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TEXAS CAPITAL SENTENCING PROCEDURES: THE ROLE OF THE JURY AND THE RESTRAINING HAND OF THE EXPERT

PEGGY C. DAVIS*

It has been held that the level of our civilization precludes imposition of the death penalty without an individualized judgment that it is "appropriate".¹ Thus, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."² It follows that capital sentencing procedures must "allow consideration of particularized mitigating factors,"³ for

[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.⁴

Death sentences are imposed in Texas whenever a jury determines that the defendant (a) was convicted of a capital crime committed deliberately and unreasonably (in view of any provocation) and (b) is dangerous.⁵ In *Jurek v. Texas*,⁶ the United

States Supreme Court considered the constitutionality of this sentencing scheme. The Court could not approve a scheme, which sent to death all persons guilty of deliberate and unreasonable capital crimes. (Indeed, it is arguable that all contemporary capital crimes, by Texas' definition or any other, are deliberate and unreasonable.)⁷ Furthermore, in a society which, by the use of an insanity defense, protects many of its most dangerous members even from judgments implying blameworthiness, the Court apparently could not rule that the finding of dangerousness necessarily took sufficient account of "the character and record of the offender"⁸ to qualify as an individuating judgment that the death penalty was "appropriate."⁹ It was able, however, to uphold the Texas statute on the theory that the Texas Court of Criminal Appeals had construed the dangerousness question such that the defendant could bring to the jury's attention whatever mitigating circumstances he could show. The Court recognized that:

In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.¹⁰

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¹ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). (Powell, Stevens & Stewart, J. J., plurality opinion).

² *Id.*

³ *Jurek v. Texas*, 428 U.S. 262, 272 (1976).

⁴ 428 U.S. at 304.

⁵ (b) . . . the court shall submit the following issues to the jury:

(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. . . .

(f) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death.

TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1978).

⁶ 428 U.S. 262.

⁷ See BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 57-62 (1974).

⁸ 428 U.S. at 287 n.7.

⁹ *Id.* at 304.

¹⁰ 428 U.S. at 272-73 (quoting *Jurek v. State*, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975)).

The determination of dangerousness therefore developed a mixed use: it was to satisfy the legislative requirement that only dangerous offenders be executed, and it was to satisfy the constitutional requirement that the sentencing decision involve "consideration of particularized mitigating circumstances."¹¹

Since the jury is to consider "whatever mitigating circumstances [the defendant] may be able to show,"¹² we must assume that it may act upon mitigating evidence which is neutral or positive on the question of future dangerousness. To assert the contrary, one must be willing in effect to preclude individualized judgments and to preordain execution of any capital offender who does not appear innocuous.¹³ There is an irresistible speculation that the mixed use is forced and that only a forthright granting of authority to preclude execution on the basis of mitigating evidence will meet the constitutional need. Nonetheless, if the *Jurek* Court's refusal to approve the Texas statute on its face and its commitment to particularized capital sentencing judgments are to have meaning, we must assume that the dangerousness determination affords flexibility. We must assume that dangerousness is a relative concept, better understood perhaps by the phrase "intolerable threat," so that mitigating evidence might lead a jury to find the risk of declining to execute acceptable to a humane and advanced society.¹⁴

If this flexibility is necessary to the constitutionality of the statute, there is danger in any practice which inhibits the jury from voting consistently with its ethical and social judgment. The delegation to psychiatric experts of the function of determining dangerousness is such a practice.

A DESCRIPTION OF THE PRACTICE

In its decision upholding the Texas statute, the *Jurek* Court noted that the highest criminal court of Texas had, in *Smith v. State*,¹⁵ based affirmance of a death sentence upon factors revealed during the trial and "the conclusion of a psychiatrist that he [the defendant] had a sociopathic personality

and that his patterns of conduct would be the same in the future as they had been in the past."¹⁶ Analysis of capital cases reviewed by the Texas Court of Criminal Appeals suggests that the State frequently introduces psychiatric evidence at the penalty phase of a capital trial,¹⁷ and that the expert typically presents a diagnosis of sociopath¹⁸ or an equivalent term¹⁹ and an unqualified characterization of dangerousness.²⁰ Particular experts appear to testify regularly for the State in these matters.²¹ The psychiatric evidence at times con-

¹⁶ 428 U.S. at 273. Smith was a non-triggerman in a robbery convicted under the felony murder rule. He had been intermittently unemployed since a conviction for marijuana possession, which had been his first offense. There was evidence that he did, and evidence that he did not, attempt to kill the victim himself. For full accounts of the case, see Dix, *The Death Penalty*, "Dangerousness," *Psychiatric Testimony*, and *Professional Ethics*, 5 AM. J. CRIM. L. 151, 153-68 (1977); Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U. L. REV. 1, 14-16 (1976). Smith's death sentence was vacated by a federal district court on the grounds that he was denied due process, effective assistance of counsel, the right to present evidence and the right not to incriminate himself by circumstances surrounding the presentation of psychiatric testimony at the sentencing hearing. *Smith v. Estelle*, No. CA 3-77-0544-F, sl (N.D. Tex. Dec. 30, 1977).

¹⁷ *Shippy v. State*, 556 S.W.2d 246, 253 (Tex. Crim. App. 1977); *Granviel v. State*, 552 S.W.2d 107, 114 (Tex. Crim. App. 1977); *Battie v. State*, 551 S.W.2d 401, 406-07 (Tex. Crim. App. 1977); *Moore v. State*, 542 S.W.2d 664, 675-76 (Tex. Crim. App. 1977); *Livingston v. State*, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976); *Gholson v. State*, 542 S.W.2d 395, 399-401 (Tex. Crim. App. 1976); *Smith v. State*, 540 S.W.2d 693, 696 (Tex. Crim. App. 1976).

¹⁸ *Battie v. State*, 551 S.W.2d at 407; *Moore v. State*, 542 S.W.2d at 676; *Livingston v. State*, 542 S.W.2d at 661; *Gholson v. State*, 542 S.W.2d at 399; *Smith v. State*, 540 S.W.2d at 696.

¹⁹ *Granviel v. State*, 552 S.W.2d at 123 (antisocial personality).

²⁰ In *Shippy* the psychiatric expert was unable to assert "a reasonable medical probability" of dangerousness. 556 S.W.2d at 256. However, in *Moore*, the defendant was termed "an absolute threat," 542 S.W.2d at 676; in *Livingston* the testimony was that the defendant "would remain a continuing threat to society," 542 S.W.2d at 661; and in *Gholson* the experts' conclusion was that both defendants "would continue to be a danger to society," 542 S.W.2d at 399.

²¹ *Granviel v. State*, 552 S.W.2d at 114 (Dr. Holbrook); *Moore v. State*, 542 S.W.2d at 676 (Drs. Grigson and Holbrook); *Livingston v. State*, 542 S.W.2d at 661 (Drs. Grigson and Holbrook); *Gholson v. State*, 542 S.W.2d at 399-400 (Drs. Grigson and Holbrook); *Smith v. State*, 540 S.W.2d at 696 (Dr. Grigson).

Even before the enactment of the present Texas capital sentencing procedure with its requirement that the jury determine dangerousness, the State had used Dr. Grigson's testimony that the defendant was a sociopath with

¹¹ *Id.* at 272.

¹² *Id.*

¹³ Statutory and case law leave it altogether unclear how dangerous an offender must be before execution is permissible under art. 37.071 (b) (2) of the Texas statute. See discussion at notes 30-41 and accompanying text *infra*.

¹⁴ The alternative notion that the presentation of mitigating evidence is to invite jury nullification presents its own constitutional problems. See 428 U.S. at 302-03.

¹⁵ 540 S.W.2d 693 (Tex. Crim. App. 1976).

stitutes the State's entire presentation at sentencing.²² Prior convictions are, of course, introduced, and on occasion testimony is presented that the defendant's reputation for being a peaceable and law abiding citizen is "bad."²³

There is no indication in the appellate opinions that defense counsel in capital cases have made use of psychiatric experts at the penalty phase, but the Texas Court of Criminal Appeals has reversed a capital conviction for the trial judge's failure to permit the defense to present a psychiatric witness.²⁴ There is evidence that the resources of the defense are so limited that the use of such evidence might be foreclosed.²⁵ The introduction of other kinds of mitigating evidence may also be significantly limited. For example, as the Court of Criminal Appeals held in *Hovila v. State*, the statute "allows a trial judge broad discretion in determining just what constitutes 'relevant [and therefore

admissible] evidence' at the punishment stage."²⁶

In upholding the Texas statute, the Supreme Court in *Jurek* seemed to rely upon the ability of the Texas Court of Criminal Appeals to provide, by a process of review, "a means to promote the evenhanded, rational, and consistent imposition of death sentences under law."²⁷ However, the sufficiency of the evidence supporting a death sentence has been reviewed only in those cases in which the issue has been raised by counsel²⁸ and the evidence has never been found wanting. More than ten capital convictions have been affirmed with only cursory appellate review of the issue.²⁹ These results have occurred even though members of the court have twice expressed the view that findings of dangerousness may not rest exclusively upon psychiatric evidence of the kind typically offered by the state,³⁰ and Judge Phillips has announced his belief that a review of the sufficiency of the evi-

"no regard for societal rules, familial rules, moral rules and legal rules" and could not be rehabilitated, to influence a jury sentencing decision. The testimony was offered to counter testimony at the penalty hearing by defendant's mother and sister that they thought he could be rehabilitated. The jury sentenced him to death. *Armstrong v. State*, 502 S.W.2d 731, 735 (Tex. Crim. App. 1973). In *Bruce v. Estelle*, 536 F.2d 1051 (5th Cir. 1976), a homicide conviction, upheld in the district court by reliance upon the testimony of Dr. Grigson that the defendant was a sociopath and had been competent to stand trial, was reversed. The circuit court declared the "finding that Bruce is a sociopath clearly erroneous" and noted:

Except for Dr. Grigson, all the physicians who examined Bruce detected an underlying schizophrenic disorder. . . . [T]he only dissenting expert, Dr. Grigson, conducted his first examination three and one-half years after trial. . . . Nor did Dr. Grigson keep Bruce under lengthy observation. . . . When asked how it was possible that the other experts who had examined Bruce over a nine-year period had arrived at a radically different diagnosis, Dr. Grigson's sole explanation was that he was better qualified than they to determine Bruce's condition, a fact not established in the record.

Id. at 1060-61.

²² *Moore v. State*, 542 S.W.2d at 676; *Livingston v. State*, 542 S.W.2d at 663.

²³ *Shippy v. State*, 556 S.W.2d at 256; see *Jurek v. Texas*, 428 U.S. at 267.

²⁴ *Robinson v. State*, 548 S.W.2d 63, 66 (Tex. Crim. App. 1977) ("Testimony to the contrary on behalf of the State has been held admissible at the punishment stage of the trial. A good rule of evidence works both ways.")

²⁵ *Freeman v. State*, 556 S.W.2d 287, 303 (Tex. Crim. App. 1977) (upholding a \$500 expense limit for investigation and experts in the case of a defendant charged with two counts of capital murder).

²⁶ *Hovila v. State*, No. 56, 989, slip op. at 9 (Tex. Crim. App. Feb. 8, 1978) (quoting *Robinson v. State*, 548 S.W.2d at 65). *Hovila's* death sentence was affirmed despite the trial judge's refusal to permit his mother to testify that after his mistaken release from custody pending trial he had returned to her home and had stayed out of trouble and that four days later "when he discovered his release was a mistake he returned to Dallas with the intention of surrendering to the authorities." *Id.*

The evidence . . . that *Hovila* did not murder or commit other criminal acts during a four-day period would not show that he probably would or would not be a continuing threat to society—the trial court's error, if any, in refusing to admit this evidence was not so harmful as to require us to reverse.

Id. at 10.

²⁷ 428 U.S. at 276.

²⁸ *Shippy v. State*, 556 S.W.2d 246, 256 (Tex. Crim. App. 1977); *Burns v. State*, 556 S.W.2d 270, 281 (Tex. Crim. App. 1977); *Brock v. State*, 556 S.W.2d 309, 317 (Tex. Crim. App. 1977); *Granviel v. State*, 552 S.W.2d 107, 123 (Tex. Crim. App. 1977); *Smith v. State*, 540 S.W.2d 693, 696 (Tex. Crim. App. 1977); *Moore v. State*, 542 S.W.2d 664, 676 (Tex. Crim. App. 1976).

²⁹ These include *Denney v. State*, 558 S.W.2d 467 (Tex. Crim. App. 1977); *Freeman v. State*, 556 S.W.2d 287 (Tex. Crim. App. 1977); *King v. State*, 553 S.W.2d 105 (Tex. Crim. App. 1977); *Battie v. State*, 551 S.W.2d 401 (Tex. Crim. App. 1977); *Collins v. State*, 548 S.W.2d 368 (Tex. Crim. App. 1977); *White v. State*, 543 S.W.2d 104 (Tex. Crim. App. 1977); *Woodkins v. State*, 542 S.W.2d 855 (Tex. Crim. App. 1976); *Boulware v. State*, 542 S.W.2d 677 (Tex. Crim. App. 1976); *Livingston v. State*, 542 S.W.2d 655 (Tex. Crim. App. 1976); *Gholson v. State*, 542 S.W.2d 395 (Tex. Crim. App. 1976).

³⁰ *Livingston v. State*, 542 S.W.2d at 663 (Roberts, J., dissenting). See also *Smith v. State*, 540 S.W.2d at 693 (Odom, J., dissenting), withdrawn before publication, reproduced in part in *Dix, The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 163-65.

dence supporting a death sentence is constitutionally required.³¹

The Court of Criminal Appeals has declined to refine the rather vague statutory language setting forth the concept of dangerousness. Instead, the jury is typically asked to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."³² For instance, in *King v. State*,³³ the court was asked to set aside a death sentence for the trial judge's refusal to define the terms "deliberately," "probability," "criminal acts of violence," and "continuing threat to society."³⁴ The court noted that "the definition of common terms and phrases" is not required in a charge to the jury and that "[i]n *Jurek v. Texas*, . . . the Supreme Court of the United States concluded that the submission of the issues provided by Art. 37.071, *supra*, constitutionally guided the jury's determination of the punishment issues. No special definitions of the terms of that statute were required."³⁵ The court therefore held "that [it] . . . need not provide special definitions for these terms in its charge to the jury during the punishment stage of a capital murder trial."³⁶ The court had held similarly with regard to the term "probability" and defined it as follows:

"Likelihood" is one of the definitions for "probability" in Webster's Unabridged Dictionary, 2d Ed. (1948). Other definitions of the word probability include "reasonable ground for presuming," "true, real, or likely to occur," "a conclusion that is not proof but follows logically from such evidence as is available," [and] "in the doctrine of chance, the likelihood of the occurrence of any particular form of an event."³⁷

³¹ *King v. State*, 553 S.W.2d 105, 108 (Tex. Crim. App. 1977) (Phillips, J., concurring). Judge Phillips reviewed the evidence here and found it sufficient; he has not conducted such a review in subsequent capital cases affirmed by the court.

³² TEX. CODE CRIM. PROC. ANN. art. 37.071 (b) (2) (Vernon Supp. 1978).

³³ 553 S.W.2d 105.

³⁴ *Id.* at 107.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Graniel v. State*, 552 S.W.2d at 117 n.6. The failure to narrow these terms presents independent constitutional problems. The United States Court of Appeals for the District of Columbia has noted that "when a determination of 'dangerousness' will result in a deprivation of liberty, no court can afford to ignore the very real constitutional problems surrounding incarceration predicated only upon a supposed propensity to commit criminal acts." *Cross v. Harris*, 418 F.2d 1095, 1101 (D.C. Cir. 1969) (emphasis added). The court found it necessary to

Relying upon the *King* judgment that the language of the statute is "simple" and uses terms the jury is "supposed to know,"³⁸ the Texas court has held that the defense has no right to inform its judgment regarding the use of peremptory challenges by asking prospective jurors such questions as whether they would deem a crime against property an "act of violence."³⁹

The jury which must decide the dangerousness question, and with it the fate of the capital defendant, is purged of individuals unable to swear that "the mandatory penalty of death or imprisonment for life will not affect [their] deliberations on any issue of fact."⁴⁰ It is, then, to a jury sworn to dispassionate objectivity that the medical expert presents testimony that the defendant is a sociopath and the ominous conclusion that he will "constitute a continuing threat to society."

This expert testimony is suspect on three grounds. First, mental health professionals are notoriously bad at predicting dangerousness and invariably err on the side of overinclusion.⁴¹ Al-

construe a statute requiring commitment of dangerous sex offenders to "provide an analytical framework to guide lower courts in applying the conclusory term 'dangerous to others'." For,

[w]ithout some such framework, "dangerous" could readily become a term of art describing anyone whom we would, all things considered, prefer not to encounter on the streets. We did not suppose that Congress had used "dangerous" in any such Pickwickian sense. Rather, we supposed that Congress intended the courts to refine the unavoidably vague concept of "dangerousness" on a case-by-case basis, in the traditional common-law fashion.

Id. at 1099.

³⁸ *Battie v. State*, 551 S.W.2d at 404.

³⁹ *Id.* at 405.

⁴⁰ TEX. PENAL CODE ANN. tit. 3, § 12.31 (Vernon 1974). The Court of Criminal Appeals regards inability to take this oath an independent ground for exclusion of a prospective juror. This would seem to violate the principle, established in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), that exclusion of a juror opposed to the death penalty is constitutionally impermissible absent an unmistakably clear expression of an inability to follow the law. *Freeman v. State*, 556 S.W.2d at 297; *Burns v. State*, 556 S.W.2d at 275-79; *Shippy v. State*, 556 S.W.2d at 251; *Moore v. State*, 542 S.W.2d at 667-72.

⁴¹ The evidence is reviewed in STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 25-40 (1975), with the conclusion that "[t]he mental health professionals . . . simply have no demonstrated capacity to generate even a cutting line that will confine more true than false positives." *Id.* at 33. See also Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1970).

though it has seemed a necessity in the maintenance of a system of involuntary mental health care, and a reasonable incident to the multidimensional process of making sentencing decisions in non-capital cases, psychiatric prediction of dangerousness is conceded to be highly unreliable by virtually every student of the problem. And, while the point has been made frequently and conclusively, the concessions of several mental health professionals bear repeating. It is admitted that "the longer one works in [the mental health] field, the more one is impressed with the problem of deciding the question of danger . . ."⁴²

It is also conceded that:

We cannot predict even with reasonable certainty that an individual will be dangerous to himself or to others. Thus the question as to what extent we can exercise control over dangerous individuals must be considered . . . We can make an educated guess, but what right does society have to act upon a guess?⁴³

[W]e need to examine the important ethical problems that are a direct result of the present level of knowledge in identification of violence-prone individuals. Concern about violence will inevitably lead to the development of special treatment programs, but the majority of persons placed in such programs must be false positives . . . Confidence in the ability to predict violence serves to legitimate intrusive types of social control. Our demonstration of the futility of such prediction should have consequences as great for the protection of individual liberty as a demonstration of the utility of violence prediction would have for the protection of society.⁴⁴

There can be little doubt that "[t]he judge or juror who relies on the opinion of the expert [on the question of dangerousness] acts less rationally than he thinks he does. Actually he relies on a judgment into which personal insights and experiences are bound to enter so importantly that it cannot be called scientific."⁴⁵

The difficulty with the expert testimony presented in the Texas capital sentencing proceeding is that the sociopath⁴⁶ diagnosis is the most contro-

versial and perhaps the least precise in psychiatric nomenclature.

The term "psychopath" is probably the most abused word in the whole psychiatric vocabulary. Etymologically, the word itself is nonspecific; it merely means a sick mind. Such ambiguous terms are readily subject to misuse. When a vague term is employed, it usually means that the concept which it represents is vague, and, unfortunately, this is true of psychopathy.⁴⁷

There are some who think the term without scientific meaning⁴⁸ and many who think it excessively and irresponsibly used.⁴⁹ The following characteristics were identified by Cleckley and are, with

chological journals and will here be deemed to have the same referent.

⁴⁷ M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 86 (1952).

⁴⁸ "[D]oubts are frequently expressed as to whether the concept has a substantive referent." Blackburn, *An Empirical Classification of Psychopathic Personality*, 127 *BRIT. J. PSYCH.* 456 (1975). Blackburn concluded, however, after empirical study, that the convergence of traits usually attributed to the sociopath occurred with sufficient frequency to justify use of the term. *Id.* at 460. Robins called the diagnosis a "psychiatric wastebasket," but, in the view of Lewis and Balla, "[ignored] his own warning, [and] proceeded to conceptualize 'an illness or syndrome' that included such a variety of behaviors . . . as to become meaningless." Lewis & Balla, "Sociopathy" and Its Symptoms: *Inappropriate Diagnoses in Child Psychiatry*, 132 *AM. J. PSYCH.* 720 (1975).

A minority has maintained that the psychopathic personality, as a distinct clinical syndrome, does not exist. One of these dissenters, psychiatrist Olof Kinberg, commented . . . "[the concept] should be abrogated as theoretically unsatisfactory, practically misleading and destructive to scientific thinking." And Dr. Leo Kanner has commented, "A psychopath is somebody you don't like."

W. McCORD & J. McCORD, *THE PSYCHOPATH* 2 (1964) (citations omitted).

[A] substantial number of psychiatrists do not believe there is any such condition. Many other clinical psychologists who, somewhat reluctantly, recognize its existence, nevertheless regard the psychopathic group as a dumping ground for unclassified mental disorders. Psychoanalysts view the term with an equally jaundiced eye, and indeed rarely use it, preferring their own characterological nomenclature, which however is . . . far from adequate. Even forensic psychiatrists . . . although readiest of all to accept the term, are not agreed as to its exact connotation.

E. GLOVER, *THE ROOTS OF CRIME* 118 (1960).

⁴⁹ See, e.g., W. McCORD & J. McCORD, *supra* note 48, at 20; Blackburn, *supra* note 48, at 456; Lewis & Balla, *supra* note 48, at 720; S. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 101 (1967).

⁴² Johnston, *Releasing the Dangerous Offender*, in *THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL* 29, 34 (J. Rapoport ed. 1967).

⁴³ Usdin, *Broader Aspects of Dangerousness*, in Rapoport, *supra* note 42, at 43.

⁴⁴ Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 *CRIME & DELINQUENCY* 393, 402 (1972).

⁴⁵ van der Kragt, *Can the Psychiatrist Foretell Criminal Behavior?*, 20 *INT'L J. OFFENDER THERAPY & COMP. CRIM.* 148, 151 (1976).

⁴⁶ The terms sociopath, psychopath and antisocial personality are used interchangeably in psychiatric and psy-

variations among investigators, commonly associated with sociopathy:

1. Superficial charm and good "intelligence."
2. Absence of delusions and other signs of irrational "thinking."
3. Absence of "nervousness" or psychoneurotic manifestations.
4. Unreliability.
5. Untruthfulness and insincerity.
6. Lack of remorse or shame.
7. Inadequately motivated antisocial behavior.
8. Poor judgment and failure to learn by experience.
9. Pathologic egocentricity and incapacity for love.
10. General poverty in major affective reactions.
11. Specific loss of insight.
12. Unresponsiveness in general interpersonal relations.
13. Fantastic and uninviting behavior with drink and sometimes without.
14. Suicide rarely carried out.
15. Sex life impersonal, trivial, and poorly integrated.
16. Failure to follow any life plan.⁵⁰

There is strong disagreement as to whether the term identifies a discreet clinical state or a tendency toward a mode of acting out conflicts common to a range of personality types.⁵¹ The absence of a

⁵⁰ H. CLECKLEY, *THE MASK OF SANITY* 355-56 (1950 ed.) The classification accepted by the American Psychiatric Association is:

"Antisocial personality.

This term is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups, or social values. They are grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalizations for their behavior. A mere history of repeated legal or social offenses is not sufficient to justify this diagnosis. *Group delinquent reaction of childhood (or adolescence)* (q.v.), and *Social maladjustment without manifest psychiatric disorder* (q.v.) should be ruled out before making this diagnosis."

AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 43 (1968).

⁵¹ In current literature the term "psychopathy" is defined vaguely and because of arbitrary usage tends to assume multiple meanings. . . . [T]wo major usages predominate. There are those persons who would agree . . . that psychopathy is a personality disorder, a discernible clinical entity which can be isolated from other disorders and which is clearly diagnosable. There are others who see . . . psychopathy as a hypothetical rather than an absolute condition. They would view psychopathy as a re-

satisfactory or agreed upon clinical definition or an identifiable intrapsychic dynamic has led researchers to "classify" sociopaths in terms of their behavior,⁵² with the result that frequently the classification either explains nothing or sweeps too broadly. On the other hand, objective classification systems which attempt to take account of things other than behavior are demonstrably unreliable.⁵³

The causes of sociopathy are also disputed. The onset of the disorder tends to occur between the ages of ten and thirteen.⁵⁴ Yet, rejection, emotional starvation and parental hostility in the first or first three years of life have been advanced as its causes,⁵⁵ as have early institutionalization,⁵⁶ inconsistent parental responses⁵⁷ and defective neurological structures.⁵⁸

The strong correlation between parental rejection and the sociopath diagnosis makes plausible the dynamic hypothesis that the sociopath is an individual engaged in a "search for a painless

sponse to the same kinds of conflicts that produce neurosis but would recognize that some individuals have a tendency to develop hypertrophied alloplastic behavioral patterns. Psychiatrists who support this proposition argue that one does not see real psychopaths, only individuals who are more or less psychopathic.

S. HALLECK, *supra* note 49 at 101.

⁵² See, e.g., Campagna & Harter, *Moral Judgment in Sociopathic and Normal Children*, 31 J. PERSONALITY & SOC. PSYCH. 199, 200 (1973). Cf. W. McCORD & J. McCORD, *supra* note 48, at 44, on the problem of diagnosis ("the observer should possess more than the usual amount of knowledge of his patient; he cannot depend, as with many other disorders, on the overt behavior symptoms, or complaints of the subject at the time of contact").

⁵³ Psychological testing of adolescent delinquents and volunteers (ministers, psychologists, social workers, correction officers, psychiatric residents and graduate students) in a mental health collective identified more than fifty percent of each group as psychopathic. Hawk & Peterson, *Do MMPI Psychopathic Deviancy Scores Reflect Psychopathic Deviancy or Just Deviancy?*, 138 J. PERSONALITY ASSESSMENT 362 (1974).

⁵⁴ Campagna & Harter, *supra* note 52, at 200.

⁵⁵ W. McCORD & J. McCORD, *supra* note 48, at 83; H. GUTTMACHER & M. WEIHOFEN, *supra* note 47, at 107-08.

⁵⁶ Humphrey, *A Study of the Etiology of Sociopathic Behavior*, 35 DISEASES OF THE NERVOUS SYSTEM 432 (1974).

⁵⁷ Campagna & Harter, *supra* note 52, at 203.

⁵⁸ W. McCORD & J. McCORD, *supra* note 46, at 70 ("more psychopaths seem to have defective neural structures than would be expected in a normal population, and it seems likely that such defects have some causative importance"). Recent research has focused upon the possibility of atypical responses to stimuli which preclude or inhibit avoidance learning. See SCHACHTER, *EMOTION, OBESITY AND CRIME* 152-83 (1971).

freedom from object relations" which serves as "a defense against the intolerable experience of helplessness."⁵⁹ Nevertheless, no explanation of the convergence of symptoms has won a consensus. In sum, the diagnosis tells us little more than that a subject exhibits, for unknown reasons, a cluster of characteristics which may or may not suggest an identifiable intrapsychic dynamic.

The third difficulty involved in the use of psychiatric testimony indicating that a Texas capital defendant is a sociopath is that despite the fact that the criminal or antisocial conduct is seen as an identifying symptom of sociopathy, there is, surprisingly, no reason to hope that psychiatric predictions of dangerousness will be significantly more reliable within the universe of persons diagnosed as sociopaths. Whether because the diagnosis is meaningless,⁶⁰ or difficult to make,⁶¹ or broader than the behaviorist referent,⁶² it does not permit

⁵⁹ S. HALLECK, *supra* note 49, at 103-04. A clinical example is presented in which a sociopath recalls that at the age of nine, abandoned by his father, he was helpless to avoid being left alone for long periods by his mother. He thought of pleading with his mother, and stated:

Then suddenly it came to me that no matter what I did, no matter how much I cried or pleaded, it wouldn't make any difference, she would leave anyway. At that moment somehow or another, I was a free person. I didn't need her and I didn't need anybody. I stopped worrying and I started having fun. Since that time life has been easy, and I can be happy even though I am in prison.

Id. at 105.

⁶⁰ See note 48, *supra*.

⁶¹ See notes 49-53, *supra* and accompanying text.

⁶² Halleck and others maintain that "the psychopath is not necessarily a criminal. He certainly need not be an unsuccessful criminal. If a really pure psychopath could exist, his success in the world would probably preclude his ever coming to the attention of a psychiatrist." S. HALLECK, *supra* note 49, at 101. Indeed, criminal or violent acting out is seen as a failure of the defense. *Id.* at 108-14. Cleckley recognizes in some apparent sociopaths an ability to commit, and sometimes repeat, violent, antisocial acts, but finds such conduct so atypical as to warrant modification of the diagnosis:

The [typical] psychopath, as I have seen him, usually does not commit murder or other offenses that promptly lead to major prison sentences. This is true of the disorder as I present it in what I consider a pure culture. A large part of his antisocial activity might be interpreted as purposively designed to harm himself if one notices the painful results that so quickly overtake him. Of course I am aware of the fact that [many] persons showing the characteristics of those here described do commit major crimes and sometimes crimes of maximal violence. There are so many, however, who do not, that such tendencies should be regarded as the exception rather than as the rule, perhaps, as a pathologic

a reliable prediction of dangerousness.

A search of the literature reveals only one study of the dangerousness of severe sociopaths. All of the sociopaths in this study had been convicted of at least one crime, and all had been diagnosed primary psychopaths. One quarter were convicted of no additional crimes during a fifteen year follow-up:

For some 15 years we . . . have followed the subsequent convictions of 70 prisoners . . . who were picked out as undoubted examples of psychopathic personality of a severe grade. We have compared them with nonpsychopathic prisoners. Although most of them have become very serious recidivists and have been in prison for much of the time, a quarter of them, to our surprise, have never been reconvicted. In the last 5 years of the 15 follow-up, just completed, the psychopaths who have been at liberty during this period have hardly been reconvicted more often than a control group.⁶³

The ability of psychiatrists to predict *serious assaultive crimes* among offenders who had committed at least one criminal act and fit identical with the "classical stereotype of the criminal or antisocial psychopath,"⁶⁴ has been tested in an effort in Massachusetts to identify and treat dangerous sex offenders.⁶⁵ Of the thirty patients found to be dangerous after thirty months of treatment and evaluation,⁶⁶ less than thirty percent committed serious assaultive crimes.⁶⁷

If psychiatric experts in Texas capital sentencing proceedings believe, as they seem to,⁶⁸ that all "severe" sociopaths are dangerous, they may, then, overpredict simple recidivism in one out of four cases. If they were to conduct extensive analyses,

trait independent, to a considerable degree, of the other manifestations which we regard as fundamental.

H. CLECKLEY, *supra* note 50, at 290. The task of identifying an independent pathologic trait leading to violent behavior may be no easier when the subject is a diagnosed sociopath than when he is not.

⁶³ Gibbens, Briscoe & Dell, *Psychopathic and Neurotic Offenders in Mental Hospitals*, in *THE MENTALLY ABNORMAL OFFENDER* 143-44 (de Reuck & Porter eds. 1968).

⁶⁴ Kozol, Baucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 *CRIME & DELINQUENCY* 371, 379 (1972).

⁶⁵ Kozol, Baucher & Garofalo, *supra* note 64.

⁶⁶ Evaluations were by a team including psychiatrists, psychologists and a social worker and drew upon "clinical examinations, psychological tests, and a meticulous reconstruction of the life history elicited from multiple sources." *Id.* at 383.

⁶⁷ *Id.* at 391.

⁶⁸ See Dix, *supra* note 16, at 157.

and they do not,⁶⁹ they might overpredict serious assaultive behavior by as much as seventy percent. Yet, their pronouncement that there is a probability that the defendant will commit future acts of violence because he is a sociopath must skew the sentencing process away from a balancing judgment reflecting contemporary morality and toward a rigid process of classification. Analogous conflicts between the factfinder's tendency to label at the direction of psychiatric experts and its duty to make an independent judgment are instructive.

LESSONS FROM ANALOGOUS USES OF PSYCHIATRIC EVIDENCE

The moral, social and legal judgment made by a jury deciding the appropriateness of a death sentence is much like that of a jury deciding the culpability of a defendant who raises an insanity defense. Here too the psychiatric expert may inhibit jury deliberation:

With the relevant information about the defendant, and guided by the legal principles enunciated by the court, the jury must decide, in effect, whether or not the defendant is blameworthy. Undoubtedly, the decision is often painfully difficult, and perhaps its very difficulty accounts for the readiness with which we have encouraged the expert to decide the question. But our society has chosen not to give this decision to psychiatrists or to any other professional elite but rather to twelve lay representatives of the community.⁷⁰

It has been determined that "in view of the complicated nature of the decision to be made—intertwining moral, legal and medical judgments—the insanity defense is peculiarly apt for resolution by the jury."⁷¹ And, it has been required "that trial judges and appellate judges ensure that the jury base its decision on the behavioral data which are relevant to a determination of blameworthiness,"⁷² rather than the conclusions and classifications of experts. Psychiatric experts have therefore been discouraged from stating a simple conclusion as to whether an alleged crime was a product of a mental disease or defect where that determination is essential to a determination of insanity.⁷³ They have been asked instead to give

"the kind of opinion you would give to a family which brought one of its members to your clinic and asked for your diagnosis of his mental condition and a description of how his condition would be likely to influence his conduct."⁷⁴ It has also been required that the charge to the jury admonish it against excessive reliance upon the expert's conclusions.⁷⁵

Conclusory psychiatric testimony has also been found to inhibit intelligent decision-making where civil commitment is authorized for the dangerous. In words that ring truer, perhaps, in this context than in that for which they were written, the United States Court of Appeals for the District of Columbia Circuit has said:

It is particularly important that courts not allow this second question to devolve, by default, upon the expert witnesses. Psychiatrists should not be asked to testify, without more, simply whether future behavior or threatened harm is "likely" to occur. For the psychiatrist "may—in his own mind—be defining 'likely' to mean anything from virtual certainty to slightly above chance. *And his definition will not be a reflection of any expertise, but * * * of his own personal preference for safety or liberty.*"

Of course, psychiatrists may be unable or unwilling to provide a precise numerical estimate of probabilities, and we are not attempting to so limit their testimony. But questioning can and should bring out the expert witness's meaning when he testifies that expected harm is or is not "likely." Only when this has been done can the court properly separate the factual question—what degree of likelihood exists in a particular case—from the legal one—whether the degree of likelihood that has been found to exist provides a justification for commitment.⁷⁶

It is also significant that in the insanity defense context, the diagnosis of sociopath—once thought to imply too much rationality and too little compulsion to warrant mitigating treatment—is increasingly thought to present a challenge to the presumption of responsibility which only the jury

⁶⁹ See *Dix, id.*, at 155, 159; *Battie v. State*, 551 S.W.2d at 407.

⁷⁰ *Washington v. United States*, 390 F.2d 444, 453-54 (D.C. Cir. 1967).

⁷¹ *Adams v. United States*, 413 F.2d 411, 416 (D.C. Cir. 1969) (quoting *King v. United States*, 372 F.2d 383, 389 (D.C. Cir. 1967)).

⁷² *Washington v. United States*, 390 F.2d at 447.

⁷³ *Id.* at 455-56.

⁷⁴ *Id.* at 458. The modification of the *Washington* rule in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) eliminates the prohibition of "ultimate fact" testimony, but in no way reflects a diminished concern that the proper role of the jury be maintained; under existing procedures, the court is to make it clear to the jury, by its instructions, that "[t]he experts add to perspective, without giving decision. The law looks to the experts for input, and to the jury for outcome." *Id.* at 1007.

⁷⁵ See 471 F.2d at 1006-07.

⁷⁶ *Cross v. Harris*, 418 F.2d at 1100-01 (citations omitted) (emphasis added).

may resolve. The Ninth Circuit has held, in a case involving testimony by a government witness that the defendant was a sociopath who could distinguish criminal and legal conduct, but could not "appreciate the morality of his conduct,"⁷⁷ that the trial judge committed reversible error in failing to instruct the jury that "... for purposes of the insanity defense, 'wrongfulness' means moral wrongfulness rather than criminal wrongfulness."⁷⁸ Moreover, the Fourth Circuit has held that the diagnosis that a defendant "is an Antisocial Personality and was so at the time of the alleged offenses, at which times he was able to appreciate the criminality of his act, but he was not able to conform his conduct to the requirements of the law,"⁷⁹ is evidence which entitles the defendant to take the question of insanity to a jury.⁸⁰ The Fourth Circuit has also maintained that "[t]here is enough doubt about a sociopath . . . to call for an exercise of the jury's moral judgments."⁸¹ Finally, appellate

⁷⁷ *United States v. Fresonke*, 549 F.2d 1253, 1255 (9th Cir. 1977) (quoting the testimony of Dr. H. Kaufman, a psychiatrist who testified as an expert witness for the Government).

⁷⁸ *Id.*

⁷⁹ *United States v. McGirr*, 434 F.2d 844, 846 (4th Cir. 1970).

⁸⁰ *Id.* at 849. The conviction was reversed because the defendant's motion to withdraw his guilty plea in light of the diagnosis had been denied. The psychiatric report stated:

The patient did state that he felt that he was not able to control the actions leading up to the commission of this crime and although this is said with the same glib facile manner, nonetheless the staff is of the opinion that he is correct that the commission of these crimes is part and parcel of his sociopathic personality. He will so be reported to the Court.

Id. St. Elizabeth's Hospital, the examining agency, had decided in 1957 "to treat sociopathic personality disturbance as a mental illness." *United States v. Brawner*, 471 F.2d 969, 1017 n.18 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part).

⁸¹ *United States v. Wilson*, 399 F.2d 459, 463 (4th Cir. 1968). The evidence here was reminiscent of that typically presented in a Texas capital sentencing proceeding with, of course, conclusions of blameworthiness rather than dangerousness. Significantly, Judge Sobeloff said, dissenting from affirmance of the conviction and the jury determination that the defendant was not legally insane:

When psychiatrist and counsel fail to provide sufficient underlying information to the jury, the judge, I maintain, has some responsibility to help elicit this vital information. Although ours is indeed an adversary system, a criminal trial is not a game. It is a solemn proceeding in which moral judgment is pronounced. As the governor of the trial, and not a mere moderator, the judge has an affirmative duty to do all that is feasible to assure that these judgments are based upon all the relevant evidence. The

opinions affirming convictions of diagnosed sociopaths occasionally have expressed, however indi-

judge should not hesitate to prevent the distortion of the jury's perspective by counsel's deficient exploration of the underlying, determinative facts. In some cases, the court may feel obligated to suggest that additional witnesses be called. At the very least it should ensure that the psychiatrists who do testify describe the investigations, observations, reasoning and medical theory which led to the ultimate opinion, as voiced on the witness stand.

Professor McCormick has declared that the "core" of the opinion evidence rule would be preserved by a rule "prescribing that the trial judge in his discretion may require that a witness before giving testimony in terms of inference on general description shall first give the concrete details upon which the inference or description is founded, so far as feasible." The need for judicial supervision is particularly urgent in insanity cases, where the adversary system may malfunction because of the inexperience of counsel, the complexity of the issue, or both. Most criminal defendants are represented by court-appointed lawyers with little experience in criminal law or even other areas of trial work. These lawyers must master new fields of law and new skills. When, in addition, it becomes their task to present a defense of insanity, which involves elusive medical, legal and moral problems, they are often understandably overwhelmed. In these circumstances, intervention from the bench may be absolutely essential for a fair trial.

In the instant case, the trial judge did play more than a passive role. On several occasions he commendably required the expert witness to clarify his opinions. But he never demanded that the psychiatrist present the factual basis for his opinions. Thus the jury never obtained a complete unfolding of defendant's emotional and mental processes. If they had, they might have acquitted by reason of insanity.

Id. at 465 (footnotes omitted). The opinion of the court further commented upon the "factual sparsity of the record," *id.* at 462, indicating that had the trial occurred after the more recent announcement of judicial rules for the presentation of psychiatric testimony on the issue of sanity, it would have remanded "for a retrial on the issue of mental responsibility." *Id.*

[T]he expert witness was allowed and encouraged to state his conclusory appraisal of the defendant. Conclusory answers were given to questions which called for them and which, most frequently, were attempted to be cast in terms of ultimate inferences. 'Does the defendant know the difference between right and wrong?' 'Has he the capacity to refrain from doing what he wants to do if he wants very much to do it?' These are summary paraphrases of a barrage of questions that ultimately elicited in considerable detail the psychiatrist's summary description of the defendant. No one, however, asked the witness about the bases of his judgment. . . . The deficiencies of the record here seemingly result from an elementary preference for the unexamined

rectly, a mix of reservations about the verdict and speculation that it was dictated by the form of the legal test or of the expert testimony.⁸²

There is at least one case of acquittal despite a finding of sociopathy:

The report of the psychiatrist representing the court was, with the consent of the prosecution and the defense, admitted into evidence. In it he said, "On the basis of the existing Maryland law, this patient must be considered a responsible agent, since he has the capacity to distinguish right from wrong and to realize the consequences of his act. Yet, he has not even the ability to conform to society's demands that many insane individuals possess."

The defense psychiatrists all maintained that he did not know right from wrong. Following somewhat the line of reasoning of Jerome Hall, a distinguished American law professor, they asserted that knowing did not denote intellectual cognition alone but included an ability to make use of such knowledge. Being greatly affected by the tragedy of the youth's aged parents and having the court's assurance in answer to a specific question of the foreman that on no condition would he be at large to prey upon the community, the jury found him not guilty by reason of insanity. This was the first instance in Maryland law in which a psychopath was found not guilty by reason of insanity. As such, it attracted attention even outside the state. The *Baltimore Sun* called it a victory for the common sense of the jury in that it disregarded the "peculiarly backward definition of insanity" under Maryland law and brought "the definition into full accord with the latest findings of psychiatry."⁸³

conclusions of the expert witness over their factual predicates. It was only by happenstance that the witness testified that there was very little violence in Wilson's history, and the paucity of other basic information is proclaimed by the fact that we know nothing else about him except that he was forty-six years old, white and divorced. The doctor testified that Wilson had been a failure in everything he ever attempted, but the jury and we know nothing of anything Wilson ever attempted except marriage, and that is entirely unelucidated.

Id.

⁸² See note 81 *supra*; *Apgar v. United States*, 440 F.2d 733, 734 (8th Cir. 1971) ("we feel compelled to say that ... [the defendant's] life ... demonstrates the tragically inadequate response of our institutions—mental, penal and judicial—to an individual whose acts, time and again, constituted a plea for assistance to overcome severe personal inadequacies"); *Adams v. United States*, 413 F.2d 411, 415 (D.C. Cir. 1969) ("whatever evil may be, it is uncommonly difficult to discover it in the squalid life of this man").

⁸³ M. GUTTMACHER & H. WEIHOFEN, *supra* note 47, at 98-99.

And, the McCords have reported a case in which the Governor of Maryland, "question[ing] the validity of sentencing a man because of a prediction concerning his peril to society,"⁸⁴ commuted the sentence of a sociopath condemned to die.⁸⁵

Two conclusions may be drawn from these cases involving similar decisionmaking or similarly diagnosed criminal defendants. The first is that a fair hearing on a question which involves a measurement of culpability requires that the factfinder be given all "data relevant to blameworthiness"⁸⁶ and bolstered against reliance upon conclusory expert testimony which fosters the delegation of its role to the psychiatric expert. The second is that the very diagnosis which has led to the condemnation of Texas capital defendants may be deemed mitigating where decisions are free of rigid formulae (sociopath = not psychotic = able to distinguish right and wrong = able to conform to the requirements of law) and decisionmakers are able to see the data, and the individual, behind the labels.

Texas has traditionally thought sentencing judgments best made by juries.⁸⁷ It has, moreover, been on guard lest the proper role of the jury be usurped by psychiatric experts

⁸⁴ W. McCORD & J. McCORD, *supra* note 48, at 200.

⁸⁵ The sentencing judge had said:

[The defendant] is a mentally abnormal person, and I knew him to be so when I sentenced him to hang. There is something very ugly about that bald statement. Even a judge who believes in capital punishment would hesitate a long time before he imposed the death sentence upon a person known to be mentally irresponsible. I do not believe in capital punishment ... society confesses its own failure every time it exacts a life for a life.

Id. at 174.

The Governor (Albert C. Ritchie) had this response: What I cannot understand is how the Court could first decide—as it did—that [the defendant's] mental disorder should be considered in mitigation of punishment, and that he should not be hanged; and then sentence him to be hanged anyhow, not for his crime, but because the penitentiary is the only place to which he could be committed.

Id.

The McCords themselves said, of the execution of sociopaths, that "[s]ince execution precludes the possibility of better treatment, spontaneous 'conversion,' or correcting mistaken diagnoses, it hardly seems a just solution to society's problem." *Id.* at 188-89.

⁸⁶ *Washington v. United States*, 390 F.2d at 447.

⁸⁷ The first legislature of the State of Texas passed a statute requiring that the jury assess punishment in criminal cases (1 Laws of Texas 161 (Gammel 1898)); the practice has not been significantly altered. See LaFont, *Assessment of Punishment—A Judge or Jury Function?*, 38 TEX. L. REV. 835 (1960).

The conclusion to be reached in matters of this sort is for the jury. It is not the province of an expert to give his opinion as to how a party accused of crime shall be punished in case of a conviction. He may say that the party is sane or insane, but it has not been held, nor do we believe it could be rightfully held, that the expert could express his opinion as to the amount of punishment that the jury should assess in case they found that the accused was not insane.⁸⁸

Yet, the Texas Court of Criminal Appeals has met the charge that psychiatric testimony of the kind typically used by the State in capital sentencings was "speculative and constituted an invasion of the province of the jury" with the response that: "[t]he judge, on the basis of common knowledge, impliedly found that the behavior patterns of a sociopath were beyond the knowledge of laymen and that the witness' knowledge and experience in this field would assist the jury. The evidence was properly admitted."⁸⁹ The court did not consider the relevancy of sociopathy to the questions before the jury, nor did it exhibit any inclination to articulate standards to assure that the expert testimony would inform rather than dictate the judgment.⁹⁰

One can advance compelling justifications for permitting conclusory expert testimony and for permitting expert testimony as to the ultimate fact at issue.⁹¹ But there is a constitutional need to

assure that the Texas capital sentencing jury will understand and exercise its discretion to "consider . . . not only why a death sentence should be imposed, but why it should not be imposed."⁹² It would seem, therefore, that courts supervising the Texas capital sentencing process have "an affirmative duty to do all that is feasible to assure that these judgments are based upon all the relevant evidence,"⁹³ and that the life-death decision rests, de facto, with "twelve lay representatives of the community."⁹⁴ Texas courts have taken no step to control the impact of conclusory psychiatric testimony. Moreover, the jury is not told of its authority to respond to mitigating evidence but sworn to objectivity.⁹⁵ The terms defining the concept dangerousness have not been narrowed to exclude even trivial threats or remote possibilities.⁹⁶ The trial judge has discretion to exclude apparently relevant mitigating evidence,⁹⁷ and the sufficiency of the evidence of dangerousness is, as a rule, unreviewed.⁹⁸

Professor Dix has suggested that the psychiatric profession has an obligation in situations of this kind to insist that the jury not listen to its expertise without a frank statement of psychiatric limitations.⁹⁹ The circumstances surrounding and exacerbating the problem of the expert who appears, but is not qualified (1) to know what dangerousness is¹⁰⁰ and (2) to identify it,¹⁰¹ suggest a legal remedy as well. They suggest that the Texas death penalty laws have failed in their operation to allow those meaningful considerations of particularized mitigating circumstances¹⁰² which are "a constitutionally indispensable part of the process of inflicting the penalty of death."¹⁰³

⁸⁸ *Duke v. State*, 61 Tex. Crim. 441, 444, 134 S.W. 705, 707 (1911). See also *State v. Nickens*, 403 S.W.2d 582, 587 (Mo. 1966).

⁸⁹ See *Battie v. State*, 531 S.W.2d at 407. See also *Moore v. State*, 542 S.W.2d at 676.

⁹⁰ The only hint the Texas Court of Criminal Appeals has given that it disfavors the form and effect of psychiatric evidence of this kind in capital sentencing is its statement in reviewing the sufficiency of the evidence presented in *Burns v. State*, 556 S.W.2d 270 (Tex. Crim. App. 1977), to support a death sentence. The court stated that "[w]e find the facts adduced at the guilt stage of the trial in the instant case to furnish greater probative evidence to support the jury's answer than an opinion which may be gleaned by a brief psychiatric examination." *Id.* at 280.

⁹¹ See F.E.D. B. EVID. 704, Notes of Advisory Committee on Proposed Rules (1975).

⁹² *Jurek v. Texas*, 428 U.S. at 271.

⁹³ *U.S. v. Wilson*, 399 F.2d at 465 (Sobeloff, J., dissenting).

⁹⁴ *Washington v. United States*, 390 F.2d at 454.

⁹⁵ See note 40, *supra* and accompanying text.

⁹⁶ See notes 30-39, *supra* and accompanying text.

⁹⁷ See notes 24-31, *supra* and accompanying text.

⁹⁸ See note 31, *supra* and accompanying text.

⁹⁹ Dix, *supra* note 16, at 151.

¹⁰⁰ See notes 30-39, *supra* and accompanying text.

¹⁰¹ See notes 41-45, *supra* and accompanying text.

¹⁰² *Jurek v. Texas*, 428 U.S. at 272.

¹⁰³ *Woodson v. North Carolina*, 428 U.S. at 304.