

Psychiatric Testimony in Death Penalty Litigation*

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Several recent developments have created an opportunity for a new type of psychiatric involvement in the criminal process. This new involvement raises some important new questions of its own but also requires that we rethink, in this context, several traditional issues concerning the manner in which psychiatrists should be interjected into the criminal litigation system and how they should function once so involved.

Traditionally, psychiatrists have participated in inquiries into criminal defendants' competency to stand trial and, to some extent, into the responsibility of defendants for their actions under the insanity defense. Involvement of psychiatrists in sentencing has occurred, but it has been relatively uncommon.¹ Programs for special sentencing of narrow categories of offenders defined in part at least by their perceived psychiatric abnormality have been exceptions, of course. The Maryland Defective Delinquency program² is one such situation, and programs for special processing of abnormal sex offenders in California, Massachusetts, Wisconsin and some other jurisdictions are others.³ Recently enacted death penalty statutes and their approval by the United States Supreme Court has created an incentive for increased psychiatric participation in a different aspect of sentencing: the decision whether to impose the ultimate sanction upon a criminal defendant. In the series of cases decided in July, 1976,⁴ the Court upheld the death penalty against a variety of legal attacks but stressed the need for a procedure that required individualized consideration of the appropriateness of the death penalty for each particular defendant upon whom it might be administered. In *Jurek v. Texas*,⁵ the Court approved the Texas statutory scheme in which a major consideration in this individualized sentencing process is the likelihood of the defendant's committing serious antisocial acts if not put to death.⁶ In its opinion, the Supreme Court cited with obvious approval a decision by the Texas Court of Criminal Appeals affirming the imposition of the death penalty in a case in which psychiatric testimony was apparently relied upon quite heavily to establish the defendant's dangerousness.⁷

The death penalty opinions — and especially those in *Jurek* — provide a basis for numerous possible discussions. But for present purposes, it is important to note that they constitute an invitation to involve psychiatrists in the life-or-death decision-making process. The Texas statute is apparently the only statutory scheme that specifically focuses upon dangerousness, and

*The paper was delivered at the May, 1977, meeting of the AAPL in Toronto.

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in actual administration of it prosecutors have with some frequency relied upon psychiatrists and psychologists to establish the requisite risk. But under other statutes that provide for an individualized consideration, it is likely that psychiatric testimony would be admissible as part of the prosecution's case for the imposition of death. In addition, testimony that the defendant suffered a psychological abnormality that should be regarded as mitigating the seriousness of his behavior is likely to be admissible under most if not all death penalty schemes. Courts are likely to hold that where such evidence in mitigation has been received, the prosecution may rebut it with testimony as to the defendant's condition.

Two major areas of concern are raised by psychiatric participation in the death penalty process. Both of these are not unique to this sort of involvement, but the magnitude of the penalty at issue requires special concern with them in this area. Perhaps a more thorough consideration of them here may shed light upon the proper resolution of them in other areas of psychiatric involvement in litigation.

The first matter concerns the examination of or interview with the defendant and the propriety of eliciting a defendant's cooperation in such an interview without making reasonable efforts to assure that he has a full understanding of the significance of the interview and the possible uses of the results, *i.e.*, the examiner's opinion as to his dangerousness. Traditionally, this problem has been approached by asking whether the subject has any right to refuse cooperation. If there is such a right, we have sometimes required a showing that he was informed of this right and "waived" it before or during his participation in the interview. The major possible legal basis for refusing participation in an interview under current analyses is the privilege against compelled self-incrimination. Objections based upon such grounds have often been avoided by reasoning that the matter to which the information goes is not "incrimination."⁸ It has been held that civil hospitalization, for example, is not criminal punishment, and therefore a potential patient being interviewed has no right under the privilege to refuse to respond to questions, if the answers would only tend to result in his hospitalization.⁹ It can be argued that proceedings to determine the degree of punishment — as opposed to whether the person is guilty or innocent — do not involve "incrimination." In 1972, in *McNeil v. Director*,¹⁰ the Supreme Court specifically avoided the question of whether an increased penalty under the Maryland Defective Delinquency Act was "incrimination" as that phrase is used in the Fifth Amendment. It can be argued that the matter is clear in the death penalty context. It might well be absurd to say that a person has a right to avoid answering questions that might tend to create liability for a crime with a maximum penalty of 30 days in jail, but has no right to refuse answers that, upon his conviction for another crime, may tend to increase the penalty to which he will be subject from imprisonment to death. The death penalty cases constitute a compelling basis for rejecting the traditional distinction between incrimination in the narrow sense and all other forms of governmentally imposed disadvantages. It may also be wise to rethink whether some other results of psychiatric testimony should not be regarded as incrimination as well.

Determining that defendants in capital cases have a Fifth Amendment right not to participate in a psychiatric interview if the results of that interview may be used to secure the death penalty would be consistent with the underlying purpose of the privilege and the interest in privacy which it is intended to implement. The privilege was initially intended to do no more than to prevent elicitation and use of unreliable coerced confessions.¹¹ But it is clear that now it serves much broader functions, primarily that of protecting certain elements of human dignity. Underlying the privilege is the notion that when the government seeks to act punitively against a particular person, it is inconsistent with that person's essential human dignity to permit the government to compel him to participate actively in making such action possible. In 1955, Dean Griswold explained this function of the privilege in language that now appears to have been remarkably prophetic:

We do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being.¹²

It is offensive to this innate sense of dignity to encourage a criminal defendant, especially one who is unaware of the true nature of the situation, to participate in an interview and respond to questions, the end result of which may be to cause him to be put to death. Holding that liability for the death penalty is incrimination within the meaning of the privilege is therefore consistent with the basic notion of the privilege.

Other characteristics of death penalty interviews also suggest the inapplicability of several rationales used to justify not applying the privilege to psychiatric interviews in other situations. Some courts have found that the subject of a psychiatric interview is not compelled to make "testimonial" admissions because the examiner is unconcerned with the substance of the subject's response to questions. During death penalty interviews, a major concern is often the existence of a character disorder. The examiner generally takes a history from the defendant and relies upon that history in making a diagnosis. Therefore, whatever the merits of the analysis in other contexts, it cannot be said that the psychiatrist is not eliciting a "testimonial" admission but is merely using the interview to expose and evaluate the subject's thought process. Some courts have found that the therapeutic benefit derived from being processed through a special program for psychologically abnormal offenders justifies regarding the privilege as inapplicable to examinations to determine eligibility for such programs. The argument that this rationale applies to the death penalty interview is, of course, absurd on its face. It might be argued, however, that the benefit to society from proper administration of the death penalty is so significant that on balance the privilege should be simply found inapplicable to death penalty interviews. While there is legitimate disagreement on the extent to which the death penalty has a preventive effect, it is unlikely that we can be sufficiently certain of an important enough effect to justify — in addition to the other costs involved — dispensing with the privilege against

self-incrimination in this context. Moreover, it can be argued that applying the privilege and reducing the availability of testimony based upon clinical interviews would not have an adverse effect upon the "accuracy" of death penalty decisions, and therefore recognizing the privilege would not in fact affect the social interest involved. This contention is discussed in more detail below.

The privilege should apply, in my judgment, and should protect a defendant from being compelled to give answers that would tend to increase the likelihood of the death penalty's being imposed upon him.

This conclusion should be implemented as follows: No prosecution psychiatric testimony should be admitted on the death penalty issue if that testimony is based upon an interview with the defendant unless it is shown that prior to the interview the defendant made a knowing waiver of his privilege against self-incrimination. No waiver should be regarded as "knowing" unless it was made after consultation with an attorney. Such a requirement is justified, I believe, by the impossibility of a defendant's making a knowledgeable decision in the absence of advice. A major factor in a defendant's decision, of course, is likely to be the orientation of the prospective examiner. Even if the examiner has the status of a court-appointed – and therefore "impartial" – expert, I believe that in this context at least we must recognize that such impartiality is often a fiction. Forensic psychiatrists differ significantly in their definitions of the diagnostic syndromes, their degrees of belief in the predictive value of diagnoses, their interpretations of the meaning of legal criteria, and their willingness to express unqualified conclusions. Many are, as a result, prosecution or defense oriented. Unless a defendant is aware of the orientation of an examiner, he cannot make a choice that is knowledgeable in any meaningful sense of that word. I see no alternative way of assuring this knowledge than insistence upon consultation with counsel.

In addition, the fact that a defendant refused to waive his privilege should not be admitted into evidence at a penalty proceeding. Nor should an expert be permitted to rely upon the defendant's refusal to participate in the interview in formulating an opinion as to which he testifies at the penalty stage. All of the reasons for refusing to permit use of a defendant's silence after being given the *Miranda* warnings by a police officer, recently found persuasive by the Supreme Court,¹³ apply here. Where the refusal to participate is clearly based upon a desire to invoke a legal right, it is an impermissible burden on that right to give evidentiary significance to the refusal. In other situations, the basis for the refusal is likely to be sufficiently ambiguous so that speculation concerning the "real" basis for the refusal should not be permitted.

These limitations would not necessarily require a change in the procedures for psychiatric examinations conducted pursuant to inquiries into competence to stand trial or insanity. Such examinations could still be conducted where authorized by existing law under no more stringent procedural limitations than are imposed by existing law. But – and this is the important part – the results of such examinations could not be used in the sentencing stage unless the limitations urged above were respected.

The second major area of concern regards the manner in which some

psychiatrists have presented their views in death penalty proceedings. Some of the blame for this state of affairs undoubtedly rests with the legal profession. Lawyers have sometimes failed to vigorously cross-examine prosecution psychiatrists or to confront them with contrary testimony by their colleagues. The proper concern here is less to assign blame than to emphasize the unfortunate state of affairs, whatever may be the "cause" of it.

The testimony produced by the prosecution in the penalty phase of death penalty cases is often to the effect that the defendant is a psychopathic personality or antisocial personality and that this phrase does not label mental illness but is simply a description of his character. This diagnostic conclusion is often based upon a very cursory history, sometimes obtained during the interview, and an observation that during the hour-long interview the defendant failed to demonstrate remorse or guilt. This pronouncement is followed by an opinion that the defendant would commit dangerous assaultive acts in the future, and that no known treatment exists for the defendant's condition. This summary fails to convey the vigor and certainty with which these views are sometimes presented.

Several aspects of such testimony are disturbing. The witnesses often have what is arguably an insufficiently defined concept of the diagnostic entity involved. The nature of the history required for the diagnosis is left especially fluid. Moreover, the clinical observations necessary to justify a conclusion of inability to experience guilt or anxiety seem poorly defined or inadequate. It can be persuasively argued that an hour-long interview in a jail cell is insufficient. In addition, the testimony seems to me to vastly overrate the demonstrated predictive value of a diagnosis of antisocial personality. There is certainly no evidence that prediction on the basis of this diagnosis leaves us with less than 50 to 60 per cent false positives, and some evidence that this is as accurate as such predictions can be expected to be.¹⁴ The testimony also paints a misleading picture of prognosis. Robins' work¹⁵ establishes that a significant portion of psychopaths "burn out" or respond to developments in their life by reducing their antisocial behavior. While it is true that there is no generally accepted "cure" for the condition, there are creative ongoing efforts to establish methods of treatment.¹⁶ Recent evidence of a physiological and/or genetic factor in this syndrome¹⁷ provides some basis for optimism in regard to future efforts to develop treatment techniques.

The fundamental defect is that in some cases judges and juries are not provided with a full and complete picture of the state of the science (or art) in this area. The impression is created — and created quite effectively, in some cases — that antisocial personality is a precisely defined syndrome, that it can be easily and quickly diagnosed, that it has tremendous and unquestioned predictive value, and that there neither is nor is likely to be any method of changing the anticipated behavior of persons who fall within the category. These are all propositions open to substantial question.

In *Jurek*, the plurality opinion stated:

It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be

made . . . What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.¹⁸

Death penalty proceedings have not lived up to this statement of what is demanded by ethical fairness as well as by due process of law. In *Gardner v. Florida*,¹⁹ decided in March of this year, the Supreme Court invalidated a death penalty because the trial judge had not disclosed to defense counsel all portions of a presentence report on which he relied in imposing the penalty. In holding that nondisclosure was constitutional error despite defense counsel's failure to request access to the report, the Court stressed the importance of safeguards against evidence being erroneous or being misinterpreted by the trier of fact. "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."²⁰ Use of psychiatric testimony of the sort that has been relied upon in some death cases endangers accomplishment of the objective of basing such decisions on reason. Moreover, by offering a judge or jury a convenient handle on which to hang a decision based upon other, perhaps unarticulated grounds, it tends to encourage decisions based upon caprice or emotion. It can be argued that the failure to present a full picture of psychiatric predictive capacity is more offensive to fairness and accuracy than the nondisclosure of the presentence report in *Gardner*.

I do not have a specific "legal" proposal to offer in regard to this second concern. It would be possible, of course, to take the position that since it is so important to avoid misleading or confusing juries in this area, psychiatric testimony should be excluded.²¹ I am not now willing to take this position, although it will become a more attractive one to me if practice under the statutes does not improve. I do believe it is necessary for more members of the psychiatric profession to make themselves available as witnesses in such proceedings to put before juries a full and fair picture of the current state of diagnostic, predictive, and rehabilitative abilities. Emphasis should be placed on empirically-demonstrated skill, rather than on intuitive hunch, given the importance of the matter at dispute and the danger that lay jurors will regard intuitive hunch as scientifically-confirmed skill. My hope is that eventually a climate will be created in which it will be practical to present only testimony based upon predictions of empirically-demonstrated accuracy.

To some extent, application of the privilege against self-incrimination to this situation may indirectly help accomplish this result. If acknowledgment of the privilege does in fact reduce the ability of prosecution psychiatrists to conduct personal examinations of defendants, this may encourage reliance upon actuarial predictive devices that require only objective information about the defendant that can be obtained without a clinical interview.²² There is substantial reason to believe that predictions based upon the use of such actuarial devices are more accurate than predictions based upon clinical judgment.²³ Moreover, predictions based upon use of such devices are less likely than testimony based upon clinical evaluation to be accompanied by a misleading aura of scientific foundation. To the contrary, it is possible that such testimony would by its nature stimulate recognition of the need to

scrutinize it with care before relying upon it.

This position I have taken has been called incomplete and even naive insofar as it does not recognize the value of the nuances of the clinical mind and the clinical inference process, which have been characterized as all that is available in areas such as this. The availability of actuarial predictive devices, of course, indicates that clinical inferences are not all that is available. In addition, however, it can be argued that it is naive at best and deceptive at worst to offer professional opinions in the absence of some empirical evidence as to the accuracy of opinions of that sort on the assumption that the opinions will be adequately scrutinized before being accepted. It is at best naive to assume that judges and jurors will in fact recognize these opinions as being based on "hunches" and as having little measurable supporting data with which to evaluate them. Such opinions are not "all we have" in this area. We have the option of frankly recognizing that there is no demonstrable skill in prediction and facing directly the question of whether we want to make life-and-death decisions on the basis of a matter in regard to which no one — even the "expert" — has such skills. This at least has the value of open acknowledgment of our limitations.

Use of psychiatric testimony in death penalty proceedings is a special issue, and should be treated as such. It may be appropriate to consider some of the suggestions urged here beyond the area of death penalty proceedings. Further consideration might, for example, be given to whether the elicitation of information to establish sanity or liability for involuntary treatment should be regarded as "incrimination." There may well be a need for greater availability of testimony from persons representing a broader spectrum of the psychiatric profession in those contexts. But it is necessary to put those matters aside and recognize that the current situation concerning death penalty litigation is a separate and distinguishable matter. There is vigorous disagreement concerning the ethical propriety and the preventive value of the death sentence. But there is probably widespread agreement that if it is to be imposed, those persons making the life-and-death decision should have full information fairly obtained. Today, in many cases, they simply do not. I urge that we seek to change this condition in the future.

References

1. See Suarez: Psychiatry and the criminal law system. 129 *Am J Psychiatry* 293 (1972)
2. Carney: The indeterminate sentence at Paruxent, 20 *Crime & Delinquency* 135 (1974)
3. See Dix: Differential processing of abnormal sex offenders: Utilization of California's Mentally Disordered Sex Offender Program, 67 *J Crim L & P S* 233 (1976)
4. *Gregg v. Georgia*, 96 S.Ct. 2909 (1976); *Jurek v. Texas*, 96 S.Ct. 2951 (1976); *Proffitt v. Florida*, 96 S.Ct. 2960 (1976); *Woodson v. North Carolina*, 96 S.Ct. 2978 (1976)
5. 96 S.Ct. 2951 (1976)
6. Under the Texas procedure, the death penalty is mandatory if the jury unanimously finds that the prosecution has proved beyond a reasonable doubt that the defendant's conduct was deliberate and was committed with the reasonable expectation that death would result, that it was unreasonable in response to any provocation, and that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society". Texas Code of Crim. Proc., Art. 37.071.
7. *Smith v. State*, 540 S.W.2d 693 (1976), discussed in *Jurek v. Texas*, 96 S.Ct. at 2957
8. See, e.g., Note, Protecting the confidentiality of pretrial psychiatric disclosures: A survey of standards, 51 *N Y U L Rev* 409 (1976); Meister: *Miranda* on the couch: An approach to problems of self-incrimination, right to counsel, and *Miranda* warnings in pre-trial psychiatric examinations of criminal defendants, 11 *Colum J L & Social Prob* 403 (1975)

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10. 407 U.S. 245 (1972)
11. McCormick C: Evidence § 114 (2nd ed. 1972)
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16. See LeVine and Bornstein: Is the sociopath treatable? The contribution of psychiatry to a legal dilemma, 1972 Wash U L Q 693 (1972)
17. See Robins L: Discussion of genetic studies of criminality and psychopathy, in Genetic Research in Psychiatry, 117 (R. Fieve, D. Rosenthal, and H. Brill eds., 1976); Schachter S: Emotion, Obesity, and Crime (1971)
18. 96 S.Ct. at 2957-58
19. 20 Crim L Repr 3083 (March 22, 1977)
20. *Ibid.*, at 3085
21. See Ennis and Litwack: Psychiatry and the presumption of expertise: Flipping coins in the courtroom. 62 Cal L Rev 293 (1974)
22. *E.g.*, Cocozza and Steadman: Some refinements in the measurement and prediction of dangerous behavior. 131 Am J Psychiatry 1012 (1974)
23. P. Meehl: Clinical Versus Statistical Prediction: A Theoretical Analysis and A Review of the Evidence (1954)

Addendum

On December 30, 1977, in *Smith v. Estelle* (N.D. Texas, filed Dec. 30, 1977), a federal district court held that use of psychiatric testimony in Texas death penalty proceedings violated defendants' privilege against compelled self-incrimination unless adequate steps were taken before the psychiatric interview to protect the privilege. A defendant may not, the court held, be compelled to participate in an interview with a psychiatrist if the purpose of that interview is to determine whether the defendant is sufficiently dangerous to receive the death penalty. Before any interview is conducted for this purpose, the defendant must be advised of his right to remain silent. If he indicates that he wishes to exercise his right to remain silent, he may not be questioned by the psychiatrist for the purpose of determining his dangerousness. The opinion was recalled pending reconsideration by the court. At the time of this writing (March 27, 1978), the court had not reissued an opinion in the case.