



ARTICLES

**Privileging Empiricism in Legal
Dialogue: Death and Dangerousness***Serena Stier**

INTRODUCTION

Warren McCleskey is a black man who was convicted in a Georgia trial court of armed robbery and the killing of a white policeman during the course of the robbery. For this murder, McCleskey was sentenced to death.¹ In the course of various appeals, McCleskey claimed that the "Georgia capital sentencing process is administered in a ra-

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¹ Under Georgia law the death penalty can be imposed only if it is found beyond a reasonable doubt that the murder was accompanied by one of a series of ten statutory aggravating circumstances. GA. CODE ANN. § 17-10-30(b), (c) (Harrison 1982). McCleskey was found to have two of these aggravating circumstances — "The offense . . . was committed while the offender was engaged in the commission of another capital felony [and the] offense . . . was committed against [a] peace officer . . ." No mitigating evidence was offered. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1762 n.3 (1987) (quoting GA. CODE ANN. § 17-10-30(b) (Harrison 1982)).

cially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution.”² In support of his claim, McCleskey proffered a statistical study, the Baldus study, that demonstrated a “disparity in the imposition of the death sentence in Georgia based on the race of the murder victim. . . .”³ Using sophisticated statistical analyses, the study separated 230 nonracial factors to demonstrate that

death is imposed in 34% of white-victim crimes and 14% of black-victim crimes, a difference of 139% in the rate of imposition of the death penalty. . . . In other words, just under 59% — almost 6 in 10 — defendants comparable to McCleskey would not have received the death penalty if their victims had been black.⁴

The Supreme Court assumed, as did the Court of Appeals, that the Baldus study was valid statistically.⁵ Justice Powell, joined by four other justices, wrote the opinion for the Court. The Court upheld the constitutionality of McCleskey’s death sentence and attempted to grapple with the issues raised by the Baldus study. Justice Powell held that, even if valid statistically, the Baldus study was not a reason to invalidate the Georgia death penalty. Justices Brennan, Marshall, Stevens, and Blackmun dissented. Justices Brennan and Blackmun wrote dissenting opinions that also addressed the role that empirical research studies, such as the Baldus study, should play in adjudication. Justice Brennan argued that the Baldus study, when combined with normative and historical considerations, was sufficient to invalidate the Georgia death penalty.

No doubt Justice Powell’s opinion will be criticized for giving unduly little weight to the Baldus study. Parts of the opinion support such criticism. This Article, however, takes a different tack. It suggests that Justice Powell’s opinion takes empiricism too seriously, as the Supreme Court in related areas has taken empiricism too seriously. Justice Powell claimed that the Baldus study could not be given significant weight in judging the constitutionality of the Georgia death penalty because doing so would threaten the entire criminal justice system.⁶ Such hyperbole can be understood only by presupposing that sound empirical studies should have a sovereignty in adjudication that they do not and

² *McCleskey*, 107 S. Ct. at 1763.

³ *Id.* “The Baldus study . . . examine[d] over 2,000 murder cases that occurred in Georgia during the 1970s.” *Id.*

⁴ *Id.* at 1784 (Brennan, J., dissenting) (footnote omitted).

⁵ *Id.* at 1766 n.7.

⁶ *Id.* at 1779.

cannot have. Primarily through an analysis of the Court's treatment of empirical predictions of dangerousness in civil commitment decisions, this Article shows why empirical studies lack sovereignty in adjudication. It thus explains why giving due weight to the Baldus study does not lead inexorably to the Court's imagined parade of horrors.

Empiricism elevates the values of objectivity and verifiability over the value of justice, which can only be achieved through normative discourse. Justice Brennan's dissent provides an excellent example of how empirical research findings must be placed within the context of a more general and wide-ranging legal and normative discussion if they are to play a proper role in judicial decision making. With respect to McCleskey's reliance on the Baldus study results, Justice Brennan emphasized that the "determination of the significance of his evidence is at its core an exercise in human moral judgment, not a mechanical statistical analysis."⁷ Justice Brennan's remarks remind us that not only must statistical analyses be absorbed into a judicial discourse that is fundamentally normative but that, more generally, any mechanical model of jurisprudence, including one which gives sovereignty to empirical findings, is no longer viable.

Law is neither an objective, scientific enterprise nor is it, therefore, necessarily an arbitrary, unjustifiable exercise of power. To resist the pull of this type of simplistic dichotomizing, it is necessary to reconceptualize the legal enterprise. To conceive of the legal enterprise in nonmechanical terms, a number of legal scholars have recently used interpretive models developed in literature and philosophy. Developments in science, which have had to withstand a similar loss of rootedness in objective, verifiable foundations, may help to frame a new approach to law consistent with these developments. One approach has been to think of the practice of science as a kind of conversation. This Article uses the notion of a legal conversation to reframe the discussion of law and to set the social scientific dimension of adjudication in its broader context.

I. THE LEGAL CONVERSATION — BEYOND METAPHOR: THE EXAMPLE OF SCIENCE

Those who practice science have come to understand that achieving objectivity, in the sense of creating a value free and verifiable body of knowledge, is an impossible goal. So too must law accept limitations on its own endeavors. However, neither science nor law need settle for a

⁷ *Id.* at 1789.

consequent relativism that leaves us skeptical of either scientific knowledge or acceptable law. A way to avoid the choice between objectivism and skepticism is to focus our attention on the community that makes science or law. The image of a legal community engaged in legal conversation in order to make just and orderly legal decisions is more than a poetic metaphor.⁸

The analogy between scientific and legal conversation is not perfect. The results of the legal conversation have significant societal consequences and can invoke the coercive power of the state. The legitimacy of the conversation must be justified. This can be done, in principle, by showing that the legal community is more likely to get things right because of their procedures and professional training, that the membership is representative of the plurality of viewpoints in the general society, and that the process of the conversation itself is fair. One important dimension of the conversation that contributes to its fairness and capacity to produce better decisions is the genuineness of the conversation itself. This section describes a model of the legal community and then provides a brief overview of the qualities that create a genuine conversation.

A. *Model of the Legal Community and Its Conversation*

The image of dialogue among members of the legal community is borrowed from modern efforts to understand science. Recently, major changes have occurred in our understanding of how scientific knowl-

⁸ The metaphor of dialogue or conversation infuses the work of writers on jurisprudence such as Bruce Ackerman, Steven J. Burton, and Owen Fiss. See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1985); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) [hereafter Fiss, *Conventionalism*]; Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979). German philosopher Hans-Georg Gadamer's *Truth and Method* (1975) best demonstrates its conceptual value. Its appeal for American scholars can be partly attributed to the American philosopher and literary critic, Richard Rorty, and his book, *Philosophy and the Mirror of Nature* (1980). Its use extends into fields other than philosophy, literature, and law. See, e.g., D. McCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985). For a general discussion of the power of metaphors to guide, control, and enhance thought, see G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* (1980). For objections to the legal conversation metaphor, see Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 386 (1982). Much of the debate over interpretation between those called skeptics or nihilists and those called idealists or conventionalists looks like the discussion about the glass with water at the half-way mark. Of course, it can be argued that judges, by virtue of their role, should start with a glass half-full perspective.

edge develops.⁹ To better understand the legal conversation, it is helpful to sketch what some of these developments involve.

Future historians of science and philosophy will probably describe the last quarter of the twentieth century as the period that buried Cartesian foundationalism.¹⁰ Science is no longer viewed as emanating from some Archimedean point¹¹ that founds and secures a scientific edifice based on premises untainted by human perception and evaluation. The traditional scientific model of knowledge building that inspired the twentieth century's extraordinary technological advances was a paradigm which employs a hypothetico-deductive paradigm¹² involving a

⁹ See R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983).

¹⁰ The importance of foundationalism as an approach to knowledge building is usually traced to the 17th century philosopher, René Descartes. It is a position that underlies standard empiricism. In the 17th century there was a revival of skepticism about how certain one can be of what he believes. . . . If the structure of nature is complex, if the senses sometimes deceive, if one's thought processes do not match the structure of nature, then nothing is certain. . . . If the senses cannot be trusted how reliable is scientific knowledge?. . . If moral principles cannot be justified then how seriously ought one to pursue the good life or try to do what is right?. . . René Descartes argued that by founding all knowledge on clear and distinct ideas of the self [*Cogito, ergo sum*] and of God, completely certain knowledge can be gained about self, God, and the world.

¹¹ *DICTIONARY OF THE HISTORY OF IDEAS: STUDIES OF SELECTED PIVOTAL IDEAS* 304 (1973).

Foundationalism sees knowledge as requiring some Archimedean point as a starting place from which observation and logic may then proceed. Archimedes was a third century B.C. philosopher of Syracuse "celebrated for his discoveries in applied mathematics and mechanics, and for his statement that with a lever long enough, and a point to stand upon, he could move the world." *THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY* Vol. A-O, 109 (1971). To attempt to develop a body of knowledge about science or, for that matter, about law without such a point or foundation creates what Bernstein calls "Cartesian anxiety." R. BERNSTEIN, *supra* note 9, at 16. The writings of Descartes have served as the basis for the development in philosophy of a belief in the

idea of a basic dichotomy between the subjective and the objective; the conception of knowledge as being a correct representation of what is objective; the conviction that human reason can completely free itself of bias, prejudice, and tradition; the ideal of . . . a universal science, the belief that by the power of self-reflection we can transcend our historical context and horizon and know things as they really are in themselves. . . .

Id. at 36.

¹² See *supra* note 10.

¹² See Hanson, *The Origin of Hypothetico-Deductive Explanations*, in *ON SCIENTIFIC THINKING* 305 (1981).

three stage process. First, the researcher hypothesizes a theory couched in terminology that suggests freedom from all value bias, and operationally defines the theory's terms to allow objective observational measurements to be made in order to verify the theory. Second, the researcher makes these observational measurements in a carefully controlled research setting and compares these results with those posited by the theory. Third, the researcher accepts or rejects the original hypothesis after determining whether or not the measurements statistically support the theory.

Although the natural sciences soon recognized that this paradigm was inadequate to account for the complexities of knowledge building in the natural sciences, it was a model emulated by what is called the "human sciences."¹³ The human sciences include economics, psychology, political science, and law. For example, a psychologist might posit the theory that intelligence, as operationally defined or measured by performance on the Stanford-Binet Intelligence Quotient Test, and creativity, as reflected on the Barron-Welsh Art Scale,¹⁴ are unrelated abilities. A group whose life performance suggests high intelligence and a second group considered creative would be administered both the Stanford-Binet and Barron-Welsh tests. The extent to which performance on one test correlated with performance on the other for each group would then be evaluated by statistical means to determine whether or not the results supported the postulated theory that intelligence and creativity are independent abilities.

The influence of this model is readily apparent in the legal conversation about dangerousness between Justices White and Blackmun presented in Section II of this Article. The Justices discuss dangerousness as if it were a fact which has been operationally defined as something psychiatrists can predict. The Justices look at research studies of the actual behavior of persons who psychiatrists predicted would commit dangerous acts in the future and debate whether these studies demonstrate that the psychiatric predictions have achieved statistically acceptable levels of accuracy.¹⁵

¹³ See D. McCLOSKEY, *supra* note 8, at xix.

¹⁴ See F. BARRON, *CREATIVITY AND PERSONAL FREEDOM* (1968); G. WELSH, *CREATIVITY AND INTELLIGENCE: A PERSONALITY APPROACH* (1975).

¹⁵ R. BERNSTEIN, *supra* note 9, at 33. It is recognized, however, that both the human and natural sciences exist in a postmodern world best captured by the following five research tenets:

(1) Data are "not detachable from theory, for what count as data are determined in the light of some theoretical interpretation, and the facts themselves have to be reconstructed in the light of interpretation."

In science one important effect of the death of the Cartesian model has been to shift the focus of interest from validating method to validating community. As the philosopher of science Richard Bernstein notes:

We are now aware that it is not only important to understand the role of tradition in science as mediated through research programs or research traditions but that we must understand how such traditions arise, develop, and become progressive and fertile, as well as the ways in which they can degenerate. . . . What is it that constitutes a scientific community? How are norms embodied in the social practices of such communities, and *how do such communities reach objective -- intersubjective -- agreement?*¹⁶

Bernstein's description of postmodern science focuses on objectivity in terms of two aspects relevant to law: community and intersubjectivity. Scientists still seek to develop theories that will correctly describe and predict the behavior of various aspects of the universe. However, they now recognize that this process is not free from the participant's personal values. They rely on the professional training of participants in the scientific enterprise to develop in them professional values and habits of mind. Such training makes them members of a scientific community which adheres to certain standards of what is and what is not properly part of the scientific enterprise. When disagreements arise, they seek truthful resolutions of those disagreements through scientific conversations among themselves. They recognize that this process will not produce an objective, verifiable truth. Rather, it produces what Bernstein calls "a *discursive* truth which needs to be justified or warranted by argumentation."¹⁷

In law, as in science, the demise of Cartesian foundationalism led to a debate that is often posed in dichotomous terms. Legal prescriptions can be derived deductively from a series of firm foundational statements or they are the arbitrary preferences of persons with the power to prescribe lawful behavior in society. Just as it is possible to move science beyond objectivism, verificationism and relativism, or skepticism by fo-

(2) "[T]heories are not models externally compared to nature in a hypothetico-deductive schema, they are the way the facts themselves are seen."

(3) "[W]hat count as facts are constituted by what the theory says about their inter-relations with one another."

(4) Language "is irreducibly metaphorical and inexact"

(5) "Meanings . . . are understood by theoretical coherence rather than by correspondence with facts."

Id.

¹⁶ *Id.* at 25 (emphasis added).

¹⁷ *Id.* at 153. For a discussion of how discursive truth or persuasive argument relates to rhetoric, see D. McCLOSKEY, *supra* note 8.

cusing on the community which interprets scientific events, so too can law move beyond a simple choice between foundationalism and arbitrary preferences. We can build a better understanding of the legal community and the characteristics of appropriate dialogue among the members of that community. A proper dialogue will be capable of justifying the legal implications that the conversations of the legal community have for the larger political community.

One view of the interpretive community is that it is the legal community which engages in legal conversation about legal texts and events to arrive at just decisions.¹⁸ Arguably, this community need not exercise power arbitrarily so long as there exists a representational hierarchy of decision makers constrained by adherence to a tradition of interpretation.¹⁹ The participants in the legal conversation include judges, legislators, and government executives. Others may contribute material for interpretation to the conversation: jurors, scientific, economic, social science experts, attorneys, legal academics, and concerned citizens for example. However, the role they play in the conversation generally is subsidiary to that of legislators and judicial decision makers.

The legitimacy of decisions reached through the legal community's dialogue relies, of course, on the existence of a community that is truly representative of the concerns and membership of the society for whom the participants act as authorities.²⁰ This is also an issue for the scientific community, although the injustice resulting from lack of representation may not be so readily apparent.²¹ No claim is made here that the existing legal community in the United States is legitimating. The claim is that it is possible for a well-structured legal community to have that effect.

¹⁸ Burton states:

What distinguishes the legal community from other interpretive communities is the presence of order and justice at the center of our webs of beliefs about law, the principles of legitimacy, stare decisis, and legislative supremacy near the center, and the commitment to legal reasoning in bringing these values and principles to bear in particular cases. The legal conversation is a conversation about the implications of these values and principles in particular cases.

S. BURTON, *supra* note 8, at 209.

¹⁹ See *id.* at 125-43, 199-215; see also Fiss, *Conventionalism*, *supra* note 8, at 187-91.

²⁰ See Brest, *Who Decides?*, 58 S. CAL. L. REV. 661 (1985); Brest, *supra* note 8, at 770-72.

²¹ Women scientists are beginning to examine the consequences for science of a male perspective and a paucity of female scientists. See E. KELLER, *REFLECTIONS ON GENDER AND SCIENCE* (1985).

The results of both the legal conversation and scientific dialogue must be justified, but for different reasons and in different ways. The conclusions of the scientific community reached through dialogue can usually be subjected to real world tests that may falsify their accuracy.²² It is naive to imagine that the facts speak for themselves in such scientific tests. Members of the scientific community achieve intersubjective agreement about what constitutes a fact and how that fact should be interpreted through dialogue with one another. Although the content of that dialogue may be partially constrained by the realities of funding for scientific research, the members of the scientific community, at least in principle, are free to fashion the content and process of scientific dialogue from their curiosity about the truth.

In contrast, the process and results of the legal conversation face more stringent requirements for justification. The legal conversation invokes the coercive power of the state and can affect the property, liberty, and lives of citizens. The results of the legal dialogue must not merely reflect the personal interests of the participants to be legitimate. The members of the legal community must be constrained from placing personal preference before principle and must be able to engage in a rational discourse whose contours and outcomes can be evaluated publicly. Ultimately, justification for the enterprise and their participation must rest on the legal community's ability to get it right more often than would some other available group or process.²³ Even if the legal community turns out to be the right one to make legal decisions, in order for those decisions to be just, the conversation through which these decisions are reached must represent a genuine effort to contribute to justice and order.

B. *The Qualities of a Genuine Conversation*

Among the features of conversation that may contribute to getting it right is the process of the conversation itself. This section describes some of the qualities that contribute to a genuine conversation rather than to a polemical argument. The purpose of polemic is to defeat one's opponent. A conversation seeks to achieve mutual understanding of differing points of view and to reach a better solution cooperatively than one achieved without dialogue.

The participants in a genuine conversation concentrate on the subject

²² See generally A. O'HEAR, KARL POPPER (1980).

²³ See S. BURTON, *supra* note 8, at 199-217; Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3 (1985).

matter rather than on the personalities of the speakers.²⁴ The participants in a good legal conversation may disagree with one another, may even dislike one another. Yet each respects the other as an equal contributor to a joint enterprise whose measure of success is a complex, carefully reasoned, soon to be modified argument underpinning a decision. They do not dig themselves into positions and then persuade others to capitulate through the use of appeals to sentiment or power. The participants must be open to changing their minds due to new information or persuasive argumentation developed in the course of the conversation.²⁵

The legal conversation is a fragile enterprise whose authority could be easily undermined. Confidence in the dialogic process among the participants and its observers depends on a number of factors. Probably none is more important than a belief in the willingness of the participants to face the issues forthrightly without undue attachment to predetermined positions. This means that each participant must communicate to the other that he or she is open to persuasion, is prepared to modify his or her original beliefs, even to adopt the beliefs of the other for good reason.²⁶ Each must evaluate the arguments offered and take personal responsibility for the outcome. Recourse to scientific, religious, or governmental authority *qua* power is not invoked.²⁷

²⁴ Gadamer suggests:

When one enters into dialogue with another person and then is carried along further by the dialogue, it is no longer the will of the individual person, holding itself back or exposing itself, that is determinative. Rather, the law of the subject matter is at issue in the dialogue and elicits statement and counterstatement and in the end plays them into each other.

H. GADAMER, *PHILOSOPHICAL HERMENEUTICS* 66 (1976).

²⁵ This is the approach to negotiation recommended by Roger Fisher and William Ury when they write about separating the people from the problem, focusing on interests, not positions, and engaging in a principled negotiation that insists on objective criteria. See R. FISHER & W. URY, *GETTING TO YES* (1981).

²⁶ "In speaking with each other we constantly pass over into the thought world of the other person; we engage him, and he engages us." H. GADAMER, *supra* note 24, at 57.

²⁷ Gadamer states: "Authority is not *always* wrong. . . . Authority can rule only because it is freely recognized and accepted. . . . [A]uthority is rooted in insight as a hermeneutical process. A person who comes of age need not — but he also from insight can — take possession of what he has obediently followed." *Id.* at 33-34. The kind of thinking that relies on interpersonal exchange rather than rules has been described by Carol Gilligan as more typical of women than of men. Disagreements in this process require for their resolution a conversation and "a mode of thinking that is contextual and narrative rather than formal and abstract." C. GILLIGAN, *IN A DIFFERENT VOICE* 19 (1982).

The dialogue is impersonal in the sense that what is important is exploring the subject matter thoroughly, not winning an argument, showing off one's argumentative skills, or belittling the capacities of the speakers. The dialogue is also tentative in that the participants are not invested in reaching and maintaining a conclusion for all time or even for a long time. Yet the participants see themselves as seeking the truth.²⁸ The conversation has a spirit of play about it.²⁹ They get caught up in the enterprise and are carried along by it rather than trying to stand outside and achieve a misleading sense of objectivity and

²⁸ See PLATO, *GORGIAS* (Penguin 1960). James Boyd White observed that Socrates, in the *Gorgias* dialogue

does not want to hear an oratorical display by Gorgias but wishes to engage in conversation [A kind of conversation which] requires that one make the other agree with what one says [C]omplete frankness is essential, a kind of shamelessness in saying what one really thinks This is not a competition to see who can reduce the other to his will; it is a process of mutual discovery and mutual refutation [D]ialectic is a recognition of self and other, rhetoric a reification and seduction.

J. WHITE, *WHEN WORDS LOSE THEIR MEANING* 102, 110 (1984). For a discussion of rhetoric that sees it as simply good thinking, see D. McCLOSKEY, *supra* note 8, at 28-30. Compare Fisher's discussion of negotiating power:

If I have negotiating power, I have the ability to affect favorably someone else's decisions. This being so, one can argue that my power depends upon someone else's perception of my strength, so it is about what they *think* that matters not what I actually have. The other side may be as much influenced by a row of cardboard tanks as by a battalion of real tanks. One can then say that negotiating power is all a matter of perception.

A general who commands a real tank battalion, however, is in a far stronger position than one in charge of a row of cardboard tanks. A false impression of power is extremely vulnerable, capable of being destroyed by a word. In order to avoid focusing our attention on how to deceive other people, it seems best at the outset to identify what constitutes "real" decisions of others assuming they know the truth

Fisher, *Negotiating Power*, 27 AM. BEHAV. SCI. 149, 150 (1983).

²⁹ "Word and dialogue undoubtedly include within them an aspect of the game." H. GADAMER, *supra* note 24, at 56. Gadamer states:

The back and forth movement that takes place within a given field of play does not derive from the human game and from playing as a subjective attitude. Quite the contrary, even for human subjectivity the real experience of the game consists in the fact that something that obeys its own set of laws gains ascendancy in the game [A]bsorption into the game is an ecstatic self-forgetting that is experienced not as a *loss* of self-possession, but as the free buoyancy of an elevation above oneself.

Id. at 53, 55.

verifiability.³⁰

The next section constructs a legal conversation between Justices White and Blackmun from their opinions in *Barefoot v. Estelle*,³¹ a death penalty decision as was the case of Warren McCleskey. This conversation examines one way that the legal enterprise is distorted by treating a normative issue, in this case dangerousness, as if it were a social scientific fact so that empiricism becomes a privileged basis for dialogue. Because the *McCleskey* Court focused on an empirical study, the Baldus study, it failed to properly grapple with the normative issues raised by the case. Four years earlier the Court similarly privileged empirical considerations in its discussion whether a jury may properly recommend the death penalty on the basis of a psychiatrist's prediction that a convicted murderer was likely to commit a dangerous act in the future. As the discussion below shows, Thomas Barefoot, like Warren McCleskey, became the subject of a legal discourse that failed to properly develop the normative issues because of the Court's focus on the empirical issues that attend determinations of dangerousness. Because the justification for the view of law presented in section I relies so heavily on the genuineness of legal dialogue, the impact of distortions such as that caused by the treatment of dangerousness as solely an empirical issue can be particularly dangerous to the legal enterprise.

II. THE *Barefoot* CONVERSATION

The Supreme Court decided *Barefoot* in 1983, which, in major part, reviewed the constitutionality of Thomas Barefoot's death penalty. A Texas jury had found Barefoot guilty of the murder of a policeman and sentenced him to death, primarily because of psychiatric testimony about his future dangerousness. The Supreme Court upheld Mr. Barefoot's death sentence.

The Court rejected the argument that psychiatrists cannot reliably predict whether or not a particular criminal is dangerous to the com-

³⁰ But the alternative to objectivity is not subjectivity. There is a middle path, one which Gadamer calls philosophical hermeneutics.

[P]hilosophical hermeneutics stands beyond the alternatives of transcendental reflection and empirical-pragmatic knowledge. . . . In the linguistic character of our access to the world, we are implanted in a process of tradition that marks us as historical in essence. Language is not an instrumental setup, a tool, that we apply, but the element in which we live and which we can never objectify to the extent that it ceases to surround us.

H. GADAMER, *REASON IN THE AGE OF SCIENCE* 49-50 (1982).

³¹ 463 U.S. 880 (1983).

munity because of the likelihood that he will commit dangerous acts in the future.³² The Court also held that psychiatric opinions as to dangerousness did not require a personal examination of the defendant, but might be offered in response to hypothetical questions.³³ Justice White wrote the Court's opinion and Justice Blackmun wrote one of the dissents. If we juxtapose excerpts from both Justice White's and Justice Blackmun's opinions in the form of a conversation, we obtain an interesting example of a legal dialogue about dangerousness.

White: Neither petitioner [Thomas Barefoot] nor the [American Psychiatric] Association [APA] suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials.³⁴

Blackmun: Psychiatric predictions of future dangerousness *are not accurate*; wrong two times out of three, their probative value, and therefore any possible contribution they might make to the ascertainment of truth, is virtually nonexistent. . . . It is difficult to understand how the admission of such predictions can be justified as advancing the search for truth, particularly in light of their clearly prejudicial effect. Thus, the Court's remarkable observation that "[n]either petitioner nor the [APA] suggests that psychiatrists are *always wrong* with respect to future dangerousness, *only most of the time*," . . . (emphasis supplied), misses the point completely, and its claim that this testimony was no more problematic than "other relevant evidence against any defendant in a criminal case," . . . is simply incredible.³⁵

White: If the likelihood of a defendant's committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is . . .³⁶ and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.³⁷

Blackmun: It makes sense to exclude psychiatric predictions of future violence while admitting lay testimony . . . because psychiatric predictions appear to come from trained mental health professionals, who purport to have special expertise. In view of the total scientific groundlessness of these predictions, psychiatric testimony is fatally misleading.³⁸

White: "It is, of course, not easy to predict future behavior. The fact that

³² *Id.* at 896-903.

³³ *Id.* at 903-04.

³⁴ *Id.* at 901.

³⁵ *Id.* at 928-29 (Blackmun, J., dissenting).

³⁶ *Id.* at 896 (citing *Jurek v. Texas*, 428 U.S. 262, 272-73 (1976)).

³⁷ *Id.* at 896-97.

³⁸ *Id.* at 938 (Blackmun, J., dissenting).

such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . ." [Justice White, quoting Justice Stewart, gives examples of bail, sentencing authority, and parole authorities.] "The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."³⁹

Blackmun: The Court is far wide of the mark in asserting that excluding psychiatric predictions of future dangerousness from capital sentencing proceedings "would immediately call into question those other contexts in which predictions of future behavior are constantly made." . . . In other contexts where psychiatric predictions of future dangerousness are made . . . the subject will not be criminally convicted, much less put to death, as a result of predictive error. The risk of error therefore may be shifted to the defendant to some extent. . . .⁴⁰ State evidence rules notwithstanding, it is well established that, because the truth-seeking process may be unfairly skewed, due process may be violated even in a noncapital criminal case . . . by the admission of certain categories of unreliable and prejudicial evidence. . . . The reliability and admissibility of evidence considered by a capital sentencing factfinder is obviously of still greater constitutional concern. . . . The danger of an unreliable death sentence created by this testimony cannot be brushed aside on the ground that the "jury [must] have before it all possible relevant information about the individual defendant whose fate it must determine."⁴¹

White: [T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross-examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored.⁴²

Blackmun: The Constitution's mandate of reliability, with the stakes at life or death, precludes reliance on cross-examination and the opportunity to present rebuttal witnesses as an antidote for this distortion of the truth-finding process. Cross-examination is unlikely to reveal the fatuousness of psychiatric predictions because such predictions often rest, as was the case here, on psychiatric categories and intuitive clinical judgments not susceptible to cross-examination and rebuttal. . . . Psychiatric categories have little or no demonstrated relationship to violence, and their use often ob-

³⁹ *Id.* at 897 (quoting *Jurek*, 428 U.S. at 274-76).

⁴⁰ *Id.* at 936 n.14 (Blackmun, J., dissenting).

⁴¹ *Id.* at 925 (Blackmun, J., dissenting) (quoting *Jurek*, 428 U.S. at 276).

⁴² *Id.* at 898.

scores the unimpressive statistical or intuitive bases for prediction.⁴³

White: We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.⁴⁴

Blackmun: It is extremely unlikely that the adversary process will cut through the facade of superior knowledge. THE CHIEF JUSTICE long ago observed: "The very nature of the adversary system . . . complicates the use of scientific opinion evidence, particularly in the field of psychiatry. . . ." Another commentator has noted: ". . . unrestricted use of experts promotes the incorrect view that the questions are primarily scientific."⁴⁵

White: [P]etitioner's view mirrors the position expressed in the *amicus* brief of the [APA]. . . . The *amicus* does not suggest that there are not other views held by members of the [APA] or of the profession generally. Indeed, as this case and others indicate, there are those doctors who are quite willing to testify at the sentencing hearing, who think, and will say, that they know what they are talking about, and who expressly disagree with the [APA]'s point of view. . . . We are aware that many mental health professionals have questioned the usefulness of psychiatric predictions of future dangerousness in light of studies indicating that such predictions are often inaccurate. . . . All of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury. . . . We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.⁴⁶

Blackmun: [T]he presentation of psychiatric witnesses on behalf of the defense [is not] likely to remove the prejudicial taint of misleading testimony by prosecution psychiatrists. No reputable expert would be able to predict with confidence that the defendant will *not* be violent; at best, the witness will be able to give his opinion that all predictions of dangerousness are unreliable. Consequently, the jury will not be presented with the traditional battle of experts with opposing views on the ultimate question.⁴⁷

For present purposes, two things are evident about this legal conversation. First, it treats the normative question, whether Thomas Barefoot should be put to death because he may commit dangerous acts

⁴³ *Id.* at 931-32 (Blackmun, J., dissenting).

⁴⁴ *Id.* at 899.

⁴⁵ *Id.* at 932-33 (Blackmun, J., dissenting) (quoting Burger, *Psychiatrists, Lawyers, and the Courts*, 28 FED. PROBATION 3, 6 (1964); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 626 (1978)).

⁴⁶ *Id.* at 899, 899 n.7, 901.

⁴⁷ *Id.* at 934 (Blackmun, J., dissenting) (footnote omitted).

in the future, as if it were solely an empirical question.⁴⁸ Thus, Justices White and Blackmun address only the question of whether psychiatrists can reliably predict if Thomas Barefoot will commit dangerous acts in the future. Second, the dialogue does not address any of the normative concerns that lie beneath the veneer of scientific method and objectivity that conceals the critical issues in this case. The Justices do not address the validity of the Texas statute's use of dangerousness to discriminate between those convicted murderers who should and should not receive the death penalty. They never examine the question of whether a finding of dangerousness would and should justify the state's taking a human life. By addressing only the empirical question of reliability, Justices White and Blackmun resort to arguing about the capacities of the empirical experts, psychiatrists, to make accurate judgments about

⁴⁸ It might be argued that the Justices are foreclosed from discussing the normative question because, in 1976, the Supreme Court upheld the constitutionality of the dangerousness determination at issue in *Barefoot* in *Jurek v. Texas*, 428 U.S. 262 (1976). In a single paragraph the Court wrote:

Focusing on the second statutory question [dangerousness] that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . [referring to bail, sentencing, punishment]. 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 have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

Id. at 274-76. The opinion begs the question raised in this paper. All of the settings in which dangerousness predictions are employed could be infirm. If the use of dangerousness as a standard in determinations as to bail, sentencing, and the like, is mistaken, these practices cannot justify its use in capital punishment cases. Moreover, to find something constitutional is not the same as justifying its use in normative terms. No sound argument is given in *Jurek* to justify upholding the Texas statute. Charles Black characterizes the *Jurek* opinion in the relevant respect:

This is the way not of reason but of fiat — the fiat of silence. . . . If reason, opened to public scrutiny, is the soul of law, and if the decision for death is the most solemn decision law can make, then I am right in thinking that this paragraph records one of the most disturbing and sorrowful moments in the long history of American constitutional judgment.

C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 119 (1981).

Barefoot's future dangerousness rather than discussing the justification for upholding Barefoot's sentence of death.

In these respects the dialogue is typical of most judicial and scholarly discussions of dangerousness in civil commitment and other contexts. In practice, the measure of the dangerousness standard is the psychiatrist's expert opinion whether a person is or is not likely to harm herself or others in the future. The accuracy of the psychiatrist's opinion evidence is the focus of legal review.⁴⁹ As the discussion in *Barefoot* illustrates, the concern is reliability — the epistemological issue of whether dangerousness can be accurately measured.

Justices White and Blackmun differ only on whether or not evidence of dangerousness is sufficiently reliable to be presented to the fact-finding jury in a capital punishment case. Justice Blackmun finds the evidence of dangerousness so unreliable and prejudicial that he would not have presented it to the jury; Justice White would have the jury decide for itself whether or not to rely on psychiatric predictions of dangerousness. By arguing that psychiatric opinions about dangerousness are too unreliable and prejudicial to be presented to juries, Justice Blackmun is at least prepared to take responsibility for evaluating the evidentiary situation. The striking characteristic of this conversation, however, is that Justices White and Blackmun appear to be in agreement on what question should be asked. For both Justices, dangerousness is not a term of art in law but a fact to be found by measurement. They both assume that dangerousness is a concrete, measurable fact and focus on the epistemological question of whether it can be known rather than the normative question of whether it should be used. Consequently, the empirical mode of discourse is privileged and excludes other considerations.

This Article argues below that privileging the empirical mode of discourse is unjustified. Empirical discourse itself is value laden, elevating the values of objectivity and verifiability over the value of justice. But let us first assume that Justices White and Blackmun, treated as symbols of the conventional approach to dangerousness, are asking the right question. Let us assume, therefore, that dangerousness exists as a con-

⁴⁹ See Stier & Stoebe, *Involuntary Hospitalization of the Mentally Ill in Iowa: The Failure of the 1975 Legislation*, 64 IOWA L. REV. 1284, 1382-83 (1979); "[E]ven though 'dangerousness' as used in various laws and regulations is clearly a *legal* term that requires determinations by courts and other designated triers of fact, often such crucial determinations actually tend to be made by various mental health experts." Shah, *Dangerousness: Conceptual, Prediction and Public Policy Issues*, in VIOLENCE AND THE VIOLENT INDIVIDUAL 151, 154 (1981).

crete, measurable fact, which in principle justifies deprivations of life or liberty. The next section shows that dangerousness cannot be determined reliably using the civil commitment rather than the capital punishment context. Although a great deal of research has been done on dangerousness determinations in civil commitment, it is impossible to make reliability estimates of capital punishment decisions based on dangerousness predictions unless a large number of persons found dangerous and condemned to death have their death sentences commuted.

III. ANALYSIS OF CIVIL COMMITMENT

The reliability of civil commitment decisions can be evaluated through both a statistical/probabilistic analysis and a qualitative/clinical evaluation. The conclusion of both analyses is that the decision to involuntarily hospitalize a mentally ill person cannot be made within the constitutionally required parameters of reliability that are presently operative.

A. Legal Basis for Civil Commitment

The United States Supreme Court has paid relatively little attention either substantively or procedurally to the subject of civil commitment. In 1972 Justice Blackmun noted in *Jackson v. Indiana*: "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power [to commit] have not been more frequently litigated."⁵⁰ In 1975 the Court in *O'Connor v. Donaldson*⁵¹ held that mental illness alone, without "something more," is not a sufficient basis for commitment. The *O'Connor* Court specifically refused to rule on what that "something more" must be.⁵² Later Court decisions appear to interpret *O'Connor* as holding "that a mentally ill individual has a 'right to liberty' that a State may not abridge by confining him to a mental institution, even for the purpose of treating his illness, unless in addition to being mentally ill he is likely to harm himself or others if released."⁵³ It is still unclear what range of behaviors constitute future dangerousness.⁵⁴

The Supreme Court has, however, addressed the question of what

⁵⁰ 406 U.S. 715, 737 (footnotes omitted).

⁵¹ 422 U.S. 563 (1975).

⁵² *Id.* at 573-74.

⁵³ *Jones v. United States*, 463 U.S. 354, 371 (1983) (Brennan, J., dissenting) (citing *O'Connor*, 422 U.S. at 573-76, 589 (Burger, C.J., concurring)).

⁵⁴ See *Doe v. Gallinot*, 486 F. Supp. 983, 991 (C.D. Cal. 1979).

standard of proof the fourteenth amendment requires for a state to commit an individual involuntarily for an indefinite period to a state mental hospital.⁵⁵ In *Addington v. Texas* the Court recognized that the consequence of civil commitment is a serious loss of liberty, not merely a loss of money as in the typical civil suit.⁵⁶ Consequently, a more demanding standard than the usual proof by preponderance of the evidence in civil cases should be required. The Court could have extended the criminal standard of proof, beyond a reasonable doubt, to civil commitment cases, as it previously extended the criminal standard to juvenile proceedings in *In re Winship*.⁵⁷ However, the Court concluded that the constitutionally mandated standard of proof for civil commitment is "clear and convincing" evidence.⁵⁸

As in *Winship*, the Court explained that a standard of proof serves to "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."⁵⁹ This language suggests that the question of proof actually operates within the confines of the fact finder's mind rather than on the facts themselves, although terms like "preponderance of the evidence" and "clear and convincing evidence" appear to refer to externally validated factual material.⁶⁰ The standard of proof guides the fact finder to reach a conclusion regarding the probative value of the evidence. The *Addington* Court observed: "[t]he standard serves to allocate the risk of error between the litigants and to

⁵⁵ *Addington v. Texas*, 441 U.S. 418 (1979). Standard of proof in this paper refers to the burden of persuasion and not the burden of going forward. See Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101.

⁵⁶ 441 U.S. 418, 425-27 (1979).

⁵⁷ 397 U.S. 358, 361-68 (1970).

⁵⁸ *Addington v. Texas*, 441 U.S. 418, 433 (1979).

⁵⁹ *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

⁶⁰ See *Sargent v. Massachusetts Accident Co.*, 29 N.E.2d 825, 827 (Mass. 1940); a measure of proof is "the degree of strength of belief of a fact-in-issue produced by evidence on the mind of the jury." 9 J. WIGMORE, EVIDENCE § 2489a, at 434 (3d ed. 1940). Couching the civil and intermediate standards of proof in language such as "preponderance of the evidence" and "clear and convincing evidence" creates a mistaken distinction from the criminal standard of "beyond a reasonable doubt." The first two characterizations seem to imply that the proof is to be sought objectively in the evidence itself without subjective perusal by the mind of the fact finder. However, all three burdens of proof reflect graded degrees of belief. To emphasize instead the weight of the evidence rather than the degree of belief, which the proponent of the proposition must produce in the mind of the fact finder before he or she is entitled to a favorable finding, serves to confuse the issue. See, e.g., McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 244 (1944); accord Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 809 (1961).

indicate the relative importance attached to the ultimate decision. . . . [T]he function of legal process is to minimize the risk of erroneous decisions."⁶¹

B. Application of Mathematical Values to Standards of Proof

In *Addington* the Supreme Court constitutionally mandated but did not quantify the clear and convincing evidence standard. Generally, courts do not utilize a mathematical translation of these standards. However, in acknowledging that the purpose of the standard "is to minimize the risk of erroneous decisions,"⁶² the Court clearly recognized that some standard should be developed to determine what risk is acceptable and whether or not commitment decisions meet this standard. Mathematical probabilities can be used to model the relevant analysis and clarify the issues.

Some courts and commentators have suggested mathematical values for the three standards of proof, of which "clear and convincing" constitutes the middle level of certainty. There can be little argument that the usual civil standard, "preponderance of the evidence," can be translated into a probability of more than .50 (or at least 51% in round figures) of being correct.⁶³ Thus, a fact finder would find for a plaintiff who had convinced him or her that, on balance, the plaintiff's evidence or facts to be inferred was more likely than not to be true. Under the criminal standard of proof, "beyond a reasonable doubt," the risk of error has engendered a great deal more controversy. Some commentators have argued that any mathematical translation of "beyond a reasonable doubt" would jeopardize important American social and judi-

⁶¹ *Addington*, 441 U.S. at 423, 425.

⁶² *Id.* at 425.

⁶³ "[S]ince this is an ordinary civil case, [the level of burden of proof/persuasion will be] a preponderance — that is to say the trier must be convinced, on the basis of his evaluation of the evidence, that the proposition is more probably true than false (50 % probable for purposes of this analysis)." *United States v. Schipani*, 289 F. Supp. 43, 55-56 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969); *accord* *United States v. Fatico*, 458 F. Supp. 388, 403 (E.D.N.Y. 1978); *see also* A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 33 (1975); Coccozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1084 n.1 (1976); Monahan & Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAV., 37, 38 (1978); Williams, *The Mathematics of Proof I*, 1979 CRIM. L. REV. 297 ("preponderance of evidence . . . means 'more probable than not,' and the reference to a scale of weight naturally suggests that the meaning can be numerically expressed as a probability greater than 0.5, say 0.51."). *See generally* Kagehiro & Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159, 163 (1985).

cial values.⁶⁴ Others have proposed that "beyond a reasonable doubt" could be translated into values above 90% certainty.⁶⁵

Regardless of the results of this argument, the intermediate standard of clear and convincing evidence must be greater than 51% certainty and probably less than 90% certainty. Some commentators and courts have nominated the 60-80% range as appropriate for modeling the clear and convincing standard.⁶⁶ This range is used for the purpose of the following analysis.

What does such a quantitative range mean in terms of risk of error? An 80% certainty figure applied to civil commitment decision making means that, for every one hundred decisions to commit someone, the fact finder could be mistaken twenty times. This interpretation of the proof standard would permit no more than twenty false positive findings.⁶⁷ If the mathematical value for the standard were reduced to 60%,

⁶⁴ The seminal piece in the debate is Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971). Tribe was reacting to a proposal to make use of an elementary formula of probability theory, known as Bayes' formula, to aid jurors in assessing statistical identification evidence. For an excellent presentation by a lawyer of the Bayes' formula and a proposal to use the theory in understanding legal rules, see Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021 (1977). For a discussion of probability and evidence, see MCCORMICK ON EVIDENCE § 210, at 650 (3d ed. 1984).

⁶⁵ *Schipani*, 289 F. Supp. at 57 ("permit a jury to find beyond a reasonable doubt (95% probable, for the purposes of this analysis)"); A. STONE, *supra* note 63, at 56 ("'Beyond a reasonable doubt,' or something above 90 percent certainty"); Cocozza & Steadman, *supra* note 63, at 1101.

⁶⁶ *Fatico*, 458 F. Supp. at 405 ("Quantified, the probabilities might be in the order of above 70% under a clear and convincing evidence burden."); see A. STONE, *supra* note 63; Cocozza & Steadman, *supra* note 63; Monahan & Wexler, *supra* note 63. Judge Weinstein in *Fatico* suggests, however, that clear, *unequivocal* and convincing evidence might have a probability value of above 80%. *Id.* at 405 (emphasis added). One of the few empirical studies of quantifying burden of proof found that while judges on a scale from 1-10 place preponderance of the evidence at a little more than half at 5.5, the value favored by students and jurors hovers around 7.5. Half or more of the jurors, students, and judges studied did translate "beyond a reasonable doubt" to mean an 8.6 or higher probability. Simon & Mahan, *Quantifying Burdens of Proof*, 5 L. & SOC'Y REV. 319, 325 (1971).

⁶⁷ See Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 598 n.137 (1978). False positive is another way of saying that one has predicted X is Y or will do Z and, in fact, X is not Y or does not do Z. Depending on the consequences to society and the individual, decisions about X will seek either to limit the number of false positives or false negatives. Of course, any predictive method ideally seeks to have neither false positives nor false negatives, but such perfection is nearly always impossible. See Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 84 (1968). When

then forty mistakes would be tolerated out of every one hundred commitment decisions. This would represent forty false positive findings. In other words, forty persons who, in fact, were not mentally ill and dangerous would be involuntarily hospitalized for every one hundred commitment cases heard and decided. Obviously, an error rate that would permit as many as forty mistaken decisions for every one hundred decisions to commit does not provide a very rigorous control on the commitment process. An empirical approach questions whether the decision to commit can be made with 60 to 80% accuracy.

C. *Application of Probability Theory to Commitment*

The introduction of probability theory to the trial process has been hotly debated.⁶⁸ Without entering that debate, quantification of the standards of proof are offered here merely to model an empirical approach to the problem of civil commitment. Using Pascalian probability⁶⁹ to analyze the logical structure of the standard for civil commitment should foster clarity in the discussion.

Pascalian or frequency probability is the probability method most familiar to the general reader. It involves making guesses about future events on the basis of information about past events in the form of a count made under specified circumstances. The most familiar example is the coin tossing situation in which, given the circumstances of a single, fair, balanced, and unweighted coin with a symbol identified as a head on one side and a symbol identified as a tail on the other, one

former Chief Justice Burger states in *Addington* "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state," he is opting for minimizing the number of false positives at the potential cost of increasing false negatives. *Addington*, 441 U.S. at 427. Selection of a standard of proof serves to balance false positives and false negatives. In *Addington* the clear and convincing evidence standard was chosen rather than the criminal standard of beyond a reasonable doubt, which would minimize false positives substantially. For criticism of this choice, see Stier & Stoebe, *supra* note 49, at 1295-96.

⁶⁸ See *supra* note 64.

⁶⁹ For a general discussion of various theories of probability, see H. KYBURG, *PROBABILITY AND INDUCTIVE LOGIC* (1970). For a critique of the use of frequency theory or mathematical probability in legal decision making, see L. COHEN, *THE PROBABLE AND THE PROVABLE* (1977). For a discussion by a lawyer of the issues Cohen raised, see Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34 (1979). For a concise outline of what Cohen labels Baconian or "inductive probability," see Schum, *A Review of a Case Against Blaise Pascal and His Heirs*, 77 MICH. L. REV. 446 (1979); see also Allen, *A Reconceptualization of Civil Trials*, 66 B.U.L. REV. 401 (1986).

guesses (or predicts) that the probability for any one toss to result in a head is one-half or .50 or 50%. Because the application of Pascalian probability in judicial settings has been criticized recently, an alternative theory has been proposed.⁷⁰ However, the advocacy of Baconian probability has not yet carried the day and betting persons might wager it will not.⁷¹

The frequency theory of probability would treat the civil commitment decision as a conditional probability. This is translated into the following formula: $P(H \cap E) = P(H) \times (P E/H)$.⁷² For civil commitment to occur, the probability of finding both mental illness (H) and (\cap) dangerousness (E) must equal a probability value of at least .60, *i.e.*, clear and convincing proof. Because civil commitment requires dependent findings of both mental illness and dangerousness, we multiply the probability of correctly determining that a respondent is mentally ill ($P(H)$) by the probability of correctly finding the person is dangerous given that mental illness already has been diagnosed ($P E/H$).

One of the reasons civil commitment is a particularly appropriate subject for examining the reliability of dangerousness findings is that social scientists and legal academics have done a number of empirical studies in the area. These studies can be used to suggest what values might properly be assigned to $P E/H$, the probability of dangerousness given a diagnosis of mental illness.⁷³ These are studies of groups of mentally ill persons who psychiatrists have predicted will be dangerous, whose subsequent behavior has been followed, and who in fact did or did not behave dangerously. Reviewing the results of these studies generously, it appears that it may be possible to achieve 40% accuracy, that is, 40% true positives, in determining dangerousness under the most favorable conditions given current limitations on making such predictions.⁷⁴

⁷⁰ See L. COHEN, *supra* note 69.

⁷¹ "I would venture to say, however, that the case against mathematical probability has not yet been made." Kaye, *supra* note 55, at 102 n.6; see also critiques in Eggleston, *The Probability Debate*, 1980 CRIM. L. REV. 678; Kaye, *supra* note 55; Schum, *supra* note 69; Williams, *supra* note 63, at 305; *Letters to the Editor*, 1980 CRIM. L. REV. 743; Wagner, Book Review, 1979 DUKE L.J. 1071 (reviewing L. COHEN, *THE PROBABLE AND THE PROVABLE* (1977)).

⁷² H. KYBURG, *supra* note 69, at 17-18. Use of this formula is imprecise since we are dealing with both actual and predicted mental illness and actual and predicted dangerousness. However, for analytic purposes the conditional probability formula is both well-known and simple to follow.

⁷³ See *infra* note 75.

⁷⁴ The 40% figure is used in the interests of the analysis, but such accuracy is rare. Even when reported, further scrutiny has raised substantial methodological questions.

Accuracy in diagnosing mental illness has been less systematically

Moreover, such accuracy requires an expensive and lengthy psychiatric and psychological analysis of each individual concerned. For a recent review and analysis of the data on predictive accuracy, see Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110-27 (1984).

Table 1: Studies of Mentally Ill Offenders and Level of Success in Predicting Future Criminal Behavior

<u>Study Source</u>	<u>Offender Category</u>	<u>Sample Size</u>	<u>%True Positives</u>	<u>%False Positives</u>	<u>#Predicted Violent</u>	<u>#Follow-up Years</u>
1. Kozol et al. (1972)	mentally ill	@ 600	34.7	65.3	49	5
2. State of Maryland	defective delinquents	421	46.0	54.0	221	3
3. Steadman & Cocozza (1974)	criminally insane (Baxtrom)	@1000	20.0	80.0	967	4
4. Thornberry & Jacoby (1974)	mentally ill	438	14.0	86.0	438	—
5. Cocozza & Steadman (1976)	incompetent to stand trial	257	14.0	86.0	96	3

Modification of Table 1(a) at 246, Monahan, *The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Nat. Acad. of Sci. 1978). Table 1, Study Source Citations: 1. Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371 (1972); 2. State of Maryland, Maryland's Defective Delinquency Statute - A Progress Report (1973) (unpublished manuscript); 3. H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE (1974); 4. Thornberry & Jacoby, *The Uses of Discretion in a Maximum Security Mental Hospital: The Dixon Case*, paper presented at annual meeting of the American Society of Criminology, Chicago, Ill. (1974); 5. Cocozza & Steadman, *supra* note 63, at 1095.

The Kozol study involved an exceptionally extensive evaluation protocol with independent examinations by two psychiatrists, two psychologists, and one social worker, a full psychological test battery, and a complete case history. Serious methodological criticisms have been made. For example, the authors failed to control for the length of time subjects were at risk in the community so "the group released against psychiatric advice could have been at risk as much as four years longer than the treated lower-recidivism group." Steadman, *Predicting Dangerousness*, in RAGE, HATE, ASSAULT AND OTHER FORMS OF VIOLENCE 62 (1976) [hereafter Steadman, *Predicting Dangerousness*]; see also Cocozza, *Dangerousness*, 15 PSYCHOLOGY NEWS 2 (Aug. 1973); Monahan, *Dangerous Offenders: A Critique of Kozol et al.*, 19 CRIME & DELINQ. 418 (1973).

studied, but this Article uses a figure of 80% accuracy as an estimate.⁷⁵ When we place these values in the conditional probability formula, we obtain the following result:

$$P(H \cap E) = P(H) \times P(E/H)$$

$$P(H \cap E) = .80 \times .40$$

$$P(H \cap E) = .32$$

Similar problems exist with the Maryland data from the Patuxent Institution. See Wilkins, *Treatment of Offenders: Patuxent Examined*, 29 RUTGERS L. REV. 1102 (1976). Morse suggests the reliability of predictions of violence are accurate only one-third of the time under ideal conditions. He cites the mean accuracy in seven leading studies as approximately 19%. Morse, *supra* note 67, at 595. Even less success is reported by Quinsey, *Assessments of the Dangerousness of Mental Patients Held in Maximum Security*, 2 INT'L J. L. & PSYCHIATRY 389 (1979).

Although less thoroughly studied than "danger to others," predictions of "danger to self" have also failed to attain much accuracy. For example, if one predicts that those who have attempted suicide are likely to repeat the attempt, one may wind up with 99 false positives out of every 100 attempters since "[o]nly about 1% of all surviving attempters kill themselves within a year of the attempt." Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U. L. REV. 227, 239 (1974) (footnote omitted); see also Morse, *supra* note 67, at 596. It is not clear what role incarceration plays in these studies since none exist in which those predicted to be dangerous have spent no time in some form of confinement. For a recent monograph that reviews the myriad issues surrounding treatment of violent persons, see NAT'L INST. ON MENTAL HEALTH, *CLINICAL TREATMENT OF THE VIOLENT PERSON* (L. Roth ed. 1985) [hereafter CLINICAL TREATMENT]. The major limitation is that dangerous behavior in the general population and in selected populations is relatively rare. This means dangerousness has a low base rate. Predicting low-base-rate behavior always creates serious problems. Steadman, *Predicting Dangerousness*, *supra*, at 67; see also Morse, *supra* note 67, at 598-99.

One major researcher in the area summarizes the studies: "It is an astounding paradox to see the steady publication of research data over the past five to ten years showing the inabilities of predictors of dangerousness to make accurate estimations and simultaneously to observe [sic] state legislators and groups producing or recommending criminal and mental health codes and procedures which rely so heavily on the predictive concept." Steadman, *Predicting Dangerousness*, *supra*, at 67-68.

⁷⁵ "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment" *Greenwood v. United States*, 350 U.S. 366, 375 (1956). In fact, 80% accuracy is unlikely. The only diagnostic distinction that has been made with some consistency is that distinguishing between persons considered normal and those considered psychotic — severely unable to cope with reality. "[R]eliability diminishes as one proceeds from broad inclusive class categories to narrower, more specific ones." Zigler & Phillips, *Psychiatric Diagnosis: A Critique*, 63 J. ABNORMAL & SOC. PSYCHOLOGY 607, 611 (1977); see also G. FRANK, *PSYCHIATRIC DIAGNOSIS: A REVIEW OF RESEARCH* (1975); Katz, Cole & Lowey, *Studies in the Diagnostic Process*, 125 AM. J. PSYCHIATRY 937 (1969); Morse, *supra* note 67, at 608-11; Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA L. REV. 379, 381 (1973).

The resulting value of 32% accuracy is substantially below the clear and convincing range of 60 to 80% accuracy, which is a reasonable mathematical interpretation of the constitutionally mandated standard of clear and convincing evidence for civil commitment. In fact, it does not even reach the 51% accuracy of the less demanding preponderance standard. Sixty-eight erroneous commitments would be allowed under the 32% figure. This means that for every one hundred persons involuntarily hospitalized, more than two-thirds would have been committed without actually meeting the commitment standard. One might wonder whether any legal system can tolerate so many instances of error, particularly when this high risk of error is accompanied by substantial costs to individual liberty.

According to this probabilistic analysis of civil commitment, for commitment decisions to be made within the bounds of the clear and convincing evidence standard, diagnoses of mental illness and predictions of dangerousness would both have to achieve at least 80% accuracy. At the present time such a level of accuracy is not possible with respect to dangerousness, and may never be possible given certain inherent limitations on making such predictions.⁷⁶

The probability analysis leads to the conclusion that the use of dangerousness as an element in civil commitment cannot be implemented at a constitutionally mandated level of reliability if this standard is interpreted probabilistically. Given the current methods for predicting dangerousness, civil commitment within the bounds of constitutional requirements becomes a logically impossible task. Must we then reject dangerousness as a proper standard for civil commitment based on this empirical analysis or abolish civil commitment itself?⁷⁷ The next section examines whether there are nonprobabilistic values which override the prior analysis but still provide an empirical, logical framework for dealing with the problem of civil commitment.

D. Evaluation of Nonprobabilistic Values

The limitations of the dangerousness standard demonstrated above depend on a probabilistic, statistical approach to civil commitment. It could be argued, however, that the commitment decision should be made on the basis of qualitative information gathered from observations of each individual who is the current subject of a commitment decision rather than quantitative information about groups of persons who have

⁷⁶ See *supra* note 13 (concluding discussion).

⁷⁷ See *infra* text accompanying notes 101-04.

been committed in the past.⁷⁸ Proponents of retaining dangerousness as a meaningful and proper commitment standard might contend that a statistical approach fails to pay enough attention to the uniqueness of the individual.⁷⁹

Generally, courts have recognized the limitations of quantitative or mathematical information for the purposes of legal decision making. Our legal system hesitates to permit a person to suffer legal detriment solely on the basis of mathematical information about the base rate for some characteristic.⁸⁰ In order to lock up Mary Smith without bail for an alleged crime, it would not be sufficient to show that Mary Smith belongs to a group of people of whom some have quality *X* and that 90% of those with quality *X* jump bail. Qualitative information about an individual who is subject to such legal detriment would also have to be presented. It must be shown that Mary Smith herself had quality *X* for the base rate information to matter.

Such qualitative information is used in clinical prediction, a form of judgment often juxtaposed to statistical prediction in the social science literature on predicting future behavior.⁸¹ Clinical judgments, in contrast to statistical ones, may take account of each person's special characteristics. Clinical prediction may appear to be more than just statisti-

⁷⁸ See Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1425 (1979).

⁷⁹ See *Sargent v. Massachusetts Accident Co.*, 29 N.E.2d 825, 827 (Mass. 1940) (base rates alone are insufficient evidence to convince fact finder at preponderance level); Winter, *The Jury and the Risk of Nonpersuasion*, 5 LAW & SOC'Y REV. 335, 339 (1971) ("there is no case — and I mean *no* case — in which the only evidence is gross statistical conclusions."). Part of the debate referred to earlier on the use of mathematical information in a trial (*supra* note 48) stems from a failure to recognize the need to utilize statistical data only in an individualized context. Ellman and Kaye point out that the failure to do so involves a confusion of the probability of exclusion, which can be based solely on statistical data, and the probability of pinpointing the proper person. For example, even if a haplotype in bloodtyping can exclude 95% of a potential sample of donors, it does not identify the particular defendant as the father in a paternity suit. Let us imagine a case in which we know a woman has been impregnated by an adult male in Los Angeles and the sample size is two million males. Let us say the test eliminates 95% of the sample but leaves 5%. That means there are 100,000 men who potentially could be the father. Ellman & Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?*, 54 N.Y.U. L. REV. 1131, 1140-41 (1979); see also Williams, *supra* note 63, at 305.

⁸⁰ See generally McCormick, *supra* note 64, § 210, at 651 (arguing "[i]n one important sense, all evidence is statistical. Admittedly, courts sometimes suggest that evidence about a class of objects cannot be used to support a conclusion about a member of the class. But we rely on such evidence all the time.").

⁸¹ See Morse, *supra* note 67, at 594; Underwood, *supra* note 78, at 1420-21.

cal prediction because of its capacity to consider qualitative differences among people.⁸² The individualistic orientation of clinical prediction also seems to be more consistent with our intuitive feelings about prediction and decision making.⁸³

These two factors — a greater appearance of fairness and intuitive appeal — may give decisions reached through clinical analysis the appearance of having greater legitimacy than those reached through statistical analysis.⁸⁴ Thus, it might be argued that despite the probabilistic statistical analysis presented earlier, dangerousness can still be justified as an appropriate standard in civil commitment through the use of clinical prediction because of nonprobabilistic values, such as considerations of individual fairness, and to protect the intuitive appeal of the commitment process.

Several studies have compared the accuracy of clinical and statistical predictions in the social sciences. Regularly, these studies find that basing decisions on statistical information proves more accurate than using clinical information when making predictive judgments.⁸⁵ Application of the dangerousness standard to decisions about whether or not to hospitalize someone involuntarily involves just such a predictive judgment. The primary focus of the clinical judgment about dangerousness is whether or not the person can be expected to behave dangerously in the

⁸² Underwood, *supra* note 78, at 1425.

⁸³ *Id.* at 1428-29.

⁸⁴ *Id.*

⁸⁵ For example, Professor Morse found:

The comparative accuracy of statistical and clinical prediction is one of the most well-studied topics in behavioral science and one of the few in which there is near unanimity in the outcome of the studies. Statistical prediction is nearly always more accurate. Prediction based on clinical judgment may seem more "human," but it is simply not as good as mechanical application of actuarial data to the case at hand.

Morse, *supra* note 67, at 594-95 (footnote omitted).

In 1954, in a now famous book, *Clinical Versus Statistical Prediction*, Paul Meehl made the classical evaluation of the two methods. Holt criticizes Meehl and others and argues that most comparative studies of the two methods are unfair to the clinical method. Nonetheless, Holt acknowledges: "Clinical psychologists are trained specifically in assessing personality, not in making predictions of behavioral outcomes." Holt, *Yet Another Look at Clinical and Statistical Prediction: Or, Is Clinical Psychology Worthwhile?*, 25 AM. PSYCHOLOGIST 337, 341 (1970). See Slobogin, *supra* note 74, at 109-27 (discussion of what author calls clinical and actuarial prediction). See generally Underwood, *supra* note 78, at 1420-32 (given limits of knowledge on prediction of violent behavior, it is unfortunate that the statistical method is not joined to the clinical with respect to involuntary mental patients as it is in the context of paroles).

future.⁸⁶ Thus, dangerousness determinations are most susceptible to the inadequacies of clinical prediction.⁸⁷

The fact that clinical prediction is consistently less accurate than statistical prediction is counterintuitive for most people.⁸⁸ Nonetheless, if clinical predictions are consistently less accurate than statistical predictions, an argument based on individual fairness cannot be sustained. After all, one major purpose of law and reason is to controvert wrong intuitions. In some circumstances the perceived legitimacy of clinical prediction may cloak prejudice and ignorance. Legal process is committed to penetrating false beliefs; it must be prepared to acknowledge when the emperor is indeed unclothed. Thus, although a judge may feel he or she is engaged in individualized prediction and decision making in which intuition and judgment are superior to statistics, the judge should be prepared to give up reliance on this clinical approach once the inadequacies of clinical prediction are demonstrated.

In fact, various psychological studies suggest that a systematic bias operates when both invalid clinical information and valid statistical information are available. Decision makers ignore the valid statistical data and are guided to a false conclusion by the invalid clinical data.⁸⁹

⁸⁶ "[D]angerousness is essentially a prediction, an estimation. Dangerousness is not dangerous behavior." Steadman, *Predicting Dangerousness*, *supra* note 74, at 56.

⁸⁷ Courts have recognized the special difficulty in predicting future events. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 402 n.4 (1978) (Powell, J., concurring) (prediction that children will not become public charges unacceptable as prerequisite for issuing marriage license to parent; statute authorizes standardless distinction and hence raises serious question of procedural due process "in light of the hazards of prediction in this area"); *State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977) (reasonable-doubt standard should not apply to civil commitment proceedings because prediction of dangerous conduct cannot be made with same certainty as determination of past fact), *cert. denied*, 435 U.S. 129 (1978). Nonetheless, in the capital sentencing context, the Supreme Court has declared prediction of future events which have legal consequences to be constitutional. *See Jurek v. Texas*, 428 U.S. 262 (1976) (holding constitutional a Texas statute imposing the death penalty on an offender convicted of certain categories of murder contingent upon a prediction that he or she would be violent in the future). "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made." *Id.* at 274-75. The method of prediction, particularly when legal consequences follow, should be the most accurate available. *See Morse*, *supra* note 67, at 595 ("The law should thus be extremely skeptical about pure clinical prediction. Although statistical prediction also is generally not highly accurate, it is the best tool for making legal predictions.").

⁸⁸ Underwood, *supra* note 78, at 1428-29.

⁸⁹ When "worthless specific evidence is given; prior probabilities are ignored." Kahneman & Tversky, *On the Psychology of Prediction*, 80 PSYCHOLOGICAL REV. 237, 242 (1973).

Apparently, decision makers may be misled by intuitively appealing, but often factually inaccurate, judgment devices. These devices are termed "heuristics."⁹⁰

One such judgment device is called the "representativeness heuristic" because it "refers to the tendency to predict the outcome that appears to be most representative of the available evidence."⁹¹ When a judge is asked to determine whether a particular person should be committed, a mental health expert, usually a psychiatrist, advises the judge whether the person meets the mentally ill and dangerousness standards. The better experts typically base their opinions on clinical interviews and sometimes the results of psychological testing. If the expert considers the person dangerous, this usually determines the judge's decision.⁹²

Both the mental health expert and the judge treat the clinical information about the person as representative of the universe of information that should properly be considered when making a commitment determination. The judge is unlikely to discount the expert's clinical prediction if only one essential source of information has been neglected. That information is the base rate for dangerousness. Both in the general population and among those diagnosed as mentally ill, the base rate for dangerousness is extremely low.⁹³ The judge has not been trained to understand that

if only 10% of a particular group are expected to engage in future violent behavior on the basis of prior probabilities (base rates) and if the specific evidence concerning the predictions is of poor reliability (e.g. clinical assessments and certain psychological test indices), then the predictions should remain very close to the base rates under the above conditions.⁹⁴

Recall that constitutionally permissible commitment, under the clear and convincing evidence standard requires the expert to predict with 60-80% probability of being correct that the respondent is mentally ill

⁹⁰ "[P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors." Tversky & Kahneman, *Judgement Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974). See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Kahneman, Slovic & Tversky eds. 1982).

⁹¹ Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCHOLOGIST 224, 229 (1978).

⁹² See Stier & Stoebe, *supra* note 49, at 1333-34.

⁹³ See Morse, *supra* note 67, at 593 ("infrequent behavior is especially hard to predict"); Jacoby, *Dangerousness of the Mentally Ill — A Methodological Reconsideration* in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 20, 31 (C. Frederick ed. 1978) ("the mentally ill, as a group, are not especially dangerous").

⁹⁴ Shah, *supra* note 91, at 229.

and will commit a future dangerous act.⁹⁵ The base rate for dangerousness indicates that the actual likelihood of such an act occurring is closer to the base rate figure such as the 10% described above. When something has a high base rate, it is very likely to occur. For example, if the base rate for dark hair among Spaniards is high, clinical judgments or intuitions that a Spaniard is likely to have dark hair are likely to be substantiated more often than not. Intuitions based on qualities with a low base rate are likely to be wrong more often than not. Thus, decisions based on predictions made with clinical data are likely to be even more susceptible to error than those based on statistical data, which can control for the impact of the base rate. Even statistically based predictions of dangerousness were shown in the earlier section to produce correct commitment decisions no more than 32% of the time.⁹⁶

The problem of using predictions of dangerousness to determine whether a convicted felon should be sentenced to death has not yet been examined as it has in the civil commitment context. In fact, it may never be possible to make such statistical studies unless a large group of convicted murderers sentenced to death for dangerousness have their capital sentence commuted. However, it is not difficult to see how the prior analysis applies to cases similar to that of Thomas Barefoot. This would involve predicting future dangerousness given that a person had been convicted of murder. It might be argued that the issue of feloniousness has a less than perfect probability value; that is, Barefoot's conviction is less than 100% certain to be correct. However, even assuming a 100% value for the accuracy of the conviction of murder variable, since these are criminal cases involving the penalty of death, the determination of future dangerousness must be made beyond a reasonable doubt.⁹⁷

If we require that the decision to invoke capital punishment be made

⁹⁵ See *supra* note 66 and accompanying text.

⁹⁶ See *supra* text accompanying notes 68-76.

⁹⁷ 1973 Tex. Gen. Laws 426.

Art. 37.071 Procedure in capital case . . .

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

. . . .

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society

(c) *The state must prove each issue submitted beyond a reasonable doubt*

. . . .

Id. (emphasis added).

with at least a 90% probability of being correct, then for cases like *Barefoot*, the decision maker must be at least 90% accurate in predicting the future dangerousness of the person subject to the death penalty. Although recent research suggests the possibility of improved predictions of future dangerousness for persons with a history or a pattern of prior violent crimes, predictive accuracy is still far short of the 90% certainty standard.⁹⁸ Moreover, cases similar to *Barefoot*, in which the testifying psychiatrists never even examined the subject, are clearly susceptible to all the failings of clinical prediction described above.

Earlier I noted that clinical prediction appealed to us intuitively and seems fairer. This view is mistaken. Quantitative and qualitative analyses have shown that a commitment system based on predictions of future dangerousness has only an illusory analytical validity. Once one adopts the conventional social scientific conception of dangerousness, it is hard to avoid the conclusion that predictions of dangerousness are unreliable at best.

IV. THE PRIVILEGED VALUES OF SOCIAL SCIENTIFIC DISCOURSE

Only if two conditions are met would the conventional use of the dangerousness concept rescue civil commitment from civil liberties problems so that its utilization to limit liberty and take life would be justified. First, dangerousness must actually exist as a property of persons which warrants limiting their liberty. Second, dangerousness must be a property of persons which can be measured reliably.⁹⁹ The probabilistic analysis presented in Section III establishes that dangerousness is *not* a property of persons that can be measured with sufficient reliability to meet even a minimal standard of proof.

Were law a social science, or dangerousness a wholly empirical concept, such a demonstration would be sufficient to invalidate the use of dangerousness in civil commitment.¹⁰⁰ However, law is not and cannot

⁹⁸ CLINICAL TREATMENT, *supra* note 74, at 80.

⁹⁹ See *supra* text accompanying notes 78-97.

¹⁰⁰ See generally M. SAKS & R. HASTIE, SOCIAL PSYCHOLOGY IN COURT 154-91 (1978). For a normative approach, see *supra* text accompanying notes 62-77. Justice Brennan noted:

It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.

Craig v. Boren, 429 U.S. 190, 204 (1976) (holding unconstitutional an Oklahoma statute permitting females to drink beer at age 18 but requiring males to be 21; the Court

be a strictly empirical science, and dangerousness is not a wholly empirical concept. We recognize that the law utilizes a plethora of concepts without reliable, measurable, empirical markers to make decisions about peoples' lives. Legal terms of art facilitate making normative distinctions when talking about different cases and their consequences. We do not pretend that terms of art, such as "negligence," refer to properties or can be reduced to properties that actually exist in certain situations or persons. The label "negligence" may be used in a case involving an accident to mean something like "these defendants had a duty of care which was breached and therefore they *should* be held responsible for the consequences of their actions." We do not lose sight of the normative quality of these judgments.

We do lose sight of the normativeness of the concept of dangerousness, however, and treat it as if it were a wholly empirical concept.¹⁰¹ A demonstration that our confidence in dangerousness cannot be substantiated, as presented in Section III, should invalidate the dangerousness concept if we seriously consider the conventional social scientific approach implicit in the dialogue between Justices White and Blackmun. However, a striking anomaly emerges from the literature and the cases on dangerousness in this regard.

The unreliability of findings of dangerousness in the civil commitment context is notorious,¹⁰² yet almost no scholars¹⁰³ or courts are pre-

found the use of statistics on the relationship between maleness and driving when intoxicated unpersuasive).

¹⁰¹ One of the reasons for this is psychological. We are more likely to mistake dangerousness, and not a concept like negligence, for a thing that exists in the real world partly because the concept of danger has become so emotionally charged. Beginning in childhood, we learn that certain situations can harm us. We do not put our hands in a fire and we do not caress a lion in Africa. This conditioned fear and avoidance of harmful situations and objects becomes associated with the concept of danger. We also develop a fear of persons labelled mentally ill. See Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness*, 35 J. CONSULTING & CLINICAL PSYCHOLOGY, 159 (1970), reprinted in *THEORY AND RESEARCH IN ABNORMAL PSYCHOLOGY* 304 (D. Rosenhan & P. London eds. 1975). These two fears — of mental illness and of situations and things labelled dangerous — then combine to make it very easy to rationalize decisions to involuntarily hospitalize persons labelled as both mentally ill and dangerous. The same analysis applies even more strongly to the case of convicted murderers labelled as dangerous.

¹⁰² See Shah, *supra* note 49, at 160-61. Even Justice White in *Barefoot* acknowledges the unreliability of dangerousness predictions:

We are aware that many mental health professionals have questioned the usefulness of psychiatric predictions of future dangerousness in light of studies indicating that such predictions are often inaccurate. . . . Dr. John Monahan, upon whom one of the State's experts relied as "the lead-

pared to accept the implications for civil commitment that properly follow within the social scientific approach. Some scholars strain mightily to rationalize and legitimate the concept¹⁰⁴ to eliminate the choice between abolishing civil commitment or returning to paternalistic practices that threaten civil liberties. There seems to be some strong unarticulated appeal to the continued use of civil commitment, at least in some circumstances,¹⁰⁵ which keeps us from abolishing it even when the practice cannot satisfy the conventional criteria for its justification. Articulating the intuitions behind this appeal reveals that our concept of dangerousness does have a normative component, which we lose sight of when we privilege the values of social science discourse.

A. *The Role of Our Moral Intuitions*

Despite clear and repeated evidence of the unreliability of dangerousness predictions, our continued utilization of civil commitment can be partly attributable to an implicit feature of our thought. We simply hold widely shared moral intuitions that it is sometimes not only just but right to involuntarily commit some persons to mental institutions.¹⁰⁶ This moral intuition, however, has not been sufficiently defined to generate clear criteria for identifying the persons and circumstances in

ing thinker on this issue," . . . concluded that "the 'best' clinical research currently in existence indicates that *psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past . . . and who were diagnosed as mentally ill.*"

463 U.S. 880, 900 n.7 (quoting J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47-49 (1981)) (emphasis in original).

¹⁰³ Cf. Myers, *Involuntary Civil Commitment of the Mentally Ill: A System in Need of Change*, 29 VILL. L. REV. 367, 413-14 (1983-84). But see Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54, 67-76 (1982).

¹⁰⁴ See, e.g., Monahan & Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 L. & HUM. BEHAV. 37 (1978).

¹⁰⁵ See National Center for State Courts' Institute on Mental Disability and the Law, *Guidelines for Involuntary Civil Commitment*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 409 (1986). The author of this Article, a member of the National Task Force of the Center for State Courts, was impressed by the group's unity of view that services must be provided, even, if necessary, involuntarily. *Id.* at 413. Task Force members representing patients' rights organizations or families with mentally ill members shared this view. In contrast, just a decade ago, patients' rights advocates argued for strict limitations and even abolition of commitment.

¹⁰⁶ The structure of the argument is like that employed in R. DWORKIN, *LAW'S EMPIRE* 183 (1986).

which civil commitment is just.¹⁰⁷ Consequently, we seek to articulate such criteria in the law.

It is easy to accept that mental illness is a necessary condition for civil commitment and, in the current legal culture, that mental illness is *not* a sufficient condition to warrant a deprivation of liberty. Dangerousness can be seen as a failed attempt to articulate the further condition that would satisfy our intuitions about justice in this context. The failure lies in the misguided effort to reduce a moral intuition to factual properties.¹⁰⁸ Despite the social scientific evidence, we do not abandon civil commitment because our moral intuitions remain strong.

Consider some examples of persons considered for commitment. Harry is a sixty-four year old white male, who has suffered from epileptic seizures since childhood. At home, where he lived with his married daughter and grandchildren, he became increasingly disorganized and agitated. He was unable to communicate what bothered him and when family members tried to talk to him, he became verbally and physically abusive. He threatened to kill himself and asked that someone give him a gun. Placed in a nursing home, he broke windows on his nursing ward and often forgot to take his medicine. He was diagnosed as psychotic.¹⁰⁹ His family felt involuntary hospitalization was the only solution since they could not keep him at home and he would not agree to voluntarily hospitalize himself.¹¹⁰ In this case, the moral intuition that something must be done for Harry was consistent with the substantive commitment law¹¹¹ since Harry was mentally ill, incompetent to make decisions for himself, and dangerous.

Roger, a twenty-three year old white male, dropped out of college and returned to live at home. When he began to stay in his room and failed to respond to his parents, he was taken to a psychiatrist for evaluation. He was diagnosed as a paranoid schizophrenic and put on a drug regimen which, when followed, made it possible for him to work

¹⁰⁷ For a discussion of many of the conflicting values that operate in this situation, see A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 1-108 (1975).

¹⁰⁸ See G. MOORE, *PRINCIPIA ETHICA* 5-21 (1922). For a discussion of how complex a fact itself is, see L. FLECK, *GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT* (1979).

¹⁰⁹ Based on a case in the hospital study cited in Stier & Stoebe, *supra* note 49, at 1453.

¹¹⁰ Serious questions exist about the competence of many mentally ill persons to give informed consent to voluntary hospitalization. Appelbaum, Mirkin & Bateman, *Empirical Assessment of Competency to Consent to Psychiatric Hospitalization*, 138 AM. J. PSYCHIATRY 1170 (1981).

¹¹¹ IOWA CODE ANN. § 229.1(1)-(3) (West 1985).

as a stock boy and participate in the normal routine at home. Periodically, however, Roger stopped taking his medicine and would become withdrawn. His mother could usually coax him into taking his medicine again. However, shortly after his twenty-third birthday, Roger apparently stopped taking his medicine and informed his parents that it was poisoning him. He once more withdrew to his room, would only eat certain foods if his mother tasted them first, refused to bathe or leave his room, and sat for long hours in the dark weeping until his parents became utterly distraught. Reasoning, begging, threats — all failed to get him to start taking his medicine again or to see the doctor. Finally, out of desperation, his parents instituted commitment proceedings, but he could not be involuntarily hospitalized because he was found not to be dangerous. It became very clear that Roger's thinking was very confused; he had created an elaborate fantasy world for himself. His home was a castle, where he was imprisoned. He could save himself only by resisting everyone and being careful not to eat any poisoned food or take any poisoned medicine. Roger was not mentally competent to make decisions for himself. Were the focus of commitment on competence instead of danger, it would have been possible to hospitalize Roger involuntarily and assist both him and his parents.¹¹²

At the age of forty-five, the mood swings that characterized Eleanor's life became more extreme and intense. A psychiatrist evaluated Eleanor as suffering from manic-depression. Eleanor began a drug program, which was of some assistance to her. However, periodically Eleanor suffered from intense depression and withdrew from her family. Other times, she became almost hysterically happy and lively and took the family car out, driving at high speeds on back country roads. She never had an accident but received two tickets for speeding. Her husband became alarmed and, when she refused to enter a hospital voluntarily, he had her committed. Although Eleanor meets the substantive standard actually used in commitment — mental illness and dangerousness — in her case involuntary hospitalization appears to be totally wrong.¹¹³

The Supreme Court in *O'Connor v. Donaldson* tried to capture our moral intuition about civil commitment when it held that "something more" than mental illness was required to justify civil commitment.¹¹⁴

¹¹² Based on a clinical case reported to the author.

¹¹³ Based on a clinical case observed by the author during a commitment hearing. Lack of mental competence may be included in a commitment standard, but may be rarely used, as in Iowa. Stier & Stoebe, *supra* note 49, at 1381.

¹¹⁴ 422 U.S. 563, 573-76 (1975). In a unanimous opinion, Justice Stewart wrote: "In short, a State cannot constitutionally confine without more a nondangerous individ-

The Court did not specify that the “something more” was dangerousness. In so doing, the Court was able to accurately reflect our inarticulate and strongly felt moral intuitions that we have an obligation to assist some mentally ill persons even involuntarily while others should be protected from state intrusion. In the case of Harry, the use of dangerousness as that “something more” than mental illness appears to warrant commitment. On the other hand, for Ralph, although there is “something more” to his situation than mental illness, which is not properly called dangerousness, focusing exclusively on dangerousness meant that Ralph could not be helped even though our moral intuition is that it would be right to do so. In contrast, Eleanor is both mentally ill and technically dangerous, but we do not feel it is just to hospitalize her involuntarily.

In practice, dangerousness represents that “something more” necessary for involuntary hospitalization. This probably reflects the police power association that dangerousness evokes. The unreliability of dangerousness predictions, together with problems of both under and over inclusiveness, suggests that dangerousness should not be used exclusively. However, the problem remains of how to properly implement our moral intuitions in the civil commitment context by applying normatively a concept like dangerousness without the social science gloss on dangerousness that leads to its improper use in other contexts.

B. Shift in Discourses

We must shift the discourse about dangerousness from the social scientific to the normative for three reasons. First, social science discourse privileges certain values which create bad consequences, in this instance, for law. Social science discourse privileges the values of objectivity and verification. We have seen, in the case of dangerousness, that when it is not possible to sustain the values of objectivity and verification, we are forced either to ignore our moral intuitions about commitment or to ignore the blatant unreliability of dangerousness and make the law look like it cannot be justified. Second, the values of objectivity and verification translate concepts into facts which should operate independent of a particular context. Thus, if dangerousness appears to be a fact, it can be applied in contexts other than civil commitment. In these other contexts, such as the death penalty, we do not have shared social moral intuitions that justify deciding who should and who should not

ual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” *Id.* at 576.

receive capital punishment on the basis of dangerousness. Third, social science discourse allows legal actors to abdicate their responsibility for making decisions about peoples' lives.

The shift in the conversation about dangerousness in civil commitment from a social scientific discourse to a normative discourse need not exclude social scientific considerations. In this way, courts in each case must face the normative question directly and justify a decision to commit a person by giving further reasons of a moral sort.¹¹⁵

The concept of dangerousness, like negligence and many other normatively ambiguous terms in law, should be treated as a legal term of art. In doing so, we must recognize that just as we rely on language to make cognition and communication possible,¹¹⁶ language can also be treacherous. There is a tendency for linguistic concepts to be treated as if they must refer to things that actually exist in the world of sensation so that the only issue for us in dealing with a concept is how to develop an appropriate instrument to find and measure the referent of the concept. We construct a concept to make discourse possible but eventually treat the concept as if it stands for something that really exists.

For example, when Alfred Binet was asked to help educators in Paris place children in appropriate educational settings, he developed a set of questions to evaluate their problem-solving capacities, which became the Stanford-Binet Intelligence Test.¹¹⁷ Eventually, people began talking about the measure of performance on this test, the Intelligence Quotient or I.Q., as if it were a measure of intelligence and then as if it were intelligence itself. The debate about I.Q. then centered on the reliability of the Stanford-Binet test. Focusing on reliability avoided the

¹¹⁵ See *supra* text accompanying notes 99-114; *infra* text accompanying notes 116-21.

¹¹⁶ Although no philosopher has satisfactorily explained it to us, we all know there is a real world out there. We are not all engaged in a *folie à tout*; most of us refuse to accept solipsism as a satisfactory world view. Yet, as thinking and experiencing beings, we constantly feel the tension of trying to capture the world of experience in a world of analysis which is necessarily linguistic. As Gadamer observed: "Every interpretation of the intelligible that helps others to understanding has the character of language. To that extent, the entire experience of the world is linguistically mediated." H. GADAMER, *supra* note 24, at 99. There may be experience without language but not until sensations are translated into words and concepts are we able to know our own thoughts or communicate them to others. Through our language we organize reality for ourselves. When we attempt to communicate that reality to others, we have to do so in a way that can be understood. Generally, that organization will follow certain social rules that give it a grammatical structure recognizable by others so they can, at least to some extent, evaluate our characterization of our reality for themselves.

¹¹⁷ See T. WOLF, ALFRED BINET 139-218 (1973).

question of whether that which it purported to measure, an underlying unified human characteristic called general intelligence, even existed. Application of I.Q. measures to various groups of people has had significant consequences for their lives.¹¹⁸

The parallels to dangerousness seem obvious. First, opinion evidence by psychiatrists that a person would commit an act in the future that was dangerous to self or others is a supposedly factual determination that is adopted by legislatures to limit the number of persons diagnosed as mentally ill who would be subject to limitations on their liberty.¹¹⁹ This factual indicator of the concept "dangerousness" is transformed into the idea that certain people have a measurable quality, dangerousness, that would warrant depriving them of their liberty or even their lives. Judges and juries deciding whose liberty should be limited and whose life taken, are bedazzled by the sleight of hand of making the conceptual appear factual. They have retreated from taking responsibility for treating dangerousness as conceptual shorthand for implementing their moral intuitions and for facing the continuing need to make normative judgments. Instead, the legal actors turn to psychiatrists to re-anchor the issue in what looks like a fact couched in empirical terms: the psychiatric prediction of future dangerousness. Obviously, opinion evidence of psychiatrists is neither objectively factual nor value-free. It is not surprising then that the legal conversation about dangerousness begins to look like a false enterprise.

C. *Reasons for Shifting Discourses*

If we shift from a social scientific to a normative discourse, we can preserve a legal concept such as dangerousness to explore and implement our moral intuitions about civil commitment. We can also avoid creating distortions in the legal conversation that can have immoral consequences for people's lives by inappropriately utilizing dangerousness in contexts other than commitment. Equally important, by making the legal conversation appear more rational we can avoid undermining the law's capacity to function properly as an organizing principle in

¹¹⁸ See *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979) (use of I.Q. tests which had disproportionate effect on black children held unconstitutional). "While many think of the I.Q. as an objective measure of innate, fixed intelligence, the testimony of the experts overwhelmingly demonstrated that this conception of I.Q. is erroneous. . . . [W]e cannot truly define, much less measure, intelligence." *Id.* at 952. See generally S. GOULD, *THE MISMEASURE OF MAN* (1981).

¹¹⁹ See, e.g., Bezanson, *Involuntary Treatment of the Mentally Ill in Iowa: The 1975 Legislation*, 61 IOWA L. REV. 261, 278 (1975).

our society.

The attraction of dangerousness within a social scientific discourse is its promise of objectivity and verifiability in judicial decision making. When social scientific claims to objectivity and verifiability are accepted, however, the resulting "facts" can be utilized in any context. We should not rationalize dangerousness in social scientific discourse to save civil commitment because the motive for rationalization is our shared moral intuition that sometimes civil commitment is just. Social scientific "facts" like dangerousness, however, can be used in contexts in which we do not have such widely shared intuitions.

Thus, the Court in *Barefoot* can be criticized for relying on studies of dangerousness in the civil commitment context to bolster a general notion of dangerousness in other contexts such as the death penalty. We simply do not have widely shared moral intuitions in the latter context. Use of social science discourse obscures the moral differences between the various contexts utilizing dangerousness. Translating whether certain people ought to be deprived of their lives into logical empiricist problems can allow decision makers to devalue their intuitive grasp of reality, including their grasp of the rightness or wrongness of action. Instead, they can imagine that their task is strictly conceptual and that responsibility for translating concepts, such as dangerousness, into realities, such as death, lies in the hands of empiricists such as psychiatrists. As a result, difficult normative decisions are perceived as merely technical, logical, and factual problems.¹²⁰

The dialogue between Justices White and Blackmun illustrates how this occurs. We no longer perceive Thomas Barefoot as a flesh and blood person. Instead, we imagine Barefoot only as a case, an impersonal label on an empirical problem.¹²¹ The legal conversation between Justices White and Blackmun¹²² gives the impression that the task for

¹²⁰ Gadamer states:

I think, then, that the chief task of philosophy is to justify this way of reason and to defend practical and political reason against the domination of technology based on science. That is the point of philosophical hermeneutics. It corrects the peculiar falsehood of modern consciousness: the idolatry of scientific method and of the anonymous authority of the sciences and it vindicates again the noblest task of the citizen — decision making according to one's own responsibility — instead of conceding that task to the expert.

Gadamer, *Hermeneutics and Social Science*, in 2 CULTURAL HERMENEUTICS 307, 316 (1975).

¹²¹ See J. NOONAN, PERSONS AND MASKS OF THE LAW (1976).

¹²² The exchange of views between Justices White and Blackmun in *Barefoot* (used to develop a dialogue in Section II) was not intended by the Justices to be viewed as a

the jury is merely to decide how to evaluate the statistical evidence for and against the capacity of psychiatrists to correctly predict whether a person who has committed a dangerous act in the past will do so again in the future. Although this may be a true characterization of what the conversation actually looks like, it is not what the conversation should properly be. Herein lies the danger of dangerousness for the legal conversation. It distorts the conversation. Instead of providing an opportunity for a normative dialogue on whether or not the state is justified in killing Thomas Barefoot, the concept of dangerousness seduces the participants into focusing on the experts' battle over scientific evidence.

To say that courts should confront normative questions in civil commitment and other cases raises further questions. Recognition that law is not and does not choose to be solely an empirical science makes legal actors uneasy about the enterprise in which they are engaged. If they are not fully constrained by fact and logic, then what, if anything, legitimates the legal enterprise? Most legal participants would object to the view that what they do is simply an exercise of power that protects the interests of the ruling elite. Ironically, anxiety about viewing law as merely contingent on the prejudices of the decision maker, leads legal participants back into the empirical modality of focusing on facts and their logical manipulation.

But as Section I showed, this dilemma is not unique to law. With the death of what might be called Cartesian foundationalism,¹²³ the philosophy of science too has confronted the dichotomy of objectivism or verificationism and relativism. The philosophy of science has extricated itself from choosing sides by recasting the discussion in terms of community and conversation. As was shown above, the example of science shows how law too can extricate itself from having to choose between an irrelevant and potentially dangerous logical empiricism and unconstrained authoritarianism or nihilism. However, this is possible only if the genuineness of the legal conversation is not distorted by treating normative issues such as dangerousness as if they were empirically constrained social science facts.

conversation. The statements of the two justices were taken from their published opinions. Yet it would seem fair to assume that these opinions reflect prior exchanges which occurred in the judicial conference and through the process of drafting their opinions. Since the published opinions are all that we are privy to, they will have to suffice for our analysis.

¹²³ See *supra* note 10.

V. A FINAL LOOK AT LEGAL INTERPRETATION

A. *One Hermeneutic Dimension: The Fusion of Horizons*

A legal conversation among judges about civil commitment or capital punishment is an exercise in interpretation. Today no one imagines that judges apply a mechanical logic to determine the meaning and applicability of a statute.¹²⁴ Interpretation proceeds through dialogue with the text, its context, and the interpretive community.

Recently, legal scholars have become interested in interpretation and have examined potential contributions from other fields, such as theology, philosophy, rhetoric, literature, and aesthetics.¹²⁵ An interpretation represents an interaction between the thing interpreted, for example, a literary text, an art object, or a legal statute, its context and the interpreter together with his or her interpretive community.¹²⁶ We assume that the interpreter approaches the interpretive experience in good faith. That is, she or he has no consciously personal or professional axe to grind but truly wishes to understand fully the object's meaning. The interpreter looks to his or her interpretive community for a dialogue that will shed light on the interpretive process.

In the nineteenth century the field of interpretation, which is called hermeneutics, had what we now consider a naive faith that an interpreter by dint of education could so steep him or herself in the culture of another time that it would be possible to learn both what some text meant to its creator and to its intended audience. Today we understand

¹²⁴ Today we find astonishing Justice Roberts' remark that the Court's only duty is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." *United States v. Butler*, 297 U.S. 1, 62 (1936).

¹²⁵ See, e.g., *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985). For an introduction to some of the issues in this area, see Patterson, *Interpretation in Law — Toward a Reconstruction of the Current Debate*, 29 VILL. L. REV. 671 (1983-84).

¹²⁶ Various aspects of the interpretive enterprise constrain the good faith interpreter. Perhaps an example from the world of art can illustrate my point. Assume the object whose meaning is to be interpreted is an oil painting. If it is a twentieth century example of abstract expressionism consisting of various colored geometric forms then the viewer is obviously less constrained by the object itself than if the picture were a painting by the nineteenth century English landscape painter, John Constable. If the setting for viewing is a private English country estate whose prior owners commissioned Constable to paint a scene from their domains, the painting will probably be experienced somewhat differently than if the setting is a museum retrospective of famous landscape painters in New York City. If the viewer has been trained as an art historian, she will surely see the painting — and certainly discuss it — in different terms than would the interested tourist or museum attendee.

that hermeneutics is "a continuing conversation rather than . . . the unveiling of definitive truth."¹²⁷ Nonetheless, even if we cannot ever capture the true and eternal meaning of a text or object, as good faith interpreters we are still constrained in what we attribute to it.¹²⁸ I cannot honestly look at a painting of the pietà by a Renaissance artist and claim it is primarily an exercise in arrangements of color and forms, nor look at an example of abstract expressionist art and claim it explores the sorrow and hope of the mother of God.

Once we understand the impossibility of achieving complete and accurate objectivity in science or in law, we also see that there can be no neutral conversation. The participants will have prejudices that interact with the object they seek to interpret and some will be inescapable. Instead of treating these inevitable prejudices as something necessarily destructive to the enterprise, we can recognize the potential benefits of the interpreter's prejudices, once we abandon the search for objective or verifiable truth as a goal.¹²⁹ Distorting prejudices often can be discounted when called to attention through dialogue. Other prejudices can enhance the meaningfulness of the interpretive exercise.¹³⁰

¹²⁷ A. MEGILL, *PROPHETS OF EXTREMITY* 271 (1985).

¹²⁸ *But see* Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984).

¹²⁹ Let me illustrate with an example from the world of art. A late 20th century viewer cannot fully appreciate what a 15th century Florentine artist was attempting to communicate in his paintings. We are likely to be ignorant of the identity and political importance of the real persons so often portrayed in such paintings but even the visual messages conveyed by the artist's techniques no longer form a part of our own visual education. *See* M. BAXANDALL, *PAINTING AND EXPERIENCE IN FIFTEENTH CENTURY ITALY* (1972).

Of course, we can read about the milieu of 15th century Florence and study the intentions and techniques of these Renaissance artists to enhance our appreciation of their artistic accomplishments, but we can never really see with the eyes of their contemporary audience. We have experienced a rich art education that includes 19th century impressionism and 20th century abstract expressionism. Because of this cultural history, we view Renaissance art with a different sensitivity to the color, forms, and perspectives created than would a 15th century Florentine. These are our prejudices. Without them the paintings of the Renaissance would be dead relics to us rather than glowing, moving visual experiences.

¹³⁰ As Gadamer noted:

It is not so much our judgments as it is our prejudices that constitute our being. This is a provocative formulation, for I am using it to restore to its rightful place a positive concept of prejudice that was driven out of our linguistic usage by the French and the English Enlightenment. . . . Prejudices are not necessarily unjustified and erroneous, so that they inevitably distort the truth. In fact, the historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our open-

Specially trained experts in a particular interpretive field will have learned some professional prejudices that affect their interpretations. Lawyers, for example, will have learned the impossibility of complete neutrality and the desirability of understanding as fully as possible the arguments for both sides in a controversy. They will have learned that interpreters of statutory legal texts should defer in some ways to the democratic institutions that enacted the texts.¹³¹ The legal conversation occurs within an ongoing legal tradition. The tenets of that tradition have become part of our prejudices and enhance the quality of our practice.

The professional standards of the legal tradition, including the need to defer to democratic decision makers, becomes part of the personhood of every member of the legal community through professional training and experience. Yet members of the 1988 legal community cannot per-

ness to the world. They are simply conditions whereby we experience something — whereby what we encounter says something to us.

H. GADAMER, *supra* note 24, at 9.

Bernstein suggests:

For Gadamer, it is in and through the encounter with works of art, texts, and more generally what is handed down to us through tradition that we discover which of our prejudices are blind and which are enabling. . . . [I]t is only through the *dialogical* encounter with what is at once alien to us, makes a claim upon us, and has an affinity with what we are that we can open ourselves to risking and testing our prejudices.

This does not mean that we can ever . . . achieve complete self-transparency. . . . To think that such a possibility is a real possibility is to fail to do justice to the realization that prejudices “constitute our being”. . . .

R. BERNSTEIN, *supra* note 9, at 128-29.

Richard Danzig provides a psychological analysis of a Supreme Court Justice that demonstrates the operation of prejudice possibly envisioned by Gadamer. In *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675 (1984), Danzig convincingly shows how Justice Frankfurter refused to excuse the children of Jehovah's Witnesses from responsibility for saluting the American flag because of his firm belief in the importance of “schools as welders of national unity.” *Id.* at 709. This commitment to general education stemmed in turn from his reaction to his own Jewish heritage. *Id.* at 691-705. The example here was chosen because it shows the complex ways in which the judicial interpreter's personhood may influence his reading of the Constitution and that this inevitable prejudice provides a point of view that can be reasonable and valuable. This is not an argument for the legitimacy of all prejudice. There are prejudices which our judicial system would not and should not tolerate. One role for the interpretive tradition is to evolve a practice that distinguishes good from bad prejudices.

¹³¹ How to implement this principle of deference has been the subject of much debate. For the classic statement of the principle of legislative deference, see A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

fectly comprehend the intentions of a community, even one as close in time as 1975, as expressed through texts such as statutes, legal opinions, and scholarly articles. This does not reflect differences in training or the limitations of language itself. It reflects the fact that current participants cannot escape the influence of the present socio-cultural context when interpreting texts of an earlier period. However, this inherent subjectivity should not be decried as a failing. It is an asset that contributes to the living meaningfulness of the ongoing interpretive enterprise.¹³²

We can achieve a fair reading of legal texts while recognizing that any interpretation is deeply colored by our own context. The text cannot be recreated objectively, as it was understood by its original creators. As contemporary interpreters, we can still achieve a genuine understanding of a text created by others in another time and place. Hans-Georg Gadamer characterized the relevant process as a "fusion of horizons."

"The horizon is the range of vision that includes everything that can be seen from a particular vantage point."¹³³ In trying to understand a horizon or vantage point from the past, such as the point at which a statute was enacted, we must accept the impossibility of escaping from our own context. Instead, we seek to fuse our own horizon, our contemporary interpretation, with that of the past. In so doing, "our own horizon is enlarged and enriched."¹³⁴ For example, when Renaissance artists developed the vanishing point perspective in painting, they were able to fuse two horizons. The medieval horizon focused on an intense religiosity. Their own horizon focused on the centrality of man as the viewer and experiencer of reality. They developed an interpretation of painting technique that creates for the contemporary viewer an experience of religious motifs in an illusory three dimensional space. Medieval religiosity and Renaissance anthropocentrism were fused in a new and creative interpretation.

The statutory text must be understood in the contemporary context. It is impossible to do otherwise.¹³⁵ A contemporary interpreter does not engage in an objective re-creation of the legislator's intent at the time of

¹³² "Awareness of our own historicity and finitude — our consciousness of effective history — brings with it an openness to new possibilities that is the precondition of genuine understanding." Linge, Introduction to H. GADAMER, *supra* note 24, at xxi.

¹³³ H. GADAMER, *TRUTH AND METHOD* 269 (1975).

¹³⁴ R. BERNSTEIN, *supra* note 9, at 143.

¹³⁵ See Fish, *supra* note 128, at 1334-35.

a statute's passage.¹³⁶ Instead, what occurs is a melding of the present interpreter's understanding of the original context with the contemporary context. The two horizons fuse. Judicial dialogue that confines itself to value-free facts fails to address the normative meaning of the text and does not achieve this fusion.¹³⁷

B. *Some Thoughts on Practice*

Interpreting the dangerousness element of contemporary civil commitment statutes in the conventional social scientific mode cannot achieve a fusion of horizons. The topic of such a legal conversation is the wrong topic. Substantial evidence suggests that adoption of the dangerousness requirement was intended to place responsibility for the decision to commit in the hands of judges and remove it from the hands of psychiatrists.¹³⁸ Though it was expected that psychiatric opinions about dangerousness would remain relevant, this restructuring of civil commitment suggests that the legislature intended to emphasize the normative dimension by incorporating dangerousness into the substantive standard for commitment. This understanding of the legislature's horizon comports well with the Supreme Court's holding in *Donaldson v. O'Connor*.¹³⁹ Despite the widespread legislative use of dangerousness in addition to mental illness, the Court did not endorse the dangerousness concept but indicated that "something more" than mental illness is constitutionally required. Consequently, the legislature's horizon should be seen to require contemporary interpreters to supply that "something more."

In doing so, the contemporary interpreter must rely on the contem-

¹³⁶ This is not only impossible but often not the intent of the original creators of the text, for example, legislators, themselves. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

¹³⁷ The process of such fusion can be compared to making a translation from one foreign language to another, when the translator

is bound by what stands there, and yet he cannot simply convert what is said out of the foreign language into his own without himself becoming again the one saying it. But this means he must gain for himself the infinite space of the saying that corresponds to what is said in the foreign language. . . . The task of the translator, therefore, must never be to copy what is said, but to place himself in the direction of what is said (i.e., in its meaning) in order to carry over what is to be said into the direction of his own saying.

H. GADAMER, *supra* note 24, at 67-68.

¹³⁸ See Bezanson, *supra* note 119; Shah, *supra* note 49.

¹³⁹ 422 U.S. 563, 573-74 (1975).

porary context. The legal conversation through which that "something more" receives its meaning should concern the justice of civil commitment for those persons who are candidates for involuntary hospitalization. Legislators who wrote the texts of the contemporary civil commitment statutes were attempting to transform earlier laws that derived from a social context dominated by a confidence in the value of paternalism. They sought to create laws that would reflect the predominant relevant value of the 1970s: the protection of individual liberty. Today these laws must be interpreted in light of two major developments in the current social context: evidence of the excesses of "deinstitutionalization" (the "bag lady" phenomenon) and increased public fear of potential victimization from violent individuals. Judges cannot help but consider these developments in giving a contemporary meaning to civil commitment and capital punishment statutes. The current interpreter's horizon ensures the contemporary relevance of the resulting interpretation.

To fuse these two horizons requires a normative conversation. The inherent and irremedial personhood of the interpreter, in the fusion of horizons, must be explicated and discussed in a frank and sincere dialogue. Such a dialogue has not occurred with respect to dangerousness. If a genuine conversation about dangerousness were to occur, it would not be forestalled by appeals to a false objectivity promised by empiricism. Instead of concentrating on whether psychiatric predictions of dangerousness are reliable, judges would ask: Is it *right* for us to interpret civil commitment statutes to protect the "bag lady" from the vicissitudes of the street?¹⁴⁰ Should the citizens of Texas be protected from condemned murderers who are considered dangerous by putting the murderers to death? These are the kinds of normative questions that need to be raised about dangerousness.

No doubt many normative links can be constructed to connect the original and contemporary contexts. It is not the purpose of this Article to preempt the conversation by advocating one of the possible links. The kind of link that is needed can be suggested nonetheless. If this one approach to fusing horizons refocuses the ongoing legal conversation in

¹⁴⁰ Expanding the utilization of civil commitment to re-institutionalize the "bag ladies" is not the only or preferred solution. The problem is not de-institutionalization but the failure of the local, state, and federal governments to provide the community services necessary to keep the mentally ill out of institutions and off of the street. Recognition of this need has been dramatized by the recent funding of demonstration projects to provide care without unnecessary institutionalization by the Robert Wood Johnson Foundation. AM. PSYCHOLOGICAL ASS'N MONITOR 12 (Apr. 1986).

the courts and scholarly journals, this Article will have succeeded whether or not the specific proposal is adopted.

Until the 1970s persons diagnosed as mentally ill could be hospitalized and treated involuntarily even if they had committed no act that warranted curtailment of their freedom.¹⁴¹ Commitment was person based in that a quality of the individual, mental illness, itself was sufficient to justify state curtailment of that individual's liberty. By contrast, an act-based approach required evidence of some actual behavior as a necessary condition for commitment.¹⁴² Many state legislatures in the 1970s revised their civil commitment statutes to create what appeared to be act-based statutes. These statutes require a finding of dangerousness, as well as mental illness, to warrant involuntary hospitalization.¹⁴³

This shift in focus from a person-based to what appears to be an act-based jurisprudence was prompted by an enhanced sensitivity to civil liberties. Civil commitment based on a person's qualities was viewed as a paternalistic and objectionable intrusion on individual autonomy, including the right to be different.¹⁴⁴ The dangerousness standard is sup-

¹⁴¹ See *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1203-05 (1974) [hereafter *Developments*]. Changes in the substantive standard for commitment in the late twentieth century are reminiscent of the standard used in the nineteenth century. Stier & Stoebe, *supra* note 49, at 1290-92.

¹⁴² [W]hereas mediation is directed toward *persons*, judgments of law are directed toward *acts*; it is acts, not people, that are declared proper or improper under the relevant provisions of law. This distinction is not quite so simple as it seems on the surface, for there are routine occasions within the operations of a legal system when judgment must be passed on persons. This necessity arises, for example, when a court must decide whether a convicted criminal should be admitted to probation or when a judge must determine which of two contesting parents should be given custody of a child. But in its core operations, in deciding, for example, whether a man has committed a crime or broken a contract, the standards of legal judgment are derived from rules defining the consequences of specific acts or failures to act; these rules do not attempt or invite any general appraisal of the qualities or dispositions of the person
Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 328-29 (1971).

¹⁴³ Beis, *State Involuntary Commitment Statutes*, 7 MENTAL DISABILITY L. REP. 358 (1983). In some states, including Iowa, it is constitutionally required that a recent overt act or threat must have occurred to warrant a finding of dangerousness. But the actual kinds of acts or threats and their relationship to danger may be quite tenuous. See Stier & Stoebe, *supra* note 49, at 1375-76.

¹⁴⁴ See Stier & Stoebe, *supra* note 49, at 1290-92. One constitutional scholar characterized concerns about the right to be different as no more than a petty upper-class problem with issues like hair length. Ely, *Democracy and the Right to be Different*, 56 N.Y.U. L. REV. 397, 405 (1981). For some mentally ill persons, however, their right to

posed to invoke the state's police power, rather than *parens patriae* justifications for state action.¹⁴⁵ Dangerousness, thus, is typically defined in the commitment context as the likelihood that a mentally ill person will harm him or herself or others in the future unless involuntarily hospitalized.¹⁴⁶

Dangerousness can avoid civil liberties problems only if two necessary conditions are met. First, dangerousness must be a property of persons, like brown hair, which some people have and others do not and which warrants special treatment. Second, we must be able to determine reliably which mentally ill persons have this property and which do not. Both conditions must be satisfied if findings of dangerousness are to serve any justificatory function in adjudication.¹⁴⁷

Sections III and IV of this Article addressed both of these conditions in the context of civil commitment and other applications of dangerousness. Is dangerousness a property of some human beings that justifies legal detriments? If it is, can it be determined reliably? The first question is couched in normative terms and invokes a normative discourse. The second question is couched in empirical terms and invokes a social scientific discourse. Section IV argued that the law wrongly treats dangerousness as if it were only an empirical concept with reliability problems. Dangerousness also is a normative concept whose normative quality cannot be ignored if it is to contribute to the justification of civil commitment.¹⁴⁸

be different, to display annoying but harmless behaviors in public, to accept abominable but unfettered living conditions that the upper-class would consider an act of madness in itself, is a much more serious problem than not cutting one's hair in the army. See generally W. GAYLIN, I. GLASSER, S. MARCUS & D. ROTHMAN, *DOING GOOD: THE LIMITS OF BENEVOLENCE* (1978).

¹⁴⁵ See *Developments*, *supra* note 141, at 1207-12, 1222-28.

¹⁴⁶ See Beis, *supra* note 143. For a discussion of some of the complexities of defining dangerousness, see Slobogin, *supra* note 74, at 101-02.

¹⁴⁷ Civil commitment is sufficiently justified if, in addition, mentally ill and dangerous persons are incompetent to recognize their problem and either control themselves or seek help voluntarily, the impositions on their liberty are the least restrictive necessary to provide assistance, and the treatment offered is reasonably effective.

¹⁴⁸ Some scholars concentrate on observation and measurement while others concentrate on ideas that cannot be observed and measured in the world. That the distinction may be rhetorical in character does not necessitate its abandonment, so long as it is not reified.

[T]here is no sharp line between "reasoning" and talk about facts and values. It is true that science has drawn such a distinction, seeking to rely exclusively on the two forms of thought, deductive and empirical, to which it gives a special standing. The appeal of these two forms of reasoning is at heart the same: each lays claim to the power of proof. Agreement with a

The importance of this thesis extends beyond the civil commitment context, in which dangerousness is now a well accepted basis for involuntary hospitalization of the mentally ill. Some states now permit detention of persons accused of a crime, but not yet found guilty, if a psychiatrist predicts that it is likely they will commit some dangerous act if they are released on bail.¹⁴⁹ With the emergence of terrifying diseases such as AIDS and the intransigence of disabilities created by dependencies on illegal drugs, some commentators now suggest that the dangerousness rationale should be extended to include forced hospitalization and treatment of persons who are not mentally ill.¹⁵⁰ As we have seen in the discussion of *Barefoot*, some states even permit a prediction of future dangerousness to determine who should and who should not suffer capital punishment.¹⁵¹ The problems identified in the civil commitment context counsel restraint in employing the dangerousness concept in other contexts.

In practice, the new civil commitment and capital punishment laws rely on psychiatrists to predict dangerousness as they rely on psychiatrists to diagnose the presence of mental illness. Operationally, dangerousness has come to be defined as the opinion of a psychiatrist that a mentally ill person would harm him or herself or others if not treated. A similar approach is taken in other contexts in which predictions of future behavior are made. If 'dangerousness' is not a quality that warrants special treatment or if we cannot reliably determine its presence in an individual, then both civil commitment and these other practices must be fundamentally rethought.

proposition of mathematics or of science can simply be compelled by the force of a logical or empirical demonstration. But on the matters that really divide a community, agreement cannot be compelled by the force of logic or by the demonstration of facts; it can only be reached, by discussion and argument

J. WHITE, *WHEN WORDS LOSE THEIR MEANING* 22 (1984).

¹⁴⁹ See E. SHAUGHNESSY, *BAIL AND PREVENTIVE DETENTION IN NEW YORK* 204-11 (1982).

¹⁵⁰ See, e.g., Lieber, *Coping with Cocaine*, ATLANTIC MONTHLY, Jan. 1986, at 47-48.

¹⁵¹ See, e.g., 1973 Tex. Gen. Laws 426, art. 37.071. The capital sentencing statutes of at least four other states now make proof of dangerousness an aggravating circumstance that will support the death penalty. See IDAHO CODE § 19.2515(g)(8) (Supp. 1984); OKLA. STAT. ANN. tit. 21, § 701.12 (West 1983); VA. CODE ANN. § 19.2-264.4(C) (1983); WASH. REV. CODE ANN. § 10.95.070(8) (Supp. 1984). In at least two other states, nondangerousness is explicitly recognized as a mitigating factor. See COLO. REV. STAT. § 16-11-103(5)(k) (1986); MD. ANN. CODE art. 27, § 413(g)(7) (Supp. 1987).

Although drawn from a capital punishment case, the participants in the *Barefoot* dialogue about dangerousness, as in most conversations about dangerousness, treated it as only an empirical concept.¹⁵² Empirical sounding conversation about legal issues also gives the legal enterprise itself a false patina of objectivity. Removing this misleading gloss may seem to some to expose the law's naked use of power. But as argued previously, law can forgo the false mask of an empirical science without assuming the face of an arbitrary dictator. One way to limit arbitrariness is to confine legal intervention generally to evidence of actual behavior on the part of those subject to legal consequences.

American jurisprudence is act rather than person based. This is consistent with our support of the values of liberty and justice over order. To limit state intrusions into the lives of its citizens, it makes sense to require that the state prove a person has performed a proscribed behavior before the state can call that citizen to account.

Although we generally prefer to attach legal consequences to acts, some characteristics of persons require the state to intervene in their lives. For example, there is a long tradition of attaching legal consequences to the personal fact of minority.¹⁵³ Not only may the state constrain the liberty of juveniles in ways that would be considered unacceptable for adults, but the state would not be fulfilling its moral responsibility to care for its youngest citizens if it did not do so.

The primary justification for allowing these special state intrusions on the liberty interests of minors is that young persons are not capable of making considered autonomous decisions in certain circumstances. The state balances its support for the value of personal autonomy against its moral responsibility to assist those who lack the mental and emotional competence to make certain kinds of decisions for themselves.

The civil commitment situation may be treated as analogous to the situation of juveniles. One might argue that when mentally ill persons are incompetent to make decisions about their own need for assistance,

¹⁵² For a discussion of what constitutes empiricism, see 3 *DICTIONARY OF THE HISTORY OF IDEAS* 545-51 (1973). For our purposes, empiricism approaches decisions by collecting facts — observable and measurable events in the world. Naive empiricism treats facts as if they are value-free. Contemporary empiricists recognize that what one considers a fact, how it is observed, and how it is measured are all actions that are affected by values. It has been useful in law to contrast discussions about empirical facts or data with discussions about values which are normative. See, e.g., Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in *LAW IN A CHANGING AMERICA* 56 (1968).

¹⁵³ See Stier, *Children's Rights and Society's Duties*, 34 *J. SOC. ISSUES* 46, 48 (1978).

the state has a moral obligation to prevent such persons from making decisions that would endanger their own or some other person's well-being. Assuming that the state can actually assist the incompetent mentally ill person and provide this assistance with minimal infringement on her liberty, then the state may be justified in civilly committing such a person.¹⁵⁴ Mental illness alone, however, does not justify violating a person's autonomy. A substitute decision maker like a judge is justified because, as a consequence of the mental illness, the person cannot make decisions for herself.¹⁵⁵ What is important in this view of civil commitment is the focus on incompetence rather than dangerousness. What is at issue is the capacity of mentally ill persons to decide whether or not

¹⁵⁴ For a description of the concept of least restrictive alternative and its actual implementation, see Keilitz, Conn & Giampetro, *Least Restrictive Treatment of Involuntary Patients: Translating Concepts into Practice*, 29 ST. LOUIS U.L.J. 691 (1985).

¹⁵⁵ See *Developments*, *supra* note 141, at 1223.

The exercise of the police power to confine persons in anticipation of future criminal behavior has been challenged as a denial of the fundamental fairness guaranteed by the due process clause and as an impermissible punishment for status. Nevertheless, society's interest in reducing harmful conduct might make preventive detention of dangerous persons constitutionally acceptable.

Even if states have the power to adopt a prediction-prevention approach to antisocial behavior, they have not chosen to apply it to authorize the confinement of all dangerous persons. . . . [U]nlike other members of society, the mentally ill may be incarcerated for the protection of the community because of their potential for doing harm rather than because of the harm they have caused. The equal protection clause demands that such disparate treatment of the mentally ill be justified. . . .

One potential justification . . . might be that the mentally ill . . . are substantially more dangerous than other groups. Although there is evidence that this belief is commonly held, studies indicate that the mentally ill as a class are at most slightly more dangerous, and quite possibly less dangerous, than their fellow citizens.

Id. at 1228-30 (footnotes omitted). Substantially diminished responsibility becomes a threshold requirement for special treatment of the dangerous mentally ill. *Id.* at 1228. Some states, Iowa, for example, require that persons have judgmental incapacity as part of the substantive standard for civil commitment. Unfortunately, such a provision is not implemented in practice. Stier & Stoebe, *supra* note 49, at 1374, 1380. See generally S. JORDAN, *DECISION MAKING FOR INCOMPETENT PERSONS* (1985). For an example of a normative approach to mental disorder and dangerousness, see Morse, *Justice, Mercy and Crazyness* (Book Review), 36 STAN. L. REV. 1485 (1984) (reviewing N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982)). It might be argued that the kind of paternalism directed at treating someone who is mentally ill and not competent to care for herself or seek needed services can be justified as a means for avoiding harm to her later self. See generally Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113 (R. Sartorius ed. 1983).

they should seek treatment. The state can impose a substitute decision maker and limit the autonomy of the mentally ill not because they are dangerous, but because the substitute decision maker is more likely to make the right treatment decision. Thus, the topic of the legal conversation about a particular civil commitment decision is the rightness of treatment for these particular incompetent mentally ill persons.

The situation of the convicted murderer is a different matter. There can be no argument that he or she is mentally incompetent to make decisions. Moreover, the consequence of state intervention in this instance is not a relatively brief constraint on liberty for the purpose of treatment in the least restrictive environment. It is imposition of the ultimate irreversible societal sanction: death. If the death penalty is to be used at all, it must be reserved for the most heinous acts and never to punish a hypothetical characteristic of a person — dangerousness. Since a majority of the Supreme Court is not prepared to overturn *Jurek* and *Barefoot* despite clear evidence that dangerousness cannot be reliably and hence constitutionally determined, the Justices should examine the validity of the dangerousness enterprise. What are the implications when the state decrees the death penalty for a hypothetical quality of certain persons? One is reminded of the many who burned in late seventeenth century America for having the hypothetical quality of being witches.

At the time of the global explorations of Christopher Columbus, some people warned that to venture beyond the horizon was to sail one's ship into the jaws of a dragon. Today there are those who would limit our horizon by using fear of violence in contemporary society to anchor us to a person-based jurisprudence rationalized by the concept of dangerousness. We must refuse to so limit our horizons and instead must risk the turbulent waters of a normative discourse unfettered by such false anchors as dangerousness.

We understand that a fusion of horizons does not capture some eternal, unvarying essence, but it still can contribute to the moral quality of our actions. It does not achieve a moral truth as envisioned by the naive believer in science or law as objective, verifiable enterprises. Modern scientists and members of the legal community, along with philosophers like Gadamer, have rejected the notion of truth as a knowable correspondence between something in the real world and the conceptual language we devise to talk about it. Rather, truth "is revealed in the process of experience . . . and that emerges in the dialogical encounter

with tradition.”¹⁵⁶

C. A Re-View of Barefoot

Genuine dialogue or conversation is the vehicle used to fuse the horizons of the past creators of texts and the present interpreters of their meaning in order to arrive at a persuasive, discursive truth. Justices Blackmun and White fail to achieve such a truth in their conversation about Thomas Barefoot.

Both Justices begin with a position. As the conversation proceeds, they ensconce themselves more firmly in their respective positions rather than engaging one another in the gentle art of dialogue. Consequently, their exchange is nearly farcical, although each appears to be dealing with reasons. Justice White is reduced to arguing that the American Psychiatric Association does not suggest that “psychiatrists are always wrong with respect to future dangerousness, only most of the time.”¹⁵⁷ Justice Blackmun criticizes such a position as “simply incredible.”¹⁵⁸ Instead of a reasoned evaluation of factual and normative purposes the conversation becomes an exchange verging on the *ad hominem*.

However, the most important aspect of the conversation that undermines the quality of the dialogue is the willingness of both Justices to shift the role of the scientific expert from a background contributor of information to the foreground, taking responsibility for the direction of the legal conversation. Instead of a conversation about the normative implications of using predictions about future acts to decide whether or not to exercise the ultimate authority of the state, the taking of a human life, the dialogue becomes a debate about the empirical implications of a body of research on predicting future dangerousness.

Both Justices set aside the authority of reasoning with one another and the requirement of taking personal responsibility for making a decision by concentrating on whether or not the jury should be allowed to hear certain psychiatric testimony. Justice White appeals to rules of evidence *qua* rules to justify letting in the psychiatric testimony. Justice Blackmun appeals to scientific demonstrations of empirical inadequacy to justify preventing information about future dangerousness from being shared with the jury. Both Justices act as if some statistical template existed that could be used to automatically screen out prejudicial

¹⁵⁶ R. BERNSTEIN, *supra* note 9, at 152.

¹⁵⁷ Barefoot v. Estelle, 463 U.S. 880, 901 (1983).

¹⁵⁸ *Id.* at 929.

evidence. For Justice White, the screening template is within the minds of the jurors; for Justice Blackmun, the judge must at least take responsibility for reviewing the reliability and prejudicial power of the evidence and the testifying expert. But both Justices are distracted from the normative track by concentrating on the reliability rather than the validity of dangerousness determinations.

Jones v. United States,¹⁵⁹ decided the same year as *Barefoot*, involved an involuntarily hospitalized mental patient. In his opinion for the Court Justice Powell recognized that in judicial decision making empirical issues should remain in the background. The Court rejected petitioner Jones' request for release from hospitalization and Powell addressed the dangerousness issue:

In attacking the predictive value of the insanity acquittal, petitioner complains that "[w]hen Congress enacted the present statutory scheme, it did not cite any empirical evidence indicating that mentally ill persons who have committed a criminal act are likely to commit additional dangerous acts in the future." . . . He further argues that the available research fails to support the predictive value of prior dangerous acts. . . . We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . ." *The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.*¹⁶⁰

The analysis of civil commitment presented earlier demonstrated that uncertainty about the unreliability of predictions of dangerousness does not exist; they cannot be made within constitutionally justifiable bounds of accuracy. Yet Justice Powell does have the right idea about what kinds of issues should be the focus of the legal conversation. The legal conversation should focus on normative questions such as when courts should defer to the legislature and not empirical questions such as whether or not psychiatrists can reliably predict dangerousness. The Court's majority and dissenting focus in *Barefoot* on the empirical experts, psychiatrists, is particularly ironic. As was discussed earlier, some if not all legislatures that introduced dangerousness as a standard for civil commitment did so in order to return the responsibility for civil commitment to the hands of the normative decision makers, the legal

¹⁵⁹ 463 U.S. 354 (1983).

¹⁶⁰ *Id.* at 364 n.13 (emphasis added) (citations omitted).

authorities.¹⁶¹ This does not mean that empirical issues should never be part of the judicial dialogue, but only that these issues should not be allowed to take over and effectively corrupt that dialogue as has the question of dangerousness.

¹⁶¹ See, e.g., Bezanson, *supra* note 119, at 282.