

Confronting the Demons of Future Dangerousness

Michael R. Cavanaugh¹, Marilyn McShane¹& Frank P. Williams III²

Abstract

Despite the advancement of empirical techniques for detecting discrimination in the application of the death penalty, American courts continue to uphold controversial decisions tainted by the unscientific nature of assessments of future dangerousness. From early studies that focused on characteristics of the victim and offender and their effect on which cases became death penalty trials, research has progressed to more sophisticated studies of not only how jurors are selected but how they process information in decision making. While jurors' predispositions toward the death penalty have been addressed directly in case law, more subtle forms of bias are introduced when death-qualified jurors report being influenced more by future dangerousness than any other aspect of a case. This paper examines research related to risk assessments and perceptions of offender dangerousness as well as the influence of media and social networks on individuals in their judgments about future dangerousness. While future dangerousness determinations in death penalty cases are used in only a few states, the potential for bias, particularly racial bias, is undeniable.

Keywords: death penalty, racial bias, future dangerousness, discrimination, perceptions, media influence

1. Introduction

David Baldus's pioneering research has been instrumental the advancement of empirical techniques for detecting bias in the application of the death penalty in American courts.

¹University of Houston –Downtown. Email: cavanaughm@uhd.edu, Phone: 713-226-5578, Fax: 713-223-7409

²Professor Emeritus California State University

Gross (2012) calls Baldus' legacy the ability to make even those jurists predisposed to non-intervention in death penalty issues and cases recognize the reality of racial discrimination evidence.

He cites the meticulous and comprehensive nature of Baldus' research that brought sweeping changes to death penalty processes across the country following the use of his work in *McCleskey v. Kemp* (1987). But focus on the race of the defendant or the race of the defendant and victim was only the beginning for the academic study of discrimination in the conduct of death penalty cases. From that point, research has progressed to more sophisticated studies of not only how the traits of criminal justice system professionals affect cases selected for trial but how jurors are selected and how they process information in decision making. Perhaps if Baldus were still alive today, he would have turned his attention to this even more ambiguous legal Hydra – the concept of future dangerousness. For within this more amorphous context, racial, socio-economic and a plethora of other biases can operate behind the law.

2. Research on Factors Influencing the Death Penalty

Despite the absence of any major legal shifts in the construction of death penalty statutes, more sophisticated analyses conducted over the past decade have shed considerable light on the workings of death penalty trials. In a 2009 study, Connell found that group dynamics and a more positive deliberation climate among the jurors was a better predictor of death decisions than case characteristics such as the race of the victim or defendant. Connell's (2009) finding that defendant demeanor, when perceived as remorseful, had a mitigating effect on death sanctions is also informative for how such interpretations influence perceptions of dangerousness. It implies that remorse would impact future behavior, and reduce chances for committing further violent acts.

Other traditional mitigating factors may, in fact, lead a jury to find that an individual will be a future danger to society. As Shapiro (2008) explains, well-seasoned prosecutors can influence a jury to make a determination that the youth of a defendant or his decreased mental capacity will lead him to be a future danger to society. This combined with remorse, or lack thereof, can cause a jury to ignore the defendant's culpability and instead focus almost entirely on future dangerousness in a death penalty determination (Shapiro, 2008). Blume, Garvey, and Johnson's (2001) research with South Carolina jurors in capital cases specifically focuses on the issue of future dangerousness.

They find that, even when future dangerousness is not brought as a mitigating factor by the prosecution, the jurors, nonetheless, look at the issue. Thus, avoiding the concept of future dangerousness may be an impossible task for jurors.

Along these lines, the requirements that a jury respond affirmatively to specific fact-finding elements that characterize the evaluation of aggravating and mitigating circumstances creates a false sense of scientific investigation and implies a dispassionate weighing of evidence that may have very little impact on a case. Follow up surveys with jurors indicate decisions are instead made early in the process and are based on human emotional feelings of fear and mistrust. Bowers and Foglia's (2003) research indicates that premature decision making by jurors includes personal conclusions developed prior to both sentencing instructions and deliberations. These individual assessments include an underestimation of the alternatives to the death penalty which may also be related to a mistrust or lack of faith in those alternatives. Likewise, Blume, Garvey, and Johnson (2001) explain, consistent with Bowers and Steiner (1999), that jurors in capital cases in South Carolina underestimated the prison sentence for those not sentenced to death. Of the jurors of the eleven states examined by Bowers and Steiner, the median estimated prison sentence from the jurors was below the mandatory minimum in each jurisdiction. Additionally, none of the median estimated prison sentences was above twenty years.

As with public knowledge of most components of the criminal justice system, presumed knowledge of death penalty alternatives is founded on various mythologies perpetuated by both media and the American political system and is part of the consciousness jurors bring to their roles. Underestimating both the form of and the actual nature of death penalty alternatives is likely to be endemic among jurors and tantamount to preconceived bias. The question then becomes: "How does this bias operate?"

3. An Analysis of Texas Cases

Texas has long been at the forefront in use of the death penalty and the administration of capital punishment (Hart, 2011). With the third largest number of current death row inmates and accounting for almost half of the executions in this country since the reinstatement of the death penalty in 1976, the state appears immune from trends (2000-2011) depicting a decline in death penalty sentencing and executions (Fins, 2013).

Today, more than one third of all Texas death row inmates come from the Houston area, more specifically, Harris County (Texas Department of Criminal Justice, 2014).

Still, former District Attorney Pat Lykos defends their case selection process as fact-based and race neutral (Olsen, 2011). Even so, twelve of the last thirteen to be sentenced to death, the *Houston Chronicle* reports, were African American. Eight of those occurred during the administration of her colleague, former District Attorney Chuck Rosenthal whose long tenure ended abruptly after sexually-explicit and racially-charged emails surfaced in his office accounts (Olsen, 2011).

In a recent capital murder prosecution the Harris County, a Texas Assistant District Attorney commented on the defendant's case to the media. "We are here," she explained "because of who this man is, not because of what he did" (Rogers, 2011, p. B2). Ironically, her summation runs counter to legal reasoning that frames punishment in terms of the desserts relative to the act, or, the punishment relative to the crime. Her characterization of the convicted killer as "a continuing threat to society" represents the essence of the concept of future dangerousness and is a critical element of capital sentencing in this state.

Historical analysis of the legislative process on future dangerousness in Texas was performed by Citron (2006). As he explains, the inclusion of future dangerousness in death penalty cases was the direct result of the U.S. Supreme Court ruling that the death penalty was applied in an arbitrary and capricious manner (*Furman v. Georgia*, 1972). The Texas legislature, which still meets every two years, passed a death penalty bill through a conference committee compromise and subsequent passage through both chambers, with very little or no debate, on the last day of the legislative session (Citron, 2006). Future dangerousness, a central figure in the compromise bill, did not appear in the original House or Senate bill before the conference committee. The inclusion of future dangerousness was the compromise between the mandatory death penalty bill from the House and the Senate's discretionary death penalty bill. Furthermore, Citron (2006) claims that a finding of future dangerousness by a jury, in a large majority of cases, equals a death sentence for the defendant. Nevertheless, the U.S. Supreme Court signaled support for the use of future dangerousness in death penalty cases (*Jurek v. Texas*, 1976) and the use of psychiatrists to offer a clinical opinion on whether the defendant was a future danger (*Barefoot v. Estelle*, 1983).

4. From *Barefoot* to *Buck*: Toxic Testimony

Commenting on the nature of the prediction of future dangerousness, Regnier (2004) concludes that the courts have hardly been consistent. On the one hand, it is often argued that death is different and must continually be held to a higher standard of consideration. On the other hand, it is often countered that decisions about future dangerousness are made at many points in the criminal justice system's processing of offenders and that the type of information used would be similar across these decisions (bail, parole, etc.).

Perhaps the most controversial aspect of the concept of future dangerousness surrounds the testimony of psychiatrists during the penalty phase. Again, the courts have been vague on the role that the expert witness plays in the jury's determinations of future dangerousness. Still, the significant number of cases that have been tainted by psychological testimony implying that the defendant's risk of continued violent behavior even if sentenced to life, was tied to that person's race led a number of cases, particularly in Texas, to be overturned on appeal. For example, in a 2004 5th Circuit Appeals case (*Saldano v. Roach*, 2004), the court struck down an attempt to resentence an offender to death on the same testimony that the U. S. Supreme Court had already found to be tainted. Both courts heard evidence that psychologist Walter Quijano believed that the Argentinean-born offender's ethnicity "could be a factor in whether he posed a future danger, citing the over-representation of blacks and Hispanics in the prison system" (Rice, 2004, p. A28; *Saldano v. State*, 2002).

Quijano testified in the punishment phase of six death penalty cases for the prosecution, claiming that Hispanic and black men were more likely to be a future danger, due in part to lesser education, little work history, and low socioeconomic status (Grissom, 2011). In the case of Duane Edward Buck, Quijano, testifying for the defense, said during cross-examination that Buck was more likely to be a future danger because he was black (*Buck v. Thaler*, 2011). Should there be any doubt about the specificity of his remarks, the prosecutor queried him with "The race factor, black, increases the future dangerousness for various complicated reasons, is that correct?" To which Quijano simply replied, "Yes" (Hart, 2011, p. B1; *Buck v. Thaler*, 2011, p. 34). Still, Buck moves closer to execution as his appeals have been rejected by courts of higher review including the U. S. Supreme Court.

In her dissent in the Texas Court of Criminal Appeals decision, Justice Elsa Alcala characterizes the case as one where the integrity of Buck's representation is "called into question by the admission of racist and inflammatory testimony" (Tolson, 2013).

Throughout the death penalty literature, authors agree that race continues to be the strongest predictor of capital punishment (Recer, Silverman, Meibeyer, Sheales, & van Resnburg, 2012). Nonetheless, over time it has become evident that race is a more complex variable to unravel with differences of language, culture, ethnicity, citizenship and religion complicating the Sisyphean task of humanizing the accused. The effects of factors that jurors might use to distance themselves from the defendant creates an "empathetic divide" that may seem unbridgeable and a perception of the client as unsalvageable (Recer et al., 2012). And unfortunately, the sense of dangerousness that is inherent in juror decision making along these lines will not rise to the level of a "discriminatory purpose" the standard established by the Court in *McClesky* (Sullivan, 2012). Even in the face of psychiatric testimony that was professionally censured and had led to reversals in other cases, the Court has allowed race-based dangerousness assessments no matter how ill-conceived, particularly if introduced in defense-solicited testimony (*Buck v. Thaler*) (Sullivan, 2012).

The late James Grigson often testified for the prosecution, with experience in over 150 capital sentencing hearings for the prosecution (Dennis, 2002). The vast majority of these cases in which Dr. Grigson testified in were death penalty convictions (Giannelli, 1993; Rosenbaum, 1991). According to Rosenbaum (1991), Grigson often offered the same testimony in each case, claiming that medical science indicated the convicted would pose a future danger to society. This testimony also often came without Grigson even examining the offender. While this seems to be a bit subjective and a bit unscientific, the Supreme Court has allowed this type of testimony, as Grigson was one of the two psychologists to testify in the sentencing phase of the *Barefoot* (1983) case.

Grigson was reprimanded several times and ultimately expelled by the American Psychiatric Association for unprofessional practices including one colleague's assessment, Michael Weiner, that "he was fundamentally biased in his assessments, and was performing cursory evaluations and drawing broad and damning conclusions from only limited information—a problem of credibility and objectivity" (as cited in Tolson, 2004).

Other critics were more condemning. Randy Schaffer complained "If the facts did not fit his theory, he would change his theory to fit the facts. He was such a complete tool of whoever hired him first, that for money he would say literally anything.... I think he probably did more to cause disrespect and distrust for psychiatric testimony than any other doctor in the history of the country" (Tolson, 2004).

While Grigson is no longer around to testify, others have stepped in to fill the void, and a doctor's testimony on future dangerousness carries a good deal of weight for the jurors. Just how accurate are these experts' opinions on future dangerousness? A study on capital defendants in Texas sought to answer that question (Edens, Buffington-Vollum, Keilen, Roskamp, & Anthony, 2005). Edens and colleagues found 155 current or former prisoners who had been given the death penalty at sentencing, and who had been found to be a future danger to society. Looking at the prison misconduct of the sample, the researchers found that only 5.2% of the sample had committed serious assaults while in prison. According to the authors, the 5% accuracy rate indicates that these experts are very unreliable (Edens et al., 2005). The number brings into question the admissibility of such testimony.

5. Defining Future Dangerousness

Although formal predictive instruments and assessments have been all but eliminated from capital sentencing due to their unreliability, most state capital punishment processes allow for some consideration of the defendant's future dangerousness. In some jurisdictions, there must be an affirmative finding to that fact, others simply allow it as an aggravating circumstance or accept the lack of dangerousness as a potentially mitigating factor (Berry, 2010). This contradiction, the impugning of risk prediction to the point that it has been barred in some states while future dangerousness "flies under the constitutional radar," Shapiro (2008, p. 176) believes to be an unacceptable flaw in our justice system. She reflects that Supreme Court reasoning in *Gardner v. Florida* (1977) mandated that statutes provide a rational basis for death sentencing rather than an emotional one, yet the courts have continually supported measures like future dangerousness that rely on the power of fear. Such measures, Shapiro finds, are in violation of the Eighth Amendment.

Definitions of future dangerousness remain a constant source of debate in courtrooms, particularly in Texas due to its requirement in death penalty cases and the overall number of death sentences in the state. When long-term death row inmate, Carl Buntion won a rehearing on his capital sentence, defense attorneys argued that his 22 years of discipline-free incarceration should negate any possible finding of future dangerousness. Prosecutors counter that this is hardly a testimony of potential as, before Buntion murdered a police officer, he had 17 years of violent priors all punctuated with terms in prison. Relying on the adage that past behavior on the outside is the best predictor of future behavior were he to be released, victims' advocates remain in favor of his execution. Ironically, although his supporters claim that he has proved himself capable of serving a life sentence without parole, the legislation guiding his term still allows for life with parole, which jurors may find too risky an option to allow (Rogers, 2012).

Research examining the actual rates of prison misconduct among those offenders alleged to be a future danger seem to produce mixed evidence. DeLisi and Munoz (2003) compared death row inmates to inmates with life sentences and to inmates in the general population in Arizona's prison system. The results found that the inmates with death sentences were more dangerous in prison than other inmates. These inmates committed serious offenses at a greater rate than the two other groups. The authors concluded that those inmates convicted of capital crimes, "will indeed continue to behave violently even within the confines of death row." (DeLisi & Munoz, 2003, p. 300)

Another study of prison misconduct on death-penalty-eligible offenders found opposing results (Cunningham, Reidy, & Sorenson, 2008). Cunningham and colleagues studied a group of 145 Federal prisoners who were serving a life-without-the-possibility-of-parole sentence, having been convicted of or pleading guilty to a capital crime. Among the sample, 104 of these offenders were alleged to be a future danger to society at some point in the legal process. In looking at the inmates' prison misconduct cases, the authors found that the allegation of future dangerousness was not related to the number or seriousness of disciplinary infractions. Writing about future dangerousness, the authors go further in calling on the Supreme Court of the United States to "re-examine this aggravating factor in light of reason and evolving standards of fairness." (Cunningham et al., 2008, p. 62).

In regard to jurors' concerns that death penalty alternatives will ultimately release a dangerous offender upon society, there are two issues: how likely are those offenders to be released and, if released, will those offenders commit new violent offenses? Concerning the first issue, the likelihood of release is tied to a political process and the trend is decisively conservative. In most cases, the decision rests on the governor's authority to not only appoint board members but to reverse their decisions. In Maryland, for example, Mullane (2012) reports that, from 1970 to 1994, 193 of the inmates serving life with the *possibility* of parole were released from Maryland prisons. Over the next 11 years only 13 were paroled and, since 2007, none have been authorized community supervision. The point here is that if inmates who are serving life ***with the possibility of parole*** are not released, why are people afraid that inmates serving life without parole will be freed?

The rise of an alternative sentence of life without the possibility of parole in states with the death penalty has led to a lower number of death sentences (Olsen, 2011), however, the fear of true lifers getting out is still flamed by the death penalty supporters. One only needs to look at the life without parole section on Prodeathpenalty.com website. In regard to the second issue, that of commission of new violent offenses if released, Mullane (2012) reports that, of the 1,000 prisoners who had life-with-the-possibility-of-parole sentences and who were eventually paroled in California, not one ever committed murder again. Another study (Sorensen, Marquart, & Bodapati, 1990) examined post-*Anderson*-decision (California's equivalent of the Furman decision) death row inmates commuted life sentences and ultimately released to the community (*People v. Anderson*, 1972). The researchers found that both new crime and violent behaviors of the previously death-row inmates matched those of the general inmate population (i.e., those regularly released on parole). Further, Marquart and Sorensen's (1988) examination of Texas post-Furman death-row inmates found only a few serious violent prison misconduct cases. Moreover, these same researchers (Marquart & Sorensen, 1989) examined the records of post-Furman inmates in several states and found that some 80% of them had not subsequently committed additional crimes. In short, the fear of releasing dangerous offenders on society through the use of alternatives to the death penalty seems, at least factually, to be unfounded.

6. Future Dangerousness: Media from Death Row

According to the U. S. Supreme Court, when evidence at sentencing is presented about the future dangerousness of the defendant, the jury must also be clearly instructed as to the status of parole ineligibility that would accompany a life or life without parole decision (*Simmons v. South Carolina*, 1994; *Schafer v. South Carolina*, 2001; *Kelly v. South Carolina*, 2002).

Much of what potential jurors accumulate in media accounts of capital defendants comes from stories of death row or even from other violent inmates serving terms of incarceration. Still other potential jurors receive information about the death penalty from media coverage of executions. During the period surrounding an execution families of victims speak out about their feelings regarding the death penalty that make powerful emotional connections with many readers. From these accounts, potential jurors may develop the sense that the death penalty allows those whom Vollum (2008, p. 29) calls co-victims "justice, closure and healing" as well as "relief and satisfaction" and that those closest to the impact of the crime find it to be the "appropriate and most effective method" to meet their needs. Gross and Matheson's (2003, p. 54) research found that "the great majority of newspaper accounts of executions include at least some description of the reactions of the victims' families and of any surviving victims." Continuous exposure to such accounts would reinforce the viability of the death penalty.

In his analysis of co-victims' comments, Vollum (2008, p. 172) provides examples that illustrate this point. Broadly distributed interviews include statements like "tonight we finally obtained peace," "I didn't know that I would feel this relief," "it made me feel good, real good." Those exposed to these ideas are also warned of the necessity of the execution, "we thank God that the individual was taken off the street where he can't do this again," he "told me personally that if he ever got out, he would do it again," There's no life sentence in Texas. That is just not even an acceptable alternative," and "If he had ever escaped, I would have gone into hiding. I would have probably been the second person, after his ex-wife, who he would have come after" (2008, p. 186).

7. Future Dangerousness: Prison Escapes

Even though prison escapes are statistically rare events, any incident of a violent offender on the loose becomes a significant historical marker in the minds of potential jurors. Even though a case might have occurred 10 or 20 years ago, they serve as the basis for reinforcing perceptions of continued dangerousness. As Tolson explained in 2007, only one inmate escapee has remained successfully at large in all of Texas history. Nonetheless, as criminal justice professor Dennis Longmire admits in an interview, the public is fascinated with the phenomenon, “people escaping from the custody of the state are sort of the ultimate criminal, the ultimate renegade, the rebellious spirit” (Tolson, 2007, p. A6).

The recent capture of a fugitive who fled a New Jersey prison in 1970 made worldwide headlines. George Wright, who had an extensive record of violent crime, was serving a 15-to-30-year sentence for a murder committed during the robbery of a gas station. After escape and disguised as a priest, he and some militant associates hijacked an airliner to Algeria which allowed the group various forms of political asylum over the years (Henry, 2011). In Texas in 1998, seven death row inmates attempted to escape although only one was successful (that one was found a short time later drowned in a nearby creek). Although noting that this was the first such incident in 64 years, the system used this event to move death row to an advanced security facility. In 2000, seven violent offenders, six of whom were serving 50-years-to-life escaped another Texas prison unit, later killing an Irving police officer who interrupted their hostage-taking robbery of a sporting goods store. The extensive media coverage of this prolonged chase and recapture may have served to cement into many people's minds the idea that even a life sentence does not insure that someone will not continue to be a threat to society.

By extension, the potential for escape colors jurors' perceptions of the feasibility of a life-without-parole sentence. The fear that families and co-victims articulate is rarely realized but, when a violent inmate does escape, the effects are widely heralded and long and painfully remembered. An example comes from the Houston Chronicle (Tolson, 2007). As the author explained, these prison breaks tend to remain in the mind of citizens. He chronicled a fairly recent escape, where a correctional officer was killed in 2007 and two inmates escaped from the work fields in Huntsville, Texas.

The two escaped inmates, Jerry Duane Martin and John Ray Falk Jr., were caught and subsequently tried for capital murder. Martin received a death sentence and Falk is being retried after a mistrial on procedural grounds during the capital case (Kiely, 2013). However, these types of escapes are extremely rare. In Texas in 2011, there were a total of three attempted prison escapes from among the Texas Department of Criminal Justice yearly average prison population of 141,000 (TDCJ, 2012). And, all escapees were caught. This seems to indicate, at least in Texas, that these prisons are fairly secure institutions. Furthermore, TDCJ has almost 10,000 administrative segregation cells for the most dangerous inmates, including those who pose an escape risk (Cunningham, 2006). The risk of escape is a trait on which all inmates are evaluated and, once bestowed, the label of "escape risk" and its implied attributes are almost impossible to overcome. According to Cunningham, these super-maximum security cells can house and prevent violence among the state's most dangerous inmates, while also serving to prevent escapes.

8. Social Media and Portrayals of Dangerousness

While the impact of today's new forms of media on jurors is unknown at this point, research has been conducted on the use of new media (internet sources) versus traditional media sources. The Pew Research Center has been collecting data on where Americans get their news, with data going back to 2001 that includes television, newspaper, radio, and internet sources (2011). In 2001, Americans' main source of news was from television, followed by newspapers, radio, and, finally, the internet. In 2010, the internet became the second most utilized news source behind only television. Pew estimates that the internet will surpass television as Americans' main source for receiving news in the next few years (2011). The current troubles of traditional print media, is no doubt helping to fuel this trend (Carr, 2012). While it is commendable that millions of Americans can access news instantly, a number of so-called news sites on the internet do not have the quality controls that have been a hallmark of more traditional media sources. This has led to the dissemination of news that, while factually accurate (or not, as the case may be), may have a decided ideological slant that emphasizes one point of view while glossing over or ignoring the other side. This, combined with evidence of self-selection of new sources (people will gather news from places that share their political or moral views, see Garrett, 2009), contributes to a citizenry that has only heard one side of an issue.

Considering that jurors are pulled from the general public, a jury may be made up of people who have inaccurate, or at the very least incomplete, views on what kind of future danger convicted murderers pose.

To date, legal arguments have yet to develop a research-based analysis of the degree to which exposure to Internet websites that are pro-death penalty encourage readers to view death row inmates as dangerous and unrepentant. Groups with agendas that support execution create inmate profiles that emphasize certain details of offenses or offenders that evoke images of dangerousness and depravity that sources more regulated and balanced would perhaps not provide. An example of this phenomenon can be seen by a comparison between ProDeath Penalty.com and Deathpenaltyinfo.org (See Table 1) in the type of materials made available to internet users looking for information about the executed Florida inmate, Robert Waterhouse. ProDeath Penalty.com, as its name suggests, is decidedly pro capital punishment. It was created by Charlene Hall (see Hall, 2012) and provides numerous details about each of its cases, including the inmate and victim's names, the date and state of the scheduled execution, the status of the sentence (executed, stayed, commuted, etc.) and, when available, pictures of the victims. Deathpenaltyinfo.org, on the other hand, offers a more anti-death penalty stance. A comparison of the content between the two sources presents a stark contrast.

Table 1: Comparison of Internet Information on Convicted Defendant Robert Waterhouse

Source	ProDeath Penalty.com	Deathpenaltyinfo.org
Criminal History	<ul style="list-style-type: none"> * Charged with 1st Degree Murder and Burglary for rape and strangling * Pled guilty for Second Degree Murder – Received life sentence * Released on parole after 8 years 	*N/A
Description of the Offender	<ul style="list-style-type: none"> * A drywall and plaster worker * Told a witness that he liked anal intercourse * Arrived at work asking for day off and appeared to have a hangover * Told police he had problems with alcohol, violence, and sex * Indicated that he would be executed after talking with police 	<ul style="list-style-type: none"> * Age 65 * White male * Spent 32 years on death row, record for Florida
Description of the Victim	<ul style="list-style-type: none"> * Ella Carter (previous victim) - 77 yr. old woman * Deborah Kammerer – 29 yr. old woman * Kammerer was close with her family, mother of three children, divorced, fun, and friendly 	* One victim, a white female
Description of the Offense	<ul style="list-style-type: none"> * Broke almost every rib in Ella's body and left teeth marks on one of her breasts (previous conviction) * Kammerer's body found naked with 30 cuts and 36 bruises * Kammerer had broken teeth, nose, and defensive wounds consistent with beating by tire rod * Bloody tampon shoved in Kammerer's mouth * Implied Kammerer showed signs consistent with anal rape * Cause of death for Kammerer was ruled drowning and police indicated she was dragged into Tampa Bay during high tide 	* Murder in 1980 in St. Petersburg, Fl. (Pinellas County)
Depiction of Dangerousness	<ul style="list-style-type: none"> * When he drinks a lot he "snaps" and cannot control behavior * When potential sex partners are menstruating he gets angry and frustrated * Lied to detectives during interview * Committed murder before current offense * Heinousness of crime (see above) * Family of Kammerer felt closure after execution of Waterhouse 	* N/A
Description of Execution	* Executed on February 15, 2012 in Florida	<ul style="list-style-type: none"> * Executed February 15, 2012 in Florida * Method was lethal injection (3 drug cocktail)

The summary of the pro-death penalty website is obviously fact heavy and somewhat subjective, and seems to emphasize the guilt of the offender without presenting any mitigating evidence. Material in the site also provides quotes from the victim's family explaining that the execution provided "closure" for the family. Prodeathpenalty.com also has other sections where the users can look at the issues on the death penalty (innocence, life without parole, deterrence, recidivism, etc.) presented with a definitive pro-death penalty view. How this affects the public's view, or a potential juror's view, on the death penalty is yet to be determined.

9. Setting Standards for the Use of the Concept of Future Dangerousness

A prominent death penalty defense attorney interviewed by the *Houston Chronicle* argued that jurors are less likely to feel comfortable taking the life of someone who looks like them (Olsen, 2011). Sentiments about personal similarities or differences would seem to weigh strongly on perceptions about future dangerousness, particularly if experts reinforce those views in their testimony. The cumulative effects of allowing psychiatrists to testify about the continued threat a defendant represents without even having interviewed that person, along with the propensity of psychiatric testimony to introduce racial discrimination, appears to stack the deck in favor of death sentences, particularly for minority defendants.

The potential for bias when personal conclusions about future dangerousness are allowed in sentencing has resulted in critics charging that it undermines the entire death penalty process. The widely touted example of Randall Adams, argued by a psychiatrist to be a future danger, before being found factually innocent of the crime, speaks to the absurdity of the practice. As this article has described, inaccurate media messages about the risk of escapes as well as the potential for prison violence distort the realities of the death row population despite clear empirical evidence to the contrary (Useem&Piehl, 2006).

In examining the future of future dangerousness LaFontaine (2002) argues that the current use of forensic psychologist testimony to assess future dangerousness should be termed unconstitutional. He further explains that the expert testimony shows the death penalty is being applied in an arbitrary and capricious manner, which was the deciding factor in striking down the death penalty in *Furman v. Georgia* (1972).

LaFontaine posits that the courts should base the expert testimony of future dangerousness on *Daubert v. Merrell Dow Pharmaceuticals* (1993)ⁱ, instead of the *Barefoot* (1983) case. Alternatively, Regnier (2004) argues for a revamped *Fryerule*ⁱⁱ for assessing clinical testimony on the future dangerousness of the convicted, instead of *Barefoot*. Other scholars claim that the continual use of this testimony to justify future dangerousness is a fundamental violation of due process and a miscarriage of justice because of the lack of reliability of such testimony (see, Beecher-Monas, 2003).

While the courts may ultimately change their mind on *Barefoot* and clinical forensic testimony of future dangerousness, the movement to link genes to behaviors may provide a new problem for the courts. Beecher-Monas and Garcia-Rill (2006) chronicle the recent research to again link genetics and criminal behavior. The movement has been gaining steam and it is feared that the genetic predisposition to violence could be used to bolster a future dangerousness finding by a psychologist (Beecher-Monas & Garcia-Rill, 2006). The fear is not so unfounded, as Looney (2010) reports that British authorities used MRI scans to aid the determination of whether pedophiles were likely to reoffend. Is this biological component destined to become part of a future dangerousness assessment in the United States? That question cannot be answered here, but the research on genetic and behavioral links has gained credibility and acceptance in recent times, especially in criminological circles (see, Barnes, Beaver and Boutwell, 2011).

10. Conclusions

The publication of the Baldus et al. studies demonstrated for many researchers that no matter how well-collected and interpreted the data were, the Supreme Court is reluctant to admit its relevance. Having found the principles of post-Furman death sentencing to be constitutionally valid, the Court has rubber-stamped most "guided discretion statutes" (Regnier, 2004, p. 471) based on the weighing of aggravating and mitigating circumstances and has been disinclined to tinker with the mechanics of juror decision-making any further. Conservative leaning jurists seem to be buoyed by popular public sentiments that appear to have an emotional rather than statistical base. Unfortunately this emotional base, derived from media- and politically-manipulated fear mongering, provides an emotional basis on which jurors can issue predictions of future dangerousness.

Freedom from fear was a basic right for all persons as pointed out by Franklin Roosevelt. The ability of a juror to dispense justice without being manipulated by fear is essential to the legitimacy of our system. Reforms that would prevent prosecutors from playing on these jurors' fears of the future hypothetical offending would be a welcome respite. While the future dangerousness of an offender may be a practical and valuable factor to know, its current use as an aggravating factor is highly problematic. Not only is the term "danger" itself subjectively interpreted, but the reliability of experts' testimony on an offender's future dangerousness has been shown to be extremely unreliable. Furthermore, the use of this determination as a reason to sentence someone to death seems to be in clear violation of our nation's founding principles. The United States of America is a nation of laws; under the classical system from which these laws were derived, punishment can only be justified when meted out for violations of these laws, not for potential future violations.

References

- Barefoot v. Estelle, 463 U.S. 880 (1983).
- Barnes, J. C., Beaver, K. M., & Boutwell, B. B. (2011). Examining the genetic underpinnings to Moffitt's developmental taxonomy: A behavioral genetic analysis. *Criminology*, 49, 923-954.
- Beecher-Monas, E. & Garcia-Rill, E. (2006). Genetic predictions of future dangerousness: Is there a blueprint for violence? *Law and Contemporary Problems*, 69, 301-341.
- Beecher-Monas, E. (2003). The epistemology of prediction: Future dangerousness testimony and intellectual due process. *Washington and Lee Law Review*, 60, 353-416.
- Berry, W. W. (2010). Ending death by dangerousness A path to the de facto abolition of the death penalty. *Arizona Law Review*, 52, 889-924.
- Blume, J. H., Garvey, S. P., & Johnson, S. L. (2001). Future dangerousness in capital cases: Always at issue. *Cornell Law Review*, 86, 397-410.
- Bowers, W. J. & Foglia, W. (2003). Still singularly agonizing: Law's failure to purge arbitrariness from capital sentencing. *Criminal Law Bulletin*, 39 51-86.
- Bowers, W.J. & Steiner, B. D. (1999). Death by default: An empirical demonstration of false and forced choices in capital sentencing. *Texas Law Review*, 77, 605-717.
- Buck v. Thaler, 132 S. Ct. 32 (2011).
- Carr, D. (2012, July 8). The fissures are growing for papers. *New York Times*. Retrieved from <http://www.nytimes.com>
- Citron, E. F. (2006). The legislative history of future dangerousness and the Texas death penalty. *Yale Law & Policy Review*, 25, 143-175.
- Connell, N. M. (2009). *Death by jury: Group dynamics and capital sentencing*. El Paso: LFB Scholarly Publishing.
- Cunningham, M. D. (2006). Dangerousness and death: A nexus in search of science and reason. *American Psychologist*, 61, 828-839.

- Cunningham, M. D., Reidy, T. J., & Sorenson, J. R. (2008). Assertions of future dangerousness at federal capital sentencing: Rates and correlates of subsequent prison misconduct and violence. *Law and Human Behavior*, 32, 46-63.
- Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).
- DeLisi, M. & Munoz, E. A. (2003). Future dangerousness revisited. *Criminal Justice Policy Review*, 14, 287-305.
- Dennis, D. M. (2002). Constitutionality, accuracy, admissibility: Assessing expert predictions of future violence in capital sentencing proceedings. *Virginia Journal of Social Policy and the Law*, 10, 292-315.
- Edens, J. F., Buffington-Vollum, J. K., Keilen, A., Roskamp, P., & Anthony, C. (2005). Predictions of future dangerousness in capital murder trials: Is it time to disinvent the wheel? *Law and Human Behavior*, 29, 55-86.
- Fins, D. (2013). Death row U.S.A.: Fall 2013. New York, NY: NAACP Legal Defense and Education Fund, Inc. Retrieved from:
http://www.naacpldf.org/files/publications/DRUSA_Fall_2013.pdf
- Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
- Furman v. Georgia, 408 U.S. 238 (1972).
- Gardner v. Florida, 430 U. S. 349 (1977).
- Garrett, R. K. (2009). Echo chambers online? Politically motivated selective exposure among internet users. *Journal of Computer Mediated Communication*, 14, 265-285.
- Giannelli, P. C. (1993). Junk science: The criminal cases. *Journal of Criminal Law and Criminology*, 84(1), 105-128.
- Grissom, B. (2011, October 31). Texas ends deal with psychologist over race testimony. *The Texas Tribune*. Retrieved from <http://www.texastribune.org>
- Gross, S. & Matheson, D. (2003). What they say at the end: Capital victims' families and the press. *Cornell Law Review*, 88, 2: 486-516.
- Gorss, S. (2012). David Baldus and the legacy of McClesky v. Kemp. *Iowa Law Review*, 97, 1905-1924.
- Hall, C. (2012, December 6). February 2012 executions. Retrieved from
<http://www.prodeathpenalty.com/Pending/12/feb12.htm>
- Hart, P. K. (2011, September 11). Where's justice in execution process? *Houston Chronicle*, B1.
- Henry, S. (2011, September 28). Killer on run for 40 years caught in Portugal. *Houston Chronicle*, A3.
- Jurek v. Texas, 428 U.S. 262 (1976).
- Kelly v. South Carolina, 534 U.S. 246 (2002).
- Kiely, M. (2013, June 26). Judge denies defense request in Falk murder case retrial. *The Eagle*. Retrieved from <http://www.theeagle.com>
- LaFontaine, E. T. (2002). A dangerous preoccupation with future danger: Why expert predictions of future dangerousness in capital cases are unconstitutional. *Boston College Law Review*, 44, 207-243.
- Looney, J. W. (2010). Neuroscience's new techniques for evaluating future dangerousness: Are we returning to Lombroso's biological criminality? *University of Arkansas at Little Rock Law Review*, 32, 301-314.
- Marquart, J., & Sorensen, J. (1988). Institutional and post-release behavior of Furman-commuted inmates in Texas. *Criminology*, 26, 677-694.

- Marquart, J., & Sorensen, J. (1989). A national study of the Furman-commuted inmates: Assessing the threat to society from capital offenders. *Loyola Law Review*, 23, 5-28.
- McCleskey v. Kemp, 481 U.S. 279 (1987).
- Mullane, N. (2012). *Life after murder: Five men in search of redemption*. NY: Perseus.
- Olsen, L. (November 13, 2011). Racial pattern in death penalty. *Houston Chronicle*, A1.
- People v. Anderson, P.2d 880, (Cal. 1972).
- Pew Research Center (2011). Internet gains on television as public's main news source. Pew Research Center for the People and the Press. Retrieved from <http://www.peoplepress.org>
- Recer, D., Silverman, M., Meibeyer, C., Sheales, D., & van Resnburg, K. (2012). Representing foreign national capital defendants. *University of Memphis Law Review*, 42, 965 -1025.
- Regnier, T. (2004). Barefoot in quicksand: The future of "future dangerousness" predictions in death penalty sentencing in the world of Daubert and Kumho. *Akron Law Review*, 37, 469-507.
- Rice, H. (March 25, 2004). Court thwarts death sentence over race issue. *Houston Chronicle*, A, 28.
- Rogers, B. (2011, October 25). Jury weighs killer's fate. *Houston Chronicle*, B2.
- Rogers, B. (2012, February 12). Second chance for cop's killer. *Houston Chronicle*, A1, A5.
- Rosenbaum, R. (1991). *Travels with Doctor Death*. NY: Penguin Group.
- Saldano v. Roach, 363 F.3d 545 (5th Cir. 2004).
- Saldano v. State, 70 S.W.3d 873 (Tex. App.2002).
- Schafer v. South Carolina, 532 U.S. 36 (2001).
- Shapiro, M. (2008). An overdose of dangerousness: How 'future dangerousness' catches the least culpable capital defendants and undermines the rationale for the executions it supports. *American Journal of Law*, 35, 145-200.
- Simmons v. South Carolina, 512 U.S. 154 (1994).
- Sorensen, J., Marquart, J., & Bodapati, M. (1990). Research note: Two decades after People v. Anderson. *Loyola Law Review*, 24, 45-56.
- Sullivan, J. T. (2012). Furman at forty: The abyss of racism. *The Journal of Appellate Practice and Process*, 13, 91- 117.
- Texas Department of Criminal Justice (2012). Legislative appropriations request for fiscal years 2014 and 2015. Retrieved from http://www.tdcj.state.tx.us/documents/finance/LAR_FY2014-15.pdf
- Texas Department of Criminal Justice. (2014, May 20). County of conviction for offenders on death row. Retrieved from http://www.tdcj.state.tx.us/death_row/dr_county_conviction_offenders.html.
- Tolson, M. (2004, June 17). Effect of "Dr. Death" and his testimony lingers. *Houston Chronicle*, A27.
- Tolson, M. (October 1, 2007). Prison escapes: myth and mayhem. *Houston Chronicle*, A1, A6.
- Useem, B., & Piehl, A. M. (2006). Prison buildup and disorder. *Punishment & Society*, 8, 87-115.
- Vollum, S. (2008). *Last words and the death penalty*. New York: LFB Scholarly Press.

Endnotes

- i Daubert v. Merrell Dow Pharmaceuticals (1993) was a civil case decided by the U.S. Supreme Court. The Court ruled that scientific evidence needs to be relevant and reliable. However, this ruling has yet to be applied to assessments of future dangerousness in death penalty cases.
- ii The Frye rule came from the D.C. Circuit case of Frye v. United States (1923). The Frye rule states that for scientific evidence to be admitted in a court of law, the scientific principle behind the evidence needs to be generally accepted in the scientific community.