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Predicting the Supreme Court's Response to the Criticism of Psychiatric Predictions of Dangerousness in Civil Commitment Proceedings

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I. INTRODUCTION

During the last decade, both courts and legislatures have increasingly scrutinized civil commitment statutes and the practice of hospitalizing the mentally ill. Although reform has focused primarily on the imposition of new procedures for involuntary civil commitment, substantive changes in the law have also occurred.[1] Disenchanted with traditional subjective "clinical" standards[2] that depend on fallible

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1. Dix, *Major Current Issues Concerning Civil Commitment Criteria*, 45 LAW & CONTEMP. PROBS. 137, 138 (1982). The increased involvement of the legal system in the civil commitment process has resulted in the imposition of both substantive and procedural restraints to restrict coerced hospitalization of the mentally ill, protect patient rights, and reduce arbitrary application of vague and overbroad commitment criteria. *Id.* at 139. *See also* Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54, 55 n.8. (1982).

2. Clinical standards used to commit mentally ill individuals generally were derived from the "medical model" that supported hospitalization of individuals who re-

psychiatric judgments,[3] most courts and legislatures now require a finding of "dangerousness" to justify coerced hospitalization.[4]

The concept of "dangerousness" has spurred considerable debate in recent psychiatric and legal literature. By substituting customary clinical commitment criteria with the contemporary "dangerousness" standard, courts and legislatures seem to assume that such a criterion is more precise and limited, thus reducing the risk of erroneous detention.[5] Numerous studies have emerged, however, to demonstrate that psychiatric predictions of dangerousness are not reliable and do not identify accurately potentially violent individuals. Despite these empirical findings, most courts continue to permit psychiatric expert testimony regarding potential dangerousness to self or others to justify the exercise of the state's coercive power to hospitalize the mentally ill.[6]

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quired care and treatment based on a diagnosable mental illness. Decisions regarding the necessity for treatment and/or hospitalization, although in theory conforming to statutory requirements, rested almost entirely on the discretion of mental health professionals. *See* Morse, *supra* note 1, at 54. *See generally* Chodoff, *The Case for Involuntary Hospitalization of the Mentally Ill*, 133 AM. J. PSYCHIATRY 496, 497-501 (1976).

In the last several decades, both civil liberty lawyers and some physicians have rejected the medical model as an assertion of social control by states and psychiatrists over individuals who exhibit annoying or socially unacceptable behavior. *Id.* at 497.

3. Chodoff, *supra* note 2, at 499. The author agrees that "medical model criteria are 'soft' and subjective," thus often depending on the "fallible judgment of psychiatrists."

4. *See* Dix, *supra* note 1, at 140. Dix notes that those dissatisfied with traditional standards such as "need of care and treatment" have found the criteria that the proposed patient be dangerous to others to be a "conceptually satisfying standard for commitment." *But see* Chodoff, *supra* note 2, at 499 (arguing that any possible "fuzziness" of the medical model approach is not ameliorated by the adoption of the supposed "objective" criteria of dangerousness nor are lawyers or judges "any less fallible than psychiatrists").

Most states currently authorize hospitalization based on some "dangerousness" scheme. Although definitions vary, most statutes permit "preventive" detention upon evidence that an individual is mentally ill and poses some likelihood or risk of harm to him or herself or to others. For a recent overview of all state civil commitment statutes, see Beis, *State Involuntary Commitment Statutes*, 7 MENTAL DIS. L. REP. 358 (1983). Many states also authorize involuntary commitment based on either a "gravely disabled" criterion or some variation reflecting an individual's inability to care for him or herself. "Gravely disabled" may, in some states, require a finding of dangerousness to self. Under those circumstances, this Article will be relevant to such standards and the admissibility of evidence to establish the functional fact of "dangerousness."

5. Dix, *supra* note 1, at 143.

6. Albers, Pasewark, & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 CAP. U.L. REV. 11, 30 (1976). The authors contend that "despite the vast array of evidence suggesting the unreliability of psychiatric diagnosis and of the predictive capability of psychiatrists, the courts nevertheless, and surprisingly, continue to rely

The United States Supreme Court has not expressly addressed the constitutionality of police power commitments based on a "dangerousness" standard. It has, however, intimated that it would sustain the involuntary commitment of dangerous mentally ill individuals as a legitimate exercise of the state's authority to confine those persons who pose a threat to themselves or the community.[7] More importantly, the Court has never considered whether psychiatric opinions and predictions of future dangerous conduct may be admitted into evidence to establish the functional basis for the state to assert its police power.

This Article will examine several Supreme Court decisions and survey recent literature and caselaw to ascertain whether the Court would uphold the use of psychiatric opinions in civil commitment proceedings. It will conclude that despite the empirical evidence that questions psychiatric expertise and the potential for erroneous confinement, the Supreme Court will continue to permit psychiatrists and other mental health professionals to proffer such testimony. This Article will further postulate that the Court should not, and will not, restrict or limit psychiatric opinions and judgments as to dangerousness, but rather should trust the adversarial process to ferret out reliable from unreliable evidence in both short-term and indeterminate commitment proceedings.

II. OVERVIEW

Civil commitment of the mentally ill has traditionally been based on two substantive rationales: the state's police power and parens patriae authority.[8] Under the police power, a state has a legitimate interest in protecting its citizens from individuals whose dangerous

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heavily on such testimony in cases of involuntary hospitalization." They contend that "courts have not responded to the fallibility of psychiatric testimony by assuming responsibility for judicial determinations that philosophically and legally reside with them," and suggest further that the legal profession and the courts have therefore "surrendered a major segment of their role in decision making regarding involuntary hospitalization . . . ." *Id.* at 30-31.

Note that other mental health professionals such as psychologists, social workers, and psychiatric nurses may also testify in court proceedings. Because most of the literature focuses on psychiatric expertise, this Article is limited to the testimony of pshychiatrists, although it is perhaps relevant to other professionals as well.

7. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (regarding "mental illness," stating that assuming that the term can be given reasonably precise content and that the mentally ill can be identified with reasonable accuracy, there is still no constitutional basis for confining individuals if they are not dangerous and can live safely in freedom). *See also infra* notes 81-83 and accompanying text.

8. For a thorough discussion on the theories of civil commitment, see La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFFALO L. REV. 499, 501-506 (1981), and Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

tendencies are inimical to public welfare. The notion of protective paternalism fostered the theory that a state has a duty under its parens patriae authority to care for patients unable to care for themselves.

Courts have increasingly begun to limit state authority, recognizing that civil commitment of the mentally ill involves a severe deprivation of liberty engendering serious adverse social consequences to the individual.[9] Efforts to limit the broad scope of state power have resulted in both substantive and procedural reforms. State action, depriving an individual of liberty, may only be justified when the state has a "compelling interest" that outweighs an individual's fundamental right to liberty.[10] Within this limited area of legitimate state action, strict procedural safequards are required.[11]

Despite the narrowing of substantive standards and the increase in procedural safeguards, some critics continue to characterize current police power and parens patriae commitment schemes as unconstitutionally vague, thereby providing inadequate notice and warning to individuals as to what conduct may lead to confinement.[12] A companion criticism reflects concern that commitment criteria are overbroad and thus permit detention in the absence of sufficiently compelling governmental interests.[13] These legal attacks, along with the increased

9. Humphrey v. Cady, 405 U.S. 504, 509 (1972) (acknowledging that commitment to a mental institution entails a "massive curtailment of liberty"). *See also* Addington v. Texas, 441 U.S. 418, 425-26 (1979) (reaffirming that civil commitment for any purpose constitutes a significant deprivation of liberty and finding it indisputable that adverse consequences such as "stigma" can have a significant impact on the individual patient). In Lessard v. Schmidt, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976), the district court noted that a former mental patient may encounter serious obstacles when attempting to find employment, sign a lease, or buy a house. *Id.* at 1089. Patients confined to mental hospitals may also be deprived of friends and family and be subjected against their will to intrusive kinds of treatment and therapy that may violate their right to bodily integrity. Parham v. J.R., 442 U.S. 584, 626 (1979) (Brennan J., dissenting).

10. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972); *In re* Levias, 83 Wash. 2d 253, 257, 517 P.2d 588 (1973). *See also* La Fond, *supra* note 8, at 519.

11. Lessard v. Schmidt, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972). *See also* Addington v. Texas, 441 U.S. 418, 425 (1979) (holding that involuntary commitment proceedings require due process protections).

12. La Fond, *supra* note 8, at 516, cites Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976), as an example of a court finding a statute permitting the state to involuntarily commit mentally ill persons in need of care and treatment because of a mental disability to be "unconstitutionally vague." The author observes that, although most courts have not accepted the argument, the lack of specificity with respect to "dangerousness" criteria presents a strong case that police power commitments are also unconstitutionally vague because the standards fail to provide adequate notice to individuals. La Fond, *supra* note 8, at 510.

13. Dix, *supra* note 1, at 138. The constitutional doctrine of overbreadth is a substantive due process issue that requires judicial assessment of the legislative criterion

recognition of the hazards of involuntary commitment, including poor hospital conditions, the lack of treatment, and the collateral effects on civil rights, have led many courts to require a showing of "dangerousness" before permitting coerced hospitalization of the mentally ill.[14]

Use of a "dangerousness" standard demonstrates both judicial and legislative development of a primarily legal analytic framework and a substantial rejection of psychiatric concerns.[15] The "dangerousness" standard, however, remains elusive, ambiguous, and perhaps artificial because of the unlikelihood of accurate application.[16] Most state statutes do not define dangerousness with any precision or specificity.[17] Thus, state officials possess extraordinary discretion in their commitment decisions.[18] Most statutes also do not define the type or the gravity of harm necessary to justify commitment under a dangerousness standard.[19] Further, statutes are generally silent with respect to

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to insure that commitment is supported by a sufficiently compelling governmental interest. *Id.* Some critics have classified police power commitments as preventive detention, therefore effectuating a loss of liberty to prevent potential future harm. *See* La Fond, *supra* note 8, at 510. Because the individual is detained based on potential behavior rather than for an act already committed, the resultant risk of error is higher. Thus, the possible over-inclusiveness of these standards questions whether the state's interest is sufficiently compelling to sanction the individual loss of liberty. *Id.* at 510-13.

14. Weissbourd, *Involuntary Commitment: The Move Toward Dangerousness*, 15 J. MAR. 83, 84 (1982). The United States Court of Appeals for the District of Columbia was among the first to require a "dangerousness" criterion for civil commitment. *See, e.g.*, Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1968); Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968).
15. Weissbourd, *supra* note 14, at 86. Concern over traditional clinical commitment procedures that merely required certification by a physician and little or no judicial review prompted both courts and legislatures to develop more "objective" legal criteria. Rejecting the "almost blanket *parens patriae* justification" of need for care and treatment, courts began to require "dangerousness to self and others" as the necessary standard for involuntary commitment. Miller & Fiddleman, *Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes*, 60 N.C.L. REV. 985, 986-89 (1982). The "dangerousness" criterion, with its greater reliance on the police power, developed as a substitute for the potential abuses of parens patriae commitment schemes and thus as a limitation on psychiatrists' power to confine individuals solely for care and treatment. Weissbourd, *supra* note 14, at 86.
16. As one author indicates, a "dangerousness" standard may lack some of the defects of the traditional "need of care and treatment" standard, yet continues to "present real problems of overbreadth, equal treatment, and precision." Dix, *supra* note 1, at 140. *See also infra* Section II (discussing the empirical evidence demonstrating that psychiatrists and other mental health professionals are prone to over-predicting dangerousness). Without narrow and more precise statutory criteria, courts are also able to interpret, at their whim, what behavior is serious enough to trigger application of the commitment statute and, therefore, the detention of the individual.
17. *See* La Fond, *supra* note 8, at 510.
18. *Id.* at 510-11.
19. Dix, *supra* note 1, at 141. Dix indicates that some statutes merely refer to "harm"

both the likelihood of harm and the predictive level of accuracy that must be attained to avoid arbitrary application of the criterion.[20]

Introduction of the "dangerousness" concept has not altered traditional reliance on psychiatric expert testimony in commitment proceedings.[21] Courts and juries tend to defer to the judgments and recommendations of psychiatrists because of their supposed expertise to diagnose and predict accurately a patient's future behavior.[22] Moreover, courts have often been relegated to mere review of psychiatric decisions since they lack knowledge and expertise in the mental health field.[23] Because of this deference to psychiatric opinions, the admissibility of such testimony on the issue of dangerousness has become a vital concern in the civil commitment arena.

III. THE CRITICISM OF PSYCHIATRIC EXPERT TESTIMONY

Many commentators have concluded that psychiatrists have not been successful at predicting dangerous behavior.[24] Most of these crit-

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to others (*e.g.*, NEB. REV. STAT. § 83-1009(1) (1981)); others refer to "physical harm" (*e.g.*, ARK. STAT. ANN. § 59-1401(a) (Supp. 1981)); and several include nonphysical harm (*e.g.*, HAWAII REV. STAT. § 334-1 (1976); IOWA CODE ANN. § 229.1(2)(b) (West Supp. 1982-83)). Dix, *supra* note 1, at 141 n.22.

20. Dix, *supra* note 1, at 142. The author contends that most statutes are either "silent or useless concerning the required risk" of harm. Some statutes require a "substantial risk." *See, e.g.*, ME. REV. STAT. ANN. tit. 34, § 2251(7) (1978); WASH. REV. CODE ANN. § 71.05.020(3) (Supp. 1984). Others require a "reasonable expectation that there is a substantial risk" of harm. *See, e.g.*, LA. REV. STAT. ANN. § 28:2(3) (West 1985). Still others require a finding that the individual can "reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself or another." *See, e.g.*, MICH. STAT. ANN. § 14.800(401)(a), (b)(Callaghan 1980). Dix supports specific "quantification" in drafting (i.e., 50 percent, 75 percent, etc.) to ascertain the predictive risk required. Dix, *supra* note 1, at 142. For example, N.M. STAT. ANN. § 43-1-3(m) (1978), requires an "apparently quantitative requirement that the occurrence of the required injury be 'more likely than not'." Dix, *supra* note 1, at 142 n.29. Morse contends that although less vague criteria may "ensure greater fairness" in application, the foundation of the system remains unsound because of the poor predictive capabilities of "anyone." Morse, *supra* note 1, at 73-74.

21. Most state statutes continue to provide that psychiatrists or other mental health professionals shall evaluate the patient and testify at hearings. *See, e.g.*, WASH. REV. CODE § 71.05.250 (1974) (allowing testimony of the physcian and waiver of the physician-patient privilege at the probable cause hearing).

22. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 694 (1974).

23. Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife That Cuts Both Ways*, PSYCHOLOGY TODAY, Feb. 1969, at 42. Albers, Pasewark, & Meyer, *supra* note 6, suggest that courts and the legal profession have abdicated their roles in civil commitment hearings by relying on fallible psychiatric testimony. *Id.* at 30-33. The authors conclude that courts often permit psychiatrists to assume the role of actual decisionmaker, rather than witness, by construing psychiatric testimony as conclusionary. *Id.* at 30-31.

24. *See generally* J. ZISKIN, 1 COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTI-

ics argue that psychiatrists also do not attain a significant level of agreement among themselves in diagnosing mental illness of particular individuals.[25] The empirical data on these two issues question the efficacy of most state commitment schemes since they require findings of both the existence of mental illness and a likelihood of future dangerousness to self or others.[26] The data also challenge the integrity of commitment hearings because the primary evidence is a psychiatric evaluation of an individual's propensity toward future violence and a diagnosis of a specific mental illness.[27]

Most critics consider the greatest failure of psychiatrists to be the unreliability of their testimony in the courtroom and their use of vague labels to describe mental illness.[28] Those who object to the psychiatric labels used in diagnoses cite numerous studies and research documenting that psychiatrists rarely agree on which or how many elements are needed to justify a particular label.[29] Yet courts continue to permit and even encourage psychiatrists to offer opinions in commitment hearings and to describe patients by using technical terminology.[30]

Many commentators criticize the "extraordinary power" given to psychiatrists in civil commitment proceedings based on the assumption of expertise and the assumption that their diagnoses and conclusions are reliable.[31] Yet research demonstrates the general inability of psychiatrists to diagnose individual patients consistently. According to one popular commentator, the chance of one psychiatrist agreeing

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MONY (3rd ed. 1981). *See also* Ennis & Litwack, *supra* note 22, at 696; La Fond *supra* note 8, at 511; Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 583 (1977).

25. *See, e.g.*, Ennis & Litwack, *supra* note 22, at 701. Mental health practitioners have been criticized because of their inability to "define and categorize" specific mental disabilities. Thus, under the medical model, any "deviant" behavior could potentially be classified as a "disorder" thereby expanding the range of commitment statutes. Morse, *supra* note 1, at 68, 69.

26. *See* Beis, *supra* note 4, at 358.

27. *See* Ennis & Litwack, *supra* note 22, at 694-95. The authors note that psychiatrists are urged to offer their opinions on the "ultimate issues" of both potential dangerousness and existence of a mental disorder. *Id.* at 694.

28. Shell, *Psychiatric Testimony: Science or Fortune Telling?*, 7 BARRISTER, Fall 1980, at 6. In general, reliability refers to the "probability or frequency of agreement when two or more independent observers answer the same question . . . ." Ennis & Litwack, *supra* note 22, at 697.

29. Shell, *supra* note 28, at 8. Common diagnostic labels often include "psychotic," "schizophrenic," "passive-agressive," "sociopathic," and "psychopathic". For a thorough description of all diagnostic categories, see AMERICAN PSYCHIATRIC ASSOCIATION, DSM-III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. 1980).

30. Ennis & Litwack, *supra* note 22, at 694.

31. *Id.* at 695.

with the diagnosis of another is barely better than fifty-fifty.[32] Two other authors, summarizing a number of empirical studies, found broad diagnostic categories (e.g., schizophrenia) more reliable than specific sub-categories, but concluded that even in controlled conditions, the reliability rates in both categories are unsatisfactory.[33] They found that psychiatric judgments were not only unreliable with respect to the ultimate diagnosis, but that they also lacked consistency in the "perception of the presence, nature, and severity of symptoms."[34] The authors suggest that this low level of agreement will decrease further when the clinical observations are made in actual psychiatric practice, rather than under controlled experimental conditions.[35]

Comparatively few studies have assessed the validity or accuracy of psychiatric diagnoses.[36] Nevertheless, several researchers have determined that most specific diagnoses do not accurately describe actual symptoms exhibited by a patient and that there is little correlation between diagnoses and behavioral patterns.[37] Other researchers studying diagnostic validity have found no significant difference in the accuracy of those diagnostic predictions made by psychiatrists and those made by lay persons.[38] Further, since no connection has been established between the actual presence of a mental illness and the likelihood of violent behavior, critics argue that a finding of psychiatric

32. J. ZISKIN, *supra* note 24, at 126.

33. *See* Ennis & Litwack, *supra* note 22, at 699-708 (citing Zubin, *Classification of the Behavior Disorders*, 18 ANN. REV. PSYCH. 373 (1967)).

34. Ennis & Litwack, *supra* note 22, at 706. In other words, diagnostic disagreements cannot be totally explained by different diagnostic preferences. The authors contend that some psychiatrists may actually see diverse or more severe symptomatology in the same patient than other diagnosticians. *Id* at 706-07.

35. *Id* at 703. Note that controlled conditions in experimental settings generally refer to those measures taken to ensure that variables other than the one under investigation are not influencing the outcome. J. ZISKIN, *supra* note 24, at 73. Variables that may produce less reliable results in actual practice include such factors as inexperienced or incompetent psychiatrists, definitional ambiguities and biases, and semantic differences. Ennis & Litwack, *supra* note 22, at 703.

36. Validity generally refers to the relationship of one fact or variable to another. The most common use of validity is referred to as "predictive validity." In other words, given certain knowledge concerning variable A, one can state with a known degree of probability the likelihood of the occurrence or coexistence of event B. J. ZISKIN, *supra* note 24, at 76-78. In more general terms, validity refers to the actual accuracy of psychiatric judgments. Ennis & Litwack, *supra* note 22, at 697. In this context, the term refers to whether persons who have been diagnosed as mentally ill and determined to be dangerous pursuant to an involuntary commitment statute will in fact commit a violent or dangerous act after the prediction.

37. Ennis & Litwack, *supra* note 22, at 709-10. *See also id.* at 711 (citing Frank, *Psychiatric Diagnosis: A Review of Research*, 81 J. GEN. PSYCHOL. 157, 164 (1969)); Wittenborn & Lesser, *Biographical Factors and Psychiatric Symptoms*, 7 J. CLIN. PSYCHOL. 317 (1951).

38. Goldsmith & Mandell, *The Dynamic Formulation: A Critique of a Psychiatric Ritual*, 125 AM. J. PSYCHIATRY 1738 (1969).

disturbance provides little assistance in accurately predicting future dangerousness.[39]

The debate over the value of psychiatric testimony has been even more prevalent with respect to psychiatrists' ability to predict dangerousness. Most of the literature documents that dangerousness is over-predicted and that psychiatrists tend to err on the side of caution.[40] One commentator found that the highest rate of accurate predictions of potential dangerousness has been only about 35 percent.[41] Another study demonstrated that even under controlled conditions, at least 60 to 70 percent of the individuals determined to be dangerous were, in fact, harmless.[42] A recent monograph, published by the National Institute of Mental Health, reviewed the major research published in the 1970's and contended that psychiatrists are more often wrong than right in predicting dangerous behavior, especially over an extended period of time.[43] The monograph concluded that no psychiatric procedures or techniques had succeeded in reducing the high rate of "false positive" predictions; i.e., affirmative predictions of future dangerous behavior that are subsequently proven erroneous.[44] The author observed that: "it would be fair to conclude 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 . . . ."[45]

These findings are consistent with the position adopted by the American Psychiatric Association in a Task Force Report on clinical aspects of violence. The Association issued a report claiming that "the state of the art regarding predictions of violence is very unsatisfactory" and that the ability of psychiatrists to reliably predict future vio-

39. Ennis & Litwack, *supra* note 22, at 716.

40. Chambers, *Alternatives to Commitment*, 70 MICH. L. REV. 1107, 1120 (1972). *See also* Comment, *supra* note 24, at 583-84. Often, psychiatrists over-predict dangerousness "to avoid a situation where a person diagnosed as not dangerous then goes out into the community and commits an act of violence." Shell, *supra* note 28, at 8. Further, psychiatrists may over-predict violence out of fear of being responsible for the erroneous release of a violent individual. *See* J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 13, 22-25, 86 (1981).

41. Comment, *supra* note 24, at 583 (citing Kozol, Boucher, & Ganofali, *The Diagnosis and Treatment of Dangerousness*, 18 J. CRIME AND DELINQUENCY 371, 390 (1972)).

42. Ennis & Litwack, *supra* note 22, at 714. Note that proponents of psychiatric predictions suggest that the percentage of preventive detentions based on inaccurate predictions is "a necessary and inevitable cost of protecting society from the large number of truly dangerous individuals who are diagnosed accurately." *See* Shell, *supra* note 28, at 8. Opponents argue conversely that the high number of wrongly committed individuals cannot be justified "in a society that values liberty." Morse, *supra* note 1, at 74.

43. J. MONAHAN, *supra* note 40.

44. *Id.* at 49.

45. *Id.* at 47.

lence remains unproved.[46] The Task Force found that clinicians should not regard prevention of future violence as within their capabilities and that " 'dangerousness' is neither a psychiatric nor a medical diagnosis," but rather involves issues of legal and social judgment.[47]

Many commentators have relied on these empirical data to support the claim that to permit involuntary deprivations of liberty based on psychiatric testimony of dangerousness violates constitutional rights of prospective patients.[48] As one author commented, the research documents that police power commitment authority based on psychiatric predictions of dangerousness permits a state to confine individuals who, in most instances, pose no danger to themselves or the community.[49] The author contends that this conclusion inevitably raises a substantive due process issue since the state's purpose in committing individuals, that of protecting the patient or the community, is not promoted in most cases by the physical restraint.[50]

A proponent of the abolition of civil commitment concludes that inaccurate psychiatric predictions "create a powerful objection to involuntary commitment."[51] He further claims that until predictive accuracy is improved, the civil commitment system will continue to produce an unacceptable number of wrongful detentions.[52] He ultimately proposes that "our duty to protect the liberty of all persons must lead us to forego commitment in those few cases where many persons might agree that it is warranted."[53]

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46. AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 30 (1974) [hereinafter cited as APA REPORT].

47. *Id* at 33. The Task Force's primary finding was that judgments concerning the long-term potential for future violence and the "dangerousness" of a given individual are "fundamentally of very low reliability." *Id* at 23. Note, however, that the Association later distinguished predictions of short-term future behavior in civil commitment cases as "clinically different from predictions of long-term dangerousness." *See* Amicus Curiae Brief of the Am. Psychiatric Ass'n at 12, Barefoot v. Estelle, 103 S. Ct. 3383 (1983) [hereinafter cited as APA Brief]. *See infra* notes 160-62 and accompanying text.

48. *See, e.g.*, Ennis & Litwack, *supra* note 22, at 743. These authors specifically contend that depriving individuals of their right to liberty based on unreliable psychiatric judgments violates both substantive and procedural due process. *Id.*

49. La Fond, *supra* note 8, at 511.

50. *Id.* at 511-12. Based on the empirical evidence demonstrating that psychiatric predictions are more often wrong than right, a strong argument can be made that the state lacks a "compelling interest" to commit individuals upon evidence of a diagnosis of mental illness and of likelihood of future dangerous behavior. *See supra* notes 9-11 and accompanying text.

51. Morse, *supra* note 1, at 75-76.

52. *Id.* at 76.

53. *Id.* at 79. The author claims that for a variety of reasons, including the desire to control deviance, difficulties in the proper definition and diagnosis of mental disorders, vagueness of commitment standards, difficulties in accurately predicting future behavior, and procedural laxity, the present commitment system will re-

Despite the potential for erroneous detention, both federal and state courts continue to sustain police power authority in involuntary civil commitment proceedings.[54] As a result, many legal commentators advocate that psychiatric evidence be eliminated or at least severely circumscribed.[55] In addition, some authors advocate that coerced detention be permitted only upon a showing that an individual committed a recent overt dangerous act.[56]

Predicating confinement on overt and demonstrable behavior would establish state authority to detain an individual based on past conduct rather than potential future behavior.[57] Further, a history of past violence tends to increase the probability that future violence will occur.[58] A growing body of empirical knowledge suggests that where there are repetitive past acts of violence, predictions of future dangerous behavior become increasingly more reliable.[59] Although not totally satisfactory,[60] proponents argue that evidence of recent

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sult in a number of improper commitments and "will continue to function as an unjust system." *Id.* at 78. He argues further that the benefits of abolition will increase liberty, reduce role confusion and the onerous tasks of mental health professionals, enhance treatment, and will result in the freeing of wasted resources. *Id.* at 93. *But see* Rhoden, *The Limits of Liberty: Deinstitutionalization Homelessness and Liberation Theory*, 31 EMORY L.J. 391, 403 (1980) ("doctors have underestimated the seriousness of deprivation of liberty and the hazards of psychiatric treatment, [but] opponents of all involuntary confinement may underestimate the suffering that can result from failure to treat . . . lawyers may have over emphasized liberty").

54. LaFond, *supra* note 8, at 513-14.

55. *See, e.g.*, Matteson, *Involuntary Civil Commitment: The Inadequacy of Existing Procedural and Substantive Protections*, 28 U.C.L.A. L. REV. 906, 948 (1981). *See also* J. ZISKIN, *supra* note 24, and *infra* note 64 and accompanying text.

56. *See* Ennis & Litwack, *supra* note 22, at 750; La Fond, *supra* note 8, at 514. *See generally* Comment, *supra* note 24.

57. La Fond, *supra* note 8, at 514. As one author contends, an overt dangerous behavior standard may supply the state with a "threshold condition" for interference with individual liberty by providing reinforcement and support to potential inaccurate psychiatric predictions of dangerousness. Comment, *supra* note 24, at 592.

58. *See, e.g.*, Comment, *supra* note 24, at 583. *But cf.* APA REPORT, *supra* note 46, at 23-31. Note that the Report indicated that for prediction purposes "severely recidivistic offenders" might be considered at greater risk for repeated violence, but the actual probability still remains slight. *Id.* at 28. The Task Force cautioned further that it is "often forgotten that dangerousness is an attribute not only of persons but of situations and environmental factors . . . and all must be attended to when considering the 'dangerousness' of an individual." *Id.* at 25. These findings support the need for more thorough evaluations of individuals before predictions can be made (*see infra* note 156 and accompanying text regarding "clinical-predictive" evaluations) and question any assumption that lay judgments, based on statistical and actuarial data, provide any more sound results. *See infra* note 159.

59. J. MONAHAN, *supra* note 40, at 14-15.

60. *See, e.g.*, Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. OF CRIM. L. & CRIMINOLOGY 226 (1978). In a study of felony defendants adjudged incompetent, these researchers found that only ex-

dangerous behavior will at least reduce the risk of error and limit psychiatric evidence based totally on mere speculation.[61]

Because of the purported lack of psychiatric expertise in predicting potential dangerousness and the lack of agreement as to diagnoses, the question remains whether this kind of testimony should ever be admitted in police power civil commitment proceedings. Many critics fear that the highly prejudicial impact of such testimony creates an unacceptably high risk that a jury or court will be incapable of separating "scientific myth from reality."[62]

Some commentators would thus limit all psychiatric evidence to merely descriptive statements and exclude any testimony as to dangerousness, opinions, or predictions.[63] Another author suggests that psychiatric evidence should not be permitted at all, and if admitted, should be given little or no weight.[64] The most ardent critics contend that psychiatrists should never be allowed to testify as experts until they can demonstrate through empirical data that their judgments are both reliable and valid and that the evidence conveys useful information to a judge or jury on the relevant issues in a civil commitment proceeding.[65]

The general evidentiary theory underlying the admissibility of expert testimony assumes that experts in a particular field can draw inferences from facts that a jury would not itself be competent to draw.[66] Court rules specifically permit expert opinion, even to the ultimate issue, when the subject is so distinctly related to a profession "as to be beyond the ken of the average layman" and when the opinions "will probably aid the trier in his search for truth."[67]

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treme repetitiveness of violent arrests (i.e., 6 or more) might have any predictive accuracy, and that the criterion employed to predict was that of the current alleged offense rather than any specific psychiatric standard. *Id.* at 229-30.

61. Ennis & Litwack, *supra* note 22, at 750. *But see* Project Release v. Prevost, 551 F. Supp. 1298 (E.D.N.Y. 1982). In this case the court held that due process was not violated by the absence of a recent overt act. The court found that "an impartial factfinder, guided by medical documentation, should be permitted to determine that mental illness is present and danger likely without waiting for an individual's conduct to make serious physical harm all but inevitable." *Id.* at 1305.

62. Barefoot v. Estelle, 103 S. Ct. 3383, 3414 (1983) (Blackmun, J., dissenting). *See also* White v. Estelle, 554 F. Supp. 851 (S.D. Tex. 1982); Ennis & Litwack, *supra* note 22, at 694. In *White* the court found when a prediction of future dangerousness "is proffered by a witness bearing the title of 'Doctor,' its impact on the jury is much greater than if it were not masquerading as something it is not." White v. Estelle, 554 F. Supp. 851, 858 (S.D. Texas 1982).

63. Ennis & Litwack, *supra* note 22, at 742. *See also* Matteson, *supra* note 55, at 948 n.250 (noting that even behavioral descriptions may be biased).

64. J. ZISKIN, *supra* note 24, at 1.

65. Ennis & Litwack, *supra* note 22, at 737-38, 742.

66. C. MCCORMICK, LAW OF EVIDENCE, § 13, at 29 (2d. ed. 1972).

67. *Id.* at 29-30. *See also* Jenkins v. U.S., 307 F.2d 637, 643 (D.C. Cir. 1962). Ennis and Litwack note that, "at commitment hearings, psychiatrists are permitted and

Some critics argue vehemently that psychiatric opinions, predictions, and judgments as to future dangerousness are so unreliable that they do not meet this general test of admissibility.[68] Two commentators contend that psychiatrists would not qualify as expert witnesses if, like other experts, they were first required to prove their expertise before courts permitted them to testify.[69] Another author concludes that the average layperson can make the kind of judgments that psychiatrists provide in the courtroom and that, due to lack of certainty, hard data, and potential for bias, such testimony cannot objectively aid the trier-of-fact in its search for truth.[70] These critics would therefore not admit psychiatric expert testimony until empirical, objective data prove its value.[71]

A recent decision in the Superior Court of the District of Columbia applied an even more stringent standard of admissibility, generally reserved for scientific techniques and experiments.[72] Based on the *Frye* test,[73] the court held that psychiatric predictions of future dangerousness were inadmissible because such evidence had not gained general acceptance in the field of psychiatry.[74] The court's holding was specifically predicated on the American Psychiatric Association's conclusion that the unreliability of such psychiatric predictions is now an established fact within the profession.[75]

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even encouraged to offer their opinions on the ultimate issues—is the prospective patient 'mentally ill,' or 'dangerous,' or 'in need of care and treatment'?" Ennis & Litwack, *supra* note 22, at 694. *See also* FED. R. EVID. 704: "Testimony in the form of an opinion or inference otherwise admissable is not objectionable because it embraces an ultimate issue to be decided by the trier-of-fact."

68. *See, e.g.*, J. ZISKIN, *supra* note 24, at 1; Ennis & Litwack, *supra* note 22, at 735.
69. Ennis & Litwack, *supra* note 22, at 735. The authors compare court treatment of psychiatric evidence to the strong judicial rejection of polygraph results, finding that psychiatric evidence is far less reliable (though admissible) than polygraph tests, which are generally not admissible as evidence. *Id.* at 735-37. *See infra* notes 128-38 & 174-76 and accompanying text.
70. J. ZISKIN, *supra* note 24, at 28, 37, 38.
71. *Id.* at 1. Ennis & Litwack, *supra* note 22, at 737-38. These authors require objective rather than subjective validation as the "central premise of the scientific method." *Id.* at 738 n.161.
72. *In re* William Wilson, Superior Court of the District of Columbia, Family Division, Mental Health Branch, M.H. No. 1124-82 (Apr. 14, 1983).
73. Frye v. U.S., 293 F. 1013, 1014 (D.C. Cir. 1923). *See infra* note 74.
74. *In re* William Wilson, Superior Court of the District of Columbia, Family Division, Mental Health Branch, M.H. No. 1124-82 (Apr. 14, 1983). Note that the interpretation of this criterion, as set forth in *Frye*, emphasized that:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. [W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye v. U.S., 293 F. 1013, 1014 (D.C. Cir. 1923).
75. *In re* William Wilson, Superior Court of the District of Columbia, Family Divi-

The above research presents considerable evidence to discredit most of the psychiatric testimony offered in police power commitment hearings. Arguably, these studies demonstrate that psychiatrists possess no special competence or expertise, thus raising serious doubt as to whether such evidence should be considered admissible in commitment proceedings under either the standard governing opinion evidence or scientific evidence. As two critics asserted, "[i]t is inconceivable that a judgment could be considered an 'expert' judgment where it is less accurate than the flip of a coin."[76] Whether, the Supreme Court will find the issue one of constitutional magnitude remains unresolved.

IV. PREDICTING THE SUPREME COURT'S RESPONSE

As mentioned previously, the United States Supreme Court has never expressly considered the issue of whether psychiatric predictions of future dangerousness should be admissible evidence in civil commitment proceedings, nor has the Court ever expressly sustained the constitutionality of police power commitments based on such predictive criteria. The Court has, however, upheld the use of psychiatric evidence in other highly controversial and analogous situations. In addition, it has ruled on specific procedural issues in the civil commitment process, thereby implicitly recognizing the underlying substantive statutory requirements.[77]

In 1956, the Court acknowledged the uncertainty of diagnoses and the tentativeness of professional judgments in the field of psychiatry in *Greenwood v. United States*.[78] Nevertheless, the Court affirmed the district court's holding that the particular defendant was incompetent to stand trial and that, "if released, he would probably endanger the officers, property, or other interests of the United States."[79] Although two court-appointed psychiatrists testified that the defendant was sane, the Supreme Court accepted the conclusion of the district court that the defendant was incompetent, holding that denial of constitutional power of Congress to commit ought not to rest on "dogmatic

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sion, Mental Health Branch, M.H. No. 1124-82 (Apr. 14, 1983) (citing APA Brief, *supra* note 47, at 12).

76. Ennis & Litwack, *supra* note 22, at 737. Note that even a flip of a coin yields better odds than the 1 chance in 3 currently demonstrated by clinical research. *See* J. MONAHAN, *supra* note 40, at 47-49.

77. *See* La Fond, *supra* note 8, at 508. The author comments that by concluding that procedural due process must be afforded in commitment proceedings, it can be argued that courts have, in effect, legitimated the fundamental assumption underlying commitment, i.e., that the state may detain a person either under the police power or parens patriae authority.

78. 350 U.S. 366, 375 (1956) (federal commitment statute for individual charged with a federal crime construed as applying to temporary and not so temporary insanity).

79. *Id.* at 375.

adherence to one view or another on controversial psychiatric issues."[80] The Court, citing the unsettled and conflicting nature of psychiatry, sustained the power of the district court to commit despite the psychiatric testimony to the contrary.

In *O'Connor v. Donaldson*,[81] the Court expressly refused to consider "whether, when, or by what procedures" a state may justify involuntary confinement. Justice Stewart, writing for the majority, stated that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[82] It has been suggested that this decision intimates that the Court would sustain the constitutionality of police power commitment of dangerous mentally ill individuals.[83] More importantly, however, the Court accepted as conclusive the jury finding that, based on "abundant evidence" including expert testimony, the petitioner posed no danger to himself or others nor had he ever committed a dangerous act.[84]

The Supreme Court has also recently addressed procedural issues in involuntary civil commitment. In *Addington v. Texas*,[85] the Court concluded that procedural due process must be afforded regardless of the type of authority asserted by the state.[86] The Court specifically held that the fourteenth amendment applies in the civil commitment process, and that the standard of proof in such hearings should be "clear and convincing" evidence.[87] Acknowledging the potential risk

80. *Id.* at 376. The Court explicitly upheld Congressional authority to involuntarily commit individuals incompetent to stand trial because of mental illness pursuant to 18 U.S.C. §§ 4244-48. By affirming the district court's findings, which were based upon psychiatric opinions, the Court implicitly sanctioned the use of psychiatric expertise to determine presence of mental illness as well as potential dangerousness.

81. 422 U.S. 563 (1975). Petitioner had been committed to a Florida hospital for maintenance and custody for over 15 years. The Court found no justification for the prolonged confinement, stating that mental illness alone does not, by itself, establish a sufficient state purpose to authorize custodial institutional care. The Court did not decide whether the provision of treatment would have supplied a legitimate constitutional basis for the confinement of non-dangerous individuals. *Id.* at 574-76.

82. *Id.* at 576.

83. *See* La Fond, *supra* note 8, at 514.

84. O'Connor v. Donaldson, 422 U.S. 563, 568 (1975).

85. 441 U.S. 418 (1979).

86. *Id.* at 426.

87. *Id.* at 433. The Court specifically addressed the issue of the standard of proof that is constitutionally required in state civil commitment proceedings. The two questions presented to the jury required a finding that the individual was mentally ill and that he required hospitalization for his own welfare and protection or for the protection of others. *Id.* at 421. The implications of the *Addington* decision indicate that the Court will constitutionally require findings supported by "clear and convincing evidence" on each issue. *See id.* at 429.

of error resulting in wrongful confinement, the Court demanded greater proof than a "mere preponderance" of the evidence as usually required in civil proceedings.[88] Also recognizing the "lack of certainty" and the fallibility of psychiatric diagnoses, the Court refused to require the traditional criminal "beyond a reasonable doubt" standard. The Court concluded that it is questionable whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and dangerous.[89]

The *Addington* decision is important in two respects. First, Frank O'Neal Addington was civilly committed for an indefinite period under a Texas statute that authorized confinement when a proposed patient was mentally ill and required hospitalization (1) for his own welfare and protection, (2) for the protection of others, and (3) because he was mentally incompetent.[90] Although the Court specifically addressed only the appropriate standard of proof, in dicta it acknowledged that a state has authority under the police power to protect the community and an individual who poses a danger to himself or others.[91] As one commentator suggests, it can be argued that by concluding that procedural due process must be afforded individuals whom the state seeks to commit under its police power, the Court has in effect legitimated the fundamental purpose of such commitment.[92] Therefore, the Court at least tacitly approved the state's police power authority to involuntarily detain mentally ill individuals who are a threat to themselves or others.

Second, the *Addington* Court recognized specifically that the state's evidence included the testimony of two psychiatrists "who qualified as experts" and who testified as to the appellant's mental state.[93] These experts also expressed medical opinions that the appellant was "probably dangerous both to himself and to others."[94] The Supreme Court of Texas had already concluded that these particular substantive issues must be answered by competent medical or psychiatric testimony.[95] Although disagreeing with the Texas court's holding

88. *Id.* at 427.

89. *Id.* at 429.

90. TEX. REV. CIV. STAT. ANN. art. 5547-51 (Vernon 1958). The Texas formula has since been amended to allow confinement either if the person is mentally ill and dangerous, or if the person is unable to function independently and unable to make a rational choice as to whether to submit to treatment. TEX. REV. CIV. STAT. ANN. art 5547-51 (Vernon Supp. 1984).

91. Addington v. Texas, 441 U.S. 418, 426 (1979).

92. *See* La Fond, *supra* note 8, at 508.

93. Addington v. Texas, 441 U.S. 418, 420-21 (1979).

94. *Id.* at 421.

95. *See* State v. Turner, 556 S.W.2d 563, 564 (Tex. 1977). Note that the court's decision in State v. Addington, 557 S.W.2d 511 (Tex. 1977), was based on this companion decision.

regarding the standard of proof,[96] the Court agreed that "whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of facts which must be interpreted by expert psychiatrists and psychologists."[97] This assertion influenced the Court's holding that clear and convincing evidence is sufficient in civil commitment proceedings since it is difficult for expert physicians to offer definite conclusions and because the traditional medical standard for fact finding is a "reasonable medical certainty."[98]

The findings of the Court in *Addington* were reaffirmed recently in the highly controversial case of *Parham v. J.R.*[99] Delineating constitutionally minimum procedures for voluntary commitment of juveniles by parents, the Court held that due process does not require a formal or quasi-formal hearing prior to initial commitment.[100] The Court, in balancing the interests of the state, child, and parents, held that a medical investigation by a neutral factfinder was sufficient to prevent the risk of arbitrary and erroneous admission decisions.[101] The Court noted expressly that "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments."[102] Citing both *Addington* and *Donaldson*, the

96. Addington v. Texas, 441 U.S. 418, 427 (1979) (the Texas Supreme Court required the state to prove the statutory requisites to commitment by a preponderence of the evidence).

97. *Id.* at 429.

98. *Id.* at 430.

99. 442 U.S. 584 (1979).

100. *Id.* at 607. In *Addington*, the Court held explicitly that adults subject to involuntary commitment proceedings are entitled to due process protections as required by the fourteenth amendment. Thus, the state must establish the substantive criteria for commitment (e.g., mental illness and dangerousness) in a hearing by proof that is "clear and convincing." Addington v. Texas, 441 U.S. 418, 433 (1979). Note that the *Parham* decision represents a case involving a parent's presumed interest in providing for the welfare of the child. Parham v. J.R., 442 U.S. 584, 602-603 (1979). Finding that state officials and federal courts are not equipped to review parental authority or decisions as to the child's best interest, the Court held explicitly that psychiatric or medical review was an acceptable check on parental discretion to commit a child to a state hospital for care and treatment. *Id.* at 604-07.

101. Parham v. J.R., 442 U.S. 584, 607 (1979). Chief Justice Burger, writing for the majority, noted that states are free to require a full hearing before commitment of a child, but cautioned that admission procedures should be flexible enough so as not to unduly burden the state nor inhibit parental decisions to seek help for a child. *Id.* He also reiterated the Court's assertion that due process is a "flexible" concept that requires only those "procedural protections as the particular situation demands." *Id.* at 608 n.16 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). Finally, he stressed that due process has never required that a neutral or detached factfinder be a legally trained judge or administrative officer. Parham v. J.R., 442 U.S. 584, 607 (1979) (citing Morrissey v. Brewer, 408 U.S. 471, 489 (1972), and Goldberg v. Kelley, 397 U.S. 254, 271 (1970)).

102. Parham v. J.R., 442 U.S. 584, 607 (1979). The Court concluded further that at

Parham Court rejected the notion that the particular shortcoming of medical specialists can always be avoided by shifting decisions from trained professionals to untrained judges or hearing officers.[103] This decision reflects the Court's acceptance of psychiatric judgments and opinions in juvenile commitment proceedings, even without the purported protections of judicial review.[104]

Finally, the very recent case of *Barefoot v. Estelle*,[105] presents the most compelling evidence to postulate that the Supreme Court will permit psychiatric opinions on diagnoses and predictions of future dangerousness in civil commitment proceedings. Thomas Barefoot was convicted of capital murder in Texas. In the subsequent separate sentencing phase of the trial, Barefoot was sentenced to death. One of the particular questions answered affirmatively by the jury was that there was a probability that the defendant would constitute a continued threat to society.[106] The state introduced evidence of the defendant's prior convictions and reputation for lawlessness, and called two psychiatrists to testify against Barefoot.[107] Both of these psychiatrists, responding to a hypothetical question phrased in terms of the defendant's own conduct, testified that Barefoot would probably commit future acts of violence and would therefore represent a continuing

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times the judicial model for factfinding could "turn rational decisionmaking into an unmanageable enterprise." *Id.* at 608 n.16.

103. *Id.* at 609. In his opinion, Chief Justice Burger contended that an adversarial model would require an untrained and nonspecialist factfinder to render a "medical-psychiatric" decision. He also noted that such adversary proceedings are often "more illusory than real," and thus do not in reality afford the protections supposedly available in the legal process. *Id.* In a sense, the Court seems to have recognized that mistaken commitment may occur. It concluded that "risks of error in the process affords no rational predicate for holding unconstitutional an entire statutory and administrative scheme that is generally followed in more than 30 states." *Id.* at 612.

104. Note that the substantive criteria in this juvenile commitment case did not require a finding of "dangerousness." The Georgia statute provided for commitment of a juvenile, upon application by the parent, when the child demonstrated evidence of mental illness and therefore would be suitable for treatment. GA. CODE § 88-503.1 (1975). Arguably, the Court could have required more substantial due process protections if the state had attempted, as in *Addington*, to exercise its police power authority to commit by finding the juvenile mentally ill and dangerous to self or others. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 600 (1979). It is highly unlikely, however, that the Court would reject psychiatric testimony as to the juvenile's potential dangerousness. In *Addington*, the Court specifically noted that proof of dangerousness turns on psychiatric expert opinions and judgments. Addington v. Texas, 441 U.S. 418, 429 (1979).

105. 103 S. Ct. 3383 (1983).

106. *Id.* at 3390. *See also* TEX. CODE CRIM. PROC. ANN. § 37.071 (Vernon Supp. 1981). It should be noted that the jury was not asked to determine whether Barefoot was mentally ill, as is universally required in involuntary civil commitment proceedings. *See* Beis, *supra* note 4.

107. Barefoot v. Estelle, 103 S. Ct. 3383, 3389 (1983).

threat to society.[108]

On appeal to the United States Supreme Court, Barefoot argued that his death sentence should be set aside.[109] He claimed that the Constitution barred the psychiatric testimony presented during the punishment phase of his trial.[110] More specifically, he contended that psychiatrists are not qualified or competent as a group to predict with an acceptable degree of reliability that an individual presents a likelihood of future dangerousness.[111] Even if they were, he claimed they could not testify without having actually examined him and, therefore, the use of the hypothetical question violated his rights to due process of law.[112]

In a six-three decision, the United States Supreme Court rejected all of Barefoot's arguments.[113] Recognizing first the constitutionality of the substantive criterion of future dangerousness to impose the death penalty,[114] the Court emphatically upheld the use of psychiatric

108. *Id.* The hypothetical question presented by the prosecution to the two psychiatric witnesses included a description of defendant's criminal record and catalogued his past antisocial behavior. In particular, it asked the psychiatrists to assume, as true, that: (1) the defendant had been convicted of five non-violent criminal offenses and had been arrested and charged on several accounts of sexual offenses involving children; (2) the defendant had a bad reputation in each of the eight communities he had resided in the previous ten years; (3) the defendant was unemployed during the two months preceding the murder, spent his time using drugs, and boasted of plans to commit numerous crimes; (4) the defendant had murdered the police officer as charged without provocation; and (5) the defendant was observed as unperturbed subsequent to the murder by "a homosexual witness." *See* APA Brief, *supra* note 47, at 4-5.

109. The *Barefoot* case also presented a major procedural issue regarding the Court of Appeals' denial of a stay of execution pending appeal on a habeas corpus judgment, since the court did not formally affirm the district court's judgment, but did rule on the merits of the appeal. Barefoot specifically challenged this summary procedure. Barefoot v. Estelle, 103 S. Ct. 3383, 3391 (1983). This argument will not be addressed or presented in this article.

110. *Id.* at 3395.

111. *Id.*

112. *Id.* at 3395, 3396.

113. *Id.* at 3406. Justice Blackmun, joined by Justices Brennan and Marshall, dissented. Justice Marshall also wrote a separate dissenting opinion on the procedural issue. *See supra* note 109.

114. *See* Jurek v. Texas, 428 U.S. 262 (1976). The Texas capital sentencing procedure required the jury to answer the following three questions in a subsequent sentencing hearing: (1) "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result"; (2) "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"; and (3) "If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1975-76). In *Jurek*, the Court held that although the Texas statute does not explicitly speak of mitigating circumstances, (*see, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976)), it did not violate the 8th

testimony on the issue.[115] In his opinion for the Court, Justice White stated that defendant's argument against permitting psychiatric predictions of dangerousness was "somewhat like asking us to disinvent the wheel."[116] Moreover, he noted the variety of occasions in the criminal process, such as determinations on bail, probation, parole, and sentencing, in which future predictions of dangerousness are required.[117] Citing *Donaldson* and *Addington*, Justice White concluded that Barefoot's position that psychiatric evidence was too unreliable to be admissible as evidence would call into question other contexts in which similiar predictions of dangerousness must be made.[118]

In upholding the admissibility of psychiatric predictions of dangerousness, the *Barefoot* Court expressly reasoned that both federal and state rules of evidence intend that relevant, unprivileged evidence be admissible and its weight left to the factfinder.[119] The Court further noted that any lack of reliability should be called to the attention of the jury and should be subject to rigorous cross-examination.[120] The majority refused to share the dissent's "low evaluation" of the adversary system and contended that this process could be trusted to ferret

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and 14th amendments because the second question, that of whether the defendant would constitute a continued threat to society, had been interpreted to allow a defendant to present any mitigating circumstances. Jurek v. Texas, 428 U.S. 262, 271-73, 276 (1976).

115. Barefoot v. Estelle, 103 S. Ct. 3383, 3396 (1983).

116. *Id.*

117. *Id.* at 3396. The Court observed that predicting future criminal conduct plays a predominant role in the criminal justice system. On a daily basis, judges or other officials are called upon to assess the probable future conduct of criminal defendants. *Id.* (citing Jurek v. Texas, 428 U.S. 262, 274-76 (1976)).

In a very recent case, the Supreme Court upheld the constitutionality of a New York preventive detention statute for juveniles. Schall v. Martin, 104 S. Ct. 2403 (1984). This statute authorizes a judge to detain a juvenile before a probable cause and factfinding hearing upon a finding that there is a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." N.Y. FAM. CT. ACT § 320.5(3)(b) (1983). Again, the Court rejected the contention that it is so impossible to predict future behavior that the statute must be constitutionally infirm, even without specific "codified" factors to guide the decisionmaker. Although no psychiatric testimony is mandated, the judge or hearing officer is free to consider a number of variables including nature and seriousness of the crime, sufficiency of the charges, home supervision, school supervision, and any special circumstances that may be brought to the attention of the court.

118. Barefoot v. Estelle, 103 S. Ct. 3383, 3396 (1983). Note that the Court specifically referred to civil commitment proceedings and again, quoting *Addington*, reiterated that "[w]hether the individual is mentally ill and dangerous to either himself or others . . . turns on the meaning of the facts which must be interpreted by expert psychiatrists and pscyhologists." *Id.* at 3397 (citing Addington v. Texas, 441 U.S. 418, 429 (1979)).

119. Barefoot v. Estelle, 103 S. Ct. 3383, 3396 (1983). *See also* FED. R. EVID. 702-06.

120. Barefoot v. Estelle, 103 S. Ct. 3383, 3397 n.7 (1983).

out reliable from unreliable testimony, judgments, and opinions.[121] Likewise, the Court approved the use of hypothetical questions, perceiving no constitutional barrier to applying ordinary rules of evidence to govern the use of expert testimony.[122] The fact that the experts had not examined the defendant should go to the weight of their testimony and not to its admissibility.[123]

A vigorous dissent in *Barefoot*, based in large part on the American Psychiatric Association Brief as Amicus Curiae, relied on studies demonstrating the unreliability of long-term psychiatric predictions of dangerousness to reject the majority decision.[124] The dissent and the *amicus curiae* brief agreed that such testimony inherently violated due process and created an intolerable risk that the death penalty could be erroneously imposed.[125]

Both the dissent and the American Psychiatric Association agreed that short-term predictions are more reliable than long-term predictions; however, they argued vehemently that permitting psychiatric evidence on the issue of future dangerousness gives rise to an issue of constitutional dimension in capital cases.[126] Further, based on the Association's contention that psychiatrists have no expertise in predict-

121. *Id.* The Court also acknowledged that Barefoot did not present any contrary expert testimony in his own defense at trial, even though in cases of indigency, Texas law provides for payment of $500 for "expenses incurred for purposes of investigation and expert testimony." *Id.* at 3397 n.5; TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (Vernon Supp. 1982).

122. Barefoot v. Estelle, 103 S. Ct. 3383, 3399 (1983). *See also* R. RAY, TEXAS EVIDENCE § 1402 (2d ed. 1956).

123. Barefoot v. Estelle, 103 S. Ct. 3383, 3399 (1983) (citing the Texas Court of Criminal Appeals in Barefoot v. State, 596 S.W.2d 875, 887 (1980)). The defendant argued vigorously that even if the Court did allow psychiatric evidence on the issue of dangerousness, then such testimony must at least be based on a personal examination. Barefoot v. Estelle, 103 S. Ct. 3383, 3399 (1983). The American Psychiatric Association (as amicus curiae) supported this argument, claiming that psychiatrists cannot render a medical opinion or diagnose an individual with any reasonable degree of certainty without first performing an "in-depth psychiatric examination." APA Brief, *supra* note 47, at 9.

In upholding the use of a hypothetical question to determine potential dangerousness, the Court observed that opinions based on hypothetical questions are "commonly admitted as evidence." Barefoot v. Estelle, 103 S. Ct. 3383, 3399 (1983). The Court noted further that defendant could have presented his own hypothetical question to the same witnesses during the trial, based on his own version of the facts. *Id.* at 3400 n.10.

124. Barefoot v. Estelle, 103 S. Ct. 3383, 3406 (1983) (Blackmun, J., dissenting). *See generally* APA Brief, *supra* note 47.

125. Barefoot v. Estelle 103 S. Ct. 3383, 3410 n.6 (1983) (Blackmun, J., dissenting); APA Brief, *supra* note 47, at 11. The American Psychiatric Association observed further that the prejudicial impact of psychiatric testimony outweighs its probative value and that psychiatric predictions of dangerousness "characterized as 'medical opinions,' serve only to distort the factfinding process." *Id.*

126. Barefoot v. Estelle, 103 S. Ct. 3383, 3416 n.14, 3411-17 (Blackmun, J., dissenting). *See generally* APA Brief, *supra* note 47, at 11-12.

ing long-term future dangerousness, the dissent likened such testimony to scientific evidence and argued that it should be inadmissible.[127] Although not specifically referring to the *Frye* test,[128] the dissent cited hornbook law that has generally been interpreted by *Frye*, and which states that: "Opinion evidence is not admissible if the court believes that the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted."[129] Thus, fearing prejudicial impact on the jury and concluding that psychiatric testimony is less reliable than other traditionally excluded scientific evidence, the dissent admonished the majority for merely labeling the rules as evidentiary without addressing the constitutional impact.[130] The dissent cited authority documenting both judicial and attorney deference to psychiatric testimony, and their lack of skill or expertise in presenting or cross-examining psychiatric expert witnesses to reject the majority's unrestricted admission of such evidence.[131]

The Court's opinion and reasoning in the recent *Barefoot* decision[132] suggest strongly that the Court will permit psychiatric predictions of dangerousness to be used as evidence and will sustain state authority to involuntarily commit persons based on substantive criteria requiring an explicit finding of dangerousness. As indicated previously, the *Barefoot* case permitted the use of psychiatric evidence in capital sentencing procedure. Since the re-establishment of the death penalty, the Supreme Court has required sentencing procedures amounting to a kind of "super due process."[133] In essence, the Court

127. Barefoot v. Estelle, 103 S. Ct. 3383, 3411 n.8, 3413-14 (1983) (Blackmun, J., dissenting). The dissent contends that the majority ignored well-established constitutional doctrines by cloaking them in a mantle of evidentiary rules. It emphatically stated that due process is violated when unreliable "scientific" testimony creates an imminent danger of an erroneous verdict that cannot be corrected by the adversary process. *Id.* at n.10.

128. Frye v. U.S., 293 F. 1013, 1014 (D.C. Cir. 1923). *See supra* notes 72-74.

129. *See* Barefoot v. Estelle, 103 S. Ct. 3383, 3413 (1983) (Blackmun, J., dissenting) (quoting C. MCCORMICK, *supra* note 66, § 13). *See also In re* William Wilson, Superior Court of the District of Columbia, Family Division, Mental Health Branch, M.H. No. 1124-82 at 4 (Apr. 14, 1983). The court here specifically applies the *Frye* test to determine when the scientific community cannot be permitted to render a reasonable opinion, i.e., if it has not been generally accepted in the particular field in which it belongs. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). *See* Barefoot v. Estelle, 103 S. Ct. 3383, 3413 (1983) (Blackmun, J., dissenting) (citing C. MCCORMICK, *supra* note 66, 31). *See also id.* (citing Ennis & Litwack, *supra* note 22, at 736, referring specifically to the inadmissibility of polygraph evidence).

130. Barefoot v. Estelle, 103 S. Ct. 3383, 3414 n.10 (1983).

131. *Id.* at 3414-15.

132. *Id.* at 3383.

133. *See* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). *See also* Eddings v. Oklahoma, 455 U.S. 104 (1982); Green v. Georgia, 442 U.S. 95 (1979); Gregg v. Georgia, 428 U.S. 153 (1976). Generally, the Court has required that the judge or jury consider any mitigating circumstances and to specifically find statutorily delineated aggravating circum-

requires open and far-ranging arguments that place as much information as possible before the jury.[134] The jury then receives the evidence and ultimately decides whether the defendant should be sentenced to death.[135] Since the individual interest at stake in such proceedings—life or death—is so significant, only reliable and relevant testimony should be presented to the decisionmaker. The Supreme Court upheld, however, the use of psychiatric predictions of dangerousness, even based on hypothetical questions in death penalty proceedings.[136] Although the majority did not address the *Frye* test, it applied traditional evidentiary rules for admissibility of psychiatric testimony, suggesting that *Frye* does not rise to a constitutional rule.[137] In effect, psychiatric testimony may therefore be presented to a court or jury and its reliability tested by the adversarial process even in capital cases.

Given the civil nature of involuntary commitment proceedings and the less serious deprivation of liberty involved, the Court surely will permit psychiatric predictions of dangerousness as admissible evidence when faced with the issue. Even the dissent and the American Psychiatric Association in *Barefoot* distinguished the use of short-term predictions for emergency commitment or treatment and in other contexts where the individual will not be criminally convicted or put to death.[138] Based on *Barefoot*, the Court is therefore likely to uphold psychiatric predictions of dangerousness even in indeterminate civil commitment proceedings.

The cases presented suggest that the Supreme Court, although acknowledging the deficiencies of psychiatric opinions, will not be persuaded that such evidence is so unreliable or incompetent that it would erect a constitutional bar to psychiatric testimony in the courtroom. Applying traditional rules of evidence, the Court apparently views psychiatrists as "experts" whose opinions and judgments are relevant in many types of proceedings.[139] Moreover, any professional doubts or shortcoming as to the reliability of the testimony should not question the admissibility of such evidence, but rather should be exposed to the trier-of-fact through the traditional adversary process.[140]

It also appears that the Court will validate police power civil com-

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stances to prevent untrammeled discretion or an arbitrarily imposed death sentence. Gregg v. Georgia, 428 U.S. 153, 206-07 (1976).

134. Gregg v. Georgia, 428 U.S. 153, 203-04 (1976).

135. *Id.*

136. Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

137. *But see supra* notes 126-31 and accompanying text.

138. Barefoot v. Estelle, 103 S. Ct. 3383, 3416 n.14 (1983); APA Brief, *supra* note 47, at 11-12.

139. *See* Barefoot v. Estelle, 103 S. Ct. 3383, 3397-98 (1983).

140. *Id.*

mitment based on a "dangerousness" criterion.[141] Because of its acceptance of psychiatric judgments and opinions, it is likely that the Court will permit such "expert" testimony to establish an individual's propensities toward future violence. Despite the criticism of psychiatric testimony, the Court has maintained that civil commitment proceedings turn on medical decisions and therefore necessitate the use of psychiatric evidence to establish the substantive criteria of both mental illness and potential dangerousness.[142]

V. PSYCHIATRIC EXPERT TESTIMONY SHOULD BE ADMISSIBLE IN CIVIL COMMITMENT PROCEEDINGS

Psychiatrists and other mental health professionals have traditionally played an active role in both civil and criminal proceedings whenever a particular legal issue involved a determination of a "mental" or "emotional" element.[143] In involuntary commitment hearings, psychiatrists have consistently been the primary witnesses to render expert opinions on the relevant substantive criteria. Despite the repeated challenges by many legal theorists claiming that psychiatric expert predictions of dangerousness are grossly inaccurate, most state commitment statutes continue to mandate the use of such evidence in both indeterminate and short-term commitment proceedings.[144]

Many critics of the use of psychiatric expertise to predict future violence have drawn sweeping generalizations from existing research to repudiate the use of such evidence in all legal proceedings.[145] A

141. *See supra* notes 77 & 91.

142. *See supra* note 103.

143. Needell, *Psychiatric Expert Wintesses: Proposals for Change*, 6 AM. J. OF L. AND MED. 425, 425-27 (1980-81).

144. *See, e.g.*, WASH. REV. CODE § 71.05, § 71.05.240 & § 71.05.250 (1975). At the conclusion of the probable cause hearing, an individual may be detained for involuntary treatment not to exceed 14 days if the court finds by a preponderance of the evidence that the person "presents a likelihood of serious harm to others or himself . . . ." *Id.* at 71.05.240 to 250. The physician-patient privilege shall be deemed waived in these proceedings to permit the introduction of relevant and competent medical records or testimony of an evaluation or treatment facility or its staff. *See also* TEX. REV. CIV. STAT. ANN. art 5547, §§ 40-57 (Vernon 1958). For indefinite commitment, the proposed patient must be (1) mentally ill, (2) in need of hospitalization for his own welfare and protection or for the protection of others, and (3) mentally incompetent. These issues must be determined by competent medical or psychiatric testimony. State v. Turner, 556 S.W.2d 563, 564 (Tex. 1977).

145. *See, e.g.*, J. ZISKIN, *supra* note 24, at. 1. Ziskin comments that "[d]espite the ever increasing utilization of psychiatric and psychological evidence in the legal process such evidence frequently does not meet reasonable criteria of admissibility and should not be admitted in a court of law . . . ." *Id. See also* Ennis & Litwack, *supra* note 22, at 696. These authors, referring specifically to civil commitment proceedings, concluded that

> (a) there is no evidence warranting the assumption that psychiatrists can

number of recent studies, however, suggest that complete refutation may be premature and that the research on the predictive ability of psychiatrists does not support the unqualified conclusion that predictions of violence are impossible.[146] Experts are now beginning to distinguish between long-term predictions of future dangerousness and short-term clinical predictions for the purpose of emergency confinement and treatment.[147]

One recent critique of past research suggests that the methodological context used in major studies to demonstrate the failure of psychiatrists to predict accurately future violent conduct cannot reasonably adduce similar conclusions with respect to short-term emergency commitments.[148] Most research has tested diagnoses made in an institutional setting to predict violence that might occur in the open community.[149] In other words, institutionalized individuals were predicted to be violent if released into society, despite an "enormous body of research" that indicates the extremely low correlation between be-

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accurately determine who is 'dangerous'; (b) there is little or no evidence that psychiatrists are more 'expert' in making the predictions relevant to civil commitment than laymen; (c) 'expert' judgments made by psychiatrists are not sufficiently reliable and valid to justify nonjudicial hospitalization based on such judgments; (d) the constitutional rights of individuals are seriously prejudiced by the admissibility of psychiatric terminology, diagnoses, and predictions, especially those of 'dangerous' behavior; and therefore (e) courts should limit testimony by psychiatrists to descriptive statements and should exclude psychiatric diagnoses, judgments, and predictions.

Id.

146. Monahan, *Prediction Research and the Emergency Commitment of Dangerous Mentally Ill Persons: A Reconsideration*, 135 AM. J. PSYCHIATRY 198 (1978). *See also* Cohen, Groth & Siegel, *The Clinical Prediction of Dangerousness*, 24 CRIME AND DELINQ. 28 (1978).

147. *See, e.g.*, Monahan, *supra* note 146, at 198-200. Generally, short-term predictions for emergency commitment refer to those made when a mentally ill individual is brought to the attention of a mental health professional for a determination of whether mental illness is present and whether the individual will commit a violent act in the immediate future. A positive diagnosis of mental illness and a prediction of likelihood of future harm would therefore result in short-term emergency hospitalization. *Id.* at 200. Conversely, long-term predictions often refer to assessment of the likelihood that an individual will engage in violent acts some time in the future; the assessment is often made in an institutional setting prior to considering the desirablility of release into the community. Long-term predictions have been used to establish the likelihood of recidivism of prisoners, as well as to predict potential future violence of mentally ill patients who have been institutionalized for lengthy periods of time. *Id.*

148. *Id.* The author admits that his hypothesis is merely theoretical, although based on the qualitative differences between long-term and short-term predictions. He further suggests that scientific proof may never be available given the ethical considerations of refusing intervention in a random half of the cases in which an individual has been diagnosed mentally ill and predicted to engage in imminently violent bahavior. *Id.* at 201.

149. *Id.* at 199.

havior predicted in one context and that observed in another.[150] In general, the author noted that institutional performance has little or no effect on non-institutional (community) behavior and that the correlation decreases as substantial periods of time intervene between the point when the prediction is made and the point at which validation is undertaken in the community upon release.[151]

In the emergency setting, however, the context of prediction is the same as the context of validation.[152] A prediction of a mentally ill individual's propensity toward violence in the community is being made by a mental health expert in the same community.[153] Moreover, the time period between prediction and validation is usually short; the prediction frequently is that the person will be violent in a matter of minutes or hours.[154] The information available to the predictor is fresh and based on the knowledge of the individual's environment and diagnostic condition and, therefore, should be substantially more reliable than the data reported on long-term institutionalized patients or prisoners.[155]

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150. *Id.* Generally, the institutionalized group predicted to be violent if released was in fact released by virtue of judicial order or parole board action, thus creating a "natural experiment." The group was then monitored for a number of years to assess the actual validity of the prediction. Low frequencies of violent behavior were recorded, thereby demonstrating the inaccuracy of these institutional predictions. *Id.*

151. *Id.* The author observes that this "gap" in time exists in current research on predicting violent behavior. Further, the jails, prisons, and mental hospitals in which the predictions are made differ from "open community situations that are the truest test of predictive validity." Substantial time periods also intervene between the point when the institutional prediction is made and the community validation is undertaken and/or between the most recent exposure to the community context in which the prediction will be validated and the point at which the institutional prediction is made. The author contends that in the former case too much opportunity exists for the individual or the environment to change in unknown ways before the prediction can be tested. In the latter case, the information on how the person behaves in the open community is obscured by the unknown changes that have occurred since institutionalization. *Id.*

152. *Id.* at 200. In other words, a prediction is being made in the open community tht the person will be violent in the open community, i.e., the same *context.*

153. *Id.*

154. *Id.*

155. *Id.* Since the prediction is being made in the same context in which it will be validated, little intervening time occurs between the most recent exposure to the context of validation and the point of prediction. In other words, the prediction is made almost immediately after observing how the individual behaves in the context (i.e., the community) in which the prediction will be validated. The author comments that any prolonged period of hospitalization may have a significant effect on the individual or the environmental context and may thus produce the predictive inaccuracies currently demonstrated by the available research. *Id.* at 201. Accordingly, while psychiatric diagnoses of mental illness and predictions of dangerousness may be sufficiently reliable for emergency short-term confinement decisions, the accuracy of indeterminate (long-term) commitment determi-

Other commentators suggest that predictions based on diverse and precise clinical behavior and social data may produce sound results and achieve a significantly higher level of accuracy than traditional statistical measures.[156] The clinician typically examines an individual's emotional, behavioral, and psychological development through detailed social, medical, and psychological records over a minimum period of time before making predictive decisions.[157] Such studies, performed within the institution, can be utilized as further support or rejection of the initial "emergency" prediction. The type of data generated from such a "clinical-predictive" approach would enhance the accuracy of predictions that are required for longer periods of hospitalization, which are currently made merely on the basis of post-institutional conduct or the past dangerous act that led initially to commitment, and which have traditionally demonstrated low reliability.[158]

The American Psychiatric Association, supporting the empirical data that psychiatrists cannot and should not predict potential long-term dangerous behavior,[159] recently recognized that psychiatrists are often expected to make such predictions about short-term prognoses,

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nations remains questionable. *But see infra* note 163, where the American Psychiatric Association apparently finds acceptable psychiatric opinions and judgments in all civil commitment proceedings because of "close monitoring," "frequent followup," and the ability to modify treatment recommendations and dispositions.

156. Cohen, Groth, & Siegel, *supra* note 146, at 28. Although this approach has been limited to offenders who have committed at least one dangerous act, the implication for civilly committed individuals appears quite noteworthy. Many critics of the use of psychiatric predictions contend that the highest rate of "false positives" is achieved when psychiatrists attempt long-term predictions over an extended period of time such as in criminal sentencing. *See, e.g.*, Barefoot v. Estelle, 103 S. Ct. 3383, 3416 n.14 (1983) (Blackmun, J., dissenting). These critics argue that such long-term predictions should therefore be based on traditional statistical and actuarial data. APA Brief, *supra* note 47, at 14. Assuming that "clinical-predictive" studies achieve even greater accuracy in offender populations than statistical or actuarial measures, the results should be even greater with mentally ill populations who have been hospitalized based on "emergency" predictions or a recent overt act. Given adequate resources, these individuals can be assessed more thoroughly to determine the continued likelihood of potential harm to self or others. *See also* Steadman & Cocozza, *supra* note 60, at 229-30 (finding that only extreme repetitive acts of violence (i.e., six or more) had any predictive accuracy based merely on the criterion of the alleged offense).

157. Cohen, Groth, & Siegel, *supra* note 146, at 30-31.

158. *See supra* note 156. *See also* Monahan, *supra* note 146, at 199 (discussing the low reliability of mere institutional conduct as a basis to predict future behavior in a non-institutional setting). "Clinical-predictive" studies include vast arrays of information, make use of a variety of professional personnel, and include environmental, behavioral, and historical data to predict dangerousness as well as non-dangerousness.

159. APA Brief, *supra* note 47, at 12. The Association observed that a long-term prediction "is an essentially lay determination that should be based not on the diag-

including predictions of dangerousness, in civil commitment proceedings.[160] It concluded that:

> Such situations, however, are clinically different from predictions of long-term dangerousness because they are made in the context of specific and usually acute mental illness (for example, severe depression), and they are made with knowledge of the individual's short-term environmental situation, which may have a direct bearing on the likelihood that he will act dangerously.[161]

Thus, for civil commitment purposes, psychiatrists can evaluate the patient's environmental situation and present mental condition to determine their potential effect on behavioral patterns, including the likelihood of violence in the near future.[162] Further, the civil commitment process generally requires close professional monitoring and frequent follow-up, and therefore mandates modification of treatment recommendations and dispositions for violent persons to reduce the potential risk of error.[163]

Criticism of psychiatric predictions has led to the extreme hypoth-

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noses and opinions of medical experts, but on the basis of predictive statistical or actuarial information that is fundamentally non-medical in nature." *Id.* at 14.

160. *Id.* at 12 n.7.

161. *Id.* Note that the American Psychiatric Association apparently views all civil commitment proceedings, including indeterminate commitments, as distinguishable from those situations such as sentencing procedures which require long-term predictions of potential future violence. *See, e.g.*, Barefoot v. Estelle, 103 S. Ct. 3383 (1983). In its brief in *Barefoot*, the Association agreed with the current literature that psychiatrists are unable to make reliable predictions of long-term future violent behavior to aid in sentencing decisions of criminal defendants. APA Brief, *supra* note 47, at 12. Further, the Association emphatically concluded that recurrent criminal behavior does not necessarily correlate with psychiatric disorders or mental illness and, therefore, that predictions in these instances must consider non-medical factors and must involve lay determinations rather than medical diagnoses or opinions. *Id.* at 14-15. On the other hand, the Association recognized that psychiatrists will often be involved in evaluating both mental illness and potential dangerousness in civil commitment proceedings. The Association observed that civil commitment decisions are distinguishably different from long-term predictions of dangerousness because of the diagnoses of a "specific" mental illness and its likely effect on individual behavior, *id.* at 12 n.7 (citing Addington v. Texas, 441 U.S. 418 (1979) (a case that involved an application for indeterminate commitment)), and because the civil commitment process presumably includes treatment, follow-up, and the ability to correct erroneous decisons. *See* Barefoot v. Estelle, 103 S. Ct. 3383, 3416 n.14, (1983) (Blackmun, J., dissenting); APA REPORT, *supra* note 46, at 30.

162. APA Brief, *supra* note 47, at 12 n.7.

163. APA REPORT, *supra* note 46, at 30. *See also* Barefoot v. Estelle, 103 S. Ct. 3383, 3416 n.14 (1983) (Blackmun, J., dissenting). Distinguishing civil commitment proceedings from criminal sentencing decisions, the dissent noted the more serious consequences associated with erroneous decisions in the latter case. A predictive error in a civil commitment hearing would not result in a criminal conviction, much less invoke the death penalty in a capital case such as occurred in *Barefoot*. Moreover, in a capital case, there is no chance for "followup" or "monitoring" and any "subsequent change of mind brings not justice delayed, but the despair of irreversible error." *Id.*

esis that lay persons or non-clinicians can make commitment evaluations as well as, or better than, psychiatrists.[164] This hypothesis is challenged, however, by a recent experiment that examined 200 adult psychiatric patients involuntarily committed to a state mental hospital to assess the adequacy of evaluations performed by psychiatrists and non-psychiatric personnel.[165] The results indicated that psychiatrists did in fact provide more adequate evidence for the necessary criteria for civil commitment, particularly in diagnosing mental illness, than did the non-psychiatric physicians.[166] Of more importance, the data documented clearly that both psychiatrists and medical physicians provided significantly more adequate evidence of both mental illness and potential dangerousness than did law enforcement personnel in emergency commitments.[167] These data suggest that psychiatrists' opinions and judgments, even as to future dangerousness, may in fact be more reliable than those judgments made by lay persons who would have even less experience than law-enforcement officers in assessing potentially violent conduct.[168]

Predictions of future behavior present difficulty for any decisionmaker, whether it be judge, jury, law-enforcement personnel, or mental health professional. The legal system, however, typically relies on such predictions in many aspects of both civil and criminal law.[169] Assuming that psychiatric expertise is greater than that of non-clinicians, as well as a necessary element in certain legal proceedings, then the evidence should be admissible in court.[170] Proponents

164. *See, e.g.*, Dershowitz, *supra* note 23, at 47.

165. Miller & Fiddleman, *The Adequacy of Commitment Evaluations Performed by Psychiatric and Non-Psychiatric Physicians*, 10 J. OF L. & PSYCHIATRY 45 (1982).

166. *Id.* at 52. In experimental research, statistical significance is achieved at .05 level. In other words, the results would indicate that only in 5 times out of one hundred could the result have happened by chance. In this study, the results are significantly higher; i.e., the probability of it happening by chance is one in ten thousand.

167. *Id.* The researchers evaluated the written examinations performed by the respective professionals. The petitions for commitment, as required by state statute, N.C. GEN. STAT. 122-58 (1979), were evaluated for evidence of both mental illness and dangerousness, as well as to whether the evidence was descriptive or conclusionary. Miller & Fiddleman, *supra* note 165, at 50.

168. The authors commented that, somewhat surprisingly, the greatest difference between law enforcement officers and physicians was found in the category of dangerousness, the particular category where it was expected that law enforcement officers would have more expertise. Miller & Fiddleman, *supra* note 165, at 52.

169. *See* Needell, *supra* note 143, at 425-27.

170. This assumption rests both on the Miller and Fiddleman study that suggests that psychiatrists can provide greater and more helpful evidence to prove the necessary substantive criteria in civil commitment proceedings, *see supra* notes 165-68 and accompanying text, and the research that demonstrates the qualitative difference between predictions for long-term sentencing decisions and those for civil commitment purposes. *See supra* notes 152-55 & 160-63. In most states, involuntary commitment requires a finding of dangerousness as well as a specific finding

warn that to eliminate all non-scientifically proven psychiatric evidence would deprive the legal system of potentially valuable observations, opinions, and judgments.[171] In legal proceedings that involve "mental" or "behavioral" issues, it appears more realistic to provide untrained judges or juries with as much information as possible, particularly from physicians trained extensively in dealing with mental disorders. Proper utilization of the traditional adversarial process can scrutinize such evidence to determine its ultimate worth.[172]

Most courts have been lenient in admitting psychiatric testimony.[173] Generally, courts have not applied the stringent *Frye* rule,[174] preferring to distinguish expert opinion testimony from the more objective "physical" evidence derived from scientific techniques.[175] The scientific principles that have been held to the higher standard of admissibility have customarily been specific mechanical devices that suggest to the jury a certainty that may not exist in expert testimony with its "aura of human fallibility."[176] Psychiatric expert witnesses, unlike machines, may typically have their fallibility ex-

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of mental illness. *See* Beis, *supra* note 4. Psychiatric evaluation and assessment of the individual is therefore necessary to substantiate these findings. Psychiatric testimony in court supplies the trier-of-fact with as much information as possible to aid in the ultimate decision to commit.

Even when a specific finding of mental illness is not mandated such as in sentencing dispositions, or if a clearly defined mental illness does not exist, psychiatric evidence may still provide important information about the individual to be useful in court proceedings. *See* American Psychiatric Association, *Draft Report of the Task Force on the Role of Psychiatry in the Sentencing Process*, 11-13. Although predictions of dangerousness may be less reliable in this context, this fact should not entirely preclude psychiatric testimony that may aid the fact-finding process.

171. Shell, *supra* note 28, at 55. As one professor of law argued, the fact that "opinion evidence is uncertain does not justify its exclusion, as long as the evidence rises above mere conjecture or speculation." Shell, *supra* note 28, at 55 (quoting Richard Bonnie, Diector of the University of Virginia, Institute of Law, Psychiatry, and Public Policy).

172. The argument in favor of liberal use of psychiatric testimony does not avert the need to improve the current inadequacies in the adversarial process. *See infra* notes 178-83 and accompanying text.

173. Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313, 323-25 (1964).

174. *See* Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).

175. Boyce, *supra* note 173, at 324; Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 13.

176. Strong, *supra* note 175, at 13. The *Frye* standard has also been criticized because little room may be left to receive evidence where professions with differing schools of thought may disagree as to its reliability. Boyce, *supra* note 175, at 314. *See also* Roberts, *Some Observations on the Problem of the Forensic Psychiatrist*, 1965 WIS. L. REV. 240, 244. This author notes that a number of schools of thought have developed in the field of psychiatry, each with its own theoretical underpinning for evaluating the mental status and treatment of a particular patient. *Id.*

posed by diligent attorneys.[177] As such, the testimony should be admissible and the weight left to the trier-of-fact.

Many critics of psychiatric testimony argue that too few lawyers are skilled in cross-examining psychiatrists and therefore such evidence, especially predictions of dangerousness, should be severely restricted or eliminated altogether.[178] Proponents of this position claim that traditional adversarial techniques will not be effective in cutting through the "facade" of superior expert knowledge.[179] These critics however, invariably underestimate the adversarial process by failing to recognize that unskilled attorneys often accentuate judicial or jury deference to psychiatric testimony by adopting a passive stance in the courtroom. For example, the lawyer in a civil commitment proceeding has been described as: "a stranger in a strange land without benefit of a guidebook, map, or dictionary. Too often he shows no interest and makes no effort to learn his way about his foreign environment."[180]

Successful advocacy in the civil commitment process depends, therefore, on training lawyers both in substantive psychiatric material and in effective litigation techniques, rather than restricting the potentially useful and relevant information of psychiatric experts.[181] In particular, lawyers must adopt an aggressive advocacy approach in preparing and examining witnesses, developing appropriate jury instructions, and insuring that the psychiatrist demonstrate the specificity and materiality of his or her data and the basis for each particular conclusion or opinion.[182] As psychiatrists seek to improve their ability to proffer more reliable evidence on mental health issues, lawyers must also pursue more effective techniques in presenting and utilizing such testimony in court. Lawyers who abdicate their advocacy responsibilities in mental health proceedings by neglecting traditional adversarial and evidentiary procedures should not be heard to complain about claimed deficiencies in the testimony of expert witnesses.[183]

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177. *See, e.g.*, Cooper, *Why Psychiatrists Shun the Court: No Room for Maybes*, 4 CAN. LAW. 10 (1980).

178. *See* Barefoot v. Estelle, 103 S. Ct. 3383, 3414-15 (1983) (Blackmun, J., dissenting). *See also* Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 535-36, 626 (1978).

179. Barefoot v. Estelle, 103 S. Ct. 3383, 3414 (1983) (Blackmun, J., dissenting).

180. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966). Professor Cohen characterizes the civil commitment process as "a legal charade in which the lawyer uneasily pantomines his empty part." *Id.*

181. Poythress, *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony*, 2 L. & HUM. BEHAV. 1, 2 (1978).

182. Pollack, "Psychiatric Consultation for the Court," in EFFECTIVE UTILIZATION OF PSYCHIATRIC EVIDENCE 71, 91 (1972).

183. Certainly a lawyer who abandons a client's interest because of his or her own inadequacies increases the likelihood of erroneous decisions. It is no excuse for unskilled lawyers that courts rarely overturn decisions on the constitutional

VI. CONCLUSION

The debate over the admissibility of psychiatric predictions of future dangerousness has raged for over two decades and shows little sign of abating. In the *Barefoot* decision, the United States Supreme Court perceived no constitutional barrier to applying ordinary rules of evidence governing the use of psychiatric expert testimony, even in capital cases involving the death penalty.[184] The Court held that expert testimony, including hypothetical questions as to potential dangerousness, may be admitted as evidence to aid the trier-of-fact.[185] Further, any differences among experts ultimately go to the weight of the evidence and not to the admissibility of the testimony.[186] Thus, the Court's sweeping acceptance of such evidence in a capital case leaves little doubt that it will permit similar judgments, predictions, and opinions in civil commitment proceedings to authorize coerced hospitalization of mentally ill individuals.

Although it is doubtful that psychiatrists will ever be able to predict future violence with 100 percent accuracy, recent research does indicate that psychiatrists can provide useful and sufficiently reliable information to aid the trier-of-fact in determining the need for emergency and extended involuntary detention.[187] As indicated in this Article, the admissibility of psychiatric testimony suggests two areas in need of immediate reform.

First, state statutes that require a finding of dangerousness to invoke civil commitment must be more precise and narrow to permit more effective utilization of the information by the trier-of-fact and to reduce total deference to psychiatric opinions and judgments.[188] Several commentators support quantifying statutes into "probabilistic" terms to reduce the "guess-work" often necessitated by vague, general substantive criteria.[189] Psychiatrists would then proffer testimony on the issue of dangerousness based on the existence of given characteris-

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ground of ineffective assistance of counsel. The constitutional controversy with respect to psychiatric opinions may be a creation of attorneys' transference of their own constitutional responsibilities.

184. Barefoot v. Estelle, 103 S. Ct. 3383, 3400 (1983).

185. *Id.* at 3399.

186. *Id.* Once the testimony is admitted, the trier-of-fact (whether judge or jury) has the duty to weigh all evidence, to sort out true from false testimony, and to give greater or lesser credence to one expert's opinions over another. *Id.*

187. *See supra* notes 146-68 and acompanying text.

188. *See supra* notes 16-20 and accompanying text.

189. *See, e.g.*, Dix, *supra* note 1 at 142-43; Monahan & Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 L. AND HUM. BEHAV. 37 (1978); Morse, *Law and Mental Health Professionals: The Limits of Expertise*, in PROFESSIONAL PSYCHOLOGY 389 (1978). Two authors suggest that it may be possible to prove "beyond a reasonable doubt" that an individual possesses a set of given characteristics and those characteristics "probabilistic" association with violent behavior. Monahan & Wexler, *supra*, at 39.

tics and their probable association with violent behavior.[190] The court (or jury) would ultimately determine if the probability meets the legal criteria in question.[191]

Second, attorneys must become more skilled and proficient in litigation techniques in civil commitment hearings. Psychiatric opinions and predictions must be tested in the courtroom to achieve an even greater level of reliability.[192] Any weaknesses in the testimony must be exposed at trial so that the adversary process can accurately separate the reliable from the unreliable evidence.[193] Lack of attorney expertise or competency is not a sufficient reason to convert traditional rules of evidence into a constitutional rule barring an entire category of expert textimony that is both relevant and useful to the particular trier-of-fact.[194]

190. Monahan & Wexler, *supra* note 189, at 39-40.
191. Morse, *supra* note 189, at 397.
192. Cohen, *supra* note 146, at 37-39; Monahan & Wexler, *supra* note 189, at 39.
193. *See, e.g.*, Barefoot v. Estelle, 103 S. Ct. 3383, 3398 (1983).
194. *Id. Cf. id.* at 3414-15 (Blackmun, J., dissenting). Justice Blackmun argues that seldom will all attorneys, as well as the trial judge, be highly experienced and skilled in the law and techniques of advocacy in sophisticated matters of medicine, psychiatry, and psychology. To the contrary, attorneys in a variety of specialties customarily develop a sufficient level of experience to successfully advocate their client's interest.