011 U.S. Dist. LEXIS 15457, at *3–7 (E.D.N.Y. Feb. 16, 2011) (granting an order for CSLI data without a warrant because the records requested were from different phones in short durations of time, instead of one long period), and *In re Application of Order Re-Authorizing the Use of a Pen Register & Trap & Trace Device*, 2009 U.S. Dist. LEXIS 55739, at *2–3 (E.D.N.Y. Jan. 12, 2009) (“[T]he

Federal courts in Utah and New York have allowed warrantless access to CSLI under the exigent circumstances provisions of the Stored Communications Act.²⁶¹ The Good Faith argument fades in usefulness over time because more and more cases are being decided in the federal districts and the authorities are more and more aware of the evolving legal arguments. This is not an acceptable state of affairs on such an important issue. The legitimacy of the courts is at stake.

PART VI: A CLEAR LEGAL STANDARD THAT PROTECTS THE RIGHTS OF CITIZENS AND INFORMS THE POLICE WHAT THEY CAN AND CANNOT DO

It is very clear that the current state of affairs is undesirable. The police are not sure what they can and cannot do. Judges faced with requests to grant orders directing cell phone service providers to release CSLI data, or with motions to suppress evidence, are not sure what the legal standard is, but have a wealth of conflicting precedents to follow. The federal courts have been highly likely to grant access to such information in the last three years based largely on the notion that everyone knows that they are giving locational data to their cell phone provider, but there is an argument to be made that the continued practice of allowing, as most federal courts do, access to historical CSLI virtually on demand goes against the grain of our history with regard to privacy. Do we really, as a society, want to make giving the government permission to track our movements on demand a condition for the use of a cell phone? It is not at all clear that doing so is in accord with public opinion. Chief Justice Roberts' extensive section on the pervasiveness of cell phones and the unique and sensitive nature of the information that can be accessed if one controls a person's cell phone in *Riley v. California*²⁶² is encouraging for advocates of digital freedom, but the legal standard for determining when and on what basis the police may obtain access to CSLI is still unclear. Within a day of the ruling, the news media reported that the authorities in Chicago, Illinois, were contemplating what the ruling means for their current warrantless use of cell site simulators to track the locations of the cell phones of suspects.²⁶³

This is not the case in five states. By statute in Maine and Montana, and by court decision in Massachusetts, New Jersey, and Pennsylvania, the courts know that such orders may only issue based on probable cause and that exclusion of evidence in the appropriate remedy. There is no confusion in these jurisdictions. They do not have to distinguish between historical CSLI, real time CSLI, and locational pings, all of which can plausibly be adjudicated based on differing standards in the current practice outside of those five states.

Additionally, the issue of who owns data generated by the use of a cell phone needs to be addressed. If the courts simply argue that all historical CSLI is a business record maintained and owned by the service provider, the cell phone user is left with little or no recourse. Abuses of government authority under the various statutes that might be used do not have a remedy. Several courts have expressly held that the remedy for

government may obtain prospective cell-site information without a showing of probable cause under the 'hybrid theory,' a combination of the authority of the Pen Register Statute and the Stored Communications Act.").

²⁶¹ United States v. Takai, 943 F. Supp. 2d 1315, 1323 (D. Utah 2013); *Gilliam*, 2012 U.S. Dist. LEXIS 130248, at *5.

²⁶² 573 U.S. ___, Nos. 13-132 and 13-212, slip op. § III(B)(1) at *17-21 (June 25, 2014)..

²⁶³ Stacy St. Clair and Jeremy Gorner, *Court Ruling May Affect Cell Tracking by Chicago Police*, Chicago Tribune (June 25, 2014, 10:22 pm), (last visited, June 27, 2014) <http://www.chicagotribune.com/news/local/ct-chicago-cell-side-met-20140626,0,4653045.story>.

violation of the Stored Communications Act does not include exclusion of evidence.²⁶⁴ Moreover, cell phone users do not routinely scan the minutiae of their contract with the provider to find the buried provision relating to who owns the data or whether the service provider will release said data to law enforcement or any other third party.²⁶⁵ What this approach leaves is a system in which the government can access CSLI on virtually any cell phone user on a showing of less than probable cause. One has to question the values implicit in a doctrine of law that permits the government to snoop on private citizens with little or no oversight by the courts.²⁶⁶ While the *Katz* reasonable expectation of privacy standard has problems, a clear statement that Americans have a reasonable expectation of privacy in their cell phone records, something that Justice Bowes did say in his opinion in *Pennsylvania v. Rushing*,²⁶⁷ would be much more consistent with core Fourth Amendment values.

One might argue that requiring a warrant and limiting the application of *Smith v. Maryland* would potentially leave people in danger. In cases like *Pennsylvania v. Rushing* where an innocent person was in great danger of harm if the armed and murderous suspect could not be located and apprehended quickly, it makes sense to allow cell phone service providers to offer such access to the police immediately. The courts in both Pennsylvania and New Jersey have made it abundantly clear that the public safety exception, as laid out in *New York v. Quarles*,²⁶⁸ would allow for the admission of such evidence based on probable cause and exigent circumstances, and two federal courts have allowed the use of CSLI under an exigent circumstances rationale.²⁶⁹ In the majority opinion in *Riley v. California*, Chief Justice Roberts was clear in stating that the *Smith v. Maryland* precedent would not be binding on the issue of accessing call logs stored on a cell phone,²⁷⁰ but also included a section on exigent circumstances.²⁷¹

Perhaps the most compelling argument for a clear standard to be established is the need for the courts to come to terms with the set of expectations that Americans have with regard to the nature of data generated by cell phones and with the impact that cellular phone technology has on our democracy. It is very hard in today's world to exist without a cell phone and getting harder to actually own anything other than a smart phone, which poses greater privacy risks than a traditional flip phone. A decision to continue to adhere to the third party records doctrine of *Smith v. Maryland*²⁷² means that the government has the ability to track the location of virtually everyone over the age of 12 in the country with almost no legal recourse on the part of the person being tracked. The sweeping opinion in *Riley v. California* is not inconsistent with this point of view.

²⁶⁴ E.g., *United States v. Booker*, No. 1:11-cr-00255-TWT-RGV, 2012 U.S. Dist. LEXIS 188404, at *47-48 (N.D. Ga. Sept. 6, 2012); *United States v. Suarez-Blanca*, No. 1:07-CR-0023-MHS/AJB, 2008 U.S. Dist. LEXIS 111622, at *10-11 (N.D. Ga. Mar. 26, 2008).

²⁶⁵ But see *U.S. v. Carabello*, 963 F. Supp. 2d 341, 348-49 (D. Vt. 2013), in which the court cited to service provider Sprint's terms and conditions and privacy policy regarding when they would release locational data in emergency circumstances, as a factor in favor of ruling for the government.

²⁶⁶ See, e.g., Steven J. Schulhofe, *More Essential than Ever: The Fourth Amendment in the Twenty-First Century*. New York: Oxford University Press 2012.

²⁶⁷ 71 A.3d 939, 961 (Pa. Super. Ct. 2013).

²⁶⁸ *New York v. Quarles*, 467 U.S. 649, 655-58 (1984) (finding a "public safety" exception to the requirement that police read Miranda rights to a suspect).

²⁶⁹ See cases cited *supra* note 261.

²⁷⁰ 573 U.S. ___, Nos. 13-132 and 13-212, slip op. at 24 (June 25, 2014).

²⁷¹ *Id.* at *26-27.

²⁷² See 442 U.S. 735, 742-43 (1979).

We are not enamored of arguments that purport to decipher the collective intent of the founders, but it is hard to imagine that a nation founded on the principles of liberty and freedom would countenance a society in which the pre-condition for participation in the social and business life of the nation is to give to the government the ability to track your location at all times. We are certain that the trespass standard that Justice Scalia would apply to such rulings is poorly adapted to the task, inconsistent with the line of cases that have been decided since 1967, and would result in the loss of freedom for Americans since it would result in the government gaining the ability to track the locations of anyone with a cell phone with little or no judicial supervision.

We are also not unsympathetic to the potential for conservative commentators to argue that we are simply proposing another way for activist judges to further a liberal agenda. It is true that one could argue that this is a policy matter that should be handled by the Congress. A statutory standard like that enacted in Maine and Montana would certainly accomplish the same goal of predictability and protection of rights without unduly hampering the ability of the police to enforce the criminal laws. Given the current state of affairs in the U. S. Congress, it seems unlikely that any such legislation will result any time soon. In addition, a Supreme Court interpretation of the Constitution is preferable because it will have more staying power in that shifts in the political winds would not change how the standard is applied.²⁷³ Subsequent Congresses would be unable to repeal such a decision. In the meantime, however, the courts will be faced with an increasing number of these cases and judges must decide them as best they can.

²⁷³ Justice Alito, in section II of his concurring opinion in *Riley v. California*, makes the opposite argument, that the privacy of cell phone data is a matter potentially well suited to action by Congress.

Appendix AList of Cell Phone Tracking Cases²⁷⁴

US v. Forest	2004	355 F.3d 942; 2004 U.S. App. LEXIS 1139; 2004 FED App. 0032P (6th Cir.)
In the Matter of an Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information	2005	396 F. Supp. 2d 294; 2005 U.S. Dist. LEXIS 27480 (ED NY)
In Re Application of the United States of America for an Order for Disclosure of Telecommunications Records and Authorizing the Use of a Pen Register and Trap and Trace	2005	405 F. Supp. 2d 435; 2005 U.S. Dist. LEXIS 33754 (SD NY)
In Re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority	2005	396 F. Supp. 2d 747; 2005 U.S. Dist. LEXIS 24497 (SD TEX)
In the Matter of the Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers [sealed] and [sealed] and the Production of Real Time Cell Site Information	2005	402 F. Supp. 2d 597; 2005 U.S. Dist. LEXIS 29883 (MD 2005)

²⁷⁴ Table created with the findings from the research described *supra* Part V.

In the Matter of the Application of the United States of America for an Order Authorizing the Release of Prospective Cell Site Information	2005	407 F. Supp. 2d 132; 2005 U.S. Dist. LEXIS 34616 (DDC)
In the Matter of the Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register and/or Trap and Trace for Mobile Identification Number (585) 111-1111 and the Disclosure of Subscriber and Activity Information under 18 U.S.C. § 2703	2005	415 F. Supp. 2d 211; 2006 U.S. Dist. LEXIS 7653 (WD NY)
In the Matter of Applications of the United States of America for Orders Authorizing the Disclosure of Cell Site Information	2005	2005 U.S. Dist. LEXIS 43736 (DC)
In the Matter of the Application of the United States for an Order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device; and (2) Authorizing Release of Subscriber Information and/or Cell Site Information	2006	411 F. Supp. 2d 678; 2006 U.S. Dist. LEXIS 3392 (WD LA)
In re: Application of the United States for an Order for Prospective Cell Site Location Information on a Certain Cellular Telephone	2006	460 F. Supp. 2d 448; 2006 U.S. Dist. LEXIS 76822 (SD NY 2006)

In the Matter of the Application of the United States of America for an order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device, and (2) Authorizing Release of Subscriber and Other Information	2006	433 F. Supp. 2d 804; 2006 U.S. Dist. LEXIS 40856 (SD TEX)
In the Matter of the Application for an Order Authorizing the Installation and Use of a Pen Register and Directing the Disclosure of Telecommunications Records for the Cellular Phone Assigned the Number [SEALED]	2006	439 F. Supp. 2d 456; 2006 U.S. Dist. LEXIS 59845 (MD)
In the Matter of the Application of the United States of America for an Order Authorizing the Disclosure of Prospective Cell Site Information	2006	2006 U.S. Dist. LEXIS 73324 (ED WI)
In the Matter of the Application of the United States of America for an Order Authorizing (1) Installation and Use of a Pen Register and Trap and Trace Device or Process, (2) Access to Customer Records, and (3) Cell Phone Tracking	2006	441 F. Supp. 2d 816; 2006 U.S. Dist. LEXIS 56332 (SD TEX)

<p>In the Matter of the Application of the United States of America for an Order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing the Release of Subscriber and Other Information; and (3) Authorizing the Disclosure of Location Based Services; In the Matter of the Application of the United States of America for an Order: (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device; (2) Authorizing the Release of Subscriber and Other Information; and (3) Location of Cell Site Origination and/or Termination</p>	2006	2006 U.S. Dist. LEXIS 45643 (ND Indiana)
<p>In re Application of the United States for an Order for Prospective Cell Site Location Information on a Certain Cellular Telephone</p>	2006	2006 U.S. Dist. LEXIS 11747 (SD NY)
<p>In the Matter of the Application of the United States of America for Orders Authorizing the Installation and Use of Pen Registers and Caller Identification Devices on Telephone Numbers [Sealed] and [Sealed]</p>	2006	416 F. Supp. 2d 390; 2006 U.S. Dist. LEXIS 7345 (MD)
<p>In the Matter of the Application of the united States of America for an Order Authorizing the Installation and use of a Pen Register with Caller Identification Device and Cell Site Location Authority on a Certain Cellular Telephone</p>	2006	415 F. Supp. 2d 663; 2006 U.S. Dist. LEXIS 6976 (SD WV)

In re Application of the United States of America for Orders Pursuant to Title 18, United States Code, Section 2703(d)	2007	509 F. Supp. 2d 76; 2007 U.S. Dist. LEXIS 68339 (Mass 2007)
In the Matter of the Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register Device, a Trap and Trace Device, and for Geographic Location Information.	2007	497 F. Supp. 2d 301; 2007 U.S. Dist. LEXIS 52009 (Puerto Rico 2007)
In re Application for an Order Authorizing the Extension and Use of a Pen Register Device, etc.	2007	2007 U.S. Dist. LEXIS 11692 (ED Cal 2007)
In the Matter of the Application of the United States of America for an Order: (1) Authorizing the Installation and use of a Pen Register and Trap and Trace Device, and (2) Authorizing Release of Subscriber and Other Information	2007	622 F. Supp. 2d 411; 2007 U.S. Dist. LEXIS 77635 (SD TEX)
In the Matter of an Application of the United States of America for an Order Authorizing the Use of Two Pen Register and Trap and Trace Devices	2008	632 F. Supp. 2d 202; 2008 U.S. Dist. LEXIS 97359 (ED NY)
U. S. v. Suarez-Blanca	2008	2008 U.S. Dist. LEXIS 111622 (ND GA 2008)
In the Matter of the Application of the United States of America for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government	2008	534 F. Supp. 2d 585; 2008 U.S. Dist. LEXIS 13733 (2008 WD PA)
U. S. v. Jenious	2009	2009 U.S. Dist. LEXIS 132385 (Ed WI)

In the Matter of the Application of the United States of America for an Order Relating to Target Phone 2	2009	733 F. Supp. 2d 939; 2009 U.S. Dist. LEXIS 130713 (ND IL)
U.S. v. Navas	2009	640 F. Supp. 2d 256; 2009 U.S. Dist. LEXIS 37464 (SD NY)
In the Matter of an Application of the United States of America for an order Re-authorizing (1) The Use of a Pen Register and a Trap and Trace Device with Prospective Cell Site Information; (2) The Release of historical Cell Site and Subscriber Information; and (3) Authorizing the Release of Subscriber Information, Including Tower/Sector & Msc Records	2009	2009 U.S. Dist. LEXIS 55739 (ED NY)
Mitchell v. State of Florida	2009	25 So.3d 632 (2009)
In re US for an Order Directing Provider of Elec. Commun. To Disclose Records to the Govt	2010	620 F3d 304 (3rd cir PA)
In the Matter of an Application of the United States of America for an Order Authorizing the Release of Historical Cell Site Information	2010	736 F. Supp. 2d 578; 2010 U.S. Dist. LEXIS 88781 (ED NY)
In re Application of the United States of America for Historical Cell Site Data	2010	747 F. Supp. 2d 827; 2010 U.S. Dist. LEXIS 115529 (SD TX)
U. S. v. Benford	2010	2010 U.S. Dist. LEXIS 29453 (ND Indiana, 2010)
In the Matter of the Application of the United States of America for an Order: (1) Authorizing the Use of a Pen Register and Trap and Trace Device; (2) Authorizing Release of Subscriber and Other Information; and (3) Authorizing the Disclosure of Location Based Services	2010	727 F. Supp. 2d 571; 2010 U.S. Dist. LEXIS 77319 (WD TEX 2010)

U. S. v. Redd	2010	2010 U.S. Dist. LEXIS 103385 (KANSAS 2010)
Mitchell v. Vogel	2010	2010 U.S. Dist. LEXIS 123188 (MD FL Fort Myers Division 2010)
Louisiana v. Marinello	2010	49 So. 3d 488; 2010 La. App. LEXIS 1331
Devega v. The State.	2010	286 Ga. 448; 689 S.E.2d 293; 2010 Ga. LEXIS 107; 2010 Fulton County D. Rep. 248; 49 Comm. Reg. (P & F) 635
U. S. v. Dye	2011	2011 U.S. Dist. LEXIS 47287 (ED OH)
In the Matter of an Application of the United States of America for an Order Authorizing the Release of Historical Cell Site Information	2011	809 F. Supp. 2d 113 (ED NY)
In the Matter of the Application of the United States of America for an Order Authorizing Disclosure of Historical Cell Site Information for Telephone Number [text redacted by the court]	2011	2011 U.S. Dist. LEXIS 156744 (DC)
In the Matter of an Application of the United States of America for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone	2011	849 F. Supp. 2d 526; 2011 U.S. Dist. LEXIS 85638 (Md)
In Re In the Matter of an Application of the United States of America for an Order Authorizing the Release of Historical Cell-Site Information	2011	2011 U.S. Dist. LEXIS 15457 (ED NY)
U. S. v. Powell	2011	444 Fed Appx 517, 2011 U. S. App LEXIS 18957 (3rd Cir NJ 2011)

In re: Application for a Court Order Authorizing AT&T to Provide Historical Cell Tower Records ; In re: AT&T Sim Card #89014103211858609369; In re: AT&T Black Samsung Flip Phone Model #SGH-A197, FCC ID#A3LSGHA197, SIN RQBZ917758D; In re: Application for a Court Order Authorizing Sprint/Nextel Corporate Security to Provide Historical Cell Tower Records	2011	55 V.I. 127; 2011 V.I. LEXIS 65 (Superior Court of the Virgin Islands, Division of St. Thomas and St. John)
People v. Fernandez	2011	2011 Cal. App. Unpub. LEXIS 1931
Tracey v. Florida	2011	69 So. 3d 992; 2011 Fla. App. LEXIS 14054; 36 Fla. L. Weekly D 1961
The People of the State of New York v. Alexander Hall	2011	86 A.D.3d 450; 926 N.Y.S.2d 514; 2011 N.Y. App. Div. LEXIS 5807; 2011 NY Slip Op 5936
In the Matter of the Application of the United States of America for an Order Pursuant to Title 18, United States Code, Section 2703(d) to Disclose Subscriber Information and Cell Site Information	2012	849 F. Supp. 2d 177; 2012 U.S. Dist. LEXIS 42779 (Mass)
U. S. v. Skinner	2012	690 F.3d 772 (6th cir TN)
U. S. v. Pascual	2012	502 Fed. Appx. 75; 2012 U.S. App. LEXIS 23272 (2nd cir NY)
U. S. v. Madison	2012	2012 U.S. Dist. LEXIS 105527 (SD Florida)
U. S. v. Graham	2012	846 F. Supp. 2d 384; 2012 U.S. Dist. LEXIS 26954 (MD 2012)
U. S. v. Hardrick	2012	2012 U.S. Dist. LEXIS 147940 (ED LA 2012)
U. S. v. Booker	2012	2012 U.S. Dist. LEXIS 188404 (ND Ga 2012)
U. S. v. Jones	2012	908 F. Supp. 2d 203; 2012 U.S. Dist. LEXIS 177294 (DC)
U. S. v. Gordon	2012	2012 U.S. Dist. LEXIS 188445 (DC 2012)
U. S. v. Reyes	2012	2012 U.S. Dist. LEXIS 134866 (Sd Cal)
U. S. v. Gilliam	2012	2012 U.S. Dist. LEXIS 130248 (SD NY)

		2012)
Smarr v. The State	2012	317 Ga. App. 584; 732 S.E.2d 110; 2012 Ga. App. LEXIS 768; 2012 Fulton County D. Rep. 2802
Commonwealth of Massachusetts v. Francis Wyatt	2012	30 Mass. L. Rep. 270; 2012 Mass. Super. LEXIS 248
Commonwealth v. Zeph Pitt	2012	29 Mass. L. Rep. 445; 2012 Mass. Super. LEXIS 39
Zuniga v. Nevada	2012	2012 Nev. Unpub. LEXIS 1626 (2012)
U. S. v. McCullough	2013	2013 US App LEXIS 8108 (2nd cir NY)
U. S. v. Caraballo	2013	2013 U.S. Dist. LEXIS 112739 (VT)
In re: Application of the United States of America for Historical Cell Site Data	2013	724 F.3d 600 (5th cir TX)
In re Smartphone Geolocation Data Application	2013	2013 U.S. Dist. LEXIS 62605 (ED NY)
U. S. v. Muniz	2013	2013 U.S. Dist. LEXIS 12162 (SD TX 2013)
U. S. v. Powell	2013	943 F. Supp. 2d 759; 2013 U.S. Dist. LEXIS 64804 (ED Michigan)
U. S. v. Moreno-Navarez	2013	2013 U.S. Dist. LEXIS 143900 (SD Cal 2013)
U. S. v. Espudo	2013	2013 U.S. Dist. LEXIS 104502 (SD Cal 2013)
U. S. v. Steve Ruby	2013	2013 U. S. Dist. LEXIS 18997 (SD Cal 2013)
U.S. v. Barajas	2013	710 F 3d 1102 (10th Cir Kan 2013)
U. S. v. Wilson	2013	2013 U. S. Dist. LEXIS 37783 (ND Ga 2013)
U. S. v. Takai	2013	943 F. Supp. 2d 1315; 2013 U.S. Dist. LEXIS 61698 (Utah, Central Division 2013)
Commonwealth v. Princiotta	2013	31 Mass. L. Rep. 68; 2013 Mass. Super. LEXIS 32
State v. Earls	2013	214 N.J. 564, 70 A.3d 630, 2013 N.J. LEXIS 735 (2013)
Commonwealth v. Rushing	2013	2013 PA Super 162; 71 A.3d 939; 2013 Pa. Super. LEXIS 1605
The People of the State of New York v. Moorer	2013	39 Misc. 3d 603; 959 N.Y.S.2d 868; 2013 N.Y. Misc. LEXIS 632; 2013 NY Slip Op 23048
Commonwealth v. Willis	2013	31 Mass. L. Rep. 436; 2013 Mass. Super. LEXIS 114
Commonwealth v. Augustine	2013	31 Mass. L. Rep. 415; 2013 Mass. Super. LEXIS 116

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USING TECHNOLOGY THE FOUNDERS NEVER DREAMED OF 101

“ARE THERE NO PRISONS?” MENTAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM IN THE UNITED STATES

Robert Rigg*

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I. INTRODUCTION

Charles Dickens penned his famous words “are there no prisons?” in 1843’s *A Christmas Carol*, as a part of a dialogue between Ebenezer Scrooge and two gentlemen soliciting donations for the poor.¹ Two years prior to the release of *A Christmas Carol*, Dorothea Dix began a crusade to reform the treatment of mentally ill inmates after

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¹ CHARLES DICKENS, *A CHRISTMAS CAROL* 13 (W. Heinemann ed., Windmill Press 1962) (1843). (“‘At this festive season of the year, Mr. Scrooge,’ said the gentleman, taking up a pen, ‘it is more than usually desirable that we should make some slight provision for the Poor and Destitute, who suffer greatly at the present time. Many thousands are in want of common necessities; hundreds of thousands are in want of common comforts, sir.’” Scrooge asked, “‘Are there no prisons?’” The gentleman replied, “‘Plenty of prisons.’” With relief, Scrooge said, “‘Oh! I was afraid, from what you said at first, that something had occurred to stop them in their useful course.’”)

witnessing firsthand the abhorrent care those individuals received.² Dix's efforts resulted in the establishment of new hospitals as well as the reorganization and restructuring of existing hospitals.³ Dix's observations of "prisoners, chained in dark enclosed spaces, lying in their own filth, without adequate clothing, and abused physically and sexually"⁴ motivated her to bring a legal fight.⁵ By the end of Dix's efforts in 1880, she had helped establish a total of 32 mental hospitals.⁶ Although 170 years have elapsed since Dix began her efforts to reform the treatment of mentally ill inmates, not much has changed—and the public perception of mental illness is still fraught with misunderstanding and fear at best and disbelief and derision at worst.⁷

The inadequate treatment of inmates with mental illness has continued into current times. In 1995, a lawsuit filed on behalf of inmates in the California correction system made its way through the federal court system and to the Supreme Court, which resulted in the 2011 decision *Brown v. Plata*.⁸ In *Brown*, the Court found:

² *Dorothea Dix*, DICTIONARY UNITARIAN & UNIVERSALIST BIOGRAPHY (January 3, 2003), <http://uudb.org/articles/dorotheadix.html> ("In March, 1841, a ministerial student, frustrated with his efforts to teach a Sunday class for women incarcerated in the East Cambridge jail, thought that a woman might better do the task. He approached Dix for advice. She decided to teach the class herself. What she encountered in the jail shocked her and changed her life. The jail was unheated. Those incarcerated were not segregated; hardened criminals, feeble-minded children and the mentally ill all occupied the same quarters. Dix secured a court order to provide heat and to make other improvements.").

³ Vasantha Reddi, *Dorothea Lynde Dix (1802-1887)*, TRUTH ABOUT NURSING, <http://www.truthaboutnursing.org/press/pioneers/dix.html> (last updated August 26, 2005) ("[B]etween 1843 to 1880—the main years that [Dix] spent advocating for the mentally ill—the number of hospitals for the mentally ill increased almost ten-fold, from 13 to 123. 'Where new institutions were not required, she fostered the reorganization, enlargement, and restaffing—with well-trained, intelligent personnel—of already existing hospitals.' This achievement indicates that her work led to vast improvements in the fledgling profession of nursing. Her efforts eventually resulted in the founding of special facilities for the insane and destitute in the United States, Canada, and at least 13 European countries . . .") (footnotes omitted).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Paul Krassner, *Behind the Infamous Twinkie Defense*, HUFFINGTON POST (Dec. 4, 2008, 02:26 PM), http://www.huffingtonpost.com/paul-krassner/behind-the-infamous-twink_b_148474.html. The "Twinkie Defense" is an expression derived from the 1979 trial of Dan White. On November 27, 1978, White assassinated Mayor George Moscone and Supervisor Harvey Milk. *Id.* At his trial, psychiatrist Martin Blinder testified that White had been depressed at the time of the crime, and he pointed to several behavioral changes indicating White's depression. *Id.* "Dale Metcalf, a former member of Ken Kesey's Merry Pranksters who had become a lawyer, told me how he happened to be playing chess with Steven Scherr, a member of White's legal team. Metcalf had just read *Orthomolecular Nutrition* by Abram Hoffer. He questioned Scherr about White's diet and learned that, while under stress, White would consume candy bars and soft drinks. Metcalf recommended the book to Scherr, suggesting the author as an expert witness. For, in his book, Hoffer revealed a personal vendetta against doughnuts, and White had once eaten five doughnuts in a row. On the witness stand, psychiatrist Martin Blinder stated that, on the night before the murders, while White was 'getting depressed about the fact he would not be reappointed, he just sat there in front of the TV set, bingeing on Twinkies.'" *Id.* As such, the defense convinced the jury that White's capacity for rational thought had been diminished at the time of the crime. *Id.* The jurors concluded that White was not capable of the premeditation required for murder, and instead, the jury convicted him of voluntary manslaughter. *Id.* Public protests over the verdict led to the White Night Riots. See Paul R. Lynd, *Juror Sexual Orientation: the Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 233-34 (Oct. 1998); see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.04[A] (Frank R. Strong et al. eds., 4th ed. 2006) (stating that the acquittal of John Hinckley caused a national reassessment of the insanity defense, reversing the trend in favor of the American Law Institute's broadened definition of insanity, and prompting a return to the *M'Naghten* test); *id.* § 25.06[B] (noting that after the Hinckley acquittal, some state legislatures and courts eliminated the insanity defense).

⁸ 131 S. Ct. 1910, 1922 (2011).

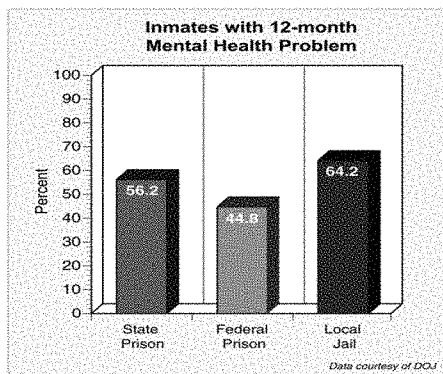
Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had “no place to put him.” Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California’s prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved “some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable.”

...
 The report found that the rate of suicides involving inadequate assessment, treatment, or intervention had risen to 82% and concluded that “[t]hese numbers clearly indicate no improvement in this area during the past several years, and possibly signal a trend of ongoing deterioration.”⁹

Mental health issues have an enormous impact on the criminal justice system.¹⁰ Mental difficulties usually become apparent upon initial contact with law enforcement, which may lead to arrest, and tragically at times, death.¹¹ Individuals with mental health

⁹ *Id.* at 1924–25, n.2. (citations omitted).

¹⁰ See *Inmate Mental Health*, NAT’L INST. MENTAL HEALTH, <http://www.nimh.nih.gov/statistics/IDOI.shtml> (last visited June 27, 2014) [hereinafter *Inmate Mental Health*]. The National Institute of Mental Health (NIMH) is part of the National Institutes of Health (NIH), a component of the U.S. Department of Health and Human Services. This survey indicates “that the rate of mental health problems differ by the type of correctional facility. In this study a mental health problem was defined as receiving a clinical diagnosis or treatment by a mental health professional. Inmates in local jails had the highest prevalence of mental problems, with nearly two thirds of jail inmates (64.2 percent) satisfying the criteria for a mental health problem currently or in the previous year.”
Id.



¹¹ Abigail S. Tucker, et al., *Responding to Persons with Mental Illness*, FBI LAW ENFORCEMENT BULLETIN (Oct. 2011), <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/october-2011/responding-to-persons-with-mental-illness>.

problems do not respond to the normal criminal justice remedies. Thus, sentencing judges are faced with a no-win scenario: short-term incarceration does little good,¹² probation is often allowed, but usually unsuccessful,¹³ and long-term incarceration with the state’s corrections department has equally abysmal results.¹⁴ The prospects for individuals paroled after incarceration are horrendous.¹⁵ The prognosis for effective treatment—as documented by the National Institute for Health and U.S. Department of Justice—is disheartening.¹⁶ Many individuals who are cycled through the criminal justice system have little hope of being successfully treated and maintaining a stable lifestyle for any extended period of time.¹⁷ These results should not surprise those who work in the criminal justice system.

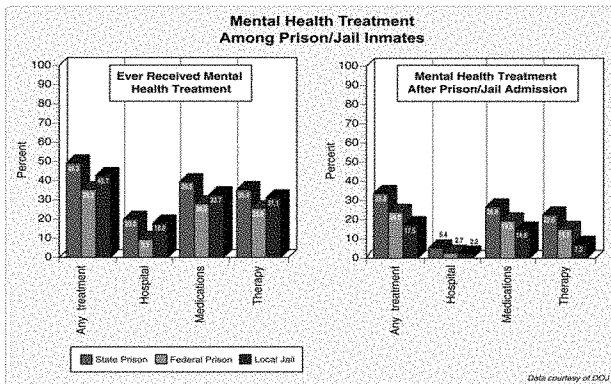
¹² PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, NCJ 174463, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (1999), available at <http://www.bjs.gov/content/pub/pdf/mhtip.pdf>; see also AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, U.S. DEPARTMENT HEALTH HUM. SERVS, INTERVENTIONS FOR ADULTS WITH SERIOUS MENTAL ILLNESS WHO ARE INVOLVED WITH THE CRIMINAL JUSTICE SYSTEM (Sep. 13, 2012), http://effectivehealthcare.ahrq.gov/ehc/products/406/1259/SMI-in-CJ-System_ResearchProtocol_20120913.pdf.

¹³ See DITTON, *supra* note 12.

¹⁴ See AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, *supra* note 12.

¹⁵ *Id.*

¹⁶ *Inmate Mental Health*, *supra* note 10. This survey indicates that less than one-half of inmates with a mental health issue have ever received treatment. One-third or fewer received mental health treatment after incarceration. However, these rates differ depending upon the type of correctional facility. *Id.*



¹⁷ See DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

Table 1. Recent history and symptoms of mental health problems among prison and jail inmates

	Percent of inmates in —		
	State Prison	Federal Prison	Local Jail
Mental health problem			
Any mental health problem	56.2%	44.8%	64.2%
Recent history of mental health problem	24.3%	13.8%	20.6%
Told had disorder by mental health professional	9.4	5.4	10.9
Had overnight hospital stay	5.4	2.1	4.9
Used prescribed medications	18.0	10.3	14.4
Had professional mental health therapy	15.1	8.3	10.3
Symptoms of mental health disorders	49.2%	39.8%	60.5%
Major depressive disorder	23.5	16.0	29.7
Mania disorder	43.2	35.1	54.5
Psychotic disorder	15.4	10.2	23.9

So, how did the criminal justice system get put in the position of a de facto mental health treatment provider? The answer is found in the history of mental health hospitals, deinstitutionalization, and the application of a 1939 study that coined the term “Penrose’s Law.” As the default mental health provider, the criminal justice system has attempted to deal with mental illness. However, it has been largely ineffective, as evidenced by inmate deterioration and recidivism rates. The inability of the system to appropriately handle mental health issues is a significant concern that needs immediate attention.

II. A BRIEF HISTORY OF MENTAL HEALTH HOSPITALIZATION IN THE UNITED STATES

State hospitals that treat individuals with mental health disorders have existed since 1773.¹⁸ The call for state hospitals grew out of families’ inability to handle mentally ill individuals and their resulting incarceration in jails or poorhouses.¹⁹ As Virginia’s Royal Governor stated in 1766:

[A] poor unhappy set of People who are deprived of their Senses and wander about the Country, terrifying the Rest of their Fellow Creatures. A legal Confinement, and proper Provision, ought to be appointed for these miserable Objects, who cannot help themselves. Every civilized Country has an [sic] Hospital for these People, where they are confined, maintained and attended by able Physicians, to endeavor to restore them their lost Reason.²⁰

These concerns led to the establishment of the Eastern Lunatic Asylum of Virginia in 1773.²¹ It was the first hospital to treat mental illnesses in the United States.²²

The public demand for the creation of state hospitals and asylums grew because the understanding of the causes of mental health disorders shifted from a religious perspective²³ to a more scientific approach.²⁴ Hospitalization would thus seem to be an enlightened approach to treating mental illnesses. First, it recognizes mental illnesses as a health issue. Second, the approach recognizes that families and communities are ill equipped to care for individuals who are suffering from a serious mental impairment. Yet,

Id. at Table 3. Note: The above table includes “inmates who reported an impairment due to a mental problem.” *Id.* This data is “based on the Survey of Inmates in State and Federal Correctional Facilities, 2004, and the Survey of Inmates in Local Jails, 2002.” *Id.*; see generally *Jails and Prisons: The Nations Largest Psychiatric Facilities*, TREATMENT ADVOCACY CENTER 3-4 (April 2009), http://www.treatmentadvocacycenter.org/storage/documents/jails_and_prisons--apr_09.pdf.

¹⁸ Lawrence Osborn, *From Beauty to Despair: The Rise and Fall of the American State Mental Hospital*, 80 PSYCHIATRIC Q. 219, 221 (2009), available at <http://www.psychodyssey.net/wp-content/uploads/2011/02/From-Beauty-to-Despair-The-Rise-and-Fall.pdf>.

¹⁹ *Id.* at 220.

²⁰ *Id.*

²¹ *Id.* at 221.

²² *Id.*

²³ See *id.* at 220 (“American colonists looked to religion as an explanation for madness. Mather, a minister in colonial Massachusetts . . . wrote that Satan himself caused turmoil and melancholy.”) (footnote omitted). Other explanations for mental disorders included an “imbalance of humors, blood phlegm, cholera (yellow bile) and black bile.” *Id.*

²⁴ See *id.* at 221. Benjamin Rush attributed mental disorders to the vascular system. *Id.* (citing BENJAMIN RUSH, MEDICAL INQUIRIES AND OBSERVATIONS UPON THE DISEASE OF THE MIND (Kimber & Richardson eds., 1812)).

early institutional treatment for the mentally ill resembled a prison more than a hospital.²⁵ “[P]hysicians placed lunatics in the basement of the hospital in barred cells while violent patients were restrained with straight waistcoats, mad shirts, or iron chains. The hospital did little to actually treat their insanity.”²⁶

The “moral treatment” was developed in the United States, as attention focused more on the scientific approach to explain the causes of mental illness.²⁷ Phillippe Pinel advanced the theory that mental illnesses have a medical origin, and thus focused on treatment that cared for the patient without using restraint, bleeding, or seclusion.²⁸ The treatment regimen he proposed suggested that the physiological and psychological causes of insanity were curable.²⁹ Pinel believed that in order to conquer the illness, one must first gain confidence, hope, and the belief that their treatment will work.³⁰ Under this style of treatment “the physician would hold the dominant role in the asylum and would seek to skillfully break the will of the insane person so he would not object to the treatment the physician prescribed.”³¹

Even though the moral approach to the treatment of mental illnesses gained traction, the need for public institutions increased as populations grew.³² By the 1850s, the increased population and need for institutions led to the development of a self-sustainability model,³³ known as the Kirkbride Model.³⁴ Under this model, the “hospital would be linear with symmetrical wings coming off a central administrative building, with a minimum of eight wards per wing.³⁵ The wings allowed for proper ventilation and light to reach every part of the hospital . . .”³⁶ Under the Kirkbride Model, it was important to provide patients with light and visibility to the outside world but also to provide structure and security in the asylum.³⁷

This model also sought to separate the violent patients from the non-violent patients, in order to keep peace and reduce agitation of calm patients.³⁸ Likewise, this model took pride in its appearance; it believed that buildings “should impress favorably not only on the patients,” but also on “others who may visit.”³⁹ This “therapeutic beauty” included “gardens, fountains, trails, and a grandiose architecture . . .”⁴⁰ The “plan was to make the hospital look as attractive and as impressive as possible to reassure and calm the patients, while bolstering support of family members who committed their loved ones.”⁴¹

²⁵ *Id.* at 222.

²⁶ *Id.* (footnote omitted).

²⁷ *Id.* at 221.

²⁸ *Id.*

²⁹ *Id.* (citing PHILIPPE PINEL, A TREATISE ON INSANITY (Davis. London & W. Todd trans., 1806)).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 222.

³³ *Id.*

³⁴ *Id.* (citing THOMAS KIRKBRIDE, ON THE CONSTRUCTION, ORGANIZATION AND GENERAL ARRANGEMENT OF HOSPITALS FOR THE INSANE (1854)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Funding for institutions also shifted from private donors to public funding,⁴² allowing for the expansion of existing institutions as well as the building of new facilities.⁴³ With the confluence of the medical model for mental health treatment, the creation of institutions dedicated to it (and public funding), treatment in an asylum for the mentally ill was the “consensus among the public and medical community.”⁴⁴

Unfortunately, by the end of the nineteenth century, public institutions found themselves underfunded and grossly overpopulated.⁴⁵ One article noted:

As the population increased in America, so did the insane. In 1860 the population of the United States was 31.4 million and the patient population in asylums was roughly 8,500. By 1890 the population in the United States doubled to 63 million and the patient population in asylums increased nine fold to 75,000. Asylums, from their very beginning, faced increased pressure to expand. Growth of population led to larger asylums being constructed which had a toll on the ability to control regimen and moral treatment. Asylums sometimes had a patient census that was triple what the institution was designed for. Without the ability to control regimen and moral treatment slipping, asylum care suffered as well.⁴⁶

The increasing population led to a shift in treatment away from an institutional focus to custodial institutionalization (i.e., warehousing the mentally ill).⁴⁷ This change was driven by both the lack of funding of the institutions and the disillusionment with the moral treatment because the mentally ill were not cured.⁴⁸ Thus, the treatment model morphed into the custodial model.

In the custodial model, inadequate funding and overcrowding led to an inevitable lack of treatment, or in the worst situations, abuse:

[S]tates had to rely, heavily, on the state hospital; it was difficult to ignore the great amount of distress that was occurring with custodial care. . . . With a doctor ratio sometimes of 1 to 500, and a nurse ratio of 1 to 1,320, there was little treatment that could be properly administered. . . . Whether it was from lack of care, no care, or high use of physical and chemical restraint because of understaffing, abuses occurred.⁴⁹

With the explosion in the number of patients at state hospitals came the development and implementation of new therapies such as “insulin therapy, electroshock therapy (electroconvulsive therapy, ECT), hydrotherapy, psychotherapy and lobotomy.”⁵⁰ The

⁴² *Id.* at 223 (footnote omitted).

⁴³ *Id.* (“By 1880, almost 140 asylums were built and by 1890 at least 70 were constructed according to the Kirkbride Model.”).

⁴⁴ *Id.* at 224.

⁴⁵ *Id.* at 225—26.

⁴⁶ *Id.* (footnotes omitted).

⁴⁷ *Id.* at 227.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 228.

therapies were employed despite physicians not understanding why or how such therapies worked.⁵¹

Due to the deplorable conditions,⁵² and as result of underfunding, the movement to deinstitutionalization and community-based treatment took hold post-World War II.⁵³ With the addition of new psychotropic drugs in the 1950s the move toward community-based treatment was further fuelled;⁵⁴ along with the legal doctrine of least restrictive alternative for mental health commitments, deinstitutionalization became the new norm.⁵⁵ Although deinstitutionalization forged ahead, little attention, and much less funding, was given to state-supported, community-based mental health services.⁵⁶ The result was a transformation of patients in state hospitals to mentally ill inmates in jails and prisons. Sadly, this result was predicted over a decade earlier.

III. PENROSE'S LAW

In 1939, researcher Lionel Penrose published a study from 18 European countries that found an inverse relationship between the number of beds in state mental health facilities and prison populations.⁵⁷ Simply put, Penrose's Law states that a reduction of mental health beds increases the number of mentally ill prisoners.⁵⁸ Penrose also predicted an increase in crime rates with the reduction of mental health facilities.⁵⁹

The predictive value of Penrose's Law has been fleshed out by several studies.⁶⁰ One Canadian study stated:

In 1955, there were 559,000 state hospital beds for a population of 164 million people. By 1994, there were only 72,000 state hospital beds for a population of 250 million people. The beds per 100,000 people had dropped dramatically from 339 to 29. Contemporaneously, the number

⁵¹ *Id.* "Psychosurgery for example, specifically the lobotomy, was developed by Egas Moniz and widely popularized by Walter Freeman. Freeman spent much time and effort campaigning that his transorbital lobotomy procedure was successful. The outcomes were mixed, with some producing death, but Freeman claimed the success of the procedure until his death." *Id.* (footnotes omitted).

⁵² *Id.* at 227 (noting that patients were secluded in straightjackets and finding the conditions comparable to that of a "snake pit").

⁵³ *Id.* at 228.

⁵⁴ *Id.* The first generation of anti-psychotic medications were developed in the mid-1950s, and were thought to support the concept that patients could indeed get better via medicine. *Id.*

⁵⁵ *See id.* ("In 1960, the U.S. Supreme Court ruled on a case that became known as the least restrictive alternative. The ruling, once applied, meant that involuntary commitment to a hospital was only possible if there were no other treatments that would give more freedom to the patient. . . . [T]reatment of the mentally ill shifted from the state hospitals to community care. The least restrictive alternative is only one in a series of court rulings that led to and facilitated deinstitutionalization.") (footnote omitted).

⁵⁶ *Id.* 228–29. "With the help of anti-psychotic medications and deinstitutionalization, the inpatient population decreased by nearly 80% over the next 30 years. The hope was that community care could provide a smaller, more humane place to treat the mentally ill. In actuality many consider deinstitutionalization and community care a failure on some levels." *Id.* (footnote omitted).

⁵⁷ Lionel Penrose, *Mental Disease and Crime: Outline of Comparative Study of European Statistics*, 18 *BRIT. J. MED. PSYCHOL.* 1, 1–15 (1939).

⁵⁸ Pål Hartvig & Ellen Kjelsberg, *Penrose's Law Revisited: The Relationship Between Mental Institution Beds, Prison Population and Crime Rate*, 63 *NORDIC J. PSYCHIATRY* 51, 51–56 (2009).

⁵⁹ *Id.* at 54.

⁶⁰ *Id.* at 51 nn. 2–3 (citations omitted).

of people in jails and prisons also rose significantly. The other side of the same phenomenon was the increasing number of prisoners associated with the reduction in psychiatric hospitals. Between 1980 and 1995, the total number of people incarcerated in the United States rose from 501,836 to 1,587,791, a 216 per cent increase—the population at that time increased by only 16 per cent.⁶¹

As for the United States, a 2009 study reported:

As previously stated, community care is not able to handle serious and chronically mentally ill persons. . . . [B]etween 1955 and 2000 the number of persons being treated in hospitals dropped from 560,000 to around 55,000. Today there is an estimated 300,000 being treated in prisons, with the LA County Jail being the largest public mental health facility in America. In Virginia, the Joint Commission on Health Care reports that regional and local jails house 59% of persons with mental illness versus 23% in state hospitals.⁶²

These studies indicate that Penrose’s Law is correct, and the criminal justice system has been forced into its role as the de facto mental health provider. If that is the case, how is the criminal justice system reacting to the influx of mentally ill defendants?

IV. CURRENT TREATMENT RECOMMENDATIONS

Dealing with mental health issues has been problematic for the criminal justice system. This is partly because of the system’s lack of understanding with regard to mental health diagnosis, maintenance of mental illness, and the treatment required.

Schizophrenia is one common example of a mental disorder criminals are often diagnosed with.⁶³ In the normal population, prevalence of schizophrenia ranges from 0.5% to 1.5%. However, it is over twice as common in the prison population, where its prevalence ranges from 2.3% to 3.9%.⁶⁴ The onset of the disease usually occurs between the late-teens and the mid-thirties.⁶⁵ Interestingly, these ages are also subject to the highest arrest rates.⁶⁶

To understand the appropriate treatment of this mental illness within the criminal justice system, it is necessary to focus on the illness from the perspective of health care professionals. Like many psychological disorders, schizophrenia is complicated in symptomology, diagnosis, and treatment. It is a challenging mental illness and it is incredibly resource-intensive. Such a psychological condition is even more straining on the criminal justice system.

⁶¹ Gary Chaimowitz, *The Criminalization of People with Mental Illness*, 57 CAN. J. PSYCHIATRY 2, 2 (2012).

⁶² Osborn, *supra* note 18, at 229–30.

⁶³ Richard Redding, *Why It Is Essential to Teach About Mental Health Issues in Criminal Law (and a Primer on How to Do It)*, 14 WASH. U. J.L. & POL’Y 407, 409–10 (2004).

⁶⁴ AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, *supra* note 12; AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 308 (4th ed. text rev. 2000) [hereinafter DSM-IV-TR].

⁶⁵ DSM-IV-TR, *supra* note 64, at 307.

⁶⁶ F.B.I., AGE-SPECIFIC ARREST RATES AND RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES 1993-2001, 3 (2003), available at http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/age_race_arrest93-01.pdf.

A. *Symptoms*

The National Institute of Mental Health (NIMH) currently describes the disease as a chronic, severe, and disabling brain disorder:

People with the disorder may hear voices other people don't hear. They may believe other people are reading their minds, controlling their thoughts, or plotting to harm them. This can terrify people with the illness and make them withdrawn or extremely agitated. People with schizophrenia may not make sense when they talk. They may sit for hours without moving or talking. Sometimes people with schizophrenia seem perfectly fine until they talk about what they are really thinking. Families and society are affected by schizophrenia too. Many people with schizophrenia have difficulty holding a job or caring for themselves, so they rely on others for help. Treatment helps relieve many symptoms of schizophrenia, but most people who have the disorder cope with symptoms throughout their lives.⁶⁷

Symptoms of schizophrenia include hallucinations,⁶⁸ delusions,⁶⁹ thought disorders,⁷⁰ movement disorders,⁷¹ negative symptoms,⁷² and cognitive symptoms.⁷³

⁶⁷ *Schizophrenia*, NAT'L INST. MENTAL HEALTH (Sept. 8, 2009), <http://www.nimh.nih.gov/health/publications/schizophrenia/what-is-schizophrenia.shtml>; see also DSM-IV-TR, *supra* note 64, at 298–302.

⁶⁸ *Schizophrenia*, *supra* note 67 (“Hallucinations are things a person sees, hears, smells, or feels that no one else can see, hear, smell, or feel. ‘Voices’ are the most common type of hallucination in schizophrenia. Many people with the disorder hear voices. The voices may talk to the person about his or her behavior, order the person to do things, or warn the person of danger. Sometimes the voices talk to each other. People with schizophrenia may hear voices for a long time before family and friends notice the problem. Other types of hallucinations include seeing people or objects that are not there, smelling odors that no one else detects, and feeling things like invisible fingers touching their bodies when no one is near.”); see also DSM-IV-TR, *supra* note 64, at 299–300.

⁶⁹ *Schizophrenia*, *supra* note 67 (“Delusions are false beliefs that are not part of the person’s culture and do not change. The person believes delusions even after other people prove that the beliefs are not true or logical. People with schizophrenia can have delusions that seem bizarre, such as believing that neighbors can control their behavior with magnetic waves. They may also believe that people on television are directing special messages to them, or that radio stations are broadcasting their thoughts aloud to others. Sometimes they believe they are someone else, such as a famous historical figure. They may have paranoid delusions and believe that others are trying to harm them, such as by cheating, harassing, poisoning, spying on, or plotting against them or the people they care about. These beliefs are called ‘delusions of persecution.’”); see also DSM-IV-TR, *supra* note 64, at 299.

⁷⁰ *Schizophrenia*, *supra* note 67 (“Thought disorders are unusual or dysfunctional ways of thinking. One form of thought disorder is called ‘disorganized thinking.’ This is when a person has trouble organizing his or her thoughts or connecting them logically. They may talk in a garbled way that is hard to understand. Another form is called ‘thought blocking.’ This is when a person stops speaking abruptly in the middle of a thought. When asked why he or she stopped talking, the person may say that it felt as if the thought had been taken out of his or her head. Finally, a person with a thought disorder might make up meaningless words, or ‘neologisms.’”); DSM-IV-TR, *supra* note 64, at 300.

⁷¹ *Schizophrenia*, *supra* note 67 (“Movement disorders may appear as agitated body movements. A person with a movement disorder may repeat certain motions over and over. In the other extreme, a person may become catatonic. Catatonia is a state in which a person does not move and does not respond to others. Catatonia is rare today, but it was more common when treatment for schizophrenia was not available.”) (footnote omitted); see also DSM-IV-TR, *supra* note 64, at 300–01.

⁷² *Schizophrenia*, *supra* note 67 (“Negative symptoms are associated with disruptions to normal emotions and behaviors. These symptoms are harder to recognize as part of the disorder and can be mistaken for depression or other conditions. These symptoms include the following: ‘[I]at affect’ (a person’s face does not move or he or she talks in a dull or monotonous voice), [I]ack of pleasure in everyday life, [I]ack of ability to begin and sustain planned activities, [s]peaking little, even when forced to interact. People with negative symptoms need help with everyday tasks. They often neglect basic personal hygiene. This may make them seem lazy or unwilling to help themselves, but the problems are symptoms caused by the schizophrenia.”); see also DSM-IV-TR, *supra* note 64, at 301.

In addition to these incredibly difficult symptoms, the issue of dual diagnosis can further complicate diagnosis and treatment:

Dual diagnosis [occurs when someone] has both a mental disorder and an alcohol or drug problem. These conditions occur together frequently. In particular, alcohol and drug problems tend to occur with [d]epression, [a]nxiety disorders, [s]chizophrenia, [and] [p]ersonality disorders. Sometimes the mental problem occurs first. This can lead people to use alcohol or drugs that make them feel better temporarily. Sometimes the substance abuse occurs first. Over time, that can lead to emotional and mental problems.⁷⁴

As a feature of the disease, substance abuse complicates treatment.⁷⁵ Regardless of the combination of symptoms, once the diagnosis has been made, then the question of treatment comes into play. The NIMH advocates a multi-faceted approach to treating the disease.⁷⁶

B. *Multi-Faceted Treatment Approach*

There is no cure for schizophrenia.⁷⁷ Depending on the severity of the disease and responsiveness to treatment, some individuals learn to function very well, while others continue with life-long impairments.⁷⁸ Once diagnosed, treatment for schizophrenia can include anti-psychotic drugs, psychosocial therapy, and rehabilitative strategies. If the individual has a dual diagnosis, the NIMH recommends that substance abuse treatment can be used concurrently with other treatment regimens for schizophrenia.⁷⁹

The treatment for schizophrenia entails the administration of antipsychotic drugs.⁸⁰ Antipsychotic drugs can have severe side-effects including drowsiness, dizziness, blurred vision, rapid heartbeat, sun sensitivity, skin rashes, and, in women, menstrual problems.⁸¹ There are also physical manifestations such as rigidity, muscle spasms, tremors, and restlessness.⁸² A severe physical side effect of long-term use of antipsychotic

⁷³ *Schizophrenia*, *supra* note 67 (“Cognitive symptoms are subtle. Like negative symptoms, cognitive symptoms may be difficult to recognize as part of the disorder. Often, they are detected only when other tests are performed. Cognitive symptoms include the following: [p]oor ‘executive functioning’ (the ability to understand information and use it to make decisions), [t]rouble focusing or paying attention, [p]roblems with ‘working memory’ (the ability to use information immediately after learning it). Cognitive symptoms often make it hard to lead a normal life and earn a living. They can cause great emotional distress.”); DSM-IV-TR, *supra* note 64, at 305 (describing the symptoms with associated laboratory findings).

⁷⁴ Nat’l Inst. of Health, *Dual Diagnosis*, MEDICINE PLUS, <http://www.nlm.nih.gov/medlineplus/dualdiagnosis.html> (last updated Jan. 20, 2014); *see also* DSM-IV-TR, *supra* note 64, at 304, 309–10 (describing comorbidity and differential diagnosis based on etiology).

⁷⁵ *Dual Diagnosis*, *supra* note 74.

⁷⁶ *Schizophrenia*, *supra* note 67.

⁷⁷ *Schizophrenia*, AM. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/schizophrenia> (last visited June 29, 2014).

⁷⁸ *Id.*

⁷⁹ *Schizophrenia*, *supra* note 67.

⁸⁰ *Id.* (“Antipsychotic medications have been available since the mid-1950’s. The older types are called conventional or ‘typical’ antipsychotics. . . . In the 1990’s, new antipsychotic medications were developed. These new medications are called second generation, or ‘atypical’ antipsychotics. One of these medications, clozapine (Clozaril) is an effective medication that treats psychotic symptoms, hallucinations, and breaks with reality.”); *see also* *Clinical Antipsychotic Trials of Intervention Effectiveness (CATIE)*, NAT’L INST. FOR MENTAL HEALTH, www.nimh.nih.gov/funding/clinical-trials-for-researchers/practical/catie/index.shtml (last visited February 22, 2014) (providing additional information regarding antipsychotic medications and their effectiveness and side effects).

⁸¹ *Schizophrenia*, *supra* note 67.

⁸² *Id.*

medication is tardive dyskinesia,⁸³ a condition causing uncontrollable muscle movement that may not be curable.⁸⁴

If the medications relieve some of the symptoms, there are additional therapies administered to help the individual function effectively.⁸⁵ One such therapy is psychosocial treatment.⁸⁶ The purpose of psychosocial therapy is to help individuals deal with everyday challenges including “difficulty with communication, self-care, work,⁸⁷ and forming and keeping relationships.”⁸⁸ In some cases, where symptoms persist in an individual despite treatment with medication, cognitive behavioral therapy is used.⁸⁹ The purpose of the therapy is to enable individuals to “test the reality of their thoughts and perceptions, how to ‘not listen’ to their voices, and how to manage their symptoms overall.”⁹⁰

The NIMH also recommends a rehabilitative strategy be developed to assist the individual to function with day-to-day stressors that include “job counseling and training, money management counseling, help in learning to use public transportation, and opportunities to practice communication skills.”⁹¹ Family members can assist individuals in maintaining medication compliance and developing coping skills to deal with the disease.⁹² NIMH also recommends self-help groups as a way to assist individuals with schizophrenia cope with the disease.⁹³

These are the current treatment recommendations by NIMH. The question is whether or not the criminal justice system can provide this type of treatment to individuals who come into contact with it. Mental health issues must be dealt with from the time of arrest and through the pretrial detention, pretrial proceedings, trial, and post-trial proceedings—which include sentencing. In the event of a guilty verdict, treatment of

⁸³ *Id.* (“Long-term use of typical antipsychotic medications may lead to a condition called tardive dyskinesia (TD). TD causes muscle movements a person can’t control. The movements commonly happen around the mouth.”).

⁸⁴ *Id.* (“TD can range from mild to severe, and in some people the problem cannot be cured. Sometimes people with TD recover partially or fully after they stop taking the medication.”).

⁸⁵ *Id.* (“Antipsychotics are usually in pill or liquid form. Some anti-psychotics are shots that are given once or twice a month. Symptoms of schizophrenia, such as feeling agitated and having hallucinations, usually go away within days. Symptoms like delusions usually go away within a few weeks. After about six weeks, many people will see a lot of improvement. However, people respond in different ways to antipsychotic medications, and no one can tell beforehand how a person will respond.”).

⁸⁶ *Id.*

⁸⁷ *Id.* (“Rehabilitation programs can include job counseling and training, money management counseling, help in learning to use public transportation, and opportunities to practice communication skills. Rehabilitation programs work well when they include both job training and specific therapy designed to improve cognitive or thinking skills. Programs like this help patients hold jobs, remember important details, and improve their functioning.”).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (“Rehabilitation emphasizes social and vocational training to help people with schizophrenia function better in their communities. Because schizophrenia usually develops in people during the critical career-forming years of life (ages 18 to 35), and because the disease makes normal thinking and functioning difficult, most patients do not receive training in the skills needed for a job.”).

⁹² *Id.* (“People with schizophrenia are often discharged from the hospital into the care of their families. So it is important that family members know as much as possible about the disease. With the help of a therapist, family members can learn coping strategies and problem-solving skills.”).

⁹³ *Id.* (“Self-help groups for people with schizophrenia and their families are becoming more common. Professional therapists usually are not involved, but group members support and comfort each other. People in self-help groups know that others are facing the same problems, which can help everyone feel less isolated. . . . Once patients learn basic facts about schizophrenia and its treatment, they can make informed decisions about their care.”).

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mentally ill inmates must continue until the individual completes their sentence. Throughout this process, which may last decades, the individual's competency and treatment are constantly revisited by a system that was never designed or intended to cope with mental health diagnosis or treatment.

V. THE CRIMINAL JUSTICE SYSTEM AND COMPETENCY

A. Law Enforcement Interaction with Individuals Having Mental Health Issues

Community law enforcement agencies are often the de facto diagnosticians when encountering individuals with mental health problems.⁹⁴ Although not all law enforcement encounters involve individuals with disorders as severe as schizophrenia, run-ins are common with people who have less severe mental illnesses.⁹⁵ In professor Linda Teplin's 2000 article, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, she describes three options available to police when confronted on the street with individuals who have mental health issues.⁹⁶ These options include: (1) informal disposition, (2) arrest, or (3) hospitalization.⁹⁷

Informal disposition is overwhelmingly preferred by officers, with 72% of encounters handled accordingly.⁹⁸ These individuals are typically described as the neighborhood characters,⁹⁹ troublemakers,¹⁰⁰ or quiet, unobtrusive "mentals."¹⁰¹ Informal dispositions by officers are a reflection of a long-term trend toward deinstitutionalization.¹⁰²

⁹⁴ H. Richard Lamb, Linda E. Weinberger, & Walter J. DeCuir, Jr., *The Police and Mental Health*, PSYCHIATRIC SERVS. (Oct. 1, 2002), <http://ps.psychiatryonline.org/article.aspx?articleID=87145> (pointing out that police have inadequate training in handling encounters with this segment of the community); Tucker et al., *supra* note 11.

⁹⁵ Gary Corder, *People with Mental Illness*, CENTER FOR PROBLEM-ORIENTED POLICING (2006), http://www.popcenter.org/problems/mental_illness.

⁹⁶ Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NAT'L INST. JUST. J. 9, 9–10 (July 2000), available at <https://www.ncjrs.gov/pdffiles1/jr000244c.pdf>.

⁹⁷ *Id.*

⁹⁸ *Id.* at 9 (noting that police resolve situations informally 72% of the time.).

⁹⁹ *Id.* at 11 ("Neighborhood characters were persons whose idiosyncrasies were well known to police in their precinct. Virtually any officer could talk about 'Crazy Harry,' 'Batman,' or 'Mailbox Molly.' These were neighborhood characters who were defined by police as 'mentals' but who were never hospitalized because they were known quantities. Police had certain expectations regarding the parameters of their behavior. As a consequence, the police tolerated a greater degree of deviance from them. More important, officers' familiarity with each citizen's particular symptoms enabled them to 'cool them out,' making an informal disposition that much easier. The following is a rather common encounter of this type: There's a lady in the area who claims she has neighbors who are beaming rays up into her apartment. The officer said he usually handles the situation by telling her, 'We'll go downstairs and tell the people to stop beaming the rays,' and she's happy. The officer seemed quite happy about this method of handling the problem. He could do something for the lady, and even though it's not the same kind of assistance he might give another type of situation, he could allay the lady's fears by just talking to her.").

¹⁰⁰ *Id.* ("If an emotionally disturbed citizen has been labeled a 'troublemaker,' hospitalization or arrest is very unlikely. Intervention in such cases is considered not worth the trouble. An example was a woman rejected by the mental hospital, who, whenever she came into the station, caused an absolute disruption. She would take off her clothes, run around the station nude, and urinate on the sergeant's desk. Officers felt it was such a hassle to have her in the station and in lockup that they simply stopped arresting her.").

¹⁰¹ *Id.* ("Persons whose symptoms of mental disorder are relatively unobtrusive are likely to be handled informally. They offend neither the populace nor the police with obvious manifestations of their illness, and their symptoms are not considered serious enough to warrant hospitalization. Moreover, quiet 'mentals' are considered more disordered than disorderly and so are unlikely to provoke arrest. Through officers' experiences with neighborhood characters, they know just how to soothe the emotionally disturbed person, to act as a 'street-corner psychiatrist.' In this way, they help to maintain many mentally ill people within the community and make deinstitutionalization a more viable public policy.").

¹⁰² *Id.* at 9; Tucker et al., *supra* note 11 ("The trend toward deinstitutionalization between the 1960s and 1980s contributed to the increased contact between police and individuals with mental illness.").

If the officer makes the decision to arrest, it triggers the involvement of the criminal justice system that is woefully unprepared to handle mental health treatment. The defendant's competency is usually the first post-arrest inquiry.¹⁰³ The question of competency is one that has befuddled courts for hundreds of years. Even now, for every-day functioning purposes, the level of competency acceptable for legal purposes is much lower than that of what a physician treating a patient with a mental illness would deem proficient.¹⁰⁴ As the Supreme Court observed in evaluating the burden of proof in a competency proceeding:

The prohibition against trying the incompetent defendant was well established by the time Hale and Blackstone wrote their famous commentaries. (“[I]f a man in his sound memory commits a capital offence ... [a]nd if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence?”). The English cases which predate our Constitution provide no guidance, however, concerning the applicable standard of proof in competency determinations.

... .
Beginning in the late 18th century, cases appear which provide an inkling of the proper standard. In *King v. Frith*, for example, the court instructed the jury to “diligently inquire ... whether John Frith, the now prisoner at the bar ... be of sound mind and understanding or not....” Some 50 years later the jurors received a nearly identical admonition in *Queen v. Goode*: ““You shall diligently inquire, and true presentment make ... whether John Goode ... be insane or not....”” Similarly, in *King v. Pritchard*, the court empaneled a jury to consider “whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial....”¹⁰⁵

The fundamental importance of a defendant's competency to stand trial was articulated in *Riggins v. Nevada*:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.¹⁰⁶

In 1960, the U.S. Supreme Court decided *Dusky v. United States*,¹⁰⁷ and set a parameter to measure a defendant's competency to stand trial. The Court stated:

¹⁰³ *Criminal Justice Section Standards: Mental Health*, A.B.A., http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html (last visited June 29 2014).

¹⁰⁴ See generally Kirk Heilbrun, et al., *Standards of Practice and Care in Forensic Mental Health Assessment: Legal, Professional, and Principles-Based Considerations*, 14 PSYCHOL. PUB. POL'Y & L. 1, 3–4 (2008), available at <http://www.mentalcompetency.org/resources/guides-standards/files/Heilbrun,%20et%20al.%20--%20Standards%20of%20Practice%20and%20Care-pdf>.

¹⁰⁵ *Cooper v. Oklahoma*, 517 U.S. 348, 356–57 (1996) (citations omitted).

¹⁰⁶ 504 U.S. 127, 139–40 (1992).

¹⁰⁷ 362 U.S. 402, 402 (1960).

[I]t is not enough for the district judge to find that ‘the defendant (is) oriented to time and place and (has) some recollection of events,’ but that the ‘test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.’¹⁰⁸

In just three paragraphs, the Supreme Court introduced the concept of a criminal defendant needing to have a “rational understanding” of how to assist counsel, appreciate the charges against them, and understand the proceedings.¹⁰⁹

In 1966, the Court in *Pate v. Robinson*¹¹⁰ held a murder conviction should be set aside because the lower court did not grant a hearing on the issue of the defendant’s competency.¹¹¹ Then, in *Drope v. Missouri*,¹¹² the Court announced the current three part test for competency: “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”¹¹³

The Supreme Court has held that the constitution presumes a defendant is competent. To prove otherwise, the burden is on the defendant to establish his incompetency.¹¹⁴ Furthermore, the Court found that the constitution requires the defendant to prove his incompetency by a preponderance of the evidence, while also finding that the heightened standard of clear and convincing evidence violates due process.¹¹⁵

¹⁰⁸ *Id.* The Court’s decision was premised on the sufficiency of the record found in *Dusky v. U.S.*, 271 F.2d 385, 387–89 (8th Cir. 1959). The lower court reviewed the evidence produced at hearing, where experts opined: “He is oriented as to time, place, and person. He denies complete memory of the events of the day of the alleged offense. . . . It is the opinion of the staff, following interview of the patient, that he had improved in recent weeks but his condition is still such that he is unable to understand the nature of the proceedings with reference to the charges against him and is unable to properly assist counsel in his defense. The patient is receiving tranquilizing medications and would probably deteriorate quickly if treatment was stopped at this time. . . . Doctor Sturgell also expressed the opinion that the defendant understood what he was charged with, knew that if there was a trial it would be before a judge and jury, knew that if found guilty he could be punished, and knew who his attorney was and that it was his duty to protect the defendant’s rights.” *Id.*

¹⁰⁹ *Dusky*, 362 U.S. at 402–03.

¹¹⁰ 383 U.S. 375 (1966).

¹¹¹ *Id.* at 385.

¹¹² 420 U.S. 162 (1975).

¹¹³ *Id.* at 171.

¹¹⁴ *Medina v. California*, 505 U.S. 437, 446 (1992) (“Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). The Court further found there is “no historical basis for concluding that the allocation of the burden of proving incompetence to the defendant violates due process . . .” *Medina*, 505 U.S. at 448.

¹¹⁵ *Cooper v. Oklahoma*, 517 U.S. 348, 368–69 (1996) (“The prohibition against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent. Because Oklahoma’s procedural rule allows the State to put to trial a defendant who is more likely than not incompetent, the rule is incompatible with the dictates of due process.”).

B. *Duty of Defense Counsel*

On a daily basis, criminal defense attorneys confront clients who are mentally impaired—some with disorders as severe as schizophrenia.¹¹⁶ The choices that attorneys are left with while representing these individuals are bleak. On one hand, counsel is to represent a client “zealously” within the limits of the law.¹¹⁷ On the other hand, lawyers are sworn to uphold the Constitution.¹¹⁸ Since it is a violation of due process to allow an incompetent individual to proceed in the criminal justice system,¹¹⁹ is the defense counsel obliged to investigate the client’s competency to stand trial even when the client resists?

The American Bar Association (ABA) Model Code of Professional Responsibility (MCPR) attempts to address that issue.¹²⁰ The rules dictate “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”¹²¹ Of course, however, for the practitioner sitting in an interview room with a client suffering from a serious mental disorder,¹²² such a rule provides little or no guidance. The commentary to the rule is a bit more helpful:

In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.¹²³

Again, the reality of practice overshadows the rule and its commentary. The attorney is confronted with confidential information that leads them to believe the client is mentally impaired. At this point in the criminal justice process, the lawyer is asked to assume the role of both psychiatrist and advocate. The ABA Criminal Justice Standards state:

¹¹⁶ See *supra* text accompanying notes 63–64.

¹¹⁷ See MODEL RULES OF PROF’L CONDUCT PREAMBLE cmt. 2 (2013).

¹¹⁸ See Carol Rice Andrews, *The Lawyer’s Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 48 (2009) (“Twenty-one states and most federal courts use a simple oath in which the lawyer swears to support the relevant laws and constitution and also promises good conduct.”).

¹¹⁹ See *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (“The State concedes ‘the conviction of an accused person while he is legally incompetent violates due process.’”).

¹²⁰ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.14 (“(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.”).

¹²¹ *Id.* at R. 1.14(a).

¹²² See generally DSM-IV-TR, *supra* note 64, at 273–315 (discussing the symptoms and features of schizophrenia and other psychotic disorders).

¹²³ MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 6.

Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.¹²⁴

While seemingly answering the question about defense counsel's obligation to raise the issue, the standards then require counsel to file a motion and "set forth the specific facts that have formed the basis for the motion,"¹²⁵ while at the same time admonishing defense counsel that they "should not divulge confidential communications or communications protected by the attorney-client privilege."¹²⁶ Since confidential information is often revealed by the client, these internally contradictory standards put defense counsel in a difficult, if not impossible, situation. Defense counsel can develop other sources of information: prior hospitalization or treatment (if the defendant discloses and signs waivers); prior prosecutions where mental health issues were raised (the applications and orders would be public record but the substance of evaluations and attorney interviews would require waivers from the client); and family, friends, or acquaintances (this again requires the client to cooperate and give the information to the attorney if it exists).¹²⁷

Even if counsel files an application for a competency hearing and the defendant is found incompetent, the case is not over. The criminal case is stayed until the defendant's competency is restored.¹²⁸ The goal of mental health treatment is to restore competency so that the criminal case proceeds, not to treat the defendant or to manage the underlying mental illness on a long-term basis. Consequently, in cases where a defendant may have a stark diagnosis, the goal is only to bring the defendant to a level where they can function for their criminal case, not to manage their symptoms. At that point, the case is revived and the mental health inquiries focus on potential defenses to the crime charged with the competency question lingering in the background.

Competency is often only met for a limited period of time and then the client lapses, dropping their mental capacity below the required baseline.¹²⁹ This oscillation undercuts the premise that an individual meets the standards for competency. Mental capacity varies from day-to-day in each individual. A static ruling by the court on a given day does not assure the defendant will remain competent for any particular length of time.

¹²⁴ ABA CRIMINAL JUSTICE STANDARDS § 7-4.2(c) (2013).

¹²⁵ *Id.* at R. 7-4.2(d).

¹²⁶ *Id.* at R. 7-4.2(f).

¹²⁷ See *Mental Illness, Your Client, and Criminal Law*, CONN. APPLESEED NETWORK 1, 25–26 (May 2007), <http://ctappleseed.org/pdfs/707/mi-criminallawhandbook.pdf>.

¹²⁸ See *Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1251 (11th Cir. 2002) (explaining that because the defendant was found to have competence restored, the criminal proceeding continued); See also *Restoration of Competency to Stand Trial*, HOGG FOUND. FOR MENTAL HEALTH (March 2013), <http://www.hogg.utexas.edu/uploads/documents/Competency%20Restoration%20Brief.pdf>.

¹²⁹ John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 231–32 (2008).

C. *Issues Regarding Medication*

Another problem in addressing competency is the use of psychotropic medication. Those with a mental illness are not always compliant in treatment due to a lack of insight into their diagnosis or a lack of interest in getting better.¹³⁰ In the 1992 decision *Riggins v. Nevada*, the Supreme Court attempted to address the problem of forcibly medicating an individual in order to maintain competency and the defendant’s right to effectively present a defense.¹³¹ On one hand, it is a violation of due process to try an individual who isn’t competent.¹³² On the other hand, the defendant is entitled to present a defense in a fashion that the jury understands.¹³³ In its analysis, the Court drew a distinction between *Riggins* (a pretrial detainee) and individuals who had been convicted and who were being forcibly medicated while incarcerated.¹³⁴ The Court had previously noted the effects of antipsychotic medications in *Washington v. Harper*:

The purpose of the drugs is to alter the chemical balance in a patient’s brain, leading to changes, intended to be beneficial, in his or her cognitive processes. While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified by the trial court is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes. The trial court found that it may be treated and reversed within a few minutes through use of the medication Cogentin. Other side effects include akathisia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face.... [T]he proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%. According to the American Psychiatric Association, studies of the condition indicate that 60% of tardive dyskinesia is mild or minimal in effect, and about 10% may be characterized as severe.¹³⁵

¹³⁰ Tania M. Lincoln et al., *Correlates and Long-Term Consequences of Poor Insight in Patients with Schizophrenia: A Systematic Review*, 33(6) SCHIZOPHRENIA BULL. 1324, 1324–42 (Nov. 2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779879/>.

¹³¹ 504 U.S. 127, 132–33 (1992).

¹³² See *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975).

¹³³ *Riggins*, 504 U.S. at 133 (“The record in this case narrowly defines the issues before us. The parties have indicated that once the District Court denied [the defendant’s] motion to terminate use of [the antipsychotic drug], subsequent administration of the drug was involuntary.”).

¹³⁴ *Id.* at 133–34 (“In *Harper*, a prison inmate alleged that the State of Washington and various individuals violated his right to due process by giving him Mellaril and other antipsychotic drugs against his will. Although the inmate did not prevail, we agreed that his interest in avoiding involuntary administration of antipsychotic drugs was protected under the Fourteenth Amendment’s Due Process Clause. ‘The forcible injection of medication into a non-consenting person’s body,’ we said, ‘represents a substantial interference with that person’s liberty.’” (quoting *Washington v. Harper*, 494 U.S. 210, 229 (1990)) (footnotes omitted).

¹³⁵ 494 U.S. at 229–30 (citations omitted).

The Court concluded that the record lacked enough detailed findings as to warrant the forced administration of antipsychotic medication to Riggins.¹³⁶ In *Harper*, the Court previously held that the involuntary administration of antipsychotic drugs would be constitutionally permissible:

First, there must be a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forward to justify it. Second, a court must consider “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.” Third, “the absence of ready alternatives is evidence of the reasonableness of a prison regulation,” but this does not mean that prison officials “have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.”¹³⁷

The Court concluded:

We hold that, given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.¹³⁸

The questions remain regarding a defendant’s competency to stand trial, ability to present a defense, and the right to a full and fair trial. The complications of understanding a psychiatric diagnosis and discerning the effects of psychotropic medications force the criminal justice system to enter a quagmire from which it cannot extricate itself. The list of drugs used to treat individuals with mental illnesses presents a maze which is difficult for psychiatrists and psychologists to navigate. NIMH lists more than 100 different medications to treat disorders ranging from psychosis to ADHD.¹³⁹

For the attorneys and judges handling cases involving mental health issues, the complexity and nuances of understanding the disease process and medications used in treating the disease are so overwhelming. Often, they simply give up and rely on reluctant experts who do not understand the criminal justice system to guide them in their decision making process. The premise that a medicated client is a competent client is simply not true.

D. *Insanity and Diminished Responsibility*

Most jurisdictions still employ the 1843 M’Naghten standard to gauge a defendant’s sanity.¹⁴⁰ The M’Naghten rule examines whether, at the time of the

¹³⁶ *Riggins*, 504 U.S. at 138 (“Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, however, we have no basis for saying that the substantial probability of trial prejudice in this case was justified.”).

¹³⁷ 494 U.S. at 224–25 (citations omitted).

¹³⁸ *Id.* at 227 (footnote omitted).

¹³⁹ NAT’L INST. OF MENTAL HEALTH, MENTAL HEALTH MEDICATIONS 17–24 (2012), available at <http://www.nimh.nih.gov/health/publications/mental-health-medications/index.shtml>.

¹⁴⁰ *The Insanity Defense Among the States*, FINDLAW, <http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html> (last visited June 30, 2014) (indicating that the states currently using the M’Naghten rule are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Iowa,

commission of the offense, the defendant knew the difference from right and wrong or understood the nature and quality of his acts.¹⁴¹ The second test regarding insanity is the Model Penal Code rule.¹⁴² The third test is the Durham rule, which was articulated in the 1954 decision by the Court of Appeals for the District of Columbia.¹⁴³ The test is a condemnation of the M’Naghten rule:

The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior. As Professor Sheldon Glueck of the Harvard Law School points out in discussing the right-wrong tests, which he calls the knowledge tests:

‘It is evident that the knowledge tests unscientifically abstract out of the mental make-up but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders. In brief, these tests proceed upon the following questionable assumptions of an outworn era in psychiatry: (1) that lack of knowledge of the ‘nature or quality’ of an act (assuming the meaning of such terms to be clear), or incapacity to know right from wrong, is the sole or even the most important symptom of mental disorder; (2) that such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved; and (3) that the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind.’¹⁴⁴

Meanwhile, some jurisdictions have eliminated insanity as a defense to a crime.¹⁴⁵

Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Washington).

¹⁴¹ *R v. M’Naghten*, (1843) 8 Eng. Rep. 718 (H.L.) (“Notwithstanding a party accused did an act, which was in itself criminal, under the influence of insane delusion, with a view of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to law. That if the accused was conscious that the act was one which he ought not to do; and if the act was at the same time contrary to law, he is punishable. In all cases of this kind the jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that *at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.*”) (emphasis added).

¹⁴² See MODEL PENAL CODE § 4.01 (2013) (“(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (2) As used in this Article, the terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.”).

¹⁴³ *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954) (stating that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”) (footnote omitted), *abrogated by United States v. Brawner*, 471 F.2d 969, 981–83 (D.C. Cir. 1972).

¹⁴⁴ *Id.* at 871–72 (discussing the history of the M’Naghten test and objections to its continued use).

¹⁴⁵ *The Insanity Defense Among the States*, *supra* note 140 (stating that Kansas, Montana, Idaho, and Utah do not allow the insanity defense).

Again, the problem with formulating legal tests to establish criminal culpability is that antiquated concepts of mental health still exist—as well as a disregard for developments in science. The notion that we would treat mental illnesses with the same therapies in existence in 1843 (when M’Naghten’s case articulated the prevailing test for insanity) would result in gasps of disbelief from medical practitioners. Legal tests should be developed in deference to and in incorporation with current medical diagnoses and treatment.

E. *The Criminal Justice System’s Inability to Address Mental Health Issues*

For the mentally ill, the criminal justice system typically reacts by medicating them to control their illness.¹⁴⁶ The notion that medication is the panacea to treat mental health issues is prevalent among the bench and bar.¹⁴⁷ As previously noted in this article, administering antipsychotic medication is one part of the treatment of schizophrenia.¹⁴⁸ However, in a recent clinical study regarding the effectiveness of antipsychotic medication in treating schizophrenia, one finding indicated antipsychotic medication does not significantly improve cognition.¹⁴⁹ In other words, medication alone does not assist an individual to produce and understand language, engage in problem solving, and make decisions.¹⁵⁰ This cognitive process is essential for an individual to have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,” and to have a “rational as well as factual understanding of the proceedings against him.”¹⁵¹ The fundamental legal question of competency is undercut by current science and its evaluation of medications used to treat schizophrenia.

¹⁴⁶ Lael Montgomery, *When Worlds Collide: Mentally Ill Criminal Defendants—Part II*, 29(7) COLO. LAW. 101, 101–05 (July 2000).

¹⁴⁷ *Id.*

¹⁴⁸ *Schizophrenia*, *supra* note 67.

¹⁴⁹ Hori H. et al., *Antipsychotic Medication and Cognitive Function in Schizophrenia*, 86 SCHIZOPHRENIA RES. 138, 138–146 (Sept. 2006), available at <http://www.ncbi.nlm.nih.gov/pubmed/-16793238>.

¹⁵⁰ *See id.*

¹⁵¹ *Dusky v. United States*, 362 U.S. 402, 402 (1960). The Supreme Court’s decision was premised on the sufficiency of the record from the lower court: “At a hearing held pursuant to 18 U.S.C.A. § 42.4, on January 21, 1959, to determine whether the defendant was competent to stand trial, the court had before [it] a detailed report of a Neuropsychiatric Examination of the defendant. This report was dated October 30, 1958, and was signed by Doctor L. Moreau, Staff Psychiatrist at Medical Center. On the last page of the report appears the following: ‘He is oriented as to time, place, and person. He denies complete memory of the events of the day of the alleged offense. . . . This patient, charged with kidnapping, has no previous criminal record. In November, 1949, he was investigated for robbery and was released the same day. He was reared in an atmosphere of severely traumatic circumstances because of the discord between his parents and has always suffered from feelings of inadequacy. He has been grossly maladjusted since childhood. He was discharged [sic] from the Navy because of a psychoneurosis and has been a patient in Veterans Administration hospitals on two occasions since 1956. He has also received psychiatric care through the psychiatric receiving center in Kansas City, Missouri. Since admission to the Medical Center he has shown marked emotional turmoil, insomnia, tension, feelings of self-devaluation, ambivalent feelings, and impaired judgment and insight. He complains [sic] of having feelings of being followed and visual hallucinations. Almost since admission he has required the use of tranquilizing medications. . . .’ Attached to this report was a report of the Psychiatric Staff of the Medical Center, dated October 30, 1958, signed by Doctor Joseph C. Sturgell, Chief of the Neuropsychiatric Service, reading as follows: ‘The findings of psychiatric examination were presented by Dr. Louis Moreau. Other records were reviewed and the patient was interviewed by the members of the Psychiatric Staff. It is the opinion of the staff, following interview of the patient, that he had improved in recent weeks but his condition is still such that he is unable to understand the nature of the proceedings with reference to the charges against him and is unable to properly assist counsel in his defense. The patient is receiving tranquilizing medications and would probably deteriorate quickly if treatment was stopped at this time. . . .’ The court also had before it a report of the Neuropsychiatric Staff of the Medical Center, dated January 20, 1959, as to an examination of the defendant on January 8, 1959, signed by Doctor Sturgell for the Psychiatric Staff. It reads as follows: . . . ‘When examined by the staff, the patient again presented evidence of symptoms mentioned above. The staff is of the opinion that this man is mentally ill with a

VI. MENTAL HEALTH COURTS AND DIVERSION PROGRAMS

The criminal justice system has been forced to react because of the influx of the mentally ill. In an effort to adjust to additional problems posed by this influx, courts have created its own ad hoc mental health treatment delivery systems. There are two systems of diversion programs: prebooking and postbooking.¹⁵²

A. Prebooking Diversion

Prebooking diversion of an individual with a mental illness comes in several variants. Prebooking diversion programs consist of law enforcement authorities determining whether to place an individual in a mental health setting rather than arrest.¹⁵³ These programs often employ specialized police units or Crisis Intervention Teams.¹⁵⁴ This model includes a variant in which officers are specially trained to act as “liaisons to [the] mental health system.”¹⁵⁵ Another model involves departments hiring mental health professionals who can provide real-time consultation with field officers.¹⁵⁶ The third model includes employing mobile mental health crisis teams who are part of the local mental health system.¹⁵⁷ There are also additional responses employed by law enforcement to deal with individuals with mental illnesses.¹⁵⁸ If the case is not diverted and an arrest

diagnosis of schizophrenia. Because of this illness, he is unable to properly understand the proceedings against him and unable to adequately assist counsel in his defense.’ The only witness testifying at the hearing was Doctor Sturgell, whose testimony was in substantial conformity with the reports in evidence. He explained the statement in Doctor Moreau’s report that the defendant was oriented as to time, place and person, as follows: ‘This means that he is able to know the day of the week, the hour, the place in which he finds himself geographically, and the circumstances of his present situation. He knows he is in a court room; he knows the day of the week and the day of the year, and he knows that you are his attorney and Judge Smith is the judge. This is the orientation to person. He knows it all.’ Doctor Sturgell also expressed the opinion that the defendant understood what he was charged with, knew that if there was a trial it would be before a judge and jury, knew that if found guilty he could be punished, and knew who his attorney was and that it was his duty to protect the defendant’s rights.’ *Dusky v. United States*, 271 F.2d 385, 387–90 (8th Cir. 1959) *rev’d*, 362 U.S. 402 (1960).

¹⁵² See Frank Siroitch, *The Criminal Justice Outcomes of Jail Diversion Programs for Persons with Mental Illness: A Review of the Evidence*, 37 J. AM. ACAD. PSYCHIATRY L. 461, 462–63 (2009).

¹⁵³ *Id.* at 462.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *id.* at 462–63 (“In addition to these models . . . [there are] three additional precharge diversion models: joint police/mental health teams, specialized reception centers, and joint protocol initiatives. Joint police/mental health teams are composed of a mental health crisis worker and a plain-clothes police officer. The crisis worker undertakes mental health assessments, while the police officer can effect an apprehension pursuant to civil mental health legislation and transport individuals in psychiatric crisis to a hospital when civil commitment is required. When civil commitment criteria are not met, the team attempts to steer the subject of the police call to community care services in lieu of criminal arrest for behavior that could constitute low-level criminal offenses. Reception center models involve specialized crisis response sites where police officers can take an individual in psychiatric crisis requiring psychiatric assessment and immediately return to their regular patrol duties. These reception centers are secure facilities that have the legal authority to take custody of persons in crisis and can provide assessment, mental health treatment, and referral to outpatient community mental health and addiction services. Detoxification services are frequently located on site. Operating 24 hours a day, these one-stop service centers are thought to promote diversion by providing an expeditious alternative to transporting individuals in crisis to an emergency department where officers may have to wait long periods to have an individual assessed and may face refusals to admit individuals because of unmet criteria for civil commitment. Finally, joint protocol initiatives represent a generic category of prebooking diversion initiatives for models in which mental health service providers and the police mutually develop common operating procedures that enable police officers to connect an individual with a mental health agency, in lieu of laying a charge.”).

occurs, the defendant will be booked, and the criminal justice system will come into play with the possibility of postbooking diversion.¹⁵⁹

B. *Mental Health Courts*

Mental health courts are a “dedicated docket for persons” with a mental illness.¹⁶⁰ The court and other actors in mental health courts have training to deal with individuals who are mentally ill.¹⁶¹ The first problem with mental health courts is that the underlying premise behind the concept is to only accept individuals who are rational enough to obey treatment recommendations under the threat of sanctions—or self-selectivity.¹⁶² The criteria for acceptance is restricted by the nature of the mental illness the defendant has,¹⁶³ the type of crime the defendant is charged with,¹⁶⁴ and whether or not the defendant has a concurrent substance abuse problem.¹⁶⁵ The referrers—as one would expect—include judges, attorneys, jailors, and mental health professionals, while non-traditional referrers include “families, service providers, law enforcement personnel, community agencies, and parole officers.”¹⁶⁶ With success rates or graduation¹⁶⁷ rates driving the discussion of mental health courts, proponents can devise a system where the courts are handling low risk offenders with minimal mental health disorders to demonstrate a greater success rate.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 463.

¹⁶¹ *Id.* (“[M]ental health courts are diversion initiatives in which the diversion process occurs in one specialized court. The judge, prosecutor, defense lawyer, and other court staff may have specialized training in working with persons with serious mental illness and will often work collaboratively, in conjunction with mental health court liaison staff, to link the accused to treatment and supports. These courts mandate community-based mental health treatment and monitor participants’ treatment adherence, using both praise and sanctions to encourage treatment compliance. Moreover, the promise of dismissed charges or the avoidance of incarceration is used as an incentive to participate in treatment.”).

¹⁶² See Julie B. Raines & Glenn T. Laws, *Mental Health Court Survey*, 45 CRIM. L. BULL. 4, 5 (Summer 2009) (“An area of concern for any public agency is having positive outcomes—no matter what the program. One common problem among the mentally ill is compliance to authority. In order to investigate compliance amongst participants in mental health court systems, the following issues were examined: how the court manages participant compliance; how many participants on average drop out of the program; and the recidivism rate of graduates. The respondents were asked what they did to manage participant compliance and they were given the following response categories: (1) use rewards to encourage participation such as fewer therapy sessions and/or court sessions; (2) apply sanctions for non-compliance such as more therapy sessions, more court sessions, and/or jail time; (3) no sanctions; and (4) problems with compliance so there is no need to manage compliance. The respondents were instructed to choose all that applied. Overwhelmingly 100% of respondents used sanctions while 93% used rewards to encourage compliance. A miniscule 3% recorded having no problems with compliance. The largest number of respondents, 31%, reported a drop out rate of less than 5% of participants and only 10% reported a drop out rate of 30% or more.”); see also Sirotych, *supra* note 152, at 463 (“[E]nrollment in the mental health court is voluntary.”).

¹⁶³ See Sirotych, *supra* note 152, at 463 (“Although they share several common features, mental health courts vary considerably in their operation. They differ on the type of charges that they accept (misdemeanor versus felony versus a combination), on the type of community supervision that they employ (community treatment providers monitoring treatment adherence and reporting back to the court versus probation officers or court personnel monitoring compliance), and on the type of dispositions that they entertain (dismissal of charges, guilty plea but deferred sentence, or conviction with probation in lieu of a jail sentence). The courts also vary in the duration of court supervision of treatment and in the frequency of status review hearings of treatment progress. Finally, they vary in the use of sanctions for noncompliance with treatment conditions. Sanctions may include returning the person to court for hearings, admonishments, imposition of stricter treatment conditions, and reincarceration.”); see also Raines & Laws, *supra* note 162, at Figure 1-1 (illustrating that the categories include: depression, bipolar, mania, psychosis, personality disorder, and other.).

¹⁶⁴ Raines & Laws, *supra* note 162, at Figure 1-2.

¹⁶⁵ *Id.* at Figure 1-5.

¹⁶⁶ *Id.* at Figure 1-4.

¹⁶⁷ *Id.* at Figure 2-1 (questioning the use of the term “graduation” when dealing with individuals suffering from mental health issues).

The secondary problem with mental health courts is the relatively low number of individuals involved in the system.¹⁶⁸ As for a reduction in recidivism for participants in mental health courts, one survey seems to be hopeful;¹⁶⁹ however, a more comprehensive review of other studies reveals a mixed bag of results, with two studies finding “no difference between participants and nonparticipants in the prevalence rates of recidivism.”¹⁷⁰ Given that the goal of any criminal justice system is to reduce recidivism, these results undercut the value of mental health courts per se.

C. Postbooking Diversion

The second model of diversion is postbooking.¹⁷¹ There is jail-based diversion, where pretrial services screen and assign individuals to community based mental health services,¹⁷² and court-based diversion, where mental health professionals working in the court system screen and assign individuals to community-based mental health services.¹⁷³ This system operates in multiple courts.¹⁷⁴ One study comparing postbooking diversion programs with postbooking programs notes that individuals in postbooking programs were more “functionally impaired” than individuals involved in prebooking programs.¹⁷⁵ It also notes that postbooking programs were coercive in their nature, as a “part of a continuum of social control.”¹⁷⁶

The goal of these programs is to eliminate or reduce the need for the criminal justice system’s interaction with mentally ill individuals. An evaluation of the programs would necessarily focus on the amount of time in incarceration and rates of recidivism. A

¹⁶⁸ See *id.* (“Some courts, 10%, have fewer than 15 participants at any given time. However the largest number of respondents, about one-third, see between 16–30 participants at any point in time. There are numerous factors that play into these figures; such as the size of the jurisdiction, the size of the budget, the amount of manpower, and the amount of local services available. Likewise, when survey respondents were asked how many participants were seen in a year’s time, the numbers varied greatly. The highest percentage of respondents, 24%, provided this program to over 150 participants during the course of a year. How long is the typical participant involved in a diversion program prior to graduation? The majority of courts, 71%, stated that their participants were in the program for over a year. From the eleven to twelve month time frame, 18% of courts graduated participants and the last 11% of the courts surveyed graduated participants within anywhere from five to ten months.”) (citation omitted).

¹⁶⁹ *Id.* (“Figure 3-1 shows that the majority of mental health court participants are staying in their treatment programs. Likewise, the recidivism rate, according to respondents, seems equally encouraging: 42% of respondents recorded a recidivism rate of 5% or less (see Figure 3-1). Although the recidivism rate appears low, 25% of the respondents unfortunately did not track recidivism, skewing the results.”).

¹⁷⁰ Sirotych, *supra* note 152, at 468.

¹⁷¹ *Id.* at 462.

¹⁷² *Id.* at 463 (“Jail-based postbooking diversion programs are typically operated by pretrial service personnel or specialized jail personnel who identify, assess, and divert mentally ill detainees from custody to community-based mental health treatment with the consent of the prosecutor, judge, and defense lawyer. Jail liaisons undertake mental health assessments of detainees and develop a treatment plan for individuals in cooperation with jail mental health staff and community-based mental health service providers.”).

¹⁷³ *Id.* (“[C]ourt-based postbooking diversion programs employ mental health clinicians who work within the courthouse. They screen the arraignment lists for known clients and receive additional referrals from court staff. They conduct assessments and, in negotiations with the prosecutor, defense, and judge, develop a treatment plan to secure a bail release of the mentally ill accused person. Typically cases are continued for a brief period to ensure that the patient is linked and adhering to the necessary treatment services before charges are withdrawn. Alternatively, an accused person may be convicted and receive probation with special treatment conditions rather than a custodial sentence. Diversion occurs in multiple courts before multiple judges.”).

¹⁷⁴ *Id.*

¹⁷⁵ Pamela K. Lattimore et al., *A Comparison of Prebooking and Postbooking Diversion Programs for Mentally Ill Substance-Using Individuals with Justice Involvement*, 19 J. CONTEMP. CRIM. JUST. 30, 58 (Feb. 2003).

¹⁷⁶ *Id.*

review of current studies indicates that diversion programs do not reduce recidivism.¹⁷⁷ Mental health courts,¹⁷⁸ court based diversion,¹⁷⁹ jail based diversion,¹⁸⁰ and prebooking diversion¹⁸¹ all seem to have a minimal effect on recidivism. However, these programs do significantly reduce the amount of time the mentally ill are incarcerated.¹⁸² These studies need to continue.

VII. CONCLUSION

Unfortunately, the discussion of mental health and the criminal justice system in the 21st century is hauntingly familiar. The problem with the treatment of the mentally ill is that it has not changed since 1766, when the medical model of treatment gained support. It came with the recognition that individual families and communities were not able to handle the problem. As a result, jails, prisons, and workhouses were filled with the mentally ill. Public mental health hospitals were created to alleviate the problem. Yet, chronic overcrowding and underfunding of the state hospitals created warehousing of the mentally ill and led to neglect and abuse of patients in state hospitals. This mistreatment of patients within the state hospital system led to deinstitutionalization. Community-based treatment was believed to provide a better delivery system for mental health services. Unfortunately, community-based treatment was never developed or implemented. The mentally ill were turned out of hospitals onto the streets—homeless with no treatment or support system—which, in many cases, led to a repeated cycle of arrest and prosecution.

The role of treating individuals with a mental illness was deposited in the criminal justice system as a result of deinstitutionalization. Currently, the role of psychiatrist is passed among the participants in the criminal justice system. From the officer on the street, to defense counsel, to the courts, and ultimately to the jails and prisons, individuals with little or no mental health training are making treatment decisions.

¹⁷⁷ Sirotych, *supra* note 152, at 469 (“[E]vidence suggests that diversion programs in general do not reduce recidivism among persons with mental illness. In addition . . . evidence suggests that the diversion initiatives, as a broad category of interventions targeting persons with serious mental illness, reduce time spent in custody by adults with serious mental illness. Tentative evidence suggests that court-based diversion programs that mandate treatment adherence serve to reduce the amount of jail time that the mentally ill accused serve relative to treatment as usual or to jail-based diversion programs that do not mandate and monitor treatment compliance. Further study is needed to verify this finding.”).

¹⁷⁸ *Id.* at 468 (“Six studies were located in which the criminal justice outcomes of mental health courts was evaluated. Of the six, four reported on the prevalence rates of recidivism. One study, with a retrospective observational design and propensity-weighted regression analyses used to attenuate the biasing effects of nonrandom assignment, found a 26 percent reduction in the probability of a new charge among mental health court participants relative to nonparticipants. Another study, with a prospective quasi-experimental design that compared subjects who opted into a mental health court with those who opted out, found an increase in the prevalence of recidivism among the opt-in group. The remaining two studies, a retrospective cohort study and a pre-post with comparison group study, found no difference between participants and nonparticipants in the prevalence rates of recidivism.”).

¹⁷⁹ *See id.* (“[E]vidence supports the use of court-based diversion to reduce the length and prevalence of incarceration among persons with serious mental illness; however, there is as yet no evidence to suggest that this diversion model serves to reduce the incidence or prevalence of recidivism in this group.”).

¹⁸⁰ *Id.* at 467 (“[E]vidence indicated no overall reduction in the subsequent criminal activity of individuals receiving jail-based diversion relative to their nondiverted counterparts, but very tentative evidence of an interaction effect showing that jail-based diversion may reduce the incidence of arrest among low-level misdemeanants.”).

¹⁸¹ *See id.* (“[E]vidence supports the use of prebooking programs to reduce the amount of time that mentally ill persons spend in custody with greatest support for a police-based specialized police response model; however, the existing evidence does not support the use of prebooking programs to prevent recidivism in this population.”).

¹⁸² *Id.* at 466, Table 2.

Legislatures have attempted to solve a medical problem with a legal solution—a solution that has failed miserably.

Legal tests formulated for competency, insanity, and diminished responsibility are flawed in that they treat mental health issues like an on-off switch—the individual is competent or not competent; the individual is sane or insane; the individual can form the culpable mental state (*mens rea*) or the individual cannot. This approach in formulating legal tests does nothing to address the medical issues arising on a routine basis in the criminal justice system.

This fundamental misunderstanding of mental illnesses results in mistreatment and death for those involved in the system. Although diversion programs are reducing the number of days incarcerated, there is no evidence they reduce recidivism. It should be remembered that diversion programs are really a reaction to deinstitutionalization and constitute a mental health treatment delivery system. They are, simply put, the newest variant in a series of failed programs.

The result of the application of Penrose’s Law is increased crime rates and incarceration of the mentally ill. We have come full circle. *Brown v. Plata*¹⁸³ appears to have been predictable and inevitable based on studies that have been completed by the psychiatric community. Until policy makers are willing to establish and maintain sustained funding for a mental health treatment system run by medical personnel, changes in existing delivery systems are the equivalent of rearranging deck chairs on the Titanic.

We end where we began, with Scrooge asking: “Are there no prisons?”¹⁸⁴ Unfortunately, the answer today is the same as it was then: Yes, “Plenty of prisons.”¹⁸⁵

¹⁸³ 131 S. Ct. 1910, 1923 (2011).

¹⁸⁴ DICKENS, *supra* note 1.

¹⁸⁵ *Id.*

TEACHING CRIMINAL LAW: INTEGRATING PROFESSIONAL RESPONSIBILITY

*Robert Batey**

As indicated in another article,¹ my days of teaching first-year Criminal Law are probably over. Before exiting, I would like to detail a few of the ways in which I tried to introduce ethical issues into that course. Whenever possible, I used cases involving lawyer defendants, or lawyers whose trial tactics ran afoul of the law, to show the kinds of messes wayward attorneys can get themselves into. In this respect, one particularly rich area is the law of theft, where I not only used lawyer cases, but also devised a series of hypotheticals raising ethical questions for both lawyers and law students. However, my most serious foray into professional responsibility came when discussing the law of mens rea and its temptations for the subornation of client perjury.

* * *

The study of almost all the topics in Criminal Law can be adorned with cases involving lawyer defendants or lawyers using questionable trial tactics. Not only do such cases illustrate the topic being studied, they also strongly suggest that students ought to avoid these lawyers' behaviors. Moreover, students might realize the scope of misconduct in the profession they are about to enter and begin to understand the need for higher standards of professional behavior.

Following the casebook I long used,² the first topic covered in depth in my Criminal Law course was the vagueness doctrine. For years, I included a note on *United*

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¹ See Robert Batey, *Teaching Criminal Law: Buzzgroups, Short Writings, and Hypotheticals*, STETSON U. COLLEGE OF L. LEGAL STUD. RES. PAPER SERIES, Oct. 2013, <http://ssrn.com/abstract=2291153> (last updated Nov. 21, 2013).

² PETER W. LOW ET AL., *CRIMINAL LAW: CASES AND MATERIALS* (2d ed. 1986). For the last two decades, I have combined excerpts from this casebook and its successor editions (with appropriate copyright notices) with notes on cases, statutes, and other legal developments in a single ring-bound book. Almost all of the legal materials mentioned in this article were presented to the students in this way. The local publisher of the book took responsibility for all copyright issues and still managed to sell the book at less than the cost of the casebook. I received no profits from any of the book's sales.

States v. Rybicki,³ the prosecution of two lawyers for mail fraud.⁴ The lawyers had given kickbacks to insurance adjusters regarding the settlement of tort claims.⁵ The prosecution was unable to prove that the settlements were higher than they would have been without the kickbacks and argued instead that the lawyers had used the mails to deprive the adjusters' employers of their right to the adjusters' "honest services" under 18 U.S.C. sec. 1346.⁶ The lawyers contended that sec. 1346 was unconstitutionally vague – an argument subsequently accepted by the Supreme Court in *Skilling v. United States*.⁷ The same claim was rejected by the Second Circuit eight years before *Skilling*.⁸ *Rybicki* thus adds a sidebar on lawyer misconduct to the fascinating interaction of the "honest services" statute and the vagueness doctrine.

Attorney misfeasance surfaced in the succeeding unit, on statutory construction. In *United States v. Baum*,⁹ a criminal defense attorney concocted a plan to try to win a reduction for his already-sentenced client, in which a former client would lure a suspected drug dealer to the United States (in exchange for some money from the current client), but Baum would get this cooperation credited to the current client by lying to the government about the relationship between his two clients (that they were close friends) and about the money.¹⁰ When this scheme blew up (because the current client decided instead to cooperate with the government in its investigation of the lawyer), Baum was charged with obstruction of justice.¹¹ Baum countered that because the current client had already been sentenced, there had been no "pending proceeding" – a requirement case law had read into the federal obstruction of justice statute¹² – but District Judge Denny Chin (since promoted to the Second Circuit) read the requirement broadly. Specifically, "[c]orrupt attorneys pose a grave threat to our adversarial system of justice."¹³ In addition to illustrating that policy considerations sometimes push judges to construe criminal statutes broadly,¹⁴ *Baum* thus also portrays attorney behavior that students need to be warned against.

In teaching possession, I mentioned in passing *Schalk v. State*,¹⁵ the prosecution of a criminal defense lawyer who arranged a drug buy from a police confidential informant in order to discredit the informant, who was an integral part of the case against one of Schalk's clients.¹⁶ The courts rejected Schalk's many variations on the theme of innocent possession, a concept that has been recognized in other contexts.¹⁷ Another lawyer prosecution given brief attention, in the unit on mens rea, is *United States v. Flores*,¹⁸ where Flores facilitated several transactions for his client that were ultimately

³ See 354 F.3d 124 (2d Cir. 2003). See also Batey, *supra* note 1, at 9 n.21.

⁴ *Rybicki*, 354 F.3d at 127.

⁵ *Id.*

⁶ *Id.* at 128.

⁷ 130 S. Ct. 2896 (2010).

⁸ *Rybicki*, 354 F.3d at 126-27. *Skilling*'s rewriting of the statute in order to save it from vagueness, which limits § 1346 to cases of bribery and kickbacks, would likely have upheld the convictions in *Rybicki*. See *Skilling*, 130 S. Ct. at 2929-31. Thus *Rybicki* could be used in class discussion to tease out the meaning of *Skilling*.

⁹ 32 F. Supp. 2d 642 (S.D.N.Y. 1999).

¹⁰ *Id.* at 644-45.

¹¹ *Id.* at 643-44.

¹² *Id.* at 648.

¹³ *Id.* at 650.

¹⁴ A few students may see how the same policy considerations affected the resolution of the vagueness issue in *Rybicki*. See *United States v. Rybicki*, 354 F.3d 124, 129-32 (2d Cir. 2003).

¹⁵ 943 N.E.2d 427 (Ind. Ct. App. 2011).

¹⁶ *Id.* at 428.

¹⁷ See, e.g., *Stanton v. State*, 746 So. 2d 1229, 1229-31 (Fla. Dist. Ct. App. 1999).

¹⁸ 454 F.3d 149, 152 (3d Cir. 2006).

found to be money laundering.¹⁹ With the assistance of the client's testimony, the government was able to convict Flores of conspiracy to commit money laundering on a willful blindness theory.²⁰

Flores could also have been used in the unit on conspiracy, but instead I noted a similar case, *United States v. Sharpe*,²¹ where willful blindness was used to convict a lawyer who managed the proceeds of his client's fraud and let a coconspirator use the lawyer's office in furtherance of the fraud.²² *Sharpe* can profitably be contrasted with *Vinluan v. Doyle*,²³ in which the appellate court enjoined the conspiracy prosecution of an attorney for advising his clients, nurses in a contract dispute with their nursing home employer, that they could resign en masse.²⁴ The prosecution charged a conspiracy to endanger some of the patients at the nursing home, specifically, chronically ill children on ventilators.²⁵ While such endangerment was certainly foreseeable to the lawyer, the appellate court prevented his prosecution because "it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy . . . whenever a District Attorney disagreed with that advice."²⁶ So policy reasons overcame any application of willful blindness or of any other version of the mens rea necessary for conspiracy.

Supplementing these lawyer defendant cases were a few cases involving much paler forms of lawyer misconduct. Prosecutors frequently err in stating the burden of persuasion to the jury.²⁷ One flamboyant example involved a PowerPoint presentation:

The PowerPoint program begins with a blue screen. When the program is started, a slide show begins in which six different puzzle pieces of a picture come onto the screen sequentially. The picture is immediately and easily recognizable as the Statue of Liberty. The slide show finishes when the sixth puzzle piece is in place, leaving two rectangular pieces missing from the picture of the Statue of Liberty—one in the center of the image that includes a portion of the statue's face and one in the upper left hand corner of the image.

.....

The prosecutor went on to tell the jury that "[w]e know this picture is beyond a reasonable doubt without looking at all the pieces of that picture. We know that that's a picture of the Statue of Liberty, we don't need all the pieces of the [*sic*] it. And ladies and gentlemen, if we fill in the other two pieces" [at this point the prosecutor apparently clicks the computer mouse again, which triggers the program to add the upper left hand rectangle that includes the image of the torch in the statue's right hand and the central rectangle that completes the entire image of the

¹⁹ *Id.* at 152, 154-56.

²⁰ *Id.* at 154-56, 159.

²¹ 193 F.3d 852 (5th Cir. 1999).

²² *Id.* at 870-72.

²³ 837 N.Y.S.2d 72 (N.Y. App. Div. 2009).

²⁴ *Id.* at 82-83.

²⁵ *See id.* at 76.

²⁶ *Id.* at 83.

²⁷ *See, e.g.,* *Bristol v. State*, 987 So. 2d 184, 185-86 (Fla. Dist. Ct. App. 2008) ("If you find the Defendant not guilty, what's the evidence?"); *Paul v. State*, 980 So. 2d 1282, 1283 (Fla. Dist. Ct. App. 2008) ("[I]f [the defense attorney] wants to present theories of how she believes this case should play out, there's got to be some level of proof that [the state's star witness] was lying") (emphasis omitted). The ethical implications of *Bristol* are doubled because the defendant's actual claim was that his trial lawyer was ineffective for failing to object to the prosecution's statement. 987 So. 2d at 185.

statue], “we see that it is, in fact, the [S]tatue of [L]iberty. And I will tell you in this case, your standard is to judge this case beyond a reasonable doubt.” The prosecutor argued such standard was met by the evidence.²⁸

The appellate court declared this PowerPoint unacceptable,²⁹ which emphasizes to prospective prosecutors the need to rein in at least some of their more inventive attempts to succeed with juries.

The same caution applies to defense attorneys tempted to make a nullification argument. *Harding v. State*³⁰ approves the trial judge’s actions in the following situation:

During closing argument, Harding’s counsel told the jury that “sometimes the law doesn’t fit, sometimes it just isn’t right. The ends don’t always justify the means.” Counsel then baldly said, “I’m standing up in front of you as Gary Harding’s attorney and asking you not to follow the law.” The trial court immediately interrupted and stated, “Counsel, that’s improper and I’ll instruct the jury to disregard, and if they do that, that’ll be a violation of your oath that you took when you were sworn in to try this case. I don’t want to hear another word about that.”³¹

Cases like *Harding* help to clarify the otherwise airy contentions surrounding nullification, while also providing valuable practice lessons for the student.

A final instance of lawyer misconduct arose when I taught duress. In situations of arguable duress, the prosecution occasionally seeks to convict both the threatener and the threatened, in separate proceedings of course.³² This may cause the state to take inconsistent positions regarding the influence of the threatener, as was the case in the separate homicide prosecutions of Deidre Hunt and her abusive boyfriend Konstantinos Fotopoulos.³³ Hunt, the shooter, was the second to be prosecuted; her lawyer quoted the prosecution’s statements in Fotopoulos’ trial about his “clear pattern of physical assault, abuse, intimidation, and coercion -- . . . the direct and primary cause of Deidre Hunt’s criminal activity.”³⁴ But the trial court refused to instruct Hunt’s jury on duress, and the appellate court agreed, because “duress is not a defense to homicide.”³⁵ So the case not only illustrates that hoary rule of duress law, but also instances what two justices of the state supreme court, writing in Fotopoulos’ appeal, considered a clear violation of due process: “[I]t is repugnant to the tenets of due process and fundamental fairness that the State would purposefully present differing renditions of the same factual scenario during separate proceedings, simply to obtain a particular result against codefendants.”³⁶ Cases

²⁸ *People v. Katzenberger*, 101 Cal. Rptr. 3d 122, 125 (Ct. App. 2009).

²⁹ *Id.* at 126.

³⁰ 736 So. 2d 1230 (Fla. Dist. Ct. App. 1999).

³¹ *Id.* at 1230. For a more permissive approach, see *United States v. Rosenthal*, 266 F. Supp. 2d 1068 (N.D. Cal. 2003).

³² See, e.g., *Fotopoulos v. State*, 838 So. 2d 1122, 1125-26 (Fla. 2003).

³³ Compare *id.* at 1128-29 (discussing the State’s assertion that Fotopoulos was dominating Hunt), with *Hunt v. State*, 753 So. 2d 609, 611-12 (Fla. Dist. Ct. App. 2000) (discussing State’s assertion that Hunt voluntarily murdered Ramsay without duress).

³⁴ *Hunt*, 753 So. 2d at 611.

³⁵ *Id.* at 613.

³⁶ *Fotopoulos*, 838 So. 2d at 1137 (Lewis, J., concurring in result only); accord *In re Sakarias*, 106 P.3d 931 (Cal. 2005) (ruling similarly in a non-duress case).

like these, and the others in this part, show that a professor can raise important ethical issues while teaching the basic rules of criminal law.

* * *

Theft law provides a particularly rich environment for examining lawyer ethics. Combining normal human avarice with the many opportunities attorneys have to separate others from their property produces a wealth of examples of criminal, or at least unethical, conduct.

The bottom line of my class on theft was that the complexity of the “common law” offenses has caused many jurisdictions to adopt remarkably broad consolidated theft statutes. To show the charging difficulties created by the old law of larceny, embezzlement, and false pretenses – as discussed in Joshua Dressler’s chapter on theft in *Understanding Criminal Law*,³⁷ portions of which were assigned for reading – I usually gave the students a streamlined version of *Graham v. United States*.³⁸ For example, A, a criminal lawyer, induces his client to give the lawyer \$2,200, telling the client that \$2,000 of this money is necessary to bribe a police officer into dropping the charges against the defendant. The officer drops the charges after talking to the lawyer, who keeps all the money. If you were the prosecutor under the old law of theft, with which crime would you charge A?

Most students would opt for larceny by trick, on the theory that A accepted the \$2,000 with the intent to defraud the client.³⁹ But this charge would be vulnerable to the contention that A decided to keep all the money only while talking to the officer, in which case the crime could only be embezzlement.⁴⁰ One could even contend that title to the \$2,000 passed to the attorney at that time (as title to the \$200 fee surely did), as payment for services legal and illegal, which would make A guilty of obtaining property by false pretenses.⁴¹ Conversely, if the court deemed A’s false promise to bribe the officer a promise of future conduct, A would be guilty of neither larceny, embezzlement, nor false pretenses.⁴² The point of the exercise was not to teach the distinctions between the “common law” theft offenses, but to demonstrate the need for reform through another instance of lawyer misconduct.⁴³

While some American jurisdictions took the Model Penal Code’s more measured approach to reforming the theft offenses (codifying each of the former crimes but granting

³⁷ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 543-65 (6th ed. 2012).

³⁸ 187 F. 2d 87, 88 (D.C. Cir. 1950), discussed in DRESSLER, *supra* note 37, at 562.

³⁹ See DRESSLER, *supra* note 37, at 550. The court in *Graham* accepted this reasoning. See 187 F.2d at 88-89.

⁴⁰ See DRESSLER, *supra* note 37, at 560-61. The defendant in *Graham* unsuccessfully argued that the trial judge’s charge to the jury did not sufficiently distinguish larceny from embezzlement. 187 F.2d at 89-90.

⁴¹ See DRESSLER, *supra* note 37, at 561-64. *Graham*’s primary contention was that the prosecution should have charged him with obtaining property by false pretenses. See 187 F.2d at 88.

⁴² See DRESSLER, *supra* note 37, at 564.

⁴³ A more recent lawyer case, *Durie v. State*, can be used to make the same point. 751 So. 2d 685 (Fla. Dist. Ct. App. 2000). *Durie*, a plaintiff’s attorney representing two men injured in a bar fight, attempted to avoid a Medicaid lien on the amount recovered by one of his clients, by telling the insurance company that only 0.5% of the \$100,000 coming from the bar’s liability insurance policy would be going to the client with the Medicaid lien, when in actuality that client was slated to receive 80% of the money. *Id.* Larceny (and of whom)? Embezzlement? Obtaining property by false pretenses? None of the above? Another example is *Winters v. Mulholland*, in which a disgruntled 15-year associate copied and stored some client files without authorization from his firm, and through an accomplice, tampered with client contact data in the firm’s computer system. Upon leaving the firm, the associate took client files with him and lied to some of those clients about the firm’s ability to continue to represent them. 33 So. 3d 54 (Fla. Dist. Ct. App. 2010). Which “common law” theft offense is the taking of the files? Are the associate’s other actions any form of theft?

the court the right to conform the charge to the proof at trial),⁴⁴ others have chosen to create a single consolidated crime, usually denominated theft.⁴⁵ Florida's theft statute is on such law, modeled on a proposal by Professor G. Robert Blakey and a coauthor.⁴⁶ I usually walked the students through its remarkably broad provisions:

- A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
- (a) Deprive the other person of a right to the property or a benefit from the property.
 - (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.⁴⁷

Breadth continues in the statute's definition of key terms. "Property" means anything of value," including "services," which are defined as "anything of value resulting from a person's physical or mental labor or skill"⁴⁸; "property of another" is defined to include property in which the defendant "has an interest" as long as someone else has an interest in the property upon which the defendant "is not privileged to infringe without consent."⁴⁹ But the broadest provision of all is the definition of "obtains or uses":

[A]ny manner of:

- (a) Taking or exercising control over property.
- (b) Making any unauthorized use, disposition, or transfer of property.
- (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
- (d) (1) Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining property by false pretenses, fraud, or deception; or
(2) Other conduct similar in nature.⁵⁰

Despite the "kitchen sink" approach of this definition, the Florida Supreme Court rather summarily rejected a vagueness challenge to it.⁵¹

⁴⁴ See DRESSLER, *supra* note 37, at 565 (discussing MODEL PENAL CODE § 223.1(1) (Proposed Official Draft 1962)).

⁴⁵ See generally Sherry A. Moore, *Nevada's Comprehensive Theft Statute: Consolidation or Confusion?*, 8 NEV. L.J. 672, 673-74 & n.11 (2008).

⁴⁶ See *Goddard v. State*, 458 So.2d 230, 234 (Fla. 1984). See also G. Robert Blakey & Michael Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 MICH. L. REV. 1511, 1620-26 (1974) (including a model statute). When one of my former colleagues contacted Professor Blakey by telephone, he seemed surprised that Florida had enacted his proposal and implied that it might need some revision.

⁴⁷ FLA. STAT. ANN. § 812.014(1) (West 2013).

⁴⁸ *Id.* § 812.012(4), (6).

⁴⁹ *Id.* § 812.012(5). This provision, meant to deal with the question (among others) of whether a partner could be guilty of stealing partnership property (famously raised in the classic case of *People v. Sobiek*, 106 Cal. Rptr. 519 (Cal. Ct. App. 1973)), should have been used to decide *Rigal v. State*, in which a lawyer in dispute with other lawyers at his firm pocketed checks meant for the firm. 2000 WL 348109 (Fla. Dist. Ct. App. Apr. 5, 2000), *superseded by* 780 So. 2d 256 (Fla. Dist. Ct. App. 2001). The appellate court first decided that Rigal could not be prosecuted for theft because a partner could not steal partnership property, but then changed its mind, holding that Rigal was never a partner. *Id.* Neither opinion uses the definition of "property of another," which would have reached the eventual result with far greater ease.

⁵⁰ § 812.012(3).

⁵¹ *Dunnigan v. State*, 364 So. 2d 1217, 1218 (Fla. 1978).

To better understand the comprehensiveness of this statute and to return to the theme of ethical conduct, the students were required to prepare oral answers to three hypotheticals:

- 1) X, a lawyer, holds a client's retainer in a trust account. Unable to meet payroll one month, the lawyer takes money from the trust account for this purpose (in violation of the Model Rules of Professional Conduct), intending to put it back into the trust account within a month. Is X guilty of theft under Florida's theft statute? Why or why not?
- 2) Y, an upper-class law student authorized to use a computer legal research program, but for educational purposes only, uses the program for compensated research for a local lawyer for whom the lawyer is clerking. Is Y guilty of theft under Florida's theft statute? Why or why not?
- 3) Z, a first year law student taking an exam, copies from the student sitting next to him the answers to several multiple choice questions, without that student's knowledge. Is Z guilty of theft under Florida's theft statute? Why or why not?

Most students had little problem with the first hypothetical. X, whose actions would at the least jeopardize his license to practice law, also made an unauthorized use of the money.⁵² Even though he had a trustee's interest in the money, the client also had an interest on which the lawyer was not privileged to infringe. He might not have an intent to deprive the client of any benefit from the property (as Florida is an IOTA state, with the interest on most trust accounts going to a charitable fund that among other things provides grants to law schools⁵³), X does intend to temporarily appropriate the property to his own use.⁵⁴

Usually only a few students failed to see the guilt of Y (whose actions also would violate her law school's contract with Westlaw or Lexis and thus risk suspension of that contract, triggering serious consequences for her law school and her⁵⁵). She knowingly made unauthorized use of a service – the definition of which includes “[p]rivate . . . communication . . . services,”⁵⁶ and she intended both to deprive the company providing the computer research program of the fees her employer would otherwise have had to pay, and to appropriate the computer service to the use of another.

While acknowledging that Z has violated his law school's honor code, some students typically balked at criminal liability for him. Z knowingly made unauthorized use of the other student's answers, they would say, but are those answers property? Well, yes, if property includes services and services are defined as “anything of value resulting from a person's . . . mental labor or skill.”⁵⁷ But, they would follow up, doesn't their value

⁵² Note that the statute does not even require an unauthorized use, but that seems the only sensible way to read its language.

⁵³ *Interest on Trust Accounts (IOTA)*, FLA. BAR, <http://www.floridabar.org/DIVCOM/PI/BIPS2001.nsf/1119bd38ae090a748525676f0053b606/b33301c604dd6bd a8525669e004f836c!OpenDocument> (last updated Nov. 30, 2012).

⁵⁴ Florida's theft statute does not indicate whether its two intent requirements are conjunctive or disjunctive, but courts appear to have read an “or” into the statute.

⁵⁵ See, e.g., Pace Law, *Lexis and Westlaw*, <http://www.law.pace.edu/lexis-and-westlaw> (last visited Feb. 11, 2014).

⁵⁶ FLA. STAT. ANN. § 812.012(6)(c) (West 2001).

⁵⁷ *Id.* § 812.012(6).

depend on whether the answers are correct? Not under the statute's definition of value, which refers to "market value . . . at the time and place of the event."⁵⁸ They would finally complain, Z had no intent to deprive the other student of the value of her answer, as she would get credit (or not) regardless of Z's answer. At this point, other students who understood the curving of grades would begin to howl, while the calmer members of the class would point out that in any event Z did have the intent to appropriate the answers to her own use.

I would usually finish the class by pointing out that prosecution of persons like X, Y, and Z are exceedingly rare; it is not the language of the statute that prohibits them, but prosecutorial discretion.⁵⁹ Fear of the courts' reaction to a prosecutor's pushing the edges of the theft envelope, by strictly construing the statute or raising anew the question of its vagueness, may explain some of this reticence. In addition to striking these by now familiar chords, and teaching the tedious process of applying the elements of a criminal statute to particular facts, this class also reminded students of the ethical burdens they already bear and of greater ones in their future.

Just to drive the point home, I usually finished by giving the class a bouquet of recent cautionary headlines. Here is the last batch: "Punishing Lawyers in Corporate Frauds,"⁶⁰ "Disbarred Attorney Pleads Guilty to Guardian Account Thefts,"⁶¹ "2 Lawyers Charged in Claimed \$1.1M Client Embezzlement Scheme,"⁶² "Fla. Lawyer in \$83M Real Estate Fraud: I Didn't Think It Was Criminal,"⁶³ "Chicago Lawyer Sentenced to 7 Years in Prison,"⁶⁴ "Former Boston Lawyer Sentenced to Four Years for Mortgage Fraud,"⁶⁵ "Attorney Gets Four Years for Stealing."⁶⁶ These headlines, plus the other uses of legal chicanery in the theft class, tend to break down the distance that law students typically feel from criminal defendants, reminding the class how easy it is to slip from attorney to client.

* * *

My most serious foray into legal ethics in the first-year Criminal Law class resulted from a student comment. I was rather blithely using variations on the facts of *United States v. Short*⁶⁷ to teach the differences between the common law and Model Penal Code approaches to mistake of fact. Specifically, under what circumstances would

⁵⁸ *Id.* § 812.012(10)(a)(1).

⁵⁹ See SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 1114-15 (9th ed. 2012).

⁶⁰ Peter J. Henning, *Punishing Lawyers in Corporate Frauds*, N.Y. TIMES DEALBOOK, (Jan. 10, 2010), <http://dealbook.nytimes.com/2010/01/19/punishing-lawyers-in-corporate-frauds/>.

⁶¹ Vesselin Mitev, *Disbarred Attorney Pleads Guilty to Guardian Account Thefts*, LAW.COM (Nov. 6, 2009), <http://www.law.com/jsp/article.jsp?id=L202435221538>.

⁶² Martha Neil, *2 Lawyers Charged in Claimed \$1.1M Client Embezzlement Scheme*, ABA J. LAW NEWS NOW (Nov. 5, 2009, 3:29 PM),

<http://www.abajournal.com/news/article/2-lawyers-charged-in-claimed-1.1m-client-embezzlement-scheme/>.

⁶³ Martha Neil, *Fla. Lawyer in \$83M Real Estate Fraud: I Didn't Think It Was Criminal*, ABA J. LAW NEWS NOW (Feb. 18, 2009, 2:09 PM),

<http://www.abajournal.com/news/article/fla-lawyer-in-83m-real-estate-fraud-i-didnt-think-it-was-criminal>.

⁶⁴ Larry Neumeister, *Chicago Lawyer Sentenced to 7 Years in Prison*, U-T SAN DIEGO (Jan. 14, 2010, 11:54 AM), <http://www.utsandiego.com/news/2010/jan/14/chicago-lawyer-sentenced-to-7-years-in-prison/>.

⁶⁵ Sheri Qualters, *Former Boston Lawyer Sentenced to Four Years for Mortgage Fraud*, LAW.COM (May 18, 2011),

http://www.law.com/jsp/law/article.jsp?id=L202494381380&Former_Boston_Lawyer_Sentenced_to_4_Years_for_Mortgage_Fraud.

⁶⁶ Todd Ruger, *Attorney Gets Four Years for Stealing*, SARASOTA HERALD-TRIB., Jan. 27, 2011, at BN1, available at <http://www.heraldtribune.com/article/20110127/ARTICLE/101271047?p=2&tc=pg>.

⁶⁷ 4 U.S.C.M.A. 437 (1954) (deciding case of drunken soldier in occupied Japan who physically accosts a young Japanese woman, claiming to believe she was a prostitute and that he was trying to agree with her on a price).

Short's mistaken belief in consent be a defense if Short were charged with assault with intent to rape at common law (the actual case)? If Short were charged with rape at common law (assuming contrary to the actual case that penetration did occur)? If Short were charged with rape under the Model Penal Code (again assuming penetration)? Discussing the last hypothetical, I drew out the answer that his mistake would be a defense if it negated the consciousness of risk necessary for recklessness, the minimum required culpability for rape under the Code,⁶⁸ at the end of which I said something careless like, "What would you say to your client?" The naïve reply I got from a very good student was, "I would tell Short to say that it never occurred to him that Tomobe was not consenting to his actions." I knew in a flash that I had to include a class on the ethical perils of client perjury.

I would set up that class by asking the students to prepare an answer to a somewhat more careful version of my client advice question,⁶⁹ but I also required them to read the relevant portions of the Model Rules of Professional Conduct⁷⁰ as well as an excerpted version of "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions"⁷¹ before answering. Thus primed, I began the class by cautioning the students not to follow what I consider natural human behavior – to be as helpful to the client as possible, by telling him about the legal significance of his lack of consciousness of the risk of non-consent. Both ethical considerations and the law regarding subornation of perjury require criminal defense attorneys to behave in a much less straightforward way.

To illustrate the point, I showed clips from Otto Preminger's great trial film *Anatomy of a Murder*.⁷² First, the discussion between the defense attorney (James Stewart) and his disbarred friend (Arthur O'Connell) about their prospective client (Ben Gazzara), an Air Force officer accused of murdering the man who had allegedly raped the officer's wife (Lee Remick) some hours before the killing. In the discussion the friend suggests that the lawyer give his client "a chance" to find a defense by describing the relevant law to him. Second, a subsequent discussion with the would-be client, in which the lawyer nudges⁷³ the client toward facts that would support an insanity plea (punctuated by the client's hilarious question, "Am I getting warmer?"). Third, a later brief conference in

⁶⁸ See MODEL PENAL CODE §§ 2.02(3), 2.04(1)(a), 213(1)(a) (Proposed Official Draft 1962).

⁶⁹ "If you were the defense attorney for Short in [my third hypothetical], speaking to your client before he has told his side of the story to anyone, how would you advise him?"

⁷⁰ I used excerpts from Florida's versions of rules. See FLA. STAT. ANN. Bar Ch. 4 - 1.1 (West 2013) (Competence), 1.2 (Scope of Representation), 1.6 (Confidentiality of Information), 2.1 (Advisor), 3.3 (Candor toward the Tribunal), 3.8 (Special Responsibilities of a Prosecutor), and 4.4 (Respect for Rights of Third Persons) and from Florida's comments to rules 1.6 and 3.3. For additional excerpts I should have included, see *infra* note 91.

⁷¹ See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). This brief article needs only minor excerpting: a reference to the supersession of the Canons of Ethics, on which Freedman relies, by first the Model Code of Professional Responsibility and then the Model Rules of Professional Conduct; removal of Freedman's discussions of the defense attorney unwilling on ethical grounds to enter a guilty plea for a client whom the lawyer believes innocent, made irrelevant by the Supreme Court's implicit approval of such behavior in *North Carolina v. Alford*, 400 U.S. 25 (1970); and deletion of the postscript, which replies to criticisms from other members of the symposium in which the article appeared.

⁷² See ANATOMY OF A MURDER (Columbia Pictures 1959). Freedman's article discusses the novel on which the movie is based. See Freedman, *supra* note 71, at 1481-82 (citing Robert TRAVER, ANATOMY OF A MURDER (1958)). A far more brief discussion of this movie appears in Robert Batey, *Literature in a Criminal Law Course: Aeschylus, Burgess, Oates, Camus, Poe, and Melville*, 22 LEGAL STUDS. F. 45, 75-76 (1998).

⁷³ The lawyer in the novel is more direct than the one in the movie, see Traver, *supra* note 72, at 20-49, though not as direct as Freedman's paraphrase of the novel, see Freedman, *supra* note 71, at 1481.

which the now well-schooled client describes his irresistible-impulse state of mind, causing the lawyer to (finally) accept his case.⁷⁴

Film almost always captures the students' attention, and the novelty of a rather grainy black-and-white video helps. Turning the students to a discussion of Freedman's article, I began with a basic question – if a criminal trial is a search for truth, what obligation does the defendant have to participate in that search? The answer Freedman provides is clear. None at all.⁷⁵ If even a guilty defendant has the right to force the state to prove her guilt, the defense lawyer's duty of competent representation requires a zealous challenge to that proof.⁷⁶ This makes the answer to Freedman's first "hard" question rather easy. It is "proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth."⁷⁷

The defendant's sole obligation to the search for truth in a criminal trial is not to commit perjury.⁷⁸ Not only may the client be guilty, but anyone who counsels the client to commit perjury, including her defense attorney, may be prosecuted for subornation of perjury.⁷⁹ The natural-human-behavior response in advising a client like Short, as well as my good student's naïve response to my careless question, could be a path to prison. Having made this point, I shifted to Freedman's more complicated issue, the problem of the criminal defense attorney who merely knows, rather than suggests, that his client (or some other defense witness) is about to commit perjury.⁸⁰

In 1966, Freedman argued that a defense lawyer who knows⁸¹ a witness is committing perjury should not suffer ethical punishment for calling that witness and questioning her like any other witness.⁸² He reasoned that the duty of maintaining client confidentiality requires this conduct⁸³ because the knowledge that perjury is being committed almost always comes from a confidential disclosure by the client.⁸⁴ For even making this radical suggestion (in a speech to some members of the District of Columbia

⁷⁴ ANATOMY OF A MURDER, *supra* note 72.

⁷⁵ See Freedman, *supra* note 71, at 1471.

⁷⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004). Freedman's reliance on the now superseded Canons of Ethics is helpful, because they explicitly include the obligation of "warm zeal," which the Model Rules now subsume in the concept of "competent representation." See Freedman, *supra* note 71, at 1470 (*quoting* CANONS OF PROF'L ETHICS Canon 15 (1908)).

⁷⁷ Freedman, *supra* note 71, at 1469, 1474-75. The requirement of zealous advocacy thus trumps Model Rule of Professional Conduct 4.4, entitled "Respect for the Rights of Third Persons." For another perspective on this question, see Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055 (2000).

⁷⁸ See Freedman, *supra* note 71, at 1471.

⁷⁹ See generally GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 69-79 (3d ed. 1999). As a few previous examples indicate, prosecutors seem especially interested in going after defense attorneys, even to the point of making plea deals with the client in exchange for testimony against the defense attorney. See also *supra* text accompanying notes 11 & 20.

⁸⁰ "Is it proper to put a witness on the stand when you know he will commit perjury?" Freedman, *supra* note 71, at 1469.

⁸¹ Freedman rightly rejects the "how can you ever really know anything?" copout that some defense lawyers use. See *id.* at 1472. Interest in the mysteries of epistemology is not a common trait among a very practical lot of criminal defense attorneys, so its popping up at this point raises doubts. For some cases dealing with the knowledge issue, see *United States v. Midgett*, 342 F.3d 321 (4th Cir. 2003); *Farnbaugh v. State*, 778 So. 2d 369 (Fla. Dist. Ct. App. 2001); *State v. McDowell*, 669 N.W.2d 204 (Wis. Ct. App. 2003). See generally J. Vincent Aprile II, *Client Perjury: When Do You Know the Client Is Lying?*, 19 CRIM. JUST. 14, 15 (2004) (offering more examples of the criminal lawyer's dilemma).

⁸² See Freedman, *supra* note 71, at 1475-78.

⁸³ See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004).

⁸⁴ Freedman, *supra* note 71, at 1475.

bar), several Washington-area judges (including Supreme Court Chief Justice-to-be Warren Burger) wanted Freedman disbarred or suspended from practice.⁸⁵

Every state rejected Freedman's contention, instead adopting some version of Model Rule of Professional Conduct 3.3.⁸⁶ That rule and its comments outline a three-step process for the lawyer who knows of potential perjury.⁸⁷ First the lawyer should remonstrate⁸⁸ with the potential witness about the impropriety and danger of committing perjury,⁸⁹ including the likelihood of being exposed by a prosecutor well trained in the art of cross-examination.⁹⁰ If the remonstration fails, the lawyer should seek to withdraw from the case,⁹¹ though as Freedman notes judges are usually quite unwilling (for reasons both practical and ethical) to allow lawyers, especially appointed lawyers, to take this second step.⁹² If withdrawal is not a possibility, the lawyer faces disclosure of the perjury to the court.⁹³

In the words of the official commentary to rule 3.3, "The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury."⁹⁴ So lawyers seek at all costs to avoid the knowledge of client perjury that will place them at the top of rule 3.3's three-step slippery slope, and thus behave like the defense attorney in *Anatomy of a Murder*, who advised the client about the law before hearing his version of the facts. This tactic raises the third of Freedman's hard questions: "Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?"⁹⁵

⁸⁵ The proceedings against Freedman were ultimately dropped. See Freedman, *supra* note 71, at 1469 n.1. Regarding Burger's participation, see Paul R. Tremblay, *Moral Activism Manque*, 44 S. TEX. L. REV. 127, 138 n.24 (2002).

⁸⁶ See, e.g., *Variations of the ABA Model Rules of Professional Conduct Rule: 3.3: Candor Toward the Tribunal*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3_authcheckdam.pdf (last updated Aug. 16, 2013).

⁸⁷ See generally MODEL RULES OF PROF. CONDUCT R. 3.3.

⁸⁸ I would pointedly define this word in class and then made sure to use it in a multiple-choice question on the final exam.

⁸⁹ See MODEL RULES OF PROF. CONDUCT R. 3.3 cmt. 6.

⁹⁰ See Freedman, *supra* note 71, at 1478. As Freedman notes in another context, such remonstration is particularly likely to cause any client, but especially an indigent one with appointed counsel, to wonder whose side her lawyer is really on. See *id.* at 1473.

⁹¹ See MODEL RULES PROF'L CONDUCT R. 1.16 cmt. 2; *cf. id.* 3.3 cmt.10 (mentioning withdrawal in passing). I probably should have included parts of rule 1.16 and its comments in the assigned reading for the class on criminal defense ethics. See *supra* note 70.

⁹² See Freedman, *supra* note 71, at 1475-76; see *infra* note 94. Some cases cast doubt on the withdrawal option. See *State v. Hischke*, 639 N.W.2d 6 (Iowa 2002); *Commonwealth v. Mitchell*, 781 N.E.2d 1237 (Mass. 2003); *People v. DePallo*, 714 N.Y.S.2d 755 (App. Div. 2000), *aff'd*, 754 N.E.2d 751 (N.Y. 2001).

⁹³ See MODEL RULES PROF'L CONDUCT R. 3.3 cmt. 10.

⁹⁴ *Id.* cmt. 11. For an example of how bad things can get, see *State v. Chambers*, 994 A.2d 1248 (Conn. 2010). Chambers' lawyer disclosed and attempted to withdraw, but the judge instead allowed Chambers to testify in narrative form and limited the defense's right to object during Chambers' cross-examination. During cross Chambers admitted several times that he was lying. Prior to closing arguments, the defense attorney again attempted to withdraw, because he could not ethically comment on Chambers' testimony in the defense's closing. Again the judge refused, instead giving both the defense attorney and Chambers himself the right to make closing arguments. Apparently throwing in the towel, the defense attorney gave no closing and convinced his client to remain silent too. Chambers was convicted, and the state supreme court affirmed. See also *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007) (judge allowed defense attorney to leave the courtroom during defendant's testimony; conviction reversed on grounds of ineffective assistance).

⁹⁵ Freedman, *supra* note 71, at 1469.

As Freedman points out, giving such advice “creates the appearance that the attorney is encouraging or condoning perjury.”⁹⁶ Nevertheless, this conduct is widely condoned.⁹⁷ In support of this contention I show excerpts from “To Defend a Killer,” one installment of the 1988 PBS series *Ethics in America*.⁹⁸ It consists of a roundtable discussion in which Professor Charles Ogletree poses dilemmas for experts ranging from Justice Scalia to several prominent criminal defense lawyers (at least one of whom was subsequently disbarred).⁹⁹

Ogletree portrays a man who has killed his girlfriend, but his role in Wendy’s murder likely will not be discovered.¹⁰⁰ He confesses to a clergyman and a psychiatrist (two panel members), both of whom suggest that he turn himself in.¹⁰¹ I would begin rolling the tape as he approaches James Neal, who won fame both as a criminal defense attorney and as a Watergate prosecutor.¹⁰² Neal drolly advises that he wants to tell Ogletree about the law before the lawyer hears Ogletree’s version of the facts. Neal’s brief rendition of the law includes the statements, “If you tell me that you stabbed Wendy, I can’t put you on the stand and have you deny that you stabbed Wendy,” and “don’t go around talking to any more preachers or psychiatrists.”¹⁰³ “There are very few deaf and dumb people in the penitentiary.”¹⁰⁴

I would usually let the tape roll, as Professor Stephen Gillers, another panel member, defends the conception of criminal defense that condones Neal’s invitation to perjury¹⁰⁵ while acknowledging its “psychic toll,”¹⁰⁶ followed by a philosopher who seems horrified by that conception, which sparks stirring advocacy from defense attorney Jack Litman.¹⁰⁷ Stopping the video at this point, I would usually ask the students to ponder whether they want to live with this psychic toll,¹⁰⁸ before commenting briefly on the much

⁹⁶ *Id.* at 1478.

⁹⁷ One might even argue that it is required. See MODEL RULES OF PROF’L. CONDUCT 2.1 (“In representing a client, a lawyer shall . . . render candid advice.”).

⁹⁸ ETHICS IN AMERICA: TO DEFEND A KILLER (Columbia University Seminars on Media and Society 1989) (on file with Annenberg Learner) available at http://www.learner.org/vod/vod_window.html?pid=192.

⁹⁹ See C. Vernon Mason, WIKIPEDIA, http://en.wikipedia.org/wiki/C._Vernon_Mason (last modified Dec. 12, 2013).

¹⁰⁰ ETHICS IN AMERICA: TO DEFEND A KILLER, *supra* note 98.

¹⁰¹ *Id.* at 3:00-14:20.

¹⁰² See James F. Neal, WIKIPEDIA, http://en.wikipedia.org/wiki/James_F._Neal (last visited Feb. 8, 2014).

¹⁰³ ETHICS IN AMERICA: TO DEFEND A KILLER, *supra* note 98, at 23:40-25:15.

¹⁰⁴ *Id.* See Robert Batey, *Commentary: Symposium: Criminal Law Defense, Ethics, and the Client Who Plans to Lie*, 7 OHIO ST. J. CRIM. L. 637, 637-38 (2010) for another hypothetical of client perjury, this time in the sentencing context.

¹⁰⁵ ETHICS IN AMERICA: TO DEFEND A KILLER, *supra* note 98. But note that Gillers disagrees rather vehemently with Freedman’s resolution of his second hard question. See Stephen Gillers, *Monroe Freedman’s Solution to the Criminal Defense Lawyer’s Trilemma Is Wrong As A Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821, 823 (2006).

¹⁰⁶ ETHICS IN AMERICA: TO DEFEND A KILLER, *supra* note 98. For a fuller version of Gillers’ comment, see Robert Batey, *Alienation by Contract in Paris Trout*, 35 S. Tex. L. Rev. 289, 302 n.67 (1994).

¹⁰⁷ TO DEFEND A KILLER, *supra* note 98 at 25:15-28:30. In an attempt to balance this exchange (compared to Litman, the philosopher blusters a great deal, but is undone mostly by an egregious toupee), I usually noted Litman’s much-criticized defense of the “preppie killer” Robert Chambers, Jr., with its many variations on “blame the victim.” See Jack Litman, WIKIPEDIA, http://en.wikipedia.org/wiki/Jack_Litman (last updated Dec. 2, 2013) (describing Litman’s criminal defense strategies).

¹⁰⁸ Demonstrating the psychic toll is a quote, included in the reading assignment for this class, from the protagonist of *The Lincoln Lawyer*:

I headed back to the door, my steps quick. I hate being inside a jail. I’m not sure why. I guess it’s because sometimes the line seems so thin. The line between being a criminal attorney and a criminal attorney. Sometimes I’m not sure which side of the bars I am on. To me it’s always a dead-bang miracle that I get to walk out the way I walked in.

different ethical rules that apply to prosecutors.¹⁰⁹ I would end the class by using this asymmetry in the professional responsibilities of prosecutors and criminal defense attorneys as another example of the bias for liberty in American criminal law.¹¹⁰

I have never taught the Professional Responsibility course nor do I pretend to be an expert in any of its topics.¹¹¹ However, I did feel the obligation as a teacher of Criminal Law to at least alert future lawyers about the ethical issues they do and will confront. Cases and hypotheticals involving wayward lawyers, especially in the area of theft, and the foregoing brief foray into the problem of client perjury were my ways of trying to meet this obligation.

MICHAEL CONNELLY, *THE LINCOLN LAWYER* 15 (2005).

¹⁰⁹ See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004) (explaining that the prosecutor should not pursue a case if she knows probable cause is lacking; prosecutor must turn over all information favorable to the defense). The reading for this class also included citations to a few cases and several articles discussing prosecutorial improprieties, most notably the Duke lacrosse rape prosecution, which resulted in the disbarment of district attorney Michael B. Nifong. See, e.g., *Prosecutor in Duke Lacrosse Rape Case is Disbarred for Intentional Misconduct*, 81 Crim. L. Rep. 470 (2007).

¹¹⁰ See SCOTT TUROW, *ONE L* 311 (Penguin Books 2010) (1977), explaining that while initially frustrated as a prosecutor by "the manifold ways in which the truth becomes distorted in a criminal courtroom," Turow became "like Saul on the road . . . converted . . . [T]here was a moral vision at work here . . . [W]e could not safely deprive any human being of his or her liberty without first knowing that the provable facts could not be contorted into a shape reasonably consistent with innocence."

¹¹¹ For that reason, I cited students to a number of articles discussing client perjury. See Monroe H. Friedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008); Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209 (2006); Evan A. Jenness, *Ethics and Advocacy Dilemmas—Possessing Evidence of a Client's Crime*, 34 CHAMPION, Dec. 2010, at 16; Peter A. Joy & Kevin C. McMunigal, *Deceit in Defense Investigations*, 25 CRIM. JUST., Fall 2010, at 36; L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707 (2007). See also Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client Is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature*, 18 S. CAL. INTERDISC. L.J. 229 (2009). I also referred them to a broader perspective on legal ethics. See Douglas Ammar & Tosha Downey, *Transformative Criminal Defense Practice: Truth, Love, and Individual Rights—The Innovative Approach of the Georgia Justice Project*, 31 FORDHAM URB. L.J. 49 (2003). But see Cheryl G. Bader, "Forgive Me Victim for I Have Sinned": *Why Repentance and the Criminal Justice System Do Not Mix—A Lesson from Jewish Law*, 31 FORDHAM URB. L.J. 69 (2003).